Paulina E. Wilson (ed.)
Marijana Mladenov (ed.)
Jelena Trajkovska-Hristovska (ed.)

Resilience and Reform: Administrative Law and Public Policy in a Changing World

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Resilience and Reform: Administrative Law and Public Policy in a Changing World

Editors:

Paulina E. WILSON

Activity

Dr Paulina E. Wilson is a Lecturer in Law, Deputy Director of Education and LLB Programme Coordinator at the School of Law, Queen's University Belfast; a Fellow of the Higher Education Academy, and a member of the British Institute of International and Comparative Law, the Irish Society of Comparative Law, the Society of Legal Scholars, the Socio-Legal Studies Association and the Chartered Institute of Linguists. She holds a Master of Arts degree in English Language and Literature, a Master of Legal Science degree and a PhD in Comparative Law/Legal Translation. Her interdisciplinary research focusses on conceptual micro-comparisons in the areas of tort and criminal law, and the impact of interjurisdictional law variation on global law practice, including judicial cooperation, foreign law as evidence, and both professional and legal-lay communication. Dr Wilson is an Editorial Board member at the Northern Ireland Legal Quarterly and is also involved in training delivery at the Judicial College in Northern Ireland, UK.

Publications

Dr Wilson is the author of numerous articles and book chapters, including "Comparative Law in Legal Education and Practice: An Interdisciplinary Perspective," *Juridical Tribune* 14, no. 3 (2024, forthcoming); "Towards Transdisciplinarity in Legal Education and Practice: A Call for Academic Leadership," in *A Plea for an International Transdisciplinary Chair: Dialogue Between Culture and Technoscience*, ed. C.E. Popa Tache, H. Landier, L. da S. G. Martins da Costa and M. Thieriot Loisel (Bucharest, Paris and Calgary: ADJURIS – International Academic Publisher, 2024, forthcoming); "Secondary exposure to asbestos: a case of pleural plaques," *Journal of Professional Negligence* 40, no. 2 (2024): 81-85; "Comparative law outside the ivory tower: an interdisciplinary perspective," *Legal Studies* 43 (2023): 641-57; P. E. Wilson and K. J. Fandl, "The Effects of Brexit on Real Property Investment in Northern Ireland," *Real Estate Law Journal* 46, no. 3 (2017): 392-420; "Interjural Incommensurability in Criminal Law: Constructing a Framework for Micro-Comparisons for Translation Purposes," in *Language and Law in Social Practice Research*, ed. G. Tessuto and R. Salvi, 200-23 (Mantova: Universitas Studiorum, 2015).

Prizes

During her academic career, Dr Wilson received a number of distinctions, including an Award under the Economic and Social Research Council (ESRC) Impact Acceleration Account (IAA) CRoSS+ Fund, 1 Jun 2023; an Award under the ESRC IAA CRoSS Fund, 24 Nov 2022, and an Individual Performance Award under the STAR

Scheme, 30 Nov 2022. Her paper entitled ‘Comparative law outside the ivory tower: an interdisciplinary perspective’ was shortlisted for the Society of Legal Scholars’ Best Paper Prize at the SLS Annual Conference in 2020.

Marijana MLADENOV

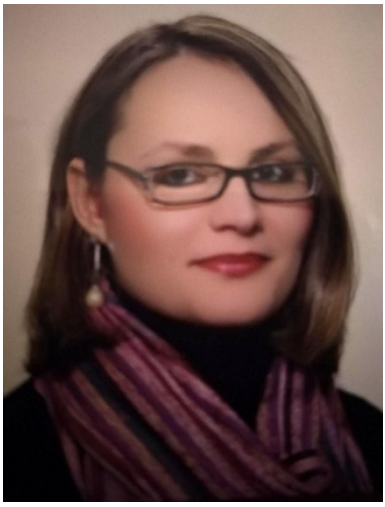
Activity

Dr. Marijana Mladenov is Associate Professor at the Faculty of Law for Commerce and Judiciary, University Business Academy in Novi Sad. She completed her basic studies at the Faculty of Law, University of Novi Sad, in 2009. At the same faculty, she defended the master thesis titled "The right to privacy in the practice of the European Court of Human Rights" in 2010, and completed doctoral studies in 2017, thesis “Right to an adequate environment as a fundamental human right". In 2009 she was elected for the teaching assistant at the Faculty of Law for Commerce and Judiciary and promoted to the position of assistant professor in 2017. In October 2018, she was elected for Vice-Dean for International Cooperation at the Faculty of Law for Commerce followed by the election for the Director of International Relations Office at the University Business Academy in Novi Sad. She has been professionally involved in several national and international scientific projects. She is a professor at Jean Monnet Module "Application of EU values in the policies of the candidate states", teaching two courses: "Human Rights Protection in the European Union" and "Human rights and climate change within the EU legal framework" supported by the European Commission (Education, Audiovisual and Culture Executive Agency).

Research projects and publications

She is engaged as a researcher on the international project "Global Digital Human Rights Network", organized by the academic network COST, supported by the EU Framework for Research and Technological Development, as well as on numerous national projects related to Environmental Law: "Transposition of the requirements of the Aarhus Convention into the legal system of the Republic of Serbia with special reference to the competence of local self-government units on the territory of AP Vojvodina" supported by the Provincial Secretariat for Higher Education and Scientific Research (2017- 2018), "Obligations of the City of Novi Sad determined by the Law on Environmental Protection and other special laws in this area" supported by Administration for Environmental Protection of the City of Novi Sad (2018-2019), "Review of the potential Deposit-Refund System for Liquids Packaging applicable in the Republic of Serbia" supported by the Ministry of Environmental Protection of the Republic of Serbia (2019). She is a reviewer of the journal "Law-Theory and

Practice". Professor Mladenov teaches and writes in the areas of public international law, environmental law and human rights law. She is the author or co-author of over 40 academic books or articles, among which we mention: Počuča, M. B., Mladenov, M., & Mirković, P. (2018). *The analysis of the Aarhus Convention in the context of good environmental governance*. „Economics of Agriculture", 65(4), 1615-1625; Mladenov, M., & Staparski, T. (2022). *Human rights approach to internet access with a special emphasis on the case-law of the European Court of Human Rights*. „Revija za evropsko pravo", 24(1), 23-38; Mladenov, M., & Serotila, I. (2022). *Human Rights' Approach to Environmental Protection-Practice of the Human Rights Committee*. „Law Theory & Prac.", 39, 52; Mladenov, M., Prelević, P. S., & Staparski, T. (2022). *Climate change from the perspective of the European Court of Human Rights*. „International Review", (3-4), 118-122; Mladenov, M., Stefanović, N., & Marković, S. (2023). *Locus Standi of the Right to an Adequate Environment–Universal and Regional Human Rights Mechanisms*. „Kultura Polisa", 20(2), 1-16.



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Prof. Jelena Trajkovska-Hristovska works as Full Professor at the Department of Constitutional Law and Political system, Faculty of Law „Iustinianus Primus" Skopje. In 2009 she obtained scientific degree of Master of Legal Studies specializing constitutional law (parliamentary law) on „Legislative Procedure - Comparative Review of the Basic Models". In 2013, she obtained the title PhD in legal sciences-Constitutional law (Constitutional justice). The topic of doctoral dissertation was „Control of constitutionality and legality of legal acts". Participated in many conferences, workshops and seminars in her field of study and research, all around the world. She is a member of numerous national and international scientific and research projects founded by IFES, IRI ect. Involved in several working groups at the Ministry of Justice for drafting legal proposals and laws. Fields of expertise: constitutional law, political system, human rights, parliamentary law, constitutional justice, constitutionalism.

Publications

She has published several books in the field of constitutional law, political system and constitutional justice and presented and published more than 80 papers in journals indexed in referenced bases like Web of science, Scopus, Heinonline etc. of which we mention: *Distortion of the prnciple of separation of powers inflicted by the decrees with the force of law (Case study of Republic of North Macedonia), World*

Congress of Constitutional Law, South Africa, 2022; *Local Self Government-the Foundation of Democratic Political System*, „Iustinianus Primus Law Review", vol. 2, issue 2, 2021; *The Features of the Modern Concept of Separation of Powers as an Element of Constitutionalism - "The Garden of Eden" or "The Dark Side of the Moon"?,* „Khazar Journal of Humanities and Social Sciences", Volume 21 № 2 2018, 104-118; *The constitution and the constitutionalism is the constitution condition sine qua non for the constitutionalism*, „People: International Journal of Social Sciences" Vol. 4 No. 2 (2018); *The Constitutional Justice and Protection of the Human Rights (The Constitutional Court of Republic of Macedonia - Dilemmas and Prospects-)*, „Academic Journal of Interdisciplinary Studies", Vol. 4 No. 3 S1 (2015): December 2015 - Special Issue.

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Preface

Editors
*Dr **Paulina E. Wilson**, Lecturer in Law at Queen's University Belfast, United Kingdom*
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*Prof. **Jelena Trajkovska-Hristovska**, Professor in Law at Saints Cyril and Methodius University, North Macedonia*

This volume contains the scientific papers presented at the 7th International Conference "Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective" that was held on 17 May 2024 online on Zoom. The conference was organized by the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: https://alpaconference.ro.

The scientific studies included in this volume are grouped into three chapters:

- *Public Administration Resilience and Reform.* The papers in this chapter refer to: resilience of the Romanian penitentiary system in the context of the COVID-19 Pandemic; reforming the management of income in the Albanian tax legislation; directions of public administration professionalisation in the Slovak Republic.
- *Legal Frameworks and Administrative Challenges*. This chapter includes papers on: the cumulative actions in Court for the suspension of unilateral administrative acts: is it possible?; local autonomy without an elected body: how to live (administratively) without breath (of the local council); the European Union and Romanian jurisprudential perspective on the public procurement contract – category of the administrative contract; how administration should treat rules of ethics for investment advisors: possible legal consequences of their violation in Polish law.
- *Digitalisation, Sustainability, and International Perspectives*. The papers in this chapter refer to: striving for coherence: exploring the complexities of international administrative law; digitalisation of public spatial planning and construction proceedings within the sustainable development goals; comparative analysis of the public function in the European Union; urban planning, nature-based solutions, and local sustainability.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical and administrative sciences, who are interested in recent developments and prospects for development in the field of public law and public

administration at international and national level.

We extend our gratitude to all contributors and partners, and are confident that this volume will meet the increasing demand for documentation and information among readers in the context of globalisation, and the rise of dynamic elements in contemporary public law and public administration.

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PUBLIC ADMINISTRATION RESILIENCE AND REFORM

Directions of Public Administration Professionalisation in the Slovak Republic

Associate professor **Iveta DUDOVÁ**[1]
Associate professor **Silvia MATÚŠOVÁ**[2]

Abstract

The paper identifies the framework of the public administration system in the Slovak Republic, considering its professionalisation. The aim of the paper is to demonstrate the process of the public administration transformation and legislation and the basic features of the existing model, to identify the main categories of public administration employees, and to indicate their professional development. Secondary analysis of primary legislation, and statistical data were applied in the research. The paper highlights the professional training of public employees as a lifelong process that follows the acquisition of qualification prerequisites and professional experience. The professionalisation of public administration should by 2030 include the expansion of professional in-service training for employees in particular specific workplaces, the development of training programs, the training of employees in local self-government, the extension of managerial training for professional and senior employees in the state administration. The requirements of the state administration and self-government should be recognised and included in higher education. The quality level of education providers should be assessed and ranked with respect to quality ranking system of education providers, considering newly defined job positions and the uplifting of human resources in public administration.

Keywords: *employer-employee relations, human resources, professional development, public administration.*

JEL Classification*:* H10, H70, J45, K23

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1. Introduction

Public administration is a term that includes the terms 'public' and 'administration'. Administration is simply defined as the daily activity of each subject, which takes care of itself, or matters entrusted to it. The public represents a community of people, citizens who inhabit a certain territory and live together in harmony. It is therefore possible to understand certain activities through which public goals are achieved under the term public administration. Public goals are achieved on behalf (in the interest) of the public, the community of people, while they are controlled by the state. It is necessary to note that public administration is a certain instrument of the state in achieving state goals, such as the economic growth or lowering the unemployment rate.

Public administration is used to manage the public sector, since no other entity in the sector is available. The public sector is financed from public funds, which are made up of resources from residents. Some economists assume that public administration without the economic policy of the state loses its meaning, as it loses the direction and object for its activity and action. And vice versa, the economic policy of the state cannot exist without public administration, as political forces cannot fulfil their role. Public administration is an important element in economic policy.

The aim of the paper is to outline recent development trends in public administration in the Slovak Republic and characterise the main features of the existing model which has been in place and operating for over 20 years. The existing model will be characterised as the model with the features of democratic governance, decentralised, however, operating as two parallel systems, including state administration and local self-government. The analysis would like to show that there are several components bonding both systems – namely the legislative framework, the depoliticisation efforts, human capital development, the professionalisation of the system and the uplifting and upskilling of public administration employees. The paper was based on the analysis of the legislative framework, strategic documents issued by the Slovak government and the results of examples of good practice via relevant projects implemented in the country.

According to Kuril,[3] from the functional aspect, public administration can be understood as the executive activity of the state as a basic public law entity, which is carried out through its bodies, as well as the executive activity of the so-called other public entities, or of their bodies, which has its basis in the administration of public affairs and is implemented as a manifestation of executive power in the state.

Thus, it could be explicitly stated that the public administration is the backbone in the performance of the executive powers of the state, and in this case, also the rights and competences of the self-governments.

[3] Kuril. J. 2018. *Verejná a štátna služba. Vybrané otázky*. Bratislava: Wolters Kluwer, p. 75.

2. Process of public administration transformation in Slovakia

In accordance with the transformation of the social and economic systems, after 1989, the process of transformation of public administration had to begin in Slovakia as well, in order to meet the current conditions of the environment and society. Such a goal of the transformation of the public administration system was set by the government of the Slovak Republic.

According to Hamalová,[4] the public administration system reform was divided into three stages, while Stage I (1990–1991) represented the beginning of the reform; Stage II (1995–1996) was a reform of the territorial state administration and Stage III (after 1999) was characterised as a systemic reform of public administration in the Slovak Republic.

According to Búšik,[5] the goal of the Stage I was to create stable conditions for the functioning of the state based on the 27 principles of the democratic system as applied in European countries. There was a deconcentration of state administration after the national committees were annulled. New public administration bodies were created, in the state administration district and district offices were created, mayors of municipalities, mayors of cities, and councils came into existence in self-government.

Due to the Act of the Slovak National Council (Parliament) no. 369/1990 Coll. on the municipal establishment, a real self-government body was created in the villages, headed by the mayor of the village. According to the Act of the Slovak National Council (Parliament) no. 472/1990 on the organisation of local state administration, the territorial division of the country was changed, four regions were nullified, 121 territorial districts were created, and 38 districts were preserved. During Stage I, a regional self-government was not created, however, no functional connection between the self-governments and the state administration was in place.

During the Stage II of public administration reform, districts and district offices were abolished. At the level of districts and regions, the offices of the general state administration took over the competence. State administration on the basic level was performed by 79 district offices. The regional division of Slovakia was renewed, with eight regional offices created, which carried out state administration on the second level. All competences of district offices were transferred to district offices. From the original district offices, some competences were transferred to the regional offices. Most of the specialised state administration networks were cancelled. District and regional offices have become coordinated bodies of state administration. However, in the second stage of public administration reform, the regional level of self-government was still not created.

The Stage III of public administration reform was a systemic reform of

[4] Hamalová, M. 2008. *Teória, riadenie a organizácia verejnej správy. Organizácia verejnej správy*. Dunajská Streda: Valeur s. r. o., p. 111.

[5] Búšik. J. 2003. *Verejná správa a regionálny rozvoj.* Bratislava: Ekonóm, p. 87.

public administration in Slovakia after 1999. The direction of the d III of public administration reform was defined by the Government Program Declaration[6] (Government Decree no. 788 of 18 November 1998), in which the Government undertook to consolidate the democratic rule of law, to modernise its functioning via further the decentralisation of competences from state administration bodies to territorial self-government and the decentralisation of public finances, as well as by the ratification of the European Charter of Local Self-Government.[7]

3. Public administration in Slovakia and human resources – basic frameworks

According to Feik,[8] a parallel model of public administration has been introduced in the Slovak Republic, which is manifested by the state administration as an independent component of public administration. In the territory of the Slovak Republic, we can currently speak of a single-level local state administration which is covered by district offices (72) with several competences, including state defence, economic mobilisation, environmental care, real estate cadastre and others. At the local level, executive power is entrusted to municipalities and cities, the number of which is not constant. Currently (2024), there are 141 cities and 2927 municipalities in Slovakia.

Due to Konečný,[9] as part of their self-governing competence, they provide several activities, namely in the field of spatial planning, local communications, culture, public transport, local police, nature and environmental protection, collection of local taxes, sewerage and municipal waste management, local development, housing, preschool and school facilities, social facilities, medical facilities and others, as well as participation in regional plans and within the transferred powers from the state administration, in the area of registry, elections, spatial planning and building regulations, and others.

According to Dudová and Vadkertiová, for example, recently the support in favour of the solution of socio-economic problems through the social economy has been of particular importance.[10]

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[6] Government of the Slovak Republic. Government Program Declaration. Government Decree no. 788 of 18 November 1998.

[7] Council of Europe. 1985. European Charter of Local Self-Government. European Treaty Series No. 122. Strasbourg. 15.X.1985.

[8] Feik, M. et al. 2021. *Zamestnanosť vo verejnej správe. Identifikácia potrieb, štruktúry a odmeňovania pracovníkov v štátnej a verejnej správe a ich vplyv na trh práce. Spôsoby odmeňovania v štátnej správe, súčasný stav – štruktúra a ich vplyv na trh práce (Employment in public administration. Identification of the needs, structure and remuneration of workers in state and public administration and their impact on the labor market. Remuneration methods in the state administration, the current state – structure and their impact on the labor market),* https://www.kozsr. sk/wp-content/uploads/2021/03/AV6_Zamestnanost-vo-verejnej-sprave.pdf.

[9] Konečný, S. 2016. *Verejná správa v členských štátoch Európskej únie. Bratislava*: Mayor, p. 57.

[10] Dudová, I., Vadkertiová, S. 2024. „A szociálisgazd aságmintaharm adikszektorte vékenységiterületea Slovák Köztársaságban (Social economy as an area of activity of the third sector in

In Slovakia, state administration and self-government meet at the regional level, where self-governing regions perform tasks on behalf of the state, but they are dependent on the state funds regarding their income.

The term e-Government is most often associated with the electrification of public administration, which is relatively difficult to define. In general, however, it can be characterised as the use of information and communication technologies in the performance of public authority. The issue of e-Government is regulated in the Slovak legal system by Law No. 305/2013 Coll. on the electronic form of exercise of jurisdiction of public authorities and on amendments and additions to certain laws.[11]

The main goal of this law is the introduction of electronic communication as the primary form of communication between persons (natural and legal entities) and public authorities, as well as between public authorities mutually. The strategic goal, according to the National Concept of Informatization of Public Administration of the Slovak Republic,[12] is to achieve progress by 2026 in the DESI index of the digital economy and society in the field of digital services by 40% more compared to the current state.

By means of the DESI index,[13] the European Commission monitors the digital progress of member states. The European Commission applies the Digital Economy and Society Index (DESI) to rate the digital economy and society in EU countries. The DESI index makes it possible to assess the overall level of digitisation of society in each member state and identify problem areas to which the state should pay attention.

The DESI Index in 2022 focused on human capital, connectivity, integration of digital technology in businesses and digital public services. In 2021, according to the DESI index, Slovakia ranked 22nd among the 27 EU member states. Slovakia has remained in the same position as in 2020. Regarding the human capital indicator, it ranked just below or around the EU average. Although as many as 54% of Slovaks have at least basic digital skills and 27% have above-average digital skills, this is less compared to the EU average of 56% and 31%, respectively. In 2022, Slovakia ranked 23rd among the 27 EU member states. It means that the two thirds of the EU member states progress in DESI Index; however, Slovakia remains at the same position as in 2020, ranking among the seven least progressing EU member states. According to Matúšová and Kollár (2023),[14]

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the Slovak Republic"). In: *Civil Szemle*. Vol. 21, No. 1, pp. 105–121, DOI 10.62560/csz.2024.01.07.

[11] Law No. 305/2013 Coll. on the electronic form of exercise of jurisdiction of public authorities and on amendments and additions to certain laws.

[12] Ministry of Investments, Regional Development, and Informatization of the Slovak Republic. 2021. National Concept of Informatization of Public Administration of the Slovak Republic.

[13] European Commission. 2023. Digital Economy and Society Index (DESI) in EU countries in 2022.

[14] Matúšová, S., Kollár, V. 2023. „Labour and Education Markets in Industry 4.0". In *Acta Educationis Generalis*. Vol, 13, Issue 1. DOI: 10.2478/atd-2023-0001.

Slovakia is below the EU average across the indicators for digital public services. Simply, Slovakia needs to improve and expand digital public services.

Digital transformation is one of the main pillars of the Recovery and Resilience Plan of Slovakia, with the main emphasis on public services, skills, and digitisation of business.

According to the National Concept of Public Administration Informatization in the Slovak Republic[15] to improve the country's position in the DESI index, public administration must improve services, create conditions for digital transformation, better use of data, increase effective IT, and support cyber and information security. The state of public administration in every period of its existence reflects society and political conditions in the country. Public administration is dynamic, it is part of the state and should be depoliticised to the greatest extent possible.

The state is in charge of the public administration employees, and therefore must take care of their professionalism, impartiality, and trustworthiness, as they manage public resources, i.e. the public finances. According to Hamalová,[16] it is the task of the state to obtain the best candidates for the performance of public functions, to distinguish between political and professional positions, to guarantee the professional continuity of the performance of public functions, to give the public service legitimacy as well as credibility among citizens, and to create control mechanisms to prevent abuse of public powers.

Public administration is governed by the Constitution of the Slovak Republic and the resulting laws, decrees, and regulations. Public employees must fulfil their duties in accordance with the legislation, but their rights are protected by law and must not be denied. Although public employees differ from civil sector employees, and special laws apply to them, it is possible to consider them as a special group. Even in the group of state administration employees the employment relations significantly differ therefore the group is differentiated and distinguished by employment relations.

Exempli gratia, it is possible to cite the principle of centralism and strict hierarchical subordination or the principle of disciplinary responsibility. These principles are prominently represented and applied in the employment relations of police officers and soldiers, and less in the employment relations of officials.

Law no. 552/2003 Coll. on the performance of work in the public interest, as amended, defines the rights and obligations of employees and employers in the performance of work in the public interest, which, in the sense of this Act, means an interest that brings financial or other benefit to all or most citizens.

Law no. 553/2003 Coll. on the remuneration of certain employees when

[15] Ministry of Investments, Regional Development, and Informatization of the Slovak Republic. 2021. National Concept of Informatization of Public Administration of the Slovak Republic.

[16] Belajová, A., Gecíková, I., Hamalová. M. & Papcunová, V. 2015. *Teória, riadenie a organizácia verejnej správy*. Bratislava: Wolters Kluwer, p. 124.

performing work in the public interest, as amended, specifies negotiations in salaries and general conditions of work in the public interest.

Since public administration also includes state administration, civil service, we must mention the following laws:

- Law no. 55/2017 on the civil service and on the amendment of certain laws, as amended.
- Law no. 73/1998 Coll. on the civil service of members of the Police Force, the Slovak Intelligence Service, the Prison and Judicial Guard Corps of the Slovak Republic and the Railway Police, as amended.
- Law no. 346/2005 Coll. on the state service of professional soldiers of the Slovak Armed Forces, as amended.
- Law no. 200/1998 Coll. on the state service of customs officers, as amended.
- Law no. 315/2001 Coll. on the Fire and Rescue Service, as amended.
- Law no. 151/2010 Coll. on foreign service as amended.

The specifics of these employment relationships in the public and state service refer to social security, which is different compared to the civil, private sector. Law no. 328/2002 Coll. on the social security of policemen and soldiers and on the amendment of certain laws regulates social security, which consists of sickness insurance, accident insurance, seniority service provision and social security services. The law defines who is specifically meant by the term police officer as follows: 'For the purposes of this law, the term police officer means a member of the Police Force, the Fire and Rescue Service, the Mountain Rescue Service, the Slovak Intelligence Service, the National Security Office, the Prison and Judicial Guard Corps and an armed member of the financial administration, unless otherwise provided by law.'

The education of civil servants in public administration is included in the Act no. 55/2017 on civil service. Decree no. 126/2017 Coll. of the Government Office of the Slovak Republic establishing details on the education of civil servants. In this decree, the subject of the decree is 'details on the forms of continuous education, the content of adaptive education, types of competence education, the systemic approach in the education of civil servants'.

4. Professionalisation and development of public administration

The development of public administration is essential for the modernisation of public administration. The strategies are directed to the modernisation and efficiency of the public administration and in accordance with all goals that were set during the development of the public administration. Equally important in the professionalisation of public administration is human resources, i.e. public employees. They play an important role in the achievement of modernisation and professionalisation of the public sector.

Effective public administration, despite its specific features, can be perceived as an activity that is carried out in the manner and to the extent defined by law, while it can also be regulated by strategic goals. In the European Union, public administration operates in accordance with the principles of 3E's, i.e. Economy, Efficiency and Effectiveness. The principle of economy is based on the allocation of public funds in compliance with the specific objectives that the objectives are achieved in the most economical way, while the required level of quality must be delivered.

In Slovakia, this principle is often misunderstood. In public procurement, for example, the lowest price of a tender offer is determining, but in the end, non-compliance with the required quality causes inefficient use of public funds, which is contrary to the principle of economy. The principle of efficiency is perceived through productivity, which means that for a given amount of funds, the sector should get as much performance as possible.

Even with this principle, it is impossible to admit that productivity can increase at the expense of the required quality. When public administration is assessed, the third principle of efficiency is the most problematic. In relation to the other two principles, effectiveness is based on the economic rationality of utilising public funds. However, the goals of public administration cannot always be clearly defined in such a way that they are easily measurable. For this reason, the identification of the effectiveness in public administration through efficiency is sometimes impossible.

According to Dudová, professionalisation can be understood as the uplifting of knowledge and practical skills of the parties involved in a certain field, the goal of which is the development and improvement of the quality of the given environs, the services that are offered in the field.[17]

In the process of professionalisation, the public administration attempts to retain existing public employees and attract potential employees with the necessary skills, as it is the employees that promote the performance and strategic results of activities in the public sector, using the available tools, techniques, and methods as efficiently as possible. Professionalisation in public administration depends on two prerequisites: the existence of a competence basis, and the relevance of adequate education, abilities, and skills of public administration employees. The operation of public administration in accordance with a competence basis requires the provision of relevant education activities to public employees that will enable them to acquire the necessary knowledge, abilities, and skills from the aspect of theory and practice.

The second prerequisite for the public administration professionalisation is a suitable code of ethics (code of conduct), in which the ethical values of em-

[17] Dudová, I. 2013. „Human and social capital under conditions of intelligent and inclusive growth". In: *Ekonomičnij časopis – XXI: naukovij žurnal*. Vol. 18, No 7–8 (1), pp. 30–33.

ployees are stated, while individual points of the code point to unacceptable behaviour, specify methods of inappropriate behaviour control and identify penalty consequences. The Code of Ethics also contains appropriate ways of applying the acquired education of employees.

In 2020, the Decree of the Government Office of the Slovak Republic No. 400/2019 Coll. issued the Code of Ethics for civil servants. This decree was established according to § 21 letter h) Act no. 55/2017 Coll. on civil service and on amendments to certain laws as amended. The civil servant's code of ethics also deals with the professionalism of civil servants: 'The civil servant ensures compliance with Art. 6 of the law by performing official tasks conscientiously, at a high professional level, striving for the best possible results and supporting and enforcing the provisions of the code of ethics. The civil servant is responsible for the quality of the performed official tasks and for the development of one's abilities, knowledge and skills.'

Experts from the Sector Council for Public Services and Administration have drawn up a comprehensive Strategy for the development of human resources in the sector of public services and administration until 2030. The strategy analyses and assesses the current situation and forecasts the requirements for public administration employees. The strategy contains 34 measures aimed at human resources in public administration. Part of the Strategy for the Development of Human Resources in Public Administration also contains a detailed list of activities that are necessary to fulfil the given measures.

The measures contained in the strategy are aimed at the main trends in the human resources development in public administration, namely the professionalisation of human resources, digitisation of public administration and the increase of the competitiveness of public administration vis-à-vis the private sector as regards the recruitment, development, and the care of human resources.

According to the Strategy for the Development of Human Resources in the Public Service Sector and Administration until 2030,[18] human resources are considered one of the most important pillars in the modernisation of public administration. It is therefore understandable that the most significant goal is the personal development in the public administration employees, continuous education, and the increase of the competences in existing public administration employees.

It is the professionalisation of employees in public administration that makes it possible to achieve innovative changes and modernise the public sector. The strategy was elaborated within the project financed by the European Social Fund within the Operational Program Human Resources. The strategy was developed by experts as part of the implementation of the National Project 'Sector-driven innovations for an effective labour market in the Slovak Republic'.

[18] Sector Council for Public Services and Administration. 2022. Strategy for the development of human resources in the sector of public services and administration until 2030. National Project Sector-driven innovations for an effective labour market in the Slovak Republic.

The Government of the Slovak Republic in the Government Program Statement committed to increase the level of professionalisation of the public administration via regular education. The content of the education has been adapted to the project delivering good governance in Slovakia, which was implemented with the support of the European Commission and the Council of Europe.

5. Strategic directions of professional development in public administration

According to sector-specific employment indicators reported by the Sector Council for Public Services and Administration, the average age of employees in the public sector is 47 years (in 2021).[19]

The share of employees aged 55 and over represents up to 30% in the public administration, from which approximately one third of employees will retire within the next 10 years. The job in the public administration has the advantage over the private sector that it offers employees job stability, the certainty of financial remuneration and salary increase, respecting the years worked. Over 71% of university-educated employees from the total number of public employees are employed in the public sector.

According to Dudová, Stanek and Polonyová, public administration is the second-largest sector with the highest number of university-educated employees, the first-largest sector represented by education.[20] There are many job positions in public administration that require university education, which corresponds to the share of employees. One of the negative phenomena that concern public administration employees is the political influence on public administration.

Adequate remuneration of public employees, modernisation of workplaces, education and many other things depend on the financial flow from the state budget. With all changes in the public sector, the acquisition of new knowledge and skills to increase one's competencies in public administration is literally a necessity. Human resources, i.e. employees in public administration, constitute an important element that assists maintain public administration in the form it is currently presented and helps it develop to become modern and efficient. Employees in the public administration have an obligation to develop their knowledge, and the public administration has an obligation to provide public employees with personal development and professionalisation.

The Recovery and Resilience Plan for the Slovak Republic[21] is made up

[19] Sector-specific employment indicators.

[20] Dudová, I., Polonyová, S., Stanek, V. 2016. *Social Inequalities and Quality of Life*. In: 3rd International Multidisciplinary Scientific Conference on Social Sciences and Arts SGEM 2016: Political Sciences, Law, Finance, Economics and Tourism. Conference Proceedings, Vienna: SGEM. ISBN 978-619-7105-51-3, p. 519–526.

[21] Recovery and Resilience Plan. 2023. Available at: https://www.planobnovy.sk/kompletny-plan-obnovy/, consulted on 1.05.2024.

of investments, reforms and measures that address the challenges identified by the European Commission, which are to be resolved by 2026. One of the areas targeted by the Recovery and Resilience Plan for Slovakia is effective public administration and digitisation. Funds allocated represent the amount of 1014 mil. Euro effective public administration and digitisation include 5 important components, namely the improvement of the business environ, justice reform, fight against corruption and money laundering, safety and protection of the population, digital Slovakia, and sound public finance. The main priorities that the reform wants to achieve include higher transparency of processes in public administration, better quality of public services, reduction of bureaucracy and the fight against corruption. An equally important priority is the introduction of effective tools and, with their help, the promotion of professionalisation in public administration.

In the Recovery and Resilience Plan for Slovakia, specifically in the part focused on the fight against corruption, the issue of streamlining and strengthening the administration at various levels of public administration is addressed. One of the challenges mentioned in this issue is to minimise and eliminate public disinterest in reforms and mistrust in public administration due to lack of information. The measures implemented in this field are intended to support the improvement of the qualifications of employees, their professionalisation, the uplift of their competence in advice provision in all public services for citizens and at the same time the increase of the personal integrity of public employees against corruption. During the implementation of the measures, a specialised education platform is available and applied, which will contribute to the improvement of qualifications, knowledge, and practical skills in public employees.

In the Strategy for the Development of Human Resources in the Public Services and Administration Sector until 2030, as part of the professionalisation of public administration, it is planned to require the supplementary education for employees with a special designation (for example, employees on maternity/ parental leave, newly recruited employees, employees in pre-retirement age over 50 years), development and educational programs in regional educational centres, in local self-government in specific fields and extension of management education for professional and senior employees in the state administration.

The requirements set in the above-mentioned project from the aspect of the professionalisation of public administration also include the effective students' practice in public administration, the transfer of the requirements from the state administration and local government to the higher education system, the creation of new management positions in public administration, and the exchange of expertise and experience between sectors with the purpose to increase the quality and performance of public employees.

Within the Code of Ethics for civil servants,[22] professional development

[22] Code of Ethics of Civil Servants. 2021.

can also be applied in Slovakia by observing the code. According to this code, inter alia, a civil servant, is obliged to take care of the improvement of services for the public, develop one's own abilities and skills via education and does not abuse the information obtained during work in the state administration.

Since the education of employees is part of their professionalisation, it is extremely important to offer public employees the opportunities of personal growth, developing their qualifications, knowledge, and professional skills. Education of public employees in Slovakia is a lifelong process. The education of public employees is contained in the Concept of Education in Public Administration in the Slovak Republic[23] and in the Concept of Further Education of Public Administration Employees of the Slovak Republic.[24]

The system of education in public administration is regulated by laws on civil service, on public service and in other legal regulations, e.g. decrees and regulations. In these laws, the rights and obligations of public administration employees and employers regarding education are precisely defined. If primarily refers to the systematic education of public employees, while completion of in-service education is part of regular evaluation of employees in the public sector. The employer has the right to require from employees in the public administration to deepen and increase their qualifications, while the employer is obliged to create the relevant conditions for this. Lifelong education systematically follows the professional training of a public employee completed prior to the start of the public administration, i.e. the qualification prerequisites of education and professional experience.

According to Dudová and Matúšová, professional education of public employees can be divided into adaptive (introductory, preparatory), deepening of qualifications (for example, innovative, specialised and language education), functional, uplifting of qualifications and retraining.[25] The professional education of employees in public administration is provided by public educational institutions in the relevant fields of the public sector. The relevant secondary schools, higher vocational schools and universities are part of the educational framework, which, according to the relevant laws, are mainly involved in the qualification growth and in the functional education of employees in the public administration.

6. Conclusion

The analysis of the legislative framework regarding the public administration in the Slovak Republic aimed to show that the public administration is

[23] Ministry of Interior of the Slovak Republic. 2017. Concept of Education in Public Administration of the Slovak Republic.
[24] Ibid.
[25] Dudová, I. & Matúšová, S. 2022. *Development trends of human resources in public administration in Slovakia*. In: LIMEN Conference 2022 Conference proceedings: ISBN 978-86-80194-66-0, pp. 229–238, https://doi.org/10.31410/LIMEN.2022.

governed by relevant laws, acts, and degrees. Public administration demonstrates a system which is built on principles of democratic governance, ethical codes of conduct, sets of requirements concerning the fulfilment of qualifications and education, the educational needs of public administration employees and the necessity to professionalize the performance of personnel. However, there is a firm delineation between the state administration and self-government administration. The latter system is rather fragmented, provided with extra powers and competences.

Among the most significant innovations and innovation trends currently affecting public administration in Slovakia are the reduction of bureaucracy and departmentalism in public administration, digital transformation of public administration, new municipal management and forms of inter-municipal cooperation, strategic planning and modern human resource management, introduction of multi-channel communication with public administration, data integration in public administration and the use of big data, automation and semi-automation of processes in the performance of public administration agenda, smart agenda and intelligent management system development in network infrastructure, shared storage and remote access to agenda and office systems, introduction of new methods of cyber security, increase in cross-border interactions and adoption of uniform solutions across the European Union, effective crisis management. They should result in legislative changes and changes in the content of work, requirements for individual employees, and even the creation of new professions.

Personnel development of employees must be in the focus in the public administration, as trained and prepared human resources to make it possible to fulfil the modernisation goals of the public administration. On one hand, this is associated with the recruitment of new highly qualified experts, and on the other side with the impact of continuous education upon the increase of competences in existing public administration employees. Human resources are one of the most important *condicio sine qua non* of the modernisation of public administration and the achievement of innovative goals.

The professionalisation of human resources in the public sector will require, in particular, the extension of continuous education and in-service training for employees with a special designation, the development of educational programs in regional education centres, the extension of types of continuous education in self-government in specific professional fields, the extension of managerial education for senior employees and professional employees in the state administration, the transfer of requirements embedded in the state administration and self-government to the higher education system, identification of different qualitative levels of education among individual providers using the ranking scheme of education providers, support for the exchange of experience in order to improve the quality of human resources, definition of new job positions in public administration (in the area of management, performance of original and transferred competencies).

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Reforming the Management of Income in the Albanian Tax Legislation

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Abstract

The reform of the Albanian tax system is a process that began almost three decades ago and continues even today. During this period, this process has been complex and quite difficult since the issues related to taxes, especially those concerning income, have been very delicate and sensitive for Albanian citizens. This paper aims to identify some of the most important problems in the field of income taxation, mainly with the application of new legal changes related to the taxation of income from freelancers and small businesses. For the realisation of this study, a combination of qualitative and quantitative methods was used simultaneously. Statistical analyses, surveys, interviews, and specific case studies have been taken as the basis for formulating the conclusions and specific recommendations of this issue. The results of this study are easily applicable in the procedures for administering the Albanian tax system, contributing to a system that is simple to administer and low-cost, which also reduces the possibility of tax evasion.

Keywords: *administrative reform, tax law, income tax, business income, taxation principles.*

JEL Classification: K23, K34

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1. Introduction

The ongoing reform of the income tax law in Albania represents a critical and ambitious endeavour to modernise the fiscal framework and enhance economic fairness. Initiated nearly three decades ago, this comprehensive process aims to adapt the tax system to the evolving economic landscape and align it with

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international standards. Such reforms are imperative not only for improving revenue collection but also for fostering a business environment that encourages investment and growth.

Albania's journey towards tax reform has been intricate, addressing sensitive and complex issues that affect both individual taxpayers and the broader business community. Key areas of focus include simplifying the tax code, enhancing transparency, and increasing compliance while minimising the administrative burden on taxpayers. Special attention is being given to the taxation of income from freelancers and small businesses, recognising their significant role in the economy and the unique challenges they face.

The reform efforts are also geared towards reducing tax evasion and ensuring a more equitable distribution of the tax burden. By reevaluating tax rates and thresholds, and introducing progressive policies, the government seeks to achieve a balance where taxation policy supports economic activities without stifling growth.

As Albania continues to refine its income tax laws, the implications of these reforms are far-reaching, affecting every facet of economic life and promising to reshape the fiscal landscape in a way that is modern, efficient, and just.

2. Research method

Albania has made significant strides in recent years with its efforts to safeguard fiscal sustainability, which is essential for macroeconomic stability and sustainable growth. This study provides a theoretical legal analysis of the income tax law in Albania, focusing primarily on the new legal changes related to the taxation of freelancers and small business income. The analysis of this study was based on Law no. 29/2023 'On income tax', which defines the legal framework for income taxation, as well as the rules that apply to tax obligations by individuals and entities according to the definitions specified in the law. In addition to this law, our study also drew on several guidelines from the Council of Ministers, the General Directorate of Taxes, the IMF, etc.; scientific journals with impact factors; and various national and international publications and studies.

To organise the information, a matrix was created that synthesises the following data: author(s), year, source, and abstract from the Web of Science and Scopus databases. The analysis of the selected studies was qualitative, identifying the main concepts, factors, and processes reported in the literature regarding income taxation in Albania. The results are presented descriptively, following a thematic structure.

3. Principles of taxation

The primary and most important function of every state, which is carried

out through the government and other public authorities, is the provision of various public services to citizens. These services include national defence, the judicial system, public order, infrastructure, education, etc., and of course, to exercise these functions, significant financial resources are needed, which are largely realised through taxes and duties[3]. Taxes are the fundamental financial instrument for collecting public revenues with which the state covers its expenses in order to meet the needs of society. Therefore, tax is a payment to the state budget that is obligatory and non-refundable, which also includes administrative penalties as well as interest for late payments specified by law.

The tax system should be based on several principles, because different fiscal policy objectives are achieved through the tax system. The doctrine of financial law groups the principles of taxation into two categories: the universal principles of taxation and the constitutional principles of taxation. In capitalist states, the universal principles of taxation are as follows:

1. Taxes should be ***clear*** and understandable to taxpayers and not arbitrarily imposed by the public operator. The principle of accuracy and security is especially important in a rule of law state where the tax burden on citizens must be determined by law and not left to the whim of the public operator. Generally, this principle is met in modern states because taxes can only be determined by the legislature. However, in practice, the financial administration enjoys considerable discretion in decision-making during the verification of taxpayer declarations.

2. The tax system should be ***simple to administer*** so that it has low costs, whether directly for administrators or indirectly for taxpayers, and it should reduce the possibility of tax evasion.

3. The distribution of the tax burden should be ***impartial***, whether in terms of ***horizontal neutrality or as vertical neutrality.*** The tax system should be inspired by principles of neutrality, understood both at the horizontal level as equal treatment of equals and at the vertical level, which requires different treatments for different entities in different situations.

4. The tax system should aim to achieve ***a redistribution of income*** and/or wealth in a direction and to an extent that is considered socially desirable.

5. The tax system should be ***efficient*** so as not to create distortions in the distribution of resources and to correct existing ones.

6. The tax system should meet the requirements for ***stabilising national income*** and should support the implementation of tax policies for this purpose.

7. ***Flexibility***, the tax system should adapt to the development needs of the country[4].

In the category of constitutional principles of taxation, are included in the principle of legality and the ability to pay:

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[3] Gjyli K., *Shkenca mbi financat dhe e drejta financiare.* Tirane, 2010, p. 223-227.

[4] Fundamental principles of taxation, OECD iLibrary 2014. Chapter 2, p. 31, https://www.oecd-ilibrary.org/fundamental-principles-of-taxation_5jxv8zhcggxv.pdf, consulted on 10.05.2024.

1. The principle of legality is also sanctioned in the Constitution of the Republic of Albania[5], Article 155, Part XIII, Public Finance: 'Taxes, duties, and national and local financial obligations, the relief or exemption from them for certain categories of payers, as well as the method of their collection are determined by law. In this case, the law cannot be made retroactive effect.' The principle of legality is the basis of compliance with all procedural aspects in qualifying the circumstances of the case, choice, and use of law[6].

2. The principle of ability to pay: The principle of ability to pay is one of the constitutional-financial principles which, together with another constitutional principle, that of legality, constitute the two fundamental constitutional pillars that should characterise the fiscal legislation as a whole. According to this principle, 'Everyone shall contribute to public expenditures in relation to their income,[7]' meaning that every tax subject will contribute to the increase of public revenues in proportion to their ability to pay. The subject cannot pay tax obligations that are unjustified by their ability to pay or by their contributory capacity[8].

4. New regime on income taxation

The year 2023 marked an important year for the reform of the fiscal legislation in Albania regarding income taxation. The new Law No. 29/2023 replaced the previous tax law that had been in effect in our country for more than 25 years, a law that had many unregulated gaps due to changes the financial order had undergone over these years. Legislative deficiencies left ample room for interpretation, often abusively by the enforcers, creating significant dissatisfaction among taxpayers. The same can be said from the taxpayers' side, who in many cases, took advantage of the unclear provisions of the law to create abusive schemes, which in their entirety created the perception that the existing law envisaged unequal treatment of taxpayers. The adverse effect may result for lower tax rates, as people tend to report on higher incomes[9].

The new Income Tax Law has focused not only on strengthening neutrality in the Albanian tax system but also on its gradual alignment with EU Directives. In general terms, through comprehensive legal provisions, it has attempted to address many deficiencies that have troubled taxpayers and tax consultants over the years. Thus, the new law and the guidelines for its implementation have managed to provide legal clarity on a series of issues that have left much room for interpretation in the past.

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[5] Law no. 8417, date 21.10.1998 was published in the Official Gazette No. 28/1998.

[6] Nedbailo P. E. (1960). *The Application of Soviet Legal Standards*. Moscow: State-Publishing House of Juridical Literature, p. 512.

[7] Constitution of the Italian Republic, Article 53.

[8] La Rosa Salvatore, *Principi di diritto tributario*, Giappichelli; 2° edizione, (2006), p. 73.

[9] Gerald Auten and Robert Carroll, 'The Effect of Income taxes on household income,' *The review of economics and statistics*, no. 81 (1999): 14.

The New Income Tax Law is designed to regulate the taxation of individual and corporate income, along with the taxation associated with inheritance, gifts, and income originating from Games of Chance. One of the innovations introduced by the new law, which came into effect on January 1, 2024, was the implementation of significant new changes in the way withholding tax is applied. Additionally, several amendments have been made to the Law on Tax Procedures concerning the procedures for applying Double Taxation Treaties, the relevant deadlines, and applicable penalties.

A very important positive aspect of this law is the clarity it provides regarding points considered evasive in the tax aspect, such as residency, ownership changes, business reorganisations, amortisation, losses, bad debt, and others. For the first time, the new tax law made a clear distinction among three categories of personal income that would be considered taxable. The following incomes are considered taxable income of a personal income taxpayer:

a) income from employment;

b) income from business;

c) income from investments.

A significant part of the legal changes also includes the taxation of freelancers and small businesses. Professionals such as accountants, doctors, and lawyers employed by companies would pay personal income tax under the same rules as other employees. However, if they were to register as self-employed and offer the same services as a business, their tax bills would be much lower and often even zero. In this way, the new tax law was changed to ensure that freelancers would be taxed in a manner comparable to other employed taxpayers, while the favourable treatment for businesses aims to better serve firms and owners engaged in commercial activities.

According to the new Law no. 29/2023 dated 30.03.2023 'On Income Tax', the business income of the individuals (self-employed or entrepreneurs) will be governed by the provisions regulating the section of the Personal Income Tax. The existing Income Tax legislation previously has included the taxation of the business income of individuals based on the compliance rules of simplified income tax. Later on, the taxation of such income has been governed by local taxes legislation whereby the municipalities were the competent authority for the tax collection. With the implementation of the new Law, the governance of the taxes of individual businesses is expected to be shifted to the central tax administration[10].

One of the complexities introduced by the new law involves the intricacies of the relationships it governs, necessitating that taxpayers seek professional assistance. Similarly, its implementation will also demand specialised support. There remains ambiguity around the classifications of self-employed individuals,

[10] Paparisto A., *New Income Tax Law in Albania,* KPMG 2024, https://kpmg.com/al/en/home/insights/2023/09/new-income-tax-law-in-albania-.html, consulted on 10.05.2024.

specifically those who will remain exempt from Income Tax and others whose earnings will be categorised as business income. This represents another drawback in the enforcement of the new legislation.

Among its positive aspects, we can certainly list the administration of revenues. The fiscalisation process, where businesses now report all transactions and activities electronically, has positively impacted revenue collection and the transparency of the entire tax system.

5. Personal Income (*employment income, business income and investment income*) tax rates

5.1. Income from employment

Every benefit received by an individual that is related to employment relationships is considered employment income and is taxed as such, regardless of whether it is named salary, wage, reward, bonuses, allowance, compensation, etc. The main principle for considering something as employment income is that the taxable individual must follow the instructions of the income payer, i.e. the employer, or the person (also in the role of an employer) who has assigned a duty/function, in order to receive the salary/wage/reward/bonus/compensation or allowance, or other similar elements[11].

Within the concept of employment income are included the base salary for time worked or quantity produced, any permanent additions to the base salary such as allowances for position, seniority, difficulty, distance from residence, special nature of work or service, as well as other salary supplements and other rewards. Likewise, income that the individual receives in the form of compensation from a special fund, or from other funds established by various legal or statutory acts of companies, such as the 13th salary, or various payments of this nature, are considered employment income and are consolidated on a monthly basis.

The law follows a progressive taxation order for income by setting annual thresholds for calculating income from employment. For annual incomes up to 2,040,000 Albanian leks, the tax rate is 13%, and above this threshold, the tax rate becomes 23%. This regulation will come into effect starting from January 1, 2025. While making a financial plan for personal finances or family finances, everyone must be careful by evaluating every rule and law knowledge, in order not to conflict with fiscal legislation and to use all the advantages and opportunities it offers, for not paying more than required[12].

[11] Agim Binaj, Ilir Binaj and Irini Limaj, 'Personal Income Tax Policy Analysis: Albania vs. the United States,' *Interntional Journal of Economics and Financial Issues*, No. 3(1) (2013): 42–49.
[12] Arthur J. Keown, *Personal finance-turning money into wealth,* Seventh edition (Boston: Pearson, 2016), 101–120.

5.2. Business income tax

Business income will be considered as the income of a natural person, the income from interest, dividends, and fees, which are effectively connected with the business; income from the sale of securities; income from leasing a business, regardless of whether the lease involves all or part of the tangible or intangible assets; income from the sale of any type of business assets and liabilities, including the sale of the entire business; capital gains realised from the transfer of business assets and liabilities in a business reorganisation; gifts, grants, or subsidies received by a person in connection with his business; income realised by the natural person for any type of automatic technical or digital service fees; capital gains from the revaluation of business assets when these assets are given as an in-kind contribution to the capital of a company, whether at its establishment or capital increase; income from the extraction or benefit of virtual assets; and income from transactions with virtual assets, which are effectively connected with the business.

The new income tax law provides a tax rate of 15% for taxable annual profits up to 14,000,000 Albanian lek and 23% for amounts exceeding this threshold for self-employed and registered entrepreneurs.

5.3. Tax on investment income

According to Law 29/2023 on income taxation, income derived from dividends, interest, fees, capital gains from the transfer of financial instruments and other securities, capital gains from investments made in a life insurance plan, and returns from investments made in a private pension will be considered as part of investment income. Additionally, capital gains from the transfer of real estate, income from renting out real estate, exploitation of virtual assets, and transactions with virtual assets are considered as investment income (to the extent that they are not classified as business income). Individuals receiving income from any of the aforementioned investment categories are subject to a personal income tax rate of 15%, except for income from dividends, which are taxed at a rate of 8%.

6. Corporate income tax

A corporate income tax is a tax imposed on the net income (profit) of corporations and other business entities[13]. This type of tax is calculated based on the earnings of the corporation after accounting for deductible expenses such as cost of goods sold, salaries, and other operating expenses, as well as allowances

[13] Alex Durante, *Who Bears the Burden of Corporate Taxation? A Review of Recent Evidence*. Tax Foundation, June 10, 2021, https://taxfoundation.org/blog/who-bears-burden-corporate-tax/, consulted on 10.05.2024.

for depreciation. The corporate income tax applies to all taxable corporate incomes. In the Albanian legislation, this regulation is dedicated to a separate chapter in the income tax law, thereby establishing new standards and security for Albanian taxpayers.

According to this law, all entities established as general partnerships, limited partnerships, limited liability companies, or joint-stock companies, as well as all other entities not mentioned above, even when subjected to a special tax regime, will be considered taxable subjects. Enterprises, partnerships, known legal entities, asset management entities or net capital, trusts, and those established by special laws in Albania, will be considered taxpayers for corporate income tax, regardless of their annual turnover. The corporate income tax rate is 15%. Exceptionally, the tax rate for dividends is 8%, without deducting any costs.

The tax base for resident taxpayers includes taxable income sourced both within and outside Albania, whereas for non-resident taxpayers, it includes only taxable income sourced within Albania. In cases where the income for an Albanian resident is sourced from outside the territory of Albania, tax crediting comes into assistance. If during a tax year a resident entity earns taxable income from sources outside the Republic of Albania, the tax due from that entity on this income should be reduced by the amount of tax paid in a foreign country on that income.

7. Taxation of inheritance, gifts, and games of chance income

The tax on inheritances, gifts, and games of chance applies to natural persons and entities that are residents in the Republic of Albania, who receive a gift or inheritance of assets located in Albania or abroad, or earn winnings from gambling activities conducted in the Republic of Albania or abroad; and non-residents in the Republic of Albania, who receive a gift or inheritance of assets located in Albania, or earn winnings from a game of chance activities conducted in Albania. Gifts, in the context of this article, include movable or immovable property or money received without any compensation in exchange[14]. The tax rate for inheritances, gifts, and earnings from a game of chance according to this article is 15%, with no deductions for any costs.

The recent changes to the income tax law have triggered significant debates among professionals, prompting discussions about potentially challenging the law in the Constitutional Court. The core of the debate revolves around claims of infringing on the freedom of economic activities and issues of disproportionality. Critics contend that the law strays from the principle of income-based taxation and introduces distinctions that depend on the type of economic activity, which they see as a violation of fair taxation principles.

[14] Law no. 29/2023 'The Law on Income Tax'.

8. Conclusion

The new income tax law represents a pivotal shift in the taxation landscape of Albania. It aims to modernise the tax system and align it more closely with European Union standards, which could potentially enhance economic efficiency and fairness. Despite its objectives, the law has stirred considerable debate among professionals and the broader public. Concerns primarily revolve around perceived threats to the freedom of economic activities and the fairness of imposing tax rates based on the nature of these activities rather than income levels alone. As a response, there may be a need for further review and possible adjustments to ensure that the law equitably balances the principles of economic freedom and fair taxation while fostering an environment conducive to growth and compliance. In conclusion, while the new law sets the stage for significant fiscal reforms, its success will depend on its implementation and the resolution of the ongoing debates to achieve a consensus that supports Albania's long-term economic goals.

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The Resilience of the Romanian Penitentiary System in the Context of the COVID-19 Pandemic

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Abstract

This article analyses, from an interdisciplinary approach perspective, the challenges faced by the Romanian penitentiary system, as a representative institution of the national security system, in the context of the COVID-19 pandemic, the solutions identified to protect the population segment for which it is directly responsible, and how it managed to empower central structures and subordinate units in this regard. The analysis aims to highlight the institutional adaptability of the Romanian penitentiary system in the face of certain dynamic elements (escalation of the situation regarding the spread of the virus, gradual recommendations from European and global health organisations), as well as considering certain internal and international legal benchmarks. Furthermore, the analysis highlighted in this article aims to correlate the institutional adaptability of the Romanian penitentiary system with the concept of resilience, considering its multidisciplinarity.

Keywords*: resilience, penitentiary system, institutional policies, national security, public health, fundamental rights and freedoms, organisational behaviour.*

JEL Classification*:* F52, I18, K14, K23

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1. Introduction

Detection of cases of infection with the new coronavirus (COVID-19) in China in December 2019, as well as the rapid spread worldwide, led the World Health Organization to declare a Public Health Emergency of International Concern on January 30, 2020, and a Pandemic[2] on March 11, 2020.

The way each country chose to protect its population and empower its

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[2] World Health Organization, https://www.who.int/europe/emergencies/situations/covid-19, consulte on 1.05.2024.

institutions were based on dynamic elements (escalation of the situation regarding the spread of the virus, affected groups of people, vaccination campaigns, and gradual recommendations from the World Health Organization and the European Centre for Disease Prevention and Control), as well as considering certain internal and international legal benchmarks. Each country built and updated its public health and public security policies based on these factors. In this paradigm, regarding the COVID-19 episode, each country had the opportunity to test and develop resilience at various levels (because this concept is indeed multidisciplinary and intersects multiple domains).

In the research, I used the systemic method in the structured approach to the theme, analysing the public policy adopted by the Romanian state in the field of public health and security, as well as the solutions adopted by the Romanian penitentiary system regarding the application of principles for the execution of penal law. Additionally, I documented the measures taken by the Spanish state in the same field, in order to highlight a common trait of the two prison systems – resilience. The logical method underpins the identification of legal reasoning and best practices within the Romanian penitentiary system, while the interpretative method supports the argumentation of conclusions and main ideas.

2. Definition of key terms used in the research

The term *resilience* comes from the Latin 'resilire' meaning 'to bounce back', and the concept of resilience has its roots in the work of C.S. Holling, an ecologist who first noted the characteristics of a resilient ecological system in 1973. Since then, the concept of resilience has been applied in fields as diverse as psychology, disaster management, supply chain management and, more recently, strategic management[3].

In some areas, the trend in interpreting the concept of resilience is towards identifying it with the ability to bounce back from disruption or to resist change and control it in order to maintain stability, materialising in how we learn to live with and use change.

In simple terms, resilience is the ability to persist in the face of change, to continue to thrive in changing environments, and the practical approach to the concept of resilience is about how periods of gradual change interact with sudden change, and the ability of people, communities, societies, cultures to adapt or even transform themselves into new developmental pathways in the face of dynamic change[4].

In terms of organisational behaviour, resilience can be understood as 'the ability of an organisation to survive, adapt and grow in a dynamic and uncertain

[3] Waller, M.A. (2001), 'Resilience in ecosystems context: evolution of the concept', *American Journal of Orthopsychiatry*, Vol. 71 No. 3, pp. 290–297, DOI: 10.1037/0002–9432.71.3.290.

[4] Folke, C. 2016. Resilience (Republished). *Ecology and Society* 21(4):44. https://doi.org/10.5751/ES-09088-210444.

environment'[5].

According to a study[6] conducted in April 2014 on a group of 340 men serving a custodial sentence in the Polish prison system, one of the determinants of quality of life for prisoners is resilience, the ability that allows a convicted person to adapt to adverse conditions, and during the coronavirus pandemic, as you will see throughout this article, the individual resilience of prisoners was complemented by assisted resilience.

The concept of assisted resilience was described by Professor Ovidiu Predescu, almost six years before the pandemic was declared, in an interview for Juridice Publication[7] on the eve of the Second World Congress on Resilience: 'From Person to Society' (Timișoara, 8–10 May 2014), starting with the fact that 'resilience is a multidisciplinary concept, being a universal process, of interactions with others, it cannot take place without the support of mentors, tutors' and continuing with the statement that it 'resides in the fact that the process is supported by specialists, has a preventive nature and is based on the strengths of the person at risk … resilience, especially assisted resilience, influences the legal factor … in terms of preventing delinquency … opening up new perspectives'. The concept of assisted resilience of inmates in the Romanian penitentiary system materialises, without excluding the other categories of staff interacting with this social category, through the support of penitentiary police specialists in the fields of education, psychological assistance and social assistance.

We can also extend the definition of the concept of assisted resilience to the whole penitentiary system by implementing the institutional policy of the National Administration of Penitentiaries in the field of COVID-19, aimed both at sentenced prisoners and all staff on duty, as well as representatives of civil society (relatives of sentenced persons, representatives of partner NGOs, economic operators who contract inmates to do labour activities).

3. Institutional strategy development according to the evolution of the pandemic

The first official reaction with legal implications regarding the global situation caused by COVID-19 came from the Romanian State on the 6th of May 2020, when, following the meeting of the Technical-Scientific Support Group on the management of highly contagious diseases on the territory of Romania, Decision No. 6 was adopted, whereby certain measures were taken and certain rights

[5] Siddharth Shankar Rai, Shivam Rai & Nitin Kumar Singh (2021), 'Organisational resilience and social-economic sustainability: COVID-19 perspective', *Environment, Development and Sustainability*, Vol. 23, pp. 12006–12023, doi: 10,100 7/s 10668-020-01154-6.

[6] Skowroński B., Talik E. 'Quality of Life and Its Correlates in People Serving Prison Sentences in Penitentiary Institutions'. *International Journal of Environmental Research and Public Health*. 2021; 18(4):1655. https://doi.org/10.3390/ijerph18041655.

[7] https://www.juridice.ro/317649/interviu-ovidiu-predescu-despre-rezilienta-juridica.html, consulted on 1.05.2024.

of the population were restricted (procedures for suspending school classes, prohibition of activities involving more than 1000 people, etc.). Following the declaration of the Pandemic by the World Health Organization on the 11th of March 2020, the President of Romania decreed a state of emergency on the territory of Romania for an initial period of 30 days by Decree 195 of 16th of May 2020, to be subsequently extended. This is the first piece of legislation to establish additional obligations for prison officers (the obligation to participate in all activities carried out in accordance with the instructions of superiors and the creation of the legal possibility for prison officers to change the place and/or type of work without their consent) and to suspend certain obligations (obligations to perform unpaid community service, to attend school or vocational training courses, to attend one or more social reintegration programmes) and rights of inmates (exercise of the right to receive visits, exercise of the right to private visits, exercise of the right to receive goods through the visiting sector, application of rewards consisting of permission to leave the prison).

As regarding the institutional policy of the National Administration of Penitentiaries in the field of COVID-19, it started initially by addressing to the subordinate establishments the Plan of Measures for the Prevention of Sickness and Infection with SARS-CoV-2. Given that, in the period from 22 end to 23rd of February 2020, outbreaks had already been confirmed on the territory of Italy in the regions of Lombardy, Piedmont, Veneto, Emilia-Romagna, the impact on the penitentiary system in certain cases (extradition, visits of relatives of persons deprived of liberty returned from Italy, return to work of staff after a period of rest carried out in areas at high epidemiological risk) on the 24th of February 2020, the first Plan of measures for the prevention of COVID-19 infection among staff and prisoners is approved and submitted to the subordinate prisons[8]. By the decision of the Penitentiary Director General no. 394 from the 24th of May 2020, the Intervention Methodology for combating COVID-19 infection in the penitentiary system was adopted, and after the end of the state of emergency, the Action Plan for the penitentiary system was established and regularly updated.

The possibility of SARS-CoV-2 infection in the Romanian prison environment led from the very beginning to management of the phenomenology with maximum responsibility, considering the particularities of the prison system and the fact that the virus could be easily transmitted through staff, visitors, through the transfer of convicted persons, through the mobility of staff and between prisoners through daily interactions, which required constant monitoring of the health status of staff and convicted persons and updating/adapting working procedures to limit the sickness of prisoners and protect their health.

The directives issued by the Romanian central penitentiary institution in

[8] Laurenția Ștefan, Răzvan Grecu, 2020, 'Provocarea COVID-19 în sistemul penitenciar românesc', *Revista de Practică Penitenciară* No. 3/2020; pp. 4-12.

charge of control and coordination, provided measures suspending/limiting certain rights established by the law on the execution of custodial sentences, such as the suspension of visits without separation and intimate visits, suspension of the granting of rewards with permission to leave the prison, limitation of social reintegration activities supported by external collaborators in prison units or planned outside the places of detention and suspension of work activities carried out outside the places of detention, to external beneficiaries, and also exceptions have been established: two types of work activities were maintained which involved the packaging of humanitarian aid packages for disaster victims/inhabitants in need.

As regarding to the implementation of social reintegration activities, from the 24th of February 2020, according to the plan of measures established by the National Administration of Penitentiaries, group activities as well as activities in the community were to be suspended, in the event of confirmation of infection of a convicted person with COVID-19, while informing prisoners about the possibility of applying these types of measures. The information of convicted persons was carried out through the campaign on the prevention of SARS-CoV-2 infection, which mainly involved the transmission of the necessary information through the inner TV studio, and the practice of positive behaviours among prisoners was carried out through the 'Cleanest Room' Campaign, a thematic competition with the motto 'Cleanliness – the basis of health and the mirror of feeling'. The pioneering of the campaign was ensured by the Bucharest-Jilava Penitentiary and the subsequent activities were carried out by a multidisciplinary team (educator, social worker, psychologist, ward manager).

The schooling process for inmates was carried out exclusively online and the vocational training activity was suspended. Sports activities carried out in the open air exclusively involved the participation of inmates in planned activities at sports fields in groups constituted according to the type of accommodation (at the level of holding room/small groups of holding rooms within the same holding section). The measure to suspend visits was compensated by increasing the number of online calls.

These measures and information campaigns were continued even after the end of the state of emergency and were also reflected in the Plan of measures for the penitentiary system after the end of the state of emergency, and the focus was on making the most of the information opportunities offered by the inner TV studio, alternating with individual or small group activities. That enabled reintegration activities to be carried out in groups of detainees belonging to the same holding room or in groups of rooms belonging to the same holding section, with the wearing of protective equipment by both reintegration staff and detainees. The information and empowerment campaigns this time included both the segment of information transmission via the inner TV studio and the alternation of direct social reintegration activities with activities carried out in the holding rooms. The schooling process continued to be carried out online and there was

created the possibility to carry out the training process applying the principles of social distancing and wearing of protection equipment.

According to the information provided in May 2020 by the National Administration of Penitentiaries at the request of the Association for the Defence of Human Rights in Romania – Helsinki Committee, the Romanian penitentiary system held over 20,000 inmates, of whom 7,700 with chronic diseases, and had a number of 11,000 full-time employees, excluding medical staff. As of 7th of May 2020, there were no confirmed or suspected COVID-19 cases among inmates, with 333 inmates and 558 prison officers tested to that date and 22 cases of COVID-19 infection confirmed among the above-mentioned categories. These data support the effectiveness of the initial measures taken by the National Administration of Penitentiaries to stop the infection of inmates with the new coronavirus. Further evidence for the effectiveness of the measures taken in the penitentiary system is the fact that during the state of emergency no place of detention was closed.

Another element that supports the adaptability of the Romanian penitentiary system is the effective way in which, through information campaigns and the personal example of prison officers, the vaccination campaign was implemented in the penitentiary system, which made it possible to immunize, through vaccination against SARS-CoV-2, 21,817 prisoners. Of these, 4,055 inmates were released. As a result of the institutional actions undertaken, through the collaboration supported by the National Coordinating Committee for Vaccination Activities against COVID-19, at the systemic level, the data showed that as of 7th of January 2022, a total of 17,763 inmates had been vaccinated with the full schedule, representing an immunization rate of almost 80% of the total prison population. At the same time, 95 convicted persons were confirmed infected with SARS-CoV-2 and were in medical isolation, receiving medical care in specialized prison units.

The maximum number of simultaneously recorded prisoners infected with SARS-CoV-2 was in the second part of 2021, i.e. 450 prisoners.

By comparison, the Spanish prison system holds 55,195 inmates as of the 17th of January 2021. From March to December 2020, a total of 783 cases of confirmed infection with the new coronavirus were reported in the Spanish prison system, with a low incidence[9]. Spain was invited by the World Health Organisation to present the measures adopted in prison in a forum held on the 21st of July 2020, attended by 120 countries, where examples of good practice in the prevention and control of Covid-19 in prison were presented. Among these we can list some measures implemented since the first half of 2020, such as suspension of visits, communications and transfers, suspension of permission to leave prison, with certain exceptions, extension of telephone communication with family and

[9] Defensor del Pueblo [Publicación en línea] Informe sobre « Actuaciones ante la pandemia de covid-19 », https://www.defensordelpueblo.es/wp-content/uploads/2020/12/Documento_COVID - 19.pdf, consulted on 1.05.2024.

lawyers and suspension of intimate visits, suspension of educational activities, vocational training, work and in general all group activities. In the case of the Spanish prison system, we can also identify indicators of personal and institutional resilience, similar to the situation and approaches adopted by the Romanian prison system. This information reinforces the findings of study mentioned on the quality of life of sentenced persons that an attitude of acceptance of an unfavourable situation is conductive to acting in accordance with one's conscience and contributes to the development of morality, and last but not least, highlights a common feature of the two prison systems – resilience.

Regarding the vaccination campaign in the Spanish prison system, according to the Ministry of Health press release of 17th of February 2021, the criteria for prioritising vaccination have been updated, moving from social groups (elderly people in hostels, care staff, front-line medical staff, etc.) to the criterion of age. Prison staff are mentioned as one of the groups included in the strategy, but inmates are not included[10].

4. Conclusions

The interactions of the Romanian penitentiary system's staff with inmates, and in particular the experiences of the social reintegration staff, revealed during the pandemic period the need of the majority of the prison population for specialized support and assistance, and because both staff and inmates experienced the same situations of restrictions and the general feeling of insecurity, the process of assisted resilience was naturally achieved, the restrictions and solutions offered to the convicted persons by the social reintegration staff were easily assimilated, especially from the perspective of the group of individuals of different status but with a common goal – to achieve together a transformative process in which, although limited and subject to rather discouraging restrictions to social interactions, the specialised assistance and individual or small group interactions facilitated the crossing of this period efficiently and effectively.

While resilience was apparently found to be a common feature of some prison systems during COVID-19, it can vary widely in organisational, personal or social manifestations. In the face of significant stressors such as the risk of illness or the risk of losing a family member or a close friend, resilience can generate different approaches or solutions such as active problem solving or seeking social support[11]. Taking into account these coordinates, as well as the evidence

[10] Julio García-Guerrero, Enrique J. Vera-Remartínez 2022. 'Normativa frente a la pandemia covid-19 en las prisiones españolas', *Cuadernos de Bioética* 33(107): 89-98, doi 10.30444/CB.115.

[11] Emma K PeConga, Gabrielle M Gauthier, Ash Holloway, Rosemary S W Walker, Peter L Rosencrans, Lori A Zoellner, Michele Bedard-Gilligan. 2020. 'Resilience Is Spreading: Mental Health Within the COVID-19 Pandemic'. *Psychological trauma-theory research practice and policy*, Aug; 12(S1): S47-S48. doi: 10.1037/tra0000874.

related to the solutions addressed and the results obtained by the Romanian penitentiary system during COVID-19, we can conclude that, both at managerial and executive level, but also with regard to the majority of people serving a custodial sentence, the main attitude was the adoption of adaptive behaviours and experimentation with some of the best solutions.

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LEGAL FRAMEWORKS AND ADMINISTRATIVE CHALLENGES

Cumulation of Court Actions to Suspend the Enforcement of Unilateral Administrative Acts: Is It Possible?

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Abstract

The suspension of administrative acts requires proving the existence of those circumstances that are likely to create a serious doubt as to the legality of the administrative act and the need to temporarily remove the enforceability of the act in order to prevent imminent harm, which is analysed in concrete terms. The seat of the matter regarding the suspension of the execution of administrative acts by the court is Articles 14 and 15 of the Law no. 554/2004 on administrative litigation. Practical work in the field of law creates the prospect of analysing legal institutions in novel hypotheses, as well as in their interaction. For example, is it possible to file two applications for the suspension of the same administrative act, based on Articles 14 and 15 of the Administrative Proceedings Act No. 554/2004? In our opinion, the answer is positive, but also nuanced. The aggrieved persons justify a procedural interest in filing both claims, first of all, given their different effects over time. Moreover, Articles 14 and 15 can be used several times on different grounds, since Article 14 para. 6 also applies accordingly to Article 15 of the Act. The research conducted is accompanied by relevant case law, analytical insights and several conclusions.

Keywords: *administrative act, suspension of effects, well-justified case, imminent damage, administrative litigation.*

JEL Classification: K23, K41

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1. Introduction

The suspension of the execution of an administrative act is *an exceptional and temporary measure* by which the court deprives the administrative act of its

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enforceability. The institution is a means of legal protection against damages suffered by injured parties as a result of allegedly unlawful administrative acts[2], but also a means of guaranteeing legality. Suspension may be ordered only in the conditions expressly provided for by law, the exceptions being of strict interpretation and application (*exceptio est strictissimae interpretationis*). The enforceability of administrative acts derives from the three *simple presumptions* associated with them: the principle of legality (the administrative act is in conformity with the law); authenticity (the administrative act is presumed to emanate from the competent public authority) and veracity (the act reflects a correct factual situation).[3]

The suspension of administrative acts requires proving the existence of those circumstances that are likely to create a *serious doubt as to the* legality of the administrative act and the need to temporarily remove the enforceability of the act in order to prevent imminent harm, which is analysed in concrete terms.

The seat of the subject matter as regards the suspension of the execution of administrative acts by the court is the provisions of Article 14 and Article 15 of the Administrative Judicial Proceedings Act No. 554/2004 (*Section 1*). The grounds for applying for a suspension of the administrative act under Article 14 and Article 15 of Act No. 554/2004 (hereinafter referred to as the ACL) are common. *The well-justified case* and the *imminent damage*, the two cumulative conditions for the suspension of administrative acts, have the same content. The distinction between the provisions of art. 14 and art. 15 of the LCA is the existence or not of an action for the annulment of the administrative act before the courts, which is verified in relation to the date of the application for the suspension. Secondly, the suspension of the execution of the administrative act can be ordered on the basis of art. 14 LCA *until the court has ruled on the merits of the case*, and on the basis of art. 15 LCA *until the final resolution of the case*.

Practical work in the field of law creates the prospect of analysing legal institutions in novel hypostases. For example, is it possible to successfully file two applications for the suspension of the same administrative act, based on Art. 14 and Art. 15 respectively of the Administrative Litigation Act No. 554/2004? We will present a case decision of the Craiova Court of Appeal which,

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[2] Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Ed. Universul Juridic, Bucharest, 2022, p. 375. See also Dana Apostol Tofan, „O nouă perspectivă în teoria actului administrativ (III)", *Studii și Cercetări Juridice*, Year 4 (60), no. 2, April-June 2015, pp. 159–165. The author also makes a comparative analysis of the legal institutions leading to the temporary or definitive termination of the effects of administrative acts.

[3] For the conditions of the suspension of unilateral administrative acts and the problem of suspension of unilateral normative administrative acts, see Anamaria Groza. *The effects of judgments on the suspension of normative administrative acts and their concrete consequences*, published in the book Spyridon Flogaitis, Cătălin-Silviu Săraru (editors), *Administrative Corpus Juris between Implementation, Reforms and Continuous Developments*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2022, pp. 13–24.

although it did not settle this issue on the merits, facilitates an interesting reflection on the subject (*section 2*). In our opinion, the answer to the previous question is positive and we will present the arguments in the following study (*conclusions*).

2. Suspension of operation of the act (Article 14 of Law No. 554/2004) and application for a suspension by main action (Article 15 of Law No. 554/2004)

Article 14 of Law no. 554/2004 gives the possibility to the aggrieved persons, *in well-justified cases* and in order to *prevent imminent damage*, after having been notified, under the conditions of Article 7 of the same normative act, the public authority that issued the act or the hierarchically superior authority or within a maximum of 30 days from the date of becoming aware of the content of the act that can no longer be revoked, to request the competent court to order the suspension of the execution of the unilateral administrative act *until the court has ruled on the merits*. The suspension of the execution of the administrative act shall have the effect of ceasing any form of execution until the duration of the suspension has expired.

Article 2 para. (1) letter t) of Law no. 554/2004, define a *well-justified case* as a *circumstance related to the state of fact and law, which is such as to create a serious doubt as to the legality of the administrative act*. Under this condition, the legality of the act, the suspension of which is sought is not examined, this being the task of the contentious court which will examine the action for an annulment. In determining the existence of a well-founded case, the judge may only proceed to a summary analysis of the act, apparently without prejudging the merits, by reference to the factual and legal grounds invoked by the plaintiff on the basis of minimal evidence, excluding a substantive analysis of the legality of the administrative act.

It is important to note that if, in order to verify the criticisms raised by the plaintiff, the judge would have to administer complex evidence (*such as expert evidence*) or prejudice the merits of the case, the condition of a manifest appearance of illegality of the challenged act in favour of the plaintiff would not be met, but, on the contrary, there would be an appearance of legality of the administrative act.

The mere different interpretation by the parties of the legal provisions applicable in the present case (…) is not such as to conclude that the well-founded case condition is fulfilled. The divergence of the parties as to the incident in the present case of the normative acts does not constitute a ground of apparent unlawfulness of the contested act[4].

In its case law, the Supreme Court has held that the issuance of an act by

[4] Craiova Court of Appeal, administrative and fiscal litigation section, Decision no. 2164/2019, rolii.ro, cited in Gabriela-Victoria Bîrsan, Eugenia Marin, *Legea contenciosului administrativului nr. 554/2004 adnotată*, Ed. Hamangiu, Bucharest, 2021, p. 245, 246.

an incompetent body, the failure to justify the administrative act, the failure to indicate the legal basis for the issuance of the administrative act, the declaration as unconstitutional of the Government ordinance that was the basis for the issuance of the administrative act, the annulment or partial revocation of the administrative act by the issuing public authority or by the hierarchically superior authority may constitute such well-justified cases. According to the doctrine, indications of illegality may concern violations of both procedural and substantive law[5].

Imminent damage is defined by Art. 2 para. (1) letter ș) of Law No. 554/2004 as the *future and foreseeable material damage or, as the case may be, the foreseeable serious disruption of the functioning of a public authority or public service.* As has been held in national case law, the possibility of damage being caused is a question of fact, left by the legislature to the discretion of the judge. Administrative acts are enforceable ex officio and if the judge finds that enforcement could cause harm to the person to whom the act is addressed, he is entitled to suspend it.

In order to justify the suspension, the damage must fulfil the following conditions[6]:

- *It must not have occurred yet, because the law speaks of future damage*. Suspension of enforcement may also be requested in the case of damage caused by successive acts continued over time, the purpose of the suspension being to interrupt the realisation of those acts and thus prevent future damage.

- *Be pecuniary in nature*. The law refers to material damage, thus indicating its pecuniary nature. The suspension could not concern moral damages.

- *The occurrence must be certain, beyond doubt*. It cannot therefore be a question of possible loss, but only of certain loss, the future occurrence of which must be proved by the person who has applied for the suspension of operation of the measure.

The person who requested the suspension must also bring an action for the annulment of the act within a maximum of 60 days from the date of bringing the action for the suspension. If he or she fails to do so and it is established prior to the decision on the application for the suspension, the application will be dismissed as devoid of interest. If the suspension has been ordered, but the person has not lodged the application for the annulment of the administrative act within 60 days of the lodging of the application for the suspension of the act, the suspension shall cease automatically and without any formality. If the main application for the annulment of the administrative act is rejected, the effects of the suspension previously ordered in the first instance pursuant to Article 14 of the Act shall cease, the suspension having effected only until the first court hearing the

[5] Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*; 5th edition, revised and added, Ed. Universul Juridic, Bucharest, 2022, p. 307.

[6] See Cătălin Silviu Săraru, *Contenciosul administrativ român*, Ed. C.H. Beck, Bucharest, 2019, p. 284-286.

application for an annulment has ruled[7].

From a procedural point of view, the court decides the application for an urgent stay of proceedings by way of an interlocutory application and by way of priority, with the parties being summoned, without following the procedure for regularising the application and without following the other stages prior to the setting of the first date for the first hearing. Those stages are not followed even in the appeal proceedings. The statement of defence, which is mandatory, shall be lodged on the case file at least three days before the date of the hearing and shall be noticed by the applicant on the case file, without being served.

The judgment deciding the request for a suspension may be appealed within 5 days from the date of communication and is enforceable by operation of law if the court has ordered the suspension of the administrative act. The appeal does not suspend execution. According to art. 14 para. 7, several successive requests for suspension cannot be made for the same reasons.

Article 15 of Law no. 554/2004 regulates the possibility of filing the application for a suspension together with the application for the annulment of the act, in the same action or in a separate action (filed within 60 days from the filing of the main action). The grounds for which the suspension of the administrative act can be requested under Art. 14 and Art. 15 of Law no. 554/2004 are common. *The well-justified case* and the *imminent damage*, the two cumulative conditions for the suspension of administrative acts, have the same content[8].

The distinction between the provisions of art. 14 and art. 15 of the LCA is made by whether or not the courts have an action for the annulment of the administrative act pending before them, which is determined by the date on which the application for the suspension was filed. Secondly, the suspension of the execution of the administrative act can be ordered on the basis of art. 15 LCA until the *final resolution of the case.*

The provisions on the expedited procedure, the appeal, the enforceability of the judgment, the possibility of bringing an action by the representatives of the Public Prosecutor's Office apply similarly to the suspension provided for in Article 14 of the ACL. Also, the appeal does not suspend the execution, and in the event of the admission of the substantive action, the suspension measure, ordered under art. 14, is extended by right until the final resolution of the case, even if the plaintiff has not requested the suspension of the execution of the administrative act under art. 15 LCA[9].

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[7] See Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ,* vol. II, Ed. Universul Juridic, Bucharest, 2018, p. 287.

[8] See Claudiu Angelo Gherghină, „Suspendarea executării actului administratrativ cu caracter normativ", *Revista de Stiinte Politice*, No. 56/2017, pp. 100–111.

[9] On the suspension of administrative acts of a normative nature, see Alexandru Mitra, „*Considerații cu privire la întinderea efectele cutinderea effects of the suspension of the execution of administrative acts of a normative nature"*, *Revista de Drept Public* no. 3–4/2020, pp. 110–124.

3. When the „clarity" of theory meets the „novelty" of practice: Decision no. 2794/15.12.2023 of the Craiova Court of Appeal

By ***Civil Judgment no. 869/17.11.2023*** delivered by the unpublished judgment of the Gorj Tribunal, the plea of lack of interest, raised ex officio, was admitted and the request for a suspension of execution of the administrative act filed by the plaintiff SC B. S. SRL, against the defendants Municipality of Tg-Jiu and the Mayor of Tg-Jiu, on the basis of art. 15 of Law no. 554/2004, as being devoid of interest. In order to order this solution, the lower court essentially held that the administrative act represented by the provision of the Mayor of the Municipality of Târgu Jiu no. (…)/19.09.2023 had already been suspended in relation to art. 14 of Law no. 554/2004.

The Court held that the plaintiff sought by filing a new application, based on the provisions of Article 15 of Law No. 554/2004, to ensure the extension of the effects of the judgment delivered in relation to Article 14 of the same normative act, until the final resolution of the action for the annulment of the contested administrative act. Such an aim was not considered legitimate, because in the hypothetical situation in which the action for annulment would be admitted, the suspension of the execution of the provision was no. (...)/19.09.2023 would have been extended by rights under art. 15 para. 4 of Law 554/2004 until final resolution of the case.

The court also held that since the suspension had been ordered under Article 14 and the judgment rendered in the application for the suspension was enforceable by operation of law, the plaintiff no longer justified imminent harm at the time of filing the application under Article 15 of the LCA, since the administrative act no longer produced legal effects.

By ***Decision no. 2794/15.12.2023***, the Craiova Court of Appeal found that the lower court did not analyse the request for a suspension in relation to the provisions of Article 15 of Law no. 554/2004, so that the criticisms made by the appellant defendant, based on Art. 488 para. 1(6) and (8) of the Code of Civil Procedure were well founded.

The appellate court held that *the distinction* between the effects of the suspension provided for in Article 14 and Article 15 of Law no. 554/2004 was given by the *duration of* the two forms of suspension of the execution of administrative acts. The suspension of execution ordered under Article 14 lasts until the merits of the case are settled in the first instance, while the suspension ordered under Article 15 lasts until the final decision of the case.

The fact that the will of the legislator was to allow applications based on Article 15, even when there is a court's decision to order the suspension of enforcement under Article 14, is clear from the wording of Article 15(4): „in the event of the admissibility of the substantive action, the suspension measure ordered under Article 14 shall be extended by operation of law until the final reso-

lution of the case, even if the applicant has not requested the suspension of enforcement of the administrative act under paragraph. (1) (ICCJ, C.A.F. Section, Dec. no. 188/03.04.2009)". The very fact that the suspension is provided for under Article 15 attests to the legislator's intention to allow such a request to be made, within the limits set by Article 14 para. (6) of Law 554/2004.

The trial court did not make a distinction between the two forms of suspension, in which situation the plea of lack of interest was wrongly admitted, considering that the suspension of the effects of administrative acts regulated by art.14-15 LCA can only be requested alternatively, not being allowed the accumulation of the two remedies regulated by the legislator.

The Court did not find any legal grounds to support the lower court Finding that the purpose lacked legitimacy if the application for the suspension was granted. Secondly, the reasoning in the judgment to the effect that there was a purpose not to grant the new application for a stay of proceedings and, on the other hand, that there was no imminent damage was found to be contradictory. It was concluded that the lower court had decided the case without examining the claim on the basis of the legal basis relied on and, therefore, the case was quashed and remitted for retrial before the same court, with the obligation to examine the applicant's claim in the light of the provisions of Article 15 of Law 554/2004.

4. Conclusions

In our opinion, applications for the suspension of execution of an administrative act based on Article 14 and Article 15 of Law No. 554/2004 may be filed successively. Persons who consider themselves aggrieved by administrative acts which they consider to be manifestly unlawful may bring the action provided for by Article 14 after the commencement of the preliminary procedure or within 30 days of becoming aware of the content of the act which can no longer be revoked. If the action is well founded, the court shall order a stay of enforcement of the measure until such time as the court of first instance has given judgment. An appeal against the judgment may be lodged with a higher court, but such appeal shall not stay its enforcement. If the appeal is dismissed, the decision to suspend the administrative act becomes final, but if the appeal is upheld, the administrative act will resume its legal effects. We consider that an application for a suspension based on art. 15 of the LCA can be filed even if the previous application based on art. 14 of the LCA has been rejected, except in the case where the res judicata authority of the judgment based on art. 14 of the LCA can be challenged.

The action brought on the basis of Article 15 of the LCA can only be brought subsequently to the action brought on the basis of Article 14 of the LCA, since the former must be brought either together with the action for the annulment of the act or within a maximum of 60 days from the bringing of the main action.

It is clear that the injured parties have a procedural interest in bringing both applications successively, primarily because of *their different temporal effects*. Admissibility of the applications leads to the suspension of the administrative act, but the legal basis of the action entails a different length of time during which the effects of the administrative act will not be produced. Thus, a shorter or longer period of time may elapse between the *decision of the court of cassation* and the *final resolution of the case*, assuming the existence of several procedural cycles.

A second argument relates to the unique prohibition in the matter established by Art. 14 para. 6 of Law 554/2004. According to this article, 'no more than one successive application for suspension may be made for the "same". We interpret this provision as relating to the factual grounds of the application, in particular the constituent elements of the well-founded case, and not to the legal basis. The purpose of the prohibition seems to be to respect the res judicata effect of a first judgment. However, where the grounds are different, both factual and legal grounds, successive applications may be made. Therefore, Art. 14 and Art. 15 can be used successively and even more than once in the case of different grounds, since Art. 14 para. 6 also applies correspondingly to Art. 15 of the LCA.

Related to the interpretation of Art. 14 para. 6 of Law no. 554/2004, the case law of the Administrative and Tax Litigation Section of the High Court has been consolidated to the effect that the prohibition of successive applications does not cover the situation in which an application for a suspension based on Article 14 is followed by an application for a suspension based on Article 15 of the same law, but admissibility is analysed on a case-by-case basis, depending on the grounds invoked, the decision on the first application and the other circumstances of the case. [10]

In doctrine, the opinion has been expressed that Art. 14 para. 6 LCA is a transposition of art. 187 C. pr. civ. on the sanctioning of the abusive exercise of the parties' procedural rights, but, *per a contrario*, another request for suspension may be made if the plaintiff brings new arguments, compared to the arguments set out in the first request for suspension, by proving the well-founded case and the imminent damage[11].

In the present case, we consider that the correct choice was not to resolve the case by admitting the plea of lack of interest. The appellant plaintiff had the procedural interest to use both remedies of provisional judicial protection in administrative litigation, and as long as the legislator itself regulates two such remedies, it cannot be established that the party would seek to circumvent the effects of a court judgment by trying to extend the duration of the suspension of administrative acts.

Instead, the court's solid argument is that the condition of imminent dam-

[10] Gabriela Bogasiu, *op. cit.,* p. 311.
[11] Oliviu Puie, *Tratat teoretic și practic de contencios administrativ*, vol. II, Ed. Universul Juridic, Bucharest, 2021, p. 862.

age was not met. Since the first judgment had ordered the suspension of the administrative act on the basis of Article 14 of the LCA, any form of enforcement had ceased and it could no longer cause imminent harm to the applicant. However, the analysis must be carried out *in concreto*, in relation to the finality or otherwise of the judgment under Article 14 of the LCA. Even if the aggrieved person has obtained a suspension at first instance under Art. 14 LCA, it is possible that the suspension may be overturned on appeal, in which case the administrative act will again produce its effects and may even generate the imminent damage provided for by Art. 2 para. (1) lit. In such circumstances, the decision on the merits also depends on the assessment of the res judicata authority of the decisions handed down on the basis of Article 14 of Law No 554/2004.

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Local Autonomy without Elected Body. Or How to Live (Administratively) without Breath (of the Local Council)

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Abstract

Local autonomy is a principle of organisation and operation of the public administration, mainly regulated at the constitutional level. It represents a supreme recognition of its indispensable character in the state's legal, political, and administrative architecture. Thus, the development of the life of a community in the absence of bodies democratically elected directly by the citizens appears completely outside the possibility of a natural administrative life. From this perspective, our study presents a specific case in which a territorial administrative unit functioned for three years (and will continue, most likely until the end of the mandate) without a local Council – the body democratically elected by the citizens to regulate life at the level of the fortress. The presentation will go through all the legal stages of the situation, starting from the first meeting of the legally established Local Council, following the 2020 elections, and ending up to now. The analysis of the incident regulations and the monitoring of the actual situation will highlight the weakness of the law from the perspective of its concrete efficiency and the danger it can constitute for democracy. Moreover, we try to raise an alarm signal on some interpretations that can lead to the illusion of the lack of absolute necessity of such institutions, with the argument that it is possible to live without them; often, the economic-financial factor (the costs of the elections) taking precedence over the democratic debate, especially for a young democracy that still has a long way to go before reaching democratic maturity.

Keywords: *local autonomy, local elected body, public administration, local council.*

JEL Classification: K23, K40

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1. Introduction

The elements that compose the architecture of a state must be in a state of perfect functional equilibrium for the entire institutional mechanism to function properly. To be effective, each component must be able to fulfil the role assigned to it by the legislator at its inception. The trajectory of an institution cannot be smooth and uniform; social dynamics require a high degree of adaptation of the mechanism to the constant changes in real life. Institutions, especially those of public administration, are created to serve the public interest and the needs identified in society at a given time. In this context, the continuous verification of the alignment between social reality and the 'wear and tear' of an organ is absolutely necessary, and the legislator's task – the architect of the entire social system – is of major importance.

Without constant care in regulating all the component elements of the whole, but especially the connections between them, and without active and interventionist monitoring at the moment of identifying 'deviations', the entire edifice deteriorates. It may not collapse at the first 'breakdown', but leaving it 'unattended' produces long-term effects that significantly alter the structure of society.

To ensure that a mechanism functions efficiently and fulfils the purpose for which it was created, several distinct phases must be followed: the establishment of the institution, and the implementation and control of its activities. The last stage represents a continuous activity throughout the institution's operation. In the architecture of a politico-administrative system, we find two categories of institutions: on the one hand, those that implement fundamental principles provided by the constitution and laws (local autonomy, equality before the law, the right to vote, administrative decentralisation, etc.), and on the other hand, institutions, authorities, or administrative bodies established following the identification of a need within the community (society) that must be met (a context in which the administrative doctrine interferes with the opportunity of the founding act or the acts through which the activities of the respective authorities are carried out). However, all are established to serve, through their activity, the public interest of the community and will be 'viable' as long as the purpose for which they were created is achieved. The manner in which they function and the concrete effects they produce in society determine both the necessity of the institutions and the quality of the administration and the life it provides to citizens.

The control instrument, the balancing mechanism for this entire construction, is represented normatively by the regulation of the responsibility of the aforementioned institutions.

A special situation arises in the case of deliberative authorities, established as an expression of the constitutional principle of local autonomy, where regulating their responsibility is more challenging in the final register, that of quantifying the concrete effects that the regulation manages to bring in situations

where the norm is violated by the collegial body of public administration.

In our analysis, we will observe the intervention, in the content of the regulation concerning the legal effects produced by the behaviour of authorities contrary to the legal norm, of two terms – liability and responsibility.

2. Liability and responsibility – conceptual determinations

Liability and responsibility are two fundamental concepts that, although distinct, complement each other. The Latin etymology of liability has largely preserved the sense in which it is used today – to answer for, to pay, the obligation of a person to account for their actions.

In contemporary society, the concepts of liability and responsibility are fundamental for the harmonious and sustainable functioning of communities. These concepts transcend the individual sphere, extending to the institutional, governmental, and even global levels. Liability and responsibility represent essential pillars in building a society where each individual and organisation assumes the consequences of their actions.

Responsibility is connected to morality. Dimitrie Gusti stated that it represents a moral and emotional attitude of a person towards their actions. It can manifest when two conditions are met: the freedom of personality and its capacity to make decisions. Only a free person can internalise the values from social norms, adhere to them, and commit to respecting them, thus becoming a responsible individual.

In legal and sociological literature, the terms '*liability*' and '*responsibility*' are frequently used with identical or similar meanings. Semantically, the term 'liability' is used as a general category only in languages of Latin origin, deriving from the Latin verb '*respondere*,' which means '*to answer*' or '*to pay*[2]'. Thus, any subject of law, whether it is an individual before their peers or the state, the state before its subjects, or the state before other states, must answer for its actions, assuming the consequences of the commitments made or the disregard of legal obligations.

Thus, in common parlance, the notion of liability is understood as the obligation of a person to account for their actions as a result of society's repressive reaction[3]. At the same time, some voices argue that the term liability can also signify that a person meets the conditions, for example, psychological, to be held accountable.

Although often used interchangeably (this can be observed especially in the regulation of the administrative code), the two concepts have distinct nuances and implications. Responsibility, through its preventive and ethical nature, ensures appropriate and conscious behaviour of individuals, thereby reducing the

[2] Vocabulaire juridique. Paris, PUF, 1936, p. 429.

[3] Victor Micu, „Răspunderea și responsabilitatea ca fenomen social", *Legea și viața* no. 6/2017, p. 38.

incidence of liability cases, which intervene to correct and sanction non-compliant actions. In a balanced society, an emphasis on moral and professional responsibility can significantly reduce the need to apply legal liability measures.

Without being linguistics specialists, but interested in the etymology of the terms and their usage in the legal doctrine and legislation of other countries, we examined how these notions are used by foreign legislators and made a few observations from this perspective: In the English language, different terms are used, with specific references to distinct legal notions and categories. Thus, in constitutional and international contexts, '*responsibility*' and '*accountability*' are used, while in civil law, expressions like '*liability*' or '*law of torts*' are utilised. As noted in a study on this subject, among the myriad explanations given to this notion, researchers observe that there are differences in meaning between the first two concepts, with '*accountability*' relating to the public, while '*responsibility*' relates to an individualised subject, specifically the one who is in the position of having a duty to someone or who can be blamed for a specific violation[4].

The German language[5] also has two different terms – one specific to the language of morality (*Verantwortlichkeit*) and another, more narrowly used in legal language (*Haftung*). In the beautiful French language, we find '*responsabilité*,' a single notion used both for situations leading to specific effects of behaviour contrary to a legal norm and for the moral assumption of a decision[6].

In the Romanian language, we use two different terms, '*răspundere*' (liability) and '*responsabilitate*' (responsibility), each with distinct meanings, although there is a common reference point between them. We would say that the main differentiation is related to social structures and the objectives they refer to. Thus, responsibility is of a value-based nature, while liability is of a normative nature.

Both are necessary: liability directly aims at conserving the social system, while responsibility primarily aims at improving and developing the social system through the perfection of the human being. How society seeks to achieve these objectives are also different. The functioning of liability is stimulated through the regulation of a coercive system based on sanctions, whereas in the case of responsibility, society acts through incentives[7]. Therefore, liability pertains to any individual because it involves subjection to a normative system, while responsibility is specific to individuals with a certain cultural level, implying

[4] R. D. Popescu, *Răspunderea Parlamentului în dreptul constituțional,* C.H. Beck Publishing House, Bucharest, 2011, p. 19.

[5] Dănişor D.C., Dogaru I., Dănişor GH. *Teoria generală a dreptului,* C.H. Beck Publishing House, Bucharest, 2006, p. 458.

[6] See the Larousse Dictionary where we find multiple meanings for 'responsabilité': (I) the obligation to compensate for damages caused to others; (II) the obligation to bear the punishment provided for the committed offence; (III) the capacity to make a decision.

[7] Hart D., „Organisational responsibility versus individual responsibility: safety culture? About the relationship between patient safety and medical malpractice law", *in Zeitschrift fur evidenz fortbildung und qualitaet im gesundheitswesen* no 8/2009, DOI: 10.1016/j.zefq.2009.08.006.

knowledge and the ability to make judgments, as well as an active attitude and commitment.

Responsibility involves a relationship between the individual and society, while liability involves a relationship between the individual and the authority of a community. Responsibility is developed and maintained by society because it is closely linked to the system of values institutionalised by the community, with the aim of conserving and promoting these values, realised through various actions designed to maintain social order and public good. In fact, it is a human activity that a person undertakes on their own initiative, based on choosing objectives to follow from several possible ones. A person feels (or is) responsible for their actions that are not regulated by norms as restrictions or obligations. Thus, responsibility should be viewed in relation to personality, as a set of intellectual and moral traits that transform an individual into a unique person.

The path of responsibility starts from individual virtues[8], rooted in education, personal experiences, or ethical principles, and evolves into a social value, in a complex and interconnected journey that reflects how individual actions and attitudes can influence and shape society as a whole.

In the concrete realm of action, liability intervenes as a relationship between the individual and society. While responsibility is formed based on individual development and the capacity to internalise certain values and incorporate them into behaviour, liability always demands the dimension of action.

An interesting and ever-relevant discussion is: 'The absence of responsibility does not automatically imply the absence of liability; however, the absence of liability automatically implies the absence of responsibility.' It is considered that the path of forming the human individual in the direction of liability and responsibility is intrinsically linked to the formation of self-awareness, a phenomenon through which a person reflects their own existence in relation to others, society, nature, and God[9].

3. Local autonomy – a constitutional principle underpinning the organisation and functioning of local public administration

The Romanian constitution has adopted a dual system of executive-deliberative bodies within the politico-administrative structure, intending to maintain a legislative-executive separation and thus give expression to the principle of separation of powers, both at the central and local levels.

From this perspective, at the central level, the legislative power is represented by the Parliament, while the executive power is vested in the Government.

[8] Grecu G., *Political Responsibility – my Responsibility, maybe not my Fault, in Meta-research in hermeneutics phenomenology and practical philosophy*, 1/2012.

[9] Jensen M.H., „Complicity and the responsibility dilemma", in *Philosophical studies*, no. 1/2020, DOI:10.1007/s11098-018-1182-8.

At the intermediary level – the county – there is the county council as the deliberative authority and the president of the county council as the executive authority. At the basic level (commune, town), the local council serves as the deliberative authority and the Mayor as the executive authority.

The intermediary and basic levels, representing public administration in administrative-territorial units[10], are based on the principles of decentralisation, local autonomy, and deconcentration of public services. The public administration authorities through which local autonomy is realised in communes and towns are the elected local councils and the elected mayors, in accordance with the law.

We observe that the constituent legislator was very clear in regulating the structure of the public authorities system, giving particular importance to the concrete manifestation of the principle of local autonomy. The importance of this principle is significant, as demonstrated by the special attention of the legislator, both constitutionally and legally, in its regulation and operationalisation.

Local autonomy represents the ability of local authorities to exercise power within the limits of the legislation and to manage their own public affairs independently of central authority intervention. This is a vital concept for the efficient and sustainable long-term development of local communities.

The right to make decisions regarding local matters is essential for ensuring the economic development and prosperity of the community. Local autonomy allows local authorities to manage their local finances, invest in infrastructure, promote quality education, and provide adequate health services.

By empowering local authorities to make decisions that directly affect their communities[11], local autonomy fosters a responsive and adaptive governance model that can better address the specific needs and challenges of local populations. This, in turn, promotes a more engaged and active citizenry, which is crucial for the overall health and vitality of democratic governance[12].

Through local autonomy, communities have the opportunity to define their own cultural identity and to promote and support local art and culture. This contributes to the formation of culturally diverse and dynamic communities, where diversity is promoted, and local values are respected. Moreover, implementing local autonomy creates a premise for greater citizen involvement in community life and the decision-making process. Through local institutions and participation mechanisms, citizens will have the opportunity to express their opinions and actively contribute to local development.

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[10] According to Article 4 para. (2) of the Romanian Constitution, the territory is administratively organised into communes, towns, and counties, under the law, with some towns being designated as municipalities.

[11] Strebel, M. A., Kubler D., „Citizens' attitudes towards local autonomy and interlocal cooperation – evidence from Western Europe", in *Comparative European Politics*, no. 2/2021, DOI: 10.1057/ s41295-020-00232-3, p. 198.

[12] Vasqez, I. M., „Land Use Planning Determinants as Limits to Local Autonomy in Matters of Urban Planning", in *Revista Digital de Derecho Administrativo*, no. 22/2019, pp 255–295, DOI: 10.18 601/21452946.n22.11.

Local autonomy thus entails the determination of local authorities' responsibilities by enshrining full competence in solving local interest issues and excludes the involvement of other authorities in making these decisions[13]. As a legal reality, local autonomy has been and continues to be influenced by several factors, including historical tradition, geographical framework, economic resources, the degree of civic and political education, and, not least, national and international regulations. It must be analysed as ensuring a high degree of democracy because it represents a counterbalance to centralise governance, which at least theoretically ignores community requirements and interests and is one of the most efficient forms of administrative self-management.[14]

To measuring and operationalise this principle[15], it is necessary to concretely organise the institutions outlined by law, focusing on their organisation and, especially, their efficient functioning. And why not, their effectiveness. Because, in the example we will present, we will observe with surprise that it is indeed possible to conduct administrative life without a deliberative institution.

4. Responsibility and accountability of collegial authorities: provisions of the Administrative Code

We propose an analysis of two concepts that are particularly important for our study due to their role as essential control mechanisms for the existence and effective functioning of public authorities. These concepts are responsibility and accountability, a binomial often used together with sometimes different, sometimes similar meanings.

In Romanian legislation, the accountability of deliberative/collegial authorities – Parliament, Government, local councils, or county councils – is regulated within a complex framework that includes both constitutional and legal provisions, as well as general principles of the rule of law.

The general principles of the rule of law, included in the Romanian Constitution, establish the basis for the responsibility of deliberative authorities. Article 1 of the Constitution enshrines the principles of the rule of law, while Article 44 stipulates that public functions are exercised under the conditions of the law and the oath.

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[13] F. L. Ghencea, „Descentralizarea şi deconcentrarea administrativă- principii de organizare a administraţiei publice locale", study published in: *Reformele administrative şi judiciare în perspectiva integrării europene*, *Section for juridical and administrative sciences, Caietul Ştiinţific* nr. 6/2004, Institutul de Ştiinţe Administrative « Paul Negulescu », p. 273.

[14] D. A. Tofan, *Drept administrativ*, vol. I, V edition, C.H. Beck Publishing House, Bucharest, 2020, p. 228.

[15] Fleurke F. Willemse R., „Measuring local autonomy: A decision-making approach", in *Local Government Studies*, 1/2006, pp. 71–87, DOI: 10.1080/03003930500453542, Ladner A., Keufler N., Bastianen A., „Local autonomy around the world: the updated and extended Local Autonomy Index (LAI 2.0)", in *Regional and Federal Studies*, oct/2023, DOI: 10.1080/13597566.2023.2267990.

Following legal regulations, it is clear that for each of the collegial authorities at all levels, the legislator has instituted a form of accountability, concretised through the dissolution of these bodies.

For the unique legislative authority, Parliament, constitutional regulation makes the sanction of dissolution an exceptional measure, with the conditions set by the fundamental law being almost impossible to meet[16]. Article 89 of the Constitution assigns this prerogative to the President, who can dissolve Parliament after consulting the presidents of the two chambers and the leaders of the parliamentary groups if it has not granted a vote of confidence for forming the Government within 60 days from the first request and only after at least two requests have been rejected. The rationale for granting dissolution prerogatives to the President lies in his constitutional duties to ensure the proper functioning of state authorities[17].

In the case of Parliament, the regulation of dissolution is constructed exclusively in the context of a political crisis related to the inability to form a new Government. The legislator limits the possibility of this situation occurring with the argument of institutional stability. Dissolution would mean early elections, which, along with the entire election campaign period, would lead to institutional instability.

The accountability of the Government[18] is regulated both in the Constitution and in the Administrative Code through the prerogative granted to Parliament, which can withdraw its vote of confidence via a motion of censure. If the motion is adopted, the Government is dismissed, and until a new cabinet is appointed, it continues to perform only the acts necessary for administering public affairs until the new Government members take their oath[19].

The constitutionally established necessity for the continuity of executive activity ensures that there is no gap during the transition from one cabinet to another, preventing the country from being ungoverned during this period.

Continuing to the local level, we examine how the deliberative authority can be subject to accountability and under what conditions the sanction of dissolution can intervene. The legislator's thinking, as we will see, was somewhat different in this context.

Local autonomy enjoys constitutional regulation, being exercised

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[16] V. Vedinaș, G. Condurache, „The financial independence of Romanian Parliament", in *Juridical Tribune - Tribuna Juridica*, Volume 9, Issue 2, June 2019, p. 392-401.

[17] Șt. Deaconu in I. Muraru, E. S. Tănăsescu, *Constituția României, comentariu pe articole*, 2nd edition, C.H. Beck, Publishing House, Bucharest, 2018, p. 778.

[18] According to Article 110, para. (2), and Article 113, para. (1) of the Romanian Constitution: 'The Government is dismissed upon the withdrawal of the confidence granted…' and 'The Chamber of Deputies and the Senate, in joint session, may withdraw their confidence in the Government by adopting a motion of no confidence, with the majority vote of the deputies and senators,' as well as the provisions contained in the Administrative Code in a dedicated chapter (Chapter 5 of Title II), Articles 48–50.

[19] According to the Art. 110, para. (4) from the Romanian Constitution.

through local authorities that represent the will of local communities, expressed through universal, equal, direct, secret, and freely expressed vote. This represents the legal ability of the mentioned authorities to decide independently, based on and within the limits of the law, on behalf of the local communities they represent.

At the sub-constitutional level, the Administrative Code[20] represents the main legislative framework concerning deliberative authorities at the local level. This code establishes the competencies, duties, and responsibilities of local councils. The analysis of these regulations highlights both positive aspects and areas where institutional efficiency often encounters difficulties.

5. Deliberative authority: local council accountability

The deliberative authority, the local council, is also subject to accountability through dissolution, in cases explicitly provided by law. In Part III, Chapter 3, there is a section titled: Dissolution of the Local Council, within which Article 143 provides:

'(1). The local council is dissolved by law or by local referendum. The local council is dissolved by law:

a) if it does not meet in at least one ordinary or extraordinary session over a consecutive four-month calendar period;

b) if it has not adopted any decisions in three ordinary or extraordinary meetings held over a consecutive four-month calendar period;

c) if the number of sitting local councillors is less than half the total number of council members and it cannot be supplemented with substitutes under the conditions of Article 122.

(2) The mayor, deputy mayor, general secretary of the administrative-territorial unit/subdivision, the prefect, or any other interested person may refer the matter to the administrative court regarding the cases provided in paragraph (1). The court examines the factual situation and rules on the dissolution of the local council. The court's decision is final and is communicated to the Prefect.'

From the provisions of Article 143 paragraph (1) letter a) of the Administrative Code, three cumulative conditions imposed by the law for the automatic dissolution of the local council can be inferred:

- There must be a legally compliant convening over a consecutive four-month calendar period;
- The four months must be consecutive;
- The local council must not meet in at least one ordinary or extraordinary session within the reference period.
- These stringent requirements ensure that the dissolution of a local council is not taken lightly and only occurs under specific and severe conditions of

[20] Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in Official Gazette no. 555 from 5.06.2019.

inactivity or incapacity.

We must mention that the current form of the regulation is also the result of the Constitutional Court's decisions, which were made prior to the adoption of the Administrative Code. The Court ruled that the regulation of the condition for a legal convening of the local council represents a concretisation of the principle of local autonomy, ensuring that the council's activity adheres to the legal framework for its operation[21]. The legislator aimed to prevent the paralysis of the public administration authorities' activities in communes and cities. The provision regarding the consecutive nature of the counted months was clarified to apply to months counted within the same mandate and not across two consecutive mandates. These provisions offer means through which they become effective. The dissolution of the local council, in the Constitutional Court's opinion[22], is a sanction imposed on the public administration authority for its inactivity, a situation that requires prompt intervention and resolution.

Interesting for our study is, on the one hand, the legislator's choice regarding the solution chosen to ensure continuity in managing the activities of local public authorities, specifically the person who takes over the responsibilities of the local council after it is dissolved, and, on the other hand, the manner in which this option is effective and comprehensive for the concrete situations arising in administrative life.

The Romanian legislator established – both in Law no. 215 on local public administration and in the initial form of the Administrative Code[23] – that until the new local council is constituted, the mayor or, in their absence, the general secretary of the administrative-territorial unit, resolve the current issues of the locality, respecting the duties and competencies according to the law.

A major change occurred with Law no. 375/2022[24]. The current content no longer limits the mayor to resolving the locality's current issues but extends their duties to all the local council's duties provided by Article 120. In the event of the local council's dissolution, these duties are exercised by the mayor through the issuance of decrees, which are subject to the prefect's legality control. These decrees must be approved by the new local council within a maximum of 90 days from its constitution, under the penalty of their effects ceasing[25]. We observe that, in the event of the local council's dissolution, the mayor assumes all the local

[21] Constitutional Court Decision no. 708/2015, published in Official Gazette no. 885 from 25.11. 2015.

[22] Constitutional Court Decision no. 311/2019, published in Official Gazette no. 885 from 9.07. 2019.

[23] See Art. 55, para. (8) from Law no. 215/2001 of the local public administration, published in the Official Gazette No. 123 from 23.04.2007 and art. 147 from Administrative Code, effective as 23.12.2022.

[24] Law no. 375/2022 for the amendment of GEO no. 57/2019 regarding the Administrative Code, republished in Official Gazette no. 1255 from 27.12.2022.

[25] Article 147 paragraph (1) of the Administrative Code as amended by Point 5 of Article I of Law no. 375/2022.

council's duties, which are performed, according to the law, through the issuance of decrees. The legislator granted the mayor unlimited and, in our opinion, inexplicable discretionary power. We assert this considering the legislator's constant concern to identify regulatory balance mechanisms to prevent situations where abuse replaces arbitrariness.

Indeed, the Legislative Council, through the opinion granted to the legislative proposal initiated by the Government (favourable, but accompanied by observations and suggestions[26]), draws attention to the fact that the proposed solution could potentially violate the principle of legal relations security established by Article 1 paragraph (3) of the Constitution.

But what types of responsibilities assumed by the Mayor in case of the dissolution of the local council could jeopardise the principle of security of relations between institutions?

A first example would be the responsibilities in the field of urban planning. The local council at the level of the administrative-territorial unit (UAT) is responsible for urban planning activities throughout the locality and ensures compliance with the content of territorial planning and urban planning documentation, which serve as regulatory norms.

The Law on Territorial Planning and Urbanism[27], in Chapter 3 – Responsibilities of local public administration, assigns to the local council the coordination and responsibility for 'the entire urban planning activity carried out throughout the territory of the UAT[28]', stipulating that it ensures compliance with the provisions contained in approved territorial and urban planning documentation for the implementation of the urban development program of the component localities of the commune or city.

Another example where questions arise regarding the assumption of responsibilities of the dissolved local council by the Mayor is represented by the situation where a person initiates a real estate claim action involving agricultural land within urban areas – summons the dissolved local council to court;

If at the date of trial, the Administrative Code amendments introduced by Law no. 375/2022 – Article 147 paragraph (1) – expanded the Mayor's responsibilities in the event of local council dissolution – considering the provisions mentioned earlier, the question arises whether the Mayor can represent a dissolved council in court? In what capacity will the Mayor act? Can it be considered that, according to Article 147 paragraph (1), the dissolved deliberative body can be represented by the Mayor, since there is currently no local council, hence no representative body?

[26]Legislative Council Opinion, available on https://www.cdep.ro/proiecte/2022/500/40/5/cl667.pdf.

[27] Law no. 350/2001 on territorial development and urban planning, published in Official Gazette no. 373 from 10.07.2001.

[28] Art. 25 from Law No. 350/2001.

Examples could continue, stemming from the paradoxical situation created by the legislator through the regulation of the Administrative Code.

But let's see, next, a concrete situation developed in an administrative-territorial unit where the legal dissolution of the local council has occurred.

6. Case study – dissolution of the Agigea Local Council: the responsibility clock showing once and ringing another

Legal liability represents, as previously stated, a measure of constraints applied by the state in the event of committing an unlawful act and is expressed through the application of sanctions of a material, organisational, or personal nature. Legal liability also constitutes a complex of rights and obligations which, according to the law, arise following the commission of an unlawful act and form the framework for state constraints, aiming to ensure the stability of social relations and guide members of society in upholding the rule of law. While a form of personal liability may be more readily understood in its entirety, the same cannot be said when a collective body is held accountable. We assert this viewpoint, particularly through the example we will present next (the automatic dissolution of the Agigea Local Council), which will reveal how incomplete regulation can lead to a situation that is difficult to accept and once again prove the necessity of correlating all regulations in a coherent and effective manner. Following elections held on September 27, 2020, and the validation of local officials' mandates on October 27, 2020, the Agigea Local Council's inaugural session took place. The newly established deliberative body was convened for its first ordinary session by the Mayor on November 12, 2020, with two agenda items: the formation of specialised committees and the election of the deputy mayor. Although voting occurred for both the deputy mayor and the formation of specialised committees, the meeting chairman did not announce the results, and they were not recorded in the minutes, as the secretary general of the administrative-territorial unit (UAT) refused to record the voting results and draft the Local Council Decision (HCL). The situation was brought to the attention of the Prefect, who demanded that the UAT secretary general draft the HCL. The secretary general resigned, and the position was temporarily filled by several officials appointed by the Mayor (who subsequently resigned themselves!) In a tale worthy of a movie script, the Mayor informed newly hired secretaries that no decisions had been adopted, so three additional meetings were called for December 15, 2020, December 17, 2020, and January 15, 2020, respectively, each with the agenda item: Formation of specialised committees of the Local Council. At the first meeting (on December 15, 2020), most councillors requested a postponement until a viewpoint from the Prefect's office was received regarding the refusal to draft the HCL and sign the minutes of the first meeting. The second meeting, convened on December 17, 2020, ended without adopting any decisions. The third attempt succeeded – on

January 15, 2021, the council met in an ordinary session, attended by two representatives of the Prefect's office who supported the viewpoint requested by the councillors regarding the legality of the November 12, 2020, meeting, insisting that the secretary general draft decisions following the conducted vote. Some councillors withdrew for consultations and left the room without addressing any agenda items. It appears that the goal was to organise a number of legally convened meetings that would not lead to the adoption of any decisions, thereby increasing the likelihood of the local council's dissolution.

We are certainly witnessing a political drama, but it is deeply concerning that this reality (for that is what it is, indeed) cannot be balanced afterwards by regulation.

It must be noted that this entire administrative turmoil stemmed from the fact that the majority in the Local Council opposed the Mayor, and the vice-mayor elected in the first session came from a different political party[29].

And this is precisely what happened in reality. Despite efforts by some councillors to repeatedly convene the Local Council, it did not meet again, with neither the Mayor nor the secretary general responding in any way to the councillors' requests.

Therefore, on April 14, 2021, the secretary general of the Agigea UAT filed a petition to the Constanta Tribunal requesting the declaration of the automatic dissolution of the Local Council, citing the provisions of Article 143 (1)(b) of the Administrative Code: 'if it has not adopted any decision in three ordinary or extraordinary sessions held over the course of four consecutive calendar months'. The tribunal accepted the petition and ruled for the automatic dissolution of the council.[30]

Despite the support from some councillors involved in the case, arguing that this was a contentious issue rather than a complete council inactivity, and despite the fact that the secretary general of the UAT, the only one legally responsible for drafting and sending council acts for signing, refused to perform these duties, and especially since the dissolution of the Local Council would affect their mandates, these arguments could not be invoked to prevent the application of Article 143 of the Administrative Code.

The court ruled with finality in favour of the dissolution petition filed by the UAT's secretary general, based on Article 143 (1)(b) of the Administrative Code.

According to the law, partial elections for a new local council should have been organised within 90 days, during which time the current public affairs[31] of the locality would revert to the responsibility of the mayor.

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[29] For a detailed analysis, see on: F. L. Ghencea, „Relația primar-viceprimar — parteneriat real sau concubinaj de conjunctură", in *Revista de Drept Public* no. 3/2023.

[30] The Decision of the Constanța Tribunal no. 2071/22.11.2021, available on the website: https://www.rejust.ro/juris/ee454d788, accessed on September 9, 2023.

[31] Regulation in act at that moment.

However, due to an unfortunate series of events, we might say, this did not happen even up to this point. Despite declarative statements from all involved authorities – including the Prefect's Office, the Permanent Electoral Authority, and the Government (all vested with responsibilities in organising elections) – the executive branch did not organise elections for the Agigea Local Council. Thus, the community remained without a deliberative authority for an entire mandate.

Furthermore, even though the steps taken by authorities led to the court compelling the Government to adopt[32] a Government Decision to establish the date for organising local elections and initiating the procedures for these elections for the position of mayor and the local council, in the highlighted constituencies by the Permanent Electoral Authority, things, at least concerning the Agigea Local Council, remained unchanged. The Government seemed to experiment with legislative authority by 'enthroning' a person at Agigea with exorbitant prerogatives (both as mayor and the local council).

We cannot help but notice the complete lack of appetite on the part of the legislature to seriously analyse this situation. We argue this based on the intervention of Law 375/2022 – a moment when Agigea had been awaiting elections for a new local council for over a year – which expanded the mayor's prerogatives from handling current affairs to exercising all council duties through issuing decrees.

We conclude the presentation of the case with the assertion that another episode from this chapter will follow, with the beginning of the activities of the new collegial body (expected in the autumn of 2024), which according to the administrative code will need to approve all decrees issued by the current mayor during the period when he assumed the responsibilities of the local council.

7. Conclusions

In conclusion, we reiterate the importance of local autonomy, considered a fundamental pillar of democracy and efficient public administration at the local level. By providing a framework for local decision-making and directly involving the community in managing local resources and projects, local autonomy contributes to sustainable community development and improves the quality of life for citizens. Recognised at both European and national levels, it is crucial for central authorities to acknowledge and effectively support local autonomy, providing adequate financial resources and ensuring respect for the principles of subsidiarity and local autonomy as stipulated in national and international legislation. It should be treated holistically, in interaction with other principles outlined in constitutional or legal texts[33], but most importantly, efforts should be

[32] The civil judgment of the Bucharest Court of Appeal no. 516/2023 dated March 16, 2023, available at: https://rejust.ro/juris/623922624.

[33] N. A. Ceslea, „Recursul administrativ la granița principiilor autonomiei locale și bunei administrări", in *Revista de Drept Public*, Supplement 2023, p. 119.

made to achieve its effective implementation in administrative practice.

Legal liability refers to the obligation to answer if legal norms are disregarded, aiming to defend the social values of the community. On the other hand, legal liability entails bearing corresponding consequences for the guilty party, aiming to restore the violated rule of law. Can we speak of a restoration in the situation we have presented? The liability of a collegial body, in its most severe form, namely the dissolution of such a body, occurs following the procedures stipulated by law. However, the ultimate goal of restoring the rule of law is not achieved. The case presented leads us to the natural conclusion that the effectiveness of the norm leaves much to be desired, failing to cover such a situation (unfortunately not unique). We cannot speak of oversight because leaving a community without a deliberative authority for an entire mandate represents not only a violation of the constitutional principle of local autonomy or legal relationship security, but above all, deprives the community of its deliberative body, where debates on the community's main issues were held, the deliberative process representing the main pillar of constitutional democracy in a rule of law state.

A proposal for legislative reform, similar to withdrawing confidence in the Government, should be considered. Upon such an event, the Government is considered dismissed, yet until a new Government is appointed, the old one remains in office with limited duties. In the case of a local council, we observe that the regulation is by far insufficient. The mere assumption of duties by the Mayor effectively leads to the possibility of decisions to be made at discretion by a single person, completely against the constitutional principles of public administration organisation. Moreover, correlation with electoral legislation is necessary by effectively operationalising the obligation to conduct elections for the new body within the specified period. Pursuing the achievement of the intended goal of the legal norm to its conclusion is the only way to make it effective; otherwise, the entire structure remains devoid of substance.

Moreover, if in the case of the dismissal of the Government, according to Article 110, paragraph (4) of the Constitution, the interim cabinet performs only acts necessary for the administration of public affairs until the new Government takes the oath, in the case of the local council, its responsibilities are exercised by the Mayor through issuing decrees. Surely, the legislator did not anticipate the concrete occurrence of such a situation in reality, and it is evident that the outcome of the case presented was determined by several factors, distinct and diverse elements, and the unfolding of events that involved a series of authorities and individuals in an unfortunate manner. However, this represents a limit of the system, frightening for the legal structure of the Romanian state.

Equally true is that what happened in the case shown is by no means the norm in the functioning of local public administration authorities. However, this argument is of no significance here. A single example of this kind becomes extremely dangerous in the context of events unfolding in a manner that could in-

duce distrust in public figures, authorities, and even the judicial system, ultimately responsible for restoring legality and being the guardian of law enforcement.

Socrates stated that without respect for rules, the state cannot endure. This remains perfectly valid today. However, rules, even enshrined as principles, without adequate implementation mechanisms and without the possibility of balancing and controlling situations that the legislator could not anticipate, not only fail to achieve their purpose but can distort the legal order they intended to establish. In the case of the liability of the local council, regulation fails miserably in restoring the violated rule of law. The fact that the situation is not isolated further obliges immediate action, with local deliberative authorities representing the basic level where citizens can directly engage and participate in decision-making on their community's issues.

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The European Union and Romanian Jurisprudential Perspective on the Public Procurement Contract – Category of the Administrative Contract

Judge PhD**. Marlena BOANCĂ-IVAN**[1]

Abstract

A decision-making relevance for retaining the incidence of the special legislation applicable in the matter of public procurement presents the qualification of the contract as a public procurement contract, subsequent to the analysis of the legal features of the contract, but also of the qualities of the contracting parties. The legal features that particularise the public procurement contract represent autonomous notions, defined by EU law, with the exception of the element relating to the administrative character, not provided for by Directive 2014/24/EU, but mentioned by Romanian law. Also, the qualification of the public procurement contract is an autonomous qualification, in accordance with the provisions of EU law on public procurement, and the qualification of the contract in national law is not relevant from this perspective. Equally, the concepts of contracting authority and economic operators, tenderer are defined not only at the legislative level, but have been the subject of a rich ECJ jurisprudence, which must be taken into account and applied as such by the national judge. In terms of guaranteeing the most efficient use of public money, avoiding the non-application of special provisions in the field of public procurement, as well as consolidating theoretical knowledge in the matter, it is useful to approach the previously mentioned autonomous notions in the light of European and Romanian jurisprudence and doctrine.

Keywords: *public procurement, public procurement contract, contracting authority, economic operator.*

JEL Classification*:* K23, K33

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1. Introductory aspects

The dynamics of public procurement regulations at the European level since 1970 is a reflection of the importance of consolidating the European single

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market in this area of great topicality and interest, which represents an important percentage of the EU member states' GDP.

This article represents an extensive research of the legal institution of the public procurement contract in the current context of the provisions of the 5th generation of the community acquis on public procurement and the Romanian transposition law, with an emphasis on the practical values reflected in a rich judicial practice of the ECJ and Romanian, subject to analysis.

The issue dealt with concerns about the concept of public procurement contract, its legal features, the parts of the public procurement contract and the types of public procurement contracts.

2. The concept of public procurement contract

Public procurement contracts are defined by the provisions of art. 2 para. (1) point 5 of Directive 2014/24, as contracts for consideration, concluded in writing between one or more economic operators and one or more contracting authorities and whose object is the execution of works, the supply of products or services.

Pursuant to the provisions of art. 3 paragraph (1) letter l) from Romanian Law no. 98/2016, the public procurement contract represents the contract with onerous title, assimilated, according to the law, to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, which has as its object the execution of works, the provision of products or the provision of services.

Comparatively analysing the two definitions, we notice that beyond the elements provided in Directive 2014/24, our national law adds to the fact that the public procurement contract is assimilated according to the law, the administrative act.

3. Legal features of the public procurement contract

As it follows from the legal definition of the public procurement contract itself, it is an administrative, synallagmatic, onerous, solemn, bilateral or multilateral contract.

The legal features that characterise the public procurement contract represent autonomous notions, defined by EU law,[2] with the exception of the element relating to the administrative character, not provided for by Directive 2014/24/EU, but mentioned by our national law. In this sense, the phrase public contract mentioned in art. 2 para. (1) point 5 of Directive 2014/24/EU is used to denote the fact that one of the contracting parties is the state or other contracting

[2] See Michael Steinicke, Peter Vesterdorf, *EU Public Procurement Law. Brussels Commentary*, Ed. C. H. Beck, Baden-Baden, Germany, 2018, p. 159.

authority, and not to refer to the category of public contracts known in the national law of some member states (France, Germany, Romania).[3]

In the jurisprudence of the CJEU, the autonomous qualification, in accordance with the provisions of EU law on public procurement, of the public procurement contract was highlighted, showing no relevance from this perspective the qualification of the contract in national law. In this sense, it was held, for example, that since Article 1 letter (a) of the directive on public procurement does not contain any express reference to the law of the member states to determine its meaning and scope, it is not necessary to determine what is the qualification of the respective contract in French law to judge whether this convention falls within the scope of the directive.[4]

3.1. It is an administrative contract

In article 2 of Romanian Law no. 554/2004 of the administrative litigation, which bears the marginal name: 'the meaning of some terms', the Romanian legislator assimilates to the administrative acts defined in art. 2 letter c) thesis I, the contracts concluded by the public authorities whose object is: the promotion of public property, the execution of works of public interest, the provision of public services.

The public procurement contract is an administrative contract in the light of the definition of the public procurement contract and the Romanian Administrative Litigation Law no. 554/2004. The provisions of article 8 paragraph (3) of Law no. 554/2004 are relevant, according to which, 'when settling the disputes provided for in paragraph (2), the rule according to which the principle of contractual freedom is subordinated to the principle of priority of the public interest is taken into account'.

Thus, the legal regime of the public procurement contract is a special one, predominantly of public law. The public law prerogatives available to the contracting authority consist in the fact that the contract is concluded for the performance of tasks of public interest, which puts the contracting authority in a privileged position with the possibility to impose some clauses in the contract, to control the way of execution and even termination of the contract.

Principles such as the equality of co-contractors and the balance of negotiations, which prevail in civil relations, are not found in administrative law, where the contract concluded by the public administration has certain special characteristics, imposed by the public interest that is the basis of its conclusion and execution, being considered a public contract.[5] These special characteristics

[3] See, Roberto Caranta, Albert Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, UK, 2021, p. 5.
[4] ECJ judgment of January 18, 2017, *Jean Auroux*, C-220/05, ECLI:EU:C:2007:31, para. 40.
[5] Sentence no. 264/28.04.2023, pronounced by the Mureș Tribunal, Administrative and Fiscal Litigation Section in file no. 337/1371/2022.

of the administrative contract also make the public procurement contract special.

The contracting authority and the economic operator are not in a position of legal equality. In this sense, for example, the request by the contracting authority to extend the validity of the offers, as well as the participation guarantee with a delay of 161 days, does not mean that the operator may not comply with the request of the contracting authority within the established deadline, without the provisions of art. 124 final thesis of Romanian The Government Decision no. 395/2016, which provides for the rejection of the offer as unacceptable in such a situation.[6]

To be in the presence of an administrative contract, it is necessary that one of the contracting parties is a public authority,[7] in a position of legal superiority over its co-contractor, and that the contract seeks to satisfy a general interest.

Related to the requirement that one of the parties to the contract be a contracting authority, in judicial practice it has been highlighted that the mention in the preamble of the service contract of the legal provisions in the field of public procurement does not give the contract the value of a public procurement contract as long as none of the contracting parties is not a contracting authority within the meaning of art. 4 of Romanian Law no. 98/2016.[8]

Regarding the satisfaction of a general interest pursued by the conclusion of the public procurement contract, in judicial practice it has been held, for example, that street lighting constitutes a public service, under the responsibility of the territorial administrative authority, an aspect that leads to the qualification of the contract concluded by the administrative unit – territorial having as its object the purchase of products intended for street lighting as a contract subject to the procedural provisions of Romanian Law no. 101/2016.[9]

Unlike the administrative contract, in the hypothesis of the civil/ commercial contract, the contracting parties are in a position of legal equality, and the interest pursued through the expression of the agreement of the will of the parties is private, and not general, public.

In the same vein, reflecting the contrast with the civil contract, the public procurement contract represents an exception to the principle of autonomy of will. Thus, both the European legislator and the national legislator, in the name of the general interest, establish mandatory norms and not supplementary or recommendation norms regarding the agreement of wills[10] of contracting authorities

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[6] Civil decision no. 598/21.12.2023, pronounced by the Târgu Mureș Court of Appeal, Second Civil Section, for administrative and fiscal litigation, in file no. 344/43/2023.

[7] See Alexandra-Eszter Vasiu, „Serviciul public – contractul administrativ", in *Universul Juridic Magazine* no. 6/2021, p. 1.

[8] Civil judgment no. 38/12.04.2024, pronounced by the Bucharest Court of Appeal, Xth Section for administrative and fiscal litigation and for public procurement, in file no. 2110/2/2024.

[9] Civil judgment no. 114/16.11.2023, pronounced by the Bucharest Court of Appeal, Civil Section VI, in file no. 7030/2/2023.

[10] See Andrei Bogdan Murgu, Lăcrămioara-Ionale Cojocariu, „Opinii cu privire la autonomia de voință în materie contractuală în dreptul internațional privat român", in *Pandectele Române*, no.

and economic operators.

While in civil contracts, the parties have the possibility to define the obligation of confidentiality, in principle, indefinitely, when one of the parties is a contracting authority, the public purpose of ensuring the transparency of information becomes significant.[11]

3.2. It is a synallagmatic, onerous contract

The synallagmatic contract is that contract in which the obligations born are mutual and interdependent.

According to the jurisprudence of the CJEU, the public procurement contract is a contract by which each party undertakes to perform a service in exchange for a consideration.[12]

The synallagmatic character of the contract is, therefore, an essential characteristic of a public procurement contract.[13]

The synallagmatic character of a public procurement contract necessarily translates into the creation of coercive obligations from a legal point of view for each of the parties to the contract, the execution of which must be able to be invoked in court.[14]

The contract is onerous if each contracting party seeks to obtain an advantage in exchange for the assumed obligations.

Usually, by completing the public procurement contract, the economic operator seeks to obtain a price from the contracting authority in exchange for the assumed contractual obligations, and the contracting authority seeks the execution of works, the supply of products or the provision of services by the economic operator.

As highlighted in the practice of the CJEU, the consideration of the contracting authority must not necessarily consist in the payment of a sum of money, so that the performance can be repaid through other forms of consideration, such as the reimbursement of expenses incurred for the provision of the agreed service (see among others Judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and others*, C 159/11, EU:C:2012:817, paragraph 29, Judgment of 13 June 2013, *Piepenbrock,* C. 386/11, the EU: C: 2013:385, paragraph 31, as well as Judgment of 18 October 2018, IBA Molecular Italy,

5/2021, p. 61.

[11] See Carri Ginter, Nele Parrest, Mari Ann Simovart, „Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure", in *Public Procurement Law Review*, 2013, 4, p. 158.

[12] ECJ judgment of October 18, 2018, IBA Molecular Italy, C 606/17, EU:C:2018:843, para. 28.

[13] See, in this regard, the ECJ Decision of December 21, 2016, *Remondis,* C. 51/15, EU:C:2016:985, para. 43; ECJ judgment of 28 May 2020, *Informatikgesellschaft für Software Entwicklung*, C. 796/18, the EU: C:2020:395, para. 40; ECJ judgment of June 18, 2020, *Porin kaupunki*, C 328/19, the EU: C:2020:483, para. 47.

[14] ECJ judgment of March 25, 2010, *Helmut Müller*, C. 451/08, the EU: C:2010:168, para. 60–62.

C 606/17, EU:C:2018:843, paragraph 29).

It follows that a contract whereby a contracting authority is not legally bound to provide any performance in exchange for that which its co-contractor has undertaken to perform does not fall within the scope of the notion of 'contract for consideration' within the meaning of Article 2 paragraphs (1) point 5 of Directive 2014/24.[15]

Article 2 paragraphs (1) point 5 of Directive 2014/24 cannot constitute a legal basis for rejecting an offer to propose a price of 0 euros. Therefore, this provision does not allow the automatic removal of a tender submitted under a public procurement contract, such as a tender at the price of €0, whereby an operator proposes to provide the contracting authority with the works, goods or services that it wishes to purchase without asking for a consideration.

Under these conditions, since an offer at the price of 0 euros can be qualified as an abnormally low offer, within the meaning of article 69 of Directive 2014/24, when a contracting authority is faced with such an offer, it must follow the procedure provided in this provision, asking the bidder for explanations regarding the value of the bid. From the logic on which article 69 of Directive 2014/24 is based, it follows that an offer cannot be automatically rejected just because the proposed price is 0 euros.

Thus, from paragraph (1) of this article it emerges that, if an offer seems abnormally low, the contracting authorities request the offeror to explain the price or costs proposed in the offer, these explanations may, among others, concern the elements provided for in paragraph (2) of the mentioned article. The respective explanations thus contribute to the evaluation of the reliability of the offer and would allow them to demonstrate that, although the offeror proposes a price of 0 euros, the offer in question will not affect the correct execution of the contract.

In accordance with paragraph (3) of the same article, the contracting authority must evaluate the information provided in consultation with the tenderer and may not reject such a tender unless the evidence provided satisfactorily explains the low level of the proposed price or costs.

The evaluation of this information must, moreover, be carried out in compliance with the principles of equality and non-discrimination between tenderers, as well as transparency and proportionality, which are imposed on the contracting authority in accordance with Article 18(1) of Directive 2014/24.[16]

In Romanian judicial practice, it was held that, in the case of a public procurement contract, the economic operator is always the one who undertakes to perform works, supply products or render services in exchange for the price paid by the contracting authority. Or, according to the contract concluded between the parties, the authority, as the lessor, is the one that has undertaken to

[15] ECJ judgment of September 10, 2020, Case C 367/19, *Tax Fin Lex* d.o.o., ECLI:EU:C:2020:685, para. 25 and so on.
[16] Idem.

ensure the use of the rented space in exchange for the price that the lessee economic operator has committed to pay. Moreover, even in the situation where the object of the contract would have been the provision of building rental services by the economic operator to the contracting authority, such a contract is not a public procurement contract, being explicitly excluded from the scope of the objective application of Law no. 98/2016, according to art. 29 para. (1) of the Law.[17]

3.3. It is a solemn contract

The public procurement contract is concluded in written form, provided form *ad validitatem* – aspect resulting from the administrative nature of the public procurement contract.

The imperative to conclude the public procurement contract in written form also results from the legal provisions regulating free access to information of public interest. In this sense, the provisions of art. 111 of Law no. 544/2001 states that any contracting authority, as defined by law, has the obligation to make available to interested natural or legal persons, under the conditions provided by art. 7, public procurement contracts.[18] Also, in countries such as Finland, Latvia, Slovenia, concluded public procurement contracts are public.[19]

In Romanian judicial practice, it was highlighted that one of the conditions required by the special law on public procurement to be present in a public procurement contract is that that legal act was concluded in writing, a condition not fulfilled in the context in which the legal relations established between litigating parties are proven by tax invoices and the seminar registration and accommodation reservation forms, appropriated by the signature.[20]

3.4. It is a bilateral/multilateral contract

The public procurement contract can be bilateral, in the event that the agreement of will for the completion of the said contract is expressed by a single contracting authority and a single economic operator, or it can be multilateral, in the event that the public procurement contract is concluded between several contracting authorities and/or several economic operators.

The choice of a tender and therefore of an adjudicator is an element intrinsically linked to the regulation of public procurement contracts by this di-

[17] Civil judgment no. 125/17.11.2023, pronounced by the Bucharest Court of Appeal, X[th] Section for administrative and fiscal litigation and for public procurement, in file no. 7427/2/2023.

[18] See Dan Cimpoeru, *Achiziții publice. Concesiuni. Gestiunea serviciilor de utilități publice. Parteneriat public-privat. Remedii și căi de atac*,7[th] Edition, Ed. C. H. Beck, Bucharest, 2022, p. 65.

[19] See Carri Ginter, Nele Parrest, Mari Ann Simovart, *op. cit*., p. 156.

[20] Civil judgment no. 9/4.02.2022, pronounced by the Bucharest Court of Appeal, Civil Section VI, in file no. 456/2/2022.

rective. A system of agreements, through which a public entity intends to purchase goods on the market by concluding contracts, for the entire validity period of this system, with any economic operator who undertakes to supply the goods in question cannot be qualified as a public procurement contract. Predetermined conditions, without making any choice between the interested operators and allowing them to adhere to the said system for the entire duration of its validity.[21]

4. The parties to the public procurement contract

The parties to the public procurement contract have the capacity of contracting authority, respectively economic operators.

They have the capacity of contracting authority within the meaning of art. 4 of Romanian Law no. 98/2016:

a) central or local public authorities and institutions, as well as the structures from their composition that have been delegated to the capacity of credit orderers and that has established competences in the field of public procurement;

b) public law bodies;

c) the associations formed by one or more contracting authority from those provided for in letter a) or b).

By public law body within the meaning of art. 4 para. (1) letter b) from Romanian Law no. 98/2016 means any entities, other than the central or local public authorities or institutions, as well as the structures within them which, regardless of the form of constitution or organisation, cumulatively fulfil the following conditions:

a) are established to satisfy the needs of general interest, without a commercial or industrial character;

b) have legal personality;

c) are financed, in the majority, by entities from among those provided for in paragraph (1) letter a) from Romanian Law no. 98/2016 or by other bodies under public law or is subordinated, under the authority or under the coordination or control of an entity from those provided for in paragraph (1) letter a) from Romanian Law no. 98/2016 or of another body under public law or more than half of the members of the board of directors/management or supervisory body are appointed by an entity from those provided for in para. (1) letter a) from Romanian Law no. 98/2016 or by another public law body.

In assessing whether or not such a need in the general interest is present, the account must be taken of all the relevant legal and factual elements, such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity.[22]

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[21] ECJ judgment of June 2, 2016, *Dr. Falk Pharma GmbH*, C-410/14, ECLI:EU:C:2016:399, para. 38 and 42.

[22] Charles Clarke, „The Meaning and Requirements of the Term 'Contracting Authority Under EU Public Procurement Law: A Critique of Developments from the ECJ Jurisprudence", in *European*

The fact that a need is of general interest does not necessarily imply that its satisfaction does not have a commercial or industrial character, being equally possible that the satisfaction of a need of general interest may or may not have a commercial or industrial character. The lack of commercial or industrial character of the need for interest can only be verified after the concrete analysis of all relevant factual and legal elements.[23]

It is considered that the needs of general interest have an industrial or commercial character, if the entity established, under the terms of the law, by a contracting authority cumulatively fulfils the following conditions:

a) operates under normal market conditions;

b) seeks to obtain a profit;

c) bears the losses resulting from the exercise of his activity.

In the jurisprudence of the CJEU, it was ruled that the following public law bodies can have the capacity of contracting authority:

— universities (Judgment of October 3, 2000, *University of Cambridge*, C-380/98[24]);

— public broadcasting organisations (Judgment of 13 December 2007, *Bayerischer Rundfunk and others*, C-337/06[25])

— entities that comply with the condition regarding the satisfaction of the general interest (C-470/99, *Universale-Bau*[26])

— commercial companies controlled by the state (C-283/00, Commission v. Spain[27]; C-373/00, *Adolf Truley*[28])

— national sports federations (C 155/19 and C 156/19, *Federazione Italiana Giuoco Calcio*[29])

— public health insurance companies (Judgment of June 11, 2009, C-300/07, *Hans&Christophorus Oymanns*[30]).

At the same time, in the Union jurisprudence it was ruled that a company whose material and functional connection with a contracting authority justifies the application of the in-house exception, in terms of its internal operations, falls under the directives on public procurement if it contracts with third parties for

Procurement & PPP Law Review no. 1|2012, p. 59.

[23] See Alin Mihai Laurentiu, Achim Sorin Răzoare, Ioana Romana Laurentiu, „Provocări privind noțiunea de interes general fără caracter comercial sau industrial, în contextul legislației achizițiilor publice", in *Revista română de drept al afacerilor*, no. 9/31 October 2011, pp. 71–84.

[24] ECJ judgment of October 3, 2000, *The Queen v. H.M. Treasury, ex parte The University of Cambridge,* C-380/98, ECLI:EU:C:2000:529.

[25] ECJ Judgment of 13 December 2007, *Bayerischer Rundfunk and others*, C-337/06, ECLI:EU:C:2007:786.

[26] ECJ judgment of 12 December 2002, *Universale-Bau*, C-470/99, ECLI:EU:C:2002:746.

[27] ECJ judgment of 16 October 2003, *Commission v. Spain*, C-283/00, ECLI: the EU: C:2003:544.

[28] ECJ judgment of 27 February 2003, *Adolf Truley*, C-373/00, ECLI: EU: C:2003:110.

[29] ECJ judgment of 3 February 2021, *Federazione Italiana Giuoco Calcio*, C-155/19 and C-156/19, ECLI: EU: C:2021:88.

[30] ECJ judgment of 11 June 2009, *Hans&Christophorus Oymanns*, C-300/07, ECLI: EU: C:2009:358.

works, goods or services in order to fulfil the tasks entrusted by the respective contracting authority. In any case, the respective company must be qualified as a body under public law when, having legal personality and being subject to the control of the contracting authority, it carries out an essential part of its activity with the aim of providing – without being subjected to the pressure of possible competitors and in other conditions other than those of the market – rolling stock to the respective contracting authority, so that the latter can provide the passenger and goods transport service it is tasked with.[31]

The contracting authority is not necessarily the direct beneficiary of the procurement. An example in this sense is represented by the purchase of catering services in schools, a situation in which the direct beneficiaries of the purchase are the students enrolled at the respective public education unit. In such cases, the contracting authority does not gain a direct benefit, but rather fulfils a legal obligation in the public interest.[32]

Also, the direct beneficiary of the public procurement contract can be another contracting authority. In this sense, the CJEU ruled that a contracting authority can act for itself and for others clearly designated contracting authorities that are not directly parties to a framework agreement, provided that the requirements of publicity and legal certainty and therefore of transparency to be respected.[33] For example, a central public authority can conclude the public procurement contract taking into account the expressly determined needs of the local authorities, with the aim of obtaining higher discounts. However, in practice, difficulties may arise when the contracting authorities who are beneficiaries of the public procurement contract, but who are not signatories of that contract, have not been consulted by the central public authority, so that the beneficiary public authorities conclude, themselves, a public procurement contract having the same object.[34]

The transfer by a contracting authority of its rights and obligations arising from a public procurement contract to a company – which carries out commercial activity and in which the contracting authority holds a majority stake – which does not have the capacity of a contracting authority does not mean that that contract ceases to or a public procurement contract, except in the case where, from the very beginning, the contracting authority acted on behalf of the respective enterprise.[35]

The economic operator is defined as any natural or legal person, under

[31] ECJ judgment of 2 June 2016, *Dr. Falk Pharma GmbH*, C 410/14, ECLI: EU: C:2016:399.
[32] See, Roberto. Caranta, Albert Sanchez-Graells, *op. cit.*, p. 7.
[33] ECJ judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust*, C 216/17, ECLI:EU:C:2018:1034.
[34] See Carina Risvig Hamer, M. Comba, *Centralising Public Procurement. The approach of EU member states*, Edward Elgar Publishing, the UK, 2021, p. 45.
[35] ECJ judgment of 15 January 1998, *Mannesmann Anlagenbau Austria AG and Others*, C-44/96, ECLI:EU:C:1998:4, para. 43 and 44.

public or private law, or group or association of such persons, including any temporary association formed between two or more of these entities that lawfully offer on the market the execution of works and/or a construction, the supply of products or the provision of services and which are established in EU member states, EEA third countries that have ratified the AAP agreement, other agreements by which the EU is obliged to grant free access to the market in the field of procurement public, third countries in the process of joining the EU; (art. 3 par. (1), letter jj) from Romanian Law no. 98/2016; Art. 2 para. (1) point 10 from Directive 2014/24).

According to the provisions of art. 3 paragraphs (1) letter g) from Romanian Law no. 98/2016, the bidder is any economic operator who has submitted an offer within an award procedure. In the light of CJEU jurisprudence[36], there must be no differentiated treatment depending on the legal form under which the bidders have chosen to operate. Union law opposes a national regulation that excludes the possibility of non-profit entities (e.g. foundations) to participate in a public procurement procedure.

In the sense of art. 3 paragraphs (1) letter g) from Romanian Law no. 98/2016, a candidate is any economic operator who submitted a request to participate in a restricted tender procedure, competitive negotiation, competitive dialogue or partnership for innovation or who was invited to participate in a negotiation procedure without prior publication.

The association of economic operators referred to in art. 3 letter j) from Romanian Law no. 98/2016 is devoid of legal personality, being obliged to comply with all the requirements established by the contracting authority for the bidders, benefiting from the advantage of fulfilling the qualification and selection criteria, by cumulation.[37]

In the event that the association agreement provides for the possibility of one of the members being the leader of the association, he will have the right to represent all the other members in the contractual relations with the contracting authority, with the mention that the responsibility for the way of fulfilling the contractual obligations falls in charge of all members of the association. As such, the association agreement engages the joint liability of all associates.[38]

Changing the position of leader of the association with another member within the association does not contravene Romanian Law no. 98/2016, such a change within the association not being likely to affect the rules/principles that were the basis for the declaration of the aforementioned association as the winning bidder.

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[36] ECJ judgment of June 11, 2020, Parsec Fondazione Parco delle Scienze e della Cultura, C-219/19, ECLI:EU:C:2020:470, para. 22 and 23.

[37] See Ecaterina-Milica Dobrota, Dumitru-Viorel Pârvu, *Achiziţii publice. Idei noi, practici vechi*, Ed. University, Bucharest, 2020, p. 59.

[38] Public procurement guide/ANAP case library: case 1084, the document is available online at https://achizitiipublice.gov.ro/questions/view/162, accessed on 11.05.2024.

In the event that one/more members of the association request the withdrawal from the association with which a public procurement contract was concluded, it is possible to continue the development of the contract in question by the remaining member/members of the association, provided that the contracting authority verifies if he/she has/have the capacity to carry out the public procurement contract under the same conditions as the association designated as the winner and signatory of the public procurement contract, following that the aspects related to the joint liability deriving from the association will be regulated between the associates.[39]

5. Types of public procurement contracts

Depending on the criterion of their object, public procurement contracts are classified into public procurement contracts for works, public procurement contracts for products and public procurement contracts for services, according to art. 3 paragraph (1) letters m), n) and o from Romanian Law no. 98/2016.

Public works procurement contract – the public procurement contract whose object is: either exclusively the execution, or both the design and the execution of works in connection with one of the activities provided in Annexe no. 1 of Romanian Law no. 98/2016 (mainly construction works); either exclusively the execution, or both the design and the execution of a work; or the realisation, by any means, of a work that corresponds to the requirements established by the contracting authority that exercises a decisive influence on the type or design of the work.

The public purchase contract for products – the public purchase contract whose object is the purchase of products by purchase, including payment in instalments, rental, leasing with or without a purchase option or by any other contractual means under which the contracting authority benefits from these products, regardless of whether or not he acquires ownership of them; the contract for the public purchase of products may include, as an accessory, work or location and installation operations;

The contract for the public procurement of services – the public procurement contract whose object is the provision of services, other than those that are the object of a contract for the public procurement of works according to letter m).

The division of public procurement contracts, according to their object, into public procurement contracts for products, works or services has legal relevance from several perspectives. First, Directive 2014/24/EU of the European Parliament and of the Council (art. 4), respectively Law no. 98/2016 (art. 7 para. 1) provide for different thresholds related to each type of public procurement contract previously mentioned, it being important to note that the threshold value is

[39] Idem.

higher in the case of works contracts than those regarding the purchase of products and services. Secondly, among the exceptions from the application of Directive 2014/24/EU, respectively from the application of Romanian Law no. 98/2016 the broadest are those concerning services, regarding which specific exceptions are provided. Third, a more relaxed special regime is provided for the award of social services and other specific services. Also, Directive 2014/24/EU regulates mixed procurement which refers to the awarding of those contracts containing two types of objects (works, services or products). The EU legislator decided that these contracts will be assigned according to the rules applicable to the genre to which the main object of the respective contract corresponds. The main object of the mixed contract is decisive and to differentiate the parts of the contract that are impossible to divide.[40]

6. Conclusions

In order to retain the incidence of national legislation transposing Directive 2014/24/EU of the European Parliament and of the Council, it is decisive to qualify the concluded contract as a public procurement contract. Both the qualification and the legal features of the public procurement contract, with the exception of the administrative nature of the public procurement contract, represent autonomous notions, defined by European Union law and CJEU jurisprudence.

Equally, a rich union and national jurisprudence develop aspects regarding the quality of contracting authority, which also includes public interest bodies, but also the quality of economic operator participating in the award procedure as a tenderer or candidate, without, however, exhausting the issue that can be caused by all these complex and defining concepts for the field of public procurement, in particular, for the field of administrative law, in general.

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[40] See Piotr Bogdanowicz, *Contract modifications in EU procurement law*, Edward Elgar Publishing, the UK, 2021, p. 17.

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How Administration Should Treat Rules of Ethics for Investment Advisors. Possible Legal Consequences of Them Violation in Polish Law

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Abstract

The profession of investment advisor is relatively young and not very popular in Poland. It was introduced into the Polish legal system under the Act of March 22, 1991, Law on Public Trading in Securities and Trust Funds (Dziennik Ustaw of 1994, No. 58, position 239). Currently, there are 787 people on the list of investment advisors. It is a free profession within the meaning of Art. 88 of the Commercial Companies Code This profession is largely responsible for the proper functioning of economic transactions, including commercial transactions, which results from the specificity of the duties performed by its representatives. As in any profession of public trust, its representatives are required to be particularly diligent in performing it, and above all, they are subject to a more rigorous than common ethical regime, often resulting from codes of professional ethics. The article draws attention to the erroneous identification of the concept of an investment advisor with a financial advisor. The situation of a person violating the ethical norms of the investment advisor's profession was also presented, in particular what consequences its violation may have on the financial market and whether the state's response to them is adequate.

Keywords*: investment advisor, ethics, legal consequences.*

JEL Classification*:* K22, K23

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1. Introduction

Along with social development, capital is accumulated by individual entities that are interested in its multiplication[2]. With the accumulation of financial

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resources, the market for services related to the allocation of accumulated resources is also growing in such a way to bring or the greatest possible profits in the future[3]. This, in turn, creates the need to create a group of qualified specialists, including in the field of consulting. The very concept of an advisor, understood as a person who gives advice[4], as well as such a profession, is nothing new in history[5]. What is new is the legal regulation of the status of people engaged in consulting, the requirements that must be met to be able to use a given title and, most importantly, the rules of special responsibility for violation of legal and ethical norms required from representatives of a given profession. Nowadays, financial advice, both in the context of consumer and business-to-business transactions, can have far-reaching effects on the functioning of both the individual and the entire society[6]. This constitutes a requirement for special diligence in performing the profession of an investment advisor, both in legal and moral aspects. In the former, because it involves liability, both under the Act of 29 July 2005 on Trading in Financial Instruments (hereinafter referred to as u.o.i.f.)[7], as well as the Penal Code and the Penal Fiscal Code, and in the latter, and more importantly, because it undermines trust to the institution of the free profession of investment advisors, thereby annihilating the willingness to use the services of investment advisors and, consequently, in the long run, to the extinction of this profession.

2. The concept of an investment advisor

At the beginning, attention should be paid to the fact that in the legal transactions market there are seemingly similar professions as investment advisor and financial advisor.

First of all, the financial advisor is characterised by the lack of statutory regulation, as well as the lack of mandatory certification and licensing, as well as the lack of institutional supervision[8]. The profession of investment advisor is included in the Regulation of the Minister of Labor and Social Policy of August 28, 2014, on the classification of professions and specialities for the needs of the la-

[3] C. Kindleberger, *The formation of financial centres. A study in comparative economic history*, Massachusetts Institute of Technology, Cambridge 1973, p. 4.
[4] https://sjp.pwn.pl/sjp/doradca;2,453,542, access on 30.03.2024.
[5] K. Gołąbek, „Doradcy królów w porządku chronologicznym", *Polityka. Pomocnik Historyczny*, 2022, p. 82.
[6] S. Marek, A. Wieczorek-Szymańska, *Przyczyny i przewidywane skutki kryzysu finansowego XXI wieku*, „Studia i prace wydziału nauk ekonomicznych i zarządzania", no. 21, pp. 225-236; U. Ziarko-Siwek (ed.), *Tradycyjne i alternatywne inwestycje finansowe w świetle kryzysu finansowego. Wybrane zagadnienia*, CeDeWu, Warsaw 2012.
[7] Consolidated text: Dziennik Ustaw of 2023 position 646, 825, 1723, 1941.
[8] N. Pniewska, „Regulacje prawne rynku doradztwa finansowego na przykładzie wybranych państw europejskich", *Zeszyty Studenckie. „Nasze Studia"*, 8/2017, pp. 48.

bour market and the scope of its application in the professional group under number 2412 (financial and investment advisors)[9]. Taking into account the above, a financial advisor performing his duties is liable only for violating generally binding law, as well as the contractual provisions (e.g. employment contract, consulting contracts).

The profession of investment advisor is understood as performing functions in the management or supervisory bodies of an investment company or performing or supervising the performance of activities constituting brokerage activities; activities related to the financial market that do not constitute brokerage activities; other activities related to customer service or access to accounts kept for customers – as part of the person's employment relationship, mandate relationship or other legal relationship of a similar nature with an investment company, managing the company's affairs by a general partner or partner in a partnership that is a brokerage house; the advisor being in an employment relationship, mandate relationship or other legal relationship of a similar nature with the custodian bank when performing or supervising the activities of maintaining security's accounts, derivatives accounts or collective accounts; the advisor being in an employment relationship, mandate relationship or other legal relationship of a similar nature with an entity that is obliged to employ brokers or advisors under separate legal provisions when performing or supervising the performance of the activities specified in these provisions; performance by the advisor of the activities referred to in art. 79 section 2 or 2c. u.o.i.f. (art. 125 u.o.i.f).

A natural person who has full legal capacity may be entered on the list of brokers or on the list of advisors; enjoys full public rights; has not been found guilty by a final judgment of committing a tax crime, an offence against the credibility of documents, property, economic transactions, money and securities transactions, crimes or misdemeanours specified in art. 305, art. 307 or art. 308 of the Act of June 30, 2000 – Industrial Property Law, offences specified in the Act of October 26, 2000, on commodity exchanges, the Act on investment funds, the Act on public offering or offences specified in this Act and who submitted a positive result before the examination board for advisors referred to in art. 128 u.o.i.f.[10] As part of the profession of investment advisor, representatives of this profession bear special responsibility before the Polish Financial Supervision Authority (Article 130 of the Act on Investment Advisors) and before the Disciplinary Court of the Association of Brokers and Advisors (§ 39 of the Statute of the Association of Brokers and Advisors). This liability is of a professional nature, independent of liability for violating the norms of generally applicable law (e.g. fiscal offence).

[9] Dziennik Ustaw of 2014 position 1145.
[10] Without exemptions indicated in art. 129 sec. 1b, 2 and 3 u.i.o.f.

3. Ethics of professionals

3.1. Distinctions between ethics and morality

When starting to consider the importance of ethical behaviour of investment advisors, it is worth paying attention to the relationship between the concepts of ethics and morality. According to M. Ossowska, ethics is a branch of science which task is to show people what is good and what is bad, what should be the goal of human aspirations, what motives should guide people's behaviour, and therefore the attitude of an ethicist is the attitude of a co-creator of morality[11]. The latter, in turn, is understood as a system of ordered moral demands (orders) and behaviours (practices), covering various spheres of life and recognised as appropriate (ethical) in these spheres[12]. Therefore, ethics examine morality and try to answer the question why we consider certain patterns of behaviour to be right (moral) and others are not, as well as attempts to indicate the axiological basis of moral behaviour or to indicate why behaviour treated as moral is not or should not be so and why. Based on the above, ethics can be divided into normative ethics, which aims to ultimately determine what behaviour is right/just and what is unjust/unfair; descriptive ethics, which deals with the search for answers to what people consider to be right and just behaviour, and metaethics, which seeks answers to the question of how to understand basic moral concepts: 'good', 'right' or 'unjust'. In the context of examining the ethics of investment advisors, descriptive ethics is of fundamental importance.

3.2. Professional ethics and its legal nature

Both law and morality come from the sphere of duty and operate with directives, and the addressee of moral and legal norms is a human being[13]. However, the origin of the standards varies. On the one hand, it can be pointed out that the law is a reflection of morality and constitutes a written and formalised set of norms recognised as moral in a given society. On the other hand, law can influence morality and shape moral norms[14]. It is therefore clear that legal and moral norms may exist in society independently of each other, i.e. a moral norm may not be a legal norm at the same time and vice versa[15].

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[11] M. Ossowska, *Podstawy nauki o moralności*, PWN, Warsaw 1963, pp. 10.
[12] E. Budzyńska, *Między etyką i moralnością, czyli rodzina polska na rozdrożu*, in A. Bartoszek (ed.), *Familiaris splendour. Piękno życia rodzinnego jako wyzwanie dla społeczeństwa i Kościoła*, Księgarnia św. Jacka, Katowice, pp.37-38.
[13] W. Franken, *Recent Conceptions of Morality* in H. Castaneda, G. Nahnikian (eds.), *Morality and the Language of Conduct*, Wayne State University Press, Detroit 1963, pp. 4–9.
[14] M. Michalik, „Moralność a prawo – przegląd typowych ujęć relacji", *Doctrina. Studia społeczno-polityczne* 2/2005, pp. 383-385.
[15] Ibid, pp. 387-388.

Professional ethics is a type of environmental ethics formulated by representatives of that environment. It consists of moral assessments and standards of conduct that define the pattern of proper performance of a given profession[16]. It can be said that every profession has a written or unwritten set of ethical standards. However, in the case of professional professions[17], including investment advisors, the degree of formalisation and the need to write them down are dictated by the importance of the activities performed by representatives of this profession and the possible legal and economic consequences of their unethical behaviour.

The legal nature of professional ethics rarely takes the form of generally applicable law. This is also the case with the ethics of investment advisors. The Principles of Professional Ethics for Brokers and Advisors were adopted by the 21st Congress of Brokers and Advisors on October 18, 2014 (*Zasady Etyki Zawodowej Maklerów i Doradców uchwalone zostały przez XXI Zjazd Maklerów i Doradców w dniu 18 października 2014 roku*)[18]. Therefore, they do not constitute generally binding law. Their violation may result in the initiation of disciplinary proceedings before the Disciplinary Court (§ 39 of the Statute of the Association of Brokers and Advisors [*Statut Związku Maklerów i Doradców*][19], as well as before the Polish Financial Supervision Authority (Article 130 of u.o.i.f.).

It should also be added that investment advisors employed in brokerage houses and entities that are institutional investors are also obliged to comply with the ethical standards contained in the Code of Brokerage Houses (Kodeks Domów Maklerskich)[20] and the Code of Good Practices for Institutional Investors (Kodeks Dobrych Praktyk Inwestorów Instytucjonalnych)[21], which, like the Principles of Professional Ethics of Brokers and Advisors, are not generally applicable. Applicable law.

As a side, it should be highlighted that in u.o.i.f. a general clause was included requiring the advisor to act in accordance with the principles of fair dealing (Article 126, Article 130 sec. 1 point 2). Due to the lack of a legal definition of a given concept, its explanation was left to the doctrine and case law[22]. However, if the ethical norms contained in the Principles of Professional Ethics for Brokers and Advisors are recognised as norms violating the principles of fair

[16] I. Lazari-Pawłowska, „Etyka zawodowa bez kodeksu", *Etyka*, 27/1994, pp. 178.
[17] J. Smarż, „Relacja pojęć „wolny zawód" i „zawód zaufania publicznego", o którym mowa w art. 17 ust. 1 Konstytucji R P. Cz. II", *Przegląd Prawa Konstytucyjnego,* 1(59)/2021, pp. 134–138.
[18] The document is available online at http://reszka.edu.pl/uploads/ZASADY%20ETYKI%20ZAWODOWEJ%20MAKLER%C3%93W%20I%20DORADC%C3%93W_od%2018%2010%202014.pdf, access on 30.03.2024.
[19] The document is available online at https://zmid.org.pl/wp-content/uploads/2021/08/20200615_Aktualny-Statut.pdf, access on 30.03.2024.
[20] The document is available online at https://arslege.pl/kodeks-dobrej-praktyki-domow-maklerskich, access on 30.03.2024.
[21] The document is available online at https://www.generali.pl/media/kodeks_dobrych_praktyk_Inwestorow_instytucjonalnych_908de387ec.pdf, access on 30.03.2024.
[22] More: A. Goździńska-Skóra, W. Zatoń, „Zasady uczciwego obrotu w teorii i praktyce", *Finanse i Prawo Finansowe*, 1(33)/2022, pp. 159–173.

trading, then these norms would indirectly have the force of generally binding law. This would require, for example, a resolution of the Supreme Administrative Court or the Polish Financial Supervision Authority to clearly equate the concepts of violation of the principles of professional ethics with violation of the principles of fair dealing.

4. General characteristics of the professional ethics of investment advisors

As indicated hereinbefore, the standards of professional ethics of investment advisors are included in the Principle of Professional Ethics of Brokers and Advisors, as well as in the Code of Brokerage Houses and the Code of Good Practices for Institutional Investors, the latter two of which refer to investment advisors employed in Brokerage Houses or Institutional Investors.

The principles of ethical conduct of investment advisors can be divided into four groups general principles, principles for employers, principles for clients and principles in professional relationships.

Regarding general principles, § 1[23] indicates that the principles of professional ethics of brokers and advisors result from general moral norms applicable to the professions of a securities broker, a commodity broker and an investment advisor. However, it has not been explained or indicated what these general moral norms are. It can be concluded that the authors meant generally applicable moral norms. It was emphasised that an advisor should act honestly and behave in a dignified and trustworthy manner, taking care of the good name of the Association of Brokers and Advisors and the ethos of the broker and advisor profession (§ 4). It was further noted that the title broker or investment advisor should be used in a justified and dignified manner (§ 2). The key norm, however, seems to be the obligation to act in accordance with the law and the principles of fair trading and to take into account the legitimate interests of clients, while resolutions of the bodies of the Association of Brokers and Advisors, disciplinary jurisprudence and customs developed by the environment of brokers and advisors (§ 3). Another general principle is the prohibition of accepting benefits the amount of which could affect the objectivity of their research reports, investment recommendations or public statements (§ 23). The next principle is the obligation to act rationally regarding the portfolio of instruments financial resources, both your own and those of others, and in accordance with your public statements (§ 22). Additionally, investment advisors, in accordance with the ethical principles of their profession, are obliged to act ethically and professionally in their professional contacts, to perform their duties to the best of their knowledge and with

[23] All '§' cited hereinafter refers to the Principles of Professional Ethics for Brokers and Advisors were adopted by the 21st Congress of Brokers and Advisors on October 18, 2014.

due diligence, striving to achieve the highest work standards and guided by independent professional judgment, and they are also obliged to continue their education (§ 4). Investment advisors should also not undertake activities that could mislead or create false impressions about their qualifications, skills or competences and should not use comparative advertising unless it contains factual, true and useful information for persons who may benefit from it and provided that it does not because it is applied selectively (§ 5). Another general principle is the principle of mutual control expressed in § 6, according to which advisors should ensure that the Principles of Professional Ethics are observed by the Members of the Association of Brokers and Advisors. Advisors are entitled to bring to the attention of any broker or advisor violating these Rules. The last of the general principles is the principle of priority of transactions for clients or employers over transactions for the advisors' own account (§ 33).

Employers are obliged to take care of the good name of the employer and to be reliable in the performance of their employee duties (§ 8), including compliance with the regulations established by the employer, specifying the conditions for placing orders and the frequency of concluding transactions regarding individual or all financial instruments (§ 34). The most important, however, seems to be the principle of loyalty to the employer resulting from § 9, 24, 27 and 31. According to them, without the written consent of the employer, advisors cannot undertake commercial activities or activities that bring other benefits, which could constitute competition to the activities conducted by the employer, provided that activities for the Association of Brokers and Advisors do not require the employer's consent, as well as the optional possibility of excluding the non-competition clause in the contract for teaching or research activities, provided that it does not involve the use of information owned by the employer. The principle of loyalty also has an informational dimension, which states that advisors should inform their employer about any additional benefits obtained in connection with performing their profession, as well as the obligation to disclose to the employer any facts and circumstances that may lead to a conflict between their interests and their obligations towards clients, potential clients or employers and about any form of pressure from other people exerted on them in the performance of their professional duties (§ 27). Moreover, the principle of loyalty includes a ban on advisors using the workplace, equipment, company logos or its reputation to conduct other business on their own account without the employer's consent. The principle of loyalty is also manifested in the obligation to maintain professional secrecy (§ 24), as well as the obligation to have an investment account in the investment company where he or she practices (§ 31).

Investment advisors are obliged to act towards their clients within the limits of the law, i.e. they should not provide clients with services to which they are not entitled under the law (§ 14) in the best interest of the clients (§ 11). The concept of the best interest of the clients seems to be inappropriate. It cannot be clearly deduced from it whether it is about the client's best interest objectively or

subjectively, and in the latter sense it may refer both to the client's perception (what is best for the client in his/her opinion or belief) or in the advisor's assessment (the best according to the advisor due to his knowledge at the time of giving the advice – which does not mean objectively). It is also impossible to say to what period of time the best interest should apply. An important principle towards investment advisors' clients is also the principle of non-discrimination, according to which investment advisors are obliged to apply uniform criteria to clients and act fairly and objectively towards all clients (§ 11) and, as far as possible, analyses prepared on behalf of several clients should be provided to them at the same time, so that individual customers do not benefit from any special benefits resulting from earlier, privileged receipt of the information (§ 12 sec.5). The principle of signalling threats is also important, according to which advisors should take all necessary actions to protect clients against possible losses resulting from the termination of their activities or by their employer (§ 11 sec.3). It violates the principle of loyalty to the employer. Advisers are also obliged to provide the client with information necessary to make an investment decision, in particular regarding investment risk and the method of transaction execution (§ 12) as well as all relevant connections and circumstances that may affect their impartiality or objectivity (§ 28). The principle of reliability in providing information and settlements with clients was also emphasised, which states that the information provided to clients should be reliable, accurate and complete, and that facts should be separated from opinions and forecasts clearly marked (§ 12 sec.3), as well as obtaining information from the client about his financial situation, tax status, investment goals and restrictions, as well as other information that may be important for the recommendation or investment decision made (§ 13) and, with the utmost care, maintain documentation enabling the protection of clients' assets and their identification (§ 25). In terms of content, the most important seems to be the principle of expressing realistic predictions of changes in prices of securities and other financial instruments (§ 12 sec.4). The principle of honesty towards the client is also key, according to which advisors should not encourage clients to make transactions that are inconsistent with their investment goals and restrictions, in particular those that could seriously threaten the client's financial situation (§ 13). The principle of ethical behaviour of an investment advisor towards clients should also include the principle of impartiality and objectivity, which indirectly results from § 29, which stipulates that if there are personal conflicts between the client and the broker or advisor that have no substantive justification, and if these conflicts may have an adverse impact on the level of service provided, the broker or advisor should ask the employer to appoint another person who could take over the responsibilities related to servicing this client.

In professional relations, investment advisors are obliged to comply with internal regulations, including resolutions of the Association of Brokers and Advisors (§ 44); to cooperate with the bodies of the Association (§ 45–46) and to maintain professional secrecy regarding information obtained while performing

functions in the bodies of the Association of Brokers and Advisors (§ 41). The principle of kindness and courtesy applies in relations between advisors (§ 36). However, this principle is secondary to the interests of clients or employers. The key here is the prohibition of mutual evaluation, including the prohibition of issuing an opinion on the reliability of another advisor (§ 37).

5. Consequences of violating ethical standards of investment advisors. How administration shall qualify for infringement of ethical standards of investment advisors

The results of violating the norms of investment advisor etiquette can be considered at various subjective levels. There are consequences for the infringer himself, for society in general, for his clients, as well as for other investment advisers.

As indicated hereinbefore, the ethical standards to which internal regulations oblige investment advisors are not generally applicable law. The effects of their violation will, therefore, in principle, be of an extralegal nature, including a decline in the number of clients and a lack of support from other members of the profession[24]. Despite it, the legislator provides a legal sanction against an investment advisor in connection with his violation of: 1) regulations and other internal regulations that a broker or advisor is obliged to comply with in connection with the performance of his profession; 2) the principles of fair trading or 3) the interests of clients (art. 130 of u.o.i.f.). This sanction is the possibility of deleting an investment advisor from the list of investment advisors with the inability to reenter the list for a period of 10 years from the date of issuance of the decision, or suspension of the license to practise the profession for a period of 3 months to 2 years. However, the application of this sanction is facultative, and the indicated period of prohibition against entry on the list of investment advisers may be shortened (art. 130 sec.6 u.o.i.f.). It is also worth emphasising that in a situation where behaviour violating the ethical standards of the investment advisor's profession is also a violation of the principles of generally binding law (e.g. causes damage or constitutes a crime or fiscal offence)[25], in addition to disciplinary liability, the investment advisor is liable due to general rules.

Considering the consequences of violating the ethical principles of investment advisors, the particular importance of the financial market on the functioning of the entire economy should be taken into account[26]. They may manifest themselves in market deregulation and disruption of market stability. Opposite in

[24] A. Brien, „Professional ethics and the culture of trust", *Journal of Business Ethics*, 17/1998, p. 400.
[25] M. Freedman, „Professional responsibility of the criminal defence lawyer. The three hardest questions", *Michigan Law Review*, 64(8)/1966, pp. 1476.
[26] C. Sablich, „Duties of Attorneys Advising Financial Institutions in the Wake of the S& (and) L Crisis", *Chicago-Kent Law Review*, 68/1992, pp. 519–520.

the case of other professions (e.g. lawyers or doctors), the consequences of violating ethical principles by investment advisors may have consequences on a much broader scope than individual ones[27].

The importance of an investment advisor on the financial market is particularly important for clients using his services and advice[28]. Although the latter are not binding on clients, they are often the basis for their investment decisions. The dynamics and unpredictability of economic phenomena may affect the predictions made by investment advisors. That is why, their clients may experience different consequences of decisions made based on the advice. Therefore, the advisor's liability is not consequential in nature, but depends on the advisor's diligent action[29]. The above causes wondering whether a client who suffered damage by following the advice received from an investment advisor will be able to legally demonstrate the lack of diligent in the advisor's actions[30]. In other words, whether demonstrating a violation of ethical standards applicable to investment advisors can be a sufficient basis for legal liability. This is also complicated by the abstractness and lack of specificity of the catalogue of ethical norms and the use of vague and evaluative concepts. A client seeking damages from an investment advisor due to a violation of the ethical principles applicable to him is obliged to demonstrate on his own that behaviour constitutes a violation of ethical principles, and thus analyse, interpret and possibly classify (subsumption) them, which is subsequently verified by the competent authority[31]. Thus, a client of an investment advisor who violates the ethical principles of his profession is practically deprived of appropriate legal means of recovering the incurred losses[32]. Even if it is shown that the advisor's behaviour violated the ethical principles of the profession in question, the issue of the number of the claims pursued, i.e. proving the damage suffered, also remains problematic[33]. Simplify, the injured party should prove that if the advisor had acted in accordance with internal regulations (ethical principles), the client would have earned a given amount (higher than he obtained) or suffered a given loss (lower than he suffered). Difficulties of an evidentiary and formal legal nature when pursuing claims for violations of

[27] S. Schwarcz, „Keynote Address. The Role of Lawyers in the Global Financial Crisis", *Australian Journal of Corporate Law*, 24/2010, pp. 218–224.
[28] L. Fan, „Information search, financial advice use, and consumer financial behaviour", *Journal of Financial Counseling and Planning*, 32(1)/2021, p. 26.
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[31] R. Ion, S. Olivier, P. Darbyshire, „Failure to report poor care as a breach of moral and professional expectation", *Nursing inquiry*, 26(3)/2019, p. 2.
[32] M. Egan, G. Matvos, A. Seru, „The market for financial adviser misconduct", *Journal of Political Economy*, 127 (1)/2019, p. 260.
[33] S. Ripinsky, „Assessing Damages in Investment Disputes. Practice in search of perfect", *The Journal of World Investment and Trade*, 10(1)/2009, pp. 11–19.

ethical principles by investment advisors justify the need to strengthen the protection of people using the advisor's services.

Finally, it should be noted that the unethical behaviour of investment advisors may affect the entire professional group. These effects may be of a general and abstract nature (reducing the reputation of the profession) as well as individual ones, i.e. constitute a violation of the principles of unfair competition (Articles 3, 12, 17a of the Act of 16 April 1993 on combating unfair competition)[34].

6. Conclusions

Some professional groups are required to be particularly diligent and reliable in providing services. This group also includes the relatively young profession of investment advisor. The importance of ethical principles in its implementation is demonstrated by taking them into account when determining the legal liability of investment advisors. It should be emphasised that the consequences of violating these norms among representatives of this profession have much wider effects than in the case of other professions (including lawyers or doctors). Their violation may affect the processes taking place in the financial market and disrupt its functioning, which may, in extreme cases, result in a violation of its stability and disintegrate the economy. However, a general, abstract and non-specific catalogue of ethical norms and their lack of character as generally binding law do not guarantee their will be followed properly. In other words, the consequences of violations of ethical standards by investment advisors can be extremely harmful both for individuals and the community as a whole, while for the violators they are uncertain and relatively mild (unless they also constitute a violation of statutory law).

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[34] Consolidated text: Dziennik Ustaw of 2022 position 1233.

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DIGITALISATION, SUSTAINABILITY AND INTERNATIONAL PERSPECTIVES

Striving for Coherence: Exploring the Complexities of International Administrative Law

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Abstract

This study endeavours to clear up the terminological ambiguities prevalent within the realm of international administrative law (IAL). It traces the evolutionary trajectory of IAL, discerning its development under the influence of diverse doctrinal perspectives and highlights the challenges associated with use ambiguous terms within the jurisprudence of international administrative tribunals. The paper advocates for a departure from the dualistic terminology, exemplified by the juxtaposition of 'international administrative law' and 'administrative international law' (as observed in Romanian terminology such as 'drept administrativ internațional' and 'drept internațional administrativ', alongside consonant terms in Italian or French), in favour of a more precisely delineated lexicon. It emphasis the imperative need for clearer definitions and argues for the use of 'international institutional law' to accurately reflect the scope of regulations governing international organisations or their administrative structures. Additionally, it advocates for the use of 'law of the international civil service' as an apt descriptor for the relationships within international organisational personnel. Furthermore, the paper addresses the absence of a well-defined framework for the 'principles of international administrative law', used in some international administrative tribunals case law, underscoring the importance of clarity and coherence in legal terminology and doctrine.

Keywords: *international administrative law, administrative international law, international governance, international institutional law.*

JEL Classification: K23, K33

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1. Introduction

Alongside the emergence and consolidation of classical international law, various branches of law have 'internationalised' their dimension by adding

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the adjective 'international' to their basic names, sometimes for purely educational purposes, other times asserting or foreshadowing a new (sub) branch of law. Over time, many of these have crystallised, so today we have international private law, international criminal law, international environmental law, international economic law, international banking law, international trade law, and many others, not to mention a myriad of sub-disciplines of public international law. This proliferation underscores the evolving nature of legal scholarship and its responsiveness to global developments.

This trend, recently revitalised, together with extensive globalisation, has not bypassed the field of administrative law – a discipline often characterised by its intrinsic association with state sovereignty and territoriality. In fact, if there are now studies on the 'globalisation' and internationalisation of constitutional law, why would we refuse this capacity to administrative law? Perhaps this is just an episode in a more complex process of unifying the law, in which it dissociates itself from its territorial and state limitations.

There are increasingly frequent approaches by scholars regarding the alteration of state sovereignty or the permeability of borders, which, together with the evolution of means of communication and interaction, lead to the possibility of increasingly 'internationalised' repercussions of decisions in domestic public law. Consequently, administrative law is experiencing a growing interplay with international legal norms, necessitating a nuanced understanding of this dynamic relationship.

'Despite the interest of legal science, which has lasted for more than a century, international administrative law is neither a frequent subject of teaching at law faculties, nor the subject of habilitation or appointment procedures. Administrative law textbooks either cover it only marginally (this is the case of the German legal academy) or (as is the case in our country) they do not cover it at all.'[2] Although Prof. JUDr. Jakub Handrlica's assertion refers to Czech legal scholarship, unfortunately it can readily be attributed to Romanian doctrine as well, where (recent) references to International Administrative Law are very rare.

2. Unveiling the genesis of international administrative law

The term 'international administrative law' (IAL) is not, as one might think, a recent one, but despite the scarcity of doctrine, it is a concept addressed as early as the late 19th century to the beginning of the 20th century.

As noted by Prof. Mircea Duțu[3], beginning in the late 19th century, several types of international administrative phenomena have emerged and been rec-

[2] Handrlica, Jakub, 'Mezinárodní Právo Správní. Skica Právní Disciplíny.' *Pravnik* 161, no. 5 (2022), 468.

[3] Duțu, Mircea. 'Reflecții în legătură cu emergența, natura și trăsăturile definitorii ale dreptului administrativ global.' *Dreptul*, no. 7 (2015), 72

ognised. These have given rise to two main, divergent yet complementary research directions: international administrative law and administrative international law.

Miguel Prata Roque noted[4] that with the onset of the Industrial Revolution and the increasing complexity of international legal relations in the mid-18th century in Germany, there emerged a discourse advocating for state cooperation to promote the common good of humanity. This advocacy, championed by figures such as Gottlob von Justi and Günther von Berger, and later expanded upon by Robert von Mohl in the 19th century, emphasised the necessity of effective international collaboration to address certain administrative tasks.

In the second part of the century XIX, guided by the German unification processes, legal scholars recognised international administrative law as a distinct area, prompting a linguistic transition from terms like 'general' or 'universal' (*allgemeines*) administrative law to 'international' or 'interstate' (*internationales*) administrative law.[5]

In this regard, German scholar **Lorenz von Stein** mentioned already in 1866, the concept of *international administrative law (internationales Verwaltungsrecht)* as a body of legal norms derived partially from international conventions and partially from domestic legislation, regulating administrative activities within the international sphere as a cohesive unit.[6]

He delineates *internationales Verwaltungsrecht* as encompassing administrative activities conducted by States, either through their own administrative entities or via a novel category of international treaties. This delineation excludes traditional treaties of peace or alliance but encompasses agreements with administrative objectives *(Verwaltungsträge)*, facilitating an incipient development of European administration.[7]

Later, in 1896, **Otto Mayer** employs the term International Administrative Law as a concept that is still emerging but nevertheless significant for the era in question[8].

Mayer highlights that while in civil law, the natural boundaries of state territories are transcended, and this phenomenon is designated by the term 'Private International Law', a term he finds 'quite inappropriate'. However, he aims to label similar phenomena in administrative law as International Administrative

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[4] Prata, Miguel. A *Dimensão Transnacional do Direito Administrativo*. Lisboa: AAFDL, 2014, 475–476.

[5] *See:* Howland, Douglas. 'An alternative mode of international order: The international administrative union in the nineteenth century.' *Review of International Studies,* 41, no. 1 (2015), 166.

[6] Vogel, Klaus. 'Administrative Law: International Aspects.' In *Encyclopedia of Public International Law, 9. —International Relations and Legal Co-Operation in General*, 2–7. North – Holland: Elsevier Science Publishers B.V., 1986, 3.

[7] Cossalter, Philippe. « The internationalisation of administrative law: a French perspective, » 2019, 4.

[8] Mayer, Otto. *Verwaltungsrecht*. Vol. 2. 1896, 455–458.

Law.[9]

According to Mayer's analysis, international administrative law is closely intertwined with the application of domestic legal norms within the territory of a foreign state, particularly in governing relations with other states. For instance, consular establishments may undertake certain policing functions, support their nationals abroad, and provide other public services of an international character. Administrative law plays a pivotal role in such scenarios, with the extent of its application being contingent upon the receptivity of the authorities in the host country. Consequently, the issue of applying national administrative regulations in foreign territories is raised.

Mayer also includes within the sphere of international administrative regulation agreements between different states, the provisions of which impact governance. Such agreements compel the adoption of national regulatory acts, thereby refining domestic administration. Moreover, fulfilling these obligations may necessitate the formation of supranational administrative structures (for example, in the field of communications).[10]

Internationales Verwaltungsrecht underwent then significant development through the extensive contributions of the esteemed German scholar **Karl Neumeyer**, who explored the concept of International Administrative Law in various works, notably in a comprehensive four-volume publication spanning from 1910 to 1936. His scholarly endeavours have positioned him as a prominent figure advocating for the advancement of IAL within the Germanic academic tradition.

In his fourth volume, Neumeyer aimed to establish international administrative law as a framework governing conflicts of law in administrative matters, essentially creating a parallel between administrative law and private international law. While private international law was shaped by choice of law principles in international matters, Neumeyer's perspective focused on what he termed 'delimiting rules' (*Grenznormen*[11]). These rules, distinct from substantive law in theory, determine whether substantive administrative law should be applied or not. Neumeyer's theory also encompassed regulations concerning the application of foreign administrative law, which he referred to as 'cross-border effects' (*verwaltungsrechtliche Uberwirkungen*).[12]

Jakub Handrlica outlines[13] that, as Neumeyer contended, the primary and

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[9] *See:* Schmidt-Aßmann, Eberhard. 'Internationales Verwaltungsrecht: Begriffsbildung Im Spiegel veränderter Staatlichkeit.' *Revista Digital de Direito Administrativo* 4, no. 1 (2017), 17–18.

[10] Pobezhimova, Nelly, and Sherstoboev, Oleg. "Genesis of International Administrative Law" *Gosudarstvo i pravo* 11 (2019), 99 [in Russian].

[11] Neumeyer, Karl. *Internationales Verwaltungsrecht. Bd. 4, Allgemeiner Teil*. Zurich; Leipzig (1936), 136–153.

[12] Vogel, "Administrative Law: International Aspects", 4.

[13] Handrlica, Jakub. 'Two faces of "international administrative law."' *Juridical Tribune* 9, no. 2 (2019), 370.

fundamental origins of delimiting rules lie within the relevant provisions of national administrative law and thus, from his perspective, international administrative law should be considered as a distinct (special) branch within the broader framework of administrative law.

This approach remains distinctive within the German doctrine to this day, with certain authors suggesting, 'International administrative law regulates the application of national administrative law to matters with a foreign element. Thus, it also constitutes a conflict of laws. International tax law falls within the scope of international administrative law.'[14]

As we can see, both Neumeyer and Mayer share a common perspective in characterising International Administrative Law exclusively from the standpoint of the national administration.

In 1906 Italian scholar **Donati Donato** attempted a distinction of two terms – *diritto internazionale amministrativo* and *diritto amministrativo internazionale*. The first, administrative international law, should be seen as a part of international public law, whereas the second, International administrative law, as a part of national (municipal) law. So, international administrative law 'was understood as a particular subdiscipline of municipal law, dealing with those administrative relations where a certain foreign element appears'[15].

While Donati conceptualised this distinction in theoretical terms – endeavouring in his treatise to refute the viability of both concepts – others acknowledged and operationalised both branches of law as practical realities.[16]

Similarly, **José Gascón y Marín**, during his 1930 course titled 'Les transformations du droit administratif international', also draws a parallel distinction – 'I believe I can affirm that, for relations were the origin of the applicable legal rule is domestic law, the designation of *"droit administratif international"* seems more particularly appropriate because it involves rules drawn from the same source as domestic law, but with a purpose beyond purely national rules (due to the nationality and territory of the individuals involved and the place where the relationship is formed). On the other hand, for those rules originating from a different source, namely the will of several States, reacting in their particular administration or creating new entities whose nature is certainly highly debated but evidently different from that of internal entities, the expression "*droit international administratif*", in my opinion, is the most suitable.'[17]

A necessary terminological clarification. Prof. Philippe Cossalter cautions[18] that the terminology used by von Stein, coupled with its translation into

[14] Graf Vitzthum, Wolfgang and Proelß, Alexander. *Völkerrecht*. Berlin, Boston: De Gruyter, 2016, 16-17.
[15] Handrlica, Jakub. 'Burnt by the sun of international administrative law. A sketch of a legal chameleon.' *Persona e Amministrazione* 9 (2021), 564.
[16] Vogel, "Administrative Law: International Aspects", 3.
[17] Gascon y Marín, José. "Transformations of International Administrative Law." Volume 34. In *The Hague Academy Collected Courses/Recueil des cours de l'Académie de la Haye*. 1930, 21.
[18] Cossalter, "The internationalisation", 4.

Italian, undoubtedly perpetuates the confusion between the concepts of *international administrative law* and *administrative international law*.

Prof. Jakub Handrlica also warns us[19] that in contrast to the Italian language, German lacks the lexical precision necessary to accommodate the intricacies arising from legal dualism. As a result, the term 'internationales Verwaltungsrecht' is indiscriminately utilised in German legal scholarship to encompass both the realm of international public law and the domain of administrative law, including relations between the state and individuals.

In Romanian, a Romance language, the distinction also arises – *'drept international administrativ'* and *'drept administrativ international'*, corresponding to the consonant terms in Italian or French.

The differentiation proposed by D. Donato was, in our opinion, welcomed, as it enables a clear demarcation, akin to distinctions found in other legal domains, such as 'international criminal law' versus 'international criminal law', viewed distinctly in Romanian. In this regard, while the former pertains in Romanian literature to 'a body of legal norms governing acts constituting offences under international law, as well as the conditions and repercussions of individual liability upon their commission',[20] the latter denotes aspects related to extraterritoriality or international cooperation and legal assistance within the framework of national criminal law. Regrettably, this differentiation through adjectives, typical of Romance or Slavic languages, remains unfamiliar or less employed among scholars using the English language – a prevailing language in contemporary legal scholarship.

As Otavio Venturini, a Brazilian author, highlights, in the context of the Spanish term *Direito Internacional Administrativo*, 'the juxtaposing of the term "International" reflects an internationalist conception of Administrative Law in the strict sense, structured by a normative complex of necessarily international source'.[21]

In the same vein, J. Handrlica outlines that 'the term "international" (in international administrative law) refers exclusively to the fact, this (sub)discipline of administrative law addresses relations where certain foreign (i.e. "international") element appears. This term is not referring to any international relations between the sovereign States, or any other subjects of international public law.'[22]

We will revisit the delineations noted in legal literature subsequently to articulate an assessment on this matter, but it should be acknowledged that the

[19] Handrlica, Jakub. 'Mezinárodní Právo Správní,' 459.
[20] Nițu, Daniel. *Drept International Penal: Curs Universitar* [*International Criminal Law: University Course*]. Bucharest: Hamangiu, 2021, 14.
[21] Venturini, Otavio. 'O Direito Administrativo e a Globalização: Uma Abordagem Cosmopolita.' In *Direito Administrativo Cosmopolita*, 21–41, 2023, 37.
[22] Handrlica, Jakub. 'A Treatise for International Administrative Law.' *Lawyer Quarterly* 10, no. 4 (2020), 467.

prevailing tendency among most authors thus far has been to eschew strict adherence to such distinctions, frequently employing the term at their discretion.

Returning to the doctrinal concerns of the early 20th century, catalysed by technological and communicative advancements, we are also compelled to address the Russian legal school.

At times, **Fedor Fedorovich Martens** is credited as one of the pioneering systematic analysts of international organisational law. However, this attribution likely stems from a misinterpretation. In his three-volume work, 'Traité de Droit international' (1886), Martens allocated the second volume to a subject he termed 'droit international administratif', but Jan Klabbers notes that 'it turns out that the term, for him, served as shorthand for the special rules of international law in peacetime'[23].

Another representative of the Russian international law scholarship who notably worked at the University of Odessa is **Piotr** (sometimes, Pierre) **Evgenievich Kazansky**. The question of international administration was thoroughly examined by Kazansky in his doctoral dissertation: 'Universal Administrative Unions of States' (3 volumes. Odessa, 1897).

This three-volume investigation extensively examines the issues surrounding international administration as a novel phenomenon within the realm of international law. The first volume elucidates the scholar's theoretical viewpoints on the legal governance of international administration. Subsequently, the second and third volumes undertake an analysis of the legal status pertaining to individual international administrative unions of states.

Subsequent to the publication of his series of treatises in Russian, Kazansky produced two French-language articles that achieved wider international dissemination. In these articles, he expounded upon a theory of international administrative law infused with a fervent dedication to internationalism: 'Les premiers éléments de l'organisation universelle' (1897) and '*Théorie de l'administration internationale*' (1902).

Kazansky opposed the concept of a world state that would completely abolish the sovereignty of existing states. Instead, he advocated for administrative cooperation as a middle ground: collaborative efforts to address common interests under the rule of law, while safeguarding the independence of nations.[24]

Kazansky viewed transnational civic associations as a form of 'international self-government', requiring treaties among states to ensure their support. He believed that international public unions represented a move towards a larger-scale organisation, emphasising collective action and common interests. While advocating for international bureaus to complement national administrations, he recognised that international administrative law would limit national sovereignty.

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[23] Klabbers, Jan. 'The EJIL Foreword: The Transformation of International Organizations Law.' *European Journal of International Law* 26, no. 1 (2015), 39.

[24] Steffek, Jens. *International Organization as Technocratic Utopia* (Oxford University Press, 2021), 53.

Kazansky foresaw these organisations as early elements of a broader political order to extend beyond the state, echoing the ideas of Lorenz von Stein.

Kazansky's proposal for administrative internationalism outlined a path for international reform that aligned with the prevailing state-centric framework, reminiscent of the approach advocated by the American jurist **Paul Samuel Reinsch**, often regarded as 'one of the pioneers of the discipline of international relations'[25]. In 1909, Reinsch published a seminal study titled 'International Administrative Law and National Sovereignty,'[26] which became emblematic of the functionalist approach to international organisations. In this work, he asserted that 'international cooperation is a necessity and thus in everyone's interest, and there can even be an ethical duty to cooperate on the international level'[27].

Reinsch wrote: 'The body of law which is thus being created by the action of the authoritative organs of public international unions, and by cooperation among governments, is distinguished from general international law in that it not merely regulates the relations between national states, but undertakes to establish positive norms for universal action. We may tentatively apply to it the designation of *international administrative law* (sic!), defining it as that body of laws and regulations created by the action of international conferences or commissions which regulates the relations and activities of national and international agencies with respect to those material and intellectual interests which have received an authoritative universal organisation.'[28]

As posited by the author, the aims of international administrative endeavours might encompass safeguarding national principles for foreign entities and regulating intergovernmental relations based on overarching global interests, taking into account their scale and significance.[29]

The work of P.S. Reinsch is characterised by its exploration of enduring issues that retain contemporary relevance. While refraining from advocating for the establishment of a centralised global administration capable of exerting authority over national governments, the author delineates spheres of collaborative state activity grounded in mutual interests. Emphasising the potential simplification of internal regulation, particularly in domains such as economy, infrastructure, and security, the author posits that the harmonisation of legal frameworks involving relevant entities and national administrative organs aligns with the collective interests of 'civilised' states, forming the cornerstone of international administrative law – a domain conspicuously underexplored. Acknowledging the

[25] Orford, Anne, and Florian Hoffmann, eds. *Oxford Handbook of the Theory of International Law*. Oxford: Oxford University Press, 2016, 625.
[26] Reinsch, Paul S. "International Administrative Law and National Sovereignty." *The American Journal of International Law* 3, no. 1 (1909): 1–45.
[27] Ibid, 13.
[28] Ibid, 5.
[29] Pobezhimova, "Genesis", 95.

inherently international nature of this legal domain, the work underscores the imperative for national administrations to adhere to international norms, recognising them as catalysts for modifications in domestic procedural frameworks. It is noteworthy, however, that these perspectives encountered limited endorsement among Reinsch's contemporaries, who tended to favour more circumscribed notions of international administrative regulation.

This historical overview would certainly be incomplete without mentioning Prof. **Paul Negulescu** (1874–1946). As Prof. Mircea Duțu recalls[30], during the interwar period, Paul Negulescu developed the theory of international public administration and its specific legal framework. These ideas have been adapted in the context of current globalisation through the concept of global administrative law, as a response to the new dynamics of international governance.

Thus, considered one of the founding fathers of modern Romanian administrative law, in 1935 he defined international administrative law (*droit international administratif*) (sic!) as 'a branch of public law which, by examining the legal phenomena constituting international administration together, seeks to discover, clarify, and systematise the rules governing these activities'[31]. It is worth noting that the cited study represents the adaptation of a course delivered at the Hague Academy of International Law, entitled 'Principles of International Administrative Law' (*Principes du droit international administratif*), largely dedicated to conceptualising a specific cosmopolitan international administration and, as observed by other authors[32], to arguing the concept of 'international public service' as the object of international administrative law. From this academic perspective, Professor Negulescu raised the question of whether international administrative law represents an autonomous legal science or a branch of international law.

Paul Negulescu asserted[33] that this branch of law deals with institutions designed to address specific interests related to economic life, artistic and literary property, etc., which have an immediate impact on individual life.

As noted by Cătălin-Silviu Săraru, International Administrative Law was seen in the P. Negulescu's work as 'the right of the International Administration, whose main representative was the League of Nations, which could be counted as the International Labor Organization, the European Commission of the Danube, etc.'[34]

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[30] Duțu, Mircea. 'Dezvoltarea științei și culturii juridice românești în ultimul secol. I. Perioada interbelică (1918–1945).' *Studii și Cercetări Juridice* 7, no. 1 (2018), 49.

[31] Negulescu, Paul. « Principes du droit international administratif. » In *Recueil des cours*, vol. 51. 583-715, Paris, 1935, 15 (593).

[32] Duțu-Buzura, Andrei. « Paul Negulescu și dreptul administrativ global *in nuce* » *Revista de Drept Public* 4 (2017), 34–39.

[33] Negulescu, "Principes", 19 (597).

[34] Săraru, Cătălin-Silviu. *European Administrative Space – Recent Challenges and Evolution Prospects*. Bucharest: ADJURIS – International Academic Publisher, 2017, 20.

According to P. Negulescu, in comparison to international law, international administrative law is regarded as 'a specialised legal domain stemming from the latter'[35]. Nevertheless, he posits that international administrative law exhibits a distinct organisational framework compared to public international law, bearing greater resemblance to domestic administrative law. The field of international administrative law serves as a mechanism for coordination, yet in numerous instances, it also operates as a framework of subordination.

In Prof. P. Negulescu's conceptualisation, as synthesised by M. Duțu[36], international administrative law revolves around the concept of international public service, aiming to regulate and constrain certain activities of national public services to coordinate their actions. In contrast, domestic administrative law emphasises national public service, with state interventions focusing on limiting individual activities or obtaining advantages in specific domains. International administrative law addresses institutions serving interests related to the economic, cultural, and artistic spheres, directly impacting individual life and operating with a degree of autonomy in accordance with international conventions.

In the sphere of Romanian interwar scholarship concerning international administrative law, it's significant to note M. Duțu's assertion regarding the Royal Institute of Administrative Sciences of Romania (1930). Duțu posits[37] that the Institute's objective was 'establishing a Romanian administrative doctrine'. A pivotal component of its educational and research curriculum was a course focusing on Elements of International Administrative Law, which specifically delved into subjects like international administration and international public services.

As observed, the common thread between the International Administrative Law and Administrative International Law theories lies in the extraterritorial expression of Administrative Law, albeit with the Nation-State occupying a central role in both frameworks.

3. Recent scholarly discourse on reinvigorating international administrative Law

Fast-forwarding to the 21st century, we can observe a heightened scholarly focus on revitalising the concept of international administrative law. Cautiously, some researchers have referred to this trend as the 'internationalisation of administrative law', which, according to Philippe Cossalter, embodies 'a set of doctrinal currents and phenomena that confront administrative law with certain

[35] Negulescu, "Principes", 20 (598).

[36] Duțu, Mircea. « O contribuție românească majoră la promovarea păcii prin drept : inițiativa creării Academiei de Drept Internațional de la Haga. » *Studii şi Cercetări Juridice* 4, no. 3 (2015), 302–303.

[37] Duțu, Mircea. 'Școala română de drept internațional și provocările unei doctrine naționale în era mondializări.' *Studii şi cercetări juridice* 1 (2020), 21.

foreign elements'[38].

In 2005 German scholar **Franz C. Mayer** published his habilitation thesis entitled 'The internationalisation of administrative law. Modes and structures of influence on national law in times of Europeanisation and globalisation'[39].

Later, **Eberhard Schmidt-Assmann** authored in 2008 an article titled 'The *Internationalisation of Administrative Relations* (sic!) as a Challenge for Administrative Law Scholarship', focusing our attention to internationalisation of administrative relations, rather than internationalisation of administrative law, being a little hesitant to the established meaning of the latter. Also, one can observe the avoid using the term 'international', preferring the neutral 'internationalisation'.

The internationalisation of *administrative activity* is understood by E. Schmidt-Assmann as 'processes of an administrative nature extending beyond national administrative borders, either because they have evolved beyond such borders or because they were, from the outset, conceived without consideration of such borders'[40].

According to him, there is a recognised convergence between international law and administrative law. This stems from the fact that certain administrative legal constructs transcend national boundaries; some evolve into international constructs, while others are initially conceived with a supranational character. Therefore, the concept of 'international administrative law' emerges, which should be conceptualised in terms of domestic administrative law. It aims to safeguard individual rights against administrative actions and establish legal procedures and mechanisms for the effective execution of administrative functions. Consequently, there is a need for a new body of international administrative law. Its core would be legislation concerning the internationalisation of administrative relations, regulating cooperation among executive authorities of different states.

Schmidt-Assmann contends that the understanding of the term 'International Administrative Law' in von Stein's language is outdated, expressing a desire to imbue the term with fresh significance. Instead of interpreting it solely as the national conflict of laws, he proposes to view it as 'the administrative law of action, determination and cooperation established in international law'[41].

International administrative law encompasses, in E. Schmidt-Assmann's opinion, three main functional circles: (1) it is a body of law governing international administrative institutions, (2) a body of law determinative of national ad-

[38] Cossalter, "The internationalisation", 2.
[39] Mayer, Franz C., *Die Internationalisierung des Verwaltungsrechts: Modi und Strukturen der Einwirkung auf das nationale Recht in Zeiten der Europäisierung und Globalisierung*. Tübingen: Mohr Siebeck, 2005.
[40] Schmidt-Aßmann, Eberhard. 'The Internationalisation of Administrative Relations as a Challenge for Administrative Law Scholarship.' *German Law Journal* 9, no. 11 (2008), 2063.
[41] Schmidt-Aßmann, "Internationales Verwaltungsrecht", 23.

ministrative legal orders, and (3) a body of law on cooperative handling of specific associative problems.[42]

E. Schmidt-Assmann's work offers a thorough overview of international administrative law, extending beyond the internal activities of international organisations. It encompasses administrative cooperation internationally and traditional administrative relations related to human rights protection and economic development. Examples include agreements on double taxation treaty interpretation, data transmission standards in social spheres, and liability in police information systems. This material serves as a foundational resource for further administrative and legal research, aiding in the organisation of relevant norms within domestic legal systems.

Another prolific researcher and advocate of the concept of International Administrative Law, who dedicated several articles[43] to disseminating the concept of IAL, including in the pages of *Juridical Tribune*[44], is Prof. JUDr. **Jakub Handrlica** from Charles University in Prague (where he also teaches a course titled similarly, built upon the concepts he has developed in his works).

As a miscellaneous fact, in line with the aforementioned terminological confusions, it is worth mentioning that in Handrlica's works written in Czech, a shifting in terminology can be observed over time from the term 'Mezinárodní správní právo' (2016[45], 2017[46]), which corresponds to 'droit administratif international' (*drept administrativ internațional*), to 'Mezinárodní právo správní' (2022[47]), which translates closer to '*droit international administratif*' (*drept internațional administrativ*).

Handrlica recently authored an entire monograph in Czech entitled 'Introduction to international administrative law' *('Úvod do mezinárodního práva správního'*[48]). To our knowledge, this is the latest scholarly contribution in this

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[42] Schmidt-Aßmann, Eberhard. 'The Internationalisation,' 2077.

[43] Handrlica, Jakub. 'A Treatise for International Administrative Law.' *Lawyer Quarterly* 10, no. 4 (2020): 462–75; Handrlica, Jakub. 'A Treatise for International Administrative Law, Part II: On Overgrown Paths.' *Lawyer Quarterly* 11, no. 1 (2021): 178–91; Handrlica, Jakub. 'Burnt by the sun of international administrative law. A sketch of a legal chameleon.' *Persona e Amministrazione* 9 (2021): 562–83; Handrlica, Jakub. 'Mezinárodní Právo Správní. Skica Právní Disciplíny.' *Pravnik* 161, no. 5 (2022): 454–68; Handrlica, Jakub. 'Revisiting International Administrative Law as a Legal Discipline.' *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci* 39, no. 3 (2019): 1237–58 and others.

[44] Handrlica, Jakub. 'Two faces of "international administrative law".' *Juridical Tribune* 9, no. 2 (2019): 363–76; Handrlica, Jakub. 'About the international administrative law and other demons. A venture in a "delimiting law".' *Juridical Tribune* 10, no. 3 (2020): 339–63.

[45] Handrlica, Jakub. 'Mezinárodní Správní Právo: Minulost, Současnost a Perspektivy. ' *Studia Iuridica Cassoviensia* 4, no. 3 (2016): 39–52.

[46] Handrlica, Jakub. 2017. *Transteritoriální správní akty: studie z mezinárodního správního práva*. Studie Národohospodářského ústavu Josef Hlávky, 5/2017. Praha: Národohospodářský ústav Josefa Hlávky.

[47] Handrlica, Jakub. 'Mezinárodní Právo Správní. Skica Právní Disciplíny.' *Pravnik* 161, no. 5 (2022): 454–68.

[48] Handrlica, Jakub. *Úvod do mezinárodního práva správního*. Prague: C.H. Beck, 2022.

field, addressing the presence of a foreign element in national administrative law relations. In this book, the author not only covers basic terminology and presents international administrative law as a distinct legal discipline, defining its relations to other areas of administrative law and other legal branches, but also dedicates two extensive chapters to analysing the direct and indirect application of foreign administrative law. Additionally, the book address-related problems such as normative extraterritoriality of administrative law regulations, foreign administrative bodies operating within a country, and domestic administrative bodies operating abroad.

For Handrlica, 'extraterritoriality' is viewed[49] as situations where an administrative authority of one state exercises legal jurisdiction beyond its own territory, specifically within the sovereign territory of another state. Nerveless, he prefers the term 'transterritorial'[50], which still refers to a cross-border interaction. Yet, we believe there exists at times a transnational space, a social realm separated from the national or international, characterised as 'a metaphorical, ideational, not territorial field'[51], and 'deterritorialisation' could be viewed also in this non-dimensional realm. (Some authors[52], speaking of 'transnationality' in administrative law see it like internationality in private international law, involving a foreign element in a legal relationship, differing from internationality in public international law, but we consider this understanding a narrow one. Others state[53] that a transnational legal perspective on administrative law advocates for a theory that spans national and international realms, as well as public and private sectors.)

We will delve into Handrlica's perspective on IAL as a branch of national administrative law in section 4.2.

Given our previous mention on the contribution of Russian doctrine to the theory of international administrative law in the early 20th century, we find it pertinent to examine the current situation, which is quite the opposite.

Although it was mentioned that in contemporary Russian law scholarship, there is still no comprehensive understanding of the legal nature of international administrative law and its position within the Russian legal system[54], Rus-

[49] Handrlica, "A Treatise… Part II.", 181.
[50] *See:* Handrlica, Jakub. 'International Administrative Law and Administrative Acts: Transterritorial Decision Making Revisited.' Czech Yearbook of Public and Private International Law 7, no. April (2016): 86–98.
[51] Bostan, Alexandru. 'Transnational Law – A New System of Law?' *Juridical Tribune* 11 (2021), 354.
[52] Chevalier, Emilie, and Olivier Dubos. 'The Notion of "Transnationality" in Administrative Law: Taxonomy and Judicial Review.' *German Law Journal* 22, no. 3 (2021), 327.
[53] Schill, Stephan W. 'Transnational legal approaches to administrative law: Conceptualising public contracts in globalisation'. *Rivista Trimestrale di Diritto Pubblico*. 1 (2014), 4.
[54] Pobezhimova, N. I. 'International Administrative Law and Its Place in the System of Russian Law.' *The Topical Issues of Public Law* 8, no. 20 (2013), 62.

sian scholars typically exhibit resistance towards the concept of international administrative law. For example, **Valeri Bogatyrev** considers[55] there is one particular feature of international administrative law that makes it quite challenging to recognise its existence – namely the fact that the essence of this law lies in its inter-system nature, which refers to a system of norms consisting of rules from various legal systems and legal branches within a single legal system.

Alexei Afanasievich Demin, professor at MGU, goes further and states that 'globalisation of administrative law is a destiny of weak and compelled to obey'[56] and denies the sole existence of International Administrative Law, arguing that 'international administrative law can be described as neither international, nor administrative, nor the law'[57]. He states that it can't be considered international law because traditionally 'international' implies involvement of sovereign states as primary subjects, while the proposed theory suggests these administrative law norms would apply to both states and individuals, challenging the idea of its true international nature. Moreover, it is not administrative law as the term 'administration' implies a specialised apparatus for enforcing legal norms, which does not exist here. Lastly, it cannot be categorised as law since there is no entity formulating its norms.

This reluctant opinion is pervasive in Russian doctrine, which traditionally rejects any attempt of 'modernising' international law, seeing current trends as a geopolitical subtext aimed at increasing the influence of the US 'hegemon'.

However, we have identified in Russian doctrine a relatively recent and quite original positive opinion. Thus, Professor **Andrey Alievich Mamedov**, advocating for considering global integration processes due to globalisation in the field of administrative law, believes that IAL can be viewed broadly and narrowly.

In his view[58], international administrative law should be conceptualised as a body of norms: 1) governing administrative relations of all kinds that extend beyond the jurisdiction of any single state, encompassing both public and private spheres (broad understanding of IAL); and 2) regulating the organisation of international managerial relations at the macro level (narrow understanding).

We must note that this approach is infused with concepts from Russian doctrine on administrative law, which places a strong emphasis on managerial relations.

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[55] Bogatyrev, V. V. "International Administrative Law: History and Perspectives of Development." *Actual Problems of Public Law: Collection of Scientific Works of the II All-Russian Scientific and Practical Conference with International Participation*, 2021, 64 [in Russian].

[56] Demin, A. A. "Discussion on the Influence of Globalisation on the Emergence of International Administrative Law." *The Topical Issues of Public Law* 1 (June 2018), 29.

[57] Demin, A. A. 'Once Again on International Administrative Law' *Public Law Today*, No. 3 (2020), 106 [in Russian].

[58] Mamedov, A. A. « Modern Concept of the Development of Administrative Law. » *Education and Law* 4 (2021), 77 [in Russian].

Important to note, in Russian doctrine, was recently noted about 'integration of administrative law'[59] as a developing component of international administrative law. The integration segment of international administrative law possesses distinct institutional characteristics, reflected in the organisational and managerial activities of integration bodies. This perspective is grounded within a broad approach to international administrative law, which extends beyond the sphere of activity of national bodies.

In the recent resurgence of scholarly interest in international administrative law, we cannot overlook the mention of the **Global Administrative Law** (GAL) movement[60], first proposed and described in a seminal article published in 2005[61], co-authored by a team of researchers affiliated with New York University – Benedict Kingsbury, Nico Krisch, and Richard B. Stewart.

The primary question here is whether there is a distinction between 'global administrative law' and 'international administrative law', or they essentially describe the same phenomenon using different terms?

Sometimes, there is confusion between these two terms. So, while advocating the necessity to develop 'such an unconventional branch of law as international administrative law'[62] Prof. JUDr. Yu. Tikhomirov refers to its subject as the coordinated development and use of principles and norms of international law in the field of governance and the resolution of global challenges, common regulatory frameworks, and typical administrative procedures of foreign states, as well as the systems of national administrative legal regulators, which in essence resembles the Global Administrative Law movement.

Other authors even consider these terms to be synonymous–'To conclude the "international-global-issue", we submit that the notions are practically synonymous and viably interchangeable'[63]. We cannot concur with this viewpoint, as traditionally, the term 'international' pertains to interactions between states (and international organisations established by states), whereas the global domain encompasses both state and non-state actors, including hybrid entities.

Similarly, the proponents of GAL have referred to IAL as a precursor and to authors who have addressed IAL as their spiritual forefathers, drawing mainly

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[59] Agamagomedova, S. A. 'International and Integration Administrative Law: the Problem of Correlation', *Pravovaya Politika i Pravovaya Zhizn'* 2 (2023): 24–33; Agamagomedova, S.A. 'National, Integration, and International Administrative Law: Correlation Issues' *University's Proceedings. Volga Region. Social Sciences*, no. 3 (2023): 148–58. [in Russian].

[60] *See:* Bostan, Alexandru. 'Aspecte introductive privind Dreptul Administrativ Global.' ['Introductory Aspects on Global Administrative Law.'] *Știința juridică autohtonă prin prisma valorilor și tradițiilor europene [Domestic Legal Science Through the Prism of European Values and Traditions]*, 156-164. Chișinău: ULIM, 2018.

[61] Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. 'The Emergence of Global Administrative Law.' *Law and Contemporary Problems* 68:15, no. 3 (2005): 15–61.

[62] Tikhomirov, Yu A. 'Management Vectors in the Focus of Law'. *Issues of State and Municipal Governance* 1 (2019), 143 [in Russian].

[63] Ruffert, Matthias, and Steinecke, Sebastian. *The Global Administrative Law of Science*. Berlin, Heidelberg: Springer Berlin, Heidelberg, 2011, 21.

three ideas from the concept of IAL.

The first consists of seeing 'transnational governance' as a form of administration, and therefore calls for the application of certain principles to frame its action. Secondly, GAL shares with the aforementioned schools the definition of a branch of law as administrative by the prior identification of an Administration. Finally, GAL is based on the idea that the Administration, in the exercise of its regulatory power, must be framed by principles, mainly those of participation, transparency, and accountability.[64]

Further development of the concept of GAL will be addressed in a separate contribution. For now, it can be stated that while these concepts share considerable similarity in essence, they have undergone distinct evolutionary trajectories, with global administrative law encompassing a significantly broader scope than international administrative law.

Additionally, it is worth noting that some scholars propose the existence of a nascent branch within IAL, referred to as 'EU international administrative law'[65]. This designation should not be conflated with 'EU administrative law'—an established legal field characterised by its own distinct features. Some even treat transnational administrative law to be 'at the same time, European and International Law'[66].

4. Exploring the (dual) frameworks of international administrative law

Therefore, the nascent doctrinal approaches concerning the concept of international administrative law can be encapsulated into two frameworks: (a) the law governing international organisations, frequently denoted as ***international institutional law*** – a constituent of public international law; or (b) administrative law incorporating ***extraterritorial elements***, resembling the structure of private international law.

Prof. Ioan Alexandru considers that IAL and AIL 'have been progressively integrated into their own relevant branches'[67], namely public international law or domestic administrative law.

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[64] Fromageau, Edouard. *La théorie des institutions du droit administratif global : Étude des interactions avec le droit*. Bruxelles: Bryulant, 2016, 16.

[65] Handrlica, Jakub. « Is there an EU international administrative law? A juristic delusion revisited. » *European Journal of Legal Studies* 12, no. 2 (2020), 115.

[66] Agudo, Jorge. 'Regulatory Foundations for Transnational Administrative Law.' *European Review of Public Law* 30, no. 2 (2018), 345

[67] Alexandru, Ioan. *From national administrative law to global administrative law*. Bucharest: Romanian Academy Publishing House, 2017, 209.

4.1. International administrative law as a part of public international law

4.1.1. IAL as international institutional law

International institutional law is considered to be an 'organisational law'[68], 'a sub-discipline within the larger field of public international law'[69] dealing with the international organisations and its members.

The genesis of International Administrative Law's applicability to international organisations is attributed to scholar C. F. Amerasinghe ('international administrative legal system and the law it embodies are really the backbone of international organisation and its successful functioning'[70]), although it traces back to the early 20th century 'international administrative unions' and progresses to contemporary international organisations recognised within the realm of international law.

The designation of an entity as an international administrative union was initially intended to highlight its apolitical nature, emphasising its role in coordinating technical functions rather than engaging in political activities.

According to P. Negulescu, the ultimate aim of international administrative regulations, aligned with the broader interest of the international community of states, can only be realised through the establishment of an adequate international public service. This service represents the pinnacle of action by international administrative structures established in the early 20th century. For instance, the Danube European Commission incorporated organs with exclusively international functions, not necessarily representing member states. As emphasised by Professor Negulescu, the Commission's primary objective is to serve a technical interest of international significance, namely ensuring the navigability of the river. Consequently, it assumes the role of an international administrative body entrusted with a public service mandate.

As P. Reinsch aptly predicted, there is a significant imperative to harmonise the operations of international organisations with state sovereignty. This necessitates downplaying their political dimension. At the same time, as we noted, P. Kazansky was among the earliest to explore institutional inquiries and address institutional concerns. He observed parallels in the organisational frameworks of

[68] Amerasinghe, C. F. *Principles of the Institutional Law of International Organizations*, 2005, 20.
[69] Schermers, Henry G. and Niels M. Blokker. *International Institutional Law*. Vol. 29. Nijhoff, 2011, 27.
[70] Amerasinghe, C. F. "The Future of International Administrative Law." *International and Comparative Law Quarterly* 45, no. 4 (1996), 794.

the identified entities, characterised by plenary and administrative organs, occasionally including a tribunal.[71] He noted the emergence of an evolving 'international administration' which involves states, international societies, and related entities, including congresses, bureaus, commissions, and tribunals. This administration aimed at safeguarding broader international social interests, particularly those of individuals rather than solely states' interests. Kazansky used the concept of 'international administrative law' to describe the legal framework governing this administration, derived mainly from treaties, customary practices, and informal state agreements.[72]

J. Handrlica concludes[73] that despite not being traditionally recognised as subjects of international law, international administrative unions were often established through international treaties, leading scholars during the belle époque era to consider 'international administrative law' as a *specialised branch within international law*.

Some jurists advocate for the recognition of IAL as a distinct branch of international law, defining it as the collection of legal principles regulating interactions between international organisations and their personnel, positing that its aim is international cooperation and asserting that, akin to domestic administrative law, it entails administrative jurisdiction.[74]

Romanian Professor Ioan Alexandru considers that 'the emergence of classic international organisations […] has created legitimacy to talk about international administration and international administrative law, but the vision remains closed to aspects related to the organisation and functioning of the organisation itself'[75].

In this regard, Klaus Vogel observes[76] that components of the administrative law of an international organisation include regulations pertaining to the rights and obligations of its officials and employees, the accountability of the organisation itself, legal recourse against the actions of its organs, as well as the administrative tribunals, boards, and commissions within international organisations.

Ming-Sung Kuo considers[77] that the concept of international administra-

[71] Klabbers, Jan. 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations.' *European Journal of International Law* 25, no. 3 (2014), 664-65.
[72] Kingsbury, Benedict, and Donaldson, Megan. 'Global Administrative Law.' *Max Planck Encyclopedia of Public International Law*. March 2012. Oxford University Press. Accessed May 1, 2024. https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e 948.
[73] Handrlica, 'Two Faces', 369.
[74] Khaleel, Safwan Maqsood. 'The United Nations Civil Servant: An Important Role in International Relations.' *JANUS NET E-Journal of International Relation* 2, no. 11 (2020), 132.
[75] Alexandru, *From national administrative*, 198.
[76] Vogel, 'Administrative Law: International Aspects', 3.
[77] Kuo, Ming-Sung. 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism.' *New York University Journal of International*

tion (governed by IAL) is expansive, encompassing not just international institutions but also domestic administrative entities when they operate concerning transboundary regulations.

4.1.2. IAL as international civil service law shaped by international administrative tribunals

A growing trend, developed alongside the proliferation of international organisations, involves confining international administrative law to the relationships among international officials, namely the collaborators and agents of international organisations. However, it is imperative to bear in mind that 'only those civil servants whose employment, escaping the direct authority of a sovereign State, is subject to an international legal regime, can only claim an international status, because they exercise functions within the service of a group of States or more commonly of an international institution'[78].

Yu. Kryvoi argues[79] that international administrative law restrains the authority of international organisations over civil servants, ensuring accountability and legitimacy, a perspective echoed by Peter Quayle, who emphasises[80] its role in preserving the independence of international officials.

Esteemed scholar C. F. Amerasinghe, who sees IAL as an employment law of international organisations, asserts, '[t]he law that an international administrative court applies is international administrative law'[81]. The judicial bodies to resolve disputes between employees of IO are often termed international administrative tribunals, which form 'part of the internal systems of administration of justice that international organisations have put into place to settle employment disputes, which would otherwise fall under no jurisdiction'[82].

Thus, the first international administrative tribunal (IAT) was created in 1927, within the framework of the League of Nations – *Administrative Tribunal of the International Labour Organization*.

From 1927 to 1946, the Tribunal adjudicated complaints against the League of Nations Secretariat and the International Labour Office, expanding from 1947 to encompass grievances from current and former ILO personnel and

Law & Politics 44, no. 1 (2011), 64.

[78] Plantey, Alain, and François Loriot. « Chapitre 1. Nature et champ de la fonction publique internationale ». In *Fonction publique internationale*. Paris : CNRS Éditions, 2005, 1.

[79] Kryvoi, Yaraslau. 'The Law Applied by International Administrative Tribunals: From Autonomy to Hierarchy.' *George Washington International Law Review* 47 (2015), 272.

[80] Quayle, Peter. 'Chapter 1 The Modern Multilateral Bureaucracy: What is the Role of International Administrative Law at International Organizations?" In *The Role of International Administrative Law at International Organizations* (Leiden, The Netherlands: Brill | Nijhoff, 2020), 18.

[81] Amerasinghe, "The Future", 774.

[82] Villalpando, Santiago. 'International Administrative Tribunal' In *The Oxford Handbook of International Organizations*. Oxford, 2016, 1085.

other recognised international organisations. It currently serves over 58,000 international civil servants from 58 organisations, with a panel of seven judges representing various nationalities to ensure impartiality.[83]

We have to say, the name administrative tribunal is a bit elusive and probably prompted their consideration as part of an administrative jurisdiction thanks to the consonance with 'administrative tribunals', which in the francophone legal system represents an 'administrative jurisdiction completely separate from judicial tribunals'[84].

There has been lately a notable proliferation of international administrative tribunals, with the establishment of more than 15 new entities of this nature.[85]

Among the recent created significant international administrative tribunals are those within the financial sector, including the *World Bank Administrative Tribunal* (WBAT) and the *International Monetary Fund Administrative Tribunal* (IMFAT).

These administrative jurisdictions have relatively recent origins, attributed in part to historical reservations from the United States. The Statute of the WBAT became effective only on July 1, 1980, with its regulations adopted on September 26 of the same year. The Administrative Tribunal of the International Monetary Fund, established in 1994, represents a more recent addition to this landscape.[86]

A significant role in shaping the concept of international administrative law as relevant to the rights of international civil servants was played by the establishment in 1950 by the United Nations General Assembly of the *United Nations Administrative Tribunal* (UNAT), whose purpose was to 'resolve employment-related disputes between United Nations staff and the Organisation. It is the highest appeals body in the internal administration of the justice system and the only body that issues binding judgments'[87].

Subsequently, in 2009, it was replaced by another system of 'UN internal justice', in which the first instance is represented by the *United Nations Dispute Tribunal* (UNDT). This is 'the tribunal UN system staff members apply to when they decide to challenge an administrative decision made by an entity over which the UNDT has jurisdiction, and which the applicant believes violates their rights as a staff member due to non-compliance with the terms of their appointment or

[83] International Labour Organization. 'ILO Administrative Tribunal.' Accessed May 1, 2024. https://www.ilo.org/ilo-administrative-tribunal.
[84] Iorgovan, Antonie. *Tratat de drept administrativ.* Vol. 1. Bucharest: All Beck, 2005, 104.
[85] Powers, Joan S. 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?' In *Good Governance and Modern International Financial Institutions*, 108-25. Brill | Nijhoff, 2019, 109.
[86] Forteau, Mathias, Alina Miron, and Alain Pellet. 2022. *Droit international Public*. 9e édition. Paris-La-Défense (Hauts-de-Seine) : LGDJ, 891.
[87] United Nations. 'United Nations Administrative Tribunal.' Accessed May 1, 2024. https://untreaty.un.org/unat/Overview.htm.

contract of employment'.[88]

Regarding the adjective 'internal'. In scholarly literature, the terms 'internal' and 'external' law of international organisations are commonly used to refer to the norms governing the status and activities of these organisations. However, this division is somewhat conditional due to the lack of clear criteria for differentiation. Internal law 'covers more than employment relations'[89]. Internal law of international organisations encompasses 'constitutions, procedural rules, decisions, regulations, and other enactments adopted by the organisation'[90]. These elements are crucial for the effective functioning of international organisations. It is worth noting that the 'internal law' of international organisations is not only a scientific concept but is also actively applied in the practices of international judicial bodies, without delving into discussions on classification of norms regulating international organisations' status and activities.

The jurisdiction of the UNDT extends to applications by UN officials and agents against any administrative decision of UN organs, including the ICJ, which, in their opinion, violates their conditions of employment or their employment contract or which imposes a disciplinary measure (art. 2.2 of the TCANU Statute). It can also extend to appeals filed by officials of specialised agencies, under conditions established by agreement between these organisations and the Secretary General of the UN.

In its **jurisprudence**, the UNDT defines International administrative law as 'the law which regulates the relationship between intergovernmental organisations and their staff members'[91]. In another case, the UNDT stipulated that 'It is an established principle of international administrative law that an applicant's right to review of a contested administrative decision can be pre-empted should s/he, by unequivocal conduct inconsistent with an intention to seek a review, acquiesce in the decision'[92].

Likewise, in a 2011 judgment, UNDT stated, 'International administrative tribunals may rely on, among other sources, general principles of law – including international human rights law, international administrative law and labour law – which may be derived from, inter alia, international treaties and international case law.'[93]

The use of the term 'principles of international administrative law' is quite ambiguous, but it is often encountered in relation to IATs, insofar as 'those

[88] United Nations. 'United Nations Dispute Tribunal.' Accessed May 1, 2024. https://www.un.org/en/internaljustice/undt/.
[89] Amerasinghe, *Principles*, 273
[90] Kryvoi, 'The Law Applied', 281.
[91] United Nations Dispute Tribunal. 'Judgment No. UNDT-2010-019." Accessed May 1, 2024. https://www.un.org/internaljustice/oaj/sites/default/files/documents/undt-2010-019.pdf, para. 20.
[92] United Nations Appeals Tribunal. 'Judgment No. 2020-UNAT-1017.' Accessed May 1, 2024. https://www.un.org/en/internaljustice/files/unat/judgments/2020-UNAT-1017.pdf, para 28.
[93] United Nations Dispute Tribunal. 'Judgment No. UNDT/2011/032.' Accessed April 30, 2024. https://www.un.org/internaljustice/oaj/sites/default/files/documents/undt-2011-032.pdf.

principles are to a significant extent shared among international intergovernmental organisations'[94] and 'develop from the practice of international administrative tribunals'[95].

The IMFAT has adopted the perspective that 'general principles of international administrative law are among the sources it draws upon in deciding cases. General principles may extend to the universal principles of human rights, such as the principle of nondiscrimination. The Tribunal deploys general principles to buttress the written law […] and to fill *lacunae* in it'[96].

The Statute of the IMFAT states in art. III that 'In deciding on an application, the Tribunal shall apply the internal law of the Fund, including generally recognised principles of international administrative law concerning judicial review of administrative acts'[97]. As it was explained[98], the reference to recognised principles of international administrative law aims to limit the tribunal's powers, ensuring its standards of review align with those of other tribunals and IMFAT must adhere to the same limitations observed by other administrative tribunals when reviewing the Fund's decisions. In essence, its authority to review employment decisions doesn't grant it greater discretion than other tribunals.

In the same vein, it was noted that 'employment disputes between an international organisation and its employees or other internal matters linked to the operations of an international organisation'[99] shall be considered as international administrative acts issued under international administrative law. But an IAT doesn't settle broader administrative disputes, while international administrative law is a 'wide-ranging concept, also inclusive of legal norms, that apply to the administrative acts of international organisations in general'[100].

As observed[101], despite the existence of distinct regulations and rules within each tribunal, a set of general principles of international administrative law has evolved over time. These encompass principles concerning discrimination, equality of treatment, procedural and substantive irregularities, and other employment-related matters.

We may concur with Sinichi Ago (President of the Asian Development Bank Administrative Tribunal), who asserts that *'IATribunals have tended simply*

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[94] Goldman, Celia. 'Administrative Tribunal: International Monetary Fund (IMF).' In *Max Planck Encylopedia of International Procedural Law*. Oxford University Press, 2020, para. 39.
[95] Kryvoi, 'The Law Applied', 285.
[96] Goldman, 'Administrative Tribunal', para. 40.
[97] IMF. 'Statute of the International Monetary Fund.' Accessed April 30, 2024. https://www.imf.org/external/imfat/statute.htm.
[98] IMF. 'Commentary on the Statute Resolutions of the Board of Governors.' Accessed April 30, 2024. https://www.imf.org/external/imfat/pdf/2020_Amended-Statute.pdf, 17.
[99] Senn, Myriam. 'The Recognition of Foreign Administrative Acts in Switzerland.' In *Recognition of Foreign Administrative Acts*, vol. 10, 319–352. Springer, Cham, 2016, 330–331.
[100] Ago, Shin-ichi. 'A Few Thoughts about the Concepts of International Administrative Tribunals and International Administrative Law.' *Asian Journal of International Law* 12, no. 2 (2022), 214.
[101] Kryvoi, 'The Law Applied', 286.

to refer to the concept of IALaw whenever they could not clearly say what they were applying. When the European Bank for Reconstruction and Development (EBRD) Administrative Tribunal states, for instance "The Tribunal also noted that there is no principle in international administrative law that imposes 100% of salary is paid in case of service incurred illness" the Tribunal appears to justify its decision by referring to IALaw because, otherwise, it may be open to a criticism that the Tribunal made its decision in a vacuum. Likewise, when the WBAT states: "According to well-established principles of international administrative law, grades should correspond to position and compensation should correspond to grade," we are left with an uncertainty as to the concrete law with which the Tribunal came to its decision.'[102]

In regard to the principles of IAL, Yu. Kryvoi suggests that 'international Law Commission could codify general principles of international administrative law, similar to the Draft Articles on the Responsibility of International Organizations, as this will explicitly establish the supremacy of such principles over the internal law of international organisations'[103], but in our opinion this scope is quite ambitious and unfeasible, as long as there are disagreements regarding the very nature of IAL.

Peter Quayle emphasis[104] that the statutes of the three major IATs do not provide a legal basis for international administrative law beyond employment contracts or terms of appointment of international organisations, nor do they identify the governing law for this relationship. The functional rationale of IATs is not evident, and there is no indication that their approach to hearing complaints and rendering judgments should involve anything beyond being self-contained, without reference to external legal principles. Thus, the role of international administrative law remains unstated and uncertain.

In a similar context, Sinichi Ago suggests that the use of the term international administrative law by international administrative tribunals is inaccurate. He proposes that a more appropriate term in this context would be 'International Civil Service Law', reflecting the nature of IATs. Ago argues: 'the name for the norms those institutions apply should be more employment law specific rather than using general terminology such as IALaw'[105]. Renuka Dhinakaran also contends[106] we can conceive 'international civil service' as a legal institution and 'international civil service law' as the legal regime of this institution.

Concurring with the inadequacy of using the term 'international administrative law', it should be emphasised that relations with international civil servants, governed by the internal law of international organisations, do not fall within

[102] Ago, 'A Few Thoughts', 213.
[103] Kryvoi, 'The Law Applied', 301.
[104] Quayle, 'Chapter 1', 12.
[105] Ago, 'A Few Thoughts', 211.
[106] Dhinakaran, Renuka. 'Law of the International Civil Service: A Venture into Legal Theory.' *International Organizations Law Review* 8, no. 1 (2011), 172.

the purview of international administrative law regulation.

In our opinion, restricting International Administrative Law solely to relations concerning personnel of international organisations is excessively narrow compared to the scope of any administrative law. The relationships of public officials (even if the international) represent only a small part of the regulatory scope of administrative law of any jurisdiction, 'The public office appears to us obviously as an institution of administrative law'[107]. Usually, the institution of civil service or public office represents only a fraction of administrative law.

4.2. International administrative law as (special) part of national administrative law

As seen in the begging of this paper, there is a school of thought that suggests international administrative law is a specific subdiscipline of administrative law and a branch of its special part. According to this perspective, the special part of administrative law encompasses regulations governing individual areas of substantive law as well as international administrative law, which deals with issues arising from the presence of a foreign element in relationships governed by the aforementioned regulations.

Administrative law in the international context may refer to 'domestic administrative law specifically concerned with international problems or situations'.[108]

Prof. Ioan Alexandru considers that 'international administrative law has been integrated into national administrative laws, as it is no longer possible to study administrative law without measuring the impact of formal sources from public international law or supranational law'.[109]

International administrative law has thus been intertwined with issues of jurisdictional conflicts and the applicability of a specific country's law to a particular case, like in private international law.

There are opinions suggesting that the alignment with private international law arose from a particular use in German legal writing of the term *Internationales Verwaltungsrecht* ('international administrative law'), very similar to *Internationales Privatrecht* ('private international law').

Otto Mayer wrote in 1896: *'In the field of civil law, this natural closure of state territories is comprehensively breached. The doctrine of the principles by which this breach occurs is termed – albeit very inadequately –* internationales Privatrecht*. The corresponding phenomena in administrative law are referred to as* internationale Verwaltungsrecht*. They do not follow the same rules and, nota-*

[107] Iorgovan, Antonie. *Tratat de drept administrativ.* Vol. 1. Bucharest: All Beck, 2005, 584.
[108] Vogel, "Administrative Law: International Aspects", 3.
[109] Alexandru, *From national administrative*, 209.

bly, do not provide an equivalent to what constitutes the core of private international law.'[110]

According to O. Mayer, international administrative law and private law operate on different principles and pursue distinct objectives. Mayer's argument rests on the premise that states prohibit the application of foreign administrative law norms by their courts due to the legal inequality among participants in legal relations and the imperative regulation dictated by national interests. Rather than enforcing foreign administrative acts, Mayer suggests the concept of 'external cooperation', wherein each state 'respect and admits' the legal actions of other states. Therefore, instead of comprehensive collision regulation, international administrative law relies exclusively on intergovernmental cooperation, whereby states supplement mutual agreements with their own regulations, thereby binding their own administrations to these agreements.

Eberhard Schmidt-Assmann also criticised the attempt to draw parallels between international administrative law and private international law, arguing that it was flawed and has resulted in significant disagreement. According to him, these two fields have fundamentally different objectives, and international administrative law, as he sees it, does not concern itself with the choice of law among different legal systems. He further suggests that 'administrative law scholarship should abandon this inaccurate parallel radically reorder the formation of terminology. International administrative law is to be understood as the administrative law originating under international law'[111].

'International administrative law is a newly founded branch of private international law'[112] – asserted **Karl Neumeyer** in 1901 during his habilitation as a lecturer.

Neumeyer leaned toward the view that international administrative law is essentially rooted in domestic legal norms, making it a branch of domestic public law, while also acknowledging the significance of international conventions as sources of its norms, such as in determining state borders or the course of border rivers.

Unlike in other legal domains, these questions have long remained contentious: Can one truly pose the traditional query regarding the applicability of foreign law in a realm overwhelmingly governed by the actions of national authorities, which are primarily constrained by the imperatives of their respective national public law?[113]

Klaus Vogel contends that the choice of law principle is inapplicable in administrative matters. He posits that there is no choice of law issues in public law, particularly in administrative law; instead, there exists a singular general choice of law doctrine wherein administrative authorities are invariably obligated

[110] Mayer, *Verwaltungsrecht*, 454.
[111] Schmidt-Aßmann, Eberhard. 'The Internationalisation,' 2076-77.
[112] Neumeyer, *Internationales Verwaltungsrecht*, III.
[113] Ruffert, *The Global Administrative*, 20.

to apply their own legal framework. Additionally, there may exist legal prerequisites in administrative law that the legislator may deem fulfilled either by invoking the laws of an individual's domicile or by treating administrative actions undertaken under foreign jurisdiction as tantamount to domestic ones. Instances of this include the issuance of a driver's license or authorisation to practise a specific profession. In such circumstances, the formulation of a choice of law principle would be even less suitable. In these instances, unequivocally, there exist substantive legal norms permitting the fulfilment of these prerequisites with reference to both domestic and foreign legislation. Essentially, the situation does not differ fundamentally from that of a substantive rule in private law mandating a specific legal act or authentication.[114]

More recently, **J. Handrlica** likes to speak[115] in the tradition of Neumeyer's *Grenznormen,* about delimiting norms in international administrative law. According to him, delimiting norms in IAL set limits on how administrative actions in one jurisdiction affects others. They are unilateral, meaning they only apply within their own territory unless reciprocity is established. Examples include recognising foreign administrative acts like university diplomas or driver's licenses. Some norms require formal recognition, while others automatically apply. These norms often stem from international agreements or EU directives, but some are based on customary practices. They also affect procedural aspects, like using foreign documents as evidence. Additionally, they can exclude certain individuals, such as those with extraterritorial status, from administrative obligations.

However, Handrlica does not believe that international administrative law is an autonomous discipline, arguing that unlike private international law, which has emerged as a distinct field from private law, IAL has not yet separated from administrative law. As he sees it[116], the process of extracting IAL norms and codifying them separately has not occurred, making it challenging to consider IAL as an independent legal discipline.

At the same time, while admitting[117] international administrative law does not constitute a coherent branch of substantive law, he has also argued[118] that international administrative law represents a specific (sub)discipline within the special part of administrative law, governing administrative relations involving foreign elements. While it shares similarities with both international public

[114] Vogel, "Administrative Law: International Aspects", 4-5.
[115] Handrlica, 'A Treatise', 472–473; Handrlica, Jakub. 'Revisiting International Administrative Law as a Legal Discipline.' *Zbornik Pravnog Fakulteta Sveučilišta u Rijeci* 39, no. 3 (2019), 1241-42.
[116]Handrlica, 'Mezinárodní Právo Správní', 466.
[117] Handrlica, 'A Treatise', 471; Handrlica, 'Is there', 97; Handrlica, Jakub. 'About the international administrative law and other demons. A venture in a "delimiting law."' *Juridical Tribune* 10, no. 3 (2020), 351.
[118] Handrlica, 'About the International', 360; Handrlica, 'A Treatise', 475; Handrlica, 'Mezinárodní Právo Správní', 467-68; Handrlica, 'Is there', 115.

law and international private law, IAL is an integral part of municipal administrative law. Handrlica contends 'We can only barely refer to any universal international administrative law'[119] and views, 'international administrative law as a national project, so we can speak about German, French, Italian and international administrative law and so on'[120] suggesting that a degree of isolationism persists in this branch of law, as the body of international administrative law in each jurisdiction represents distinct norms governing administrative law relations with 'foreign elements'.

Handrlica's perspective underscores the intricate relationship between international administrative law and national legal systems. By highlighting that international administrative law is essentially a national project, he emphasises the unique norms and practices that govern administrative relations involving foreign elements within each jurisdiction. This viewpoint acknowledges the diverse legal traditions and approaches across different countries, suggesting that a universal framework for international administrative law may not be feasible. Instead, it promotes a nuanced understanding of how national laws interact with international norms in shaping administrative processes. Thus, we find merit in Handrlica's assertion that international administrative law can be best understood as a national project, reflecting distinct norms governing administrative relations with foreign elements in each jurisdiction. From this standpoint, it becomes much easier to accept the internationalisation of administrative law in terms of extraneous elements and develop a general framework for interaction between different national jurisdictions.

5. Conclusions

Certainly, in a globalised world, the entire legal system undergoes metamorphoses, and sometimes it is necessary to think out of the box. Providing an identifier is necessary for administrative relations beyond state boundaries.

The phenomenon of international administrative law emerged in the late 19th century, practically concomitant with the shaping of the concept of modern national administrative law; however, its content and meaning have been different, evolving throughout history, including depending on the specificity of doctrinaires – internationalists or administrative law specialists.

Despite the fact that various authors are mentioned as predecessors IAL movement, the focus of this doctrine has traditionally been specific to German or Italian scholars. However, today it is experiencing a rejuvenation among new internationalist researchers, especially with the proliferation of European administrative law.

[119] Handrlica, Jakub. 'A Treatise for International Administrative Law, Part II: On Overgrown Paths.' *Lawyer Quarterly* 11, no. 1 (2021), 178.
[120] Handrlica, 'Is there', 99.

Although Romanian permits us to distinguish between 'dreptul administrativ internațional' *(international administrative law)* and 'dreptul internațional administrativ' *(administrative international law)*, and we could use them separately to define and delineate different legal domains, the lack of terminological precision in Romanian, coupled with the conflation of these terms in English – which is widely used in modern legal research, especially in international law – renders this scholarly pursuit unreasonable. Consequently, it risks marginalisation within Romanian legal research (and certain other Romance languages) and fails to have a global impact.

For these reasons, in order to mitigate confusion and enhance coherence, we advocate for the discontinuation of the dual use of the terms IAL/AIL. Instead, we propose adopting the unequivocal use of the term 'drept administrativ internațional' (international administrative law).

Although we believe the usage of the term 'international administrative law' ('drept internațional administrativ' not 'drept administrativ internațional') to describe a set of rules applicable to the functioning or management of international organisations or administrative structures within them is not entirely wrong, we consider it more appropriate to use the concept of *international institutional law* in this regard. As for the narrower field of relations with the staff of international organisations (the so-called international civil servants), we opt for the use, if needed, by analogy with domestic notions, of the term 'law of the international civil service', bearing in mind civil service is usually just an institution of administrative law. Subsequently, the term international administrative law should be used, in our opinion, exclusively for cases involving a foreign element or application beyond national borders of administrative regulations.

We frequently observe the term IAL or 'principles of international administrative law' mentioned in the decisions of international administrative tribunals, but we consider this approach to be elusive. Furthermore, the use of the jurisprudence of certain IATs of the term '(general) principles of international administrative law', without a well-defined framework for them, seems to occur only in the absence of more solid legal justifications. It is difficult to accept justifying decisions based on the principles of a law that lacks unanimity and does not contain a body of norms.

Certainly, regardless of whether there is acceptance or rejection of the existence of a dedicated normative framework for the application of regulations with extraneous elements, we can still discuss the didactic and doctrinal aspect of international administrative law. This aspect is used to illuminate the areas where different jurisdictions intersect in the field of administrative law.

From this standpoint, the term 'international administrative law' typically denotes a legal domain concerning administrative matters within the context of international relations involving states and international organisations. However, for clarity in teaching, it might be more precise to describe it as 'adminis-

trative law with foreign elements'. This alternative framing emphasises the incorporation of foreign elements within administrative law, making the concept more accessible to a wider audience.

Furthermore, to describe legal phenomena with administrative implications that go beyond national or international boundaries and manifest in a transnational (not territorial) context, the extended concept of 'transnational administrative law' or 'global administrative law' appears to be appropriate.

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Digitalisation of Public Spatial Planning and Construction Proceedings within the Sustainable Development Goals

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Abstract

The issue of finding an optimal model for the operation of public administration, both in terms of its internal organisation and its relationship with stakeholders, remains current and complex. However, the Information Age brings with it the potential for significant improvements. Modern electronic tools offer numerous methods and techniques for optimisation and enhancing the operation of public administration. As information technology becomes a part of daily life and impacts all activities and policies, the general public demand for digital services logically increases. Consequently, using new technologies in decision-making processes attracts research interest across several European countries. Similar development focuses on advanced information systems that enable the digitalisation of spatial planning and construction proceedings. The authors examine the digitalisation of public space, accentuating its interconnectedness with the Sustainable Development Goals. The paper also aims to share experiences from the ongoing digitalisation of construction proceedings and spatial planning in the Czech Republic. The authors describe potential benefits from the perspectives of public authorities and users of the public administration, providing practical insights into the advantages of digitalisation. The paper concludes by outlining prerequisites and challenges for the successful implementation in the daily practice of public administration and its users. The authors highlight the legal framework of the future building administration system. The authors exploit the desk research methodology and their experience in academia and legal practice.

Keywords: *digitalisation, sustainable development goals, public administration, information systems, building and spatial planning.*

JEL Classification: K23, K32

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1. Introduction

The paper argues the legal and administrative needs when implementing the digitalisation of construction proceedings and spatial planning. Urbanisation and climate change are among the most important trends shaping global development in the decades ahead. Cities and their inhabitants serve as engines of change and drive economic and social progress than at any other time in history. However, urbanisation and climate change could undercut all this by exacerbating resource scarcity and putting vulnerable communities at environmental risk.[4]

Consistent knowledge about urbanisation and its internal structure is of extreme importance. Although less than 3% of the Earth's land areas are urban, the movement of population into cities and the transformation of land cover into urban forms is proliferating. This constant development highly impacts biodiversity and surface conditions. Urbanisation covers agricultural and forest land with impermeable materials, buildings, and waste.[5] As key drivers of global environmental change, cities demand the attention and action of public authorities, local public administration, and the inhabitants and users of public administrative tools.

The role of these social groups in shaping the future of our cities and their impact on the environment is paramount. By understanding their role and taking appropriate actions, these entities can contribute significantly to sustainable urban development.

Digitalisation, or digital technologies to transform business processes, is crucial in modernising public services. It enables remote access to public authorities and the administration of public space and construction activities. The provision of public services by electronic means must be beneficial to both parties involved, i.e. users and digital service providers. From the point of view of public authorities, the potential of digitalising administrative agendas in general lies in reducing operating costs, whether in terms of the number of employees, need for physical space or other material costs, accelerating and simplifying the process of providing the service, limiting contact with the user of the service, guaranteeing compliance with regulations and procedures, higher satisfaction of users of the service, or reducing the error rate of the data provided. For recipients of public administration, digitalisation means reaching services outside the institution's

[4] Demuzere, M., Kittner, J., Bechtel, B. „LCZ Generator: A Web Application to Create Local Climate Zone Maps", *Frontiers in Environmental Science,* Vol. 9 Original Research*,* published: 23 April 2021. Available online at https://doi: 10.3389/fenvs.2021.637455. Accessed 8 May 2024.

[5] Bechtel, B., Alexander, P.J., Böhner, J. et al. „Mapping Local Climate Zones for a Worldwide Database of the Form and Function of Cities"*, ISPRS International Journal of Geo-Information*, 2015. Vol. 4, pp. 199–219. Available online at: https://doi.org/10.3390/ijgi4010199. Accessed 8 May 2024. See some interesting effects in Seehaus, S. and Peráček, T., „The Impact of the Constitutional Court Ruling of 15 November 2023 on the Federal Government's Budget Planning and the Potential ncrease in Insolvency Cases in Germany", *Juridical Tribune – Review of Comparative and International Law* 14, no. 2 (June 2024): 178–195.

working hours, which saves users' time, increasing the quality of the selected service in the sense of clear and correct data, availability of remote access, and the possibility of monitoring the course of the service provided. That is why it is unavoidable for the state to reflect the needs of the recipients of public administration when introducing new and developing existing electronic tools and services in public administration. The public administration must offer the services the users are interested in. The authors have already alerted in their research about the need for digital transformation in public services and provided insights into the potential benefits, risks and challenges.[6]

2. Sustainable development goals and the digital public space

In 2015, the United Nations General Assembly completed the effort for global sustainable development by adopting the 2030 Agenda for Sustainable Development.[7]

Goal 9 – Build resilient infrastructure, promote inclusive and sustainable industrialisation, and foster innovation. Goal 11 – Make cities and human settlements inclusive, safe, resilient, and sustainable, which form the main targets of public spatial planning. Of course, these two goals cannot be separated from the others as sustainable development is a global concern and collaborative undertaking.[8] The digital public space, as described below, helps to reduce repercussions on ecosystems and enables better and inclusive access to public authorities.[9]

The authors underline the applicability of Davis's general technology acceptance model, based on the theory of reasoned action, in introducing information technology into public administration.[10] According to this model, the individual's attitude to information technologies and their actual use depends primarily on how the user perceives their usefulness and the ease (complexity) of working with them. Similarly, Rogers's diffusion of innovation theory explains the success of introducing new technologies into practice. [11] According to this,

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[6] Sovová, O., Fiala, Z. *Challenges of Public Administration in the Global Digital Era.* In Cazala, J., Zivkovic, V. (ed.): *Administrative Law and Public Administration in the Global Social System.* ADJURIS – International Academic Publisher. 2021. pp. 138–146. Available online at http://www.adjuris.ro/editura_en.html. Accessed 8 May 2024.

[7] Available online at: https://sdgs.un.org/2030agenda. Accessed 8 May 2024.

[8] Nakamura, M., Pendlebury, D., Schnell, J., Szomszor, M. *Navigating the Structure of Research on Sustainable Development Goals*. Institute for Scientific Information, April 2019, p. 11. Available online at: https://clarivate.com/wp-content/uploads/dlm_uploads/2022/09/Navigating-the-Structure-of-Research-on-Sustainable-Development-Goals.pdf. Accessed 8 May 2024.

[9] See especially SDG 13 and 17. Available online at: https://sdgs.un.org/2030agenda. Accessed 8 May 2024.

[10] Davis, F. D. „Perceived usefulness, perceived ease of use and user acceptance of information technology". *MIS Quarterly*, 1989. Vol. 13, No. 3. pp. 319–340. Available online at: https://www.jstor.org/stable/249008. Accessed 8 May 2024.

[11] Carter, L., Bélager, F. „The utilisation of e-government services: citizen trust, innovation and acceptance factors", *Information Systems Journal*, 2005. Vol. 15. No. 1, pp. 5–25. Available online

the following factors are decisive: relative advantage over the previous technology, complexity of the technology from the user's point of view, compatibility with the needs of those who are supposed to use it, credibility, and safety.

The provision of public services by electronic means must be beneficial to both parties involved, i.e. users and digital service providers. From the point of view of public authorities, the potential of digitalising administrative agendas in general lies in reducing operating costs, whether in terms of the number of employees, need for physical space or other material costs, accelerating and simplifying the process of providing the service, limiting contact with the user of the service, guaranteeing compliance with regulations and procedures, higher satisfaction of users of the service, or reducing the error rate of the data provided. For recipients of public administration, digitalisation means reaching services outside the institution's working hours, which saves users' time, increasing the quality of the selected service in the sense of clear and correct data, availability of remote access, and the possibility of monitoring the course of the service provided. That is why it is inevitable for the state to reflect the needs of the recipients of public administration when introducing new and developing existing electronic tools and services in public administration[12].

Projects aimed at digitalising construction proceedings and spatial planning are a step in the right direction. First, the authors emphasise that it cannot be just the 'mere' digitalisation of the construction proceedings but rather the digitalisation of the preparation and implementation processes of capital construction in the territory.

The processes that precede or are directly associated with the actual submission of the application for a building permit should also be digitalised, including the assessment of plans or projects by the authorities concerned and the owners of transport and utility infrastructure. Only in this way can the decision-making process be short and methodological procedures be unified to eliminate the established general or local practice of individual building authorities. Furthermore, the expectation shows that through digital technical maps, as mentioned below in more detail, digitalisation will significantly affect and fundamentally change the nature of the administration in other areas, such as property management, accident management, surveillance activities, environmental protection and much more. The principal benefits of the digitalisation of construction proceedings and spatial planning also include that project documentation will no longer have to be submitted in several copies at the offices of building authorities but

at: https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1365-2575.2005.00183.x. Accessed 8 May 2024.

[12] For a comparative view see Shevchuk, O., Kompaniiets, I., Volianska, O., Shovkoplias, O. and Baranchuk, V., „Electronic Administrative Judicial Procedure of Ukraine and the Right to Judicial Protection: Problems of Legal Regulation and Practical Issues", *Juridical Tribune - Review of Comparative and International Law* 14, no. 1 (March 2024): 98-115.

will be submitted remotely in closed 2D (pdf) and 3D (IFC) formats. The possibility of retrospectively monitoring the course of the permit proceedings will undoubtedly contribute to the overall reduction in the length of the procedure and the quality of the decision.

Generally, for the indicated potential of digitalisation of construction proceedings and spatial planning, it is necessary to pay attention to ensuring the availability of high-speed internet, with a focus on the 5G technology. The above applies not only to households but also (if not primarily) to public administration bodies, not only in terms of workplace hardware and software equipment of workplaces but also to the digital capabilities of competent officials. With this, the digitalisation of public administration in general and building administration especially, which involves processing large data sets of project documentation and cartographic works, can be considered. It also follows from current practice that the mere possibility of communicating electronically with public authorities may mean something other than that the users will rely on this form of communication. Therefore, the state must begin a targeted effort to overcome the existing psychological barriers and established stereotypes in the behaviour of citizens, i.e. to focus more on informing people about the possibilities, methods, and benefits of electronic communication. The real e-government needs to remove the mentioned psychological barriers, and users should stop perceiving electronic tools only as an 'additional' service. It is also undoubtedly necessary to pay attention to the digital exclusion and promote digital literacy. There will always be groups of citizens who have more difficulty accessing the internet. The pressure exerted by some more recent legislation on the mandatory use of electronic tools, which does not reflect the real and actual needs and wishes, can often be counterproductive. Therefore, the public administration should offer alternative access options to services in the future[13]. The same applies to the appropriate timing of the new e-tool practical initiation.

The law-binding nature of legislation must also be considered when introducing information technologies in public administration. The management and use of information systems are closely related to the issues of processing and securing the protection of personal data and other transferred data.

The law-binding nature of legislation must also be considered when introducing information technologies in public administration. The management and use of information systems are closely related to the issues of processing and securing the protection of personal data and other transferred data.

[13] See some developments in Popa Tache, C. E., Săraru, C.-S. and Kouroupis, K., „Different perspectives concerning the right not to use the internet and some analogies with education" in *European Journal of Privacy Law & Technologies,* Issue 2024/1, Focus Section available open access here: https://universitypress.unisob.na.it/ojs/index.php/ejplt/index, accessed on 8.05.2024.

3. Legislative matters in question. A Czech example

This part of the paper highlights the most frequently discussed topic regarding the digitalisation of construction proceedings and spatial planning in the Czech Republic, emphasising this transition's numerous benefits.

Adopting the Digital Services Act[14] is the first legislative step toward digitalising construction proceedings and spatial planning. In general, and most importantly, it serves in the Czech legal system as a unifying legal regulation governing the provision of digital services. For this paper, it is possible to draw particular attention to the wording of the provisions of Section 14, based on which the so-called digital services catalogue was created, containing actions aiming at digitalisation and taking place between citizens and public administration.

Within the framework of the construction agenda and public space planning, public administration must take numerous actions to ensure the digitalisation of the state administration of Land Surveying and Cadastre.[15]

The amendment to the Land Survey Act[16] of 2020[17] was also significant. It anchored, with effect from 1 July 2023, the regulation of digital technical maps – a large-scale cartographic work maintained on a computing device. A database file with a detailed transport and utility infrastructure drawing and selected natural, building, and technical objects and facilities expressing their actual condition entered into force. In particular, the capture of utility infrastructure, apart from the financial demands of creating a digital technical map, poses a relatively big challenge for digitalisation because the number of owners of utilities is significant. Their number is estimated to be between 10 and 20 thousand in the Czech Republic. Therefore, the authors assume that not all of them will have the required tools and technical possibilities. Officially authorised surveying engineers' verification could guarantee the accuracy of the data.[18]

Municipal and regional governments already use technical maps at various levels. Less than half of municipalities use them in some form. Also, digital map management will remain voluntary for municipalities in the future.[19]

The nature and purpose of digital technical maps indicate that they will

[14] Act No. 12/2020 Coll.

[15] Information about the State Administration of Land Surveying and Cadastre is available at www.cuzk.cz/en.

[16] Act No. 200/1994 Coll.

[17] Act No. 47/2020 Coll.

[18] Section 12(b) of Act No. 200/1994 Coll. on Surveying: "*The results of surveying activities used to maintain the digital technical maps and in construction must verify an officially authorised person.*"

[19] See Acquisition of an Important Agenda Information System of Public Administration within the Project Digital Technical Map of the Liberec Region, Development of E-government in the Liberec Region 2023. Tender documents: T466692632. MENA Report. Available online at: https://zakazky.liberec.cz. Accessed 8 May 2024.

become an essential source of information and projects and provide environmental information and data on physical infrastructure and several other activities. With this in mind, ensuring that digital maps are accurate and up-to-date is fundamentally necessary. Rest assured, the administration and the users are committed to ensuring the maps are complete, final, and thoroughly reliable when launched.

In connection with the digital cartographic works, it appears appropriate to mention that digital technical maps supplement rather than replace the existing cadastral maps that contain information on property rights; orthophoto maps capture the appearance and condition of the territory and follow up on other possible 'layers' of cartographic works, like zoning plans, road data records or green area data records. Their existence is only a logical consequence of previous long-term development.

The interconnection of cartographic works holds significant potential for streamlining the self-assessment of specific projects from the individual authorities' perspective. If effectively implemented, this interconnection could significantly reduce the overall length of the decision-making process, thereby enhancing efficiency and productivity.

The Building Code follows the Digital Services Act and the Land Survey Act,[20] which regulates public administration information systems in spatial planning and construction proceedings. The Building Code subsequently reflects these systems.

With effect from 1 July 2024, the Surveying Act provides for the establishment and launching of the following public administration information systems in matters of spatial planning and construction proceedings, which will enable remote access and the provision of digital services:

a) The Builder's Portal.
b) National geoportal of spatial planning.
c) Register of construction procedures.
d) Register of electronic documentation.
e) Building identification number information systems.
f) Construction proceedings information systems.

The Builder's Portal should enable digital actions about the building authority and the body concerned that provides the documents for issuing decisions, submitting applications to the owner of public transport or utility infrastructure and providing statements from the owner of public transport or utility infrastructure, entering data and documents in the national geoportal of spatial planning, register of construction procedures, register of electronic documentation, and digital map of public administration, making them available, and referring to them. The Builder's Portal generates a gateway to digital services provided under the Building Act. The aim is to set up the Builder's Portal so that the builder can

[20] Act No. 183/2006 Coll.

complete all tasks related to the permit for their project within its interface. That is why the system must allow the interconnection of builders, building authorities, administrative authorities, and affected utilities and infrastructure network owners. In order to make the user environment more manageable to understand, it will be linked to the register of construction proceedings. The register enables access to all documentation related to specific construction proceedings, decisions of building authorities, binding opinions of administrative authorities concerned and statements of owners of utility and infrastructure networks. The register of electronic documents serves as a documentation repository for plans and projects.

The right of access to data and electronic documents in the register of construction proceedings and the register of electronic documentation will be granted to those with the right to consult the file under the Code of Administrative Procedure.[21] Parties to the proceedings and their legal representatives, persons who prove their legal interest or other serious reason, and persons who do not violate the rights of any of the parties or other persons concerned or the public interest can access the electronic documentation.[22] Those obliged to comment on it and the designer will also be allowed access to the project documentation.

It should be possible not only to electronically submit, prepare, and complete the relevant submission with the possibility of referring to existing documents but also to monitor the current state of the proceedings and, if necessary, verify any relevant information. The interconnection of these information systems will significantly contribute to accelerating and clarifying the permit processes. The user can lodge from anywhere and at any time.

However, this advantage could be risky. Without working hours, such flexible working possibilities could be dangerous for work-life balance.[23] Unstable home connections to the Builder's Portal can lead to critical errors, potentially causing delays. Using personal devices without adequate cybersecurity measures, such as a firewall, can leave data vulnerable to attacks or misuse[24]. Even simple actions like sharing passwords can compromise privacy and confidentiality.[25]

Despite these risks, with proper technical and legal safeguards, the

[21] Act No. 500/2004 Coll.

[22] Section 38 of Act No. 500/2004 Coll. Code of Administrative Procedure.

[23] *Anytime, anyplace, anywhere: Mobile information technology devices and the blurring of borders between work and non-work domains.* "Human Resource Management International Digest "2018.Vol. 26, No. 4, pp. 46–48. Available online at: https://doi.org/10.1108/HRMID-04-2018-0067. Accessed 8 May 2024.

[24] For some extended consequences see Konstantinos, K. and Sotiropoulos, L. „Cyber Challenges amid the Digital Revolution in Maritime Transport", *Juridical Tribune - Review of Comparative and International Law* 14, no. 2 (June 2024): 321-340.

[25] Sovová, O., Sova, M. and Fiala, Z., „Privacy Protection and E-document Management in Public Administration", *Juridical Tribune – Tribuna Juridica*, Volume 7, Issue 2, December 2017, pp. 17–26. Available online at: http://tribunajuridica.eu/arhiva/anul7v2_en.html. Accessed 8 May 2024.

Builder's Portal can be a convenient digital platform for all stakeholders to collaborate and share their views[26].

As already mentioned in the introductory part of this paper, whether the Builder's Portal will fulfil its indicated potential will also depend on the friendliness of its user environment and the digital readiness of its users. It is self-evident that significant amounts of sensitive data will flow through the Builder's Portal. The users' digital literacy is required, especially that of public officers.

The National Geoportal of Spatial Planning will publish selected parts of the spatial planning documentation and the definition of the built-up area or other spatial planning tools in uniform standards. Access to data published in the national geoportal of spatial planning may be restricted or denied in the interest of public security, ensuring national defence or protection of international relations, or protection of the rights of third parties.

The building identification numbers information system will record descriptive data on buildings and facilities and assign a unique identifier to each building or facility, enabling the identification of the building or facility in the information systems of the building administration. The building authority, without undue delay after the commencement of the proceedings, should issue the so-called birth number of the buildings. The number will serve primarily for the internal needs of the public administration. Further, the law should enshrine the parameters of the information system for construction proceedings. The records and files will be stored electronically.

4. Digitalisation and the Czech Building Code

The digitalisation of construction proceedings and spatial planning, a significant step forward, is intricately woven into the communication between decision-making entities. This integration is firmly established in Part 6, Sections 171–266, of the new Building Act, which is the legal backbone for these changes.

In connection with the digitalisation of construction proceedings, it is, first of all, possible to point out the method and form of submission, including the application. Submissions under the Building Act will also be possible via the Builder's Portal. Therefore, the possibility of submitting it in writing remains. The application, as a specific submission format, may only be generated using a specified form. The implementing regulation will enshrine formula details. However, due to the logic of the matter, electronic forms for other types of submissions will also have to be available in the Builder's Portal. In a situation where a document that is an essential part of the documentation, like the statement of the authority concerned or the owner of transport or utility infrastructure, will already

[26] See few comparative aspects in Vâlcu, E. N., „Crowdfunding Platforms, an Innovative Way of Providing Crowdfunding Services in the Age of Artificial Intelligence. EU Legislative Implications. Applicability in Romania", *Athens Journal of Law* 2024, 10: 1-11 https://doi.org/10.30958/ajl.X-Y-Z.

be filed in the register of electronic documentation or the register of construction proceedings, the applicant will be able to refer to this document in their application instead of attaching it to the application. At the latest, with the application submission, the builder will have to enter the project or planning permit documentation into the electronic documentation register. In the case of applying itself, building administration information systems is only an option. However, the mentioned system must be applied when submitting the documentation.

The law requires building authorities to record all acts and insert all documents into the construction proceedings register, allowing the party to monitor the proceedings' course. Concerning the authorities concerned, the cited provisions establish an obligation to enter a statement, coordinated statement, or binding opinion in the register of construction proceedings, even when the applicant has contacted the authority concerned before the commencement of construction proceedings. In addition, the applicant must obtain the relevant statement, too. Such a course of action should facilitate the builder's procedure when applying, as they will not have to attach the statement of the authority concerned but only refer to it, as already mentioned above.

Under the new system, documents will flow exclusively through the construction procedures register, which will serve as a central hub for communication between the building and concerned authorities. This streamlined process aims to enhance efficiency and transparency in the proceedings.

Precise legal regulation is needed to deliver documents by the building authorities and the authorities concerned with the parties to the proceedings.

Public authorities will continue to deliver documents to the parties to the proceedings in the same way as before. In other words, the building administration information systems do not send documents to the parties involved in the proceedings. These systems only perform an information function. However, this only applies where the legal conditions for expressing the owners of public transport or utility infrastructure in terms of the possibility and method of connecting the project or the conditions of the protection and safety zones concerned are met.

The difficulty of these assignments in terms of the time frame set in the Czech Republic has repeatedly raised the issue of postponing the implementation of the new Building Act.[27] An utterly chaotic situation will arise if the building administration information systems are launched in time and the Building Code does not enter into force. The newly submitted applications will not be considered, and the proceedings to be completed at that time will be paralysed.

[27] Hegenbartova, M. *Amendments to New Czech Building Act Under Discussion*. 5 July 2022. Available online at: https://ceelegalmatters.com/czech-republic/20438-amendments-to-new-czech-building-act-under-discussion. Accessed 8 May 2024.

5. Discussion

The digitalisation of construction proceedings and spatial planning has considerable potential to move e-government in the desired direction. It offers several advantages for all stakeholders in the preparation and implementation of capital construction, especially in facilitating and accelerating their mutual communication, unifying methodological procedures, or monitoring the course of proceedings. The European Union (EU) is a leader in SDG research. However, applying the theory to functional outcomes and practice varies greatly in EU Member States and outside Europe.[28]

Despite occupying a relatively small part of the planet, urbanisation and cities pose a significant climate risk. Such concerns underline the crucial role of the evidence base in urban centres for accurate predictions and practical actions to safeguard nature and the climate.[29]

The main pitfall of the digitalisation process can be its time horizon. The experience in the Czech Republic suggests that it involves many gradual steps. Among the most important ones, the following can be mentioned – creating a legislative framework, including the issuing of the necessary implementing regulations, setting up and launching the building administration information systems, completing and continuously updating digital technical maps of regions and municipalities, creating appropriate technical facilities for public administration bodies, training authorised officials, and digitalising various types of submissions under the respective legislation.

In the digital age, social networks and media are opinion-makers. The state and public administration must address their users more humanly than the traditional bureaucratic tone. This humanised approach conveys a personality behind the authority and makes the procedure more understandable.[30] So, a broad information campaign must accompany the digitalisation of construction proceedings and spatial planning. Complete digitalisation in the construction industry can only be discussed when companies and citizens widely use electronic applications and communicate with public administrative bodies[31]. Therefore, this

[28] Nakamura, M., Pendlebury, D., Schnell, J., Szomszor, M. *Navigating Structure Research on Sustainable Development Goals*. Institute for Scientific Information. April 2019. p. 11. Available online at: https://clarivate.com/wp-content/uploads/dlm_uploads/2022/09/Navigating-the-Structure-of-Research-on-Sustainable-Development-Goals.pdf. Accessed 8 May 2024.

[29] Demuzere, M., Bechtel, B., Middel, A., Mills, G. „Mapping Europe into local climate zones". *PLOS ONE* 14(4), April 2019. e0214474. Available online at: https://doi.org/10.1371/journal.pone.02144. Accessed 8 May 2024.

[30] Mullan, A., Kidney, E. „Humanising of the brand voice on social media: The case of government agencies and semi-state bodies". *Journal of Digital & Social Media Marketing* "Henry Stewart" Publications. March 2020. Vol. 7(4). Pp. 344–354. Available online at: https://hstalks.com/article/5559/humanising-of-the-brand-voice-on-social-media-the-/?business&noaccess=1. Accessed 8 May 2024.

[31] Popa Tache, C. E. and Săraru, C.-S., „Evaluating Today's Multi-Dependencies in Digital Transformation, Corporate Governance and Public International Law Triad", in *Cogent Social*

system must be sufficiently user-friendly and intuitive, but first, addressees and potential users must learn about its advantages and benefits in general.

Even if users still need to fully grasp and utilise digitalisation potential, its other elements, designed to enhance information exchange between building authorities, concerned bodies, owners of transport and utility infrastructure, and designers, will remain valuable. Their usefulness and necessity are undeniable.

6. Conclusion

In the future, it will become increasingly crucial to approach cartographic works with caution. The data they capture should be utilised in decision-making, serving as a local contribution to environmental protection. The significance of digitalisation in public administration and its vital role in environmental preservation are indisputable.

Working with information is one of the fundamental areas for both the public administration and its addressees. The theory and practice speak about a global information technology society, which takes many forms. Its specific types and characteristics also depend on historical and geographical conditions.[32] That is why the approach and progress of digital public space differ in EU countries. Undoubtedly, the implementation depends on the country's economic conditions in general, public financing of digitalisation and the digital literacy of public officers and users. According to the Digital Economy and Society Index (DESI) 2022[33] Internet connection options and their acceleration in the EU are steadily growing. At least sufficient mobile connections are available in rural parts, too.

While the EU is making strides in digitalisation, the same Index cautions that urgent attention is needed on investments like semiconductors and chips. The EU states are trailing behind leaders such as the USA, South Korea, and Taiwan. Achieving digitalisation targets will necessitate significant public and private investments. The role of public administration in this matter is crucial, and new incentives for the private sector are vital for the technological autonomy of EU Member States.[34]

Digitalisation, planning and construction of public spaces, their precise legal regulation and application by public authorities, and the inclusion of all community members form the way to sustainable life within Europe and all over the planet. Research in this field is essential, as it has the potential to shape the future of public administration in environmental protection worldwide.

'*I have seen in many places housing which has been developed under*

Sciences 10 (1) by Taylor & Francis. DOI:10.1080/23311886.2024.2370945.

[32] Wilson M. I., Kellerman A., Corey K. E., *Global Information Society: Technology, Knowledge, and Mobility*. Lanham: Rowman & Littlefield Publishers, Inc., p. vii, 2013.

[33] Available online at https://digital-strategy.ec.europa.eu/en/policies/desi. Accessed 8 May 2024.

[34] Digital Economy and Society Index (2022). Digital infrastructure. 2 DESI 2022 thematic chapters, p. 22. Available at https://digital-strategy.ec.europa.eu/en/policies/desi. Accessed 8 May 2024.

government influences, but I have never seen any projects in which governments have played their part which has fountains and statues and grass and trees, which are as important to the concept of the home as the roof itself.'[35]

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Comparative Analysis of the Public Function in the European Union

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Abstract

The European civil service, a remarkably intricate institution in contemporary law, presents a fascinating subject for analysis and holds significant implications for our understanding of public administration. Its complexity, far from being a barrier, is a gateway to a deeper comprehension of its functioning. Analysing the principal regulations regarding public office and civil servants in different states of Europe reveals several similarities and relevant differences, further adding to the intrigue of this study. In Europe, there are two groups of countries where the public function differs. The first group comprises countries with traditional and stable professional civil servants, relatively independent from politics. These countries are some EU member states and others located in the so-called European Economic Area. The second group of countries, the ex-communist ones, face unique challenges. In these countries, there are no apparent distinctions between the apparatus of political parties, the public administration and the idea of the state as an independent reality. The countries in the second category are striving to develop new public service systems, a task that is not without its difficulties, to align themselves with the first group of countries. We aim to uncover an ideal model for regulating public function. This model would ideally ensure a balance between political influence and professional independence, promote meritocracy, and maintain a high level of public trust. We will achieve this by comparing how states establish norms applicable to it, a model that we hope to find in as many European administrative systems as possible through future reforms.

Keywords: *European Union, European civil service, administration, career, reform, administrative systems and public administrations.*

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1. Introduction

Given that the European Union is constituted as a conglomerate of

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states[2], each with different traditions in public office, we can say that these traditions influence different situations and experiences.

This raises the question whether the European civil service can be a European model that all national administrations should adopt, or is it just a carbon copy of a civil service in an EU Member State?

In this paper we set out to conduct an analysis of the civil service in several Member States of the European Union in an attempt to find an ideal model to be applied uniformly, taking into account the fact that national administrations and, implicitly, the civil services in the Member States are increasingly affected by European integration. Informal cooperation between national administrations in civil service matters has reached considerable proportions, and European administrative law is increasingly influenced by the case law of the Court of Justice of the European Union[3], especially as the European Union is currently tending to become a federal state.

2. Civil service regulations in the Member States of the European Union

In what follows we will try to present comparisons between the ways in which the Member States intends to establish rules applicable to the civil service and civil servants and to capture the differences and similarities that characterise the administrative systems of these European countries.

The diversity of conditions for access to the civil service is mainly rooted in Member States' education systems and difficulties in comparing their educational standards[4].

The following analysis is based on information that EU Member States's civil services have sent to EIPA (European Institute of Public Administration). This analysis covers the most recent changes and developments in the Member States' recruitment systems. The selection methods applied in the Member States for the recruitment of civil servants differ considerably, but we can distinguish two broad groups. In some Member States recruitment procedures are formalised, while in others there are no specific rules. In the latter, departments and/or organisations select functioners by searching for persons that can provide the skills and experience needed for the jobs they will be recruiting, but also by frecvently using them in the private area.

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[2] Verginia Vedinas, *Administrative Code Annotated. Novelties. Comparative examination. Note explicative*. 3rd edition, Universul Juridic Publishing House, Bucharest, 2021, p. 60.

[3] Florentina Iuliana Weber, Laurenția Georgeta Avram, *Economy and Law of the European Union,* Ed. Economica, Bucharest, 2023, p. 74.

[4] Mihaela Victorița Cărăușan, *Administrative Law.* Volume 1, Ed. Economica, Bucharest, 2012, p. 369.

2.1. Presentation of the civil service in countries that joined the EU before the fall of communism

The first group of Member States, i.e. the countries that joined the European Union before the fall of communism[5], brings together the vast majority of countries that generate their civil service following the career system. Under the career system, a civil servant enters the civil service as an entry-level civil servant, at the lowest level of a career for which sufficient knowledge and training are required; the civil servant is promoted according to a regulated system. The official generally has a career until retirement. Several countries organise open competitions on a regular basis. After certain oral and/or written tests, lists of candidates' results and performance are published. The best candidates are recruited from the top of the ranking list until all posts are filled. In the interval between two competitions, vacancies are filled from the reserve lists from recruitment.

2.2. Access to the civil service

Competitions are the most widely used selection method in France, Germany, Ireland, Italy, Luxembourg, Portugal, Spain and Belgium[6].

In **France,** there are three main types of competitions organised at the level of the State civil service, the territorial civil service and the hospital civil service. The competition organised by the State civil service is an external competition, open to candidates who are not part of the civil service and who meet the minimum age and educational requirements. These competitions are organised for the purpose of recruiting personnel from outside the civil service for career access posts in a particular position. For example, to have access to a category A career, candidates must have a university degree. These competitions are organised every year by the ministry or component departments depending on the level of the vacancy.

The territorial civil service competition is an internal competition organised for the recruitment of staff already employed in the civil service who wish to move into other groups or who wish to obtain a post at a higher level. The internal competition is definitely a tool for internal promotion. It has the reputation of being more accessible than the external competition. In addition, wishing to open up the civil service to civil society, special laws have provided for a new type of entrance examination for admission to certain schools, open to persons

[5] Florentina Iuliana Weber, *The fundamental objectives of the EU vis-à-vis the directives of the world of communism until 1990,* an article published in the First Edition of the National Conference with international participation of teachers and experts on '*Justice and Management in modern society*', May 20–21, 2016, Brasov, Sitech Craiova Publishing House, 2016, p. 122.

[6] Mihai Dorel Vlad, „Public Service Management in Some States Members of the European Union", *Scientia Moralitas International Journal of Multidisciplinary Research*, Vol. 6, No. 2, 2021, p. 67-77, DOI: 10.5281/zenodo.5804954.

who can demonstrate their ability to work in the private sector or to serve as an elected member of a local or regional authority assembly. Competition within the civil service of the state or hospital civil service gives the right to a job and the status of civil servants. On the other hand, the competition within the territorial civil service does not give the right to a job. It only gives you the opportunity to apply for positions offered by the local administration. Two years after the competition, the candidate loses the right to apply for vacant positions in the public administration.

In Greece, recognition is carried out on a competitive basis, possibly using priority lists established on the basis of objective criteria laid down by law. The management of the system is entrusted to a central and independent administrative authority, the Staff Selection Committee. Competitive recruitment applies to administrators. The Staff Selection Committee constitutes a central selection board which allocates vacant posts; this board may be assisted by decentralised selection boards. The marks obtained in the competition may be increased on the basis of social, regional or merit criteria. Candidates are appointed on the basis of their final marks and their desire for the posts they have applied for. Priority lists are drawn up on the basis of merit criteria or social circumstances. Directors are recruited through a competitive examination at the National School of Public Administration, which is open to university professors, graduates in technical fields or civil servants in the public service. This training entitles the holder to a grade and four additional pay scales.

In Ireland, organised by the Civil Service Commission for posts below middle management level in the general administrative structure. For some levels a higher level of knowledge is required and the competition generally consists of written tests and an interview. Candidates are called for the post as and when it becomes vacant and according to the ranking established after the competition. All below-medium level posts are not awarded by open competition. Nearly 50% of the posts at the lower level are filled internally through promotions. Intellectual and technical posts – sometimes up to a higher level – are equally awarded by open competition. Contrary to what happens in France, no reserve list is kept in order to be able to re-recruit old candidates in case additional posts are required.

Italy has abolished the system of job classification levels previously used in the civil service and introduced a new system with nine levels of civil servant competencies and two levels of senior management. Candidates must take part in a competition for all posts above the fourth level. In Italy, there are different types of competition. For the lower levels, the exam consists of two tests, one written and one oral, which allow for the establishment of shortlists as in France. The main aim is to recruit the best candidates and then keep a reserve list. Higher-level posts requiring a high level of training can sometimes be filled by an assessment of abilities alone or a combination of these two selection methods. Capability assessment consists of a comparison of qualifications obtained in the required

course of schooling and, possibly, an assessment of previous work and professional experience. There is a special competition for posts which begin with a pedagogical training with an examination for the probationary official.

In **Luxembourg,** the competitive examination is the most widely used method for selecting those who will be admitted to begin their training and probationary period, which is also a prerequisite for the National School of Administration.

Portugal also organises internal and external competitions. Staff are selected on the basis of test results, except for high-level posts.

In **Spain,** there are three types of competitions. The general method of recruitment is *oposcion,* a written competition. *Concurso - oposcion* is a combination of tests consisting of a test of abilities through the evaluation of diplomas. A stand-alone competition is used only in exceptional cases.

Austria and Germany do not organise competitions like those described above, but they have different access criteria. In **Austria,** the law on the advertisement of vacancies distinguishes four admission procedures: aptitude tests, accelerated procedures, interviews and evaluation of candidates. An independent committee formulates a specialised case on which the decision-making process is based. In consultation with the other ministries, the Department of Human Resources Development and the Federal Ministry of Finance develop appropriate tests and help the recruitment services to develop recruitment procedures, objectives and improvements. The criteria that must be met to fill a vacancy are notified publicly and in a precise manner so that interested persons can apply and be admitted to the recruitment competition.

In Germany, the basic criteria for a career of a certain level are laid down by law. The other criteria are set by the Bund or by the Länder and departments, depending on the specific requirements of the publicly advertised vacancies (*Stellenausscreibung*). Selection criteria are skills, knowledge and previous experience. German selection methods are considerably decentralised. One group includes Member States that do not apply to the career system. Throughout the reforms, Member States in this group have moved to open recruitment. The essential principle is that officials are recruited for a specific post rather than for a specific career. To be recruited, candidates must meet the conditions set by the relevant department and/or agency. In this case, the specific skills required for a post are more important than a diploma required for a specific career, as is the case in countries applying the career system. The important difference with other groups is that in this case there are not universally applicable formal procedures. In fact, selection methods are comparable to those in the private sector. The law specifies training criteria only for certain positions with a high level of responsibility or for civil service positions exercised under a career system.

In Denmark and the Netherlands, the department and/or agency concerned shall provide a specific job description and shall allege the selection meth-

ods applicable according to the importance of the post and the tasks to be performed.

In the **Netherlands,** recruitment is often carried out through assessments. The first step in the recruitment procedure is to implement the selection process within your own organisation.

In **Sweden,** selection criteria are stipulated by the Constitution and the Civil Service Employment Act. Within this framework, staff are recruited in the same way as in the private sector. Different selection methods are generally applied in interviews.

In **Finland,** recruitment decisions are often based on the assessment of external consultants, and administrations organise complementary interviews.

2.2.1. Accessibility of published information

In Austria, the federal ministry has implemented a central information counter on vacancies in the civil service. It serves for the exchange of information on federal staff who wish to exchange positions. At the same time, the Civil Service Job Exchange, a joint website to support all ministries in their recruitment efforts – www.jobboerse.gv.at – has been set up and allows candidates to apply directly online.

In Finland and Sweden, a there is no single, agreed method for informing interested staff. The advertisement must be made by means adopted at vacancy levels. The relevant department and/or agency is free to choose the method it will apply, but it must ensure that as many qualified persons as possible are informed of the posts and receive sufficient information to make a notable application.

In other Member States, the advertisement must be published at least in the Official Journal and inserted in the job advertisements section of newspapers and specialised magazines.

In Greece, the public notice, which until recently only summarised the applicable conditions, is now much more detailed.

In France, a provisional calendar is published in December of the previous year to inform the public about upcoming competitions. The definitive dates are published in the Official Journal. We can also be informed by Minitel or through the services of the Ministry of the Civil Service.

In **Germany,** posts accessible only through internal promotion is advertised publicly within administrations.

In **France,** these vacancies are not the subject of a public notice, but of reforms planned to make the process more transparent.

In **Belgium,** the Official Gazette in which a short description of vacancies appears is called the Belgian Monitor. The list of vacancies notices clearly describing the type of post is updated via the SELOR website, the Belgian selection and guidance body for all federal, regional and community civil service posts.

2.2.2. Qualifications and conditions for access to the civil service

In all Member States, specific conditions stem from the skills required to enter the civil service as a civil servant. Some Member States require certain diplomas or a specific educational background for the different levels of employment. Among other things, the requirements cover **language skills, knowledge of civil rights, military obligations, age limit.** In some Member States, knowledge of the language of the employing state is a legal imperative. However, it is, in fact, required to enable the official to perform his/her duties.

In **Austria,** language requirements require sufficient knowledge of German.

In **Belgium, the** language criteria to be met for civil service posts must be designed in accordance with the general legislation on the use of foreign languages. Language knowledge is tested using computer-based methods. The ATLAS program tests all aspects of language skills and the test can be completed by an oral or written examination.

Finland has two official administrative languages, Finnish and Swedish. Applicants for posts requiring a university degree should generally have a good knowledge of both languages. In departments and agencies located in unilingual districts, candidates must have a command of the official language and demonstrate an understanding of other languages.

In **Greece,** knowledge of certain languages is required for certain positions, especially in the scientific field.

In **Ireland,** there is no language requirement for a civil service post, except where knowledge of Welsh is required.

Luxembourg also has official languages which must be mastered. In exceptional cases, only one of these languages is sufficient.

For posts requiring participation in the exercise of public authority, Member States may impose a **nationality criterion.**

Almost all Member States set minimum and maximum **age limits** for access to the civil service, except the Netherlands, Sweden and Ireland. In Belgium, the maximum age limit is generally 60, but ministries may set minimum age limits for access to competition or different maximum age limits for certain posts.

In Austria, Denmark, Finland, Germany, Italy, Portugal and Spain, the minimum age is eighteen years, with certain exceptions. In Luxembourg there are different minimum age criteria for each competition for the upper career, the age limit is 25 years as opposed to 21 for the middle career and 19 years for the lower career. In Denmark, this minimum age criterion is 20 years for direct access to the civil service without a probation and training period. In Austria, the maximum age is 40, there is no maximum age limit in Denmark and Finland, it is 41 and 46 in Italy, depending on the candidate's family situation, and 40 in Luxembourg. In Germany, in principle, there is no age limit, except for the preparatory services where it is set at 30. In Sweden, the law or regulations may stipulate minimum

age requirements. In France, for a category A competition, the age limit varies between 27 and 45.

An applicant may already have some **work experience** in the public or private sector in the Member State where he/she is applying or in other Member States. Thus, three cases arise where it is important to know whether this practical experience is taken into account. Previous professional experience may have a favourable influence on the recruitment decision, seniority grading and eligibility for promotion. In all Member States, some professional experience is one of the criteria for selecting staff, even if this experience is likely to enhance the applicant's ability to meet the requirements of the post. In Portugal, the Netherlands and Sweden, professional experience is a much more important factor as no minimum training requirement is set for a certain level.

This applies to recruitment procedures relating to career access posts, and to recruitment throughout the recruitment process. In Portugal, teaching practical experience is a condition for recruitment. In Austria a required experience in the civil service in another Member State may be a specific recruitment criterion for a particular post. Periods of employment in the private sector are recognised and are increasingly limited by law. In Germany the length of service in another Member State may be taken into account in determining the initial grade, with the approval of the Federal Committee on Personnel Matters or the Land Committee on Personnel Matters. The period of employment in the private sector is not taken into account. In the current debate on the reform of civil service structures in Germany, it is proposed to recognise professional experience in all Member States and EFTA. In Italy and Spain, previous periods of employment are evaluated during the capability assessment procedures. In Greece, the administration may take into account candidates' professional experience in certain specialisations. In Luxembourg, half of the time spent outside the civil service is added to seniority.

2.2.3. Career development

Career development means vertical promotion, salary progression and horizontal geographical mobility.

As far as internal promotion is concerned, Member States can be divided into two groups, depending on how they practise the career system or the system of different structural features. Member states belonging to the first group have well-defined promotion systems in place in which the official is promoted on the basis of fixed conditions and regular salary increases. In this system, career development is dealt with extensively. In Finland, the Netherlands and Sweden, which have a system with structurally different characteristics, career advancement are not organised according to a fixed system.

In Austria, there are nine pay groups with seven groups each. In the em-

ployment category system, there is a possibility of promotion within the categories from one level to the next higher level after a waiting period and according to performance. In the promotion system, which is applied in parallel, advancement from one grade to another occurs only once every two years.

In Belgium, there are five levels of employment involving 13 ranks. Promotion is by advancement, either from one rank to the next higher rank at the same level, or from one level to the next higher level. Career advancement by promotion to a higher level is possible only by means of entrance examinations. Promotion in grade is conditional on passing the examination. In France, promotion is governed by the general and special statutes of the civil service. Promotion is based on seniority but also on merit. Officials seeking promotion must take part in a competition or an internal selection procedure. Among other things, promotion from a higher level or grade may be based on results, seniority or performance.

In Germany, posts for promotion are generally advertised internally. Promotion is granted on the basis of job performance and available budget posts. The official is always promoted to the next higher career grade, which comprises an access grade, a promotion grade and a higher grade. In general, the official remains in one of the four categories – Einfacher, Mittlerer, Gehobener or Höherer Dienst – but there is also the possibility of moving up to a career in the higher categories.

This requires officials to follow a specific additional course or training and participate in a regulated promotion procedure.[7]

In Greece, advancement to a higher grade depends on performance, seniority conditions and the civil servant's evaluation. The decision is taken by a ministerial commission. This committee selects the junior managers and heads of directorates. A special ministerial commission chooses heads of directorates general from among university candidates who already have experience as heads of directorates.

There is no regulated promotion system in Ireland, but seniority is one of the criteria taken into account. In terms of promotion within departments, it can be said that internal promotion systems vary from one department to another and that a procedure may be aimed at the direct assessment of eligible staff within departments or a formal competition to bring together groups of qualified candidates. This inter-ministerial competition is organised to ensure promotion to a certain number of posts, up to the principal level. Almost all vacancies at senior management level are advertised throughout the civil service and are filled by internal competition.

The increased influence of the European dimension is another key element. This influence is particularly noticeable in the area of European exchange

[7] Gheorghe T. Zaharia, Odette Budeanu Zaharia, Tudor I. Budeanu, Tudor Alexandru Chiuariu, *Tratat de drept administrativ român*, Ed. Junimea, Iași, 2014, p. 45.

programs for civil servants from Member States. However, it should be noted that in two of the new Member States, Austria and Finland, mobility in relation to other EU Member States and other European institutions is very rare. Moreover, EU accession is placing high demands on public administration, and other public services are playing an increasingly decisive role in the choice of operators in the economy when deciding where to locate their activities. The two contingent factors that shape the ability of staff to reconcile the public and private aspects of their work are also crucial: the degree of fiscal austerity and the space for reflective practice[8].

All major **forms of mobility** can be observed in various public functions. But often a distinction is made between voluntary and compulsory mobility. In general, mobility is encouraged for the following reasons: from the point of view of the administration, mobility is a means of increasing the flexibility of the functioning of the ministry, office or agency; from the point of view of the civil servant, mobility allows familiarisation with other working methods, the development of new skills, the broadening of horizons, professional advancement.

In terms of the various legal bases for mobility, a distinction can be made between temporary mobility and permanent transfer: in the case of temporary change, France and Germany have developed a number of instruments to promote flexibility in human resources management. In the Netherlands, various tools have been designed and implemented to promote temporary mobility. Examples are project teams, groups of officials who are assigned for a short period to special projects. These officials then return to their posts; structural collaboration with interim working agencies; cooperation agreements between ministries to exchange specially qualified or redundant staff. In terms of permanent redeployment, Ireland has developed an interesting instrument. For appointment to a higher grade, candidates are selected on a competitive basis. Grades are identical in all ministries, which allows inter-ministerial mobility.

Italy has come up with a noteworthy solution for re-staffing following restructuring. Italian civil servants have the possibility to apply at their discretion for civil service vacancies which are published on a list. These officials are transferred on the basis of a list drawn up by the host administration. In the case of officials who have been dismissed and who have not applied for a change, they are reclassified by the civil service on the basis of a list of the posts remaining despite voluntary mobility. In the Netherlands, mobility centres have been set up to help redundant staff find jobs elsewhere. In Belgium, Finland, France, Luxembourg, Spain, Spain, transfer possibilities are generally limited and often an exchange is only possible for a short period. In Finland, a staff rotation system has been introduced which allows civil servants to occupy different posts for 6 or 12 months without changing employer. More recently, Austria and Germany have

[8] Catherine Needham, Catherine Mangan, „The 21st century public servant: working at three boundaries of public and private", *Public Money & Management,* Volume 36, Issue 4, 2016, p. 265–272, https://doi.org/10.1080/09540962.2016.1162592.

started to promote the mobility of civil servants within career paths between different departments.

In France, the various forms of mobility of civil servants are seen as a tool enabling the administration to adopt its new career systems. However, transfers are mainly on request, in the interests of the civil servant. Geographical mobility can take the form of transfers, this form of mobility concerns almost 3% of civil servants each year. In terms of functional mobility, there are various possibilities: secondment, whereby an official can serve for three years in a State administration, a public institution, an institution or body providing services of general interest or an international organisation, while continuing to receive the remuneration corresponding to the previous post; secondment, whereby officials can serve in central government agencies, public institutions and public undertakings, local or regional authorities, international organisations, and private undertakings, institutions or associations providing general services. These legal entities pay their officials, but they retain their rights of advancement and promotion in their home administration.

Spain authorises transfers if the official's request is linked to a specific appraisal or competition or if it is linked to a nomination of the most senior officials. There is an involuntary transfer if the official's former post has been abolished following the restructuring. Ex-officio transfers to an international organisation or for specific tasks are carried out on a temporary basis, while permanent transfers to another department take place with the consent of the official. In Denmark, Ireland, Italy, the Netherlands and Portugal, Sweden and the United Kingdom, geographical or professional mobility with or without a change of employer is frequent and easily achievable. In this group of countries, the options for mobility are numerous[9]. The transfer from one department to another is common. In Denmark, the liberal or multilateral system of exchange has been introduced between various ministries, institutions, etc., in some cases between the public and private sectors. In Ireland, civil servants may, in terms of service regulations, be obliged to take up their posts anywhere in the country, but in practice active staff, for general grades of service, are not obliged to change their posts. At middle management level, mobility can take any form. When recruiting university trainees, civil servants with the grade of administrative officers have to move to another ministry every year for a period of three years after taking up their civil service.

In Italy, all forms of mobility are possible, either at the request of the civil servant or ex officio through the *Dipartimento della funzione pubbica.* As part of the structural reform of the civil service, the Netherlands has started to promote the mobility of civil servants. For senior posts, a change of posts and spheres of responsibility is one of the conditions for promotion. In Portugal, civil servants

[9] Ani Matei and Florin Popa, *Instruments for Promotion and Assurance of Public Integrity*, Munich Personal RePEc Archive, MPRA Paper No. 18677, posted 17 Nov 2009, https://mpra.ub.uni-muenchen.de/18677/1/MPRA_paper_18677.pdf, p. 6 et seq.

can be transferred by default, but there are many ways to take into account their interest and desire for mobility.

In Sweden, there is no stipulated decision on mobility, but in general it is widely practised according to guidelines set by the responsible departments, agencies, and job mobility is supported and encouraged by the Swedish civil service pay system, where salaries are determined on a case-by-case basis. Mobility between different segments of the labour market is desirable, which explains why work experience gained in the private sector is given as much value as that gained in the civil service.

2.3. The size of the civil service in Central and Eastern European countries

Many Eastern and Central European countries have enacted civil service laws, and others are preparing draft laws – it is widely recognised that a permanent and stable civil service is necessary for the performance of state functions. Few who draw on European cultures find this assumption challenging. At the same time, a number of complex problems arise when attempting to translate this assumption into legal provisions relating to the civil service. In these countries the main effort is to construct a new civil service by destroying old concepts.

In Eastern Europe it is now accepted that every government should have a permanent public administration to implement its policies. The public administration must be permanent in order to promote and maintain the institutional knowledge and professionalism necessary to carry out complex policies and law enforcement in modern societies. As the main component of public administration is personnel, defining the size of the civil service becomes the sore point of the problem. An important challenge is therefore to decide on the size of the civil service needed to execute government policies, exercise public authority[10] and manage public funds without promoting costly public administration.

In Latvia, the Law on State Civil Service was adopted in September 2001 and entered into force on January 1, 2001, which contains the narrow concept of the notion of civil service. Civil service is divided into two categories: general civil service and specialised civil service. The general civil service comprises those functions located within the State Chancellery, ministries and public institutions subordinated to ministries or within the administration which develop strategies or policies, coordinate sectoral activities, allocate or control financial resources, draft laws, control the implementation of legislation, issue administrative acts, draft laws, control the implementation of legislation, issue administrative acts, draft or adopt decisions concerning the rights of individuals. Specialised

[10] Ioan Alexandru, *Public Administration Treatise,* Universul Juridic Publishing House, Bucharest, 2019, p. 510.

civil service includes those functions within the Diplomatic and Consular services, police, public security, penitentiary, fire and rescue units.

In Lithuania, the Civil Service Law, adopted in July 1999, distinguishes between civil servants, civil servants with special status and public employees. Civil servants are those who in the institutions or agencies of the central and local public administration exercise the functions of public administration in accordance with the legislation. These functions relate to the executive activity, the issuing of administrative acts and the administration of public services. Civil servants are those employed in central or local institutions or agencies and provide services to the public and perform auxiliary functions.

In Poland, the Civil Service Act of December 1998 distinguishes between civil servants and officials. Civil servants are those appointed to a public office by following the procedures laid down by law. Civil servants are those employed under an employment contract based on the principles laid down by the Civil Service Act. Civil servants are in the chancellery of the Prime Minister, the offices of ministers and chairpersons of committees that are members of the Council of Ministers and offices of central government administration agencies; offices of prefects and other offices that constitute structures of local government administration agencies subordinated to ministers or central government administration; the governmental centre for strategic studies, headquarters and inspection offices and other organisational units composing structures in support of the heads of general services in prefectures, guard and inspection units and in support of the heads of regional, guard or inspection services, unless otherwise provided. The Foreign Service is regulated by another law.

In Bulgaria, the 1999 Civil Servants Act defines a civil servant as a person who holds a paid public office within the administration and to whom a special law grants a special status of civil servants obliged to comply with the provisions of this law. The Council of Ministers is responsible for adopting the National Register of Civil Servants. The law excludes from the civil service those functions which are politically appointed to the offices of dignitaries and those of a technical nature.

In Romania, the 1999 Civil Servants Act gives a broad dimension to the civil service by designating as civil servants those who are appointed to a permanent public office at central, county, municipal or communal level. Civil servants are those who perform public duties.

In Slovenia a draft civil service law has been in preparation for a long time. One of the obstacles in getting the draft approved by the government was that it proposed too broad a civil service. Work is now continuing on a new draft with a narrower civil service.

In Croatia there are four categories of civil servants employed in central and local government whose status is regulated separately by special laws. These are: (1) civil servants in state administration (ministries and other agencies), (2) local civil servants serving in central and county basic bodies, (3) civil servants

employed in centrally funded public service institutions and (4) civil servants serving in locally funded service institutions (kindergartens, schools, libraries, museums, etc.).

The status of the first category is regulated by the Civil Servants Act of 2005. The next three categories, employees of institutions financed from the local budget, are regulated by the Law on Civil Servants and Employees of Regional and Local Institutions of 2008.

3. Conclusions

The reforms within the civil service systems are in a constant state of flux, adapting to the realities of the administrative process, to the transformations brought about by the phenomena of Europeanisation and globalisation[11]. The result of these transformations is the emergence of new civil service models.

But these changes are closely linked to the political class and aim to create a positive image for it. The real changes are very difficult and require a longer period of preparation, which is closely linked to the political risk, because the decisive role belongs to culture, which has a significant influence on the functioning of public administration. Cultural norms have been formed over many decades, perhaps even centuries, in most European countries. Every attempt at reform that does not take into account historical and cultural conditioning is doomed to failure. The quality, capacity and values of civil servants are important factors influencing government administration and the government's competitive advantage[12].

There are currently two groups of countries in Europe where the situations are different. The first group is made up of countries with stable traditions of professional civil services that are relatively independent of politics. These countries are some EU Member States and other countries located in the so-called European Economic Area. The second group of countries are the former communist countries, where there are no apparent distinctions between the political party apparatus, public administration and the idea of the state as an independent reality. In recent years, it has been observed that these countries are also making efforts to create civil service systems in order to approximate to the first group of states. However, the analysis also shows that there are also commonalities between the two groups, especially with regard to the responsibilities of the state in a changing world.

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[11] Florentina Iuliana Weber, *Elemente de drept comunitar,* Ed. Paralela 45, Pitești, 2007, p. 22.

[12] Hui-Yan Zhang, Run-Tian Jing, Yu-Han Zhang, Ting Li, *Improving the civil servant training system to enhance the quality of civil servants.* Proceedings of the 2007 International Conference on public administration (ICPA 3rd), Vol. II, Edited by Xiao-Ning Zhu, Shu-Rong Zhao, 2007, pp. 928–933.

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9. Weber, Florentina Iuliana, The *fundamental objectives of the EU vis-à-vis the directives of the world of communism until 1990,* an article published in the First Edition of the National Conference with international participation of teachers and experts on '*Justice and Management in modern society*', May 20–21, 2016, Brasov, Sitech Craiova Publishing House, 2016.
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11. Zhang, Hui-Yan, Run-Tian Jing, Yu-Han Zhang & Ting Li, *Improving the civil servant training system to enhance the quality of civil servants.* Proceedings of the 2007 International Conference on public administration (ICPA 3rd), Vol. II, Edited by Xiao-Ning Zhu, Shu-Rong Zhao, 2007, pp. 928–933.

Urban Planning, Nature-Based Solutions and Local Sustainability

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Abstract

The 11th Sustainable Development Goal (SDG) summons cities to strive for sustainable development. Cities' resilience to the damaging effects of climate change must be enhanced. Urban sustainability is primarily the responsibility of local government. Nevertheless, it requires the participation of citizens, be they economic agents, workers, urban planners, or local leaders. Portuguese urban planning law already has legal instruments, namely municipal ecological structures (MES). As in other subjects, the law cannot and should not rule society without involving other areas of knowledge. Nature-based solutions (NBS) are already incorporated into legal planning instruments. Through natural processes, they contribute to counteracting the rise of urban temperatures, preserving public spaces and biodiversity, and promoting energy sustainability, thus, safeguarding public health, fighting harmful social effects such as energetic and social poverty, unemployment, and the breakdown of community ties. However, urban resilience requires networking with other urban centres. The paper will be a description of the state of the art involving three axes: urban planning, NBS, and the contribution of legal instruments to urban sustainability. To achieve this goal, the article will essentially be based on a survey of the literature and examples of NBS implementation.

Keywords: *11th SGD; urban resilience; stakeholders' participation; urban planning; municipal ecological structures; nature-based solutions.*

JEL Classification*:* K23, R14, Q24

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1. Introductory section

The 11th SDG summons cities to become humanly inclusive, safe, sustainable, and resilient. This SGD is directly related to the twofold role that cities play in climate change. On the one hand, the effects of these changes strike cities and their inhabitants in the most impressive and devastating ways. On the other

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hand, the cities' structure, their demography, building organisation, economic activities, and transport policy act as triggers for accelerating climate change. Therefore, the 13th SDG is directly involved.

The 11th SDG is subsequently substantiated in target 11.3 when it is proposed, 'By 2030, [to] enhance inclusive and sustainable urbanisation and capacity for participatory, integrated and sustainable human settlement planning and management in all countries'[2]. One of the target's indicators is 'Proportion of cities with a direct participation structure of civil society in urban planning and management that operate regularly and democratically'[3]. In other words, the vital importance of the participation of all the stakeholders in achieving the goal. This outlines two of the axes of the analysis, essentially based on a literature review: the concept of urban resilience and the importance of the participation of cities' stakeholders in urban planning. It is important to reflect on whether law, particularly urban planning law, as a branch of the law that addresses the use, transformation, and occupation of urban territory, has and/or can play a role in this endeavour. As with many other subjects, the law cannot and should not be able to regulate society's behaviour without recourse to other fields of knowledge and must therefore embrace interdisciplinarity. One of the non-legal instruments that have been used in urban planning and management are so-called nature-based solutions. Although there are already, as the literature shows, many cities that apply NBS, we present a Portuguese legal tool that could be the vehicle for a wider use of NBS in urban planning and management in Portugal: Municipal Ecological Structures (MES).

2. Urban resilience – a multidisciplinary concept

Climate change refers to the significant disturbances and alterations in climatic patterns and conditions over time primarily attributed to human activities, such as the burning of fossil fuels, deforestation, and industrial processes. These changes manifest in a variety of ways, including rising global temperatures, changing precipitation patterns, increased frequency and intensity of extreme weather events (such as heatwaves, floods, and droughts), melting ice caps and glaciers, rising sea levels, and shifts in ecosystems and biodiversity. Importantly, climate change not only affects environmental conditions directly, but also has cascading effects on socio-economic systems and human well-being.

[2] 'Make cities and human settlements inclusive, safe, resilient and sustainable,' accessed 25 May 2024, https://sdgs.un.org/goals/goal11#targets_and_indicators. 'Participation processes are widely encouraged in international conventions, such as the Local Agenda 21 Action Plan (United Nations Conference on Environment and Development, 1992), the European Landscape Convention (Council of Europe, 2000), and the EU Aarhus Convention (Stec et al., 2000).'[Hanna Fors et al., 'Striving for Inclusion-A Systematic Review of Long-Term Participation in Strategic Management of Urban Green Spaces', *Frontiers in Sustainable Cities* 3 (2021), https://doi.org/10.3389/frsc.2021.572423.]

[3] Idem.

Therefore, addressing climate change requires global cooperation and concerted efforts to reduce greenhouse gas emissions, foment the transition to renewable energy sources, conserve natural resources, and adapt to the changes already underway[4]. Considering that 'the growing body of literature' is focused 'on urban-rural temperature differences, known as the Urban Heat Island, which does not provide insight into urban heat dynamics', the authors prefer the 'understanding of urban heat dynamics rather than an urban-rural comparison'[5]. The heat island effect is one of the greatest manifestations of the growth of cities, usually due to urban activities such as industrialisation and transportation, both highly responsible for 'increasing greenhouse gas emissions caused by the anthropogenic effect'[6]. On the other hand, precipitation patterns can disrupt agricultural productivity, leading to food shortages and price fluctuations. Extreme weather events can cause physical damage to infrastructure, homes, and livelihoods, and result in loss of lives and displacement of populations. Additionally, climate change can exacerbate existing socio-economic vulnerabilities, impacting marginalised communities disproportionately and exacerbating inequalities. Moreover, climate change can amplify existing shocks and stresses, even if not directly caused by climate-related factors. For instance, they can aggravate water scarcity issues in regions already facing water stress, worsen air quality in urban areas, and heighten the spread of vector-borne diseases in regions where they are already endemic.

In short, the impact of climate change is multifaceted and encompasses a wide range of environmental, social, and economic consequences that unfold over time. It is characterised by disruptions to natural systems and human societies, as well as the potential to exacerbate existing vulnerabilities and shocks. Furthermore, urban growth, rapid urbanisation[7], and the associated climate issues, are expected to increase even more in Countries of the Global North and of

[4] Nadja Kabisch et al., 'Nature-Based Solutions to Climate Change Mitigation and Adaptation in Urban Areas: Perspectives on Indicators, Knowledge Gaps, Barriers, and Opportunities for Action', *Ecology and Society* 21, no. 2 (2016), https://doi.org/10.5751/ES-08373-210239; Pritipadmaja, Rahul Dev Garg, and Ashok K. Sharma, 'Assessing the Cooling Effect of Blue-Green Spaces: Implications for Urban Heat Island Mitigation', *Water* 15, no. 16 (18 August 2023): 2983, https://doi.org/10.3390/w15162983; Merve Ersoy Mirici, 'The Ecosystem Services and Green Infrastructure: A Systematic Review and the Gap of Economic Valuation', *Sustainability* 14, no. 1 (4 January 2022): 517, https://doi.org/10.3390/su14010517; Federica Marando et al., 'Urban Heat Island Mitigation by Green Infrastructure in European Functional Urban Areas', *Sustainable Cities and Society* 77 (February 2022), https://doi.org/10.1016/j.scs.2021.103564.

[5] Noëmie Probst et al., 'Blue Green Systems for Urban Heat Mitigation: Mechanisms, Effectiveness and Research Directions', *Blue-Green System* 4, no. 2 (1 December 2022): 348–76, https://doi.org/10.2166/bgs.2022.028.

[6] Ersoy Mirici, 'The Ecosystem Services and Green Infrastructure: A Systematic Review and the Gap of Economic Valuation'; Yijian Xu and Yanhong Kong, 'Sponge-City-Based Urban Water System Planning: A Case Study of Water Quality Sensitive New Area Development in China', *Blue-Green Systems* 3, no. 1 (January 2021): 249–66, https://doi.org/10.2166/bgs.2021.022.

[7] Qiwei Ma, Yonghua Li, and Lihua Xu, 'Identification of Green Infrastructure Networks Based on Ecosystem Services in a Rapidly Urbanising Area', *Journal of Cleaner Production* 300 (1 June

the Global South[8]. These impacts highlight the urgent need for efforts to reduce greenhouse gas emissions, as well as adaptation measures. Therefore, strengthening urban resilience is imperative, and it can be pursued through physical infrastructure and systems to address robustness and flexibility issues for facing climate change, but also social networking to build cohesion, collaboration and engagement among cities' stakeholders[9].

Urban resilience is a dynamic and multidimensional concept that requires proactive measures, strategic investments, and collective action[10]. The goal is to better prepare cities to withstand shocks, adapt to changing conditions, and thrive in the long term. Environmental sustainability, as well as adaptative planning and governance, are also interesting and fruitful tools to build urban resilience. Our goal is to reflect upon whether the use of NBS can contribute to strengthening the cities' resistance to extreme weather events[11].

3. Local government and stakeholders' participation

Although urban planning issues are generally the responsibility of local

2021): 126,945, https://doi.org/10.1016/J.JCLEPRO.2021.126945; Mahmoud Mabrouk et al., 'Assessing the Effectiveness of Nature-Based Solutions-Strengthened Urban Planning Mechanisms in Forming Flood-Resilient Cities', *Journal of Environmental Management* 344 (15 October 2023): 118,260, https://doi.org/10.1016/J.JENVMAN.2023.118260.

[8] Ersoy Mirici, 'The Ecosystem Services and Green Infrastructure: A Systematic Review and the Gap of Economic Valuation'.

[9] Edoardo Croci and Benedetta Lucchitta, eds., *Nature-Based Solutions for More Sustainable Cities* (Emerald Publishing, 2022); Javier Babi Almenar et al., 'Nexus between Nature-Based Solutions, Ecosystem Services and Urban Challenges', *Land Use Policy* 100 (January 2021), https://doi.org/10.1016/j.landusepol.2020.104898; Wito Van Oijstaeijen, Steven Van Passel, and Jan Cools, 'Urban Green Infrastructure: A Review on Valuation Toolkits from an Urban Planning Perspective', *Journal of Environmental Management* 267 (August 2020): 110,603, https://doi.org/10.1016/j.jenvman.2020.110603; Renato Monteiro, José Ferreira, and Paula Antunes, 'Green Infrastructure Planning Principles: An Integrated Literature Review', *Land* 9, no. 12 (16 December 2020): 525, https://doi.org/10.3390/land9120525.; Judy Bush and Andreanne Doyon, 'Building Urban Resilience with Nature-Based Solutions: How Can Urban Planning Contribute?', *CITIES* 95 (December 2019), https://doi.org/10.1016/j.cities.2019.102483.; Yaella Depietri and Timon McPhearson, 'Integrating the Grey, Green, and Blue in Cities: Nature-Based Solutions for Climate Change Adaptation and Risk Reduction', 2017, 91–109, https://doi.org/ 10.1007/978-3-319-56091-5_6.; Grazia Brunetta et al., *Urban Resilience for Risk and Adaptation Governance*, Resilient Cities (Springer Cham, 2019). Niki Frantzeskaki, Nadja Kabisch, and Timon McPhearson, 'Advancing Urban Environmental Governance: Understanding Theories, Practices and Processes Shaping Urban Sustainability and Resilience', *Environmental Science & Policy* 62 (1 August 2016): 1–6.

[10] Grazia Brunetta et al., *Urban Resilience for Risk and Adaptation Governance*, Resilient Cities (Springer Cham, 2019); Vanessa Assuma et al., 'Scenario Building Model to Support the Resilience Planning of Winemaking Regions: The Case of the Douro Territory (Portugal)', *Science of the Total Environment* 838 (2022), http://dx.doi.org/10.1016/j.scitotenv.2022.155889.

[11] Alessandro Arlati et al., « Stakeholder Participation in the Planning and Design of Nature-Based Solutions. Insights from CLEVER Cities Project in Hamburg,' *Sustainability* 13, no. 5 (March 2021), https://doi.org/10.3390/su13052572.

authorities, the legal systems that regulate such issues provide for citizens' participation from the beginning (at least in Portugal[12]). However, the inclusion of new concepts such as NBS requires a broader participation.

It is no longer a question whether typical legal and construction decisions prompt any comment, but rather one of including solutions that address, in a different, more holistic and environment-friendly way, a set of problems that are not, strictly by definition, typical of urban planning. Furthermore, it is increasingly a question of implementing a holistic process of continuous participation of the different stakeholders. Thus, 'Deploying NbS in urban contexts requires the cooperation [therefore, the participation] of different public and private stakeholders to manage those processes'[13].

Hanna Fors et al. propose, 'a new holistic approach comprising a cyclic process model for long-term participation in the strategic management of urban green spaces, including analysis, design, and implementation phases, each followed by an evaluation'[14]. They include all the stakeholders, even the marginalised ones, usually more prone to be affected by the social effects of climate change.

It is not only the subjective scope of participation and its procedural extent that must be reconsidered and reflected upon, but also the ways in which it is implemented. The participants are all different because of their specific role in relation to the urban planning instrument. Some are responsible for the procedure of creating and including solutions (local authorities), others use these urban planning solutions (citizens), others design them and think about how to include these solutions in order to maximise their beneficial effects, and others are responsible for monitoring its implementation. Thus, the traditional means of participation must be updated. Arlati et al. refer to 'using the existing regulatory framework concerning participatory processes and eventually stimulating the finding of novel tools towards conducting a transparent and open process of co-creation. In this context, co-creation means allowing stakeholders to collaborate in the process of solution design, implementation, and monitoring. In this sense, the co-creation of NbS is understood as a combination of various expertise from

[12] The Portuguese law establishes the principle of citizen participation in the elaboration of the MMP through public consultation, thus summoning citizens to collaborate in the definition of solutions on their city space and on the more specific requirements of the buildings they inhabit – see. Articles 6 and 89 of Decree-Law no 80/2015, 14th May. The participation is possible through a proposal to prepare a territorial plan, through public consultation or even a stakeholder hearing.

[13] Arlati et al., 'Stakeholder Participation in the Planning and Design of Nature-Based Solutions. Insights from CLEVER Cities Project in Hamburg.'; Israa Hanafi Mahmoud and Eugenio Morello, 'Co-Creation Pathways as a Catalyst for Implementing Nature-Based Solution in Urban Regeneration Strategies: Learning from CLEVER Cities Framework and Milano as Test-Bed', *Urban Information* 278 (2018): 204–10.

[14] Fors et al., « Striving for Inclusion – A Systematic Review of Long-Term Participation in Strategic Management of Urban Green Spaces ».

different scientific fields and the local knowledge of civil society representatives'[15].

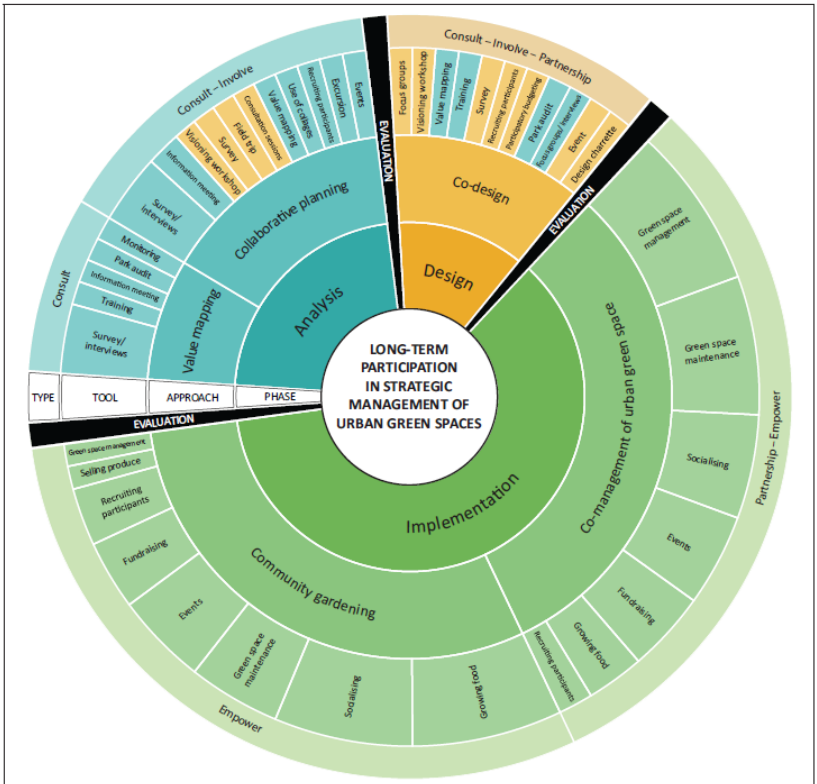

FIGURE 7 | Cyclic process model for long-term participation in the strategic management of urban green spaces (UGS). The inner ring shows the phases of participation in the strategic management of UGS. Analysis phase: turquoise slices; design phase: yellow-brown slices; implementation: green slices. An evaluation of the outcomes from the previous phase is carried out before moving to the next phase. The inner middle ring shows the participation approaches, with the outer middle ring containing the specific tools used within each approach. The outer ring shows the dominating participation type for each approach (based on **Figure 6**).

Figure 1[16]

Citizens, in general, are not used to participating in such procedures, for the following reasons: 'lack of trust in existing political decision-making structures, fear of not having any real political influence, direct exclusion from the physical or social landscape and lack of awareness among users of the possibility

[15] Arlati et al., 'Stakeholder Participation in the Planning and Design of Nature-Based Solutions. Insights from CLEVER Cities Project in Hamburg.'

[16] Fors, Hanna, Frederik Aagaard Hagemann, Asa Ode Sang and Thomas B. Randrup. 'Striving for Inclusion – A Systematic Review of Long-Term Participation in Strategic Management of Urban Green Spaces.' *Frontiers in Sustainable Cities* 3 (2021). https://doi.org/10.3389/frsc.2021.572423.

to participate'[17]. This means that the central government has a key role in disseminating and explaining NBS' public policies.

Nevertheless, participation and coordination are key for a successful implementation of NBS in urban planning.

4. Urban planning tools for fighting climate change – NBS

Given the conceptual scope of NBS, they cannot be considered an instrument, or set of instruments, restricted to the urban legal or urban planning dimension. Nevertheless, our scope is the NBS concept applicable to cities.

As can be easily understood from the literature, the concept is elusive, extensive, and encompasses solutions inspired by nature. They may be infrastructure, networks, and provide relevant ecological services. Therefore, our reflection will use the concepts of UBGI (urban blue, green infrastructure), GI (green infrastructure), and ES (ecosystem services) as more restricted concepts within the NBS concept. UBGI combine 'water management and green infrastructure to maintain natural water cycles and [enhance] environmental and urban renewal' above ground, on the ground, and/or under the ground[18]; GI focus on the green solutions, and ES are used when the perspective is a functional one. Even though there is no consensus regarding the content of the concept, the wide range of benefits – environmental, societal, and even economic ones[19] – of whatever called structure that uses natural solutions in the urban area is not disputed. Kimic

[17] Thomas J. Straka, Allan P. Marsinko, and Christopher J. Childers, 'Individual Characteristics Affecting Participation in Urban and Community Forestry Programs in South Carolina, the U.S.', *Journal of Arboriculture* 31, no. 3 (May 2005): 129–35.

[18] Kinga Kimic and Karina Ostrysz, 'Assessment of Blue and Green Infrastructure Solutions in Shaping Urban Public Spaces-Spatial and Functional, Environmental, and Social Aspects', *Sustainability* 13, no. 19 (October 2021), https://doi.org/10.3390/su131911041. Jan Kopp et al., 'Integrating Concepts of Blue-Green Infrastructure to Support Multidisciplinary Planning of Sustainable Cities', *Problemy Ekorozwoju* 16, no. 2 (2021): 137–46, https://doi.org/10.35784/pe.2021.2.14. Nafsika Drosou et al., 'Key Factors Influencing Wider Adoption of Blue-Green Infrastructure in Developing Cities', *WATER* 11, no. 6 (June 2019), https://doi.org/10.3390/w11061234.

[19] Kimic and Ostrysz, 'Assessment of Blue and Green Infrastructure Solutions in Shaping Urban Public Spaces – Spatial and Functional, Environmental, and Social Aspects.'; Mathew P. White et al., 'Blue Space, Health and Well-Being: A Narrative Overview and Synthesis of Potential Benefits', *Environmental Research* 191 (1 December 2020): 110,169, https://doi.org/10.1016/J.ENVRES.2020.110169.; Renato Monteiro, José Ferreira, and Paula Antunes, 'Green Infrastructure Planning Principles: An Integrated Literature Review', *Land* 9, no. 12 (16 December 2020): 525, https://doi.org/10.3390/land9120525. Rieke Hansen et al., 'Planning Multifunctional Green Infrastructure for Compact Cities: What Is the State of Practice?', *Ecological Indicators* 96 (January 2019): 99 – 110, https://doi.org/10.1016/j.ecolind.2017.09.042.; Stephan Pauleit et al., 'Nature-Based Solutions and Climate Change – Four Shades of Green', 2017, 29.–49, https://doi.org/10.1007/978-3-319-56091-5_3.; Christopher M. Raymond et al., 'A Framework for Assessing and Implementing the Co-Benefits of Nature-Based Solutions in Urban Areas', *Environmental Science & Policy* 77 (November 2017): 15–24, https://doi.org/10.1016/j.envsci.2017.07.008.

& Ostrysz (2021) describe 19 BGI solutions (table 1) considering their location on the surface (runoff troughs, grassed swales, infiltration trenches, vegetated swales – street-side – bioretention basins, grassed retention and infiltration basins, rain gardens, wetland ponds, surface water reservoirs, retention and infiltration of water reservoirs, water squares, permeable/pervious pavements), underground (infiltration wells, infiltration boxes, structural tree root cells, underground water reservoirs) or above the surface (blue roofs, green roofs, green walls)[20]. NBS, conceived as an umbrella concept, are a tool for enhancing urban resilience, namely within urban and adaptative planning[21]. There are already some examples of NBS regarding spatial strategy and regeneration, as Edinburgh, which has an open space strategy and uses a spatial assessment[22]. The rehabilitation and regeneration of 'vacant and derelict land' is a goal which can

[20] Kimic and Ostrysz, 'Assessment of Blue and Green Infrastructure Solutions in Shaping Urban Public Spaces – Spatial and Functional, Environmental, and Social Aspects'; Helena I. Hanson, Björn Wickenberg, and Johanna Alkan Olsson, 'Working on the Boundaries – How Does Science Use and Interpret the Nature-Based Solution Concept?', *Land Use Policy* 90 (January 2020): 104,302, https://doi.org/10.1016/j.landusepol.2019.104302.

[21] Sofia Castelo, Miguel Amado, and Filipa Ferreira, 'Challenges and Opportunities in the Use of Nature-Based Solutions for Urban Adaptation', *Sustainability* 15, no. 9 (26 April 2023): 7243, https://doi.org/10.3390/su15097243.; Peta Brom et al., 'A Decision Support Tool for Green Infrastructure Planning in the Face of Rapid Urbanization', *Land* 12, no. 2 (4 February 2023): 415, https://doi.org/10.3390/land12020415.; Javier Babi Almenar et al., 'Nexus between Nature-Based Solutions, Ecosystem Services and Urban Challenges', *Land Use Policy* 100 (January 2021), https://doi.org/10.1016/j.landusepol.2020.104898. Judit Boros and Israa Mahmoud, 'Urban Design and the Role of Placemaking in Mainstreaming Nature-Based Solutions. Learning From the Biblioteca Degli Alberi Case Study in Milan,' *Frontiers in Sustainable Cities* 3 (2021), https://doi.org/10.3389/frsc.2021.635610; Judy Bush and Andreanne Doyon, 'Building Urban Resilience with Nature-Based Solutions: How Can Urban Planning Contribute?', *Cities* 95 (December 2019), https://doi.org/10.1016/j.cities.2019.102483; Hade Dorst et al., 'Urban Greening through Nature-Based Solutions – Key Characteristics of an Emerging Concept', *Sustainable Cities and Society* 49 (August 2019): 101,620, https://doi.org/10.1016/j.scs.2019.101620. Pauleit et al., « Nature-Based Solutions and Climate Change – Four Shades of Green » ; E. Cohen-Shacham et al., eds., *Nature-Based Solutions to Address Global Societal Challenges* (IUCN International Union for Conservation of Nature, 2016), https://doi.org/10.2305/IUCN.CH.2016.13.en. Nadja Kabisch et al., 'Nature-Based Solutions to Climate Change Mitigation and Adaptation in Urban Areas: Perspectives on Indicators, Knowledge Gaps, Barriers, and Opportunities for Action', *Ecology and Society* 21, no. 2 (2016), https://doi.org/10.5751/ES-08373-210239.

[22] Rieke Hansen et al., 'Planning Multifunctional Green Infrastructure for Compact Cities: What Is the State of Practice?', *Ecological Indicators* 96 (January 2019): 99–110, https://doi.org/10.1016/j.ecolind.2017.09.042.

also be found in cities such as Chongqing, China[23]; Seoul, South Korea[24]; Brescia, Italy[25]; Milan[26]; subtropical Asian cities[27]; Malmö, Sweden[28]; Hamburg, Germany[29]; and Melbourne, Australia[30]. Milan also uses urban gardens – the Gardens of Porta Nuova – , as Barcelona[31]. On the other hand, Melbourne also uses urban forests: the whole process was collaborative and involved both public bodies and private actors: 'the strategy's focus included urban trees and tree cover, vegetation and greening, the urban forest, biodiversity, and nature[32]. In the building dimension, we can find several examples of the use of green roofs and living walls[33].

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[28] Johanna Alkan Olsson et al., 'A Just Urban Ecosystem Service Governance at the Neighbourhood Level-Perspectives from Sofielund, Malmo, Sweden', *Environmental Science & Policy* 112 (October 2020): 305–13, https://doi.org/10.1016/j.envsci.2020.06.025.

[29] Bernhard Scharf et al., 'NBS Impact Evaluation with Greenpass Methodology Shown by the Case Study 'Fischbeker Hofe' in Hamburg/Germany', *Sustainability* 13, no. 16 (August 2021), https://doi.org/10.3390/su13169167.

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[31] Johannes Langemeyer et al., 'Stewardship of Urban Ecosystem Services: Understanding the Value(s) of Urban Gardens in Barcelona', *Landscape and Urban Planning* 170 (February 2018): 79–89, https://doi.org/10.1016/j.landurbplan.2017.09.013.

[32] Niki Frantzeskaki and Judy Bush, 'Governance of Nature-Based Solutions through Intermediaries for Urban Transitions-A Case Study from Melbourne, Australia', *Urban Forestry & Urban Greening* 64 (September 2021), https://doi.org/10.1016/j.ufug.2021.127262.

[33] https://www.greenroofs.pt/en/projects.

Although NBS implementation faces some challenges[34], there is a consensus as to their usefulness for building sustainable cities[35]. We will consider all the urban spatial dimensions of the public space (such as streets, parks, gardens). Public and private buildings are very relevant due to their impermeable surfaces, which intensify the hazards of some climate effects. The literature converges on the range of benefits that cities can reap if they choose to include solutions of this type in urban planning. When elaborating the set of principles related to planning for the integration of green infrastructure, Monteiro R., Ferreira JC, and Antunes P. (2020) indicate the principle of multifunctionality as one of the fundamental principles and one of the three principles most mentioned in literature and in the European and international framework[36]. This feature can be very useful when combined with the urban planning functions.

Besides reducing the impacts of climate change in urban environments, such as the heat-island effect, 'Stormwater regulation, flood protection, microclimate regulation, improved water quality and air circulation'[37], NBS can promote other, less attainable, effects: urban well-being, environmental protection,

[34] Nadja Kabisch, Niki Frantzeskaki, and Rieke Hansen, 'Principles for Urban Nature-Based Solutions', *Ambio* 51, no. 6 (June 2022): 1388 – 1401, https://doi.org/10.1007/s13280-021-01685-w; John Deely et al., 'Barrier Identification Framework for the Implementation of Blue and Green Infrastructures', *Land Use Policy* 99 (December 2020), https://doi.org/10.1016/j.landusepol.2020.105108; Shahryar Sarabi et al., 'Uptake and Implementation of Nature-Based Solutions: An Analysis of Barriers Using Interpretive Structural Modeling', *Journal of Environmental Management* 270 (September 2020), https://doi.org/10.1016/j.jenvman.2020.110749; M. Wihlborg, J. Sorensen, and J. Alkan Olsson, 'Assessment of Barriers and Drivers for Implementation of Blue-Green Solutions in Swedish Municipalities', *Journal of Environmental Management* 233 (March 2019): 706–18, https://doi.org/10.1016/j.jenvman.2018.12.018.

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[36] Monteiro, Ferreira, and Antunes, 'Green Infrastructure Planning Principles: An Integrated Literature Review', 16 December 2020. Rieke Hansen et al., 'Planning Multifunctional Green Infrastructure for Compact Cities: What Is the State of Practice?', *Ecological Indicators* 96 (January 2019): 99–110, https://doi.org/10.1016/j.ecolind.2017.09.042.; Claudia de Luca et al., 'Nature-Based Solutions and Sustainable Urban Planning in the European Environmental Policy Framework: Analysis of the State of the Art and Recommendations for Future Development', *Sustainability* 13, no. 9 (May 2021), https://doi.org/10.3390/su13095021.

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recreation, connectivity between urban and rural areas, and social inclusion[38]. That is, they can reduce urban vulnerabilities and 'counteract [t] the negative effects of climate change', particularly when combining BGI and ES[39]. This is why many authors emphasise the various functions associated with this type of solution: provision, support, regulation ('carbon sequestration, erosion prevention or pest control') and cultural functions[40]. There are several studies that support and recognise the effect of this kind of solution, namely GI, on temperature. Therefore, the implementation of microclimates in cities, through green roofs and walls, urban forests and trees, geographically adapted, are considered to be major advantages. Marando et al. conclude that 'trees significantly reduce UHI, with an impact that is dependent on the extent of green areas and the amount of transpiration inside a city. In particular, it has been observed that a tree cover of at least 16% is required in order to achieve a reduction of average summer temperature equal to 1◦C. Stakeholders and city administrators can take advantage of the cooling indicator in order to better foresee temperature mitigation strategies in cities in view of a sustainable and effective planning'[41]. A last concern is equal access to NBS for all urban actors[42].

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[38] Monteiro, Ferreira, and Antunes, 'Green Infrastructure Planning Principles: An Integrated Literature Review', 16 December 2020. Renato Monteiro and Jose Carlos Ferreira, 'Green Infrastructure Planning as a Climate Change and Risk Adaptation Tool in Coastal Urban Areas', *Journal of Coastal Research*, no. 95 (2020): 889–93, https://doi.org/10.2112/SI95-173.1.; Giacomo Fedele et al., 'Reducing Risks by Transforming Landscapes: Cross-Scale Effects of Land-Use Changes on Ecosystem Services', *Plos One* 13, no. 4 (24 April 2018): e0195895, https://doi.org/10.1371/journal.pone.0195895. Raffaele Lafortezza et al., 'Nature-Based Solutions for Resilient Landscapes and Cities', *Environmental Research* 165 (August 2018): 431–41, https://doi.org/10.1016/j.envres.2017.11.038.; Raymond et al., 'A Framework for Assessing and Implementing the Co-Benefits of Nature-Based Solutions in Urban Areas'. Christine Haaland and Cecil Konijnendijk Van den Bosch, 'Challenges and Strategies for Urban Green-Space Planning in Cities Undergoing Densification: A Review', *Urban Forestry & Urban Greening* 14, no. 4 (2015): 760–71, https://doi.org/10.1016/j.ufug.2015.07.009.

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[42] Steffen Lehmann, 'Growing Biodiverse Urban Futures: Renaturalization and Rewilding as Strategies to Strengthen Urban Resilience', *Sustainability* 13, no. 5 (March 2021), https://doi.org/10.3390/su13052932. Lena Simperler et al., 'Identification and Pre-Assessment of Former Watercourses to Support Urban Stormwater Management', *Sustainability* 12, no. 14 (July 2020), https://doi.org/

The first challenge faced by NBS is raising the awareness of spatial planners, public bodies, and developers to join green and blue solutions, namely, to incorporate infrastructure based on natural solutions in models traditionally thought for grey structures[43].

This incorporation and combination of different structures may not be technically easy in the dimensions of construction, development and maintenance, and they always imply a cost-benefit study demonstrating their immediate economic viability (in addition to that in the long term)[44]. This requirement is not new in law and urban planning, though. It should be recalled that in Portugal, as regards external administrative regulations, as is the case of Municipal Master Plans (at the most important urban level), the law obliges the elaboration of such a study, even without considering these BGI. It seems, however, that such a study applied to BGI faces added difficulties, given the absence of data and monitoring reports, the challenges associated with measuring environmental externalities in economic terms and budget difficulties[45]. Other methodologies not usual in the legal field refers to the need to implement NBS' assessment through tools such as LCC, evaluation, and monitoring of the applied solutions[46]. In essence, it is proposed that urban planning law should also embrace the perspective of sustainability in planning through a holistic approach[47].

10.3390/su12145660.

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[47] M. G. Hutchins et al., 'Why Scale Is Vital to Plan Optimal Nature-Based Solutions for Resilient Cities', *Environmental Research Letters* 16, no. 4 (April 2021), https://doi.org/10.1088/1748-932

5. Municipal ecological structures (MES) – the Portuguese case

Portugal's legal order already has a tool where NBS can be enshrined – the above-mentioned MES[48]. Ecological structures (EE) are one of the territorial resources that must be included in municipal plans. EE is one of the public interests to be considered when drawing up planning instruments, particularly those that are directly binding on private individuals, as well as public bodies. They are now regulated in much the same way as before, albeit with the nomenclature adaptations that have taken place, in the meantime, and the issue of 'the risk of environmental imbalances' has been emphasised. The classification of land continues to be relevant (into urban and rural, and the classification of developable land has ended). The classification of land implies the ecological weighting of both urban and rural land.

Each Municipality in Portugal has a MES, and we can find several examples of NBS such as green corridors, building prohibitions, such as prohibition of construction in flood areas, and so on.

From the Portuguese 16 municipal plans consulted, it was possible to draw a set of relevant conclusions for urban planning:

a) there are different concerns depending on whether the municipality is coastal or inland;

b) inland municipalities (but not exclusively, e.g. Aveiro) have concerns about agriculture (Braga, Santarém);

c) almost all municipalities possess a municipal ecological structure, which normally includes green spaces of various features (Aveiro, Beja, Braga, Évora, Leiria, Lisbon, Portalegre, Porto, Setúbal, Viana do Castelo, Vila Real);

d) NBS related to urban planning are parks, gardens, gardened areas, green corridors; forests (Aveiro and Viana do Castelo);

e) articulation with other planning levels, namely the REN and RAN, is present in many MMP;

f) there are incentives for compliance with ecological goals in the arrangement of economic activities (Coimbra) and financial incentives (fund for environmental and urban sustainability – Oporto);

g) all PDMs establish prohibitions and limitations on building in green areas;

6/abd9f4.; Marcelo Enrique Conti et al., 'Fostering Sustainable Cities through Resilience Thinking: The Role of Nature-Based Solutions (NBSs): Lessons Learned from Two Italian Case Studies', *Sustainability* 13, no. 22 (November 2021), https://doi.org/10.3390/su132212875. Niki Frantzeskaki, 'Seven Lessons for Planning Nature-Based Solutions in Cities', *Environmental Science & Policy* 93 (March 2019): 101–11, https://doi.org/10.1016/j.envsci.2018.12.033.; Thomas Campagnaro et al., 'Indicators for the Planning and Management of Urban Green Spaces: A Focus on Public Areas in Padua, Italy', *Sustainability* 11, no. 24 (December 2019), https://doi.org/10.3390/su11247071.

[48] For a larger explanation of the tool, see Raquel Carvalho, 'Planeamento urbanístico e o impacto das estruturas ecológicas municipais no *ius aedificandi*', *Julgar*, 52, 2023, p. 182 and ff.

h) there are PDMs, such as Setubal's, that already use the concepts of ecosystem services referring to climate regulation, air and water quality regulation; noise reduction; food production; recreation and leisure; landscape value; application of circular economy principles to promote environmental efficiency, and enshrining the principle (and actions) of climate change adaptation and mitigation;

i) green and ecological solutions, including the limitations on building areas, are mandatory.

6. Conclusion

This paper intended to conclude whether urban planning and managing law could be of service to mitigate the adverse effects of climate changes in the cities through the use of NBS as an ecological friendly tool to be joined with other instruments to tackle climate change. Although this concept can be elusive, the multiple solutions already implemented in many cities, different in size, geographical location, and climate circumstances, have led to the conclusion that the introduction and use of NBS is very beneficial. As is proper for urban planning, considering its diversity as a result of the different territories to which it relates to, one of the main conclusions to be drawn is that NBS must be tailored-made. Therefore, it is difficult to establish a single methodology for all cities. Firstly, it is necessary to characterise the specific type of city, its biophysical, demographic and socio-economic features, and the area of land occupied by construction, as well as to identify the main climate change effects to be mitigated or resolved. Then, based on this characterisation and identification, and in the light of the many NBS that have been put into action, it is necessary to identify those that could help make the city more climate-resilient. Their inclusion in planning instruments will always require the broad participation of all stakeholders and a previous determination of the existing urban planning instruments. Both international and national experiences represent the *animus* to go deeper in NBS implementation through urban law, mainly within building regulations. Portugal already has an urban tool, which is mandatory in MMP, that already includes some NBS – yet it can be further explored to deepen the inclusion of NBS. We can also conclude that these tools are particularly adequate to pursue the SGD goals: not only the 13th, on Climate Change, but also the 11th, on resilient cities.

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