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(editors)

Looking for New Paths in Comparative and International Law



ADJURIS 
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**Looking for New Paths in Comparative and
International Law**

Editors:



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Publications

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Publications

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Dalvinder Singh (ed.)

Cristina Elena Popa Tache (ed.)

Cătălin-Silviu Săraru (ed.)

Looking for New Paths in Comparative and International Law

Contributions to
the Conference on Comparative and International Law
International Conference
June 25, 2021, Bucharest

ADJURIS 
International Academic Publisher

Bucharest, Paris, Calgary 2021

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ADJURIS – International Academic Publisher is included among publishers recognized by **Clarivate Analytics (Thomson Reuters)**.

ISBN 978-606-95351-0-3 (E-Book)

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Editing format .pdf Acrobat Reader

Bucharest, Paris, Calgary 2021

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Preface

Editors

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Researcher Cristina Elena Popa Tache, Institute of Legal Research of
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Associate profesor Cătălin-Silviu Săraru, Bucharest University of
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This volume contains the scientific papers presented at *the Conference on Comparative and International Law* that was held on 25 June 2021 online on Zoom. The conference is organized by the Society of Juridical and Administrative Sciences together with the Faculty of Law of the Bucharest University of Economic Studies. More information about the conference can be found on the official website: www.comparativelawconference.eu.

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

- *Inspirational analyzes in comparative law.* The papers in this chapter refer to: the four main constitutional gaps regarding the presidential veto in North Macedonia and their filling in the light of comparative constitutional law; legislative election during pandemics - challenges to democracies; constitution and the institutions, the benign nexus is on fall: a comparative study of India, Nepal and Myanmar; winner prescription as a way of gaining the right of real servitude according to the legislation in Kosovo with a comparative view with some European countries; settlement of disputes in HoReCa (food and hospitality field); the inapplicability of personal exceptions between joint debtors and creditors, under Romanian and French private law; the efficiency of the legal framework in fighting domestic abuse - comparative study Romania – UK; aspects of comparative law regarding the regulation of civil procedural capacity in Romanian and Spanish law; the common Franco-German matrimonial property regime of the community of surplus; legal regime of competition in Canada; preventive action on pollution of watercourses with waste – a comparative perspective of the main international, European and national regulations.
- *Seeking the brilliance of international law.* This chapter includes papers on: compliance with the legal treatment standards of international investments during the global economic crises; space forces and the purpose of excuse for the militarization of outer space: an international crime against

peace; general issues regarding the risk of water pollution; International Criminal Court - restorative or retributive justice; the impact of the recognition and enforcement of the European confiscation order on the third parties of good faith; tourism in the European Union in the context of the Covid Pandemic crisis 19; European cooperation rather than EU integration - Iceland and the European Union.

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

We thank all contributors and partners and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in comparative and international law.

Table of Contents

INSPIRATIONAL ANALYZES IN COMPARATIVE LAW	11
Jeton SHASIVARI	
The four main constitutional gaps regarding the presidential veto in North Macedonia and their filling in the light of comparative constitutional law.....	12
Claudia GILIA	
Legislative election during pandemics. Challenges to democracies	29
Subhankar KHAN, Swargodeep SARKAR	
Constitution and the institutions, the benign nexus is on fall: a comparative study of India, Nepal and Myanmar	47
Kastriote VLAHNA, Hajredin KUÇI	
Winner prescription as a way of gaining the right of real servitude according to the legislation in Kosovo with a comparative view with some European countries	58
Laura Ramona NAE	
Settlement of disputes in HoReCa (food and hospitality field)	73
Juanita GOICOVICI	
The inapplicability of personal exceptions between joint debtors and creditors, under Romanian and French private law	85
Mihaela SAVA	
The efficiency of the legal framework in fighting domestic abuse. Comparative study Romania - UK	99
George-Bogdan IONIȚĂ	
Aspects of comparative law regarding the regulation of civil procedural capacity in Romanian and Spanish law	114
Konstantin KELLER	
The common Franco-German matrimonial property regime of the community of surplus	122

Ovidiu-Horia MAICAN Legal regime of competition in Canada	135
Cristiana MIC-SOARE, Stelian-Mihai MIC Preventive action on pollution of watercourses with waste – a comparative perspective of the main international, European and national regulations	144
SEEKING THE BRILLIANCE OF INTERNATIONAL LAW	160
Cristina Elena POPA (TACHE) Compliance with the legal treatment standards of international investments during the global economic crises. Between yes and no.....	161
Adnan JASHARI, Stefani STOJCHEVSKA, Vedije RATKOCERI Space forces and the purpose of excuse for the militarization of outer space: an international crime against peace.....	172
Lidia-Lenuța BĂLAN General issues regarding the risk of water pollution.....	189
Ioana - Celina PAȘCA International Criminal Court, restorative or retributive justice?.....	196
Elise-Nicoleta VÂLCU The impact of the recognition and enforcement of the European confiscation order on the third parties of good faith.....	206
Ioana-Nely MILITARU Tourism in the European Union in the context of the Covid-19 Pandemic crisis	219
M. Elvira MÉNDEZ-PINEDO European cooperation rather than EU integration. Iceland and the European Union.....	225

**INSPIRATIONAL ANALYZES IN
COMPARATIVE LAW**

The four main constitutional gaps regarding the presidential veto in North Macedonia and their filling in the light of comparative constitutional law

Professor **Jeton SHASIVARI**¹

Abstract

The President of North Macedonia has at his disposal a constitutional legal instrument which influences the legislative activity of the Parliament. It is about the right of veto over the laws approved by the Parliament, which temporarily suspends the adoption of laws which, according to the President of North Macedonia, are not in the interest of the state or the citizens. The Constitution of North Macedonia regulates this constitutional legal instrument within the part that refers to the Parliament, and not to the President of North Macedonia, which means that the right of veto first of all has a legislative function because it is one of the stages of the legislative procedure. It is interesting that, within the constitutional system of North Macedonia since its first President from 1991 onwards after independence from the former Yugoslav Federation, there is an unwritten rule according to which if the President of North Macedonia is close to the ruling parliamentary majority or acts as a duo with this majority, in the vast majority of cases, it does not use or very rarely uses the right of veto, and on the other hand, after the ruling parliamentary majority is changed, the duel between the new ruling parliamentary majority and the President also begins, therefore, presidential activism in the use of veto increases. This issue is very important because in the constitutional law and practice of relations between the Parliament and the President of North Macedonia there are four main constitutional gaps regarding the presidential veto, which promoted the views that without the signature of the president there are no laws otherwise such views in fact turn the weak presidential veto into a absolute veto or legislative sanction against the Parliament which is unacceptable in contemporary constitutional law. Therefore, the main purpose of this paper is through the teleological method of interpretation of constitutional norms as a whole and in close correlation with the guarantees of fundamental freedoms and rights and rule of law principle as well as through regional comparative constitutional analysis to reach an adequate and effective constitutional solution to such constitutional gaps and cases.

Keywords: *presidential veto, presidential activism, legislative procedure, promulgation of laws, publication of laws, constitutional gaps.*

JEL Classification: K10

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1. National constitutional context of the presidential veto in North Macedonia

The presidential veto in North Macedonia is regulated by the constitutional provision of Article 75 of the Constitution of North Macedonia. According to this provision, laws are promulgated by decree. The decree for the promulgation of laws is signed by the President of the Republic and the President of the Parliament. The President of the Republic may decide not to sign the decree promulgating the law. The Parliament reviews the law again and if it approves it by a majority vote of the total number of MPs, the President of the Republic is obliged to sign the decree. The President is obliged to sign the decree, if according to the Constitution, the law is approved by a two-thirds majority vote of the total number of MPs².

Analyzing this constitutional provision, although at first glance things seem clear, however, it is concluded that there are some issues that present constitutional gaps, where some of them in the constitutional system of North Macedonia are filled with the Law on the Parliament and the Rules of Procedure of the Parliament.

The following are the main four constitutional gaps: the first: within which deadline the President shall sign the decree for promulgation of the law; the second: if the President refuses to sign the decree promulgating the law then at what stage of the legislative procedure, the Parliament again reviews the law returned by the President, within which deadline and on which issues legal amendments can be submitted; the third: at the moment when the President accepts the approved text, is it a law or a law proposal; and the fourth: if the President, even though has an imperative constitutional obligation, does not sign the decree for the promulgation of the law which the Parliament has reviewed and approved again by a majority vote of the total number of MPs, can that law be published in the Official Gazette even without the signature of the President and whether such a law from a constitutional point of view, can be considered validly adopted and entered into force.

Since the Constitutional Court of North Macedonia does not assess the constitution in terms of whether or not there are constitutional gaps, as for the Constitutional Court the constitution is the highest legal act on the basis of which it assesses the accordance of lower legal acts³, the following will analyze the first three constitutional gaps that have been filled through legislative intervention by

² Article 75 of the Constitution of the Republic of North Macedonia, available online at: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nsp (accessed on June 1, 2021).

³ For more on this issue see: XIVth Congress of the Conference of European Constitutional Courts: “*Problems of Legislative Omission in Constitutional Jurisprudence*”, National Report, Skopje, October 2007, available online at: https://www.confueconstco.org/reports/rep-xiv/report_Macedonia_en.pdf (accessed on June 1, 2021).

the Law on the Parliament and the Rules of Procedure of the Parliament.

In this regard, the first constitutional gap that has been filled by the Law on the Parliament is related to the issue within which deadline the President shall sign the decree for promulgation of the law. This constitutional gap has been filled through the legal provision of Article 38 of the Law on the Parliament of 2009, which stipulates that, the President shall sign the decree for promulgation of the law within seven days of receiving it or shall within that deadline inform the President of the Parliament in a written form that the law was not promulgated⁴. In fact, this legal provision derives this seven-day deadline from the second chapter of the Constitution of North Macedonia that regulates basic freedoms and rights, specifically point 3 which refers to the guarantees of basic freedoms and rights in the constitutional provision of Article 52 which stipulates that, the laws and other regulations are published before they come into force. Laws and other regulations are published in "The Official Gazette of the Republic of North Macedonia" at most seven days after the day of their adoption. Laws come into force on the eighth day after the day of their publication at the earliest, or on the day of publication in exceptional cases determined by the Parliament⁵. On the other hand, the main purpose of this legal provision was to avoid possible constitutional crises and open political conflicts in conditions when the ruling parliamentary majority changes, as was the case in 2008 when the President of the Republic was of political provenance opposed to the ruling parliamentary majority⁶.

In comparative constitutional law, regarding the deadline for promulgation of laws by the president, there are shorter and longer deadlines, starting from three days to one month. In this regard, for instance: in Montenegro this deadline is three days according to the constitutional provision of Article 94⁷; in Hungary this deadline is five days according to the constitutional provision of Article 6⁸; in Kosovo this deadline is eight days according to the constitutional provision of Article 80⁹; in Lithuania (Article 71), Latvia (Article 69) and USA (Article 1,

⁴ Article 38 of the Law on the Parliament, "Official Gazette of the RNM", No. 104/2009 (20.8.2009), available online at: <https://www.sobranie.mk/law-on-the-assembly-of-rm.nspx> (accessed on June 1, 2021).

⁵ Article 52 of the Constitution of the Republic of North Macedonia, available online at: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx (accessed on June 1, 2021).

⁶ For more information see at: Deutsche Welle in Macedonian, *Владачкото мнозинство во отворен судир со претседателот (The ruling majority in open conflict with the president)*, 07.08.2008, available online at: <https://www.dw.com/mk> (accessed on June 2, 2021).

⁷ Article 94 of the Constitution of Montenegro, available online at: <https://www.wipo.int/edocs/lexdocs/laws/en/me/me004en.pdf> (accessed on June 3, 2021).

⁸ Article 6 of the Constitution of Hungary, available online at: available online at: https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en (accessed on June 3, 2021).

⁹ Article 80 of the Constitution of Republic of Kosovo, available online at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf> (accessed on June 3, 2021).

Section 7) this deadline is ten days¹⁰; in Russia this deadline is fourteen days according to the constitutional provision of Article 107¹¹; in Serbia (Article 113), Bulgaria (Article 88), Ukraine (Article 94), the Czech Republic (Article 50) and France (Article 10) this deadline is fifteen days¹²; in Albania (Article 84) and Romania (Article 77) this deadline is twenty days¹³; in Italy (Article 73) and Greece (Article 42) this deadline is one month¹⁴.

The main purpose of this deadline of seven days is to give to the President of North Macedonia a reasonable and adequate time to declare his will regarding the signing of the decree for promulgation of the law but not to serve as a mechanism for sabotaging the work of the Parliament as a representative body of citizens and holder of legislative power through the possibility for the President to freeze the law for a long period of time in order the law to be forgotten, because such a thing is contrary to the very essence and the purpose of the presidential veto, on the basis of which, the president can challenge the law but, can not prevent its entry into force if the Parliament after the veto from the President approves the law again with the necessary majority. This is so because, presidential veto means the right of the president, within the prescribed deadline, to return the law, once adopted by the parliament, for reconsideration and adoption when it deems it unconstitutional or inexpedient, but on the condition that it cannot prevent the law from entering into force, if the parliament approves it again by the required majority prescribed by the constitution¹⁵.

¹⁰ Article 71 of the Constitution of Lithuania, available online at: <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf>; Article 71 of the Constitution of Latvia, available online at: <https://likumi.lv/ta/en/en/id/57980>; Article 1, Section 7 of the Constitution of USA, available online at: https://www.senate.gov/civics/constitution_item/constitution.htm (accessed on June 3, 2021).

¹¹ Article 107 of the Constitution of Russia, available online at: <http://www.constitution.ru/en/10003000-06.htm> (accessed on June 3, 2021).

¹² Article 113 of the Constitution of Republic of Serbia, available online at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/74694/119555/F838981147/SRB74694%20Eng.pdf>; Article 88 of the Constitution of Republic of Bulgaria, available online at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/26650/72971/F7039954/BGR26650%20En%202007.pdf>; Article 94 of the Constitution of Ukraine, available online at: <https://rm.coe.int/constitution-of-ukraine/168071f58b>; Article 50 of the Constitution of Czech Republic, available online at: https://www.constituteproject.org/constitution/Czech_Republic_2002.pdf; Article 10 of the Constitution of France, available online at: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en (accessed on June 4, 2021).

¹³ Article 84 of the Constitution of Republic of Albania, available online at: https://www.constituteproject.org/constitution/Albania_2012.pdf?lang=en; Article 77 of the Constitution of Romania, available online at: <https://www.wipo.int/edocs/lexdocs/laws/en/ro/ro021en.pdf> (accessed on June 4, 2021).

¹⁴ Article 73 of the Constitution of Republic of Italy, available online at: <https://www.wipo.int/edocs/lexdocs/laws/en/it/it037en.pdf>; Article 42 of the Constitution of Greece, available online at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (accessed on June 4, 2021).

¹⁵ See more in Darko Simovic, Vladan Petrov, *Constitutional Law*, Belgrade, 2018, p. 250.

This is especially important because in North Macedonia there are opinions according to which, no other second deadline is prescribed within which the President of the Republic is obliged to sign the decree for promulgation of the law after the Parliament reviews the law again and approves it by a majority vote of the total number of MPs¹⁶. In relation to this issue, in order to prevent the personal power of the President as well as the blocking of changes by the new ruling parliamentary majority, in my opinion that other second deadline by analogy as an interpretive tool for filling legal gaps should be the same as the first deadline, namely seven days determined by the Law on the Parliament of 2009, as a general legal deadline for the promulgation of laws in North Macedonia. This solution regarding the second deadline derives from the context of the constitutional provisions of articles 75 and 52 of the Constitution of North Macedonia and the legal provision of Article 38 of the Law on the Parliament, because the first seven day deadline means the deadline within which the President does or does not promulgate the law, which, in fact, implies the use or non-use of the presidential veto, meanwhile, in the second seven day deadline, if the Parliament has reviewed and approved again the law by a majority vote of the total number of MPs, then the President is obliged within this deadline of seven days to promulgate the law because he has no constitutional right to veto the law for the second time. This issue is very important, because the absence of this general deadline of seven days, in fact, inaugurates the right of pocket veto which in fact means absolute veto, a right that the constitution does not recognize to the President of North Macedonia. A pocket veto is possible only when it is explicitly provided for in the constitutional text and as such is present in its pure form only in the United States. The pocket veto means the situation in which the US President is sent for promulgation the voted bill at the moment when there are less than ten days left until the end of the Congress session. Thus, the President can leave this bill in his pocket and it will never become law, because according to the US Constitution, if any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law¹⁷. In this regard, the essential difference should also be underlined, which consists in the fact that the US Congress works in certain sessions while, the Parliament of North Macedonia is in a

¹⁶ See more in: Vladimir Mirceski, *What will be the fate of the Law on Languages? Analysis of legal options*, 20.03.2018, available online at: <https://360stepeni.mk/kakva-ke-bide-sudbinata-na-zakonot-za-j/> (accessed on June 5, 2021).

¹⁷ See more in: Article 1 Section 7 parag. 2 of the Constitution of United States available online at: https://www.senate.gov/civics/constitution_item/constitution.htm (accessed on June 3, 2021); Ljubomir Kostovski, *Pocket veto: rhetorical fabrication for legal manipulation*, Truthometer, 26.06.2018, available online at: <https://vistinomer.mk/dhebno-veto-retorichka-izmislitsa-za-pravna-manipulatsija/> (accessed on June 5, 2021).

permanent session¹⁸. For the practice and the very dynamic frequency of using the presidential veto by the US President, the fact from the US constitutional practice shows enough, according to which from 1789 until today, a total of 2.584 vetoes have been exercised, of which 1.518 regular and 1.066 pocket vetoes, while only 112 were overridden¹⁹.

In this context, it is also worth mentioning the fact that the constitutionality of filling the constitutional gap regarding the deadline within which the President of North Macedonia shall sign the decree for promulgation of the law through the legal provision of Article 38 of the Law on the Parliament was confirmed by the Constitutional Court in 2013. In this sense, in the allegations of initiating a procedure for assessing the constitutionality of Article 38 of the Law on the Parliament, it was stated that Article 38 of this Law is not in accordance with the constitutional principle of separation of power and the constitutional provisions of Articles 75 and 52 of the Constitution of North Macedonia, because the absence in Article 75 could not be compensated by a legal norm but only by amending the Constitution and due to the fact that if the President until the last moment of the seven-day deadline, just before midnight on the seventh day, will decide to sign the decree promulgating the law, the law can be published at the earliest on the eighth day from the day of enactment of the law, which will violate the constitutional provision of Article 52 of the Constitution. However, the Constitutional Court in this case decided not to initiate proceedings to assess the constitutionality of this legal provision. In the reasoning of its decision, the Constitutional Court finds that, between all three organs of state power (parliament, government and courts) there is relative independence and autonomy, but also control over each other, whereby, the tendencies to establish balance between the legislative and executive power, in the parliamentary system of North Macedonia it is harder to achieve, but it still works. According to the Court, the constitutional legal analysis clearly shows that after the adoption of the law, it is referred to the President to promulgate it by decree. The decree is a declarative general act by which the President promulgates the laws. The decree is a declarative act because with it the President only declares his will that promulgates the law or does not promulgate it, without entering into the legislative sphere of the Parliament. If the President decides not to sign the decree promulgating the law, the law is returned to the Parliament for reconsideration and if the Parliament adopts the law by a majority vote of the total number of MPs (absolute majority), the President is obliged to sign the decree. According to the Court, the deadline of seven days

¹⁸ See more in: Article 66 of the Constitution of Republic of North Macedonia, available online at: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx (accessed on June 5, 2021); Denis Presova, *When the "experts" will calm down: The crisis of constitutionalism in the Republic of Macedonia*, „Political Thought”, vol. 16, no. 56, Skopje, December, 2018, p. 19, available online at: <https://idscs.org.mk/wp-content/uploads/2019/07/Politicka-Misla-56-MKD.pdf> (accessed on June 5, 2021).

¹⁹ See more in: US Senate, *Summary of Bills Vetoed*, available online at: U.S. Senate: Vetoes, 1789 to Present (accessed on June 5, 2021).

provided in the legal provision of Article 38 of the Law on the Parliament, in which the President signs the decree promulgating the law, i.e. uses the presidential veto is in correlation and conditionality with Article 75 and Article 52 of the Constitution. Therefore, based on the above analysis, the Court finds that, according to the content and consistency, this legal provision of Article 38 of the Law on the Parliament does not enter into the original constitutionally determined right of veto of the President, nor does the legislator set a deadline for using the veto that would go out of constitutionally defined framework. On the contrary, the disputed legal norm as a whole absolves the constitutional right of the President to a presidential veto provided in Article 75 of the Constitution as well as the deadline within which that right can be exercised, which is provided in Article 52 of the Constitution²⁰.

At the end of this section, it is worth noting that, the second and the third constitutional gaps that has been filled by the Rules of Procedure of the Parliament are related to the issue of whether the President refuses to sign the decree promulgating the law then at what stage of the legislative procedure, Parliament again reviews the law returned by the President, within which deadline and on which issues legal amendments can be submitted as well as at the moment when the President accepts the approved text, is it a law or a law proposal. The Rules of Procedure of the Parliament of 2013 in the provision of Article 173 fills these two constitutional gaps, and according to this provision, if the President of the Republic decides not to sign the decree for promulgation of the law, the Parliament shall again review the law proposal in a third reading, within 30 days from the day of the adoption of the law. In the renewed discussion of the law, amendments may be submitted only in relation to the remarks by the President of the Republic²¹.

2. Regional and broader comparative constitutional context of the presidential veto

In order to analyze the fourth constitutional gap in North Macedonia that has to do with the issue if the President, even though has an imperative constitutional obligation, does not sign the decree for the promulgation of law which the Parliament has reviewed and approved it again by a majority vote of the total number of MPs, can that law be published in the Official Gazette even without the signature of the President and whether such a law from a constitutional point of view, can be considered validly adopted and entered into force, in this part of

²⁰ For more on this case from the jurisprudence of the Constitutional Court of North Macedonia see in its Decision No: 175/2012-0-0 (13.02.2013), available online at: <http://ustavensud.mk/?p=10942> (accessed on June 6, 2021).

²¹ Article 173 of the Rules of Procedure of the Parliament of North Macedonia, available online at: https://www.sobranie.mk/rules-procedures-of-the-assembly-ns_article-rules-of-procedure-of-the-assembly-of-the-republic-of-macedonia-precisten-tekst-2013.nsp (accessed on June 7, 2021).

the paper we will address some of the regional comparative constitutional solutions that can help finding the most adequate and effective constitutional solution for North Macedonia, having regard in particular to the principles of the rule of law, separation of power and guarantees of basic freedoms and rights.

This issue related to the above constitutional gap, in particular has a great practical importance because in the constitutional and legal order of North Macedonia, from 2019, there are two decrees for the promulgation of two laws: the Law on the use of languages and the Law on ratification of Prespa International Agreement concluded between North Macedonia and Greece in 2018 under the auspices of the United Nations, which were published in the Official Gazette only with the signature of the President of the Parliament, without the signature and the seal of the President of the Republic, where in that part is placed a footnote number one, while in that footnote there is a note with three paragraphs, where it is said that: the decrees for the promulgation of these two laws are published without the signature of President Gjorge Ivanov for the following reasons: everyone is obliged to respect the Constitution and the laws (Article 51, para. 2 of the Constitution of North Macedonia); the President of the Republic is obliged to sign the decree for the promulgation of laws if they are again approved by a majority vote of the total number of MPs (Article 75 para. 3 of the Constitution of North Macedonia). The Law on the Use of Languages was approved again by a majority vote of the total number of MPs in the 32nd session of the Parliament on March 14, 2018, while the Law on Ratification of the Prespa Agreement was approved again by a majority vote of the total number of MPs in the 54th session of the Parliament on July 5, 2018; due to non-fulfillment of the above obligations by President Ivanov and according to the obligation under Article 52 of the Constitution, the President of the Parliament is obliged to send these two laws to the Official Gazette of North Macedonia for their publication²².

As can be seen, although the above two laws were approved again by the Parliament with the necessary majority, President Ivanov did not sign the decrees for their promulgation, thus, the President violated Article 75 of the Constitution because he did not fulfill the imperative constitutional obligation to sign them, while on the other hand, he misused its constitutional status by usurping the legislative power of the Parliament, in order to hold these two laws hostage through the endless dragging of their promulgation in the sense that, there is no deadline for the President to remain silent in rejecting these two laws, which in fact implies the unconstitutional transformation of the presidential veto into an absolute veto or legislative sanction against the Parliament, in the style of medieval monarchs, which is unacceptable to contemporary constitutional law.

Currently, these two decrees for the promulgation of these two laws have

²² Law on the use of languages and the Law on ratification of Prespa International Agreement, "Official Gazette of North Macedonia", 7/2019, available online at: <https://www.slvesnik.com.mk/Issues/1c2c606e0a894e1ea3f2cd277ff6a1fa.pdf> (accessed on June 8, 2021).

been challenged before the Constitutional Court, and on March 18, 2021, the author of this paper as a constitutional expert was invited to the preparatory session of the Constitutional Court to give a professional opinion on this issue²³.

However, when it comes to abusing of the presidential veto in North Macedonia, it should be noted that, the first President Gligorov was the first to violate the Constitution when in 1997 he refused to sign the decree promulgating the Law on Criminal Procedure, which was adopted by a two-thirds majority of the total number of MPs, although according to Article 75 he had an imperative constitutional obligation to sign it. The second violation is related to the second President Trajkovski when in 2001, same as President Ivanov in 2018, he refused to sign the decree promulgating the Law on the Privileges of the MPs, after it was approved again by the Parliament²⁴.

In this aspect, regarding the comparative constitutional law on the above constitutional gap, it should be emphasized that, although some constitutional solutions are encountered²⁵, the following constitutional solution that prevails as the

²³ See more in: *Profesori Shasivari pjesëmarrës në seancën e Gjykatës Kushtetuese lidhur me Ligjin për përdorimin e gjuhëve dhe Ligjin për ratifikimin e Marrëveshjes së Prespës*, Tetova Sot, 19.03.2021, available online at: <https://www.tetovasot.com/2021/03/profesori-shasivari-pjesemarrres-ne-seancen-e-gjykates-kushtetuese-lidhur-me-ligjin-per-perdorimin-e-gjuheve-dhe-ligjin-per-ratifikimin-e-marreveshjes-se-prespes/> (accessed on June 8, 2021). *Shasivari: "shqipja" dhe "e veriut", të vlefshme*, ALSAT-M, 20.03.2021, available online at: <https://alsat.mk/shasivari-shqipja-dhe-e-veriut-te-vlefshme/> (accessed on June 9, 2021).

²⁴ See more in: Svetomir Pirkarić, Appeal to Ivanov to abandon the unconstitutional pocket veto, Respublica, 04.07.2018, available online at: <https://respublica.edu.mk/mk/blog/2018-07-04-10-54-18> (accessed on June 9, 2021).

²⁵ This includes some constitutional solutions that are quite specific that go beyond the classic presidential veto, which do not serve the main objectives of this paper, as is the case with Article 138 of the Constitution of Ecuador whereas, the reason for this constitutional solution lies in the fact that, the presidential veto has a delaying effect to provide enough time to calm political tensions in order for a wider discussion to take place. See more in: Elliot Bulmer, *Presidential Veto Powers*, International IDEA Constitution-Building Primer 14, 2017, Stockholm, p. 16, available online at: <https://www.idea.int/sites/default/files/publications/presidential-veto-powers-primer.pdf> (accessed on June 10, 2021). Article 138 of the Constitution of Ecuador stipulates that, if the President of the Republic totally objects to the bill, the National Assembly can once again consider it, but only one year after the date of the objection. Once this period has elapsed, the Assembly can ratify it in one single debate, with a favorable vote of two thirds of its members and shall send it immediately to the Official Register for publication. If the objection is partial, the President of the Republic shall submit an alternative text, which cannot include subjects not envisaged in the bill; the same restriction must also be observed by the National Assembly when adopting the suggested amendments. The Assembly shall examine the partial objection within thirty (30) days as of the date of its submission and shall be able, in one single debate, to adhere to it and amend the bill with the favorable vote of the majority of those attending the session. The initially adopted project can also be ratified by the favorable vote of two thirds of its members. In both cases, the Assembly shall send the law to the Official Register for publication. If the Assembly does not examine the objection within the time-limits indicated, it shall be understood that it adheres to it and the President of the Republic shall order enactment of the law and its publication in the Official Register. If unconstitutionality is the grounds of the objection, then the objection shall first be resolved. See more in:

most adequate and effective in relation to the principle of separation of power, the rule of law and guarantees of basic freedoms and rights, on the basis of which, in case of silence of the president, the adopted law is automatically promulgated and enters into force according to the force of the constitution, respectively the decree for promulgation of the law is approved by the President of the Parliament. However, it should be noted here that from a regional comparative constitutional perspective, there are also constitutional solutions, such as in Croatia, Slovenia and Bosnia and Herzegovina that do not help because in Croatia and Slovenia, the presidents has only the constitutional obligation to promulgate the laws, but not the right to veto the laws, while in Bosnia and Herzegovina the presidential veto does not belong to the presidency of the federation, but only to the president of Republic of Srpska. Thus, according to the Constitution of Croatia, laws shall be promulgated by the President of the Republic within eight days from the date when they were passed in the Croatian Parliament. If the President of the Republic considers the promulgated law not in accordance with the Constitution, he may initiate proceedings to review the constitutionality of the law before the Constitutional Court of the Republic of Croatia²⁶. Whereas, according to the Constitution of Slovenia, laws are promulgated by the President of the Republic no later than eight days after they have been passed. The National Council may within seven days of the passing of a law and prior to its promulgation require the National Assembly to decide again on such law. In deciding again, a majority of all deputies must vote for such law to be passed unless the Constitution envisages a higher majority for the passing of the law under consideration. Such new decision by the National Assembly is final²⁷. While, according to the Constitution of Republic of Srpska, the President of the Republic shall promulgate laws within seven days of their adoption in the National Assembly. Within this time the President of the Republic may request the National Assembly to vote again on the law. The President of the Republic shall be bound to promulgate the law passed for the second time by the National Assembly²⁸.

In this regard, when it comes to this issue, for example, the first written constitution in the world which is still in force today and objectively for the first time has predicted the most powerful presidential veto in the world, namely the US Constitution²⁹, regulates this issue in the constitutional provision of Article 1,

Article 138 of the Constitution of Ecuador, available online at: https://www.constitute-project.org/constitution/Ecuador_2008.pdf (accessed on June 10, 2021).

²⁶ Article 88 of the Constitution of Republic of Croatia, available online at: <https://www.wipo.int/edocs/lexdocs/laws/en/hr/hr049en.pdf> (accessed on June 10, 2021).

²⁷ Article 91 of the Constitution of Republic of Slovenia, available online at: <https://www.us-rs.si/media/constitution.pdf> (accessed on June 10, 2021).

²⁸ Article 80 of the Constitution of Republic of Srpska, available online at: https://www.legislationline.org/download/id/8199/file/BiH_Constitution_Republic_Srpska_am2011_en.pdf (accessed on June 10, 2021).

²⁹ The US President has 10 days to give consent or to exercise a veto. If US Congress is not in session, the US President may exercise a pocket veto, which cannot be overridden by US Congress.

section 7, para. 2, which stipulates that, every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law³⁰.

Meanwhile, from the regional constitutional comparative law, the constitutional solutions of Albania, Kosovo and Serbia will be analyzed as quite useful.

According to the Constitution of Albania, the President of the Republic has the right to return a law for re-consideration only once. The decree of the President for the re-consideration of a law loses its effect when a majority of all the members of the Parliament vote against it. A law is deemed promulgated if the President of the Republic does not exercise the rights provided for in paragraph 1 of article 84 or in paragraph 1 of article 85³¹.

According to the Constitution of Kosovo, laws adopted by the Parliament are signed by the President of the Parliament and promulgated by the President of the Republic upon her/his signature within eight days from receipt. If the President of the Republic returns a law to the Parliament, he/she should state the reasons of return. The President of the Republic may exercise this right of return only once per law. The Parliament decides to adopt a law returned by the President of the Republic by a majority vote of all its deputies and such a law shall be considered promulgated. If the President of the Republic does not make any decision for the promulgation or return of a law within eight days from its receipt, such a law shall be considered promulgated without her/his signature and shall be published in the Official Gazette³².

According to the Constitution of Serbia, the President of the Republic shall be obliged to issue a decree on promulgation of laws or to return the law for reconsideration with a written explanation to the National Assembly, within maximum 15 days from the day of adoption of the law, that is, not later than within seven days, if the law has been adopted by emergency procedure. If the National Assembly decides to vote again on the law, which has been returned for reconsideration by the President of the Republic, the law shall be adopted by the majority vote from the total number of deputies. The President of the Republic shall

The veto can be overridden by a 2/3 majority in both houses of US Congress. See more in: Jeton Shasivari, *E drejta kushtetuese*, Furkan-ISM, Shkup, 2020, p. 86-87.

³⁰ Article 1, Section 7, para. 2 of the Constitution of USA, available online at: https://www.senate.gov/civics/constitution_item/constitution.htm (accessed on June 11, 2021).

³¹ Articles 84 and 85 of the Constitution of Republic of Albania, available online at: https://www.constituteproject.org/constitution/Albania_2012.pdf?lang=en (accessed on June 11, 2021).

³² Article 80, para. 2-5 of the Constitution of Republic of Kosovo, available online at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf> (accessed on June 11, 2021).

be obliged to promulgate the newly adopted law. If the President of the Republic fails to issue a decree on promulgation of the law within the deadline stipulated by the Constitution, the decree shall be issued by the President of the National Assembly³³.

In this context, it is worth emphasizing that, an identical constitutional solution to the above solutions is provided by the Constitution of Ukraine, which stipulates that, within fifteen days of the receipt of a law, the President of Ukraine signs it, accepting it for execution, and officially promulgates it, or returns it to the Verkhovna Rada of Ukraine with substantiated and formulated proposals for repeat consideration. In the event that the President of Ukraine has not returned a law for repeat consideration within the established term, the law is deemed to be approved by the President of Ukraine and shall be signed and officially promulgated. Where a law, during its repeat consideration, is again adopted by the Verkhovna Rada of Ukraine by no less than two-thirds of its constitutional composition, the President of Ukraine is obliged to sign and to officially promulgate it within ten days. In the event that the President of Ukraine does not sign such a law, it shall be without delay promulgated officially by the President of the Verkhovna Rada of Ukraine and published under his or her signature³⁴.

Regarding the fourth constitutional gap in North Macedonia, on the basis of comparative constitutional analysis in the region but also beyond, starting from the legal nature of presidential veto which is a declaration of will which activates this constitutional mechanism but which as such does not create new rights or obligations for the subjects as well as from the purpose of this right of the president, on basis of which the president can challenge the law but, can not prevent its entry into force if the parliament after the veto from the president approves the law again with the necessary majority, it can be summarized that, the American, Albanian, Kosovar, Serbian and Ukrainian constitutional solutions are more effective and correspond more correctly with the principle of rule of law, separation of power as well as with guarantees of basic freedoms and rights, because in the light of these comparative constitutional solutions, it is clear that, in case of silence of the president, the adopted law is automatically promulgated and enters into force according to the force of the constitution respectively, the decree for promulgation of the law is approved by the President of the Parliament, because the president's dragging silence in promulgating laws, however, cannot violate fundamental constitutional values.

At the end of this section, it is also worth mentioning the frequency of using the presidential veto by the presidents of North Macedonia.

In this regard, the first President of North Macedonia, Kiro Gligorov who

³³ Article 113 of the Constitution of Republic Serbia, available online at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/74694/119555/F838981147/SRB74694%20Eng.pdf> (accessed on June 12, 2021).

³⁴ Article 94, para. 2-4 of the Constitution of Ukraine, available online at: <https://rm.coe.int/constitution-of-ukraine/168071f58b> (accessed on June 12, 2021).

was the President of the Republic for two terms, in the period 1991-1994 and 1994-1999, during his first term did not use his presidential veto at all; while during his second term, he has used his presidential veto a total of four times.

The second President of North Macedonia, Boris Trajkovski, who was the President of the Republic for one term in the period 1999-2004, has used his presidential veto a total of six times.

The third President of North Macedonia, Branko Crvenkovski, who was the President of the Republic for one term in the period 2004-2009, is a record holder in the use of the presidential veto, because he used this veto ten times in total.

The fourth President of North Macedonia Gjorge Ivanov who was President of the Republic for two terms, in the period 2009-2014 and 2014-2019, in the first seven years of his term did not use his veto at all; while in 2018 he used it twice in total³⁵.

The fifth current President of North Macedonia, Stevo Pendarovski, who has been elected the President of the Republic since 2019, has used his presidential veto once so far³⁶.

3. Conclusions

Unlike the president's right to pardon, which has not yet adapted to the concept of the contemporary constitutional law and still has traces of the past, on the other hand, the presidential veto has successfully adapted its legal nature and purpose to contemporary constitutional law with several differences as we have seen in comparative constitutional law in terms of various forms and understandings in the region and beyond. Therefore, the main purpose of this paper is to analyze the weaknesses of the constitutional solution of the presidential veto in North Macedonia, prescribed in Article 75 of the Constitution, wherein four main constitutional gaps were identified, three of which have been filled through legislative intervention by the Law on the Parliament and the Rules of Procedure of the Parliament. Whereas, as it was ascertained, regarding the fourth constitutional gap in North Macedonia that has to do with the issue if the President, even though has an imperative constitutional obligation, does not sign the decree for the promulgation of the law which the Parliament has reviewed and approved again by a majority vote of the total number of MPs, can that law be published in the Official

³⁵ For more on these statistics see: Nikola Ambarkov, *Factors Affecting the Use of the Presidential Veto - The Macedonia Case*, Proceedings of the International Scientific Conference "Social Changes in the Global World", 2(6), 719-737, available online at: <https://js.ugd.edu.mk/index.php/scgw/article/view/3162/2873> (accessed on June 12, 2021). Radica Todorovska, *Between Political Responsibility and Party Discipline: Presidents of the State and the Veto*, Republic, 06.09.2016, available online at: <https://respublica.edu.mk/mk/blog/2016-09-06-08-59-14> (accessed on June 10, 2021).

³⁶ Deutsche Welle in Macedonian: *Pendarovski spoils Zaev and Mickoski's "reconciliation"*, 15.05.2021, available online at: <https://www.dw.com/mk/> (accessed on June 12, 2021).

Gazette even without the signature of the President and whether such a law from a constitutional point of view, can be considered validly adopted and entered into force, on the basis of comparative constitutional analysis in the region but also beyond, starting from the legal nature of presidential veto which is a declaration of will which activates this constitutional mechanism but which as such does not create new rights or obligations for the subjects as well as from the purpose of this right of the president, on basis of which the president can challenge the law but, can not prevent its entry into force if the parliament after the veto from the president approves the law again with the necessary majority, it was concluded that, the American, Albanian, Kosovar, Serbian and Ukrainian constitutional solutions are more effective and correspond more correctly with the principle of rule of law, separation of power as well as with guarantees of basic freedoms and rights, because in the light of these comparative constitutional solutions, it is clear that, in case of silence of the president, the adopted law is automatically promulgated and enters into force according to the force of the constitution respectively, the decree for promulgation of the law is approved by the President of the Parliament because the president's dragging silence in promulgating laws, however, cannot violate fundamental constitutional values.

Article 75 para. 3 of the Constitution of North Macedonia very clearly instructs the President because it is an imperative constitutional obligation, to sign the decree promulgating the law after the Parliament reconsiders the law and adopts it again by a majority vote of the total number of MPs. On the other hand, as it was found in this paper, the decree promulgating the law signed by the President has absolutely no constitutive legal effect that would create legal norms or situations in the legal order, because it is a declarative general act or statement of will, since with it the President only declares his will that promulgates the law or does not promulgate it, without intruding or usurping the legislative power of the Parliament. Thus, the promulgation of laws is a material action that does not create legal norms or situations but anticipates the circumstances for the application of legal norms, because in essence, promulgation or signing of laws as well as their publication are not legal acts.

So, according to Article 75 of the Constitution of North Macedonia, the presidential veto exists whenever the President with his written statement of will can reject the promulgation of the law, respectively return the passed law until the final and definitive decision is made, because the final fate of the passed but returned law by the President in no case depends on the will of the President but only on the will of the Parliament, where the basic condition for enactment of the returned law is to achieve an absolute majority, namely it is necessary for it to receive a majority of votes from the total number of MPs, which means 61 MPs need to vote for such a law in order for it to be validly adopted, which brings the final and definitive decision on the fate of the returned law by the President.

In this regard, the position of the former President of the Republic, Gjorge Ivanov that without his signature in the decrees there is no Law on the use

of languages and Law on the ratification of the Prespa International Agreement, takes us back to the distant past, when the king as the guardian of justice had the right of legislative sanction and absolute veto against the parliament, and he set his universal judgment and final and definitive decision on the fate of the laws, even by rising above the parliament as the legal sovereign of the citizens, which is unacceptable in the light of contemporary constitutional law.

Finally, regarding the fourth constitutional gap on the presidential veto in North Macedonia, it is unrealistic to expect that this gap will be filled by the Constitutional Court because this Court does not have this competence according to the Constitution, just as it does not have the competence to review the constitutionality of the acts and actions of the President of North Macedonia, which in itself represents another fifth constitutional gap quite harmful regarding the confirmation of the responsibility of the President for his constitutional violations. However, what can be expected from the Constitutional Court, especially in the case of deciding on the Law on the use of languages and the Law on ratification of the Prespa International Agreement, whose decrees were published in the Official Gazette without the signature of the President, is that through teleological interpretation of constitutional norms in close correlation with the principle of rule of law, separation of power and guarantees of basic freedoms and rights, in the light of regional and wider comparative constitutional solutions, to reach the constitutional conclusion that, these two laws are validly adopted and entered into force, and are applicable laws, so that the definitive fate of these two laws does not remain hostage to dragging silence in promulgating laws by the President of North Macedonia, respectively to his unsuccessful presidential veto, because as was also ascertained by the comparative constitutional analysis, in case of silence of the president, the adopted law is automatically promulgated and enters into force according to the force of the constitution, respectively, the decree for promulgation of the law is approved by the President of the Parliament.

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Legislative election during pandemics. Challenges to democracies

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Abstract

The Covid-19 pandemic has challenged the democracies. A representative democracy is the favourite instrument in terms of expressing a people's sovereign will. Any democratic system is based on free, periodical elections. The election procedure is the natural way in which peoples participate indirectly in political decision-making. The conduct of the election under special conditions, like the conditions the health crisis imposed, had consequences, particularly in terms of legitimacy. The pandemic-affected countries have taken a number of measures to ensure safe voting to electors, though a number of shortcomings marked the organization and carrying on of the election processes, such as lack of funding, technical errors, quarantined people's inability to vote, low attendance, and legitimacy issues. In our study, we are analyzing the legislative elections that took place in Romania, Slovakia, Croatia, and Lithuania. After the electoral processes, which took place under these special conditions, it is a must to rethink the electoral processes in order to allow all voters to participate in the election of political decision makers.

Keywords: *general election, democracy, legitimacy, rule of law, voting systems.*

JEL Classification: K16

1. Elections during pandemic

Elections are a key element of any democratic construction. Their role in the power equation is well established. This is the reason why, depending on the way the elections are conducted, the political scene of a country may look differently.

To hold election during the COVID-19 pandemic was a challenge for each country which chose this solution, in spite of the health crisis that affected largely the countries around the world. Though, there were some countries which preferred to postpone the elections, mainly local and regional elections, even for a year.²

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² For example, the United Kingdom of Great Britain and Northern Ireland postponed the local election which were to be held on 7 May 2020 by one year. France postponed the second round of regional election from February to May 2020. Local elections in the German districts Hesse and Saxony were postponed from April & October 2020 to March 2021. More information can be found online at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> accessed on 10 June 2021.

However, we can say that the democracy spirit overcame the fear of infection. To what extent some parliamentary assemblies have a high degree of legitimacy, although they were voted by few people (in some countries, the lowest percentages of turnout in all their constitutional history were recorded), I will explain in this research.

The choice of the four countries (Slovakia, Croatia, Lithuania and Romania) was not accidental. All these countries are "young" democracies, because they had been part of the Eastern bloc, but they decided, nevertheless, not to postpone the legislative elections.

2. February 2020 legislative election in Slovakia

The Slovak Parliament consists of a single legislative chamber.

The National Council of the Slovak Republic - *Národná rada* - is the sole constitutional and legislative body of the Slovak Republic.³

The National Council of the Slovak Republic has 150 members, who are elected for a four-year period. The Members of Parliament are elected by secret, universal, equal and direct ballot.

People wishing to stand as members of the National Council of the Slovak Republic must be over 21 years of age on election day, have the right to vote, and have their permanent residences in the territory of the Slovak Republic.⁴ There is a special law which sets out the framework for deputies' election.⁵

The Slovak Republic's territory is an only constituency in terms of electing the Parliament's members. The elections take place in 5,998 voting districts.⁶

The political parties submit the candidates' lists both in paper and electronic format no later than 90 days before voting day.⁷ The lists must be accompanied by both the candidate agreement forms, signed by each candidate, and by candidates' statements that they are not running also for a different party, as well as the proof they paid 17,000 Euros.⁸ The voting system in use is based on proportional representation. It is used to distribute mandates by the Hagenbach-Bischoff method. 5% of the votes is the election threshold for a political party to take seats in Parliament.⁹

³ Art. 72 of the Slovak Constitution.

⁴ Art. 74 of the Slovak Constitution.

⁵ Legislative act no. 180/2014. The document is available online at: https://www.legislationline.org/download/id/7883/file/Slovakia_Act_conditions_electoral_law_2014_am2015_en.pdf, accessed on 10 June 2021.

⁶ These districts are located in the 8 regions of Slovakia: Bratislava, Trnava, Trenčín, Nitra, Žilina, Banská, Bystrica, Prešov, Košice, to which the one intended for voters outside the borders of Slovakia adds.

⁷ Section 50 paragraph (1) of Legislative Act no. 180/2014.

⁸ Section 50 paragraph (4) of Legislative Act no. 180/2014.

⁹ For party coalitions, the threshold is set at 7%, and if the coalition brings together four or more political parties, the threshold is 10%.

After the 2019 presidential election, legislative election took place in February 2020, when the pandemic began, though the country had not been affected yet by the health crisis.¹⁰

The context of the elections in Slovakia was marked by dissatisfaction due to corruption and the country's mismanagement. Analysts considered that the elections were an important test for Slovakia's democratic path. The elections took place in an environment marked by social tensions, which were generated by the high corruption of the ruling political class. The fight against corruption has also been the driving force behind the new political parties' emergence, such as ZA ĽUDÍ.

Twenty-five political parties and alliances registered for February 2020 election race.

Most voters voted for protest, unpredictable, conservative right-wing, populist right-wing, and euro-skeptical parties. As in the presidential elections, fight against corruption was the main theme of the campaign.¹¹

General election in Slovakia, 29 February 2020

Political Party ¹²	Votes	%	Mandate
OLaNO - NOVA ¹³ - <i>OBYČAJNÍ ĽUDIA a nezávislé osobnosti (OLANO)</i> ¹⁴ , NOVA, <i>Kresťanská únia (KÚ)</i> , <i>ZMENA ZDOLA</i>	721,166	25.02%	53 (+34 ¹⁵)
SMER - SD - <i>SMER - Sociálna Demokracia</i> ¹⁶	527,172	18.29%	38 (-11)
SME RODINA ¹⁷	237,531	8.24%	17 (+6)
Kotlebovci - ĽSNS - <i>Ludová strana Naše Slovensko</i> ¹⁸	229,660	7.97%	17 (+3)

¹⁰ In 2016, out of the 4,426,760 voters 2,648,184 voted, that is 59.82% of the total number of voters, while in the 2020 election, out of the 4,432,419 voters, 2,916,840 voted, that is 65.80% (+5.98), which represented the largest turnout since the 2002 election.

¹¹ It should be mentioned that an important campaign theme was the murder of journalist Jan Kuciak and his fiancée in 2018, the one who had investigated the corruption cases in relation to the European funds. This election was held a few days after the commemoration of 2 years since their assassination.

¹² For more details: <https://volby.statistics.sk/nrsr/nrsr2020/en/data02.html> accessed on 10 June 2021.

¹³ Conservative party, created in 2012.

¹⁴ Right-wing party, created in 2011.

¹⁵ Based on the number of seats in 2016. See: <https://volby.statistics.sk/nrsr/nrsr2016/en/data02.html>, accessed on 10 June 2021.

¹⁶ It is a social democratic party, created in 1999.

¹⁷ Right-wing, populist party, created in 2015.

¹⁸ Far-right nationalist party.

PS-SPOLU - <i>Progresívne Slovensko-Spolu</i>	200,780	6.96% ¹⁹	0
SaS - <i>Sloboda a Solidarita</i> ²⁰	179,246	6.22%	13 (-8)
Za ĽUDÍ ²¹	166,325	5.77%	12 (+12)

OL'aNO Political Party ('The Party of Ordinary People and Independent Personalities'), which was founded by entrepreneur and political activist Igor Matovič, was the big winner of the election, with 25% of the votes. This party is a tireless fighter against corruption and a supporter of the rule of law strengthening.²² It also supports right-wing conservative and populist views.

The Slovak voters penalized SMER-SD, the ruling party, led by Robert Fico, which had been governing almost continuously since 2006. However, 18 percent of the votes was a result beyond expectations to SMER. SME Rodina, a right-wing populist party, was a big surprise as it came the third in the election.

The People's Party Our Slovakia, led by Marian Kotleba, scored a little below 8 percent, a better score than the 2016's, but below the score this party had expected.²³ SaS - *Sloboda a Solidarita*, the liberal party led by Richard Sulik, ranked the fifth, with eight seats less than in the 2016 election. Za Ľudí, the new liberal-conservative party, which was created in 2019 by former President Andrej Kiska, got about 6 percent of the votes. Instead, "Progressive Slovakia/Together" (PS/Spolu) social-liberal electoral alliance failed largely due to the 7% electoral threshold, set for electoral coalitions. Likewise, the Christian-Democratic Party achieved a score below 5%. Also, for the first time since 1990, no Hungarian minority party is represented in Parliament.²⁴

An overview of the 2020 legislative election shows that the election results are the very image of a deeply divided country. By the votes they gave to the political parties, the voters showed they wanted a fundamental change in terms of strengthening the rule of law, enhancing the fight against corruption, increasing transparency, building a sustainable governance and making better social policies.

After the legislative election, in order to form the Government, OL'aNO, SME Rodina, SaS and Za Ľudí formed a coalition. Igor Matovič, the new prime minister, was appointed as leader of the winning party.

Unfortunately, the way how Prime Minister Igor Matovič managed the

¹⁹ It did not meet the electoral threshold for the coalitions.

²⁰ Liberal party, created in 2009.

²¹ Center-right party, created in 2019.

²² For details, the information is available online at: <https://www.theguardian.com/world/2020/mar/01/slovakia-election-centre-right-olano-wins-poll-on-anti-graft-platform> accessed on 10 June 2021.

²³ Opinion polls in the weeks before the elections estimated a score of 14%.

²⁴ For more details see: <https://www.robert-schuman.eu/fr/oe/1875-l-opposition-emmenee-par-igor-matovic-victorieuse-des-elections-legislatives-en-slovaquie>, accessed on 11 June 2021.

Covid-19 pandemic²⁵, and his decision to purchase the Sputnik V vaccine as well, during the pandemic, without a prior consultation with his coalition partners, led to a government crisis²⁶, which came to an end when the Prime Minister resigned and Eduard Heger, Minister of Finance from OĽaNO, was appointed to form the new Government, on 1 April 2021.

3. July 2020 general election in Croatia

The Constitution of the Republic of Croatia was adopted in 1990. Since then it has been amended several times. The most important changes aimed at reducing the duties of the head of state (2000), transforming the Parliament from a bicameral body into a single legislative chamber (2001)²⁷, and preparing Croatia's accession to the European Union (2010).²⁸

Croatia's Parliament - *Hrvatski Sabor* - is the people's representative body, that is vested with legislative powers.

The Croatian Parliament has 100 to 160 members, who are elected, under direct, universal and equal suffrage, by secret ballot.²⁹ The members of Parliament are elected for a four-year term. The election of the new Croatian Parliament's members takes place no later than 60 days since the expiry of the previous parliament's term or since its dissolution. The first session of the Croatian Parliament takes place no later than 20 days after the elections. The Croatian Parliament is constituted at its first session, when the majority of the present members elects its president.³⁰ Legislative elections in Croatia are held under the Law on 9 June 2015.³¹ The election of parliamentarians is carried out by multi-member ballot. The mandates are assigned based on d'Hondt method.

The voters whose permanent residence is in the territory of the Republic of Croatia vote at the polling stations in the territory of the Republic of Croatia, based on their place of residence. The electoral ballot is developed in 12 electoral districts:

- 10 constituencies in Croatia, which elect 14 deputies each;

²⁵ Slovakia had the third highest mortality and infection rate/person in the world.

²⁶ The article can be consulted online at: <https://www.lefigaro.fr/flash-eco/slovaquie-demission-du-ministre-de-l-economie-pour-eviter-la-crise-politique-et-pandemique-20210322>, accessed on 11 June 2021.

²⁷ After 1990, the first Croatian Parliament was set up on 30 May 1990. In 1990, the Croatian constitution established a bicameral structure of the Parliament. The Chamber of Deputies was created in 1992, while the House of Commons was established in 1993. After the revision of the Constitution, the House of Commons was abolished, making Parliament unicameral.

²⁸ Elena Simina Tănăsescu, *Constituția Republicii Croația. Prezentare generală* in Ștefan Deaconu (coord.), *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, Ed. Monitorul Oficial, Bucharest, 2015, p. 390.

²⁹ Art. 71 of the Slovak Constitution.

³⁰ Art. 73 of the Slovak Constitution.

³¹ The provisions of the law, here: *Croatia_Parliamentary_Elections_Act_2003_am2015_en.pdf* (legislationline.org), accessed on 11 June 2021.

- 1 local constituency for national minorities. Members of national minorities in the Republic of Croatia have the right to elect 8 Parliament representatives. They are elected in a special local constituency.³² 22 national minorities are officially recognized in Croatia.

- 1 constituency for Croat citizens who live abroad. Voters whose residences are not in Croatia have the right to elect representatives from the candidate lists which are submitted to the special constituency abroad - Constituency XII, Diaspora.

A political party must achieve an electoral threshold of at least 5% to gain representation in Parliament.³³ The lists of candidates must be drawn up by observing the gender equality criterion. The political parties' candidate lists should include at least 40% women. An independent candidacy must be accompanied by a list of at least 500 voter signatures, while for the lists submitted by the national minorities 100 voter signatures are required.³⁴

The last general election was held during the Covid-19 pandemic. Following the election on 5 July 2020, the Croatian Parliament consists of 151 elected members.³⁵

Croatia's political scene is dominated by two major parties: HDZ (the Democratic Union - *Hrvatska demokratska zajednica*) and SDP (the Social Democratic Party - *Socijal demokratska partija Hrvatske*).

The election was held in a difficult context, in the midst of the pandemic, while the country was facing serious economic problems. The Croatian Prime Minister Andrej Plenkovic,³⁶ leader of the HDZ conservative party, decided to dissolve the Parliament. Thus, he paved the way for early general election.³⁷

His Conservative Government hoped to capitalize the management of the coronavirus crisis, which the ruling party's representatives considered that it was effective. Another of the PM's reasons to hold early election was the fear that the pandemic would worsen in the fall of 2020.

Thus, at the proposal of the governing coalition, the Croatian Parliament was dissolved on 18 May 2020.³⁸

The pandemic management was the main theme of the campaign. Thus, the HDZ leader stated that '*the country does not need experiments like Bernardic*

³² Art. 16 of the law on general elections in Croatia.

³³ More details, here: *ODIHR Election Assessment Mission Final, Republic of Croatia, parliamentary elections, 5 July 2020 Report*, Warsaw, 28 September 2020. The document is available online: https://www.osce.org/files/f/documents/b/4/465120_0.pdf, accessed on 11 June 2021.

³⁴ Art. 18 of the law on general elections in Croatia.

³⁵ Their mandate has begun on 22 July 2020.

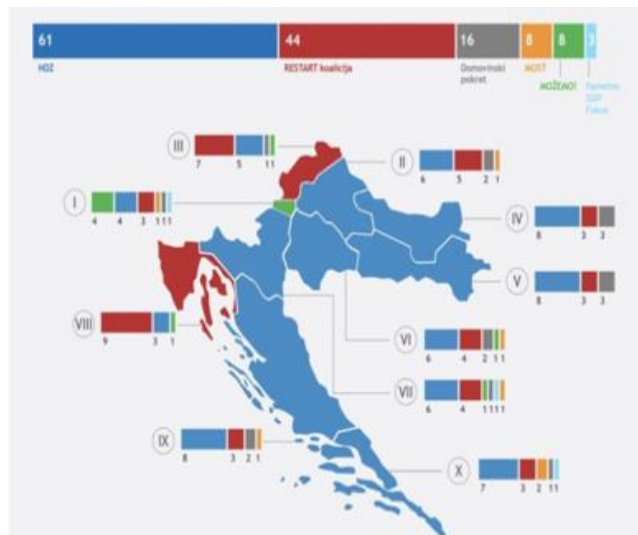
³⁶ Andrej Plenkovic took the power in October 2016, following the early election.

³⁷ They would have taken place on 23 December 2020.

³⁸ With 105 votes "for", 8 votes "against" and 4 "abstentions" the Parliament was dissolved. Even the opposition voted for the early termination of Parliament's term.

or *Škoro*'.³⁹ The opposition attacked the ruling Conservatives, accusing them of instrumentalizing the health threat in order to promote their political agenda. Another campaign theme, that was the opposition left-wing party Mozemo used, was how the Conservative government handled the March & December 2019's earthquake crises. Also, the issue of corruption, the economic problems (the very high unemployment rate), and the mass migration were campaign themes of the opposition. Davor Bernardić, the 40-year-old leader of the center-left SDP party, whose opponents blamed him for his lack of charisma, accused the government of putting Croatia 'in danger' by deciding to hold election during the pandemic.

The Covid-19 pandemic deeply influenced the general election, as Croatia had the lowest turnout since its independence.



General election result - Croatia - 5 July 2020⁴⁰

Political Parties	Votes	%	Seats
<i>Democratic Union - Hrvatska demokratska zajednica - HDZ, HSLS</i>	621,035	37.26	66 (+5) ⁴¹
<i>'Restart' Coalition - Restart koalicija - SDP, HSS, HSU, SNAGA, GLAS, IDS, PGS</i>	414,645	24.87	41 (-4)
<i>Patriotic Movement Coalition - Domovinski pokret-DPMS-HKS-</i>	181,493	10.89	16

³⁹ Online information can be found here: <https://www.lesechos.fr/monde/europe/croatie-les-conservateurs-renforcent-leur-majorite-1221529> accessed on 11 June 2021.

⁴⁰ Online information can be found here: <https://www.izbori.hr/arhiva-izbora/index.html#/app/parlament-2020> accessed on 11 June 2021.

⁴¹ Comparison with the seat number following 2016's election.

<i>HRAST–BzH–ZL–SU</i>			
<i>MOST Nezavisnih Lista – MOST</i>	123,194	7.39	8 (-5)
<i>Green–Left Coalition - Zeleno–lijeva koalicija</i>	116,480	6.99	7
<i>Fokus</i>	66,399	3.98	3 (+3)
<i>Hrvatska narodna stranka – Liberalni demokrati- HNS-LD</i>	21,725	1.30	1 (-8)
<i>People's Party - The Reformists - Narodna stranka – Reformisti - NS-R</i>	16,900	1.01	1
Minorities			
<i>Serbian Independent Democratic Party - Samostalna Demokratska Srpska Stranka</i>			3
<i>Democratic Union of Hungarians in Croatia - Demokratska zajednica Mađara Hrvatske or DZMH</i>			1
<i>Roma Alliance 'Kali Sara' - Savez Roma u Republici Hrvatskoj 'Kali Sara'</i>			1
Others			
Independents			3

The Croatian Democratic Union - HDZ, the party that has dominated the political life since Croatia's independence, managed to persuade the voters to remain loyal to it. Thus, it won 66 parliamentary seats. The party managed to mobilize its own electorate before the situation in the country worsened and in order to avoid any electoral losses as a result of the pandemic management. The SDP was heavily defeated, particularly as it had won the presidential election in early 2020.

HDZ formed a new center-right parliamentary majority, with two Liberal parties (the Croatian People's Party HNS and the Reformists - NS-R) and with the representatives of the national minorities, which led to the the appointment of the Government led by Andrej Plenković.

A feature of the elections in Croatia is the creation of coalitions of parties to participate in the elections in order to obtain a percentage as high as possible. There is also a rise in terms of populist parties. Thus, the Patriotic Movement Coalition, led by Miroslav Škoro, which was established at the end of February 2020, as a nationalist, populist party, ranked the third in the preferences of Croatian voters. Parties representing national minorities also played an important role in the election equation. In the new term, five deputies will represent the national minorities in Croatia: the Serbian, the Hungarian, and the Roma.⁴²

⁴² In 2016, 6 minority deputies were elected to the Croatian Parliament: Serbian (3), Hungarian (1), Roma (1), and Albanian (1).

4. 11 and 25 October 2020 general election in Lithuania

The Lithuanian Parliament - Seimas - consists of a single legislative chamber.

The Parliament is composed of the people's representatives. The 141 members of Parliament are elected for a four-year term on the basis of universal, equal, direct and secret suffrage.

Any citizen of the Republic of Lithuania, who is a permanent resident in Lithuania and is not bound under an oath to another country, and who, at the time of the election, is at least 25 years old, including on election day, may stand as a candidate in the general election. The people who are sentenced based on a judgment, as well as the people whose incapacity was declared by a court cannot stand in the general election.⁴³ Ordinary Parliament election are held in the year when the term of office of the Parliament Members expires, on the second Sunday in October.

The procedure for electing Parliament members is established by law⁴⁴. The vote system used for general election is the mixed system. The territory of Lithuania is divided into 71 uninominal constituencies. Also, at national level, a national constituency is established to elect 70 deputies.⁴⁵ The list submitted by a political party to the national constituency must include 25 to 141 candidates.

In uninominal constituencies, any candidate who meets the conditions set out in the Constitution and the special election law may run if his or her candidacy is supported by at least 1,000 vote signatures. In order to win the seat in a single-member constituency, in the first round, a candidate must get the vote majority, provided that the turnout exceeds 40% or at least 20% of the voters registered on the ballot lists, in case of a smaller presence. Otherwise, a second ballot will be held for the first two candidates. The candidate who obtains more votes will be elected, regardless of the turnout.

For the MMC (multi-member constituencies) election to be valid, a turnout of at least 25% is required. To qualify for the MMC seats, a 5%-threshold is provided to parties and a 7%-threshold to coalitions. Seats are distributed to the parties and coalitions which exceed the threshold and obtain together at least 60% of the votes. For the national MMC constituency, voters can choose up to 5 candidates.

A candidate can run for both types of constituencies and many candidates have done so. 39 candidates, who were already elected in the MMC, entered the second round in the SMCs. By law, the candidates elected in both ways get the seat for which they won the vote majority. In the end, 24 candidates, who were

⁴³ Art. 56 of Lithuania's Constitution.

⁴⁴ Election law was approved on 9 July 1992 – Nr. I-2721, and its last change has been done in 2016. The document is available online: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21164?jfwid=t60ymzslb>, accessed on 12 June 2021.

⁴⁵ Chapter II, art. 9 of the law concerning the Parliament election.

elected in the MMCs by preferential votes, won SMC seats in the second round and their MMC seats were distributed to candidates who got fewer votes, under the law. These features of the voting system could create uncertainty among voters and could alter the reflection of the voting options in the seat distribution.

The voting process is managed at central level by the Central Electoral Commission, the electoral commissions of the 71 constituencies, and the 1,989 polling stations. Only voters outside the country can vote by post.

Voters over age of 70, people with disabilities and their carers can vote from home.

Due to the Covid-19 pandemic, during both rounds, voters who were coming back from abroad and the infected people's contacts were allowed to vote at home.

For the first time in the country's ballot history, Lithuanians abroad were able to vote for their own representative in the special constituency that was established for the diaspora.

In the October 2020 elections, 1,754 candidates and 17 parties registered in the voting process. In the 71 constituencies, 758 candidates ran, of which 559 were men and 199 were women. Of the 71 elected people, 54 were men and 17 women⁴⁶. In order to hold general election in the midst of the pandemic, the Lithuanian authorities had to take a series of measures to ensure the safety of citizens, as well as a fair voting process.

Lithuania has solved the problem of more than 30,000 quarantined voters. The Central Electoral Commission officially asked those who could not leave their homes to register to vote. All those who previously registered received their ballot papers at home, voted and put the ballot papers in sealed envelopes. The employees of the Central Electoral Commission took these ballot papers one day before the first round and one day before the second round. The entire mail voting process was overseen by civil society. An NGO called White Gloves asked voters who did not have the opportunity to vote by post to report their situations. Those cases were reported to the Central Electoral Commission⁴⁷.

Due to the COVID-19 pandemic, the Central Electoral Commission proposed to extend the early vote (four days instead of two days). According to the data from the Central Electoral Commission, 178,145 voters, *i.e.* 7.39% of the Lithuanian electorate, voted in advance. There was an increase in number of staff for the electoral commissions to ensure a faster flow of voters and to collect the votes from those in quarantine. In Vilnius, Kaunas, Šiauliai and Raseiniai districts, for the second round, special polling stations for self-isolated voters were set up.

⁴⁶ More details here: <https://www.vrk.lt/2020-sei/kandidatai>, accessed on 12 June 2021.

⁴⁷ Radu Carp, *Alegeri și referendumuri în timp de pandemie – soluții și controverse din perspectivă comparată*, „Revista Polis”, Volum VIII, No. 4 (30), New series, September-November 2020. The document is available online at: [http://revistapolis.ro/documente/revista/2020/4\(30\)/2.%20Radu%20Carp.pdf](http://revistapolis.ro/documente/revista/2020/4(30)/2.%20Radu%20Carp.pdf), accessed on 12 June 2021.

On 21 October, a few days before the second round, Lithuanian municipalities were divided into green, yellow and red 'risk areas', with *de facto* blocking rules, masks and capacity limits. Despite the prevention and safety measures taken by the authorities, the turnout was low: only 47.8% in the first round, and 39.70% in the second round.⁴⁸

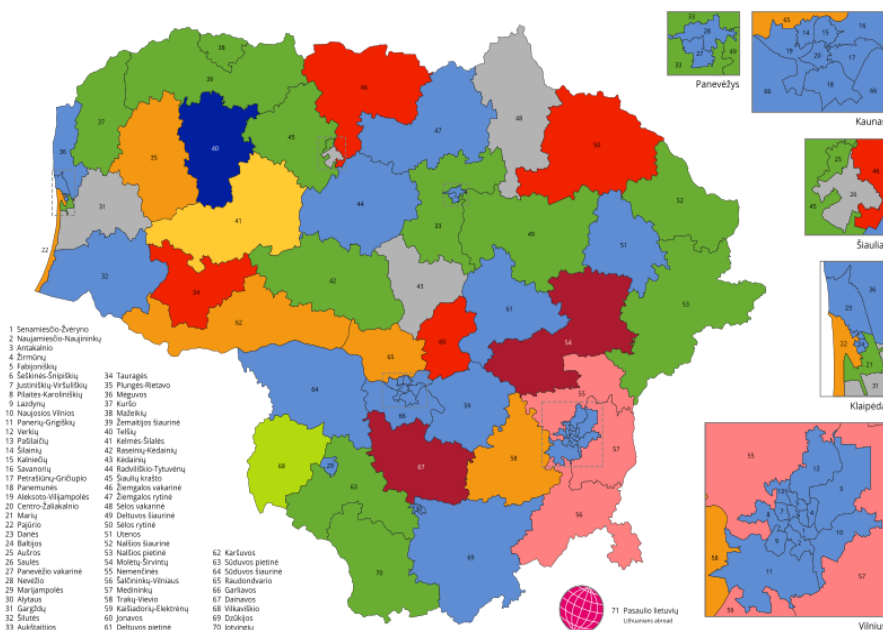
National Constituency

Seats	70	
Voters	2,457,722	
Votes	1,175,026	47.81%

Uninominal Constituencies

Seats	71			
Voting	First round of election – 11 October 2020		Second round of election – 25 October 2020	
Voters	2,457,722		2,355,726	
Votes	1,174,725	47.80%	917,720	38.96%
Seats	3		68	

Uninominal Constituencies



⁴⁸ In the elections of 9 & 23 October 2016, the turnout was 50.64%. It should be noted that those outside the country a number of 40,000 people voted, unlike 2016 when only 19,000 people voted.

General election results – Lithuania – 11&25 October 2020⁴⁹

Political Party	Votes	%	RP	Majority	Seats
<i>Tėvynės sąjunga – Lietuvos krikščionys demokratai, TS–LKD</i>	292,124	25.8	23	27	50 (19)
<i>Lietuvos valstiečių ir žaliųjų sąjunga - LVŽS</i>	204,780	18.1	16	16	32 (-22)
<i>Darbo Partija, DP</i>	110,780	9.8	9	1	10 (+8)
<i>Lietuvos socialdemokratų partija, LSDP -</i>	108,649	9.6	8	5	3 (-4)
<i>Laisvės partija</i>	107,057	9.4	8	3	1
<i>Lietuvos Respublikos Liberalų sąjūdis – LRLS</i>	79,755	6.8	6	7	3 (-1)
<i>Lietuvos lenkų rinkimų akcija – Krikščioniškų šeimų sąjunga - LLRA–KŠS -</i>	56,386	5.0	-	3	3 (-5)
<i>Lietuvos socialdemokratų darbo partija - LSDDP</i>	37,198	3.3	-	3	3
<i>Lietuvos Laisvės Sąjunga (Liberalai)</i>	23,355	1.9	-	1	1
<i>Lietuvos Žaliųjų Partija – LŽP</i>	19,303	1.6	-	1	1
Independents				4	4

The election campaign was developed around two major themes: on the one hand, it focused on how the center-left coalition managed the pandemic crisis, and on the other hand it aimed at reducing economic and educational disparities between urban and rural areas.

In the first round, that was held on 11 October 2020, only a quarter of the seats were distributed. 68 seats were distributed after the second round of election.

The Union for the Country - Christian Democrats - TS-LKD, a party led by Ingrida Šimonytė, won the general election, with 50 of the 141 seats. Ingrida Šimonytė was the first candidate on the list of the party and she led the party to

⁴⁹ More information here: https://www.lrs.lt/sip/portal.show?p_r=35354&p_k=2, accessed on 12 June 2021.

victory. After the election, Simonyte was appointed as Prime Minister and became the second woman to hold this position, after Kazimira Prunskiene.⁵⁰

The ruling party suffered a heavy defeat, as it lost 22 seats compared to the 2016 election. The surprise was the Freedom and Justice Party⁵¹, which, although in its first participation in an election, succeeded to be given 11 seats.

5. General election in Romania, 6 December 2020

The Romanian Parliament has a bicameral structure: the Chamber of Deputies and the Senate. The Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country. The Chamber of Deputies and the Senate's members are elected by universal, equal, direct, secret and free vote, according to the electoral law. The number of deputies and senators is established by the electoral law.⁵² Senators and deputies are elected by voting list, according to the principle of proportional representation.

In order to organize the parliamentary election, constituencies are set up at the level of each of the 41 counties, a constituency in Bucharest and a constituency for the Romanian citizens whose residences are abroad. There are 43 constituencies. The organization of general election in Romania is managed by the Permanent Electoral Authority.

The electoral threshold is 5% of the total valid votes cast at national level or 20% of the total valid votes in at least 4 constituencies for all electoral competitors. In the case of political alliances and electoral alliances, 3% of the valid votes throughout the country shall be added to the 5% threshold for the second member of the alliance, and for each member of the alliance starting with the third, only one percent of the valid votes in all constituencies, but not exceeding 10% of these votes.

The 2020 general election took place in the framework of prolonged conflicts between the President of Romania and the Parliament, dominated by the Social Democratic Party. The Government, led by the National Liberal Party, was also present in the conflict equation between the main actors. The Covid-19 pandemic occurred when the Romanian legislative system did not meet the needs of a major health crisis. Due to the magnitude of the pandemic, the Parliament postponed the local election that was scheduled for early June to September. In the public sphere there have been lots of disputes among political parties concerning a possible postponement of the general election, but the Constitution did not make

⁵⁰ Kazimira Prunskiene served as Prime Minister from 17 March 1990 to 10 January 1991, after Lithuania gained its independence.

⁵¹ The party was created in 2019.

⁵² According to art. 5 paragraph (2) of Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as on the organizing and functioning of the Permanent Electoral Authority, the representation norm for the election of the Chamber of Deputies is 1 deputy to 73,000 inhabitants, and for the election of the Senate is 1 senator to 168,000 inhabitants.

provisions for a postponement as such. The legislation which provided that it was the Government to decide upon the date of election was amended to allow the Parliament decide when the election would be held⁵³. The law was not promulgated by the President, and the Government decision setting up the date of the election remained in force. These disputes between the Parliament and the Government have only generated instability and ambiguity regarding the implementation of the election calendar.⁵⁴ The law was challenged in the Constitutional Court, which ruled that it was constitutional in its entirety.⁵⁵

The entire election process was affected by the Covid-19 pandemic, from the collection of vote signatures for submission of candidacies, to the constraints concerning the conduct of the electoral campaign, and to the participation in the voting, particularly for isolated people and the elderly.

The Romanian citizens abroad were able to vote by post or in person for two days, in 748 polling stations, which were set up in 92 countries. Due to the restrictions imposed by the COVID-19 pandemic, almost 100 polling stations fewer were set up abroad than in the 2019 presidential election. While 39,244 citizens abroad chose to vote by post, in case of the votes in person, prior registration was not required. Recruitment of polling station staff and delivery of ballot papers by post brought additional challenges in the context of the COVID-19 pandemic. There were also special regulations stating that if, for security reasons, in order to prevent and combat the effects of the COVID-19 pandemic, the competent authorities in the country of residence did not allow the establishment of polling stations neither in the headquarters of the embassies and consulates, nor outside them, no polling stations were set up in that country.

One of the major issues of December 2020 voting process was to make it possible for the isolated or quarantined citizens to exercise their right to vote. By Decision no. 40/29.11.2020⁵⁶, the Central Electoral Bureau (CEB) provided clarifications on the documents required in order to be able to vote at home in case of quarantine or isolation and guided the polling stations to address the health authorities to request such documents upon receiving requests from voters. The

⁵³Art. 1. - (1) of the Law on some measures for the organization of election for the Senate and the Chamber of Deputies, as a result of the mandate termination in case of the Parliament elected in 2016, stated: *'By derogation from the provisions of art. 6 paragraph (2) of Law no. 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority, with subsequent amendments and completions, the date of election for the Senate and the Chamber of Deputies to be held following the mandate expiration of the Parliament shall be established by organic law, at least 60 days before the date of the election'*.

⁵⁴International experts also pointed out that Parliament adopted a number of changes to electoral legislation through an accelerated procedure and without a prior public consultation, as opposed to the international commitments and good practice.

⁵⁵ Decision of the Constitutional Court no. 678 of 29 September 2020, published in the Official Gazette of Romania, Part I, no. 946 of 15.10.2020.

⁵⁶ Its content can be read here: https://parlamentare2020.bec.ro/wp-content/uploads/2020/11/dec_40_rep.pdf, accessed on 14 June 2021.

voters in the above mentioned situations could also request a mobile ballot box also electronically, until 4 December. The CEB decision simplified the requirements and improved the voters' access to this procedure, however, the late approval limited its impact.

The election campaign was anemic not only because of the pandemic, but also due to the political fatigue, as the parliamentary election were the fourth election in the past 18 months.

While the campaign initially focused on issues such as economic recovery and anti-corruption, the worsening public health situation quickly captured the political debate. The President repeatedly expressed his political preferences in public statements in the run-up to the elections. This was also criticized by international experts who said that the interventions of the Head of State in the election campaign in supporting a certain political party 'blurred the line between his official duties and the election campaign, contrary to the international standards and the commitment of all OSCE countries to maintain a clear line between the state and political parties'.⁵⁷

On the other hand, the way in which the health crisis was managed by the rulers, the countless stutters in the public communication on the pandemic figures, the voting messages which came in contradiction with the alarming situation in terms of infections and deaths, as well as a series of unpopular measures taken by the Government determined a low turnout. The fear of infection prevented many Romanians to participate in the parliamentary election.

The polarization of Romanian political life, as well as the use of the same type of speech by the main competitors, that is the Social Democratic Party (PSD) and the National Liberal Party, led to the emergence of a new political party on the political scene, which was delivering a nationalist, radical speech, namely the Alliance for the Union of Romanians (AUR), that carried out a sustained campaign on social media networks.

General election results, Romania - 6 December 2020

POLITICAL PARTIES	CHAMBER OF DEPUTIES ⁵⁸			SENATE ⁵⁹			Seats
	Votes	%	Seats D	Votes	%	Seats	
PSD	1						

⁵⁷ For more details, please see: *Report on Preliminary Findings and Conclusions, ODIHR Special Election Evaluation Mission, Romania - Parliamentary Elections, 6 December 2020*. The document is available online: <https://www.osce.org/odihr/elections/romania/472812> accessed on 14 June 2021.

⁵⁸ Online information here: https://parlamentare2020.bec.ro/wp-content/uploads/2020/12/pv_1639.pdf, accessed on 14 June 2021.

⁵⁹ For more details, please visit: https://parlamentare2020.bec.ro/wp-content/uploads/2020/12/pv_1640.pdf accessed on 14 June 2021.

	,705,786	8.9 %	10	,732,2 89	9.32 %	7	57
PNL	,486,402 ¹	5.18 %	3	,511,2 27	5.58 %	1	34
USR PLUS	06,965 ⁹	5.37 %	5	36,864	5.86 %	5	0
AUR	35,831 ⁵	.08 %	3	41,938	.17%	4	7
UDMR	39,030 ³	.74 %	1	48,262	.89%		0
MINORITIES	-		7				1

The new Parliament has 465 members, representing five political parties to which national minorities add.

PSD won the election at a relatively short distance from its rival, PNL, while USR PLUS came in the third place. UDMR, the party representing the Hungarian minority, managed, very close to the limit, to go beyond the electoral threshold. There were two surprises on 6 December 2020 election: the Popular Movement Party, which failed to cross the electoral threshold, and AUR, which won 47 seats.

As no political party managed to obtain the majority of seats, the formation of a new Government was decided by the President of Romania, who entrusted it to the party which came in the second place, PNL. Together with USR PLUS, UDMR and the minorities, PNL has formed the new parliamentary majority for 2020 - 2024 legislature.

The conduct of the election in the midst of the pandemic revealed even more the weaknesses of the Romanian electoral system and its lack of adaptation to the new trends in the public life. I have repeatedly mentioned the need to have an Electoral Code making provisions for all aspects of election processes.

Frequent changes in terms of election legislation do nothing but make the voters become confused, make the election processes more difficult and create unnecessary dysfunctions. Also, there are no regulations for exceptional situations, like Covid-19 pandemic. The body of electoral experts managing the elections needs to become professional in order to remove the influence of politics. The implementation of modern technology tools has proved necessary and particularly useful to voters.

Following the December 2020 election, Expert Forum made a series of recommendations which we fully agree with: 'No significant reforms or new voting methods should be introduced without first being tested (electronic voting,

postal voting extended to all voters). Voting must ensure the safety of all those involved. Steps such as collecting supportive voting signatures, consulting election lists, preparing the members of the electoral administration, centralizing the results must be achieved as much as possible, through online methods and electronic tools’.

The voting methods must not create advantages or disadvantages to a certain category of voters or to an election competitor. The election process must ensure the participation of as many voters as possible and be as inclusive as possible. The results of local elections must provide representativeness, which may be affected by the majority voting system with one ballot and a possible lower turnout due to the pandemic. Also, increasing the number of polling stations, establishing preferential intervals for vulnerable groups of voters and additional measures (including voting by post) for people with disabilities, hospitalized, quarantined, in isolation or in prisons should be considered.

I hope that the pandemic was a lesson for the rulers, as well as for the entire political class, from the perspective of regulating and implementing a voting system that must keep up with the times.⁶⁰

6. Conclusions

Democracies have been put to the test during the health crisis. The countries had to adapt as they went along. The voting democratic process was managed by each country according to the regulations in force, to which they added new ones, through which they tried to respond to an exceptional situation. It was obvious that turnout would be much lower than in previous elections in the countries we approach in this study, which happened, with the lowest turnout since the political regimes changed in the 90s. However, this low participation of citizens in the voting process in the 2020 pandemic year raises the issue of the legitimacy of the legislative authorities under review.

The 2020 parliamentary elections were held under special conditions, imposed by the Covid-19 pandemic. Authorities in the countries under review had to take measures to ensure fair voting processes, to enable quarantined citizens to exercise their right to vote, and also to ensure the health safety to all voters. The mobile polling stations, the early voting, the electronic voting represented the solutions which the analyzed countries implemented. The inclusion of these voting tools and forms in order to facilitate the citizens' access to the decision-making process must be maintained even beyond the end of the pandemic. I believe that the legislators in Croatia, Slovakia, Lithuania, and Romania need to make regulations for other instruments as well to ease the way how the citizens exercise their right to vote or if they are temporarily unable to go to a polling station.

⁶⁰ To read the document, please visit: <https://fiecarevot.ro/2021/01/18/raport-observarea-alegerilor-parlamentare-2020/>, accessed on 14 June 2021.

Another solution would be to regulate a much easier procedure for postponing elections during total lockdown.

Ensuring conditions that create the premises for a fair democratic process is essential for any country that wants to be a rule of law.

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Constitution and the institutions, the benign nexus is on fall: a comparative study of India, Nepal and Myanmar

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Abstract

A society constitutionally manifested, where institutions for it stands inevitably the major organs, voice of the people resting through it usher to be the ethos of democracy at large. Leon Duguit in his saying of “social solidarity” asked for the interdependency, and to it anything stand against shall be the reason of rejection for the initiatives. India, Nepal and Myanmar, are of the fact witnessing bitter for the said principle, not satisfying the institutions in work of their absolute veneration, rather from their imbedded values they are in strips. The paper in its endeavour would in roll to assess different of the institutions in work for the countries named, where for the world at large a significant social solidarity is in need to hammer the knock on power, to which challenges and imperils for the citizenry rest at large. The methodology for the paper is doctrinal, which the author in assessing the institutional works of the countries will employ, where crisis of the present times, constitutional provisions in strip and jurisprudential approach for the democracy, would be the part of analogy.

Keywords: veneration, Constitution, social solidarity, interdependency.

JEL Classification: K10, K33

1. Introduction

Institutions in a society constitutionally manifested, stand to be the major organs of the societal anatomy. The functions they carry are for the society to sparkle its growth and prosperity, which with time, in roll of life, inflexibly retiring from the values within which they dip to smother. The recent phenomena what for the society witnessing at large, is not of a nature that smokes positive fire for the democracy out. Recently if of the Country India, the position of the parliament considered in passing laws, then exercise of such power looks and substantiate to be in a state of overriding the checks and balances. Art 123 of the constitution, which an ordinance making power, in case of situation emergent in character requires for passing of the laws, today seems to have denuded from its original values. Laws of the time evident to have passed in press of such power, which for the democracy like India, largest and young so called, is on unravelling the roads towards concentration of power. Nepal, aside to it too looks confident

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in concentrating power, where the Prime Minister K.P Oli openly throws challenge for it. Dissolving of the house and calling it to be unconstitutional by the Supreme Court, is not of a nature which speaks institution's veneration in place of security and integrity. Similar to it, Myanmar is chequering anonymity on the surface, return of the military, coup to takes place, winning leader to be incarcerated, and leading roads of the civilians upon the tyrannical blades, which all in a toto looks to be arbitrary impeachment of the civil liberties for the citizenry.

2. Myanmar tryst

Since of the time, when bright light for the soil illuminated the gloomy despondency, with the break of the shackles of dependency and retardation of the British rule from the country in the year 1948, continuation of the belligerency has proven such achievement to be a myth of the mystery. The year to evident with, the British people on leave provided a hasty constitution, democratic in character, which continued till of the year 1962, and left the first part of governance in so called of the time democratic, notwithstanding civil war and ethnic insurgencies took off in such days of governance. Military rule, which of then tasted the inebriation of power for the eighteen months to govern, had ruled out the constitution and started to govern by a decree. Burma Socialistic Programme Party (BSPP) in the leadership of General Ne Win, for the next 28 years started to be in rein.³ Ne Win stood for the election in the year 1960, but same year he steps down on restoration of the government by the earlier leader, U Nu. Ne Win in consequence of the defeat, called for the coup d'état, imprisoned U Nu and established the Revolutionary Council of the Union of Burma, with the members drawn exclusively from the armed forces. The rule of being the despot unravelled, Ne Win. Repressive economic policies, nationalisation of the major economic enterprises and one party rule, the Burma Socialistic Programme Party, secluded Burma from any foreign contract. A new constitution to the soil given of the year 1772-73, and Ne Win stood for the one party as president, who dreamt to be in power in perpetuity. The rule for the country stood poignant, took the country in the world's poorest place, lowest in the globe to suffer. The country which once being the largest exporter of rice, delved to be the soil of gravest consequences, filled with black market and corruption. 1987-88 for the country was prejudicial, anti-government riot and student led protest ushered, caused thousands of protesters killed and numerous to jail. Disturbances in continuity pushed Ne Win to resign, and the government in his absence fall. State Law and Order Restoration Council, in substance took on to rule, headed by the military personnel and Ne Win testified to be in veil of the military power, who continued to be in rule till

³ Myanmar's Elections, Skewed Constitution and Its Conundrums, Vol. 50, Issue No. 44, 31 Oct, 2015, Economic and Political Weekly. <https://www.epw.in/journal/2015/44/web-exclusives/myanmars-elections.html>, consulted on 1.03.2021.

of the year 1990.⁴

Burma, the name in 1947 was given and reckoned in the International usage. 1988, the name in pursuance of the military junta changed to Myanmar, which in the Burmese language means “nation of the strong and swift people”. The year for the country, 1988, proved to be revolutionary, which brought to an end of the thirty years dictators rule. National League for Democracy (NLD)⁵ in its favour gained eighty percent electoral vote, and set the Nobel Prize Winner Aung Sang Suu Ki to rule for the governance. The State Law and Order Restoration council with the result didn’t satisfy; they sought for the imprisonment of the winning leader and its associates.⁶ Imposition of such command reasoned with the law, which for a civilized nation is a backdated one. Art 59(f) of the constitution states, that if the person contesting election does in connection belongs to anyone of his/her kin, whether husband, son or anyone from a foreign origin, he/she shall be forbidden from that post of the president. Suu Ki, whose husband is of British origin and sons too, got her disqualified to be in the post of president. The law certainly is in wrong manifestation to be in work, which is against the civilized world. The Nobel laureate is in house arrest, which she prior to the 2010 spent under house arrest for 15 years. Allegation against her recently fostered that she was in business of accepting bribes and gold. The newspaper Global New Light came out of such fact, though the allegation sought to be absurd, as per her lawyer’s view when concerned.

Since of independency, Myanmar for its people often stood to be tyrannical, evidenced with only three times of the electoral votes that has taken place. For the world, the human rights violation has become a subject of wide discussion, but the scene of Myanmar in spite of the fact draws much of the global adherence, but the result in restoration of the democratic government has become a challenge. China to be its neighbour walked on to mediate the crisis, where they sought for the dialogue between the military group and the political party. The matter even reckoned to be in the United Nation’s discussion, where China given the positive view to resolve the dispute amicably. India to this, since of the past experience of fierce criticism in the year 1988 upheavals, stand quite, but has always voiced for the democratic set up for the country to set up.⁷

Analogy: an eye through chaos and complexity. In response to the conundrums, which of time, like repels creating the doldrums, an eye of chaos and complexity is in view to prism through. Scott in his view, called every legal system is

⁴Encyclopedia Britannica, U Ne Win, *Myanmar General and Dictator*, 20th July 1998. <https://www.britannica.com/biography/U-Ne-Win>, consulted on 1.03.2021.

⁵ Taking Stock of Myanmar’s Political Transformation since 2011, 17th Dec 2019, accepted 20th January 2020, SAGE, <https://journals.sagepub.com/doi/pdf/10.1177/1868103420905140>, consulted on 1.03.2021.

⁶ ULCA Pacific Basin Law Journal 10 (2), Violent Repression in Burma: Human Rights and the Global Response, Guyon, Rudy, publication date 1992.

⁷<https://constitutionnet.org/country/nepal-country-constitutional-profile>, *Constitution net*, international idea institute for democracy and electoral assistance, last visit 19/05/2021.

unpredictable and unstable. The paradox of justice rest in human disorder and non-confident approach, he therefore to which signifies such with the oscillating pendulum, laws for the mortal world is unable to justify correctly.⁸ The significance this theory examines is the disorder in the society created by the order. Since of time Myanmar in its existence came into being, the soil has only evident of the different variables, in which inner conflicts on religion and to be in power always prevails. The order of such disturbances created the disorder of the time being, where law and instability coexist, but not in realm of the societal profits. Their existence is only for some certain objectivity, to ascertain power. Duguit's principle of "social solidarity"⁹, sanctify of the statement of interdependency, where the society is said to be interlinked and in connection with everyone because of services in a society solidarity constitutes, and against it if anything rose, that would be rejected. Everyone therefore is of the duty to strengthen the solidarity. In such connection the leader, Nobel Prize Winner is the product of social solidarity, but the military power is against such, protest to which therefore flagging and mercilessly trigger down the common voices of the folks. The answer to the question given with, how order from the disorder withered and order from the rational order be substantiated. The order of disorder that in Myanmar continued, starting from choosing of the leader, surpassed by the military power to rule, further the leader of populist came into power, which made to be in house arrest, everything looks to be in order to distort the order of utilitarianism, chaos and complexity it is. United Nations, Universal Declaration Of Human Rights, to which most of the parties across the world signed for international peace, is today becomes questionable, that in how far such rights made are effective in play. United Nations took stance in vigour, voiced for the urgent and decisive action to be taken.¹⁰ Sovereignty, for the nation speaks loud, for which order's from the United Nations fall short, but today, international law has arisen maturely, influenced much upon the domestic law and governance, where on substantiating proper measure in pressuring the government setting aside of any vested interest of any of the nation, being a part of the security council, otherwise the conduct of the United Nation sanctify further statement of the Oppenheim "International law is the vanishing point of jurisprudence".¹¹

⁸ Scott, Robert E., *Chaos Theory and the Justice Paradox*, „William and Marry Law Review”, Year: 1993, Volume: 35, Number: 1, (pp. 329–351), p. 348.

⁹ V.D. Mahajan's, *Jurisprudence and Legal Theory*, fifth edition, Eastern Book Company, p. 526, and 527.

¹⁰ United Nations, UN rights expert calls for 'urgent and decisive' action to support people of Myanmar. <https://news.un.org/en/story/2021/03/1086482>.

¹¹ Dr. H.O. Agarwal, *International Law and Human Rights*, Central Law Publications, twenty-second edition, 2019, p. 12.

3. Nepal allegory

Nepal to its territory stand of an area of 1, 47000 kilometres, where Chin's Tibet is on north and on the east, west and south, the area is covered by India. 30 million of the population with 125 ethnic groups speaking 147 languages is what characterise the country. The country said to be ruled by a Hindu deity, an incarnation of Lord Vishnu, but the Sugauli Treaty 1816 defined the country's border, which in contemplation also of the convention held that in influence British in its boarder emphasize. In it several of the rivals witnessed rise and falls and of them Jang Bahadur stood prime facie. He became the prime minister, given effect to the nation codification of the legal system. Eventually to this, Jang Bahadur to the office of prime minister gave a status of hereditary succession, which made the dictator to continue ruling of the land. Till to the end of twelfth century in confirmation of the British consent, the rule of family succession upon goodwill continued. World War I and II consigned several of the Nepalese army to the war on side of the Englishmen. Later the retired officers on the soil confirmed for a multi party democratic government, which sooner of the time silenced in its feat. India, which of then fighting for independency and exiles of the Nepalese army in that took part with India after World War II. Padma Shamsheer Rana was in attempt to strip off the British influence from the soil claimed revolt, he onto which succeeded and given the land a new constitution in the year 1948. The constitution found to be weak, little of its power remained to keep the king equal to it. The bicameral legislature in its voice remained low, King to which at discretion to any decision taken acted, and if wished also rejected. Against the anarchy, the voice arose and civil war by the time spanned at height, which by 1951 Tribhuvan Bir Bikram Shah with the congress-party given effect to an interim constitution for the country. The situation not against the revolution stood different, monarch to the parliamentary democracy always stood above, till of time the next king Mahendra Bir Bikram Shah Dev consented for the parliamentary election in the year 1959. Soon to the change, liberal policies apprehends the king of his position, which in consequence of using inner conflicts and agitation, rejected the newly made constitution given effects into. But to that, in the year 1962, a Panchayat Constitution was given effects into, limited to the elder member to participate only in it, and in rest the executive power retained by the king. Political parties and democratic participation were banned to it, and in 1972 an election to the party less Panchayat was made. The Panchayat assembly with a narrow margin won the election and the king in pursuance thereof constituted the eleven members Constitution Reform Commission. 1990 for the nation erected revolutionary, when first time for the nation, parliamentary democracy formed with a new constitution of it. King's power got curbed and multiparty system for the entire territory given effects into. Consequently late to the years, Maoist movement started in the countryside. Conflicts took over in its entirety and the King family left dead. The constitution left unattained and the country by

took over the absolute insurgency. Till of the time upheavals continued, by 15th January, 2007, an interim constitution was given effects into.

The rise of K.P Oli. Khadga Prasad Oli, evolves to experience many rise and fall, since of 1990, the country when from the hands of monarch unveiled the roads of democracy. Oli, then of 10 years of age, from a Brahmin family of the eastern Nepal, in thrust of a better life moved with his father in Jhapa. He joined the Naxalbari movement then in India which was in force. The movement arose against the Panchayat assembly, he of which was a part. In 1973, Oli being part of the movement imprisoned, and in solitary confinement spent fourteen years. The Jhapa movement and Naxalite movement then spits over, and into a larger party amalgamates. The communist party of Nepal (Unified- Marxist Lenin), the party for the nation delved first to unbutton the role of parliamentary democracy, but in manifestation becomes constitutional and democratic monarchy. 1990, the maoist movement, 2001 the royal massacre and in 2002 returning of the monarch, much to the Nepal polity changes and drift brought about. Maoist movement in the Nepal security forces influenced, Oli, of the two constituencies then lost took strident opposition. For the first time in 2015, Oli became the prime minister, took stance at strong against the Madhesi aspiration. An agitation across guided by the Madhesi movement proliferated. In the hilly region on the goods being imported puts an embargo, India to which said to fuel in business. Oli in rage with China entered into several of the pacts in 2016. In the hilly region Oli became a popular voice and in stand against India, his establishment far more became firm. In connivance with the Pushpa Kumar Dalal led Communist Party of Nepal (Maoist Centre) for the second time in 2017, Oli came in power and became the prime minister.¹²

Much to the needs and roll of time, post 2017, things there were many to unravel, but before the power, Oli seen to sink in full. With days, split with the Nepalese Communist Party sought, the party in consequence decided Oli to step down as the prime minister. Oli to such decision decided not to subscribe, and dissolve as a result the parliament itself. Wants of being in power, is for him looks intoxicating.¹³

Detoxifying the politics. Lord Acton, the famous saying, “Power corrupts and absolute power corrupts absolutely”, powerful men are always bad, whether

¹² Nepal Prime Minister K.P. Oli | From the Jhapa revolt to the seat of power, SrinivasanRamani, 10th June 2021, last visit 18/05/2021. <https://www.thehindu.com/news/international/nepal-prime-minister-kp-oli-from-the-jhapa-revolt-to-the-seat-of-power/article31878367.ece> .

¹³ The Hindu, Nepal in turmoil: on dissolution of Parliament by K.P Sharma Oli, 22nd December 2020, (last visit 18/05.2021) <https://www.thehindu.com/opinion/editorial/nepal-in-turmoil-on-dissolution-of-parliament-by-kp-sharma-oli/article33387983.ece>.

they are of authority or influence,¹⁴ though the paradox of the saying lies on being compassionate and of giving hands, that holds the power than of being rigid.¹⁵ Contrary to such, against the saying, isn't that be worthy, when good people are to be in power,¹⁴ does in such cases too, the famous saying of the Acton justifies the position. To much of such saying, the philosophical stand that Stammler in his "The Theory of Justice" given is relevant. He called it a "just law", which sanctify the ideal between law and society, the purpose of the individual with it.¹⁶ Nepal in content, not in practice well find of the saying, leaders were found to rule the country in not satisfying the relation between individual, law and society. Rudolf Von Ihering founds therefore the purpose of law is to protect the interests, which must be in avoidance of pain and in pursuit of pleasure.¹⁷ The present bottleneck if to defrost, true need of international interference requires, where the United Nation Charter objectifies in bringing international peace and security across the world. Adaptation of the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment on 10th December, 1984, enforced on 26th June, 1987, in pursuance of the Article 5 of the UDHR and 7 of the International Covenant on Civil and Political Rights, which truly in need of substantiation.¹⁸

4. India, in veil of democracy

India to democracy stands since of 1947. Never since of inception the nation felt in devoid of democracy, till 1970 when Congress led by Mrs Indira Gandhi first time made populist to meander, where is the democracy. 5th Lok Sabha election, 1971, huge campaign led by Indira Gandhi across the country. She dared to win the election. But at Rae Bareilly Raj Narain leader of the opposition, Ram Manohar Lohia's SSP, confident of his win. Prior to the result of election, he triumphed of his win, but tragedy in the end took off, India Gandhi won the election by huge margin. Before the Allahabad High Court, eligibility of the election challenged, against Mrs Gandhi allegation of rigging slapped, to the people bribing of money and sharing of blankets arose. The High Court ruled in favour of

¹⁴ Lord Acton writes to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included, especially since "Power tends to corrupt and absolute power corrupts absolutely" 1887, last visit 18/05/2021. <https://oll.libertyfund.org/quote/lord-acton-writes-to-bishop-creighton-that-the-same-moral-standards-should-be-applied-to-all-men-political-and-religious-leaders-included-especially-since-power-tends-to-corrupt-and-absolute-power-corrupts-absolutely>.

¹⁵ Fair Observer, The Power Paradox: Does Absolute Power Corrupt Absolutely? Dacher Keltner. Aug 23, 2016, https://www.fairobserver.com/region/north_america/power-paradox-absolute-power-corrupt-absolutely-29493/, last visit 18/05/2021.

¹⁶ Dr. H.O. Agarwal, *International Law and Human Rights*, Central Law Publications, twenty-second edition, 2019, p. 519.

¹⁷ *Ibid*, p. 535

¹⁸ United Nations Human Rights Office of the High Commission. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

Raj Narain. The verdict in the Supreme Court challenged, in midst of which 39th amendment was passed, introducing 329A in the constitution. The election of the Speaker and the Prime Minister cannot be challenged before law, which on test of credibility on need be placed before the standing committee. The amendment was challenged. *Kesavananda Bharati vs State of Kerala*, with “the basic structure doctrine” had already conceived off. In application of the doctrine, art 329A Clause 4 was struck down as ultra vires, on ground that it hit the free and fair election, the democracy of the country, which is the basic structure of the constitution.¹⁹

India today in its rule has much developed, but what today the buzz that seems to loom across, is to use the constitutional provision to subvert the constitutional values. Such is of a kind, the present practice of the ordinance making power under Art 123 and 213 of the constitution, for the president and the governor rest. The power in the original constitution of 1948 was in art 102, given effects to constitute law when parliament is not in session, an emergency for the nation countered. On debates regarding misuse of the power of ordinance, the chairman of the Drafting Committee Dr B.R Ambedkar justified the need of the power, contending the power is of limitation to exercise, and in such exercise violation of fundamental rights if caused then the law promulgated through ordinance would be called in fructuous.²⁰

Two of the big cases that led the nation to raise strong voices against the Government of India, Unnao and Khatua rape case. Criminal Law Amendment 2018, made through ordinance giving death penalty to the accused, raped a girl of below 12 years of age once convicted. The Delhi High Court on merit thrown slew of questions regarding such deterrent punishment sought to be given. Misuse of the ordinance making power ratified.²¹ Some of the practices, that hit the sole of check and balances, like abashing the question hour, slashing the zero-hour limit by 30 minutes from 60 minutes in use of the ordinance, surmount true fear for the democracy. In this connection, 1989 marked with an incident, when the Bihar government passed the Non Govt Sanskrit College (Taking over of management and control) ordinance, for taking over 429 Sanskrit colleges in Bihar. None of the ordinances were placed before the State Legislature, and the procedure of re promulgation of the ordinance was challenged before the Patna High Court. The writ petition was dismissed and went before the Supreme Court on appeal. The seven judges bench took on the matter to be decided, where the judgement on behalf of the majority written by Dr J.Y Chandrachud and held that re promulgation of the ordinance is invalid in the eye of law, considering 123(2) and

¹⁹ Indira Nehru Gandhi vs. Raj Narain – Case Summary, by Hemant Varshney, 22nd August, 2018. (Last visit 19/5/2021). <https://lawtimesjournal.in/indira-nehru-gandhi-v-raj-narain/>.

²⁰<https://www.deccanherald.com/opinion/in-perspective/the-misuse-of-ordinance-powers-919618.html>, Deccan Herald, by Kruthika R, Madhavi Gopalakrishnan, Nov 25, 2020.

²¹ Ordinance Raj: Rule by Diktat, Legal India, May 5th 2018. (Last visited 19/05/202) <https://www.indialegalive.com/special-story/ordinance-raj-misuse-of-a-constitutionally-granted-right>.

213(2) of the constitution.²²

India, since of its beginning, secularism for it stand to be an indefatigable feat, though the term in the constitution was not present initially, through 42nd amendment which later being inserted in the preamble. Allegation to the soil, regarding conversion of religion is in loom. Uttar Pradesh one of the largest state evident to be of such practices, named “love jihad”. A bill in response, making conversion through marriage a non-bailable offence, through voice vote such has been passed. The passing of the bill, through voice vote rose too many of the questions. Voice vote the practice culminates the opinion of the members of the house in regards to the bill in place, whether yes or no they are in contention, in midst of the confusion, which side is sounding louder, is therefore the difficult job for the speaker to determine. The Supreme Court in regard to which, in the 2005, in an attempt to deal with such a matter, prescribed for the trust vote, and made certain rules to be followed. Criticism to the direction flown by in contention of the parliamentary sovereignty, Supreme Court to which endeavoured to intervene, alleged across. The position to the matter made clear, Supreme Court in statement substantiate in vigour, that rules framed by the house, must in compliance of the constitutional mandates prevail.²³ Present status therefore of the fact, laid much bigger emphasise on stubbornness of the government, with no consultative process creating precedent to pass laws. Triple Talaq, Farm Laws, Constitutional Amendment Law, Abrogation of Art 370 are the product of such practices.²⁴

In ignorance of the checks and balances. The Parliament within its sovereignty bounds by the checks and balances, the opposition in power are of it, to provide the fiction of law. To say, in such what today, the youngest and the largest democracy witnessing is unruly. The republic certainly at rule to pass laws in an absolute majority is in assiduity indefatigably. The doctrine of checks and balances²⁵ what in the early Anglo-American society evidenced was in practice of guarding the fundamental rights. Bentham’s utilitarianism concepts in gross seen violating.²⁶ In a democratic country where adult suffrage is in place, voice of the populist is prioritised. To make a change, and to bring the necessary implementation, the need pertains to international surveillance, where through making laws

²²Krishna Kumar Singh & Anrvs State Of Bihar & Ors. on 2 January, 2017, <https://indiankanoon.org/doc/107225908/>.

²³The Hindu, Voice Vote Valid only when nobody questions it, by Varghese K George, <https://www.thehindu.com/news/national/other-states/voice-vote-valid-only-when-nobody-questions-it/article6596275.ece>, dated 14 November, 2014.

²⁴The Way Farm Bills Passed in RajyaSabha Shows Decline in Culture of Legislative Scrutiny. S.N. Sahu, 21st Sep, 2020, The Wire. https://thewire.in/politics/farm-bills-rajya-sabha-legislative-scrutiny_

²⁵ Rafael La Porta, Florencio Lopez-de-Silanes, Cristian Pop-Eleches, Andrei Shleifer, *Judicial Checks and Balances*, https://scholar.harvard.edu/files/shleifer/files/judicial_checks.pdf.

²⁶ Dr. H.O. Agarwal, *International Law and Human Rights*, Central Law Publications, twenty-second edition, 2019, p. 441.

any of the rights violated grossly, United Nations discussion stand at par to get into, because, in today's civilization the world has become a global village, and internationally concerned issues are therefore in need to be prioritized.

5. Conclusion

This to which in respect of the present doldrums consolidated with the famous saying the William Shakespeare from King Lear is well remembered i.e. "When King Lear told the blind Gloucester", "A man may see how this world goes with no eyes"; he told Gloucester how to look with thine ears see how justice yond simple thief. Hark, in thine ear: change places; handy-dandy, which is the justice, which is the thief? Thou has seen a farmer's dog bark at a beggar?²⁷ Justice is not indeed the only soul to be dispensed therefore by the Judiciary, a duty within the throb of democracy also prevails, where Legislature the place of public opinion speaks at last.

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Winner prescription as a way of gaining the right of real servitude according to the legislation in Kosovo with a comparative view with some European countries

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Abstract

The winning prescription, both in the right of ownership and in the right of servitude has a special importance, because it is a legal title which is created by the possession of the thing in an uninterrupted manner, for a long time and without hindered by anyone. This means that the property right, respectively the right of ownership or even the right of servitude can be created if the conditions provided for the winning prescription are met. We know that all property rights must be registered in case we want to become the holder of any property right. As in this case, the right of servitude in case it is thought to be acquired even with a winning prescription it must be registered in the real estate books. For this reason, we can say that the winning prescription has a great importance in both the acquisition of the right of ownership and the right of real servitude, because a large number of subjects of law have only the de facto power over the thing yes. Thus, he possesses this right in good faith. It happens to him that people possess someone else's thing thinking that he only had a right over that thing but the truth is that he had no legal right, so he did not have it registered in the public books to use it right. According to the legislation in Kosovo, the right of real servitude is not foreseen whether it can be acquired by winning prescription, but based on the legislations of other countries, whether regional or beyond, it is said that the right of real servitude can be created and through the winning prescription. Particularly based on some legislations of European countries, the right of servitude can be acquired through winning prescription, if the conditions of winning prescription are met. The purpose of this paper is to compare the legislation of European countries and as a conclusion to conclude that in the legislation of Kosovo should be determined that the right of real servitude is acquired by winning prescription.

Keywords: *winning prescription, real servitude, creation, profit, European legislation.*

JEL Classification: K11

1. Introduction

Based on the legislation of the state of Kosovo, it is foreseen how we can

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acquire the right of servitude, specifically the real (real) servitude, as well as from the legal-judicial practice during the research, it was noticed that the servitude as a real right is acquired by law that can be called compulsory servitudes and legal actions or servitudes created voluntarily which are created by a valid legal work, but also by a court decision. As a right it must be registered in the books for the registration of property rights.

An easement is an institution of property law as well as a property right and is acquired in a derivative way (derived from the legal predecessor) and originally based on other facts provided by law. One of the original ways of gaining ownership is also the winning prescription. In this aspect there are also discussions about the original way of obtaining real servitudes through the winning prescription.

Given what was said above, I emphasize that the topic will be addressed taking into account the legislation and doctrine of international states, specifically states that have had an impact on the issuance of civil law laws in Kosovo. In this way we will work to address and clarify the right of real servitudes with special emphasis on the acquisition of real right with winning prescription.

Based on the fact that the servitude is a real right as well as the right of ownership, then it is thought that the right of servitude can be acquired with one of the sub-ways of the original way of gaining the right of ownership, which is the winning prescription. Thus, from the legal doctrine, it is noticed that many authors think that the servitude as a real right can be acquired with a winning prescription and that the same should be established in the legislation. Therefore, in the content of the paper, we will talk about the real servitude as a real right and the acquisition of the servitude right with a winning prescription, which way is not recognized by the local legislation but is claimed to be defined in the Civil Code.

2. Creating the right of servitudes with winning prescription

The right of real servitude to be created is acceptable because it can also serve as a sub-method of the original way of gaining this right. But how applicable it is in practice and defined in the legal provisions in force, remains to be seen. One of these sub-ways of the original way of creating the right of real servitude, is thought to be the winning prescription. So, the right of real servitude can be created with a legal title coming from a sub-way of the original way, which way is the winning prescription. Then, we say that the winning prescription in property law is the legal title for acquiring the property right in the original way. But the winning prescription as a legal title for gaining the right of real servitude can not be excluded.

The winning prescription, both in the right of ownership and in the right of servitude has a special importance, because it is a legal title which is created by the possession of the thing in an uninterrupted, for a long time and unhindered

by no one. This means that the real right, respectively the right of ownership or even the right of servitude can be created in case the conditions foreseen for the winning prescription are met.

We know that all property rights must be registered in case we want to become the holder of any property right. As in this case, the right of servitude in case it is thought to be acquired even with a winning prescription it must be registered in the books of real estate. For this reason, we can say that the winning prescription has a great importance in both the acquisition of the right of ownership and the right of real servitude, because a large number of subjects of law have only the de facto power over the thing of yes. Thus he possesses this right in good faith. It happens to him that people possess someone else's thing thinking that he only had a right over that thing, but the truth is that he had no legal right, so he did not have it registered in public books to use it right.

In these cases, I emphasize that the right of real servitude would have been created in case that de facto power could be registered in the real estate registers. But in order to register, the conditions set out in the winning prescription must be met.

When it comes to winning prescription, Kosovo LPDTS in an original way does not mention that a right of real servitude can be acquired by winning prescription. But based on the legislations of other countries, whether regional or beyond, it is said that the right of real servitude can be created through the winning prescription.³

I also think that the right of real servitude over an immovable property can be created through the winning prescription, but that some of the conditions of the winning prescription must be met.

In this case the conditions of the winning prescription will have to be:

- possession of the item to meet the needs of the dominant item;
- this possession of the item must be in good faith;
- and the time of 20 years must have passed from the moment when the person has started to possess that thing to meet his needs towards the dominant thing.

So, the first condition that must be met to gain a right of servitude by means of the winning prescription is the possession of the thing to meet the needs of the dominant thing. As a start, we should have possessed the thing for which the right of servitude is created long ago. What does it mean to own an item? According to property law, both by legislation and legal doctrine, possession is the de facto power over a certain thing, in which the person who has the right of possession is considered as the holder of someone else's thing. Specifically in this case it is considered that the possessor has factual (economic) power over the thing.⁴ Possession is considered as a legal institute which represents the factual

³ Luarasi, Aleks, *Civil Code with Judicial Practice*, first edition, Tirana, 2003, p. 124.

⁴ Factual power over a certain thing is a manifestation of factual storage with the thing in possession. In addition to storage, the will of the party must be expressed to keep the item for himself. Both of

situation, protected by positive law.⁵ Possession is not a property right, nor is it still a property right, but there is legal protection. Also under current legislation, possession is offered legal protection in the event of a breach by someone.⁶ Since Possession was offered legal protection, then it was thought that possession is the relevant factual and legal power, which is created for a certain thing. So, whenever a person holds someone else's thing to meet his personal needs, starting with the economic ones, it can be said that that person has effective power over that thing, or real material rule over a certain thing.⁷

And in the case in question, there must be possession of the thing in which it is thought to create the right of real servitude with a winning prescription. So, the person who used someone else's thing to meet his needs, he could think of now gaining the right of servitude over that thing. Since the right of ownership is indisputable that I will be able to acquire it, if the same conditions are met as I mention now in the acquisition of the servitude over that thing.

In case the person had de facto-effective power over the given thing, he fulfilled the first condition which enabled him to continue further to come to the creation of the right of servitude with winning prescription.

In addition to possession of the thing, the second condition must be met, which enables us to create the right of real servitude over the immovable thing. In this case the second condition is: that the possession which the person has had so far, should definitely be in good faith.

As defined in the divisions of possession, there were instances of good faith and bad faith.

Possession in good faith is considered the possession of a certain thing, without the knowledge that he had no right of possession over the certain thing.

Whereas possession in bad faith is considered when someone else's thing is held, and the one who holds it knows that that thing belonged to someone else while the holder continues to hold it and pretends that he really has the right to keep or use the thing.

In order to reach the fulfillment of the second condition, then the possession created over the given thing must be in good faith. So, the possessor was not aware that he had no right to use the certain thing.

When it came to the acquisition of the right of ownership, it was said that: possession in good faith is a legal fact on the basis of which the acquisition of the right of ownership becomes a fact.⁸

these elements will have to exist to be considered as having possession which enjoys legal protection. So in general, in order for possession to exist, there must be two essential elements, such as: possession of the thing (*corpus possessionis*) and the will to keep the thing by itself (*animus possessionis*).

⁵ Aliu, Abdulla, *Property Law*, Prishtina, 2014, p. 59.

⁶ See LPDTS, Kosovo, Article 103.

⁷ Sheu, Avni, *E Drejta Civile*, Tiranë, 1998, p. 2.

⁸ See Law no. 03/L-154, on property and other real rights, Kosovo, Prishtina, 2014, article 104, according to which it is stated that: Possession in an object is gained by creating de facto power

In these cases, in addition to gaining the right of ownership, it was always said that another property right could be acquired, and in this case, it was about gaining the right of real servitude which may come from the good faith possession of that person.

In addition to the possession in good faith, the third condition must be met, to come to the creation of the right of real servitude with a winning prescription.

In this case, the third condition is that the time of 20 years must have passed from the moment when the person began to possess that item to meet his needs towards the dominant item. So, in this case, all three of these conditions must be met cumulatively to enable the creation of the right of real servitude with a winning prescription. In addition to the possession of a certain thing and the trust in possession, a period of 20 years must have elapsed from the moment that person began to possess that thing. Regarding these conditions and the creation of the right of real servitude with winning prescription, in the local legislation it is not defined in the legal provisions of LPDTS, but it is thought that it should be defined as well. So, these conditions of the winning prescription are based on the acquisition of the property right with the winning prescription. Therefore, it is thought that it would be appropriate for the same conditions to exist in gaining the right of servitude with a winning prescription.

In this case, it was about the third condition which was the passage of a period of 20 years of possession of the thing on which is already required to create the right of real servitude.

Thus e.g. if person A had crossed the path of person B for 20 consecutive years or more, with the opinion that he had the right to cross to his land, then in this case person A has only met the conditions to gain the right of real servitude for the passage over the land of person B. It would be much more appropriate for person A, to create this right and also to register it in the books of real estate, since one day he could there is some confusion with person B or the offspring of person B. So, it would be necessary for person A to first see if I can not establish this right of servitude with the agreement of person B, and if this does not function, then person A is given the right to address the judicial system by filing a lawsuit for the acquisition⁹ of the right of real servitude by means of the winning prescription.

over the object. As in the concrete case, when it comes to gaining the right of real servitude with winning prescription, as a primary condition must be the factual power over a certain thing and that this possession must be in good faith.

⁹ The right to address the judicial system is defined by the Constitution of the Republic of Kosovo, to the personal rights of the subject of law. For more see: Constitution of the Republic of Kosovo, Prishtina, 2008.

3. Understanding the winning prescription from the right of ownership and the difference with the right of real servitudes

The right of ownership as a fundamental right guaranteed by the highest legal act of the state, as well as with the LPDTS, is given special importance and the way of gaining ownership as a real right. The right of ownership, as a right with more legal authorizations than other real rights, is also acquired on the basis of a legal title and on the basis of the registration of the right in the public books of real estate. In this case the legal title created may come from some future circumstance, such as any legal work created between the parties. This legal work can be a contract or a will, and in addition to legal work it can also be a decision of state bodies such as the court as well as the administrative body. In all these cases as an integral part of the acquisition of a property right can be as a cause and the winning prescription. When it comes to winning prescription, the authors since Roman times, more specifically since the first written laws emphasized that property rights can be acquired in two ways, that in a derivative way and in an original way.

Even the right of ownership, as mentioned above and the right of servitude, can be created by derivative means, which means that the right of ownership is created by an ancestor. The ancestor in this case is considered the previous owner of that right even though he may not be of the same blood race as the current owner. It should be noted that derivatively can be created the creation of property rights by legal work, whether by will or contract, as well as by decision of the administrative body.¹⁰ In this case, we say that we have acquired a property right by contract, but we must know that the contract is a derivative way of creating the property right. The will is also considered as a derivative way.¹¹

In addition to legal affairs, the decision of the state body can also create a property right and be called as a derivative way of creating property. This happens in all those cases when the owner of the thing existed before, while now that right of ownership passes to other persons who buy that thing, or receive a gift from the current owner, or inherit it, etc.

In addition to the derivative way, the right of ownership can also be acquired by a legal fact which leads to the acquisition of the right of ownership. In this case these facts or legal circumstances are counted as the original way of gaining ownership. So, the original way of gaining ownership is the way through which the right of ownership is created over an item to which there was no previous owner. This method has several types of sub-methods which can be as a cause that bring about the acquisition of a property right.

One of these mother ways of the original way is the winning prescription. Based on the winning prescription, the right of ownership is acquired in cases

¹⁰ See Law no. 03/L-154 on property and other real rights, Prishtina, 2009, article 252, par. 1, 2.

¹¹ Games, Andrija, *Basics of Real Law*, Prishtina, 1958, p. 146.

when the parties meet certain conditions, based on which it is proved that the right of ownership can be acquired with the winning prescription.

And according to the Kosovo LPDTS, the right of ownership is acquired by winning prescription, in case the conditions of winning prescription are met.¹²

So, in order to consider that a property right is acquired on the basis of the winning prescription, then the following conditions must be met:

Initially the party must possess the right of ownership. In this case it is understood that the person who applies for the acquisition of property with a winning prescription, he must be the possessor of the right of ownership. This means that the person seeking to acquire the right of ownership must have kept the thing, and must also have maintained, and had to use it to meet his economic and personal needs. Thus, the possessor of an item is considered the person who has the de facto-effective power over the given item, on the basis of which we can come to the acquisition of the right of ownership. It should be noted that possession of the thing must be lawful possession.

A condition other than the possession of the immovable property, the subject of the law must definitely have this possession that he made, in good faith. Good faith in this case means that the person who owns the thing, considers that it is his own. Even this does not mean that he only considers but must be convinced that the thing is his or more precisely of his ancestors. So, in the case of trust, it is a question of the consciousness of the person who owns the other thing to whom. In this case trust is an essential condition as well as the above condition.

In addition to trust, the party must have passed the time period, which years vary from state to state.

This means that the right of ownership with a winning prescription can be acquired if the party meets the third condition which is: possession of the thing continuously for almost more than 20 years. So, in real estate the right of ownership can be acquired and in a right that until now a person was only the possessor, but from now on this person claims to acquire the right of ownership, since he meets the third condition. It is considered fulfilled if the possessor of the immovable property possessed the thing (land, house, apartment, etc.) for twenty (20) uninterrupted years.¹³

Also, with a winning prescription, a property right can be created, in case the party addresses the court, and based on the lawsuit, the judge decides on the creation of the servitude or dismisses the contentious legal issue.

In this case, the winning statute of limitations is expressed when the party who is already in possession and was in possession even 20 years before the moment when he files the lawsuit. For all this factual situation, the party must prove it with evidence, such as. in this case, I can present as electricity, electricity bills, water bills, or property tax bills. All these can be used by the party as evidence,

¹² See Law no. 03/L-154 on property and other real rights, Prishtina, 2009, 28.

¹³ Aliu, Abdulla, *op. cit.*, 2014, p. 249.

since based on these it is proven that he was the owner of that house or that land, for years in a row, specifically for 20 years in a row. For these 20 years no one had objected, thinking that this possession is wrong. And since no one objected to the possession of the possessing party, then that person only meets the conditions for acquiring the property right with a winning prescription.¹⁴

In addition to the right of ownership, the right of servitude is acquired in almost similar situations as the right of ownership. So, in these cases the right of servitude can be acquired by winning prescription, if the above conditions are met the same as in the acquisition of property rights, such as: possession of the thing, continuous possession for 20 consecutive years without interruption, and possession to be in good faith.

3.1. Creating the right of servitudes with winning prescription according to the legislation and case law

Like the right of ownership, the right of real servitude can be acquired by winning prescription. Such a thing is not defined by the local Legislation, which would be necessary to be determined by legal provisions, that the right of real servitude can be acquired in the original way which is the winning prescription, and that as in next.

The person who owns a part of the immovable, twenty (20) years without interruption, and that this possession is and is in good faith, acquires the right of servitude over that part of the immovable.¹⁵

A similar provision is set out in the Kosovo LPDTS, but which speaks of gaining ownership by winning prescription, but not possession. It would be appropriate for the right of real servitude to be a provision similar to that of gaining ownership by winning prescription. From the mentioned provision, it is explained that in order to acquire a right with a winning prescription, certain conditions must be met. The same conditions would have to be met in the acquisition of the right of real servitude over a part of the property.

When we are talking about the acquisition of the right of servitude over an immovable thing, we must distinguish it from the right of ownership, and that starting from the moment when we say: the acquisition of the right of servitude in a part of the immovable property. Unlike the right of ownership which can be acquired as a right in the whole real estate but also in a part of it. While the right of servitude should always be known that this right is acquired only in a part of the immovable property. This happens because the owner of the dominant property shows the reason why he has to acquire the right of real servitude, and what

¹⁴ See Law no. 03/L-154 on property and other real rights, Prishtina, 2014, article, Article 40 Profit with prescription 1. A person who in good faith has twenty (20) years in uninterrupted possession of an immovable property or a part of it, acquires ownership in it. See also: Law no. 2002/5 on the establishment of the register of immovable property rights, Prishtina, 2008, art. 2, paragraph 2.2.

¹⁵ See Law no. 03/L-154 on property and other real rights, Prishtina, 2009, article 252, par 1.2.

is his need and on what part of the immovable property. Thus e.g. person A seeks to acquire the right of servitude over the immovable property of person B. This immovable property is the land which he seeks to use only to cross on foot, and by vehicle. This land space is 2 meters wide and 5 meters long, to be allowed to pass by the serving owner. This piece of land is required to be taken by the dominant owner in order to find access to the main road. This means that the right of servitude is acquired only in a part of the immovable property as in the concrete case, that person A acquires the right of servitude to pass only in the space he needs to pass. So, person A gains the right of servitude to cross only to 2 meters wide and 5 meters long that he needs to cross and connect to the main road.

As mentioned in the above subchapters, the right of real servitude can be acquired both in the original way and through the winning prescription, but the same is not defined in the provisions of the LPDTS of Kosovo. But it would be necessary to have a provision which defines the creation of the right of real servitude with a winning prescription.

The creation of the servitude with a winning prescription is considered as a special gain of the right of the servitude, since the conditions that must be met unlike other ways, make it to be considered a more special way of creating the real servitude. But we must keep in mind that even in the creation of the right of real servitude with a winning prescription, this right is only created, but in order to gain the right it must be registered in the books of real estate. This means that the right of real servitude in case we want to gain it by referring to the winning prescription, specifically to the conditions of the winning prescription, then the interested party must file a lawsuit in court. In this case, at the moment of filing the lawsuit in court, the contentious civil procedure begins to take place, and at the end of the procedure if the judge approves the plaintiff's lawsuit with which he requested the creation of the right of servitude with winning prescription, I can request the confirmation of the right of servitude, I can approve the lawsuit. With the approval of the lawsuit, the judge makes a decision by which the right of real servitude is created, but then the holder of this right must submit the request to the cadastral registry to register that right of servitude which has already been created by the decision of court. So even if the right of real servitude is created based on the winning prescription, we can not say that *modus aquirendi* has been achieved, but at the moment we only have an *iustus titulus*. So, the court decision is just a legal title, as we said in the chapters above.

In addition to the legal title, the interested party must proceed further to register the right already established. Thus, the court decision, even in cases of creating an easement with a winning prescription, only declares that the right exists, and in order for this right to be constituted, it must be registered in the public books of real estate.

From all that has been emphasized so far, I conclude that the winning prescription should be considered as an opportunity which leads us to gaining the right of servitude for the passage. As a special way of creating the real servitude

on a part of the immovable property, the winning prescription has existed in the previous times as well, starting from the Roman times who called it as the original acquisition of the right of servitude in the foreign thing, exercising its content which means possessing the right for the benefit of the dominant owner and that for a certain time, and that this right not to be challenged by the serving owner. The same thing applies today,¹⁶ except that when we are in the period of time of application of the right, this right can be created even with an indefinite period of time, except in cases when the right of real servitude is created by contract then the parties with their agreement can set a period of time within to which the right of real servitude may be exercised. In all other cases, especially in the case of creating an easement with a winning prescription, this right is created as long as the item exists and the need to use the item, such a thing can be excluded only if we are contrary to the principles and legal provisions in force. Among other things, the acquisition of the right of servitude with a winning prescription had evolved in its existence as a way of earning or removing the winning prescription from implementation. Thus, since Roman times and in the continuous development of civil law, the law of servitude had a case that was allowed to be acquired by winning prescription, but there were also time periods and places which excluded this way of obtaining servitude from their legislation. These evolutions occur due to the economic developments and declines of countries, which in case of need in the economic development of the country or certain persons in power then the right of servitude was allowed, in case they did not need the right then of the servitude was not allowed to be won by winning prescription.¹⁷

Thus, the right of servitude, initially in Roman times was not allowed to be acquired by means of the winning prescription. This happened on the grounds that the right of servitude was a burden on the right of ownership. In these cases, the Roman jurists ruled out the creation of the servitude in all cases and in particular and when it came to winning prescription, on the grounds that this created right was a restriction of freedom of use over the right of ownership in a particular thing.¹⁸

So, this right was forbidden, especially when it came to gaining the right of servitude with a winning prescription. This right of servitude to be acquired by winning prescription began to be allowed from the period of classical time and that on provincial land after ten (10) years *inter praesentes*¹⁹ and twenty (20) years

¹⁶ See OSCE (Organization for Security and Co-operation in Europe Mission in Kosovo: Review of Immovable Property Ownership Cases in Kosovo), March 2009, p. 15. For more see: <http://www.osce.org/sq/kosovo/36816?download=true>, consulted on 16.10.2020.

¹⁷ Kaser, Max, *Roman Private Law*, London, 1968, pp. 120, 121.

¹⁸ In Roman times, the winning prescription method was banned by *Lex Scribonia*, for more details see: Schulz, p. 395. *Lex Scribonia* was a Roman law which was in force before Justinian's civil code.

¹⁹ *Inter praesentes*, in translation means permanent ender.

inter absentes.²⁰

After the law in force which prohibited the acquisition of the servitude with winning prescription, the Civil Code of Justinian came into force, which accepted the acquisition of the right of servitude with winning prescription. Winning prescription was not only allowed in the acquisition of servitude on provincial lands, but this right was allowed in all types of lands,²¹ *e njëjta gjë e cila zbatohet edhe sot në ligjet pozitive të kohës moderne.*²²

Unlike modern law today, Justinian's legislation allowed the right to obtain an easement with a winning prescription, but neither legal title (*iustus titulus*) nor *bona fides* (fiduciary) were required. Unlike today, which must meet these conditions in order to be able to gain the right of servitude with a winning prescription. But according to Justinian's law only the possession of the thing was required to be real. This means that the item owned by the person was not stolen or forcibly taken from someone else,²³ threatening, deceiving, etc.²⁴ In addition to Justinian's right, and in the German State, the acquisition of the right of real servitude over an immovable property was allowed, but by no means was it allowed to acquire this right by winning prescription. But in order to acquire the right of real servitude, it was enough that it was necessary for that right to be acquired, and such a thing was allowed by a legal work as well as by a decision of the state body.²⁵

So even today, in the civil codes of some states it is not allowed to gain the right of real servitude with a winning prescription. A concrete case is in the German Civil Code, according to which it is stated that the real servitude can not be acquired with a winning prescription, in any way neither in the visible servitudes nor in the invisible servitudes.²⁶

Thus, the German Civil Code excludes any possibility of obtaining a real servitude with a winning prescription. But it should be noted that this is about the exclusion of all types of unregistered servitudes, while registered servitudes such as tabular are recognized by the German Civil Code and allow them to be won

²⁰ Inter Absentes, in translation means of among those who are missing. In the case of obtaining an easement with a time of 20 years, there were only cases when a right was missing and that right existed over immovable property such as lands, buildings, etc. For more details, see: Voet, *Comentarius ad pandectas* (English translation, I. Hoskzns) London, 1878, p. 40.

²¹ Lawson, H.F, *Introduction to the Law of Property*, Oxford, 1969, p. 132.

²² Hofmand, Pfaf, *Pandekte ili danasnje rimsko praco*, Beograd, 1982, p. 465-466.

²³ According to Justinian, the right of servitude could be acquired by winning prescription, but only that the item which was in the possession of one person should not have been stolen by someone else, or not taken by force, and in these cases it was used Latin expressions, among which it was said that the thing must be possessed by a real possession and not to have acquired *vi, clam* or *preacrio*.

²⁴ Egersdorfer, A, *Predavanja o pandektima*, Zagreb, 1928, p. 338-229.

²⁵ See: German Civil Code, al, 2, par 898. For more see: https://www.gesetze-im-internet.de/englisch_bgb/. Retrieved on: 18.11.2020.

²⁶ Kruse, V, *The Richt of Property*, Oxford 1939, p, 382, 383.

with a winning prescription.²⁷

This means that a servitude right could not be acquired if that servitude had never existed before. And in cases where the right of servitude was only created by another holder in the past and that this right was registered in the book of real estate. In this case it is the possibility that only that registered servitude can be obtained by winning prescription, from another person who had possessed it for years in a row without being interrupted by anyone.²⁸

Thus, based on the judicial system of the Republic of Kosovo, as mentioned above, the right of servitude is presented in many cases in which the dominant owners seek to acquire the right of real servitude over immovable property. But there are not very frequent cases when it is required to create the right of real servitude based on the winning prescription.

One of the cases presented in court and for which case the court had taken a decision in favor of the defendant, specifically approved the claim of the plaintiff, on the basis of which he had created the easement based on the winning prescription. We see the case in more detail from the case law and the following.

The plaintiffs in the lawsuit file present their claims, which they try to prove through the evidence provided to the court. Thus, the object of the lawsuit is the confirmation of the right of real servitude over the real estate of the owner N.T, which right to acquire by being called based on the winning prescription.

So, the plaintiffs stated that they used the real estate of the defendant for more than twenty (20) years in a row without ever being hindered by the defendant. Thus, by requesting the lawsuit, the plaintiffs request that the right of servitude be verified and that the right of servitude be signed in the cadastral situation. The judge of the case, after reviewing and investigating the factual situation and the evidence provided by the parties, renders a judgment on the basis of which he rejects the claim in its entirety on the grounds that there was not a sufficient legal basis to approve the right of servitude on the basis of the winning prescription. Since the LPDTS of Kosovo does not stipulate in its provisions that the right of servitude can be acquired by winning prescription, then the judge of the case is based on the Law on Legal Property Relations. Thus, the trial judge reasoned in rejecting the lawsuit in this way: The court took into account the claims of the plaintiffs' attorney when it stated that the plaintiffs and the defendant had jointly used both parts of the parcels for decades and CZ Q. and R., have established the right of servitude - crossing on foot and by vehicle despite the fact that the respondent has acquired the right of ownership based on the winning prescription from article 28 par. 4 of LMTHPJ but with the judgment with which the respondent has won ownership does not deprive the plaintiff of the right of servitude established for decades and acquired on the basis of winning prescription but

²⁷ See German Civil Code, Book II, Article 900. For more details, see: https://www.gesetze-im-internet.de/englisch_bgb/, received: 10.11.2020, time 20:42.

²⁸ There are other civil codes which exclude the possibility of acquiring the right of real servitude with a winning prescription, such as the Swiss Civil Code and that in Article 165, par. 2.

these claims were not approved by the court because the legal conditions for recognizing the right of servitude with winning prescription are not met because it is not reached an uninterrupted term of 20 years for its use in the sense of Article 54 par 1 of the Law on Basic Legal-Property Relations, as well as the plaintiff use n of the disputed route have not been used in good faith in the sense of Article 54 of the same Law.²⁹

Article 51 of the Law on Basic Legal Property Relations stipulates that "Real servitude is decided by legal action, decision of a state body and by winning prescription", Article 54 paragraph 1 of the same Law provides that "Real servitude is acquired by means of the winning prescription when the owner of the ruling property has actually realized the servitude during the period of 20 years, while the owner of the service property has not objected to this", while in paragraph 2 of this article it is foreseen that³⁰ "the real servitude can not be obtained by winning prescription if it has been exercised by abusing the trust of the owner or holder of the service property, by force, fraud, or if the servitude has been ceded until revocation", while the plaintiffs have not fulfilled none of these legal conditions to obtain the real servitude on the basis of prescription because from the above evidence it was proved that the plaintiffs do not use the above way in the legally required time to obtain the servitude with winning prescription, have not used it in good faith, for that the respondent against them initiated a contentious procedure in 2008 for obstruction of possession and for proof of ownership.

4. Conclusion

In the acquisition of the right in question in most cases from the case law they end with the rejection of the lawsuit or its rejection, because the persons who exercise this right are not aware of whether they can be called holders of this right, or what conditions they would have to meet to gain the right of servitude. Once they understood whether he could be called the holder of the law, they would know whether they could seek legal aid before the court or withdraw silently. All this, just because we need to know how to gain a right from someone else's right. Right defined as a right over a foreign thing, as the service owner

²⁹ For more details, see: Decision no. C.117/2015 of the Court of Appeals in Prishtina, which rejected the claim of the plaintiff, based on which the request for the creation of the right of real servitude on the basis of the winning prescription was rejected. Thus, in the present case, the judge decides to reject the claim of the plaintiffs, stating that it is not allowed to acquire the right of servitude on the basis of the winning prescription, as such a thing is not allowed even by the legislation. Thus based on Law no. 827 on basic legal property relations stipulates that a right to be acquired with a winning prescription must meet the conditions on which the right of servitude must be created, and in this case had not met the condition of years, ie had not passed still twenty (20) years in a row, so there is no legal basis for the judge to base the winning prescription.

³⁰ See *the Law on basic legal property relations stipulates* that "The real servitude is decided by legal action, the decision of the state body and by means of the winning prescription", with article 54 par 1.

allows, or must allow the service owner to use the right of the dominant owner either for a certain period of time or indefinitely. We find these difficulties precisely when we ask that the right of servitude can be acquired by winning prescription.

Based on the legislation as well as the practice of the right of real servitude as it was emphasized in the content of the paper, it can be obtained with a winning prescription, if the conditions of the winning prescription are met. Such a provision can be found in the provisions of some European countries, among which we mentioned the German Civil Code, as well as the legislations of other countries. We claim to find a similar provision in the legislation of Kosovo. Thus, in order for the right of servitude to be acquired with the same winning prescription as the right of ownership, the conditions of the winning prescription must be met, almost the same as the conditions of the winning prescription that the right of ownership is acquired. Generally based on practice, the right of real servitude is required to be created with winning prescription, but since there is no legal provision that allows the acquisition of real servitude with winning prescription, then a right can not to be established by a court decision. Therefore, since most European countries allow that the right of real servitude can be acquired by winning prescription, such a provision will have to be defined in the legislation of Kosovo, as it currently does not and does not allow the creation of a right. of real servitude with winning prescription.

5. Recommendation

Since the Civil Code is being finalized in the state of Kosovo, then we will recommend that the right of real servitude can be acquired by winning prescription.

The provision which will determine the acquisition of the real servitude that can be acquired by winning prescription, would be in order to be adjusted based on the German Civil Code, so e.g. to the conditions which must be met in order to gain a right of servitude with a winning prescription!

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3. Law no. 2002/5 on the establishment of the register of immovable property Rights, Prishtina, 2008.
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Settlement of disputes in HoReCa (food and hospitality field)

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Abstract

As the HoReCa industry has been developed, by improving the quality of products and services offered, the number of customers and beneficiaries in bad faith - bad payers - has also increased. The present paper, as it is entitled, presents the most common aspects in practice, which the field of HoReCa faces, in case of non-compliance with the contractual obligations of customers/beneficiaries. In this sense, we highlight the possibility of resolving disputes in the mentioned field, by amicably settlement, in order to avoid as much as possible, the legal action in the court. From this perspective, the advantages and disadvantages of using this procedure are summarized.

Keywords: *HoReCa, mediation, conciliation, amicable settlement, preliminary settlement, disputes, briefing, procedural documents.*

JEL Classification: K22, K41

1. Preliminary clarifications - HoReCa field

Horeca is an abbreviation for 3 words: Hotels, Restaurants and Cafes (Catering), used mostly in Europe namely in Scandinavia (Sweden, Norway, Denmark, Iceland and Finland), Benelux (Netherlands, Belgium and Luxembourg) and France². Later this acronym, "HoReCa", was used to describe the activity of Hotels, Restaurants and Cafeteria, today being used for Hotels, Restaurants and Catering, because it is considered that spaces such as cafes and cafeteria can be included in the category of restaurants.

This term is used in the hospitality industry to convey very clearly an activity that refers simultaneously to: accommodation and food services outlets (food and drink)³.

The horeca field includes accommodation units: hotels, motels, hostels, chalets, pensions, apartments and houses authorized for accommodation services, campsites and other accommodation structures; serving food and beverages (public catering) restaurants, pubs, bars, pizzerias, cafes, fast food, confectioneries, pastries, catering and other forms of public catering.

For a consumer, the HoReCa field should represent an area of relaxation,

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² [https://www.gastroprofis.ro/whathoreca means/](https://www.gastroprofis.ro/whathoreca%20means/), consulted on 1.05.2021.

³ For example: a 1 daisy boarding house that offers accommodation services is part of the Horeca industry as well as a 5 star hotel.

either of visits and vacations (Hotels - accommodation), the joy of enjoying certain dishes and drinks in specially arranged spaces (Restaurants), as well as the pleasure of ordering and enjoy the best food at home (Catering).⁴ In recent years, the global expansion of tourism services, globalization and the new generation's tendency to travel, especially the development of air transport, but not limited to, and also the growing financial possibilities of consumers, have made the HoReCa industry grow, and providers services in the field to improve their activity.⁵ Thus, the benefits did not take long to appear: a market with a growing added value, a clientele that can be loyal and a very good possibility of promotion.

2. Disputes in practice within HoReCa

With the growth of the Horeca industry, the improvement of the quality of products and services offered by its providers, the number of customers/beneficiaries who accessed this industry also increased, but also the number of customers in bad faith regarding the final payment for their provision services.⁶

From practice we summarize the following two situations:

1. Although, on the basis of service contracts, the service providers within the hospitality industry, for example - hotels - which have offered their clients both accommodation services and/or catering services (breakfast, lunch, brunch, dinner, festive events such as weddings, baptisms, etc.) of high quality, however, did not collect from their customers, the total final price. This situation is explained in the conditions in which the providers, out of their desire not to lose customers - because the competitive market in this field is fierce - did not request from customers, in advance, the total final contract price, but only a part of the advance (partial amount of the final price) remaining thus paid by the client, a residual payment.

2. Another situation is that of lease agreements concluded between the owner of a building, a company, in which the main activity of the company is: "Hotels and other similar accommodation facilities"⁷ - having as secondary activity and that of: "Renting and subletting own or rented real estate"⁸ In other words, within the same building, structure, a company can carry out both hotel

⁴ According to the national statistical classification of economic activities in Romania (acronym "CAEN CODE"), the provision of services within Horeca is found in the following caen codes: Hotels and other similar accommodation facilities- 5510; Restaurante- 5610; Event catering activities - 5621; Other food activities nec 5629; Bars and other beverage service activities - 5630. Order no. 337/2007 regarding the classification of the activities in the national economy of Romania, published in the Official Gazette, Part I no. 293 din 03/05/2007.

⁵ <https://www.gastroprofis.ro>, consulted on 1.05.2021.

⁶ Elise Valcu, *Brief consideration of the impact of the regional development policy ond tourism in Romania*, „The Annales of the "Ștefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration"; volume 9, Special/2009, p. 60-65.

⁷ CAEN Code 5510.

⁸ CAEN Code 6820.

activity⁹ - this being its main activity - hotel (with accommodation and catering services) and rental activities for parts of the building construction - respectively for operation of a Casino (for example: for a rented client whose main object of activity is: Gambling and betting activities - CAEN CODE 9200).

The activities carried out by a Casino, attract beneficiary clients for the Hotel, both on the accommodation side and on the public catering side (the clients who play at the Casino benefit both from the accommodation services and from the public catering services within the respective hotel¹⁰). These activities generate additional income for the property owner, both from the activities of renting the space for the operation of the Casino and from the accommodation and public catering for the Casino clients.

In those two situations presented above, the clients benefiting from the service provider, proving to be in bad faith, although, according to the clauses of the contract for the provision of accommodation and/or catering services concluded between the provider and the client ("The contract"), had the obligation to pay the remaining payment, within a certain term from the completion of the actual provision of the respective service, but they did not pay this remaining payment. At the same time, the information session on mediation became mandatory starting with 2013, based on Law no. 192/2006 on mediation and organization of the mediator profession, amended and supplemented (mediation law). In the meantime, however, according to the provisions of the New Romanian Code of Civil Procedure in force¹¹, amended and supplemented subsequently, the hearing of the parties (individuals or legal entities) on the benefits of mediation, including after initiating a trial before the competent courts, to resolve it conflict of civil, family law, criminal, and other matters is no longer mandatory. Therefore, the courts will no longer reject the claims of those who do not appear before the mediator¹².

Therefore, the court will no longer reject the lawsuits of those who do not appear before the mediator. Lawsuits who want to start a trial are no longer required to go to the mediator before filing a lawsuit to be informed about the benefits of mediation. This is because the Romanian Constitutional Court (CCR) ruled, in a ruling published in late June in the Official Gazette, that the obligation to participate in acquaintance on the benefits of mediation is an unconstitutional regulation, as it is a restriction on free access to justice.

⁹ See, Leaua Crenguța, *Business law. General notions of private law*, Universul Juridic Publishing House, Bucharest, 2012, p. 85; T. Prescure, *Civil contracts course, according to the new Civil Code*, Hamangiu Publishing House, 2012, p. 273.

¹⁰ See, Francis Deak, *Civil Law Treaty. Special contracts*, Bucharest, Universul Juridic, 2001, p. 390 and seq.

¹¹ Romanian Code of Civil Procedure of July 1, 2010, Law no. 134/2010, the Official Gazette no. 247 of April 10, 2015.

¹² Decision no. 266/2014, from the Official Gazette, Part I, no. 464 of 25 June 2014,

Thus, the Constitutional Court of Romania¹³ specified that the information session on the benefits of mediation is no longer mandatory. Therefore, the courts will no longer reject the claims of those who do not appear before the mediator. Thus, as motivated by this decision, if the parties opt for mediation, in order to resolve existing disputes, they will appear at the briefing on the benefits of mediation, but only if they consider it necessary to participate in the mediation, such a meeting, for information and clarifications regarding the advantages of mediation.

"On this occasion, the mediator has the obligation to give any explanations to the parties regarding the mediation activity, so that they understand the purpose, limits and effects of mediation, especially on the relations that are the object of the conflict"¹⁴, according to CCR jurisprudence.

The motivation of the CCR guides the transformation of the effects mentioned above into the engine of new legislative proposals, regarding this time, however, the obligation of the mediation procedure in certain cases, having as starting point the Italian model, which, besides the obligation of mediation, comes with a similar history regarding the involvement of the constitutional court and the declaration of the obligatory unconstitutional mediation in the first place.

The Mediation Council informed that, following the CCR decision, it approved a program to amend the Mediation Law no. 192/2006: "The Mediation Council will make every effort to transpose into national law the provisions of the European Directives on Mediation¹⁵, in compliance with the constitutional provisions, so that mediation becomes a mandatory procedure, taking over and adapting the model of other EU countries, respectively Italy", it is specified in the document issued by the institution.

There was a precedent in this regard, because, until the publication of the CCR Decision, the information meeting on mediation was mandatory in some specific cases. Specifically, Law no. 115/2012¹⁶, which amended the law on mediation, introduced a new article, 601, on the preliminary procedure of the court which is mandatory only in certain branches of law.

According to art. 601, the obligation to participate in the information session on the benefits of mediation does not apply to all matters where there is the possibility of mediation, but is expressly limited to certain areas, for example:

- in the field of consumer protection, when the consumer alleges injury defective product or service, non-compliance with contractual clauses or guaran-

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

¹⁶ Law no. 115/2012 for the amendment and completion of Law no. 192/2006 on mediation and organization of the mediator profession, Text published in the Official Gazette, Part I no. 462 of July 9, 2012.

tees granted, the existence of abusive clauses in contracts concluded between consumers and economic operators or violation of other rights provided in national or European Union legislation in the field of consumer protection;

- in the family law (in case of misunderstandings related to the continuation of marriage, the sharing of common property, the exercise of parental rights, the establishment of the children's domicile, the parents' contribution to child support or any other misunderstandings that arise in the relations between spouses regarding rights which they may dispose of according to law);

- in the field of disputes regarding the possession, granitation, relocation of borders, as well as in any other litigations regarding the neighborhood relations;

- in the field of professional liability in which professional liability may be engaged, respectively the causes of malpractice, insofar as no special procedure is provided by special laws; in labor disputes arising from the conclusion, execution and termination of individual employment contracts;

- in civil litigations whose value is below 50,000 lei, except for litigations in which an executory decision was pronounced to open the insolvency procedure, of the actions related to the Trade Register and in cases in which the parties choose to resort to the procedures provided in art. 999-1018 of the Code of Civil Procedure;

- in the field of criminal law, in the case of offenses for which the criminal action is initiated upon the prior complaint of the injured person and the reconciliation of the parties removes the criminal liability, after filing the complaint, if the perpetrator is known or identified, provided the victim expresses consent to participate in the information meeting together with the perpetrator.

CCR considers the mentioned article constitutional, appreciating that it must be considered from the perspective of the unconstitutional effects of the provisions of art. 2 para. (1) and (12) of Law no. 192/2006. That is because, the article applies, but not as an obligation, and only if the court deems it necessary and refers the parties to the prior information and mediation procedure, the procedure mentioned above.

3. Elements of comparative law relating to the dispute settlement procedure

In French law, for example, the Decree 101/16 February 2018 introduced the obligation to go through the preliminary mediation procedure in labor disputes. Thus, for a period of 4 years, it will be subject to compulsory mediation, disputes concerning the appeals filed by civil servants against individual administrative decisions regarding: the granting of benefits, reintegration into employment (e.g. after unpaid leave or that granted child-rearing leave), vocational training, internal promotion, adaptation of working conditions, measures concerning people with disabilities, etc.

In the French-speaking area¹⁷, the mediation organizations operating in countries such as: France, Belgium, Canada, etc. are well known. All these organizations use on a large scale in resolving disputes, the method of preventive mediation, organizational mediation (within enterprises, respectively private and public companies), in the service of a Corporate Social Responsibility.

On the same line of concern are the debates¹⁸ on the similarities and differences of practice between mediators in the French-speaking world, in order to enrich, develop and expand the range of possibilities in mediation, with an emphasis on mediation within a company¹⁹.

For example, within the large international company GDF Suez, there is a special mediation department where the main objective of GDF SUEZ mediation is to encourage the settlement of persistent disputes, given the very large number of clients which this company owns.

At the level of the European Union, the rules governing alternative dispute resolution (ADR) are:

- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in the field of consumption and amending Regulation (EC) No. 882/2004, 2006/2004 and Directive 2009/22/EC (Consumer ADR Directive)²⁰;

- Regulation No. 524/2013 of the European Parliament and of the Council on the online settlement of consumer disputes and amending Regulation (EC) No. 882/2004, 2006/2004 and Directive 2009/22/EC;

- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution in the field of consumption and amending Regulation (EC) No. 882/2004, 2006/2004 and Directive 2009/22/EC (Consumer ADR Directive).

These rules apply in particular by GDF Suez from 2013, the year of their

¹⁷ Also, three of these are international organizations in the field of mediation: Institut de la Médiation dans l'Espace Francophone (IMEF), Institut de Médiation et d'Arbitrage du Québec (IMAQ) and Association Nationale des Médiateurs (ANM) (France), which includes well-known and recognized mediators in the field of international mediation such as: Eric Battistoni - President of IMEF and co-founder of GEMME, former lawyer and judge in Verviers Belgium; Michel Astruc-mediator GDF Suez; Michel Carlier - mediator of the French-speaking community in Belgium; Dominique Chevaillier- BNP Paribas bank mediator; Gabrielle Planès- president of ANM, judicial mediator at CA Paris and Versailles.

¹⁸ Encouraging and inspiring in this respect, was the organization of the Event that took place in Bucharest between 12-13.09.2013 "The days of francophone mediation in Bucharest 2013", at the French Institute in Bucharest. This event was a premiere in Romania, due to the fact that, for the first time such a large number of foreign mediators, with a long experience in mediation, met in Romania, together with Romanian mediators, <https://www.cmediere.ro/page/939/b-zilele-medierii-francophone-la-bucuresti-les-journees-de-la-mediation-francophone-a-bucarest-2013>, consulted on 1.05.2021.

¹⁹ <https://www.cmediere.ro/page/939/b-the-days-of-francophone-mediation-in-bucharest-les-journees-de-la-mediation-francophone-a-bucarest-2013>, consulted on 1.05.2021.

²⁰ <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32013L0011&from=FR>, consulted on 1.05.2021.

adoption, according to which each consumer customer is provided with access to an officially approved organization that offers amicable settlement of disputes, for any problem (throughout the territory of European Union). Thus, the amicable settlement of disputes was increasingly preferred to legal action, with a success rate of 92% in the settlement of cases, mediation was demonstrably an effective alternative in resolving disputes. In this context, the mediator stressed the need to better understand the fundamentals of managing complaints from the company's customers and to simplify the customer experience to better meet consumer expectations, using best available practices set out in the "Good Practice Guide" created by professionals entitled to. From Europe to Brazil, Morocco, Mexico, it has been involved in improving the mediation mechanism of GDF SUEZ, in supporting the creation of various mediation systems in several countries and promoting the quality of mediation in numerous studies, presentations and symposia²¹. The mentioned European normative acts have been widely debated both in the university environment, with the specialties of law and business²² in France in order to highlight the advantages of mediation, as a preliminary amicable conciliation procedure. These events represent an effective vector for the training of future law graduates and not limited to, but also for the continuous professional training of practitioners in the field, regarding the amicable settlement of disputes and the challenges of quality mediation²³.

Although in Romanian law, the information session on the benefits of mediation is no longer mandatory, it still remains an option for litigants. That is, in hospitality sector, in the situations presented above, the parties were forced to reach a possible payment agreement, prior to the court procedure, i.e. prior to the time when the service provider - as a creditor, was forced to sue the client beneficiary of the services provided - as a debtor (through the lawsuit).

In order to prevent the stage of legal action, the contracting parties have provided and agreed by mutual agreement, in writing, within the service contract, *a special dispute resolution clause*.

This dispute settlement clause is called, for example: "dispute settlement" according to which: the parties have agreed that all disputes concerning the contract will be settled amicably by their representatives. If it is not possible to settle the dispute amicably, the parties shall refer the matter to the competent courts. Article 720¹ of the old Code of Civil Procedure (1865) provided that „in commercially assessable monetary proceedings and claims, before filing a lawsuit, the plaintiff would try to resolve the dispute by direct conciliation with

²¹ See Michel Astruc- mediator of GDF Suez, who presented a series of communications, in dialogue within the various departments and subsidiaries of the Group; <https://www.mediateur-engie.com/publication-du-rapport-dactivite-2013-du-mediateur-de-gdf-suez-michel-astruc/?lang=en>.

²² See, Ioana-Nely Militaru, *Business Law. Introduction to business law. Legal business report. The contract*, Universul Juridic Publishing House, Bucharest, 2013, pp. 16-18.

²³ Cojocaru Cristina, *Romanian business law. Fundamental concepts*, Ed. Universul Juridic, Bucharest, 2018, p. 20 and seq.

the other part". The provisions of art. 720¹ of the Code of Civil Procedure of 1865 were repealed with the entry into force of the New Code of Civil Procedure, respectively Law no. 134/2010²⁴. However, in HoReCa field, the amicable conciliation procedure applies, for the following reasons:

- the interest of the accommodation and/or catering service providers not to lose their loyal customers over time through various bonus packages, compensations in products/services as well as to attract new customers, due to the competition on the market on this business segment;

- the respect and appreciation due by the hotel to loyal customers who have demonstrated their good faith over time collaboration, by respecting the payment terms agreed by the parties to previous Contracts/collaborations and to further "guarantee" these customers in on making the new outstanding payments recorded in the new contracts within a reasonable time.

HoReCa Service Providers, in order to further show the confidence in the old, loyal customers, regarding the payment by the latter of the outstanding debts on the new concluded contracts of services (accommodation and / or public catering), they still chose to use the method of amicable settlement of disputes, in order to give their customers another chance to pay their outstanding debts.

For the purpose shown above, the HoReCa service provider - as a creditor, will convene the opposing party respectively the debtor client, communicating in writing his claims and their legal basis, as well as all the supporting evidence on which they are based.

Convening the conciliation amicably is done by registered letter with proof (confirmation) of receipt (possibly with declared content), or any other means of electronic communication, which ensures the transmission of the act text and confirmation of its receipt. The convening can also be made by handing the documents under the signature of receipt, to a proxy from the client for taking over the correspondence. The date of the convening for amicable conciliation will not be set by the creditor earlier than 15 days from the date of receipt of the communicated documents, so that the client debtor has enough time to study all documents and initiate any proposal to pay the debt to the creditor, for the meeting date. The result of the conciliation will be recorded in a document showing the mutual claims of the parties, regarding the object of the dispute between them, as well as the point of view of each party. The document on the result of the conciliation or, in case the defendant debtor did not comply with the convening provided above, the proof that 15 days have passed since the date of receipt of this convening is attached to the request for convening subsequently submitted to the competent court.

²⁴ Republished in the Official Gazette of Romania, Part I, no. 545 of August 3, 2012, starting with February 15, 2013, according to art. 81 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, no. 365 of May 30, 2012, as subsequently amended and supplemented.

From the practice of this method used by most providers of accommodation and catering services in hospitality, it follows that entrepreneurial client, debtors (correct in the business they carry out), regardless of the specifics of their activity, accept the invitation at prior amicable conciliation.

Moreover, on the date agreed for the conciliation, in order to present their good faith, they present to the creditor provider the proof of payment of the outstanding debt or proposes to him a rescheduling of the outstanding debt, within a reasonable and acceptable term for both parties.

The result of the amicable settlement of the dispute will be recorded in a document (usually in a conciliation report) which will specify exactly the amount of outstanding debt owed by the client debtor and possibly mention the amount of delay penalties related to the main debit due, the timing of the due installments, the number of these installments, their exact payment term as well as their amount.

The parties will specify that, in case the debtor client will not comply with the obligations assumed during the conciliation, the creditor provider is entitled to take all legal measures to recover the debt composed of outstanding principal debt and any related delay penalties, without any further attempt to settle the dispute amicably. Given that the debtor client fully respects its obligations under the conciliation report, this way of amicably resolving the dispute between the parties, proves in most cases efficient and advantageous for both parties, with the particular advantages at least in the case of the hospitality sector, as follows:

A. the parties may agree in the conciliation report that, if the debtor client pays installments and within the established payment terms, the total outstanding debt due, the creditor provider will waive the request for any delay penalties related to the main debt, due by the debtor client;

B. the parties no longer appear in front of the court; this fact has the following advantages:

1. relieving the courts (too crowded, and thus, with a large number of cases) and thus improving the act of justice;

2. proof by the service provider-creditor, of good faith before the court.

In this case we are in the presence of the following situation, when, at the end of the amicable conciliation procedure, no favorable solution is reached to the parties involved in the conciliation, even if the creditor proves to the court his good faith in relation to the debtor client. The good faith of the creditor consists in informing the debtor, through all the means of information and communication provided by law, of the existence of the debt due as well as the identification of all means of payment favorable to the debtor.

3. reconciliation of the parties is a fundamental principle of the civil process, so that the judge, in compliance with it, will proceed both in order to relieve the courts of cases and in order to cultivate litigation in order to appeal to the amicable dialogue and not to of the dispute.

The parties maintain their collaborative relations, due to the fact that the

found solution is on the one hand the result of their will and on the other hand it responds to both their interest and that of their employees. For example, in case of the lease agreement with the Casino presented in point 2, as a result of the preliminary amicable conciliation procedure, the following obvious benefits were registered:

a. after the negotiations with the representatives of the debtor client (Casino), materialized in the signing by the parties of the agreements for staggering the receivable, it was reached the collection by the creditor, respectively the rental service provider (namely the Hotel), of the entire receivable by the Casino;

b. as a result of the “boule de neige” effect (snowballs) the following results:

- saving and continuing the Casino's business within the rented space of the Hotel²⁵,

- maintaining the Casino's employees and avoiding its entry into insolvency proceedings,

- generating revenues to the state budget (taxes and related taxes)

- obtaining revenues for the Hotel, both from the rental activity and from the activity of accommodation and/or public alimentation, related to Casino;

- the parties do not end up in conflicting relationships generating disputes; keeping a customer satisfied by the amicable settlement, able to bring new customers;

4. in this way, a mutually favorable solution is reached as a result of the negotiations and by respecting the mutual obligations assumed in the conciliation;

5. by means of the preliminary dispute resolution procedure, if the debtor client is unable to honor the payment of his claim against the creditor provider, the parties may nevertheless reach a mutually convenient solution, namely a barter agreement. Following the signing of the barter agreement, each party has an advantage. Thus, the debtor is to provide, on account of the debt receivable, a service, which extinguishes the obligation to pay, a service that is agreed by the creditor, because he performs with the consent of the creditor;

6. the amicable settlement procedure takes place at the provider's registered office, which in our case may be a 5-star hotel or restaurant, a location which offers the parties a less rigid framework than that assumed by the court);

7. the term of settlement is much shorter than that required by the court, reducing from months to a maximum one month. The dispute is resolved quickly; litigation in court can last up to a year or more because lengthy delays;

8. the final solution recorded in the conciliation report satisfies the interest of the parties, being the result of their free agreement of will;

9. costs are significantly reduced; it is no longer necessary to pay in addition by the debtor client, the stamp duties, the expenses indicated by the bailiff

²⁵ Ioan Popa, *Civil contracts from theory to practice*, Universul Juridic Publishing House, Bucharest, 2020, p. 535 and seq.

authorized to recover the debt (principal debit + delay penalties). The latter also include the fee due to the executor as well as other penalties for delay due from the date of the judgment and until the date of actual payment of the entire claim by the debtor client, if the creditor provider is admitted to the lawsuit by the court; in addition, the losing party may be ordered to pay all the costs (including those incurred by the other party);

10. the establishment and setting up of good practice, in the sense of using this prior procedure and extending it to other hotel and/or catering service providers in Bucharest and across the country, as a result of communication between these hotels and proof that this procedure is effective in the relationship with debtor customers.

The only "disadvantage" in the case of using this prior procedure is the time spent by the creditor with the amicable transmission of the conciliation invitation, respectively the term of 15 calendar days starting from the date of confirmation of the receipt of the invitation by the debtor. If the letter containing the invitation to conciliation accompanied by the documents proving the claim claimed by the creditor, is sent to the debtor by courier/post with acknowledgment of receipt (which is attached to the court file if applicable), then, within this period, they will add a few more days necessary for the communication procedure to be carried out by the courier company/receiving post office.

Therefore, even if, the information session of the parties regarding the advantages of mediation and amicable conciliation are not (anymore) mandatory according to the provisions of the New Romanian Code of Civil Procedure, the preliminary procedure of the courts, respectively the amicable conciliation procedure of disputes, remained in the reflex of the parties. Moreover, this procedure should be maintained in practice, at least in HoReCa sector, in the situations specified above, developing effective behavior and countless advantages for the parties involved, taking into account the considerations set out above.

4. Conclusions

We reiterate in this regard the idea that the promotion and encouragement of use of this preliminary dispute resolution procedure by all appropriate means, in the context of the general reform of Romanian society, will improve the legislative framework for the administration of justice. This can be achieved in particular by simplifying and speeding up judicial procedures, increasing the quality of justice, reducing cases leading to court congestion and thus prolonging the length of dispute resolution, relieving courts which is undoubtedly an absolute priority. From within the justice system, the agglomeration of the courts is felt in this sense. Thus, we mention the Project "Elimination of factors for inflation of causes, identification of normative elements and agglomeration trends - EFFICIENT" where the beneficiary is - Superior Council of Magistracy in partnership

with the General Secretariat of the Romanian Government²⁶.

It is also necessary to organize meetings with the academic and institutional environment, in order to establish training programs, as well as action research activities, in order to promote the way of resolving disputes through prior conciliation amicably.

In conclusion, as in the GDF Suez, there is a specialized department for resolving disputes amicably, through the mediation procedure, which has proved extremely effective over time, we propose as well in HoReCa sector - at least in the hotel segment (accommodation and public catering) which establishes collaboration relations with numerous clients annually, a similar dispute settlement department should be set up through the prior amicable conciliation procedure.

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²⁶ www.poca.ro, consulted on 1.05.2021.

The inapplicability of personal exceptions between joint debtors and creditors, under Romanian and French private law

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Abstract

The paper examines the problematics of invoking personal exceptions between joint co-debtors and the creditors, while proposing a comparative approach to the incidental legal provisions and jurisprudential guidelines under Romanian and French private law. As stated in a recent decision of the French Court of Cassation (Fr. Cass., 2nd Civ., dec. of 20th May 2021), the guaranteed exception based on the existence of an insurance contract against the risks related to death, concluded by a co-debtor constitutes a purely personal exception to the latter, which cannot be invoked against the debtor by the co-obligor jointly liable for the payment of the debt. On the other versant, the provisions of art. 1448 of the Romanian Civil Code omit to make express references regarding the inapplicability of personal exceptions between the joint co-debtors, postulating, instead, in the second thesis of art. 1448, para. (1) of the Romanian Civil Code that, against the common creditor, the joint co-debtor cannot use the means of defence that are purely personal to another co-debtor. Viewed in „parallel mirrors”, the provisions of art. 1313 of the French Civil Code capture the attention of the analyst by retaining that “Solidarity between debtors obliges each of those to pay the full amount of the debt. The payment made by one of the co-debtors is releasing the other co-debtors towards the common creditor for the paying of the debt”; following the desideratum to avoid bearing the risk of insolvency of other co-debtors by the debtor who made the payment, the French legislator provided, in the text of art. 1310 of the Civil Code, that such solidarity „cannot be presumed”, except for commercial relations.

Keywords: *passive solidarity, joint debtors, personal defences, plural obligations, contractual liability, partial performance.*

JEL Classification: K12, K15

1. Introductory remarks

The issue of invoking personal exceptions between joint and several co-debtors, approached through the prism of a comparative vision on the incidental legal provisions and jurisprudential guidelines in Romanian and French private law, continues to raise questions for private law practitioners. The architecture of solidarity obligations reproduces, up to a point, that of the indivisibility of obligations, outlining itself as an application of the latter². Recent case law outlined

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² Fages, Bertrand, *Droit des obligations* (Paris: L.G.D.J, 10^e édition, 2020), pp. 427-433; Julien, Jérôme, *Droit des obligations* (Bruxelles: Bruylant, 4^e édition, 2019), pp. 191-204; Malinvaud,

in French private law allows us to observe the case law drawn by court rulings holding that the exception of guarantee based on the existence of a death insurance contract concluded by a co-debtor is a purely personal exception, which, if invoked, is unenforceable against the debtor in relations with the co-debtor jointly and severally liable for the payment of the claim³.

The recent solution ruled by the French Court of Cassation on May 20, 2021 on personal exceptions that cannot be invoked within the perimeter of insurance contracts (Civ. 2e, 20 May 2021, FP, n° 20-14.472) started from the following factual elements: the two spouses had concluded together, as joint and several debtors, a mortgage contract secured by a mortgage, the husband (yet, not his wife) simultaneously signing an insurance contract for insolvency, resulting from his death/disability, in quality of co-debtor. A few years after the conclusion of the mortgage credit agreement and the related insurance contract to cover the risk of insolvency in case of death/disability of one of the two co-debtors, the co-debtors sued the insurer and the bank creditor in a French court of law, in order to obtain the conviction of the insurance company to take over the obligation regarding the monthly payments involved in the repayment of the borrowed capital, in the context of the occurrence of the insured risk related to the alteration of the health condition of the co-debtor spouse. The court of first instance rejected their request, jointly and severally ordering them to pay a certain amount to the insurer as compensation for initiating abusive judicial proceedings. In the ruling on the appeal request made by the co-debtors, the appellate court held, in turn, that the wife's claims were inadmissible, on the grounds that the latter „did not conclude the insurance contract; therefore, she was extraneous to this contract” (not being a party to the insurance contract against the risk of insolvency). While appealing this decision, the spouse of the insured co-debtor claimed that „the appellate court had violated the provisions of art. 31 of the French Code of Civil

Philippe; Mekki, Mustapha și Seube, Jean-Baptiste Seube, *Droit des obligations* (Paris: LexisNexis, 15e édition, 2019), pp. 118-131. Specialized scholarship emphasized that, regarding the regulation of the presumption of solidarity and of the absence of passive solidarity regulated by art. 1445 and art. 1446 of the Romanian Civil Code, “In cases in which joint liability is expressly stipulated by the parties, the parties are free to stipulate in the contract the solidarity of the obligation, such a clause being perfectly valid, being neither against the law nor immoral and also not considered by law, an unwritten clause or even an unusual clause; When provided by law; in this case, it is the law that establishes that an obligation, although not assumed by a professional (aspect that would presume solidarity), is assumed in solidarity”: Țița-Nicolescu, Gabriel, *Obligațiile solidare în noul Cod civil*, „Revista Universul Juridic” no. 9/2016, available at <https://revista.universuljuridic.ro/obligatiile-solidare-noul-cod-civil/>, accessed on 19.06.2021.

³ Bigot, Rodolphe and Cayolle, Amandine, *Codébiteurs solidaires: inopposabilité des exceptions personnelles aux autres codébiteurs*. Note sous Civ. 2e, 20 May 2021, F-P, n° 20-14.472, published on May 28, 2021, available at <https://www.dalloz-actualite.fr/flash/codebiteurs-solidaires-inoppo-sabilite-des-exceptions-personnelles-aux-autres-codebiteurs>, accessed on 19.06.2021; Pellier, Jean-Denis, *Assurance-décès et obligation solidaire*. Note sous Civ. 1re, 5 juin 2019, FS-P+B, n° 17-27.066, published on July 03, 2019, available at <https://www.dalloz-actualite.fr/flash/assurance-deces-et-obligation-solidaire>, accessed on 19.06.2021.

Procedure, since the action means were open to all those who have a legitimate interest in the success or rejection of an action, and the third party to an insurance contract is not without interest to invoke the effects of this ancillary contract for the sole reason that he/she did not participate in its conclusion” (our trans. – J.G.)⁴.

The second civil chamber of the French Court of Cassation, in a decision pronounced on May 20, 2021, rejected the appeal filed by the co-debtors, emphasizing that “in application of art. 1208 of the French Civil Code, in its wording prior to that resulting from Ordinance no. 2016-131 of February 10, 2016, the exception of the guarantee against the risk of non-payment raised by a joint and several debtor, sued by the creditor of the payment obligation, as an exception extracted from the existence of an insurance contract against the risk of death, concluded by another co-debtor, constitutes a purely personal exception of the latter, which the co-debtor sued for the payment of the full value of the due claim cannot invoke against the creditor” (our trans. – J.G.)⁵.

Indeed, as has been pointed out in the previous scholarly commentaries, in the case of passive solidarity, there is one and the same debt to the common creditor, which gives rise to the possibility for the latter to request full payment from any of the co-debtors⁶. However, the plurality of links is maintained: if all the co-debtors are bound by a single debt, identical in terms of source and object, the links between those codebtors and the creditor remain separable and able to be juxtaposed; consequently, the co-debtor sued by the creditor may raise against the latter the exceptions that are common to all co-debtors⁷, such as the nullity or cancellation of the main contract, as well as those that are personal to him/her, without being able to use any of the personal exceptions of other co-debtors (as stated in Article 1315 of the French Civil Code). In the following paragraphs, we intend to review the main lines of action applicable to the invocation of personal exceptions arising from ancillary insurance contracts of a real estate loan agreement, in order to finally insist on the idea that a co-debtor, sued by the creditor for the total amount of the debt, may raise against the creditor the exceptions that are common to all co-debtors, such as the nullity or cancellation of the contract,

⁴ *Ibid.*

⁵ *Ibid.*

⁶ For the judicial regime of the solidarity of obligations, under the Romanian private law, see Vasilescu, Paul, *Drept civil. Obligații* (Bucharest: Hamangiu, 2nd edition, 2017), pp. 16-20; Veress, Emőd, *Drept civil. Teoria generală a obligațiilor* (Bucharest: C. H. Beck, 5th edition, 2020), pp. 293-299; Pop, Liviu; Popa, Ionut-Florin și Vidu, Stelian Ioan, *Drept civil. Obligațiile* (Bucharest: Universul Juridic, 2nd edition, 2020), pp. 194-206. For comments on the legal regime of passive solidarity under French law, see Rabu, Gaylor, *Droit des obligations* (Paris: Ellipses, 2^e édition, 2019), pp. 91-117; Renault-Brahinsky, Corinne, *Droit des obligations* (Paris: Gualino, 17^e édition, 2020), pp. 220-221; Sériaux, Alain, *Manuel de droit des obligations* (Paris: Presses Universitaires de France - P.U.F., 4^e édition, 2020), p. 214-231.

⁷ Wéry, Patrick, *Droit des obligations, vol. 1, Théorie générale du contrat* (Bruxelles: Larcier, 3^e édition, 2021), pp. 161-167.

as well as those that are merely personal exceptions, while the personal exceptions of other co-debtors, such as those rising from an insurance contract against the insolvency risks due to death/disability or incapacity for work, which are accessory to a real estate loan agreement, will be excluded from the possibility of being invoked.

2. Invoking personal exceptions within the perimeter of the insurance contracts that accompany a real estate loan agreement

With undeniable advantages, this form of insurance, as discussed in the case settled by the Second Civil Chamber of the French Court of Cassation, by decision of 20 May 2021, allows the joint and several debtor to be protected against the adverse consequences of events which could change the degree of solvency in view of the obligation to reimburse the loan agreement concluded with the credit institution, the co-borrower being replaced by the insurer in terms of making monthly payments or repaying the loan balance in case of death, disability or loss of employment of the borrower. For the creditor, the borrower's insurance allows the transferring of the risk of default from its client, who has in the meantime paid the insurance annuities, to the insurer, while protecting itself against the difficulties of collecting payments in the context of the insured risk.

The jurisprudential trend that characterized, under the French law, the invoking of the exception of guarantee raised by the joint debtor sued by the creditor, based on the existence of an insurance contract against the risk of death concluded by another co-debtor, had as central pivot the idea according to which this type of defence consists in a purely personal exception, which the co-debtor pursued by the creditor cannot oppose to the latter. Moreover, the First Civil Chamber of the French Court of Cassation had the opportunity to rule previously on the nature of the death insurance in respect of the joint and several liability regimes and, more specifically, the exceptions which may be opposed by the joint and several debtors, in a judgment from June 5, 2019⁸. In this case, following the acceptance of a prior offer, a company granted a loan to finance the purchase of a camping-car. One of the two borrowers entered into an insurance contract with an insurance company to guarantee the risk of insolvability due to death, a risk that occurred, the insured dying the following year. The creditor requested the co-debtor to pay the full amount of the instalments which were due, the latter invoking the existence of the insurance contract between the insurer and the deceased co-debtor. The Court of Appeal of Rouen, in a judgment of 1 June 2017, declared the claims of the surviving co-debtor inadmissible; the latter therefore appealed, arguing, mainly, that a joint debtor could oppose to the creditor all the exceptions arising from the nature of the obligation and that the co-debtor could,

⁸ <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038629606&fastReqId=223041413&fastPos=1>, accessed on 12.06.2021; Pellier, Jean-Denis, *op. cit. Assurance-décès ...*

therefore invoke the existence of a death insurance contract concluded by another co-debtor. In its decision, while rejecting the co-debtor's appeal, the French Court of Cassation held, as mentioned, that the exception of the guarantee, invoked by the joint debtor sued by the creditor, based on the existence of a death insurance concluded by another co-debtor, in view of its purely personal nature, could not be raised against the creditor by the defendant co-debtor.

The logic of the solution is fueled, *inter alia*, by the considerations set out in the recent case-law referred to in the preceding paragraphs, according to which, unless the parties agree otherwise, by clauses derogating from the supplementary rules, in cases where the borrower in a loan agreement financing the purchase of goods, has concluded an insurance that guarantees the repayment of the loan, following the insured risk, the effects of the insurance contract will involve the extinguishing, up to the value of the threshold established with the insurer in the contract, the co-debtor contribution (to the payment of the debt), so that it can be pointed out that the exception represented by the occurrence of the effects of the insurance contract does not refer *propter rem* to the claim characterized by passive solidarity; instead, it has a personal character, thus operating for the insured, in relations with the pursuing creditor (for example, in case of risk insured, consisting of death of the insured, the beneficiaries of this exception in relations with the pursuing creditor will be the successors of the deceased insured, and not the surviving co-debtor). It should be mentioned, consequently, that the solution remains the same in terms of suretyship⁹, in the context in which art. 2313 of the French Civil Code provides that „The guarantor may invoke against the creditor all exceptions which belong to the principal debtor and which are inherent in the debt, but may not oppose to the creditor the exceptions which are purely personal to the principal debtor” (our trans. - J. G.).

3. The dichotomy „exceptions inherent to the debt” versus „exceptions attached to the person of the debtor”

The controversial issues related to the taxonomy of exceptions whose invocation is allowed in the relations between the joint and several co-debtors and the creditor (or between the guarantor and the creditor, in other situations) are

⁹ Brusorio Aillaud, Marjorie, *Droit des obligations* (Bruxelles: Bruylant, 11^e édition, 2020), pp. 187-194; Cabrillac, Rémy, *Droit des obligations* (Paris: Dalloz, 14^e édition, 2020), pp. 217-228; Chantepie, Gaël and Latina, Mathias, *Le nouveau droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz, 2^e édition, 2018), pp. 121-129; Chénéde, François, *Le nouveau droit des obligations et des contrats* (Paris: Dalloz, 2^e édition, 2018), pp. 136-144; Clément, François, *L'obligation solidaire* (2016), available at <https://iej.univ-paris1.fr/open-access/reforme-contrats/titre4/chap1/sect3/sssect2/para1-obligation-solidaire/>, accessed on 19.06.2021; Delebecque, Philippe and Pansier, Frédéric-Jérôme, *Droit des obligations* (Paris: LexisNexis, 8^e édition, 2018), pp. 192-203; Fabre-Magnan, Muriel, *Droit des obligations, Tome 2, Responsabilité civile et quasi-contrats* (Paris: Presses Universitaires de France - P.U.F., 5^e édition, 2021), pp. 296-311.

based, as a general rule, on a distinction between two binary categories of exceptions: the ones which are inherent to the debt and, on the other side, the exceptions that are purely personal (and which may be defining for only one of the co-debtors or, in other cases, for the legal position of the main debtor, in the case of suretyships¹⁰, as it results from the provisions of Article 2289 and Article 2313 of the French Civil Code). This distinction stems from the flaw reported between the two categories of defences available to the debtor in relations with the pursuing creditor, insisting that only the former, the exceptions inherent to the debt, can operate in the relations between the other co-debtors and the pursuing creditor, while the purely personal exceptions (of the main debtor of the claim accompanied by the guarantee, respectively of another co-debtor, in the case of passive solidarity¹¹) cannot be invoked. Moreover, in the text of the Preliminary Draft of the Association „Henri Capitant” on the reform of the French law of guarantees (2017), in art. 2299, it was proposed to adopt the opposite solution, in order to assimilate both types of exceptions as opposable to the creditor: „The guarantor in a suretyship may invoke against the creditor all exceptions, personal or inherent in the debt, which belong to the debtor.” (our trans. - J. G.).

Under the provisions of the Romanian civil law, the side effects of passive solidarity are regulated by art. 1454-1455 of the Romanian Civil Code, by reference to the situation in which the performance of the obligation becomes impossible to execute due to the culpable behaviour of one or more joint debtors or after they have been personally delayed, the other co-debtors not being released, in these cases, of the obligation to pay the creditor by equivalent; nevertheless, these debtors are not liable for the additional damages that would be due to the creditor in such cases, as it results from the final thesis of art. 1454, para. (1) of the Romanian Civil Code. It should also be noted that, according to the second paragraph of the cited article, the creditor may claim additional damages only from joint and several co-debtors whose fault has rendered the obligation impossible to enforce in kind, as well as to those who were late in executing at

¹⁰ Pellier, Jean-Denis, *La prescription biennale du code de la consommation est une exception purement personnelle au débiteur principal*, published on January 06, 2020, available at <https://www.dalloz-actualite.fr/flash/prescription-biennale-du-code-de-consommation-est-une-exception-purement-personnelle-au-debite>, accessed on 19.06.2021; Pellier, Jean-Denis, *De la répartition de la dette entre les co-obligés solidaires*, published on October 30, 2019, available at <https://www.dalloz-actualite.fr/flash/de-repartition-de-dette-entre-coobliges-solidaires>, accessed on 19.06.2021; Pellier, Jean-Denis, *Impossibilité d'agir et solidarité passive. Note sous Civ. 1re, 23 janv. 2019, FS-P+B+I, n° 17-18.219*, published on February 15, 2019, available at <https://www.dalloz-actualite.fr/flash/impossibilite-d-agir-et-solidarite-passive>, accessed on 19.06.2021.

¹¹ Rabu, Gaylor, *Droit des obligations* (Paris: Ellipses, 2^e édition, 2019), pp. 109-116; Renault-Brahinsky, Corinne, *Droit des obligations* (Paris: Gualino, 17^e édition, 2020), pp. 220-221; Sériaux, Alain, *Manuel de droit des obligations* (Paris: Presses Universitaires de France - P.U.F., 4^e édition, 2020), pp. 151-154; Wéry, Patrick, *Droit des obligations, vol. 1, Théorie générale du contrat* (Bruxelles: Larcier, 3^e édition, 2021), pp. 211-218; <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038629606&fastReqId=223041413&fastPos=1>, accessed on 12.06.2021.

the time when the obligation became impossible to execute¹². The application of this legal text is supplementary complicated, as it has been pointed out in the specialized literature¹³, by the fact that, according to art. 1526, para. (1) of the Romanian Civil Code, the notification by which the creditor delays one of the joint and several co-debtors also produces effects with respect to the other co-debtors; therefore, it is difficult (or even impossible) to identify cases in which only some of the joint and several debtors are notified, with the effect of obliging them to pay additional compensations for the impossibility of execution in kind of the object of the obligation, after the delay of one of the joint and several debtors. Obviously, between the joint and several debtors, there is no solidarity (which is strictly established between each of them and the creditor), and the obligation remains divisible between co-debtors, so that one of them pays in full the object of the obligation, the effect generated will be that the benefit is divided by full right between co-debtors; as it results from the provisions of art. 1456, para. (1) and (2) of the Romanian Civil Code, regarding the regression between the joint and several debtors, the rule remains that the joint debtor who has executed the obligation can only ask the co-debtors to receive the part of the debt that is incumbent to each of them, correlated with the rights of the creditor, and the quotas belonging to the joint and several joint and several debtors for payment are presumed to be equal, if the contractual clauses, the special legal provisions or the conjuncture of concluding the contract do not show the opposite¹⁴. Returning to the rule of divisibility of the obligation and, implicitly, to the presumption of equality of the divisible obligation, in the absence of special clauses, legal provisions or circumstances from which the opposite results, it decisively marks the legal regime of solidarity between debtors; as an exception, it returns to the total regression rule described in the text of art. 1459 of the Romanian Civil Code, in cases where the joint and several obligation is contracted in the exclusive interest of one of the co-debtors or results from the deed of one of the co-debtors, a situation which is characterized by the fact that the latter is obliged alone to pay the full value of the debt compared to the other co-debtors, who, in this case, are considered, in relation to this debtor, to be guarantors, by assimilation with the cases of the establishment of the conventional guarantee¹⁵.

4. Heterogeneous elements characterizing passive solidarity in relationship with the pursuing creditor

In the category of the means of defence that the co-debtor cannot use in

¹² Tița-Nicolescu, Gabriel, *op. cit.*, *Obligațiile solidare...*; Vasilescu, Paul, *Drept civil. Obligații* (Bucharest: Hamangiu, 2nd edition, 2017), pp. 16-20; Veress, Emőd, *Drept civil. Teoria generală a obligațiilor* (Bucharest: C. H. Beck, 5th edition, 2020), pp. 293-299.

¹³ Pop, Liviu; Popa, Ionuț-Florin and Vidu, Stelian Ioan, *op. cit.*, pp. 621-622.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

the relations with the following creditor, as they are characteristic for the personal situation of another co-debtor, in the optics described in art. 1448, para. (1) of the Romanian Civil Code, as a general rule, the defective formation of consent that determined another co-debtor to consent to the assumption of the joint obligation are regimented; at the same time, exceptionally and marginally in the economy of the mechanism of passive solidarity, the provisions of art. 1448, para. (2) of the Romanian Civil Code manage the situations in which the joint debtor, as a result of the creditor's actions (the culpable act or faulty omission of the pursuing creditor), is unfairly deprived of a guarantee or of a right which the co-debtor could have exercised by subrogation in the personal capacity; in this case, the described debtor is released from the debt up to the amount of those guarantees or rights that the co-debtor can no longer access through the fault of the pursuing creditor¹⁶. Regarding the interruption and suspension of the prescription course towards one of the co-debtors, it should be noted that this generates symmetrical effects towards all other joint and several debtors, in accordance with the provisions of art. 1449, para. (1) of the Romanian Civil Code, from which it results that the suspension and interruption of the prescription towards one of the joint and several debtors produce simultaneously effects also towards the other co-debtors; at the same time, from the point of view of the implications in the perimeter of the succession and transmission of the debt, it is necessary to remember that the interruption of the prescription towards one of the universal/ partial successors of the joint and several debtor does not produce effects towards it, including in the hypotheses of existing mortgage claims¹⁷. Similar implications can be distinguished in the matter of the legal compensation of the reciprocal claims, since, according to the provisions of art. 1450, para. (1) and (2) of the Romanian Civil Code, the compensation does not operate between the creditor and one of the joint and several debtors except within the limit of the sequence of the debt that reverts to the payment of the latter; moreover, in this case, the other co-debtors are held jointly and severally only for the part remaining unpaid/ uncompensated from the debt subsequent to the commencement of the effects of the legal compensation¹⁸. On the other versant, within the perimeter of the effects of debt remission or of the waiver of the pursuing creditor to the right of claim, it should be noted that, in view of the applying of the provisions of art. 1451, para. (1) and (2) of the Romanian Civil Code, the remission of debt agreed by the pursuing creditor to one of the joint debtors does not generate plural effects in the relations with the other co-debtors, as it does not release the latter regarding the payment

¹⁶ *Ibid.*, p. 618.

¹⁷ *Ibid.*, p. 619. On the particularities of enforcement of the debt on consumer debtors, see Țiț, Nicolae-Horia, *Încuviințarea executării silite a debitorului consumator – exigențe europene, realități naționale*, „Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, seria Științe Juridice”, vol. 66, no. 2/2020, pp. 91-110.

¹⁸ Pop, Liviu; Popa, Ionuț-Florin and Vidu, Stelian Ioan, *op. cit.*, p. 619. See also Vasilescu, Paul, *op. cit.*, pp. 16-20.

due, with unless the creditor expressly states so, stipulating plural effects for the remission of the assumed debt; similar effects occur if the creditor voluntarily submits to the debtor the original of the document under private signature ascertaining the claim. However, as it results from the final thesis of art. 1451, para. (2) of the Romanian Civil Code, if a co-debtor is handed the original of the authentic document establishing the claim, the creditor can prove that it did consent to the debt remission strictly in respect of that particular debtor, the possibility of reversing the relative presumption remaining open to the creditor in this case. Obviously, it must be remembered that, in all the other situations, in which the debt remission operated only in favour of one of the joint and several co-debtors, the other co-debtors are implicitly bound jointly and severally in relations with the pursuing creditor, although it will automatically reduce the debt portion for which operated the remittance. However, as specified in the final thesis of art. 1451, para. (2) of the Romanian Civil Code, these co-debtors continue to be liable for the payment of the full value of the claim, in these particular cases by the fact that, at the date of debt remission, the creditor expressly reserved such a possibility, in which hypotheses, mainly, the other co-debtors maintain a right of recourse against the debtor beneficiary of the debt remission¹⁹.

In cases where the creditor waives the right to request from a single co-debtor the payment of the full value of the claim, which equivalates to a voluntary and unilateral abandonment by the creditor of the prerogatives deduced from the existence of passive solidarity, the provisions of art. 1453 of the Romanian Civil Code become incident, according to which the renunciation to the solidarity regarding one of the joint and several co-debtors does not affect the existence of the joint and several obligation as regards the other codebtors, thus not contaminating through its effects the relations between the pursuing creditor and the other codebtors; obviously, however, as it results from the final thesis of art. 1453, para. (1) of the Romanian Civil Code, the joint co-debtor who benefits from the renunciation of solidarity remains obliged for the payment sequence due for payment from the final debt, both in relations with the pursuing creditor and towards the other co-debtors in case of their regression followed by the waiver of the creditor's right to invoke the passive solidarity. Within the perimeter of the Romanian Civil law provisions, it does not operate, as a general rule, a presumption of implicit or tacit renunciation of the creditor to passive solidarity, respectively to the right to request from a single co-debtor the payment of the full value of the claim, so that, as expressly noted in the content of art. 1453, para. (2) of the Romanian Civil Code, the renunciation of solidarity must be an express one²⁰. Exceptionally, in accordance with the provisions of the third paragraph of the cited article,

¹⁹ Pop, Liviu; Popa, Ionuț-Florin and Vidu, Stelian Ioan, *op. cit.*, p. 619.

²⁰ On the other hand, not only the waiver of solidarity (which may occur implicitly, on the basis of a legal presumption, yet only marginally, in an exceptional manner), but passive solidarity itself can only be expressly stipulated and cannot be tacitly inferred, as an aspect which remains common to both the regulation of Romanian law and the regulation of solidarity under French civil law; as

the creditor will be deemed to have implicitly waived passive solidarity, as evidenced by previous scholars²¹, in cases where: “(a) without reserving the benefit of solidarity in relation to the joint debtor who made the payment, mentions in the receipt that the payment represents the latter part of the joint obligation. If the payment concerns only a part of the interest, the waiver of solidarity does not extend to unpaid interest or capital unless the separate payment of interest, as mentioned in the receipt, is made within 3 years; (b) while pursuing one of the joint and several debtors for the part of the payment, the creditor’s request having this type of object becomes admissible” (art. 1453, paragraph 2 of the Romanian Civil Code).

5. A volatile aspect: the insolvency of one of the joint co-debtors

The hypothesis in which the insolvency of one of the joint and several co-debtors reverberates on the creditor’s rights is managed by the norms enunciated in art. 1457 of the Romanian Civil Code, which shows that the damage or loss caused to the creditor by the insolvency of one of the joint and several co-debtors is borne to be handled not by the creditor itself, but by the other co-debtors, proportionately to the part of the debt due by each of these codebtors. However, as a apparent derogation from this rule, as it is apparent from the second paragraph of the cited article, a creditor who renounces to the effects of solidarity or agrees to a debt remission in favour of one of the co-debtors bears the part of the debt which would have accrued to the latter, which implies that the creditor bears, in this case, the partial damage resulting from the insolvency of a joint debtor, but only insofar as the premises described in the operative part of the cited legal norm are met, namely to have previously operated a consensual debt remission of the creditor in favour of the debtor (subsequently, insolvent, but without having the quality of debtor, following the exemption from paying the debt, by the will of the creditor), respectively to have intervened the waiver of the creditor to the effects of passive solidarity (renunciation of the prerogatives allowing the creditor to request from a single co-debtor the payment of the full amount of the

it has been pointed out by previous scholars, „*La réforme du Code civil n’a pas changé la règle générale selon laquelle la solidarité ne se présume pas, l’article 1202 ancien a été remplacé par l’article 1310 qui dispose «La solidarité est légale ou conventionnelle ; elle ne se présume pas». L’article 1309 du Code civil remplace l’ancien article 1220 en affirmant désormais la divisibilité des obligations comme principe général, alors que précédemment c’était l’indivisibilité qui prévalait (sauf pour les héritiers). «L’obligation qui lie plusieurs créanciers ou débiteurs se divise de plein droit entre eux. La division a lieu également entre leurs successeurs, l’obligation fût-elle solidaire. Si elle n’est pas réglée autrement par la loi ou par le contrat, la division a lieu par parts égales. Il n’en va autrement, [...], que si l’obligation est solidaire ou si la prestation due est indivisible»*”: Faber, Stéphanie, *Tous pour un! Un point sur la solidarité active et passive. Note sous Cass. com., 26 sept. 2018, n° 16-28.133*, posted on October 28, 2018, available at https://larevue.squirepattonboggs.com/tous-pour-un-un-point-sur-la-solidarite-active-et-passive_a3365.html, accessed on 09.07.2021.

²¹ Pop, Liviu; Popa, Ionuț-Florin and Vidu, Stelian Ioan, *op. cit.*, p. 620.

claim); both chains of the described situation do not imply a real exception to the rule of bearing by the other co-debtors, in proportion to the part of the debt incumbent on each of them, the insolvency of a co-debtor, since the latter, at the time of its insolvency, no longer retains the quality of debtor following a debt remission, or it maintains the quality of debtor, but individually, and not jointly and severally, so that the other debtors are not engaged at that time in the mechanism of passive solidarity. The provisions of art. 1317 of the French Civil Code are partially different, as they retain the solution of the reverberating of the consequences of the insolvency of one of the co-debtors on the other codebtors, including on the co-debtor who previously benefited from a remission of solidarity²².

6. Concluding remarks

The following conclusions can be drawn from the considerations set out in the previous paragraphs:

(a) as a defining feature of both the passive solidarity regime in French private law and in Romanian private law, it should be noted that the plurality of passive links established between joint and several debtors and the creditor presupposes that the links between these codebtors and the creditor remain separable, as well as able to be juxtaposed; consequently, the co-debtor sued by the creditor can raise against the latter the exceptions that are common to all co-debtors, such as the nullity or cancellation of the contract, as well as those that are personal to this codebtor, without being able to use the personal exceptions of other co-debtors, such as those intervening under an insurance contract against the risk of insolvency due to death/disability or incapacity for work, which is accessory to a real estate loan agreement;

(b) in the absence of clauses derogating from the supplementary rules, in cases where the borrower in a loan agreement, intended to finance the purchase of goods, has taken out an insurance that guarantees the repayment of the loan, following the insured risk, the effects of the insurance contract will consist in the extinguishing, up to the value of the threshold established with the insurer in the concluded contract, of the contribution (to the payment of the debt) of the insured

²² In the latest version, modified by Ordinance no. 131/2016, the provisions of art. 1317 Civil Code fr. retained that: „*Entre eux, les codébiteurs solidaires ne contribuent à la dette que chacun pour sa part. Celui qui a payé au-delà de sa part dispose d'un recours contre les autres à proportion de leur propre part. Si l'un d'eux est insolvable, sa part se répartit, par contribution, entre les codébiteurs solvables, y compris celui qui a fait le paiement et celui qui a bénéficié d'une remise de solidarité.*”; similarly, from the provisions of article 1318 of the French Civil code it results that: „*Si la dette procède d'une affaire qui ne concerne que l'un des codébiteurs solidaires, celui-ci est seul tenu de la dette à l'égard des autres. S'il l'a payée, il ne dispose d'aucun recours contre ses codébiteurs. Si ceux-ci l'ont payée, ils disposent d'un recours contre lui*”; the texts of the cited articles are available in full version at <https://www.legifrance.gouv.fr/codes/id/LEGISCTA000032031314/>, accessed on 09.07.2021.

debtor in question, so that it can be highlighted that the exception represented by the existence of the insurance contract is not attached to the main debt (the right to the payment of the debt does not absorb exceptions of this category), but has a personal nature, strictly operating for the insured, in relations with the pursuing creditor;

(c) the notification by which the creditor delays one of the joint and several co-debtors also produces effects with respect to the other co-debtors; therefore, it is difficult (or even impossible) to identify cases in which only some of the joint and several debtors are notified, with the effect of obliging them to pay additional compensations for the impossibility of execution in kind of the object of the obligation, after the delay of one of the joint and several debtors;

(d) in the hypotheses in which the joint obligation is contracted in the exclusive interest of one of the co-debtors or results from the deed of one of the co-debtors, the situation will be characterized by the fact that the latter will be obliged to pay the full value of the debt compared to the other co-debtors, who, in this case, are considered, in relation to this debtor, to be guarantors, by assimilation with the cases of the establishment of the conventional guarantee;

(e) the creditor's renunciation to the solidarity regarding one of the joint and several co-debtors does not affect the existence of the joint and several obligation as regards the other codebtors, thus not contaminating through its effects the relations between the pursuing creditor and the other codebtors; however, the joint co-debtor who benefits from the renunciation of solidarity remains obliged for the payment sequence due for payment from the final debt, both in relations with the pursuing creditor and towards the other co-debtors in case of their regression followed by the waiver of the creditor's right to invoke the passive solidarity²³.

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²³ Vasilescu, Paul, *op. cit.*, pp. 16-20.

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The efficiency of the legal framework in fighting domestic abuse. Comparative study Romania - UK

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Abstract

The present paper aims to identify, with the instruments of comparative law, similar provisions, namely differences that can be adopted in national law, by reporting Romanian legislation on combating domestic violence to the legal provisions in the UK. As a novelty, I have included a survey conducted on an accessibility sample of 50 lawyers from the Bucharest Bar, with experience in domestic violence, respectively 50 employees of barristers firms in the UK, to evaluate, comparatively, how they relate to the quality and efficiency of the legislative framework, respectively to the changes that have been brought to it or are still to be brought. The conclusions of this paper derive both from the comparative analysis of the legal norms applicable to domestic violence, in the two legislative systems, and from the analysis of the answers obtained to the questionnaire that include in the Annex.

Keywords: *legislation on domestic violence, Romania, UK.*

JEL Classification: K14, K33, K36

1. Introduction

Domestic violence, although we tend to attribute it to disadvantaged groups, or developing societies, is a phenomenon that affects all societies and all social classes². What may differ are the legal measures by which the phenomenon is controlled, at the level of each society. We can formulate, as a research hypothesis, the fact that societies with more resources, or with a longer history of investigation and combating the phenomenon develop more appropriate and reliable legal mechanisms aimed at controlling domestic violence, both punctually and as a whole, both in the short term and in the medium term. In this logic, we aim to study, comparatively, the legal framework in force, in terms of recent amendments, in the United Kingdom and Romania respectively, aiming to identify, with the means of comparative law, the development priorities for national law, in relation to British good practice.

Of course, there are different challenges, at the level of the two legislative systems – for example, for the UK, the issue of access to justice for non-native English-speaking victims. Victims' access to justice is perceived as difficult in

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² Feder, G., Lucas d'Oliviera, A.F., Rishal, P, Johnson, M. (2021), *Domestic violence during the pandemic*, BMJ, <https://doi.org/10.1136/bmj.n722>.

Romania, but in other respects – mentality, lack of financial means, dependency of abuser, etc. However, I believe that the comparative perspective is useful in highlighting the strengths and weaknesses of each legislative system and in identifying ways of transferring best practices in managing the phenomenon of domestic violence.

2. Domestic violence legislation

In Romania, the notion of domestic violence appears for the first time as such in Law no. 217/2003, under the name "domestic violence", which introduces a terminological inconsistency, especially since, in criminal law, the phrase used is that of "domestic violence". Barocas et al.³ finds that the phrase "domestic violence" is used in the legislation of several states, which include in this both domestic violence and violence between partners, which leads to an undifferentiated treatment of abusers, in particular in the determination of punishments, in criminal legislation. Emphasis must therefore be placed on the much more precise definition of the concept of "family member" and, at the same time, partner, which, for the most part, has been achieved by successive amendments to Law no. 217/2003, as we have shown previously⁴. Also, the first Romanian criminal law in which the crime of domestic violence is found is the New Criminal Code of 2014⁵. Previous criminal codes refer to crimes that can be grouped under the umbrella of domestic violence, have a more conservative approach, from the Code of Cuza, where verbal abuse, for example, of parents on children, is allowed and even encouraged, to the Penal Code of 1968, where there is the notion of "close relative", then modified to "family member" (with the condition of cohabitation), but they do not define as such a deed called "domestic violence".

In the United Kingdom, domestic violence is provided for in the legislation under the name of *domestic abuse* ("domestic abuse"). In this respect, it was promulgated, first in 2019, then in 2021, *the Domestic abuse act*, a document that makes significant changes to legislation and criminal proceedings in the matter.

In this respect, according to the law firm⁶, *the Domestic abuse act* includes a complete definition of domestic abuse and, moreover, changes the status

³ Barocas et al. (2016) Barocas, B., Emery, D., Mills, L.G. (2016), *Changing the Domestic Violence Narrative: Aligning Definitions and Standards*, „Journal of Family Violence”, 31, pp. 942-947.

⁴ Sava, M. (2021), *Aspects of legislative and procedural unification of civil and criminal instruments for fighting domestic violence*, „Perspectives of law and public administration”, 10 (1), pp.140-149.

⁵ Vladila, L.M. (2017) Domestic violence in the Romanian Penal Code of 1937, *Valahia University Law Study*, 30 (2), pp.14-23.

⁶ Kingsley Napley (2021) *Domestic Abuse Act 2021: An Overview*, <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/domestic-abuse-act-2021-an-overview>, accessed June 15th, 2021.

of children who witness or experience domestic abuse in their homes from *witnesses* to *victims*. The definition of domestic abuse has two components: abusive behavior, and the fact that people are connected to each other, an approach, in my opinion, much more comprehensive and unequivocal than that of "family member", in Romanian legislation.

I quote below the definition of "personally connected", as it appears in the act:

(1) For the purposes of this Act, two people are "personally connected" to each other if any of the following applies:

- (a) they are, or have been, married to each other;
- (b) they are, or have been, civil partners of each other;
- (c) they have agreed to marry one another (whether or not the agreement has been terminated);
- (d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
- (e) they are, or have been, in an intimate personal relationship with each other;
- (f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
- (g) they are relatives.

(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if:

- (a) the person is a parent of the child, or
 - (b) the person has parental responsibility for the child.
- (3) In this section:

- "child" means a person under the age of 18 years;
- "civil partnership agreement" has the meaning given by section 73 of the Civil Partnership Act 2004;
- "parental responsibility" has the same meaning as in the Children Act 1989 (see section 3 of that Act);
- "relative" has the meaning given by section 63(1) of the Family Law Act 1996.

We note that, in the sense of the above, related to the terminology inconsistency in our legislation, between "domestic violence" and "domestic violence", British law places much greater emphasis on violence between partners, and on violence against the minor, and only lastly by the reference to other relatives.

Compared to *the Serious Crime Act* of 2015, the definition of the notion of "personally connected" in this law has suffered the same kind of broadening of the scope that has occurred in Romanian law, including former partners, as well as family members who do not cohabit⁷.

⁷ Kingsley Napley, *op. cit.*

Victim protection instruments are similar to those existing in our legislation, namely *Domestic Violence Protection Notices (DVPN)* and *Domestic Abuse Protection Orders (DAPOs)*. The protection notices work similar to a provisional protection order, being issued by a police officer who has at least the rank of inspector, immediately after the DV is noticed, but having a shorter applicability than in our legislation, of only 48 hours. Within this period, the police officer must file an application for a protection order to the Magistrates' Court. The latter may be issued for a maximum period of 28 days.

3. Research methodology

In order to carry out exploratory research on the opinion of Romanian and British lawyers on the effectiveness of legal instruments to combat domestic violence, we have developed a questionnaire with 20 questions, of which 4 classification questions and 16 questions relating to the issues of domestic violence, respectively the applicable legislative framework. This questionnaire was distributed online, between 01-15.06.2021, to 50 lawyers from the Bucharest Bar, respectively 50 lawyers employed in well-known barristers firms in the UK. Following the collection of the answers, we obtained 47 valid answers from Romania, respectively 21 valid opinions from the UK, which were processed with statistical software.

Classification questions included the gender of the respondents, age, experience in the profession, respectively the quality of a civil law or a criminal law specialist. In the sample of Romanian lawyers, female respondents (40) predominate, compared to 13 in the British sample, which has a more balanced component. Regarding the age of the respondents and the experience in the profession, the Romanian lawyers participating in the survey are mostly people between 41 and 50 years (24), with average experience (15 lawyers in the sample have experience between 11 and 15 years) or vast (9 respondents have experience between 16 and 20 years, and 15 have over 20 years of experience).

In the case of British lawyers, the same trend is maintained, with more than half of the sample (12 lawyers) being between 41 and 50 years old, with experience between 11 and 15 years (7 respondents), between 16 and 20 years (5 respondents) and over 20 years (6 respondents).

Regarding the predilection to civil or criminal cases, the vast majority of Romanian respondents (27) plead in civil causes, 15 in criminal causes and 5 do not have a predilection. The trend is reversed in the British sample, where 14 respondents are involved mainly in criminal causes, and 7 in civil causes.

4. Results and discussions

Regarding the frequency with which they face, in current practice, do-

mestic violence cases, the answers of Romanian lawyers are summarized in **Figure 1:**

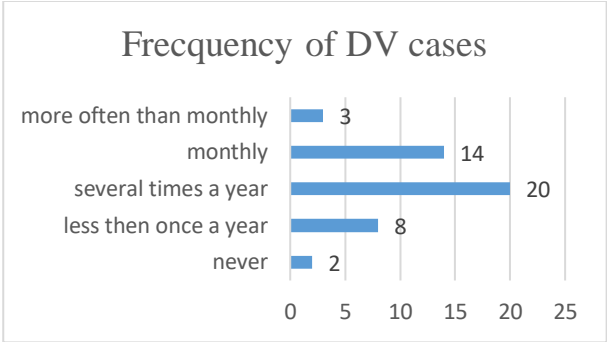


Figure 1. Frequency of domestic violence cases (RO)

We note that the vast majority of respondents are relatively familiar with domestic violence cases, often and very often advocating in such cases, which makes their opinions expressed in the survey documented and credible.

The situation is similar in the case of British lawyers, as seen in **Figure 2:**

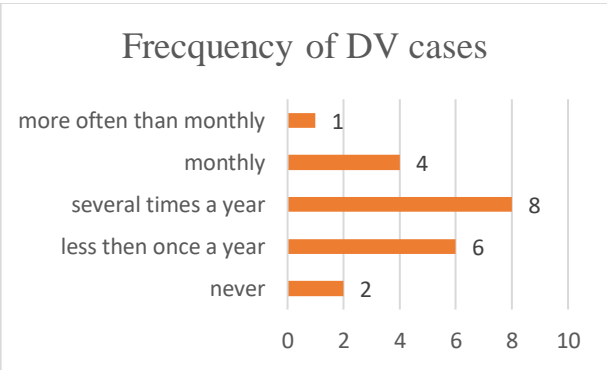


Figure 2. Frequency of domestic violence cases (UK)

Another question was the lawyer's involvement in the case as a defender of the abuser or victim.

We note that, in the case of both Romania and the United Kingdom, the lawyers questioned are or have been mainly defenders of the victims.

Most Romanian lawyers (28) said they are, in the guise of domestic violence, chosen defenders, while 7 have declared that they are public defenders, and 10 find themselves in both situations.

In the case of the United Kingdom, domestic violence qualifies, regard-

less of the victim's income, as a situation in which public judicial aid can be provided. There are also associations that facilitate victims' access to lawyers who provide assistance on a voluntary basis. Therefore, 11 respondents stated that they were public defenders or volunteers, and 8 were hired lawyers.

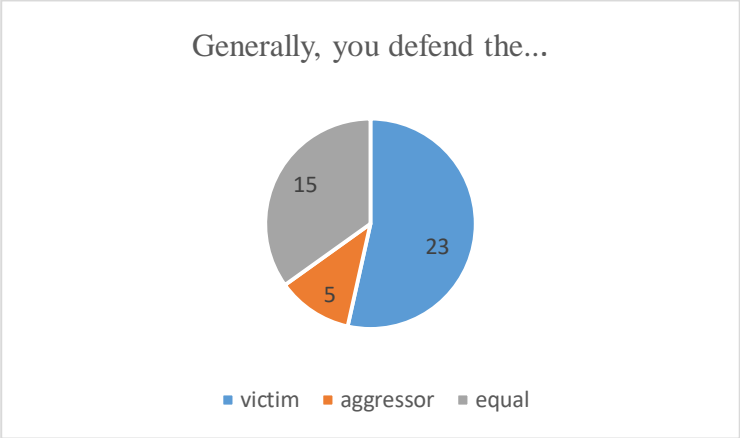


Figure 3. Involvement in the case (RO)

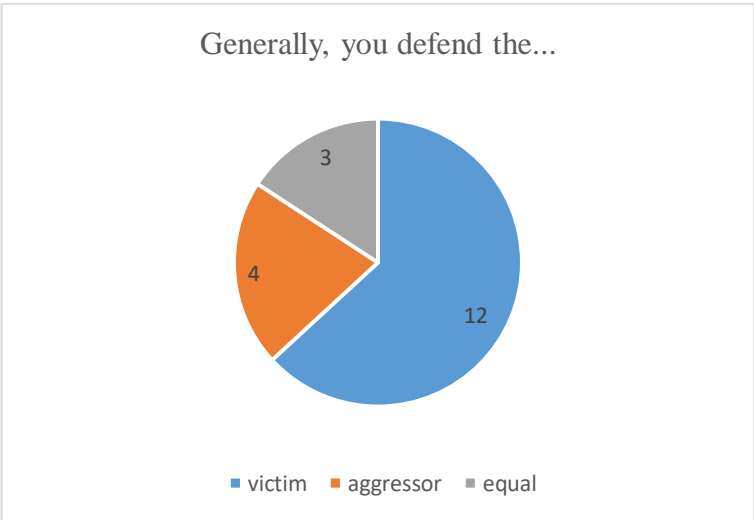


Figure 4. Involvement in the case (UK)

Regarding the degree of difficulty of domestic violence, as can be seen in **Figure 5**, most Romanian lawyers in the sample consider these cases to be more difficult than others:

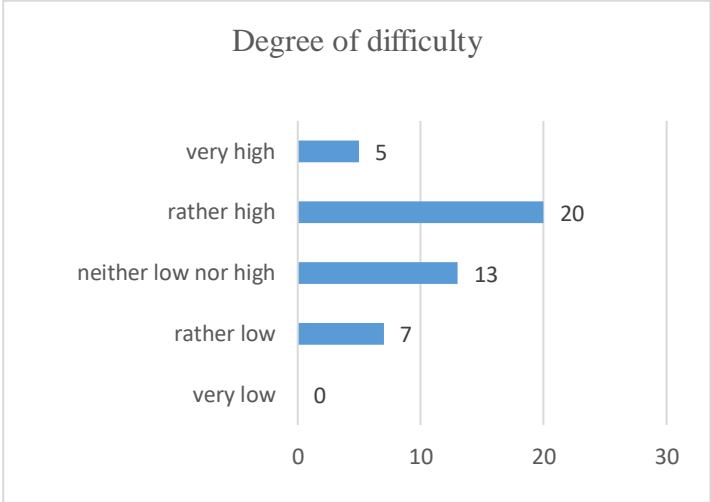


Figure 5. Degree of difficulty of domestic violence cases (RO)

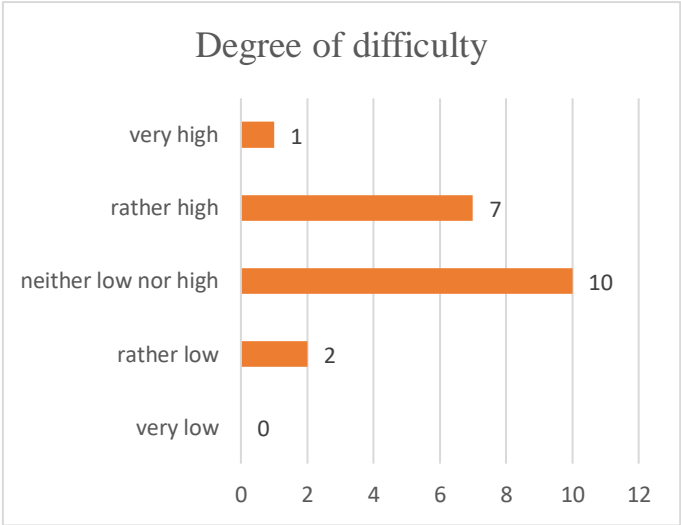


Figure 6. Degree of difficulty of domestic violence cases (UK)

With regard to the challenges, as can be seen from Figure 7 below, the Romanian lawyers put the emotional implications first, followed by the legislative framework, namely the elements of danger, and at great distance, by the procedural framework, which shows an important empathization with the victims, a situation not found in the case of British lawyers.

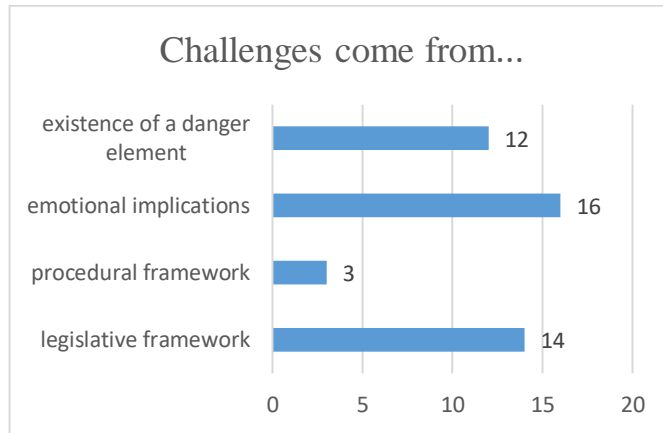


Figure 7. Sources of challenges in domestic violence cases (RO)

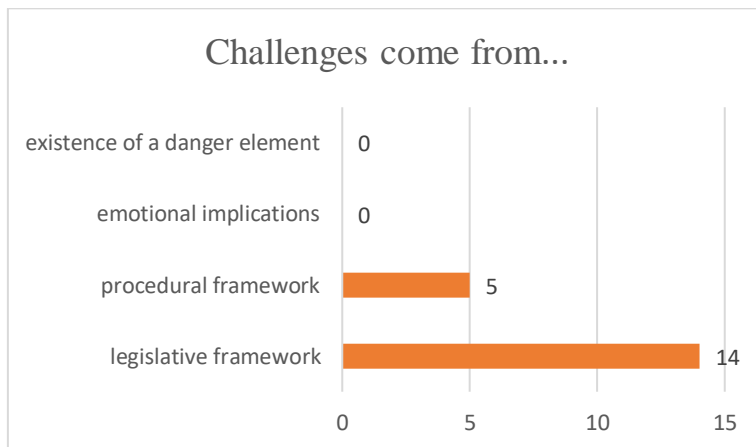


Figure 8. Sources of challenges in domestic violence cases (UK)

We note that, in the case of the United Kingdom, the approach is much more focused on the legal and procedural instruments, and not at all on the emotional and extra-legal aspects of the case.

To the question related to the need for legislative changes in civil legislation, or rather in criminal law, the Romanian lawyers questioned answered, in their majority (26) that both laws should be amended, and those who opted for a single type, chose to a greater extent (10) civil legislation.

On the contrary, British lawyers consider, for the most part (14), that criminal legislation needs to be better designed.

Asking them to detail the changes they consider necessary, the Romanian lawyers in the sample considered that initiating new texts of law or completing existing ones is at the forefront (24 respondents), followed by legislative harmo-

nization between civil and criminal laws (11 respondents). To a much lesser extent, the elimination of certain existing provisions (2 respondents), namely the revision of the rules of law enforcement (7 respondents), were mentioned.

Regarding the under-regulated issues, the Romanian lawyers questioned mentioned the supervision of recidivism (18 responses) and, at a considerable distance, the provisional protection order (7 answers), the punishment regime (6 answers), the notion of family member (6 answers), the protection order (3 answers). Therefore, a significant problem of the judicial system is what happens after the existence of a verdict in a case of domestic violence, namely the corrective effects of the punishments that apply and their effectiveness in preventing recidivism.

This answer correlates with the question of protection granted to victims by the current legislative framework, which can be seen in **Figure 9**:

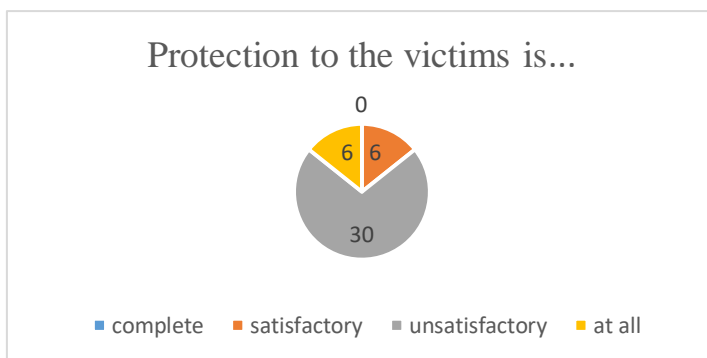


Figure 9. Evaluation of the protection offered to victims of domestic violence by the legal framework in force (RO)

We note that there is no lawyer in the sample who considers that the protection is complete, the vast majority considering that it is non-existent.

Also, the opinion on the level of current punishments for abusers can be seen in **Figure 10** below:

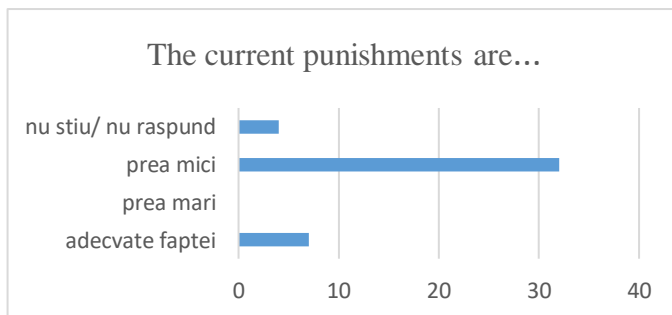


Figure 10. Evaluation of the level of sanctions (RO)

As with the foregoing question, no lawyer considers that the punishments are too great in relation to the deed committed, these being interpreted by most of the sample as disproportionate, but in the sense of too mild.

Also, most of those asked (30) find that victims' access to justice is difficult, even if the duration of trials is perceived as appropriate (24 responses). However, the verdicts in the case of domestic violence only resolve the situation temporarily, 35 respondents consider.

Most Romanian respondents opt to maintain the current situation, in which the cases of domestic violence are tried by a civil court, in the presence of the prosecutor (22), but there is a clear tendency (18 answers) to be judged by a criminal court, although the majority of those asked (36) argue that, in situations of competition of rules, the legislation that must prevail is that of civil.

Given the specifics of the investigation of domestic violence cases in the UK, the questions from the second questionnaire rather covered the aspect of a discussion with lawyers who wished to express, anonymously, a point of view. Thus, since there is a legislative text specifically dedicated to domestic abuse, the problems of legislative harmonization are put to a lesser extent than in Romania, only in cases where this *Domestic Abuse Act* refers to related laws. Although domestic violence, in my opinion, is defined more clearly than in Romanian law, British lawyers consider that there is still not enough emphasis on partner violence, as the main form of domestic violence, and there are no correlations with other forms of gender-based violence (sexual harassment, etc.).

Other problems raised relate, as in the case of the answers of Romanian lawyers to the questionnaire, to the protection offered to victims, perceived as insufficient, with a particular focus on the situation of immigrant women, who have even more difficult access to justice, respectively to support facilities, in the situation where they experience domestic violence.

5. Conclusions

From the comparative analysis of the legislation on domestic violence, in Romania and in the United Kingdom, respectively the answers offered by the lawyers selected to answer the questionnaire, from the two countries, the following conclusions emerge:

(a) concerning the rule applicable in cases of domestic violence:

- while, in the Romanian system, domestic violence benefits from a special law, amended successively in the last 18 years, since its promulgation, belonging to civil law, as well as an article in the penal code, under the name "domestic violence" (which refers to other articles), in the British system there is *the Domestic Abuse Act*, which is a criminal law to combat domestic violence. Thus, DVPNs (equivalent to provisional protection orders) and DAPOs (equivalent to protection orders) are introduced by a criminal law, which also provides for sanc-

tions related to their violation. This framing ensures, in my opinion, a greater coherence, the definition of the crime, the responsibilities in sanctioning it, and the sanctioning instruments being found in the same legislative text. Moreover, *the Domestic Abuse Act* is valid both before criminal courts and in juvenile and family courts, which eliminates the problem of competition of rules that may arise in our courts (for example, regarding the definition of the notion of family member, as we have shown previously⁸);

- moreover, *the Domestic Abuse Act* also includes elements of recidivism prevention – through DVPNs and DAPOs it is mandatory for the abuser to seek specialized help (e.g. psychiatric) in order to reintegrate into the community. Also, in the case of victims who have nowhere else to stand as a result of domestic abuse, the law provides for their support in this regard, clarifying the powers of local authorities in the matter of supporting victims. Actions related to the protection of victims and the supervision of abusers are concentrated in the hands of a *Domestic Abuse Commissioner*, who is given the power to supervise including how justice solves domestic violence cases. It may request clarification scans or makes recommendations to public institutions involved in the management of domestic violence cases. Any public institution shall be obliged to respond to the Commissioner's recommendations no later than 56 days after their receipt;

- therefore, I believe that these aspects, which relate to the implementation of the solutions of the courts and the effective management of cases of domestic violence and which, in Romania, are dissipated between several ministries, regulated by multiple normative acts, from laws to ministerial orders, which sometimes overlap and, anyway, create a volume of regulations almost impossible to contain by those responsible, are the **main source of British good practice to which our legislative system can appeal**. The centralization of responsibilities at the level of a single authority (DA Commissioner), which is given total independence from state institutions, and the right to hold them accountable is, in my opinion, an element that is appropriate taken up in our practice, paralyzed by too many regulations and bodies that overlap their duties, leaving, instead, some aspects uncovered.

(b) on the improvement able aspects identified by the lawyers participating in the survey-based research:

- in the case of Romania, the main problems identified were that the solutions of the courts punish the aggressors, without giving sufficient protection to the victims (which correlates with the issues shown above), access to justice is perceived as difficult for the victims, and punishments are usually considered at the lower limit;

- in the case of the United Kingdom, criticism of the *Domestic Abuse Act* comes from the need to nuance the definition of domestic violence, by linking

⁸ Sava, M., *op. cit.*, pp.140-149.

it with other forms of gender violence, from finding difficult access to justice, as in the case of Romania, of victims from economically and linguistically disadvantaged backgrounds, such as immigrants;

- I therefore believe that the issues raised by British lawyers can also apply to our legislation, where the notion of "family member", restrictive by reference to the broader notion of domestic violence, is maintained, both in the special law and in the Penal Code. In this respect, in British law, the "relative family member" appears last in the more comprehensive list of situations in which individual A and individual B are "personally connected". Therefore, the option for a more neutral and comprehensive phrase, which no longer poses problems of defining family, cohabitation, etc., would be beneficial, in my opinion, in our legislation.

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Annex 1. Questionnaire on the effectiveness of legal means to fight domestic abuse

Dear colleague,

I ask you to fill in this questionnaire, aimed at collecting data for my doctoral research, on the topic of the legal means to fight domestic abuse. My purpose is to analyze the effectiveness of the existing legal framework in combating domestic abuse.

I assure you that all answers are confidential, and they will be used exclusively for academic purposes. There are wrong answers, I am only interested in your opinion.

It takes on average 5 to 10 minutes to fill in this questionnaire.

Thank you for completing.

Mihaela Sava, barrister, Bucharest Bar

PhD student in Criminal Law

1. Your gender:

- F
- M

- Rather not say
- 2. Your age:
 - Under 30
 - 30-40 yrs
 - 41-50 yrs
 - 51-60 yrs
 - Over 60
- Rather not say
- 3. Age in the profession:
 - Under 5 yrs
 - 5-10 yrs
 - 10-15 yrs
 - 15-20 yrs
 - Over 20 yrs
- 4. You are usually pleading:
 - In civil causes
 - In criminal causes
 - Both
- 5. On average, you come across cases of domestic abuse:
 - Never
 - Less than once a year
 - Several times a year
 - Monthly
 - More than monthly
- 6. Usually, you plead for:
 - Victims
 - Aggressors
 - Both
- 7. Generally, you are:
 - Hired lawyer
 - Pro bono lawyer
 - Both
- 8. You think that domestic abuse cases are:
 - Very complex
 - Rather complex
 - Neither complex, nor simple
 - Rather simple
 - Very simple
- 9. Challenges arise, in your opinion, from (multiple choice):
 - The legal framework
 - The procedural framework
 - The emotional implications
 - The existence of danger elements
 - Mentalities
 - Other
- 10. If you selected the first answer, in your opinion, changes have to be made to
the:
 - Civil legislation

- Criminal legislation
 - Both
11. The changes, in your opinion, should focus on:
- Legislative harmonizing
 - Proposing new legal texts/ amending the existing ones
 - Eliminating certain legal provisions
 - The norms for applying existing laws
 - Other.....
12. Which of the following aspects you consider to be insufficiently covered, in the legislation?
- The notion of ‘family member’
 - Protection order (restraining order)
 - Ex parte protection order
 - Sanctioning regime
 - Supervising recidivism
 - Other.....
13. You think that domestic abuse cases should be judged by:
- A civil court
 - A civil court, in the presence of a prosecutor
 - A criminal court
14. In your practice, did you come across situations of concurrence of norms, which led to a less favourable solution to the party you were representing?
- Yes, frequently
 - Yes, sometime
 - I don’t know/ I don’t answer
 - No, never
15. Which norm you think should prevail?
- Criminal norm
 - Civil norm
16. The current sanctions for domestic abuse are:
- Adequate to the deeds
 - Too high
 - Too low
 - I don’t know/ I don’t answer
17. Currently, the protection offered to the victims by the legal framework in place is:
- Complete
 - Satisfactory
 - Unsatisfactory
 - Lacking
18. The access to justice for the victims of domestic abuse is, generally:
- Easy
 - Difficult
19. The average duration of the trials for domestic abuse is:
- Adequate
 - Too long
 - Too short
20. You think that the legal solutions given in the cases of domestic abuse solve

the situation:

- Temporary
- Definitively
- At all

Aspects of comparative law regarding the regulation of civil procedural capacity in Romanian and Spanish law

PhD. student **George-Bogdan IONIȚĂ**¹

Abstract

This study aims to address an important topic of great interest, both from a practical point of view and from a theoretical point of view. The main objective of the research will materialize especially on the analysis of the current regulation of Romanian law (current Code of Civil Procedure) of procedural capacity, as an essential condition for exercising a civil action in court. Similarly, the research will seek to identify and analyze the provisions of Law no. 1/2000 on procedural capacity in current Spanish law. The study will also focus on identifying possible similarities and differences between the two regulations of procedural capacity, in order to provide a more realistic picture between the legislative approach of the institution in the two legal systems under study. In carrying out this research, mainly specialized works will be used, but especially the legislation in force regarding the procedural capacity, both in Romania and in Spain.

Keywords: *procedural capacity, Code of Civil Procedure, legal system, regulation, Spanish law.*

JEL Classification: K41

1. Procedural capacity in Romanian legislation

The possibility of any subject of law to apply to the courts is unanimously recognized in all modern European national laws. In this sense, the Romanian Constitution regulates the principle of free access to justice², as a fundamental landmark of the freedom of any person to appeal to the coercive force of the state when its rights, freedoms and interests are violated.

However, although free access to justice is guaranteed, this does not equate to the actual possibility of the person who has appealed to the courts to successfully defend his or her violated rights and freedoms because, as we shall see, certain conditions must be met in view of the exercise of actions or defenses before the courts.

Regarding the current Code of Civil Procedure, art. 29 defines the civil action as *“the set of procedural means provided by law for the protection of the subjective right claimed by one of the parties or another legal situation, as well*

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² According to art. 21 of the Romanian Constitution, republished in the Official Monitor no. 767 of 31.10.2003.

as for ensuring the defense of the parties in the process³". As the definition implies, civil action refers to two categories of procedural means: the first category is composed of those procedural means necessary for the protection of the subjective right claimed by one of the parties and the second category consists of the means necessary for ensuring the defense of the parties in the process, in fact the defense being a form of manifestation of the civil action⁴.

Regardless of the form of manifestation of the civil action, the current Code of Civil Procedure establishes four cumulative general conditions for the exercise of the civil action. The first condition concerns the procedural quality (*legitimitate ad causam*) and results from the identity between the parties and the subjects of the disputed legal relationship, as it was deduced in court⁵.

The second condition concerns the existence of interest, which is the practical benefit which the applicant wishes to obtain from the judgment. The interest must be determined, legitimate, born and current, direct and personal⁶. The third condition concerns the formulation of a claim, in the sense that the claimant has the obligation to make a clear claim (a request) addressed to the court. Last but not least, the person addressing the court must have procedural capacity.

Procedural capacity represents the ability of natural and legal persons to become part of the civil process, thus representing an essential condition for a person's participation in judicial activity⁷. Procedural capacity represents the procedural application of civil capacity, being composed of capacity to use and capacity to exercise. The ability to use is the ability to have rights and obligations⁸, and the ability to exercise is the ability of the individual to conclude civil legal acts alone⁹.

From a procedural point of view, the capacity to use represents the general and abstract aptitude of the natural or legal person to have rights and obligations of procedural nature. In the case of natural persons, it is acquired at the birth of the person, unless the rights of the child are recognized from conception, but provided that he is born alive and ceases with the death of the person.

In the case of legal entities subject to registration, the usability is acquired

³ For further developments, see Viorel Mihail Ciobanu, Marian Nicolae, *New Code of Civil Procedure. Commented and annotated*, Vol. I., 2nd edition, Universul Juridic Publishing House, Bucharest, 2016, p. 150.

⁴ Gabriel Boroi, Mirela Stancu, *Civil procedural law*, 4th edition, revised and added, Hamangiu Publishing House, Bucharest, 2017, p. 36.

⁵ See art. 36 Civil procedure code.

⁶ See art. 33-34 Civil procedure code. To consult, Evelina Oprina, *Civil procedural law. Volume 1. General Theory*, Universul Juridic Publishing House, Bucharest, 2019, pp. 79-82.

⁷ Ioan Leș, Daniel Ghiță, *Treaty of civil procedural law. Vol. I. General principles and institutions; The trial before the first instance*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2020, p. 157.

⁸ See art. 34 Civil Code.

⁹ See art. 37 Civil Code.

from the date of registration and in the case of legal entities not subject to registration, the usability is acquired from the date of the founding act, from the date of authorization of their establishment or from the date of fulfillment of any other requirements by law¹⁰. The capacity to use legal entities ceases at the time of their abolition by any means provided by law¹¹.

Moreover, art. 56 C. pr. civ., stipulates that any person who has the use of civil rights can be a party to the lawsuit. Also regulated is the possibility to have procedural capacity to exercise and entities without legal personality provided that they are constituted according to law¹². If the person who brought an action in court does not have procedural capacity to use, the opposing party may invoke the exception of lack of capacity to use¹³. The exception can be invoked throughout the process and the sanction that intervenes for the procedural acts performed by the party without capacity to use is their absolute nullity.

Procedural capacity to exercise is the ability of a person to exercise and enforce his or her rights and procedural obligations, i.e. to stand trial.

In the case of natural persons, full exercise capacity is acquired at the age of 18 years¹⁴. The minor who has reached the age of 16 acquires full capacity to exercise through marriage. If the marriage is annulled, the minor who was in good faith at the conclusion of the marriage retains the full capacity to exercise¹⁵. Moreover, for good reasons, the guardianship court may recognize the full exercise capacity of the minor who has reached the age of 16¹⁶. The cessation of the procedural capacity to exercise takes place, definitively or temporarily, as the case may be, by death, by judicial interdiction or in the situation of annulment of the marriage before the minor in bad faith has reached the age of 18 years.

In the case of legal persons, the capacity to exercise is acquired from the date of establishment of the administrative bodies of the legal person¹⁷. Until the date of establishment of the administrative bodies, the exercise of the rights and

¹⁰ According to art. 205 para. (1) - (3) Civil code.

¹¹ According to art. 244 of the Civil Code, the legal person ceases by ascertaining or declaring nullity, by merger, total division, transformation, dissolution or dissolution or by another way provided by the constitutive act or by law. See also the commentary on the paper, Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Civil Code. Comment on articles*. 3rd edition, C.H. Beck Publishing House, Bucharest, 2021, p. 311.

¹² For example, the case of the simple company regulated by the Civil Code at art. 189-1948.

¹³ According to art. 245 Civil procedure code, the procedural exception is the means by which the interested party, without questioning the merits of the law, invokes irregularities that may include, among others, issues related to procedural capacity and which seeks to reject the request. The exception of the procedural quality of use is a substantive exception (aimed at violating a mandatory condition in the exercise of civil action), absolute (violates public policy rules) and peremptory (leads to the extinction of the case).

¹⁴ And the restricted capacity to exercise is acquired at the age of 14 and ceases to acquire the full capacity to exercise or by being placed under judicial interdiction.

¹⁵ According to art. 39 Civil Code.

¹⁶ See art. 40 Civil Code.

¹⁷ See art. 209 Civil Code.

the fulfillment of the obligations regarding the legal person are done by the founders, or by the natural persons or legal persons designated for this purpose¹⁸. And as for the end of the capacity, it coincides with the termination of the legal person itself.

As a general rule, art. 57 para. (2) C. pr. civ., stipulates that the party that does not have the exercise of procedural rights cannot stand trial unless it is represented, assisted or authorized under the conditions provided by the laws or statutes governing its capacity or organization.

Thus, the legal representation will intervene in the case of natural persons lacking the capacity to exercise, i.e. in the case of minors who have not reached the age of 14 and in the case of those placed under judicial interdiction. They are not personally in the process, but through their legal representatives (parents or, as the case may be, those who represent the person placed in the placement or guardian). Thus, these persons will be summoned with their name, but through the legal representative, at the latter's domicile. All procedural acts performed on behalf of or by persons without capacity to exercise must be signed by the representative¹⁹.

With regard to legal persons, as mentioned above, they are legally represented by the administrative bodies, in the case of legal persons under private law. In the case of legal persons under public law, they are represented by the bodies provided by law.

With regard to legal persons, as mentioned above, they are legally represented by the administrative bodies, in the case of legal persons under private law. In the case of legal persons under public law, they are represented by the bodies provided by law.

With regard to legal aid, it intervenes in the case of persons with limited capacity to exercise, namely in the case of minors aged between 14 and 18 years. They will be summoned and will sit in person in the process, but assisted, as the case may be, by parents or guardians, who will sign with the minors the requests addressed to the court, and for this purpose, the parents or guardians will be summoned. If the minor reaches the age of 14 during the trial, the legal representation turns into assistance, and after reaching this age, the minor will be summoned in person²⁰.

The authorization intervenes if the legal representative of the person without capacity to exercise or the minor with limited capacity and the legal guardian who assists him performs procedural acts of disposition (waiver of the trial or the claimed right, etc.). For these acts it is necessary the authorization of the guardianship court, when the minor is protected by the parents, by placement

¹⁸ See art. 210 Civil Code.

¹⁹ Mihaela Tăbărcă, *Civil procedural law. Vol. I - General theory*. 2nd edition, Solomon Publishing House, Bucharest, 2017, p. 192.

²⁰ Ioan Deleanu, *The New Code of Civil Procedure. Comments on articles, Vol. I (Art. 1-612)*, Universul Juridic Publishing House, Bucharest, 2013, pp. 110-113.

or, as the case may be, by other special protection measures provided by law, respectively the authorization of the guardianship court and the family council opinion, in case in which the protection of the incapable or of the minor with limited exercise capacity is achieved through guardianship²¹.

In case of emergency, if the natural person lacking the capacity to exercise civil rights does not have a legal representative, the court, at the request of the interested party, will appoint a special curator to represent him until the appointment of the legal representative, according to law. The court will also appoint a special trustee in case of conflict of interest between the legal representative and the represented one or when a legal person or an entity without legal personality, called to stand trial, has no representative. The appointment of these curators will be made by the court judging the case, from among the lawyers specifically appointed for this purpose by the bar for each court. The special curator has all the rights and obligations provided by law for the legal representative. The provisional remuneration of the so-called trustee is fixed by the court, by conclusion, establishing at the same time the method of payment. At the request of the curator, once his quality has ceased, taking into account the activity carried out, the remuneration may be increased²².

If the action is brought by a person without procedural capacity, the interested party may invoke the exception of lack of procedural capacity. The lack of capacity to exercise procedural rights can be invoked in any state of the proceedings. Procedural acts performed by a person who does not exercise procedural rights are void. However, its representative or legal guardian will be able to confirm all or only part of these documents. When the court finds that the procedural act has been performed by a party lacking the capacity to exercise it, it will grant a term for its confirmation and if the act is not confirmed, its annulment will be ordered²³.

2. Procedural capacity in Spanish law

As in Romanian law, procedural capacity is an important institution in Spanish procedural law. We find the regulation of this institution in Law no. 1/2000²⁴ of Civil Procedure, in chapter I, articles 6-9.

From the point of view of Spanish law, procedural capacity can be defined as the ability of the party to decide for himself the exercise of procedural rights and obligations alone in court, materializing in the possibility of validly

²¹ See also art. 145 Civil Code.

²² According to art. 58 Civil procedure code. See also the paper, Mădălina Dinu, *Theoretical and practical aspects regarding the special curatorship as a form of representation in the civil process*, "Pandectele Romane", no. 5 of 2018. The article was consulted on 20.06.2021.

²³ According to art. 57 para. (4) - (5) Civil procedure code.

²⁴ Published on January 7, 2000 in the Official monitor of Spain. The full text of the law can be consulted at: <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>. The text was consulted on 22.06.2021.

carrying out procedural acts and thus determining the procedural behavior to follow²⁵.

As is clear from the title of Chapter I, the Spanish legislature regulates three different legal institutions: the capacity to be a party (in the material sense), the procedural capacity (in the formal sense) and the procedural legitimacy.

Thus, as regards the capacity to be a party, the Spanish legislature provided that the following categories have this possibility: natural persons; the conceived but unborn child, in connection with his rights at the time of conception; legal entities; entities without legal personality whose capacity to be a party is recognized, the Public Prosecutor's Office²⁶, in the processes in which it has the competence to participate; the holders of the patrimonial masses who have been deprived of the right of disposition and administration over them; consumer groups (users) affected by an injurious act, assuming that the members of the group are already known (the action may be initiated after the group has been formed with the majority of those affected by the injurious act) and entities empowered under European law to promote collective action; diffuse consumption of consumers and users.

Article 7 of Law no. 1/2000 lists persons who, from a formal point of view, have the capacity to stand trial or to represent another party, who from the perspective of Spanish law have only the capacity to be a party (in a material sense).

Thus, as a general rule, any person can sue. In the case of minors, they will be able to be represented, assisted under the law. For the conceived but unborn child, he will be able to be represented by those people who would have represented him if he had been born at that time.

In the case of legal persons, they will be sued through those who legally represent them. Regarding the patrimonial masses regulated in art. 6, may be represented by the persons who administer them until the finalization of the legal situation of their holders²⁷. Also, entities without legal personality will be able to sue through the persons to whom the law assigns this competence. Last but not least, in the case of consumer groups, they will be represented by the persons designated for this purpose in order to be represented before third parties.

Law no. 1/2000 also brings special provisions for people with disabilities²⁸. Thus, in the processes in which people with disabilities participate, necessary adaptation and adjustment measures will be made to guarantee their participation on equal terms in court. Those measures will be taken, both at the request

²⁵ <https://www.iberley.es/temas/capacidad-procesal-partes-actuar-orden-civil-55481>. Consulted on 22.06.2021.

²⁶ It is an independent institution integrated in the judiciary with functional autonomy. The main role is to ensure the legality and impartiality of the functioning of justice and the protection of the rights of certain groups, such as minors, people with disabilities, etc. <https://www.fiscal.es/%C3%93rgano-constitucional>.

²⁷ In this case, we consider the situation of a vacant inheritance.

²⁸ According to art. 7 bis of Law no. 1/2000.

of either party or the Public Prosecutor's Office, and *ex officio*, even by the court, in all phases and procedural actions where necessary, including with regard to acts of communication.

People with disabilities have the right to understand and be understood in any action they wish to initiate. To this end, all communications with persons with disabilities, oral or written, will be made in clear, simple and accessible language, in a way that takes into account their personal characteristics and needs, using means such as easy reading. If necessary, the communication will also be made to the person providing support to the person with disabilities.

Hearing impaired people will also be provided with the necessary assistance and support to make themselves understood, which will include the interpretation of recognized signs and the means for oral communication of deaf and hard of hearing people. It will also allow the participation of an expert who, as a facilitator, performs adaptation and adjustment tasks necessary for the person with a disability to understand and be understood. Last but not least, the disabled person can be accompanied by another person of their choice from the first interaction with the official institutions.

Article 8 of Law 1/2000 regulates a legal institution similar to the special curatorship of Romanian legislation. Thus, in the case of a natural person who does not have a legal representative, the Lawyer of the Administration of Justice will appoint a legal counsel who will ensure the representation and defense of the person until a legal representative is appointed. Until the appointment of the legal counsel of the natural person, the Public Prosecutor's Office will assume the prerogative of representing the person in question. In any case, the process will remain suspended until the moment when the Public Prosecutor's Office intervenes.

Last but not least, Article 9 regulates the legal regime of lack of capacity to be a party and procedural capacity, so that the court will be able to retain their absence at any time during the trial.

3. Conclusions

As can be seen from this paper, procedural capacity is an important institution in both legal systems. From the point of view of structures in Romanian law, we find regulated both the procedural capacity to use and the procedural capacity to exercise, establishing in this context a legal regime differentiated according to certain factors such as: type of person, age of the person or some prohibitions to which it is subjected.

In Spanish law we can see that the legislator regulated two distinct institutions: the ability to be a party to a process (general capacity, such as capacity to use) but also procedural capacity (formal), which we could say is actually close to the concept capacity to exercise Romanian law, as the Spanish legislator also regulates in this case the possibility of representing or assisting certain categories of persons.

It is also useful to note that compared to Romanian law, Spanish law pays more attention to certain categories of persons, such as consumer groups (users) to whom it expressly confers procedural capacity in cases concerning their rights.

Last but not least, it is necessary to note the care of the Spanish legislator towards people with disabilities, who also give them a special regulation, adaptable to their needs in the context of the processes in which they are part, benefiting in this respect from all necessary in order to respect equality before the law.

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The common Franco-German matrimonial property regime of the community of surplus

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Abstract

On February 4, 2010, Germany and France signed an international treaty that broke new legal ground. The intention of both states was to introduce a new, common elective matrimonial property regime that would apply equally in both countries. This was implemented on 01.05.2013. The provisions of this elective matrimonial property regime are based primarily on the provisions of the statutory German matrimonial property regime, the “statutory matrimonial property regime of the community of surplus”, but also incorporate important elements of French matrimonial property law. Other EU member states can accede to the agreement as well. As a result of this matrimonial property regime, a common substantive law has been created in the contracting states, which has not yet existed in this form in the EU. The intention is to standardize the matrimonial property regimes within Europe.

Keywords: *agreement, France, Germany, elective matrimonial property regime, surplus, marriage.*

JEL Classification: K33, K36

1. Introduction

Germany and France did not decide on a common legal action in the field of property law by chance, but after careful consideration. Due to the fact that the two nations share a border, an innovation here seemed promising for practical and legal reasons. The agreement on the French-German elective property regime is a product of 40 years of cooperation between Germany and France since the signing of the Elysee Treaty in 1963². In terms of its objectives, the proposal makes reasonable changes to national matrimonial property law and fits into the international and European regulatory environment.

Binational marriages are becoming increasingly common in Germany and France. In approx. 13% of marriages in Germany in 2019, one spouse had German nationality and the other spouse had a foreign nationality (including same-sex marriages)³. Progressive globalization, increasing occupational mobility (especially as a result of the Schengen Agreement), and a more liberal "border-free"

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² <https://www.lpb-bw.de/elysee-vertrag> [17.06.2021].

³ <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Eheschliessungen-Ehescheidungen-Lebenspartnerschaften/Tabellen/eheschliessungen-deutsch-auslaender.html>. [17.06. 2021].

mindset are also leading to families moving their center of life to another EU member state at least once more frequently than in the past.

However, problems arise in binational marriages not only during their existence, e.g. in the financing of real estate loans, but also in the dissolution of the marriage. The matrimonial property regimes in the various countries differ and are largely unknown in the other country. For example, the settlement of the matrimonial property regime is already regulated completely differently in Germany and France. Whereas in Germany an attempt is first made to reach an out-of-court settlement, and in the event of failure an action for performance can be brought as a subsidiary measure, in France the notary prepares an overall settlement after estimating the various settlement items, which can then be accepted by the parties concerned without subsequent court proceedings⁴. Further differences also exist with regard to the acquisition and management of property's during the marriage and liability for debts. Another problem is the acquisition of real estate by foreign spouses in Germany. The Higher Regional Court of Düsseldorf ruled on the basis of an action brought by two Spanish spouses who wanted to acquire a property in Germany in equal shares, i.e. half each, and to have a priority notice of conveyance registered for ½ each for this purpose, that the land registry office was right to reject the application because the land register would become incorrect with regard to the Spanish matrimonial property regime of community of acquisitions. The court stated that the assessment of the scope of the rights of the individual spouses would lead to uncertainties when registering a property right in the land register⁵.

2. Initial situation

In every cross-border marriage, the question arises as to which rules apply to the property of the spouses. In Germany, the husband's and wife's property normally remain separate during the marriage, and only at the end are accrued property equalized. In France, property acquired during the marriage belong jointly to both from the outset. The differences often lead to problems in practice because the French rules are not known in Germany and vice versa. In certain cases, private international law allows the spouses to choose the law applicable to the matrimonial property regime. The legal policy intention of the bilateral agreement was to standardize the matrimonial property regimes within Europe. This was particularly the case in the light of an increasing number of marriages in which the spouses either have different nationalities or live abroad with the same nationality.

This matrimonial property regime is called the “Franco-German elective matrimonial property regime of the community of surplus” (according to § 1519

⁴ Meyer, FamRZ 2010, 612 (613).

⁵ OLG Düsseldorf, Az. I-3 Wx 258/09 in FGPrax 2010, 117 (117)/openJur 2012, 87893.

BGB in connection with the Franco-German Agreement), which contains relatively many elements of the German law of “equalization of surplus”. In the “elective matrimonial property regime of the community of surplus”, important elements of the German statutory matrimonial property regime (“*Zugewinnngemeinschaft*”) and the French “elective matrimonial property regime” (“*régime de participation aux acquêts*”) are combined with additions from the general French matrimonial property law.

The choice of law is made by a marriage contract, which requires notarization under both German law (§ 1408 BGB) and French law (Art. 394 code civil) (compare Art. 23 Council Regulation (EU) 2016/1103).

The elective property regime is deliberately kept open and is thus intended to make the participation of other EU member states more attractive. It could serve as a starting point for a sector-specific standardization of family law in Europe. However, the prerequisite is that the “elective matrimonial property regime of the community of surplus” is accepted by legal practice and proves its worth.

2.1. Legal situation in Germany and France

In order to be able to understand and classify the new “elective matrimonial property regime of the community of surplus”, it is useful to first obtain an overview of the legal situation in Germany and France.

2.1.1. German law (*Bürgerliches Gesetzbuch BGB*) so far knew three matrimonial property regimes:⁶

2.1.1.1. The “matrimonial property regime of the community of surplus”

According to §§ 1363 ff. BGB is the statutory matrimonial property regime in Germany. The spouses therefore automatically live in it from the time of marriage if no other arrangements are made. The matrimonial property regime of the community of surplus is basically a matrimonial property regime of separation of property. Thus, no common property is acquired without a corresponding agreement. The household effects are to be distinguished from this. They are divided in a separate procedure. In the “equalization of the surplus”, a different amount of accrued property during the marriage, the so-called surplus (“*Zugewinn*”), is equalized. This means that the increase in property of both spouses is the same at

⁶ Compare hereafter: <https://allemagneenfrance.diplo.de/blob/1387462/3f4cca960a3063775fbdbfa65f22859a/04-weiteres-gueterrecht-datei-data.pdf#:~:text=Frankreich%3A%20Der%20gesetzliche%20franz%C3%B6sische%20G%C3%BCTerstand%20ist%20der%20%22G%C3%BCterstand,Fehlen%20eines%20Ehevertrages%20%28le%20contrat%20de%20mariage%29%20oder> [17.06.2021].

the end of the matrimonial property regime, unless otherwise agreed⁷.

In order to determine the surplus, the balance between the initial and final property of both spouses is calculated. Debts in the initial property are taken into account as negative property (§ 1374 III BGB). This means that a reduction in debts existing at the time of marriage alone can result in a surplus after marriage. However, the amount of the equalization claim is limited to the assets existing at the end of the matrimonial property regime, § 1378 II p. 1 BGB.

2.1.1.2. The matrimonial property regime of “separation of property” may be agreed by contract

This means that the spouses are economically separated from each other. At the same time, the separation of property serves as a fallback-property regime if, for example, the spouses completely exclude the surplus without specifically regulating the property regime in which they wish to live in.

The “separation of property” is disadvantageous in terms of tax and inheritance law. While the “equalization of the surplus” allows for a tax-free transfer of property, this is not the case with the matrimonial property regime of separation of property. This also applies in the event of death. The general “equalization of surplus” by increasing the spousal inheritance quota by $\frac{1}{4}$ according to § 1371 II BGB is also not a taxable acquisition according to § 5 I S. 1 ErbStG. The matrimonial property regime of separation of property is also disadvantageous under inheritance law because the spouse's quarter is lost⁸.

In the case of the “separation of property”, it is recommended that particular care is taken when acquiring property to allocate these properties to one or both spouses and, if necessary, to make and document agreements under the law of obligations.

2.1.1.3. As a third matrimonial property regime, “community of property” can be agreed by contract in accordance with §§ 1415-1482 BGB

In the case of “community of property”, there is a common property of the spouses, so-called “joint marital property”, § 1416 BGB. It is administered by one or both spouses, §§ 1422, 1450 BGB. In addition, the spouses can each have their own properties, the separate property, § 1417 BGB. They manage these properties for the account of the joint property. These are items that cannot be transferred by legal transaction, for example, non-transferable, unseizable claims, the share in an undivided community of heirs, or a prior-inheritance⁹.

The joint property of the spouses must continue to be administered jointly at the end of the “community of property”.

⁷ Compare: MüKo/ Koch BGB § 1363 Rn. 2 ff.

⁸ Compare: MüKo/ Münch BGB, Vorbemerkung § 1414 Rn. 6-11 f.

⁹ Palandt/Brudermüller, § 1417 Rn. 2 f.

The disadvantageous consequences of the separation of property (in terms of inheritance law and taxation) also exist in the case of the “community of property”. However, the “community of property” is occasionally discussed as a way of structuring inheritance law, because through its establishment, property of one spouse can become community property¹⁰.

Limitations of liability or an extension of the restrictions on disposal (§§ 1423 ff. BGB), i.e. interventions in the external relationship, are not permissible in the interest of legal transactions¹¹.

2.1.2. The statutory French matrimonial property regime is the “community of property acquired during marriage” (*la Communauté d'acquêts*), which is regulated in Art. 1400 et seq. Code Civil (CC).

According to Art. 1400 CC, this is the case in the absence of a marriage contract (*le contrat de mariage*) or if the spouses declare that they are marrying under the “community of acquired property”. Under this matrimonial property regime, a distinction is made between three categories of property: the joint property, the husband's own property (*les biens propres*) and the wife's own property.

The joint property includes everything purchased by the spouses together or separately since the marriage, all earnings and wages.

Personal property includes, for example, personal belongings of the spouses, such as clothes and other items (Art. 1404 CC), but also, according to Art. 1405 CC, property that the spouses owned on the day of marriage or that they acquire during the marriage by inheritance, gift or legacy, or substitute property acquired by funds from the sale of an item belonging to personal property.

The debts that the spouses had on the date of marriage remain the spouses' own debts pursuant to Art. 1410 CC. The spouses are jointly and severally liable for the debts of this community¹².

In principle, according to Art. 1421 CC, each spouse has the right to manage the joint property alone. However, for gratuitous (Art. 1422 CC) and important (Art. 1424 f CC) transactions, the involvement of the other spouse is required. According to Art. 1428 CC, each spouse has the management and enjoyment of his or her own property and can dispose of it freely.

According to Art. 1441 CC, the community ends by the death of one of the spouses, by declaration of absence, by divorce, by separation of table and bed, by separation of property or by change of the property regime. If the community is

¹⁰ MüKo/Münch, § 1408 Rn. 19.

¹¹ Heckschen/Herrler/Starke/ Grziwotz, Beck'sches Notarhandbuch, B I 96 f.

¹² <https://allemagneenfrance.diplo.de/blob/1387462/3f4cca960a3063775fbd6fa65f22859a/04-weiteres-gueterrecht-datei-data.pdf#:~:text=Frankreich%3A%20Der%20gesetzliche%20franz%3%BCterstand%20ist%20der%20%22G%3%BCterstand,Fehlen%20eines%20Ehevertrages%20%28le%20contrat%20de%20mariage%29%20oder.> [17.06.2021].

dissolved, according to Art. 1467 I CC, each spouse takes back the property that did not enter into the community. Subsequently, the active and passive community property is liquidated in accordance with Art. 1467 II CC. If all withdrawals from the community property have been made, the surplus shall be divided equally between the spouses in accordance with Art. 1475 CC¹³.

Due to a notarized marriage contract (*le contract de mariage*), which is generally concluded before marriage, the spouses can change the legal property regime or choose a different property regime. A change of the matrimonial property regime in the course of the marriage is only possible two years after the marriage. Under certain circumstances, such as the presence of minor children, court approval of the marriage contract is required (Art. 1397 CC).

The contractual property regimes under French law have so far been¹⁴:

2.1.2.1. The "agreed community" (*la Communauté conventionnelle*, Art. 1497 ff. CC)

In contrast to the statutory matrimonial property regime, the joint property of both spouses is that which they acquire during the marriage and which they already possessed at the time of the marriage.

2.1.2.2. The "separation of property" (*le régime de séparation de biens*, Art. 1536 ff. CC)

Here, the spouses agree in their marriage contract that their property is to be treated separately, so that each of them has the administration, use and free disposal of his or her personal property. Each spouse is then also liable for the debts created in his or her person. Nevertheless, spouses may also acquire property jointly on a fractional basis.

2.1.2.3. The "matrimonial property regime of participation in acquisitions" (*le régime de participation aux ac-quêts*, Art. 1569 ff. CC)

Under the "matrimonial property regime of participation in acquisitions", each spouse retains the right to administrate, use and freely dispose of his or her personal property. During the marriage, this matrimonial property regime acts as if the spouses were living in the "matrimonial property regime of separation of property", but in the event of dissolution of the matrimonial property regime, each of the spouses has the right to participate in half of the value of the other's property¹⁵.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

2.1.3. The differences between the legal property regimes in Germany and France are therefore significant:

Matrimonial property regime of the community of surplus under German law means separation of property during the existence of the matrimonial property regime with an “equalization of the surplus” after the ending of the matrimonial property regime, § 1363 II BGB. The matrimonial property regime thus does not lead to a joint property of the spouses by itself. Rather, each spouse retains his or her property acquired before and during the marriage as his or her property and, in return, is liable only for his or her debts with his or her property. This ultimately also applies to an object that belongs to both spouses in certain parts (fractional community).

The community of acquired property under French law, on the other hand, recognizes three different classes of property: the wife's own property, the husband's own property and the common property (“joint marital property”).

According to Art. 1401 of the Civil Code (CC), the common property is composed of the achievements that the spouses have acquired either alone or jointly during the marriage. This also includes everything that was acquired as a result of their own work or that was earned as fruit or income from their own property. In principle, each spouse may administrate and dispose of the common property alone and independently. However, certain acts may only be performed jointly by the spouses. For example, one spouse may only make gifts from the common property with the consent of the other. Furthermore, in France, according to the applicable rules of the “*régime primaire*”, the power of the spouses to dispose of the common property alone may be restricted.

Thus, one spouse cannot dispose alone of the rights securing the family home, nor of the household effects (cancellation of the lease or sale of the family home). This restriction would apply even if the marital home is the spouse's own property¹⁶.

These different legal institutions can already lead to ambiguities and difficulties during the existence of the matrimonial property regime, but also during its settlement, e.g. in the case of the acquisition of a real estate in Germany by French spouses living in a “community of property acquired during marriage”¹⁷.

The legal situation in France and Germany, however, offered favorable conditions for a joint project. Both German and French law recognize the “matrimonial property regime of the community of surplus”. In France, it is an elective property regime (Art. 1569, 1581 Code Civil), which is, however, very rarely chosen by French spouses in practice¹⁸. Germany has introduced it as a statutory

¹⁶ Ibid.

¹⁷ Meyer, FamRZ 2019, 612.

¹⁸ Delerue, FamRBint 2010, 70 (73 f.).

matrimonial property regime. The two legal institutions and their legal environment differ in content, but these differences can be bridged¹⁹.

2.2. European environment

There are no international conventions or agreements in the area of matrimonial property law that could be "disturbed" by a Franco-German agreement²⁰. The Member States are allowed to harmonize their family law independently and in cooperation with other Member States. In this respect, the EU is not assigned with exclusive regulatory competence and provides for a standardization of substantive family law, especially matrimonial property law, at best as an annex regulation or under very narrow conditions²¹. Tätig geworden im Bereich der Harmonisierung materiellen Familienrechts ist die EU deshalb auch noch nicht. Die Arbeit der Europäischen Familienrechts-Kommission (CEFL), in der 22 europäische Rechtsordnungen vertreten sind und die gegenwärtig „Draft Principles on Matrimonial Property“ ausarbeitet, ist derzeit noch rein rechtswissenschaftlicher Natur²².

3. Design of the agreement

Articles 1 to 18 of the agreement contain provisions on the new joint property regime. With the "elective matrimonial property regime of the community of surplus", the creation of an attractive and flexible regulation was intended for the citizens of Germany and France, which also has a chance of being positively accepted by legal practice.

This new elective matrimonial property regime is attractive due to a combination of French-law and German-law elements of the "statutory matrimonial property regime of the community of surplus". Flexibility is created by the fact that, according to Art. 3 III of the agreement, the spouses may deviate in whole or in part from the provisions on the determination of the claim for "equalization of surplus" upon ending the matrimonial property regime (Art. 8 to 14). It is possible to exclude items from the "equalization of surplus". The spouses may also agree on a different method of calculating the amount of the claim for "equalization of surplus".

3.1. Choice of matrimonial property regime under German and French law

According to Art. 22 Council Regulation (EU) 2016/1103) the spouses are

¹⁹ Braeuer, FF 2010, 113 (114).

²⁰ Steer, notar 2010, 119.

²¹ Wagner, FamRZ 2009, 269.

²² Meyer, FamRZ 2010, 612 (613).

granted the possibility to subject the property consequences of their marriage to German law if

- one of them has the German nationality;
- at least one of them has the habitual residence in Germany.

If the spouses have not chosen the applicable law, the objective requirements in Art. 26 Council Regulation (EU) 2016/1103) apply.

Accordingly, German, but also French matrimonial property law is applicable if:

- the spouses had their first common habitual residence in Germany after the marriage, otherwise
- they both have German nationality, otherwise
- the law of the state with which the spouses are most closely connected according to the circumstances at the time of the marriage.²³

If German or French substantive law applies, the spouses have the choice of German or French matrimonial property regimes, which has already been presented:

The matrimonial property regimes in German law:

- “statutory matrimonial property regime of the community of surplus”
- “separation of property”
- “community of property”.

The matrimonial property regimes in French law:

- “community of property acquired during marriage”
- “property regime of the community of surplus”
- “separation of property”²⁴.

3.2. Application

The scope of application of the agreement is broad and does not only cover cross-border situations. Therefore, according to Art. 1 of the Agreement, “elective matrimonial property regime of the community of surplus” is available in personal terms to spouses whose matrimonial property regime is regulated by the substantive law of a Contracting State. The applicability of German or French law may result from relevant conflict-of-law rules of German law, French law or the law of a third state, because the agreement does not affect private international law. This is appropriate here because the conflict-of-law rules in France and Germany have similar connecting factors that will often lead to the determination of the same substantive law²⁵.

The primary criterion is the nationality of the spouses. In addition, the habitual residence and the location of immovable assets are also important.

²³ Erläuterung Bundesgerichtshof; https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/WahlZugewinnngem/erlaeuterungen.html [17.06.2021].

²⁴ Ibid.

²⁵ ZErB 2010/Suß, 281 (282).

Therefore, the following constellations are conceivable as cases of application for the "elective matrimonial property regime of the community of surplus":

- German spouses have their habitual residence in France;
- French spouses have their habitual residence in Germany;
- German and French spouses have their habitual residence in Germany or France;
- Spouses of a non-contracting State have their habitual residence in Germany or France;
- German spouses have their habitual residence in Germany;
- French spouses have their habitual residence in France;
- German and French spouses have their habitual residence in a non-contracting state that is linked to nationality in property law.

4. Establishment, change, administration of the matrimonial property regime

According to Art. 3 I of the Agreement, the spouses may agree by marriage contract that "elective matrimonial property regime of the community of surplus" is their matrimonial property regime.

The new elective matrimonial property regime may be agreed before the marriage. However, spouses may also substitute it for another matrimonial property regime during the marriage (Art. 3 II of the Agreement).

The agreement itself does not contain any provisions on the form. According to the form of business called for by private international law (the law applicable to the matrimonial property regime), in Germany (and in France) the notarial certification of the marriage contract (§ 1408 of the Civil Code) is necessary with the simultaneous presence of both spouses during the certification.

In the case of "elective matrimonial property regime of the community of surplus", the property of the spouses remain separate. Surplus is the amount by which the final property of one spouse exceed his or her initial property. When the matrimonial property regime is terminated, the accrued surplus are derived from the comparison of the accrued surplus of the spouses (Art. 2 of the agreement).

Articles 4 to 6 of the agreement contain general provisions on the administration, use and disposal of property by the spouses during the matrimonial property regime, from which they may not deviate by agreement. These provisions conclusively regulate the substantive powers of the spouses among themselves, so that uniform application of the matrimonial property regime in Germany and France is guaranteed. As far as the procedural enforcement of the rights granted is concerned, however, the agreement is open.

5. Termination of the matrimonial property regime

According to Art. 7 of the Agreement, the "elective matrimonial property regime of the community of surplus" ends upon the death or declaration of death of one of the spouses, upon a change in the matrimonial property regime, or when the divorce becomes final. The court decisions also include those on the annulment of the marriage and on the early termination of the matrimonial property regime (Art. 18 of the Agreement, which orders the separation of property for the spouses when the decision becomes final).

6. Expediency of the creation of a common property regime

The creation of a common matrimonial property regime, which is composed, practically arranged and dissolved according to identical rules in the Contracting States, represents a considerable legal advance for couples, third parties and legal practitioners. The result of this matrimonial property regime is the creation of a common substantive law in the Contracting States.

If the couple chooses this form of community, this does not lead to the difficulties that currently arise from the establishment of "community of property acquired during marriage" under French law if the spouses acquire a real estate in Germany during the marriage. Since this legal French matrimonial property regime is not known in Germany, the registration of a real estate right in the land register does not allow third parties to assess the precise scope of the rights to which the individual spouses are entitled. The variant frequently encountered in practice, namely that German property law is chosen for property located in Germany (Article 15 (2) no. 3 EGBGB), solves this problem but imposes a split property status on the spouses, which can lead to settlement difficulties in the event of a property law settlement.

In this initial situation and because the matrimonial property regime of the community of surplus exists in French and German law (statutory matrimonial property regime in Germany, elective matrimonial property regime in France), it makes sense to create an additional new elective matrimonial property regime in the way of a bilateral agreement, which is closely based on the community of surplus already existing in both countries and is structured according to simple and modernized standards that are identical in France and Germany²⁶.

In order to enable other states of the European Union to accede to the agreement at a later date, the agreement provides that after its entry into force any member state of the European Union may accede to the agreement (Article 21).

²⁶ Erläuterung Bundesgerichtshof: https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Bibliothek/Gesetzesmaterialien/17_wp/WahlZugewinnung/erlaeuterungen.html [17.06.2021].

7. Outlook

Whether the "elective matrimonial property regime of the community of surplus" will prevail in legal practice is highly doubtful. It is certain that this elective matrimonial property regime will only be of significance for a small number of spouses. In terms of numbers, it will not come close to the statutory matrimonial property regimes in both Germany and France. In France, only very few married couples have chosen the "elective matrimonial property regime of the community of surplus"²⁷. For this reason, the new Franco-German "elective matrimonial property regime of the community of surplus" is also likely to lead a rather shadowy existence, in particular because no tax incentives can apparently be associated with this property regime in France and because it represents unknown territory for French legal counsel²⁸.

In Germany, on the other hand, the Franco-German "elective matrimonial property regime of the community of surplus" appears to be particularly interesting for binational marriages, since this matrimonial property regime allows more liberal planning under inheritance law than the "statutory matrimonial property regime of the community of surplus"²⁹.

The impact of the "elective matrimonial property regime of the community of surplus" on the development of European law should not be overestimated. Nevertheless, it has a great signal effect. It remains to be seen whether other member states will join the project.

It also remains to be seen whether this form of bilateral legal unification has a future. The project was based on an exceptional starting situation, because Germany and France already had a very similar property regime. Difficulties were already encountered in the search for a successor project that the two countries could take up next.

On the other hand, this path of bilateral cooperation has shown that progress can be made for citizens even or especially below the level of the EU. The cooperation of the 27 member states in the field of family law is sluggish. This was also shown by the work on the so-called Rome III Regulation.

An approach to harmonization of substantive family law is not to be expected, also in view of the difficult question of competence (EU and/or member states).

Results can therefore be achieved more easily and in a more targeted manner on a smaller scale. The project also encourages other member states and groups of states to do so. However, an advance with a small scope such as the Franco-German agreement does not help to overcome the "patchwork" of different family rights in the EU.

²⁷ *Ibid.*

²⁸ *Delerue*, FamRBint 2010, 70 (73).

²⁹ *Braeuer*, FF 2010, 113 (115); *StiB*, ZErB 2010, 281 (284ff.)

In this respect, it would be desirable for "legal models" to emerge from the work at the scientific level that are acceptable to legislators in as many member states as possible. This, however, requires a much better interlocking of science, politics and practice than has been shown so far.

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Legal regime of competition in Canada

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Abstract

Canada's Competition Act is the federal law governing most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. While the Canadian law is similar in many aspects with the law of the United States (the Sherman Antitrust Act) it is different in a number of important ways. One aspect is that Canadians use the term competition law rather than antitrust law, which is more common in the U.S.

Keywords: *Canada, competition, antitrust, business law.*

JEL Classification: K15, K22

1. Introduction

Canadian competition laws affect all Canadian, U.S. and international companies doing business in Canada, from transactions to strategic collaborations to unilateral business plans and activities. The Competition Bureau has increased its use of formal powers to require significant document production in merger matters and to obtain court orders for production in civil and criminal investigations, and enforcement proceedings before the Competition Tribunal and courts are on the rise. Canada has also experienced an increase in competition-related class actions by private litigants. This ever-evolving landscape requires that companies implement and maintain competition best practices and protocols, including tailored compliance programs to address the risks specific to their business.

2. General aspects

The anti-trust or competition regulation of Canada has had a lengthy legislative evolution beginning in the late 1800s. Over the ultimate ninety years, the combines offences have been revised, and the framework for the administration of the quite a number Combines Investigation Acts sophisticated to take into account constitutional challenges and changing financial conditions. In 1889, predating any U.S. anti-trust legislation, Canada's first Combines Investigation Act, 'An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade' was once surpassed through the Dominion

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Parliament².

In 1892 the provisions of this act were included in the Criminal Code, the place they co-existed with the provisions in the a variety of Combines Investigation Acts until all were consolidated into the Combines Investigation Act in 1960. The Act of 1889 failed to set up a mechanism for the investigation of combines in restraint of change and therefore, in 1910, an Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers two was enacted. This Act accelerated the definition of "combine" to encompass mergers, monopolies and trusts, and supplied a mechanism whereby six or more persons could follow to a judge for an order directing an investigation of an alleged combine³.

Of the Competition Act states that the reason of the Act is to keep and motivate competition in Canada, in order to achieve 4 objectives (advertising the effectivity and adaptability of the Canadian economy, increasing possibilities for Canadian participation in world markets - while at the equal time recognizing the position of foreign competition in Canada, ensuring that small and medium-sized organizations have an equitable chance to participate in the Canadian economy and imparting customers with competitive expenses and product choices)⁴.

It has been mentioned that these 4 targets may not be consistent. Some of the most essential are the provisions respecting mergers. As section of the full-size revisions to the Act in 1986, the former criminal regulation provisions respecting mergers had been changed with an administrative regulation overview which precludes the Bureau notes that competition policy in Canada encompasses the administration and enforcement of the Act, intervention before federal and provincial regulatory agencies making choices that have an effect on competition in particular markets, the provision of input to the design and implementation of other authorities policies that affect the aggressive market system; and representing Canada's interest in international opposition policy fora.⁵

Further, the Act especially gives that the Competition Tribunal (the "Tribunal"), a quasi-judicial tribunal that has jurisdiction over mergers and certain other matters, may not block a merger if it finds that the merger has brought about or is possibly to convey about good points in efficiency that will be higher than and will offset any anti-competitive outcomes of the merger, so lengthy as the positive factors in efficiency would now not probable be attained if the merger have been blocked.

² Barry Campbell, *Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law*, „North Carolina Journal of International Law and Commercial Regulation”, Volume 5, Number 1, Article 8, (1980), p. 57.

³ *Ibid.*, p. 58.

⁴ Calvin Goldman, Joel Kissack, *The Role of Competition Policy in Canada's Industrial Policy*, „Canada United States Law Journal”, Case Western Reserve University, Volume 19, Article 15, (1993), p. 111.

⁵ *Ibid.*, p. 111.

Canada's competition law consists of a bifurcated body with separate statutory our bodies for enforcement and adjudication. One agency-the Competition Bureau, which is headed by the Commissioner of Competition-investigates potential anti-competitive activity, and a separate decision-making body-the Competition Tribunal-performs the adjudicative function. Over the previous countless years, however, the functions carried out by the Commissioner, supported by way of the Competition Bureau, have been expanding in terms of their value to businesses. Meanwhile, the function of the Competition Tribunal, partly as a end result of legislative amendments, has been diminished in relative terms.⁶

A specialized administrative tribunal in the shape of the Competition Tribunal (the "Tribunal") was once created with the intention of presenting an efficient and reliable mode of decision-making for civilly reviewable matters. Courts persisted as the adjudicative our bodies for criminal cases.⁷

Where, after investigation and assessment, the Commissioner concludes there is a probable contravention of the Act (which is not resolved), she brings the count to either the Tribunal, a specialized administrative tribunal created for adjudication of civil matters, or the provincial foremost courts of criminal jurisdiction for criminal matters. Before a crook depend comes before a provincial greatest court, the Commissioner refers it to the Attorney General for prosecution. The Commissioner of Competition Under Section 7 of the Act, the Commissioner is responsible for the administration and enforcement of the Act⁸.

The independence of enforcement officers is vital for ensuring that the balancing of competing hobbies and objectives will occur in an independent and objective manner, guided by set up felony rules and enforcement policies. The Commissioner is, to a very restrained degree, overseen by the Minister of Industry (the "Minister"). The Minister does no longer oversee competition investigations, and has only confined powers to evaluation or discontinue inquiries, or to coach the Commissioner to make further inquiries, but the Commissioner is finally responsible for the administration and enforcement of the Act⁹. This degree of independence from authorities is vital in that it depoliticizes enforcement decisions, reduces the threat of perceived bias, and gives consistency from one political time period to the next. In this connection, as stated above, the Commissioner has the statutory authority to start inquiries "into all such matters as the Commissioner considers necessary." It additionally is the Commissioner who decides which sections of the Act must be the problem of the inquiry, the common scope of the inquiry, what enforcement proceedings need to occur as a

⁶ Calvin Goldman, Navin Joneja, *The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner*, „Loyola University Chicago Law Journal”, Volume 41, Issue 3, Article 9, (2010), p. 535.

⁷ Ibid, p. 538.

⁸ Ibid, p. 539.

⁹ Ibid, p. 540.

result of the inquiry, and to an growing extent, the phrases of resolution, if any, that can also be required at the conclusion of the inquiry¹⁰.

3. Judicial aspects

The Tribunal was once created and designed to mix business, economic, and criminal remarkably affordable by means of comparison with preferences such as direct regulation. Parliament created a specialized Competition Tribunal and invested it with accountability for the administration of the civil section of the Competition Act. Accordingly, the Tribunal is comprised of no extra than six judicial contributors selected from the Federal Court as nicely as no extra than eight specialists appointed by the Governor in Council¹¹.

Questions of fact, or of blended regulation and fact, are determined through all of the participants sitting in the proceedings, while pure questions of law are decided only by means of the judicial members. The Tribunal has all such powers as are vested in a most fulfilling court docket of record, which includes with recognize to the examination of witnesses and the enforcement of its orders, to make rules, to award costs, and to order a variety of prohibitions or remedial orders. In fact, the remedial powers of the Tribunal are quite broad, and may additionally include, in the case of anticompetitive practices, the strength to order such movements "as are reasonable and as are essential to overcome the results of the practice."

The Tribunal may additionally also dissolve mergers or order divestitures and, in the case of abuse of dominance cases, as a end result of the 2009 amendments, impose administrative economic penalties of up to C\$10 million on corporations. Breach of a Tribunal order may additionally be punished by contempt lawsuits earlier than a judicial member or by means of prosecution either by using summary conviction or via indictment.

From a significant perspective, the civil provisions of the Act, which the Tribunal enforces and are contained in Part VIII, can be divided into mergers and other (non-merger) civilly reviewable practices. With respect to mergers, if a proposed (or a completed) transaction is probably to give upward shove to a widespread prevention or lessening of opposition in a market in Canada, then the Commissioner may additionally practice for a remedial order (such as an injunction or an order to divest detailed property or shares) to the Tribunal pursuant to the merger provisions of the Act. Additional provisions in the Act deal with certain civilly reviewable practices that are no longer objectionable per se, and are therefore no longer prohibited¹².

However, if positive conditions are fulfilled-notably, where the habits has a notably negative impact on competition-the Commissioner can also refer the

¹⁰ Ibid, p. 542.

¹¹ Ibid, p. 542.

¹² Ibid, p. 543.

count to the Tribunal for review. If the Tribunal finds that the statutory prerequisites are met, it might also difficulty an order prohibiting the continuance of the offending habits and, in some cases, make additional orders to overcome the anticompetitive effects of the conduct. These include: abuse of dominance, price maintenance, distinctive dealing, tied selling, and different practices covered in the civil provisions of the Act.¹³

Provisions Criminal matters under the Act, such as conspiracy, bid-rigging, and sure false or deceptive representations, are referred by the Bureau to the federal Attorney General for prosecution thru provincial greatest courts of criminal jurisdiction. In criminal matters, the selection to lay expenses will be eventually up to the Attorney General. The Commissioner may additionally advise to the Attorney General that men and women or companies be granted immunity as a end result of their cooperation in the detection and investigation of criminal offenses, however solely the Attorney General is able to provide immunity from prosecution.

As noted above, substantial amendments to the conspiracy provisions of the Act were recently enacted in 2009 by means of Canada's Parliament. The provisions of the Act dealing with horizontal agreements had been amended to create a "dual-track" approach to the remedy of agreements and preparations between competitors. While most different amendments to the Act got here into pressure on March 12, 2009, the amendments to the provisions dealing with agreements between competitors got here into effect on March 12, 2010.

The consequences of violating the criminal provisions of the Act can be severe. The Act makes sure sorts of crook offenses punishable by using fines in the discretion of the court and/or imprisonment for periods of up to fourteen years. In this regard, it is necessary to be aware that once the amendments to the conspiracy provisions of the Act come into force in 2010, conceivable fines for criminal conspiracies will expand from \$10 million to \$25 million and the maximum term of imprisonment will increase from five to fourteen years¹⁴.

The extent to which non-public events participate in opposition law enforcement in Canada has been the challenge of a whole lot debate. On the one hand, personal moves may make a contribution to opposition law enforcement, free up authorities resources, and produce a body of jurisprudence and reasoned judgments imperative to give an explanation for for organizations how the rules might apply to unique and concrete facts of each case. On the other hand, improved scope for private moves raises the prospect of frivolous "nuisance suits," a possible chilling impact on business development, and overly complicated financial issues being heard by unspecialized courts. Historically, personal parties have not played a enormous position in Canadian competition law enforcement. In the United States, non-public movements earlier than usual

¹³ *Ibid*, p. 543.

¹⁴ *Ibid*, p. 544.

civil courts for violations of antitrust legal guidelines account for the majority of all formal enforcement actions.¹⁵

The unwillingness of events to take their disputes to the Tribunal is mirrored in the numbers. Reportedly, about 99% of all mergers notified to the Bureau have been resolved through negotiation with the Bureau except the involvement of the Tribunal. In 2008, the Tribunal held fourteen proceedings, seven of which worried either the registration or variance of a consent agreement and therefore had been not contested proceedings. Five others dealt with depart applications beneath the refusal to deal or specific dealing provisions (only one of which was once granted) and two dealt with deceptive advertising and marketing practices cases. Similarly, in 2007, the Tribunal held ten proceedings, 5 of which concerned both the registration or variance of a consent agreement. Three others concerned depart purposes below the refusal to deal or distinct dealing provisions.

Given that the Bureau has a monopoly on enforcement of the abuse of dominance provisions, only the Commissioner can determine whether or not a employer will be potentially difficulty to AMPs with the aid of exercising her discretion to convey an software to the Tribunal. Moreover, underneath part 105(2) of the Act, it appears potential that a consent agreement negotiated by way of the Bureau and the target of an abuse of dominance investigation could include the imposition of AMPs of up to ten million bucks (or fifteen million bucks in some cases). This skill that the prospect of AMPs could be used as negotiating leverage via the Bureau. This would considerably decorate the Commissioner's significance with respect to enforcement, together with the manner in which abuse of dominance cases can also be settled via negotiated resolution. Once again, because of the consent order amendments handed in 2002, as, the Commissioner is in a more advantageous function in relation to proposed consent orders than she was in prior cases. Parties may additionally now have to address not solely the phrases of a remedial order however additionally a financial penalty to attain a proposed consent order in sure sorts of abuse of dominance cases.

The recent amendments also fundamentally alternate provisions dealing with agreements between competitors. Under the present statutory provisions, agreements that unduly reduce opposition or unreasonably beautify the price of a product are doubtlessly difficulty to criminal sanctions. Under the amended statutory provisions, which come into force after March 12, 2010, there will be two enforcement tracks for agreements between competitors: one for challenging core cartels and one for different agreements amongst competitors. Hard core cartels and other specific things to do (e.g., fixing prices or supply, allocating markets or customers) will be difficulty to serious crook sanctions and viable personal moves for damages¹⁶.

¹⁵ *Ibid*, p. 548.

¹⁶ *Ibid*, p. 560.

4. Recent evolutions

Canada's contemporary competition law framework used to be mounted in 1986.

Since that time, the roles of the key statutory authorities, namely, the Commissioner and the Tribunal, have advanced drastically such that the Commissioner's function and mandate has accelerated extensively in importance. Steps can and be taken, inside the bounds of the applicable statutes and case law, to see that the terrific checks and balances are in location in order to ensure that process fairness is maintained while the Commissioner's objectives in enforcing the competition regulation are fulfilled effectively and on an environment friendly and well timed basis.

In Canada, possessing a dominant role is not in itself illegal¹⁷.

Abuse of a dominant function with the aid of resorting to anti-competitive acts in a market can, however, supply upward jab to an order with the aid of the Tribunal if such abuse results in a sizeable lessening or prevention of competition. In order for the Tribunal to trouble an order in recognize of abuse of dominance there are if truth be told three conditions that must be met, vast or complete manage of a class of enterprise in Canada by a company or firms, a exercise of "anti-competitive acts"; and the practice have to have the impact of stopping or lessening opposition substantially in a market. Pursuant to current amendments to the abuse of dominance provisions of the Act, habits that contravenes these provisions can lead to administrative financial penalties of up to \$10 million (\$15 million for repeat contraventions).¹⁸

A refusal to supply a product to, or in any other case discriminate against, any person engaged in business in Canada due to the fact of that person's low pricing coverage may also amount to a shape of charge maintenance. The Tribunal may make an order prohibiting a character from persevering with to engage in price upkeep or requiring the man or woman to be given any other person as a purchaser if the Tribunal determines that the relevant habits has had, is having, or is probably to have an destructive impact on competition. Exclusive dealing is the exercise of requiring or inducing a patron to deal only or in particular in products of the provider through skill of more favourable phrases or conditions¹⁹.

Exclusive dealing preparations are problem to evaluate if the provider is a important supplier of the product, the practice impedes entry or growth of a company or product in a market or has some other exclusionary effect in the market; and the practice is probable to drastically lessen competition. If the

¹⁷ Yves Berlault, Oliver Borgers, *The Antitrust Review of the Americas Overview of Canadian antitrust law*, (2004), p. 79.

¹⁸ *Ibid*, p. 79.

¹⁹ *Ibid*, p. 78.

practice is carried on for a lifelike time solely in order to facilitate entry of a new supplier or a new product into the market, the Tribunal will now not restrict the practice. Tied selling is the practice of requiring or inducing a patron to purchase a product as a situation of imparting the patron with some other product. The Tribunal will not restrict this exercise until the conditions referred to above concerning to specific dealing are met. However, even if such conditions are met, no order will trouble if the Tribunal finds that the practice is reasonable, having regard to the technological relationship between the products²⁰.

Market restriction is the practice of requiring a consumer to sell a product only in a defined market as a circumstance of supplying that product. Again, if the practice is engaged in with the aid of a most important provider and is likely to notably lessen competition, the Tribunal can put an quit to the practice. It will not, however, make an order if the practice is engaged in for a real looking length of time solely to facilitate entry of a new provider or a new product into a market²¹.

The penalties of violating the criminal provisions of the Act can be severe. The Act makes sure kinds of criminal offences punishable by way of fines of up to C\$10 million and/or imprisonment for intervals of up to five years.²²

The Bureau has posted an immunity programme which sets out its coverage regarding recommending to the Attorney-General that immunity from prosecution be granted to parties to a crook offence (under targeted circumstances and on sure stipulations inclusive of ongoing cooperation with the authorities). The Act additionally provides for the recovery of civil damages to compensate for damage suffered as a result of a violation of a criminal provision of the Act, or as a end result of breach of an order of the Tribunal²³.

Section 29 of the Act also presents that where use has been made of patent or trademark rights to commit any of a huge range of combines offences, the Federal Court of Canada may additionally declare void any licences or agreements bearing on to the patent or trademark. The Court might also in addition direct the grant of licences, restrain the workout of rights beneath agree ments, expunge or amend a mark or make any other order deemed neces sary to stop use of the patent in an anti-competitive manner.²⁴

Unlike in the United States, in many Canadian jurisdictions, lawyers are not permitted to operate on a contingency price basis. This no doubt would have an inhibiting impact on private antitrust enforcement even if as broad a civil treatment as is available in the United States have been to be made accessible in

²⁰ Ibid, p. 78

²¹ Ibid, p. 76

²² Ibid, p. 77

²³ Ibid, p. 77

²⁴ Barry Campbell, *Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law*, „North Carolina Journal of International Law and Commercial Regulation”, Volume 5, Number 1, Article 8, (1980), p. 65.

Canada. Moreover, Canada is no longer a very litigious society. It ought to no longer be anticipated that the civil treatment in the Act will lead to a flood of actions.

5. Conclusions

Canadian competition policy revived in the 1970s after nearly a century in hibernation. In some sectors, pro-competitive reforms have achieved solid results, overcoming a tradition of ambivalence and even indifference to competition policy. As of the early 1970s, about 29% of the Canadian economy was subject to direct economic regulation of price or output (or both). Substantial deregulation and reform in transport, energy, telecoms, and financial services have reduced that share significantly.

Some of the problems in enforcement - notably the record of losses in contested conspiracy cases - are explained by inexperience, both of the Bureau's litigators and of the courts. Courts that decide few cases do not become familiar with the issues and rules. Even the specialist adjudicator, the Competition Tribunal, has only issued about one decision a year. Merger reviews are reportedly handled better, although major, complex cases stretch the system's capacities. Major cases require extraordinary funding requests to pay outside lawyers. The Commissioner's cases have reportedly gone better when handled by outside counsel²⁵.

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²⁵ Ibid, p. 66.

Preventive action on pollution of watercourses with waste – a comparative perspective of the main international, European and national regulations

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Abstract

The impact of pollution of watercourses with various types of waste – such as municipal, industrial or construction waste is often irreversible, the full restoration to the initial state of affected watercourses not being always possible. Thus, prevention manifested in relation to the pollution of watercourses with waste becomes essential, being fundamental for ensuring the protection of this natural resource. In this context, this study undertakes to identify the most relevant international, European and national regulations applicable to watercourses located on the Romanian territory, the purpose of which is to prevent pollution of watercourses with waste. The main conclusions reached by the authors are in the sense that, while the international regulations offer a framework in which general obligations for states materialising the prevention principle are affirmed, the European regulations set specific directions within this framework. Further, the Romanian national legislation includes numerous obligations that can be considered as representing components of the prevention principle; however, in the authors' view, due to their fragmented character and lack of unity, they are not designed to offer a real protection against pollution of watercourses with waste.

Keywords: *preventive action principle, watercourses pollution, waste, international regulations, European regulations, Romanian national regulations.*

JEL Classification: K32, K33

1. Introduction

Together with the industrial revolution and respectively the implicit raise of the usage of the waterways for transportation, generation of electricity, oil drilling, intensive fishing, agriculture and also as an industrial resource among other for production or cooling systems, threats over the integrity of watercourses began to significantly increase. Thus, aside from the ever-increasing utilisation degree, we identify numerous anthropogenic factors, as well as climate change determining temperature increases, contributing to the pollution of watercourses not only in Romania, but even worldwide.

Pollution sources affecting watercourses are numerous, while different

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types of wastes are among the very frequently encountered sources. On the other hand, pollution effects are most frequently irreversible, only being able to partially restore the watercourses' status to their initial characteristics. Therefore, preventive measures set in the context of the preventive action principle are essential for ensuring the sustainable management of watercourses, for the present as well as future generations.

It is important to analyse correlatively the regulations in the field of protection of watercourses against pollution with waste, from an upper level to a lower level, namely:

- starting from the international level – where there are applicable, specifically in Romania's case, the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes³ (hereinafter the “**1992 Helsinki Watercourses Convention**”), and in the field of waste the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal⁴ (hereinafter the “**1989 Basel Convention**”);

- continuing at the European level – where there are particularly relevant the framework provisions of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy⁵ (hereinafter the “**Water Framework Directive**”), Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council⁶ (hereinafter the “**Environmental quality standards Directive**”), Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives⁷ (hereinafter the “**Waste Directive**”), Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste⁸ (hereinafter the “**Landfill of waste Directive**”), Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution

³ As subsequently amended and supplemented, signed at Helsinki on 17 March 1992, ratified by Romania by Law no. 30/1995, published in Romania's Official Gazette, Part I, no. 81 of 3 May 1995.

⁴ As subsequently amended and supplemented, signed at Basel on 22 March 1989 by the United Nations General Assembly, ratified by Romania by Law no. 6/1991, published in Romania's Official Gazette, Part I, no. 18 din 26 January 1991.

⁵ As subsequently amended and supplemented, published in the Official Journal L 327 of 22 December 2000.

⁶ As subsequently amended and supplemented, published in the Official Journal L 348 of 24 December 2008.

⁷ As subsequently amended and supplemented, published in the Official Journal L 312 of 22 November 2008.

⁸ As subsequently amended and supplemented, published in the Official Journal L 182 of 16 July 1999.

prevention and control)⁹ (hereinafter “**IPPC Directive**”), Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage¹⁰ (hereinafter the “**Environmental liability Directive**”); and respectively

- reaching the national level – where, in Romania, there are relevant especially the framework provisions included in Water Law no. 107/1996¹¹ (hereinafter the “**Water Law**”), Government Emergency Ordinance no. 195/2005 on environment protection¹² (hereinafter the “**Environment protection GEO**”), Law no. 211/2011 on waste regime¹³ (hereinafter the “**Waste regime Law**”), Government Decision no. 349/2005 on the landfill of waste¹⁴ (hereinafter the “**Landfill of waste GD**”), Law no. 278/2013 on industrial emissions¹⁵ (hereinafter the “**Industrial emissions Law**”), Government Emergency Ordinance no. 68/2007 on environmental liability with regard to the prevention and remedying of environmental damage¹⁶ (hereinafter “**Environmental liability GEO**”).

Against this background, this study undertakes to frame the meaning of the main applicable notions – namely the notions of “watercourses pollution” and “waste” (in section 2). Thereafter we will continue to define the preventive action principle and identify the most relevant obligations included in the international, European and national regulations with the purpose of preventing the pollution of watercourses with waste (in section 3). In section 4 we will indicate the main effects of breaching the prevention principle of the pollution of watercourses with waste, and in the end, we will summarise the conclusions of this analysis.

The novelty character of this study comes from the integrated approach of the international, European and national applicable regulations, as well as from the emphasis on certain specific aspects of preventing the pollution of watercourses with waste.

⁹ As subsequently amended and supplemented, published in the Official Journal L 334 of 17 December 2010.

¹⁰ As subsequently amended and supplemented, published in the Official Journal L 143 of 30 April 2004.

¹¹ As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 244 of 8 October 1996.

¹² As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 1196 of 30 December 2005, approved with amendments by Law no. 265/2006, published in Romania’s Official Gazette, Part I, no. 586 of 6 July 2006.

¹³ As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 220 of 28 March 2014.

¹⁴ As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 394 of 10 May 2005.

¹⁵ As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 671 of 1 November 2013.

¹⁶ As subsequently amended and supplemented, published in Romania’s Official Gazette, Part I, no. 446 of 29 June 2007, approved by Law no. 19/2008, published in Romania’s Official Gazette, Part I, no. 170 of 5 March 2008.

As main conclusions that we can mention on a preliminary basis, we consider that the international regulations offer a framework in which general obligations for states materialising the prevention principle are affirmed. The European regulations offer a greater level of detail to these obligations, setting certain specific directions for the Member States. At the same time, the Romanian national legislation includes numerous obligations that can be understood as representing components of the prevention principle; however, we consider that they do not manage to offer a real protection against pollution of watercourses with waste.

2. Fundamental notions on pollution of watercourses with waste

Pollution in general, and of watercourses in particular, is a phenomenon that has increasingly spread during the last century, through a growing variety of pollution sources, as well as through the multitude of areas affected by it. Consequently, the regulations in the field of watercourses protection against pollution have only recently started to emerge, both internationally and regionally, as well as nationally in Romania.

We are of the view that the notions of “watercourses pollution” and of “waste” must be analysed from several perspectives: (i) horizontally, by correlating them at each regulatory level – international, European, national; respectively (ii) vertically, by studying the differences in approaching these notions depending on the level on which these provisions are included.

Preliminarily, it is important to underline the fact that pollution is not forbidden as such, on none of the analysed regulatory levels, although certain legal provisions that will be analysed below might create the appearance of such an idea (for example, art. 15 para. (1) of Water Law, which provides that “pollution in any way of water resources is forbidden”).

a. On an international level. Currently, the protection of watercourses against pollution is mainly regulated by two conventions with universal character, namely: the 1992 Helsinki Watercourses Convention, and the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, signed on 21 May 1997 at New York (hereinafter the “**1997 New York Watercourses Convention**”). Of these two conventions, only the first one is directly applicable in our country, since the 1997 New York Watercourses Convention was not ratified by Romania by the date of drafting this material.¹⁷ We note however that numerous of the provisions included in the latter convention are considered to form part of the international customary law in the field of watercourses protection, context in which we will also make references to such provisions in our analysis.

¹⁷ Namely until 17 June 2021.

Thus, the 1992 Helsinki Watercourses Convention, which Romania ratified since 1995, does not include a definition of the notion of “pollution”, although there are several provisions within it relating to this concept.

The 1997 New York Watercourses Convention defines the “pollution of an international watercourse” as representing “any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct” (art. 21 para. 1.)

On the other hand, by still referring to the international level of the regulations, we show that the notion of “wastes” is defined in the 1989 Basel Convention as representing “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law” (art. 2 para. 1.) The disposal refers to the operations identified in Annex no. 4 to the 1989 Basel Convention, among which also the release into a water body, except seas/oceans (pt. D 6)

By correlating the three above mentioned definitions, the pollution of international watercourses with wastes could mean any detrimental alteration in the composition or quality of the waters of an international watercourse, which could be or is caused by substances or objects which are released/are intended to be released/are required to be released in an international watercourse. It is arguable in this context whether, for example, the act of depositing, on the side of a watercourse, solid wastes that are neither solvable in the water, nor are they transportable on water, fits or not within the definition of “pollution of a watercourse” within the meaning of the 1997 New York Watercourses Convention. It will in any case be necessary to evaluate the possibility to cause a significant damage to another watercourse state or to its environment, in order to determine whether there is a potential breach of the provisions on pollution of watercourses of the said Convention.

At the same time, in relation to the 1992 Helsinki Convention which does not include a definition of pollution, we consider that it should be analysed whether such act could have a transboundary impact – representing any adverse effect fulfilling the cumulative conditions that: (i) it is significant to the environment (including to human health and safety, water, flora, fauna, landscape or the interaction between several environmental factors) – taking into account the specific conditions of the ecosystem of the respective watercourse;¹⁸ (ii) it has resulted from an alteration of the conditions of the transboundary waters, and (iii) it was caused by a human activity. If affirmative, the activity could constitute a breach of the states’ obligation to take “all appropriate measures” to prevent any transboundary impact (art. 2 para. 1. of the 1992 Helsinki Convention). Thus, even though pollution is not forbidden in itself, the acts that could determine or

¹⁸ Although the notion of “transboundary impact” does not expressly relate to aquatic ecosystems, we are of the view that this understanding emerges from the systematic interpretation of the whole regulation, which includes in art. 3 pt. 1 letter i) the parties’ obligation to promote the sustainable development of water resources, including by the “application of the ecosystems approach”.

have determined a quality change of the watercourse, causing a transboundary impact, are forbidden. We also mention in this sense the obligation not to cause significant damage to the watercourse states or their environment, obligation which is regarded as being part of the international customary law¹⁹ and is closely linked to the preventive action principle.

b. On a European level. Continuing the analysis with the European level of the regulations, the Water Framework Directive – which was conceived on the basis of the 1992 Helsinki Convention – offers a broader definition of the concept of “pollution”, namely: “the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment” (art. 2 pt. 33). We note the express ecosystem approach of the Water Framework Directive, specifically referring to the aquatic ecosystems, as well as to the terrestrial ecosystems which are directly influenced by the aquatic ones, with the purpose of ensuring an increased protection compared to the one imposed by the 1992 Helsinki Convention. At the same time, we also notice the limitation of the notion of pollution by reference to the adverse, deterioration effects on material property, on amenities or other legitimate uses of the environment, respectively on human health. The specific reference of the Directive to the deterioration of material property is notable, and we consider that it can be interpreted as imposing the Member States of the European Union additional obligations compared to the ones from the 1992 Helsinki Convention.

The Waste Directive defines the notion of “wastes” as representing “any substance or object which the holder discards or intends or is required to discard”, the definition being thus aligned to the one in the 1989 Basel Convention.

By correlating the definition of pollution from the Water Framework Directive with the definition of waste from the Waste Directive, it results that the “pollution of watercourses with wastes” means the direct or indirect introduction of substances or objects which the holder discards/intends/is required to discard, in the air, water or soil, activity which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment.

It is also relevant to note in this context the concept of “water damage”, defined in the Environmental Liability Directive²⁰ as representing any measurable adverse change that significantly adversely affects (i) the ecological, chemical

¹⁹ Stephen McCaffrey, *The contribution of the UN Convention on the law of the non-navigational uses of international watercourses*, „International Journal of Global Environmental Issues” 1, no. 3/4 (2001), p. 260.

²⁰ Art. 2 pt. 1 letter b) together with art. 2 pt. 2 of the Environmental liability Directive.

and/or quantitative status and/or ecological potential of the waters concerned, except for the adverse effects where art. 4 para. (7) of the Water Framework Directive applies, or (ii) a water related service, which may occur directly or indirectly. Although the meaning of the notion of “pollution” of the Water Framework Directive does not directly refer to the “water damage” (by acts causing pollution), we are of the view that this notion is relevant from the perspective of the obligations to prevent such damages (including, in our view, by pollution with waste of various types) imposed by the Environmental Liability Directive.

c. On a national level. The Romanian national legislation puts forward several provisions defining the same concepts – in some cases with an almost identical content, in other cases with a (partially) different content.

Thus, the Water Law includes a definition specific for the pollution of waters that is almost identical to the one from the Water Framework Directive. At the same time, we also note the definition of pollution in general, included in the Environment protection GEO, namely “the direct or indirect introduction of a pollutant which may be harmful to human health and/or the environment quality, damage the material property or cause a deterioration or impair or interfere with amenities or other legitimate uses of the environment”, and the “pollutant” is “any substance, solid, liquid, gas compound or in form of vapour or energy, electromagnetic, ionising, thermal, acoustic or vibrating radiation which, when introduced into the environment, alters the balance of its constituents and of the living organisms and causes damage to material property” (art. 2 pt. 50 and 51 of the Environment protection GEO). Although at a first sight the pollution may seem similarly defined as in the Water Law, taking into account the definition of “pollutant” we consider that there are differences caused by the cumulative character of the conditions that have to be fulfilled in order for a substance to be classified as “pollutant”, namely that, when introduced into the environment, (i) it alters the balance of its constituents, (ii) it alters the balance of the living organisms, and (iii) it damages the material property.

We are of the view that, in principle, the definition included in the Water Law would prevail in the case of watercourses pollution. On the other hand, if a pollution act of watercourses would be qualified and sanctioned taking into account the requirements under the Environment protection GEO, and not taking into account the provisions in the Water Law, we believe that the definition to which we should refer to would be the one in the Environment protection GEO. The situation would thus result in which, by the simple qualification of an act as being encompassed in one or the other normative act, it would be differently encompassed in the definition of watercourses pollution.

The Water Law also includes the definition of the notion of “waste”, representing: “any substance or object pertaining to the categories established by law, which the holder discards, intends or is required to discard” (pt. 27 of Annex no. 1). The Wastes regime Law, which constitutes the main normative act regarding the wastes’ regime, includes an almost identical definition. In this context, we

consider that the definition from the Water Law should be eliminated, otherwise being a risk that a lack of correlations would appear in the future and, consequently, difficulties in applying the corresponding provisions regarding wastes from the Water Law.

Noting that both the meaning of the concept of “watercourses pollution”, as well as of “wastes”, are similar in the national and European analysed legislation, the notion of “pollution of watercourses with wastes” would also correspond to the one presented above at European level.

Further, the “significant impact” is defined as the effect caused as a consequence of an activity by which “the body of the surface water body is deteriorated/reaching the good ecological status/good ecological potential and the good chemical status is compromised”, and the “permanent impact” is the one “causing long-term adverse effects on the ecological status/ecological potential and chemical status of the surface water body” (pt. 35¹ of Annex no. 1 of the Water Law). These concepts are relevant considering the fact that pollution of watercourses with wastes of various types can have as a consequence a significant or even permanent impact on watercourses.

At the same time, art. 2 pt. 13 letter b) of the Environmental liability GEO refers to the “water damage” as representing, among other, “any damage which has severe adverse effects on the ecological, chemical or quantitative status, or on the ecological potential of the respective waters, as defined in the Water Law no. 107/1996, as subsequently amended and supplemented, except for the adverse effects to which art. 27 of the respective law applies”.

Additionally, the Environment protection GEO also encompasses definitions of the notion of “significant damage to the environment” – representing a “irreversible or long-term damage, quantifiable or not in money, caused in any way to the environment” – and that of “environment deterioration” – which means “the alteration of physical-chemical and structural characteristics of the natural and anthropical components of the environment, reducing diversity or biological productivity of natural and anthropic ecosystems, the alteration of the natural environment with effects on quality life, caused, mainly, by water pollution, (...) overexploitation of resources, their lean management and capitalisation, as well as by the inadequate landscaping”.

We thus note that the Romanian legislation includes numerous notions that frequently overlap either totally, or partially, leading to interpretation and application difficulties of the relevant legal provisions, including of the ones related to the preventive action principle which represents the subject of this analysis. Therefore, we underline the necessity and urgency of the unification and elimination of the fragmented character of the provisions related to the watercourses pollution from the national legislation of Romania.

3. Prevention principle of pollution of watercourses with waste at an international, European and national level

The prevention principle, also named the preventive action principle, is one of the most important principles governing the protection of watercourses, taking into account their pollution in the majority of cases, but in certain cases also the damages to the environment in general.²¹ Together with the principle of reasonable and equitable utilisation, with the obligation not to cause significant damages and with the precautionary principle in decision-making, they form the framework for taking preliminary measures with a view to ensuring the protection of watercourses against pollution, including with wastes of various kinds.

This principle can be identified at all regulation levels: internationally – being even part of the international customary law – as well as at European and national. Consequently, we will indicate below the most important provisions defining and, as the case may be, detailing the components thereof.

a. International legal framework. Prevention of any transboundary impact, including that which could be caused by pollution, represents a fundamental pillar on which the 1992 Helsinki Convention is built, being also part of the international customary law as to any type of damage caused to other watercourse states.²²

According to the preventive action principle, states are obliged to take the necessary measures to prevent or control pollution and other transboundary damages on the environment. Specifically with respect to watercourses, the main purpose of this principle is to diminish or – ideally – even eliminate the risk that their status worsens, among other by pollution.

As opposed to the precautionary principle (which was actually born from the prevention principle), for which the states have agreed upon an express definition in the 1992 Helsinki Convention,²³ the principle of preventive action is not expressly defined in this convention, but there are included certain essential elements for framing its content. We are of the view that this is an opportune approach, capable of ensuring the possibility to circumscribe the principle depending on numerous factors – environmental, social, geopolitical, etc. – which progress differently, thus ensuring the fluidity of the content of prevention principle, without its purpose being affected.

States are obliged to take “all appropriate measures to prevent, control and reduce any transboundary impact” (art. 2 para. 2 letter a) of the 1992 Helsinki

²¹ Lucreția Dogaru, *Dreptul mediului*, 2nd ed. (Bucharest: Pro Universitaria, 2020), p. 101.

²² Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009), p. 554.

²³ According to art. 2 pt. 5 letter a), on the basis of the precautionary principle, “action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand”.

Convention). This wording of the obligation to “prevent, control and reduce” water pollution is also found in art. 21 para. 2) of the 1997 New York Convention, being closely related to the obligation not to cause significant damage to other states of the international watercourse. We agree with the interpretation provided in the literature that states need to take the necessary measures to prevent, reduce and control pollution of watercourses (including with waste) before it reaches a level that causes significant damage to another state.²⁴ However, this provision does not allow states to pollute watercourses and cause damage to other states through this activity, even if they take measures to reduce or control pollution,²⁵ prevention being thus a key element.

We note that the level of detail provided by the 1992 Helsinki Convention in connection with the prevention principle is quite high in relation to its character as a universal framework convention. In view of this, we refer to the following main obligations which are part of this principle and on which states must provide evidence that they have fulfilled them in the event of a problem regarding the compliance with the obligation to prevent pollution:²⁶

- measures have been taken to prevent pollution (including with waste) at source, “as far as possible”, and they do not cause and are not likely to cause a transfer of pollution to other environments, directly or indirectly (art. 2 para. 3. and para. 4.);

- emissions of pollutants must be prevented at source by applying, *inter alia*, less polluting or residue-free technologies (art. 3 para. 1. letter a)), applying the principle of the best available technologies which is closely related to the prevention principle;

- setting limits applicable to the discharge of hazardous substances (including from waste) by the authorisation for wastewater discharges, based on the best available technologies, respectively the prior approval of wastewater discharges (art. 3 para. 1. letters b) and c));

- application of environmental impact assessment and other specific means of assessing the impact on watercourses for potentially polluting activities, including with waste (art. 3 para. 1. letter h)), etc.

As international legislation on waste management is limited, a more concrete analysis of the obligations that make up the principle of preventing the pollution of watercourses with waste specifically will be performed below in relation to relevant European and national regulations.

²⁴ Stephen C. McCaffrey, *The Law of International Watercourses* (Oxford: Oxford University Press, 2019), Kindle edition, p. 513.

²⁵ *Ibidem*, p. 512-513.

²⁶ In this sense, please also refer to United Nations Economic Commission for Europe, *Guide to Implementing the Water Convention* (New York and Geneva: United Nations, 2013), p. 20, para. 95. The document is available online at https://unece.org/DAM/env/water/publications/WAT_Guide_to_implementing_Convention/ECE_MP.WAT_39_Guide_to_implementing_water_convention_small_size_ENG.pdf (accessed on 17 June 2021).

b. European legal framework. The fundamental nature of the principle of preventive action at European level is indicated primarily by the fact that the Treaty on the Functioning of the European Union²⁷ mentions it among the principles on which the European Union's environmental policy is based (art. 191 para. 2.).

Correlatively, the Water Framework Directive structures the entire regulation on the protection of watercourses around the idea of pollution prevention and control, having a combined approach of this issue – on the one hand by setting emission limit values, and on the other part by establishing water quality standards.

As examples of provisions of the Water Framework Directive which outline the principle of preventing pollution of watercourses with waste, we mention:

- the obligation to prevent deteriorations of aquatic ecosystems, as well as terrestrial and wetlands that are directly dependent on aquatic ecosystems, in relation to their water needs - this obligation is the first object of the Water Framework Directive (art. 1 letter. (a));
- the obligation of prior authorisation of certain activities that could cause pollution (art. 11 para. (3) letters (g) and (h));
- the obligation of the Member States of the European Union to take the necessary measures to prevent significant losses of pollutants from technical installations and to prevent accidental pollution of watercourses, including by means of detection or warning systems for these events (art. 11 para. (3) letter (l));
- setting common emission limit values for certain groups or families of pollutants (Preamble, para. (42)).

We note that this Directive includes rather general provisions, which is natural given its nature as a framework directive. These will therefore be complemented by more specific provisions, which we will briefly exemplify below.

The Environmental quality standards Directive includes a set of environmental quality standards (EQS) for priority substances and certain other pollutants, which are necessary to achieve good chemical status of surface waters, through the programs of measures set out in the river basin management plans. We consider that the imposition of such environmental quality standards represents an important element of the principle of preventive action, in the context in which they represent components of the strategies to combat water pollution included in art. 16 of the Water Framework Directive.

The IPPC Directive has a key role to play in protecting watercourses against pollution resulting from industrial activities. Thus, the fact that this Directive is based on the principle of preventive action follows from art. 1 outlining the subject of the IPPC Directive, including the establishment of norms for the

²⁷ As subsequently amended and supplemented, published in the Official Journal C 202 of 7 June 2016.

prevention of pollution resulting from industrial activities, for the prevention of emissions into water, and for the prevention of waste generation, in order to achieve a “high level of protection of the environment as a whole”. These include, inter alia, obligations for Member States: (i) to take all appropriate measures to prevent pollution – thus giving states a degree of freedom to adapt the measures taken to the characteristic national situation; (ii) not to generate any significant pollution (therefore to prevent the generation of such pollution); (iii) to prevent the generation of waste in accordance with the Waste Directive; (iv) to require the holding of permits (for example, for waste incineration, incineration or co-incineration plants, which could have a high potential for environmental pollution, including of watercourses); (v) to take all necessary measures to prevent accidents; (vi) the specific obligation for operators of waste incineration/co-incineration plants to take all necessary precautions regarding the delivery and reception of wastes so as to prevent, as far as possible, pollution of, inter alia, surface waters, etc.

The Environmental Liability Directive also includes obligations that are part of the prevention principle. They relate mainly to situations where there is an imminent threat of damage to the environment, in which case measures are needed to prevent such damage, detailed in particular in art. 5 of the said Directive. Naturally, the costs necessary for the prevention actions will be borne by the operator who is obliged, according to the Directive, to undertake them; a system of guarantees for their recovery will also be set up by the competent authority which has borne the costs, if the case (art. 8). These obligations have been transposed approximately identically in the national legislation of Romania, namely in the Environmental liability GEO.

It is also important to correlate the main provisions contained in the European legislation on the protection of watercourses (briefly mentioned above) with those included in the specific waste legislation.

Thus, the Waste Directive specifies since art. 1 that the measures taken on the basis thereof aim, inter alia, to prevent the generation of waste, the adverse effects of waste generation and management, as well as to increase the efficiency of the use of resources, all of which include the transition to a circular economy. The Waste Directive includes in art. 4, as a fundamental element, the waste hierarchy, in which “prevention” occupies the first place. This notion is defined as representing “measures taken before a substance, material or product becomes waste, which reduces: (a) the amount of waste, including by reusing products or extending their lifespan; (b) the negative impact of the waste generated on the environment and the health of the population, or (c) the content of hazardous substances in materials and products” (art. 3 pt. 12).

Also important are the minimum measures that Member States must take to prevent the generation of waste (art. 9 para. (1) of the Waste Directive), which must be included in waste management plans to prevent all forms of garbage disposal (art. 28 para. (3) letter (f)), as well as the waste prevention programs that

the Member States are obliged to establish according to art. 29 of the Waste Directive.

Important provisions for the materialisation of the principle of prevention of pollution of watercourses with waste are also included in the Landfill of waste Directive. By way of example, we mention the obligation for landfills of waste to be located and designed in such a way as to prevent pollution, including of surface waters, and the way in which this protection will be ensured (namely by combining a geological barrier and a bottom liner, during the active/operational period of the deposit, respectively by combining a geological barrier and a top liner, during the passive/post-closure phase);²⁸ introduction of a uniform waste classification procedure that can be accepted in different categories of landfills of waste, in particular standard limit values,²⁹ etc.

Last but not least, we consider useful a few brief remarks regarding the coexistence of water protection regimes in Europe through the 1992 Helsinki Convention and respectively through the Water Framework Directive together with the subsequent specific directives. Thus, although it is indisputable that, from a theoretical point of view, it is the Convention which prevails over the Water Framework Directive – even in the preamble to the latter³⁰ being stated that it is one of the measures implementing the Convention – in fact, the European Commission seems to consider that the importance and value of the 1992 Helsinki Convention has been overshadowed by the Water Framework Directive.³¹

c. National legal framework. Romanian legislation on the protection of surface waters against pollution contains a number of provisions issued mainly for the transposition of the Water Framework Directive and other applicable European provisions. Among the norms that we consider to be part of or apply the principle of preventive action regarding pollution of watercourses with waste, we mention the following:

- the prohibition of pollution of watercourses, contained in art. 15 of the Water Law, and the correlative prohibitions, such as the prohibition of discharging, dumping, introducing or depositing waste on the banks or riverbeds, in wetlands, in protection areas established by law, these being established both by the Water Law, as well as by the Environment protection GEO;
- the obligation to obtain specific regulatory acts in order to use watercourses for certain purposes – such as the water management permit, the placement permit, the water management authorisation;³²

²⁸ Art. 3.1 of Annex 1 to Landfill of waste Directive.

²⁹ Pt. (20) of the Preamble to Waste Directive.

³⁰ Pt. 23 and 35 of the Preamble to the Water Framework Directive.

³¹ In this sense, please also refer to Gábor Baranyai, *European Water Law and Hydropolitics. An Inquiry into the Resilience of Transboundary Water Governance in the European Union* (Cham: Springer Nature Switzerland AG, 2020), p. 107, 171-173.

³² The Water Law dedicates an entire section to the regime of works that are built on waters or are related to waters (Section 4, comprising of art. 48-66), in which there are also detailed the cases in

- the obligation to draw up plans for the prevention and control of accidental pollution incumbent on certain legal entities using water (art. 23 para. (2) of the Water Law);
- the obligation of water users to adopt production technologies that are as less polluting as possible (art. 17 letter a) of the Water Law);
- the prevention obligations against pollution resulting from industrial activities, imposed by the Industrial emissions Law in order to transpose the IPPC Directive (such as the ban on operating without an integrated environmental authorisation/environmental authorisation of any plant/combustion/incineration/co-incineration of waste plant; taking all necessary measures to prevent pollution; prevention of waste generation, etc.);
- the obligation to take the prevention measures included in the Environmental liability GEO for the situation of an imminent threat with an environmental damage – including on watercourses, for example in case of an imminent threat with the discharge of hazardous waste. These measures must be proportionate to the imminent threat and lead to the avoidance of damage, including taking into consideration the precautionary principle in decision-making – thus making clear the close link between the latter principle and the principle of preventive action.

Similarly, and in conjunction with the Waste Directive, one of the main aims of the Waste regime Law is to establish the necessary measures for the protection of the environment (including of waters), by preventing the adverse effects of waste generation and management. Thus, the waste hierarchy has also at national level prevention as the first priority (art. 4 para. (1) letter a)), this being defined in a manner identical to that at European level. Waste management prevention measures are included in section V – National Waste Management Prevention Program – of the 2017 National Waste Management Plan.³³ We underline that the emphasis within the national waste legislation (similarly to the European legislation) is on measures to prevent waste generation, an approach linked to the concept of circular economy whose implementation is currently ongoing. We are of the view that this component of the prevention principle is essential, if not the most important, for preventing the pollution of watercourses with waste. However, in the context in which complete prevention of waste generation is – both currently and in the near future – a desiderate rather than a reality, the importance of other measures to be taken by states to prevent pollution of watercourses with waste acquires a high importance.

which it is necessary to obtain the above-mentioned regulatory acts, the conditions to obtain, suspend, withdraw and amend them, etc.

³³ Approved by Government Decision no. 942/2017, published in Romania's Official Gazette, Part I, no. 11 bis of 5 January 2018. This is also formulated in the context of the Government Decision no. 870/2013 on the approval of the National waste management strategy 2014-2020, published in Romania's Official Gazette, Part I, no. 750 of 4 December 2013.

We also refer to the Landfill of waste GD, which was issued for the transposition of the Landfill of waste Directive and includes several obligations that are part of the principle of preventive action, including for example: (i) the specific requirements for issuing the environmental permit and the environmental authorisation for landfills of waste – among which the water management permit, the proposed pollution prevention methods; (ii) the inclusion of specific procedures for the acceptance / reception of waste in landfills of waste, as well as subsequent control and monitoring measures in the operational phase of the landfill, etc.

4. Conclusions

Measures to prevent the pollution of watercourses with waste are an essential pillar for their protection, for maintaining their qualitative and quantitative status, being a fundamental component for ensuring a sustainable use for both present and future generations.

If these measures fail or are not taken properly, there will be a number of consequences, such as the liability for damage caused to watercourses, the application of the "polluter pays" principle, the potential destruction or damage to biodiversity, wildlife and flora, degradation of drinking water quality,³⁴ harm to human health.

Following the analysis of the most important framework provisions at international, European and national level, the authors concluded first of all that these are in principle pyramidally correlated, as follows: the provisions at European level detail and implement the international ones, and the provisions at national level in Romania transpose and implement in their turn the European ones, and consequently also the international ones.

It is noted, however, that at EU level, the importance given to the 1992 Helsinki Convention is significantly diminished, with the focus on the autonomous provisions of the Water Framework Directive and subsequent ones. In this context, we are of the view that, even though the European water protection legislation is among the most complex and solidly constructed regulations in the field, Member States would still benefit from a closer focus on the 1992 Helsinki Convention as well. At national level, although Romanian legislation seems, at first sight, to transpose – often even literally – the European directives, there are still major shortcomings in this area, revealed even by the precarious situation of watercourses in Romania, which are in an alarmingly high percentage affected by waste pollution.³⁵

³⁴ Dante A. Caponera and Marcella Nanni, *Principles of Water Law and Administration* (Leiden: CRC Press, 2019), Kindle edition, p. 291.

³⁵ For example, for a very recent study from Romania on pollution of Romanian waters with microplastics, please refer to Association Act for Tomorrow, *Cartografierea Microplasticului în*

Last but not least, we consider that the national legislation in Romania contains numerous obligations that can be considered to be components of the prevention principle, but, in the opinion of the authors, their fragmented and non-unitary nature are unlikely to provide a real protection of watercourses against pollution with waste.

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**SEEKING THE BRILLIANCE OF
INTERNATIONAL LAW**

Compliance with the legal treatment standards of international investments during the global economic crises. Between yes and no

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Abstract

International investment are under the protection of international law by setting standards of legal treatment which the governments of the host states have undertaken to comply with in their investment treaties. Therefore, these standards of protection must be respected even in times of crisis, regardless of the reason that generated it, the policy of attracting and maintaining an investment climate favorable to international investment being an attribute of each state. Nothing can stop an investor from changing the geography of his business, in order to protect the investment made. The issue of violation of one or more standards by states is one of the most debated at the moment, because the international arbitration practice has decisions to oblige states to significant compensation. In my study I used as a research method interdependent analysis and synthesis through analogies developed in a comparative method. At EU² level, following the entry into force of the Treaty of Lisbon, FDI³ is now within the exclusive competence of the EU, which continues to fight to define a European investment policy that meets the expectations of investors and beneficiary states, as well as the objectives foreign policy and the EU's broader economic interests.

Keywords: *crises, European Union, foreign investment, protection standards.*

JEL Classification: D25, F21, K23

1. Legal treatment standards

The parties to an investment treaty must comply with certain conditions regarding the treatment and protection of investments established in their territories, so as not to create discriminatory treatment and therefore not to impose additional burdensome conditions on investors in which to operate.

According to public international law, domestic regulations must also be correlated with the minimum set of rights granted to aliens⁴, preferably under the corollary of the economic sovereignty of states. It can be said that the economic sovereignty of states is a combination of the opportunities they have in making individual decisions on issues related to the development of their economies, because only a sovereign state can protect its national and economic interests and

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² The EU is the acronym for the European Union.

³ FDI stands for Foreign Direct Investment; BIT stands for Bilateral Investment Treaty.

⁴ G. Geamănu, *Drept internațional public*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 330.

the interests of its citizens. and from abroad, in reality, all states being, to a greater or lesser degree, intermediaries between global and national economies⁵.

Although the practice of courts designated to settle investment disputes is unstable, its analysis has shown that the State of origin may be inclined to either preferential or differential treatment, which are not sanctioned by international law which penalizes discrimination or discriminatory treatment in the matter⁶.

The provisions of the body of the treaties on investors and investment treatment are intended to prevent possible restrictive behavior of the host government and to impose discipline on its governmental actions and to achieve this objective, the treaties define a set of standards against which host states have to adhere, comply in their attitude in the legal relations they have with investors and their investments⁷.

Specifically, the actions of the State that do not comply with the standards included in the Treaties constitute violations of the Treaties involving the international liability of the offending State which may be obliged to pay compensation for the damage caused. In order to protect foreign investors against risks, in particular against political risk arising from the placement of their assets under the jurisdiction of a host State, investment treaties stipulate obligations regarding the treatment that host States must accord to investors and their investments⁸. Although treaties do not usually define the meaning of treatment, that term in its usual dictionary sense includes the actions and behavior it will take towards another person. In other words, by concluding an investment treaty, a state makes promises about the actions and behaviors it will take towards the investments and investors of the treaty partners⁹, and the obligations thus assumed by states generate considerable legal effects, all the more so as at a

⁵ See M. V. Ershov, *Economic sovereignty of Russia in the global economy*, Ed. Ekonomika, 2005, p. 283.

⁶ In Oscar Chinn, *Belgium v. The United Kingdom*, Judgment of December 1934, p. 87, the Permanent Court of International Justice - CPJI emphasized that "prohibited discrimination is therefore one that will be based on nationality, which would a differentiated treatment for individuals belonging to different national groups depending on their nationality".

⁷ See Cristina Elena Popa (Tache), *Legal treatment standards for international investments. Heuristic aspects*, Adjuris – International Academic Publisher, 2021, Bucharest, Paris, Calgary, pp. 15-39.

⁸ Maria do Rosário Anjos, Maria João Mimoso, *Free Competition in EU: An Exploratory Study about Tax Benefits to Foreign Investment as a Distortion Measure of Free Competition*, „International Investment Law Journal” vol. I, issue 1, 2021, pp. 38-49.

⁹ See also J.W. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library 2013, p. 205. In the same context, the author exemplifies by reporting the example of Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic, ICSID Case no. ARB/03/19 (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v. Republic of Argentina), where the Court defines treatment as follows: „The word treatment is not defined in the text of the Treaty. However, the usual meaning of this term in the context of investment includes the rights and privileges granted and the obligations and duties imposed by a Contracting State in respect of investments made by investors covered by a treaty. Decision on jurisdiction, 3 August 2006”.

certain level, the legal norm is created by political power, and any codification is, from this point of view, a compromise between political tendencies and the expression of the general will.

It has been observed that in times of crisis it becomes sensitive to comply with certain standards of protection such as the prohibition of performance requirements or the free transfer of funds. With regard to performance requirements, as in many other areas of international investment law, courts invested with such actions will open new avenues in the development of jurisprudence designed to shed light on the application of these prohibitions¹⁰. In view of the way in which disputes concerning certain performance requirements have been resolved, as well as the textual analysis of how this standard has been taken over in investment treaties or in those containing investment provisions, it follows that the prohibition of performance has evolved from broad provisions to increasingly precise and detailed provisions¹¹. However, such measures have the potential to be used successfully when they are well developed, giving the possibility for their host states to use them for the success of development goals, but only if they respect the lessons taught by the arbitration practice.

In general, states can use these clauses depending on when they are applied: pre-established and not after the investment has been made, because, as we have pointed out, bridges can be created towards discriminatory treatment. Excluding this standard from the scope of the NT (national treatment) and MFN (most-favored-nation clause) standards meant that pre-established PRs (performance requirements) could be imposed on domestic investors, and the MFN clause it would not allow more favorable provisions to be imported from other treaties, which would create chaos.

2. Jurisprudence. Looking back

The practice has known a number of cases involving violations of the standards of legal treatment that should have been granted to foreign investors in order to protect their investments, and the decisions were for or against the investor. Some of the rulings of the International Court of Justice have played a particularly important role in shaping the principles on which States' responsibility for investment is based today. For example, the Chorzow case grounded the principle of compensation, the Barcelona Traction and Diablo v. Congo cases, the principle of corporate identity and nationality. However, in the

¹⁰ See Barton Legum, Ioana Petculescu, *Performance Requirements. Mobil v. Canada, ICSID Caz nr ARB(AF)/07/4*, in *Building International Investment Law: The First 50 Years of ICSID*, Ed. Kluwer Law International, 2016, pp. 428,429.

¹¹ Barton Legum, *Understanding Performance Requirements Prohibitions in Investment Treaties in Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2007*, Ed. Arthur W. Rovine, Brill 2008, p. 59, *apud* Barton Legum, Ioana Petculescu, *Performance Requirements. Mobil v. Canada, caz ICSID nr ARB(AF)/07/4*, in *Building International Investment Law: The First 50 Years of ICSID*, Ed. Kluwer Law International, 2016, p. 428.

field of international law and, implicitly, of the state's responsibility for foreign investment, jurisprudence is only an auxiliary means of determining the rules of law and a means of ascertaining and applying to a specific case and only with relative effect¹².

In *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, the complaints concerned certain breaches of protection standards during the economic crisis and measures taken by Argentina in the energy sector. Argentina's 2001-2002 crisis has led to massive public debt defaults both domestically and internationally. Real gross domestic product decreased by about 10% in 2002, the cumulative decrease since 1998 being 20%; and inflation rose to about 10% in April 2002, but eventually reached 40% for the full year. In summary, due to the overvaluation of the peso and the deterioration of the competitiveness of the economy, the stock market in Buenos Aires lost more than 60% between 1998 and 2002 while unemployment rose to over 20% in 2002. Fifty-four percent of the urban population it was now living at the "poverty line", while the population had reached a "poverty level" of 25%, with private consumption falling by 20%. So alarming was the situation that the United Nations General Assembly decided to reduce Argentina's dues because of the crisis, the first case in history.

The specific measures claimed by El Paso were adopted by Argentina in the context described above and aimed at overcoming the crisis. Most of them were related, in one way or another, to the convertibility regime and its disappearance. The Court of First Instance held that Argentina had infringed Article II (2) (a) of the ILO by failing to grant fair and equitable treatment to the El Paso investment. Argentina's defense based on the state of necessity against El Paso's claims was rejected. Within 30 (thirty) days from the date of notification of the judgment to the parties, Argentina was obliged to pay to the investor a compensation in the amount of USD 43.03 million, plus interest compounded semi-annually on this amount at the rate of LIBOR plus 2% from 1 January 2002 until the date of full payment. The decision was therefore in favor of the investor, for which reason Argentina stated in its memorandum for annulment of the judgment (the application for annulment was subsequently rejected) that: "... the Tribunal created a new standard, as if it had the power to create law or amend the BIT and applied it to the facts of the case. Indeed, according to the Court, in the same way as creeping expropriation, there may be infringements of the FET (fair and equitable treatment) standard." This is unprecedented in the history of investment arbitration and is the reason why the Tribunal could not cite a single international rule, arbitration award or work by a legal author that mentions this new concept of creeping violation of the standard of fair and equitable treatment, which was invented by the Tribunal. The Court therefore manifestly exceeded its

¹² Popescu Dumitra, *Principii și forme juridice ale cooperării economice internaționale*, Academy Publishing House, 1979, p. 34.

powers by seeking to establish a rule concerning a new method of infringing the standard of fair and equitable treatment, which was not provided for by the parties to the Treaty. The Ad Hoc Committee set up the procedure for setting aside the judgment carefully considered the above argument and concluded that what the Court of First Instance had done was an interpretation of the BIT's fair and equitable treatment in relation to the facts of the case courts in *Société Générale v. Dominican Republic*¹³ and *LG&E v. Argentina* cases.

3. International liability of States in international investment law

The interests of states and investors shape international investment law¹⁴. States' international liability for foreign investment can arise from a wide range of international obligations - when one of them may be breached - provided that they are related to an investment process (an investment report). The sources of these types of obligations are diverse. For example, the applicability of customs regarding the liability of states in investment matters is extremely limited, some of the principles on which this liability is based, now codified, have a customary origin: the right to compensation for expropriation or the right to set limits and exchange rate by internal laws by virtue of the principle of sovereignty. certain regulations on protection and liability have acquired a customary extension to other parties, which have not signed a certain bilateral foreign investment treaty. As a result, an unwritten rule for the third part of a treaty has become a general practice, relatively long and uniform, considered by states to express a legally binding rule of conduct.

Compared to foreign investment contracts, bilateral agreements provide a high degree of protection against national legislative changes that may infringe their contractual rights, through the existence of a general clause, activating state responsibility.

One of the standards of investment protection is the prohibition of capital control: these are prohibitions on a government that applies restrictions on capital flows into or out of its economy. Such restrictions are used, for example, to reduce speculative financing or to restrict the repatriation of funds to protect economic stability in the event of a financial crisis or balance of payments. Instead, the treaties normally protect the principle of free transfer of funds, giving investors the right to transfer funds related to investments in the host state. In the wake of the recent financial crisis, it has been unequivocally established that a ban on capital controls poses serious risks to governments.

¹³ See *Société Générale v. Dominican Republic*, Case LCIA No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008 and *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006.

¹⁴ J.W. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library, 2013, pp. 37-40.

There are a number of bilateral investment treaties that contain provisions that could justify attributing a wrongful act to a state, such as the rights of entry and establishment of a foreign investor in the host state. The creation of the World Trade Organization in 1995, a concept based on total market liberalization, was not as successful as the division of the world's economies into centers and peripheries, especially after the Asian crisis. At the 2003 Cancun Ministerial Meeting, developing countries and large importers of foreign capital proposed to consider the issue of foreign investment only in conjunction with providing legal means to hold large foreign corporations liable for damage to the host state. Because of this, the issue of foreign investment has been removed from the Organization's agenda¹⁵.

Thus, the issue of state responsibility for investment remains only a briefly regulated, tangential and related, in bilateral or multilateral investment treaties, as we will see below. Thus, the positive norm, the violation of which may lead to the liability of the state, is mainly established on the basis of the incidence of various institutions of international law, which may justify the attribution of an illegal act, such as human rights or environmental obligations. For example, in the United States, the Alien Tort Claims Act of 1876 established the jurisdiction of American courts over violations of public international law, such as tortious liability. U.S. courts have jurisdiction to prosecute offenses committed during the exploitation of natural resources or the construction of construction projects by multinational corporations, but under this act no compensation has ever been awarded and no damage attributable to a state authority has been established¹⁶.

As international investment law is derived from public international law, it brings up the matter of state liability mainly from the perspective of the way in which they understand to fulfill their obligations established in the investment treatment standards. In this context, however, unlike international trade law where all actors, including states (acting in accordance with *de jure gestionis*) are on an equal footing in public international law, the state acts with sovereign power under the rule of law empires. The issue of state responsibility for international investment has not yet managed to reach a clear and unequivocal way of regulation, although when states engage in investment relations by developing various rules (such as tax or customs) act sovereignly on the basis of *de jure empires*. It also does the same when it enters into relations with international governmental organizations of an economic nature, such as regional and world economic organizations¹⁷.

Through the investment treaties, States Parties undertake to comply with

¹⁵ See Cristina Elena Popa (Tache), *International investment law. Coordinates*, Ed. Epublishers, 2019, p. 307 et seq.

¹⁶ M. Sornarajah, *The International Law on foreign investment*, 3rd edition, Cambridge University Press, 2010, p. 27.

¹⁷ I. Gâlea, *Dreptul tratatelor*, Ed. C.H. Beck, Bucharest, 2015, p. 155-160.

the standards of treatment, which results in the liability of States in the event of a breach of these particular, self-assumed obligations, since, while international investors are not party to these treaties, in all cases, the consent of the third country is required, except for the “stipulation for another” which has given rise to contradictory interpretations, in the matter of the constitution, modification or extinguishment of an obligation.

In general, in case of establishing an obligation, the conditions provided in art. 35 of the Vienna Convention of 1969 are: (i) the intention of the parties to constitute an obligation on a third party; (ii) the acceptance is express and written¹⁸. The initiative of the International Law Commission to propose a common rule for the revocation of rights and obligations was noted: the consent of the third state would have been required, unless it was established that the right would have been revocable¹⁹. Governments have expressed views that the parties should not be restricted from revoking or amending the stipulation in favor of a third party by giving that state a “veto”²⁰. It is considered that the interpretation of this rule should be in the sense of those retained by the rapporteur Waldock: a presumption of revocability of the right that can be overturned by: a) bilateral agreement or b) establishing by the text of the treaty the intention contrary to the parties²¹. Unregulated situations have been identified by the Vienna Convention, in which incompatibilities may arise between obligations in relations with third parties (a state assumes an obligation to State A, and subsequently assumes an obligation to State B, incompatible with the former). And this issue falls within the sphere of international responsibility of states. This creates a problem of incompatibility. In order to identify the notion of “incompatibility”, the jurisprudence of the Court of Justice of the European Union pursuant to art. 351 para. 2 TFEU, which provides for the obligation of Member States to “eliminate incompatibilities” in relation to European Union law in treaties concluded with third countries. Thus, in a case involving the incompatibility of provisions in agreements on mutual promotion and protection of investments, the Court ruled: „The prerogatives of the Council, which are the unilateral adoption of restrictive measures in relation to third States identical or in connection with those governed by a previous agreement concluded between a Member State and a third country, shows an incompatibility with that agreement, because, first, the agreement does not contain a provision enabling the Member State to exercise its rights; fulfill its

¹⁸ See Official Records, 1969, Plenary, 59 f, para. 5, it follows that the requirement of written acceptance has been added to the text of the Convention on the proposal of the delegation of Cambodia.

¹⁹ Yearbook of the International Law Commission, 1964, vol. II, p. 184.

²⁰ See *Draft articles on Responsibility of States for Internationally Wrongful Acts* of the Commission on International Law, p.230, VI Report of the Special Rapporteur H. Waldock, doc. A/CN.4/186 and Add. 1, 2/Rev.1, 3-7, Yearbook of the International Law Commission, vol. VI, pp. 70-72, Comments Released by Israel, U.S.A., United Kingdom, Pakistan. The Netherlands has upheld a presumption in favor of the irrevocability of the law.

²¹ I. Gâlea, *op. cit.*, 2015, p. 160.

obligations as a member of the Community and, secondly, there is no mechanism under international law to make this possible²².”

In conclusion, in order to protect foreign investors from the political risk arising from the placement of their assets under the jurisdiction of a host state, investment treaties impose obligations on host states²³ on the treatment to be given to covered investments and investors.

4. Principles of international investment law, coordinated for standards

As presented above, international investment treatment standards contain self-imposed obligations by states through investment treaties. These standards are rooted in the principles of international investment law.

The principles of this field are closely related to the protection of the state, the protection of international investors and the treatment granted. At the same time, they serve to provide a legal and interpretive basis both for completing conventional and customary law and for covering gaps²⁴.

All economies have made binding commitments through investment treaties²⁵. These treaties generally apply to the actions of all governmental entities, regardless of the level of government (central, regional, local) and regardless of the branch of government (executive, legislative and judicial) but regardless of the status of the host state, whether North or South, the administrative problems that arise with the establishment of an international investment are largely similar.

In addition to the costs and time allotted, both excessive, the adaptation of domestic law to international law and, in particular, the regulation of a sufficient legislative framework to cover the main problems encountered in this area remain to be regulated.

Infringements of an investment treaty are highly serious. If a government entity takes a measure contrary to the obligations contained in an investment treaty, the action can generate significant sanctions, particularly onerous for the government that has not met a certain standard of treatment, which affects the state's reputation as a place conducive to foreign investment. , with particularly serious consequences in the future.

From an administrative point of view, the main objective is the

²² C-205/06, *Commission v. Austria*, 2009, Repertory of the Court of Justice, 1-01301, para. 37; C-249/06, *Commission v. Sweden*, Directory of the Court of Justice, 1-01301, C-118/07, *Commission v. Finland*, 2009, Directory of the Court of Justice 1 - 10889; *Commission v. Ireland*, 2006, Repertory of the Court of Justice, 1-4635, para. 154.

²³ See N.J. Calamita, *Handbook on Obligations in International Investment Treaties*, 2020, Ed. APEC Committee on Trade and Investment (CTI), p. 51.

²⁴ P. Guggenheim, *Traite de droit international public*, vol. I, 2nd ed., 1996, pp. 296-297.

²⁵ See Cristina Elena Popa (Tache), *Introduction to international investment law*, Ed. Universul Juridic, Bucharest, 2018, pp. 251 et seq.

administrative implications generated by the regulation or non-regulation of the legislative body with an impact in this field and based on an unequivocal and precisely determined whole norm.

Their implementation from an administrative point of view continues to be a challenge for every state, because, viewed in the mirror, they should be visible, in harmony with normative regulations, together with: the principles of organization and functioning of public administration, public administration, executive power, forms of activity of public administration, responsibility and accountability of public employees (civil servants), public administration authorities, administrative acts, public office. The combination of these pieces into a legal mechanism or, better said, the assembly between international investment law and administrative law is an outpouring of sources of legislation, jurisprudence and doctrine, trialism of great utility for evolution and reform.

5. Peroration

More and more investment treaties and free agreements that include investment protection chapters contain these standards or, less frequently, provisions developed in accordance with the prohibitions of TRIMs (on performance requirements) and therefore it is possible that the future practice of ICSID or other competent courts in this matter, to find an increasing number of cases in which investors claim to have violated such standards because, in the view of investors, some actions of the states represent an administrative control involved by the host state. For this reason, the majority opinion of specialists leads to the conclusion that for the compliance of government actions with the obligations of a state in the investment treaty, it is essential for all government representatives to appreciate in a real way the obligations of the IIA government²⁶, which can only be achieved through a good understanding of the link between treaty obligations, the development and implementation of internal policies, under the corollary of ensuring timely communication and consultation within government on the application of these obligations to any investor decisions and investments.

On the other hand, the guarantees granted to the investor mainly refer to the way in which they were observed and applied (executed): national treatment and exceptions, fair and equitable treatment, most-favored-nation clause, direct or indirect expropriation and its conditions, compensation, free transfer of capital, entry and stay of foreign staff, access to local finances, stabilization clause, etc. The importance of establishing and the existence of eloquent and integrated standards of treatment is a condition for survival in the face of international economic crises.

²⁶ IIAs is the acronym for International Investment Agreements. They are divided into two: (1) Bilateral Investment Treaties ("BITs") and (2) Treaties with Investment Provisions ("TIPs").

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Space forces and the purpose of excuse for the militarization of outer space: an international crime against peace

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Abstract

Triggered by the recent establishment of the U.S. Space Force, the concept of developing national space forces raises many questions concerning peace and humanity, which simultaneously contradict the guarantee of peace and safety. It is generally assumed that the militarization of outer space manifested by space forces would represent a symbol of the threatening power and dominance of space-faring nations. Considering outer space as a contemporary war zone, however, would legally represent a violation of the Outer Space Treaty, even though the treaty itself contains major loopholes legally allowing hostile extraterrestrial activities. The main purpose of this paper is to legally analyze the militarization of outer space from two contrasting perspectives: national security versus international crime against peace, where national predispositions that lead to the initiation of extraterrestrial wars of aggression are recognized as international crimes against peace, meaning that space forces would likely run afoul of international space law.

Keywords: *space force; militarization; Outer Space Treaty; national security; aggression; international crime.*

JEL Classification: K33

1. Introduction

Space militarization has been a potential consideration over the past few decades, where legal control of Earth orbits have inspired the concept of *Space Forces* – a special national military branch that conducts space warfare. Military space power speculations slowly began to realize with the development of rocket technology – the prerequisite for exploring and exploiting outer space – and two broad schools of thought emerged. The first saw space largely in scientific and explorational terms, perhaps most clearly encapsulated with the creation of the National Aeronautical and Space Administration (NASA) during the Eisenhower

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administration and John F. Kennedy's New Frontier. The conflicts among societies and states would be put aside in favor of global cooperation for the common good.⁴ Such principle is additionally supported by the 1967 Outer Space Treaty (OST), which contradicts the concept of the militarization of outer space. The other school of thought saw the future of outer space-exploration and exploitation in terms of the natural rivalry between societies and states common to history. Space could not be divorced from the political reality of the world. While regrettable for many, the idea of outer space as the ultimate high ground promised a distinct advantage to states able to exploit it for terrestrial purposes, as reiterated by the most recent *U.S. National Space Policy*: "those who effectively utilize space will enjoy added prosperity and security and will hold a substantial advantage over those who do not."⁵ The great power system may be defined as the set of relationships among great powers, with their rules and patterns of interaction (a subset of the international system). Great powers have special ways of behaving and of treating each other that do not apply to other states. The most powerful of great powers, those with truly global influence, have been called *superpowers*. This term generally meant the United States and the Soviet Union during the Cold War, but most IR scholars now consider the United States to be the world's only superpower.⁶

2. The evolution of space forces establishments

A space force represents a national military branch responsible for the conduct of space warfare and space operations, being classified under a country's armed forces. Previously, a space force was almost always considered a part of the air force. Only the Russian Space Forces had previously been an independent space force from 1992 to 1997, and from 2001 to 2011, until it was reestablished in 2015 as a branch of the Russian Aerospace Forces. The Russian Armed Forces were established on 7 May 1992, enabling the creation of VKS (Russian Space Forces). Furthermore, on 1 June, 2001, in the history of the armed forces of the Russian Federation is opened the new page: for the performance of the President's Decree of the Russian Federation of 24 March, 2001, and resolution of the Security Council of the Russian Federation of 6 February, 2001, *space troops* are formed and approached the accomplishment of their objectives in the destination. The creation of space troops dictated by the real growth of the role of national space complexes and systems in the information input of a force activity of Russia is the most important element of further strengthening of defense and national

⁴ Wilson W.S. Wong & James Fergusson, *Military Space Power: A Guide to the Issues*, ABC-CLIO, Santa Barbara, 2010, p.1.

⁵ *Ibid.*, p. 2.

⁶ Joshua Goldstein & Jon Pevehouse, *International Relations: International Edition*, Pearson, London, 1994, p.12.

safety.⁷ Given that troops are defined as soldiers on duty in a large group allows for speculations related to such “soldiers” that would possess a military status. Astronauts are not employees, but militaries hired and working for the United States of America via the National Aeronautics and Space Administration (NASA). All the astronauts have military grades.⁸ Space troops are a fundamentally new branch of service providing Russia’s safety in the space sphere. The integration of associations, connections and parts of the starting, control KA, warning about the rocket attack, the control of outer space and antimissile defense into one branch of service was dictated, in the first place, by the fact that they have one sphere of application - space.⁹ Military activities manifested in outer space are strictly forbidden, raising the dilemma as to why space forces exist when space warfare is legally prohibited. However, President Trump has signed the 2020 National Defense Authorization Act and with it directed the establishment of the U.S. Space Force (USSF) as the sixth branch of the armed forces. The USSF is part of the Department of the Air Force, much as the U.S. Marine Corps is part of the Department of the Navy. Furthermore, the purposes of the USSF unequivocally manifest potentially hostile and aggressive tendencies, as stated: *“in military operations, space is not just a place from which we support combat operations in other domains, but a warfighting domain in and of itself,”* Gen. Mark Milley, Chairman of the Joint Chiefs of Staff, said in the same statement. *“Our adversaries are building and deploying capabilities to threaten us, so we can no longer take space for granted. The U.S. Space Force is the necessary and essential step our nation will take to defend our national interests in space today and into the future.”*¹⁰

Despite such claims, according to the established United States Space Force Act, as part of the *National Defense Authorization Act for Fiscal Year 2020* (S. 1790), the Space Force shall be organized, trained, and equipped to provide:

1. Freedom of operation for the United States in, from, and to space; and
2. Prompt and sustained space operations;

And by the same token, it is stated that the Space Force’s duties are to:

1. Protect the interests of the United States in space;
2. Deter aggression in, from, and to space; and

⁷ *Russian Space Forces (VKS)*, Global Security, 2016, available at <https://www.globalsecurity.org/space/world/russia/vks.htm> (last accessed May 29, 2021).

⁸ Louis de Gouyon Matignon, *The Skylab Strike and the Need for an Outer Space Labour Law*, Space Legal Issues, 2019, available at <https://www.spacelegalissues.com/the-skylab-strike-and-the-need-for-an-outer-space-labour-law/> (last accessed May 29, 2021).

⁹ *Russian Space Forces (VKS)*, *op. cit.*

¹⁰ Leonard David, *Trump Officially Establishes US Space Force with 2020 Defense Bill Signing*, Space, 2019, available at https://www.space.com/trump-creates-space-force-2020-defense-bill.html?utm_source=notification (last accessed May 30, 2021).

3. Conduct space operations;¹¹

By establishing a new service, the U.S. government is using organizational means to consolidate military space activities, increase advocacy for military space, and build new capabilities. In addition to or instead of reorganizing, policymakers could reallocate, add, or subtract resources; alter processes; or even just provide rhetorical support for change. Although administration and DoD leaders did provide statements supporting the formation of a Space Force, their primary effort has been organizational, to build a new service.¹² The application of a cooperative security regime toward outer space can reduce space warfare. The central purpose of cooperative security arrangements is to prevent war and to do so primarily by preventing the means for successful aggression from being assembled, thus also obviating the need for states so threatened to make their own counter-preparations. Hence, the formation of a new security order requires that cooperative security arrangements be extended to other forces and potential theaters of military engagement. Clearly that exercise will stretch the minds of all those who's thinking about security have been premised on confrontational methods.¹³ On the other hand, the People's Liberation Army Strategic Support Force (PLASSF), being the fifth branch of the Chinese People's Liberation Army (PLA), legally and objectively differentiates from previous forces. It represents a combination of multiple warfare forces, including electronic warfare, psychological warfare and cyber warfare units. Within the PLA, debates about whether to build a space force date back to the mid-2000s; both the PLA Air Force and Rocket Force appeared to seek the lead in this new domain. For instance, in 2009, then-PLA Air Force Commander Xu Qiliang had argued for the creation of a space force in response to increasing competition in space. In certain respects, its structure may thus reflect an organizational compromise, creating a new structure that centralized the control of these strategic capabilities directly under the Central Military Commission.¹⁴ While the State Council produced space policy white papers in 2000, 2006, and 2011, the CCP's vision for future uses of space remains unclear. China's space ambitions are in part peaceful in nature. Yet technologies can also be used with ill-intent, and military applications of dual-use space technology are a principle concern: space technology increases the capacity of the PLA to project military power vertically into space and horizontally beyond its

¹¹ National Defense Authorization Act for Fiscal Year 2020, S. 1790, 2019, the 116th United States Congress, Conference Report to accompany S.1790, available at <https://docs.house.gov/billsthisweek/20191209/CRPT-116hrpt333.pdf> (last accessed May 30, 2021).

¹² Micheal Spiritas et al, *A Separate Space: Creating a Military Service for Space*, Rand Corporation, Santa Monica, 2020, n.p.

¹³ Ashton B. Carter, William J. Perry & John D. Steinbruner, *A New Concept of Cooperative Security*, Brookings Institution Press, Washington, 2010, p. 7.

¹⁴ Elsa B. Kania, *China has a 'Space Force'. What Are Its Lessons for the Pentagon?* Defense One, 2018, available at <https://www.defenseone.com/ideas/2018/09/china-has-space-force-what-are-its-lessons-pentagon/151665/> (last accessed May 30, 2021).

immediate periphery. Freedom of action in space offers the PLA potential military advantages on land, at sea, and in the air. At present, PLA space and counterspace programs do not appear integrated from an organizational, operational planning, or acquisition perspective. Yet the PLA is rapidly improving its space and counterspace capabilities in order to support CCP interests and defend against perceived challenges to sovereignty and territorial integrity.¹⁵ When manifesting space warfare as a “Space Force” military branch, it primarily consists of a Space System Department. The PLASSF’s Space Systems Department, evidently a *de facto* ‘Space Force’ for the Chinese military, has consolidated control over a critical mass of China’s space-based and space-related capabilities. The establishment of a unified structure through the Space Systems Department seems to reflect a response to organizational challenges that resulted from the prior dispersal of these forces, systems, and authorities across the former General Armament Department and General Staff Department.¹⁶ Distinguishing legal outcomes and responsibilities conducted by a *de facto* vs. a *de jure* Space Force would manifest the difference between factual and legal recognition. The conducting practices of a *de jure* Space Force would be legally recognized while those of a *de facto* Space Force would not, questioning whether the conducts of a *de facto* Space Force would be legally recognized as an international crime against peace, besides its objectives of proving national security. Another obvious difference between the PLASSF, on one hand, and the Russian Aerospace Forces and the USSF, on the other, is its organizational structure and military objectives. While the Russian Aerospace Forces and the USSF’s main objective focus on aerospace warfare, the PLASSF displays a combination of various forces operating under a single military branch. Even so, this is not the case with identical military forces originating from developing space-faring nations, such as the French Air and Space Force, which also puts emphasis on general aerospace power, rather than a combination of different forces as in the PLASSF’s case. The lead organization within the PLA for counterspace operations remains an open question, as does the relationship between national space and counterspace policies and programs. GAD-affiliated organizations have produced assessments of space strategy, characterizing space power and advocating the prioritization of space technology in order to further PLA warfighting under conditions of “informatization,” including counterspace operations and “space superiority.” Analysts differentiate between “hard” and “soft” counterspace measures, and the potential relevance of an independent “space force” that would centralize space operations under a unified command. Discussion of an independent space force has been underway since the 1990s, and resolution of the issue has yet to clear.¹⁷

¹⁵ Mark A. Stokes & Dean Cheng, *China’s Evolving Space Capabilities: Implications for U.S. Interests*, The U.S.-China Economic and Security Review Commission, Washington, 2012, p.6.

¹⁶ Elsa B. Kania, *op. cit.*

¹⁷ Mark A. Stokes & Dean Cheng, *op. cit.*, p. 44.

3. Space as a potential war-fighting domain

Given its violent first half, a most remarkable feature of the second half of the twentieth century was the absence of World War III. Instead, there was a *cold war*, a period of intense hostility without actual war. The hostility was so intense that many expected armed conflict between the superpowers.¹⁸ During the Cold War, the world's two greatest superpowers – the Soviet Union and the United States of America – spent large proportions of their GDP on developing military technologies. Both the U.S. and the Soviet Union began to develop anti-satellite weapons to blind or destroy each other's satellites. Furthermore, the superpowers developed ballistic missiles to enable them to use nuclear weaponry across great distances.¹⁹ Recent events have rekindled public attention regarding the question of militarization and weaponization of outer space.²⁰ Conceptualizing military space operations takes place at two levels. One involves developing applicable doctrine or policy; and the other activity involves the preliminary but necessary step of classifying what exactly military space operations entail in practice. Such a categorization helps focus one's attention upon critical functions whether they remain largely classified programs or not.²¹ The most pertinent, and of the most concern regarding the future of U.S. military space operations, are the "Joint Doctrine for Space Operations", published by the Office of the Joint Chiefs of Staff in August 2002, and the U.S. Air Force "Counterspace Operations" doctrine published in August 2004. Both of these documents are as of May 2007 still operable. The Joint Doctrine lays out four primary mission areas for military space operations: **"space control, force enhancement, space support and force application."**

- **"Space control operations** provide freedom of action in space for friendly forces, while **when directed, denying it to an adversary**, and include the broad aspect of protection of U.S. and U.S. allied space systems and negotiation of enemy adversary space systems. Space control operations encompass all elements of the space defense mission and **include offensive and defensive operations** by friendly forces to gain and maintain space superiority and situational awareness if events impact space operations."

- **"Space force enhancement** operations multiply joint forces effectiveness by enhancing battlespace awareness and providing needed warfighter support..."

- **"Space support** operations consist of operations that launch, deploy,

¹⁸ Joseph S. Nye & David A. Welch, *Understanding Global Conflict and Cooperation: An Introduction to Theory and History*, Pearson, London, 2014, p. 150.

¹⁹ M.N. Sirohi, *Military Space Force and Modern Defense*, Vij Books, New Delhi, 2016, p. 2.

²⁰ Cassandra Steer, *Why Outer Space Matters for National and International Security*, Center for Ethics and the Rule of Law (CERL), Philadelphia, 2020, p. 2.

²¹ Roger Handberg, *Seeking New World Visitas: The Militarization of Space*, Greenwood Publishing Group, Westport, 2000, p. 119.

augment, maintain, sustain, replenish, deorbit and recover space forces, including the command and control network configuration for space operations..."

• **Space force application** operations consist of attacking against terrestrial-based targets carried out by military weapons systems operating in or through space.²²

The United States Space Command, in conjunction with the United States Strategic Command, is explicitly organized to implement these four intertwined missions of military space operations.²³ Denoting space as a warfighting domain is not merely a descriptive tag; it has intended normative effects. It falls in line with arguments that the United States should try to exercise domain control in space. Many who work in national security may argue that domain control is the best way to ensure adversaries do not gain the upper hand.²⁴ According to the Dictionary of Military Terms, the concept of Space Control represents the following: "*combat, combat support, and combat service support operations to ensure freedom of action in space for the United States and its allies and, when directed, deny any adversary freedom of action in space.*"²⁵

Nowadays, near-Earth orbits do not look like anything before the beginnings of the Cold War, being cramped with various spacecrafts, rockets, satellites and telescopes, creating the perception that the intentions for the domination of space are more competitive than several decades ago. The utilization of national satellites, in particular, allows the indirect militarization of outer space, as well as causing international aggression. Features of satellite communications (sat-coms) particularly appropriate to a military role include the ability to communicate worldwide over long or short ranges irrespective of natural ionospheric variations, with no dependence on an existing communication infrastructure, and the ability to establish communications within minutes of a terminal arriving in location. Unlike their civilian counterparts, military ground terminals may also have to contend with an intentionally hostile electromagnetic environment at the onset of jamming, and be required to minimize their risk of detection through interception of the uplink carrier.²⁶ Within the Conference on Disarmament, the United States has opposed discussion of the 2002 working paper "Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of

²² United States Congress, *Weaponizing space: is current U.S. policy protecting our national security?: hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, House of Representatives, One Hundred Tenth Congress, first session, May 23, 2007.*, United States Congress, Washington, 2007, p. 8.

²³ Roger Handberg, *op. cit.*, p. 119.

²⁴ Cassandra Steer, *Why Outer Space Matters for National and International Security*, Center for Ethics and the Rule of Law (CERL), Philadelphia, 2020, p. 33.

²⁵ U.S. Department of Defense, *Dictionary of Military and Associated Terms*, U.S. Department of Defense, Virginia, 2009, p. 505.

²⁶ John Everett, *VSATs: Very Small Aperture Terminals*, Institution of Engineering and Technology (EIT), London, 1992, p. 389.

Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects". In the General Assembly, it has voted against resolutions on the Prevention of an Arms Race in Outer Space and on Transparency and Confidence-Building Measures in Outer Space Activities, stating in its Explanation of Vote that there is no arms race in outer space and "thus no arms control problem for the international community to address." Some fear that this position aims to maintain conditions allowing the use of outer space for conducting global information operations.²⁷

4. Aspects of space warfare as a threat to humanity and the Outer Space Treaty

The United States has largely taken the position that space warfare is unavoidable and has, thus, championed the mantra of achieving U.S. space dominance in an effort to prevent potential adversaries from altering the balance of power in the world. This approach could be a driving factor to a major conflict between the United States, China, Russia and/or others that could render space unusable for future generations.²⁸ The United States is preparing to make space a new arena of war. U.S. military documents speak of the U.S. seeking to "control space" and from space "dominate" the earth below. The U.S. military, furthermore, would like to base weapons in space. Billions of tax dollars are being poured annually into U.S. preparations for space warfare. However, what the U.S. is up to is a violation of the intent of the OST, the landmark of 1967 international agreement that sets space aside for peaceful purposes.²⁹ The concept of international cooperation administers the elimination of military engagement and international aggression, highlighted by article III of the OST: "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."

Despite its intentions of global peace and understanding, the likelihood to base weapons in space supports space militarization. According to Article IV of the OST, "the Moon and other celestial bodies shall be used...exclusively for peaceful purposes"; the placement of nuclear weapons or other weapons of mass destruction in orbit around the Earth is prohibited; and the establishment of military bases on the Moon or any other "celestial body," meaning any natural body in space, is prohibited. With the approval of a budget for the new U.S. Space

²⁷ Sergei Komov, Sergei Korotkov & Igor Dylevski, *Military aspects of ensuring international information security in the context of elaborating universally acknowledged principles of international law*, Information and Security, 2007, Vol. 47, p. 40.

²⁸ Cassandra Steer & Matthew Hersch, *War and Peace in Outer Space: Law, Policy and Ethics*, Oxford University Press: Oxford, 2021, p. 15.

²⁹ Karl Grossman, *Weapons in Space*, Seven Stories Press, New York, 2001, p. 9.

Command, it appears that military contest in space is on the rise, which may bring under threat the “peaceful purposes” principle of the OST.³⁰ Such space militarization-related principles initiated the banning of signatories' placing of nuclear weapons or any other weapons of mass destruction in orbit of Earth, installing them on the Moon or any other celestial body, or to otherwise station in outer space. The OST is the most important international law agreement for preventing a militarization of space; however, it does not explicitly ban the detonation of nuclear weapons in space, which could be a technique for intercepting missiles. Both the U.S. and the Soviet Union/Russia have done the research and development for this technique and are capable of deploying it, nor does the Treaty ban missile trajectories that pass through space carrying a conventional warhead or a weapon of mass destruction. Finally, there is no provision to prevent conventional weapons and military surveillance, communication and navigation satellites from being stationed in space.³¹ By contrast, *space weapons* are weapons used in space warfare. They include weapons that can attack space systems in orbit (i.e. anti-satellite weapons), attack targets on the earth from space or disable missiles travelling through space. In the course of the militarization of space, such weapons were developed mainly by the contesting superpowers during the Cold War, and some remain under development today.³² The concept of “space weapon” is not defined within any international treaty, international customary law, or domestic U.S. law. While treaty and customary law do provide some guidance on the legality of weaponization, no comprehensive definition of “space weapon” is provided. *The importance of defining space weapon cannot be understated; for whoever defines space weapons defines the debate of weaponization.* The question of what constitutes a “space weapon” is a matter of degree. One can theorize that a broad definition of space weapon would include terrestrial and space-based systems with the capacity to destroy damage or interfere with a space asset or Earth-based asset from space. Conversely, a narrow definition of space weapons would limit its application to systems in space whose designed purpose is to physically destroy or damage an object in outer space.³³ Such terminological disadvantage suppresses the utilization of ground-based anti-satellite weapons (ASATs) as a manifestation of space warfare - combat that takes place in outer space, i.e. outside the atmosphere. Technically, as a distinct classification, it refers to battles where the targets themselves are in space. Space warfare therefore includes *ground-to-ground space warfare*, such as attacking satellites from the Earth, as well as *space-to-space warfare*, such as satellites attacking satellites.³⁴ There are

³⁰ Cassandra Steer, *op. cit.*, p. 11.

³¹ *Space Weapons*, War and Peace, 2013, available at <http://warpp.info/en/m7/layers/space-weapons> (last accessed May 30, 2021).

³² M. N. Sirohi, *op. cit.*, p. 7.

³³ Micheal C. Mineiro, *The United States and the Legality of Outer Space Weaponization: A Proposal for Greater Transparency and a Dispute Resolution Mechanism*, *Annals of Air and Space Law*, 2008, Vol. 33, p. 446.

³⁴ M. N. Sirohi, *op. cit.*, p. 8.

three types of space weapons, classified by their placement and the location of their target, being either terrestrial or extraterrestrial:

- ❖ **Earth-to-space weapons** (weapons that have the capacity to attack space systems, such as satellites orbiting in space, from the Earth)
- ❖ **Space-to-space weapons** (weapons on orbiting space systems that have the capacity to attack other orbiting space systems, such as satellites)
- ❖ **Space-to-earth weapons** (weapons placed on a space system, including orbital weaponry and orbital bombardment, that have the capacity to attack certain targets on Earth, or disable missiles traveling through space, shot from ground-to-space weapons)

According to this classification, ASATs identify as Earth-to-space type of weapons, meaning they are specially designed to destroy or damage orbiting satellites for strictly strategic military purposes. *Marcia S. Smith*, author of the Brief for Congress entitled “U.S. Space Programs Civil, Military and Commercial” of April 2003, in relation to such weapons, says: “... *DOD has a long standing interest in developing capabilities to protect U.S. satellite systems and to deny the use of space to adversaries. For many years, anti-satellite (ASAT) weapons designed to attack other satellites in orbit were viewed as the primary means for denying the use of space to adversaries... One disadvantage of ASAT weapons is that they may create debris that could damage other satellites.*”³⁵

As long as human beings have been sending satellites into space, they have been contemplating ways to destroy them. In recent years, the technology behind ASAT weapons has progressed considerably. What’s more, the ability to launch and destroy them extends beyond the two traditional superpowers (the US and Russia) to include newcomers like India, China, and others.³⁶ Considering the spirit of the law, “the conclusion appears to be that anti-satellite weapons are legal, *de lege lata*, but should be illegal, *de lege ferenda*.” The type of ASAT system being considered becomes critical. While there is no formal delimitation of outer space, earth orbit is most often considered outer space. Therefore, an orbital (space-based) defense would be subject to international law, where a ground-based system would not.³⁷

5. The militarization of outer space: national security versus international crime against peace

³⁵ Marietta Benkö & Kai-Uwe Schrogl, *Space Law: Current Problems and Perspectives for Future Regulation*, Eleven International Publishing, Utrecht, 2005, p. 164.

³⁶ Matt Williams, *Now that Many Countries Have the Ability to Destroy Satellites, the US is Figuring Out Ways to Make Them More Armored*, Universe Today, 2019, available at <https://www.universetoday.com/143801/now-that-many-countries-have-the-ability-to-destroy-satellites-the-us-is-figuring-out-ways-to-make-them-more-armored/> (last accessed May 30, 2021).

³⁷ Joan Johnson-Freese, *The Viability of U.S. Anti-satellite (ASAT) Policy: Moving Toward Space Control*, DIANE Publishing, Collingdale, 2000, p.11.

Arguments in relation to the conduct of space warfare have already been set when the criminality of nuclear weapons was discussed between the U.S. and the Soviet Union. Unfortunately, the prospects for meaningful strategic nuclear arms reductions were seriously set back by the Reagan administration's proclamation of the so-called Strategic Defense Initiative (SDI) in 1983. That act represented nothing less than a formal statement by the United States government of its intention to pursue a policy that will eventually result in the commission of numerous material breaches of the 1972 U.S.-U.S.S.R. Anti-Ballistic Missile Systems (ABM) Treaty.³⁸ Considering that anti-ballistic missiles (ABMs) are surface-to-air missiles, their primary goal is to counter intercontinental ballistic missiles (ICBMs) which classify as terrestrial-based anti-satellite weapons and is simultaneously utilized for nuclear weapons delivery. Furthermore, the ABM Treaty must be strengthened by the conclusion of a separate international convention that prohibits the development, testing and deployment of anti-satellite weapons systems, which can also be used for SDI purposes.³⁹ Some of the discussions and disagreements about how the U.S. should organize and manage its national security space activities go all the way back to the opening of the Space Age. Debate around these issues intensified during the past several years, but the United States was not able to reach consensus. Between 2017 and 2019, much of the debate was in Congress and swirled around the inability of the House of Representatives and Senate Armed Services Committees to reach a compromise on how to organize.⁴⁰ There is a great deal of work that must be accomplished during the eighteen months Congress allotted to establish the initial operation capability of the Space Force and implement several other key provisions in the Space Force Act. The act established the U.S. Space Force, a distinct armed force within the Department of the Air Force under the Secretary of the Air Force and created a new General Officer position, the Chief of Space Operations (CSO).⁴¹ Particularly regarding the legality of the USSF, policy makers speculate that such military branch is likely to run afoul of international space law. Moreover, Article 2(4) of the 1945 United Nations Charter states: "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*"⁴²

Although the U.S. had previously written and signed a UN treaty to keep space for peaceful purposes, a central component in America's grand strategy was militarization of space. RAD stated that "maintaining control of space will inevitably require the application of force both in space and from space, including

³⁸ Francis A. Boyle, *The Criminality of Nuclear Weapons*, Nuclear Age Peace Foundation, Santa Barbara, 1991, p. 10.

³⁹ *Ibid.*, p. 10.

⁴⁰ Cassandra Steer & Matthew Hersch, *op. cit.*, p.154.

⁴¹ *Ibid.*, p.156.

⁴² United Nations, *Charter of the United Nations*, United Nations, San Francisco, 1945, p. 3.

but not limited to antimissile defenses and defensive systems capable of protecting U.S. and allied satellites; space control cannot be sustained in any other fashion.”⁴³ Regarding the USSF, it is additionally questioned what actions would constitute international crimes against peace. According to Principle VI of the Nuremberg Principles, the crimes hereinafter set out are punishable as crimes under international law;

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).⁴⁴

The U.N. Charter explicitly defines the means to maintain international peace and security as the “effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace.” Hence, national-security law in outer space accepts military action in outer space as necessary and legitimate, whether it is pre-emptive or to maintain the conditions of peace.⁴⁵ Furthermore, the Security Council has explicit authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression. The Security Council may then recommend or decide measures to be taken in accordance with Articles 41 and 42 of the U.N. Charter. Article 41 of the U.N. Charter allows measures not involving the use of armed force. The Security Council, thus, has the ability to determine what could be a threat or breach of the peace in outer space.⁴⁶ The Law of Armed Conflict has been defined as “that part of international law that regulates the conduct of armed hostilities.” It generally encompasses international treaty law and customary international law regulating the methods of warfare, and it has implications for the conduct of space warfare and developing its principal strategies. Serving as the foundation of the Law of Armed Conflicts is the inherent right to self-defense. Furthermore, this right is delineated in Article 51 of the United Nations Charter, which states, “Nothing... shall impair the inherent right of individual or collective self-defense if an armed attack occurs.” This well-recognized right of self-defense is one of the several reasons that offensive operations should be considered appropriate when another nation’s interest or sovereignty is threatened.⁴⁷ Such law manifested under the right of self-defense would not apply unless a prior space-related attack or its preparations performed by aggressive military

⁴³ Jack Nelson-Pallmeyer, *Authentic Hope: It’s the End of the World as We Know it but Soft Landings are Possible*, Orbis Books, New York, 2012, p.102.

⁴⁴ United Nations, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, United Nations, 2005, p.2.

⁴⁵ Michel Bourbonniere, *National-Security Law in Outer Space: The Interface of Exploration and Security*, *Journal of Air Law and Commerce*, 2005, Vol. 70, p. 8.

⁴⁶ *Ibid*, p.9.

⁴⁷ John J. Klein, *Space Warfare: Strategy, Principles and Policy*, Routledge, London, 2012, p.70.

objectives is performed by another space-faring nation. But how are such hostile actions (or preparations) legally interpreted? While there is a historical precedent for using force to defend one's interests, policy must eventually address where and in what manner force is to be applied in space. While acknowledging that future space policy will continue to be formulated, an understanding of the roles of offensive and defensive strategy in space is vital to both warfighters and policy makers alike.⁴⁸ Space militarization can be further analyzed by the conduct of both offensive and defensive strategies;

Offensive strategy is called for when political objectives necessitate wresting or acquiring something from the enemy. The need for such a strategy in space, along with its military operations, comes from the necessity of protecting one's interests and ensuring access to celestial lines of communication. It is to be expected that a combination of offensive strategy, operations, and tactics will all be necessary ingredients to obtain general or persistent command of space, thereby ensuring one's access and use of space. As Clausewitz and Corbett have noted, the offensive is the more "effective" form of war and, as a matter of general practice, should be attempted by the stronger space power.⁴⁹

Defensive strategy is called for when political objectives necessitate preventing the enemy from achieving or gaining something. By their inherent nature, the defense is the "stronger" form of war and should be used extensively by less capable space forces until the offensive can be assumed. Some strategists have commented that defensive strategy is not always the stronger form of war in space, saying that it depends on the kind of orbit the satellite is in. Thus, depending on the orbit, the offense may in fact be the stronger form of warfare. Specifically, it has been said, "In space, defense is probably the stronger form of waging war in the mid earth or high earth orbits, but probably not in low earth orbits. There is some safety in sheer distance (in most cases, equal to time)."⁵⁰ In this context, the division between stronger and weaker "space powers" indicates multiple space-faring nations. Motivations behind their establishment and comparing whether stronger forces manifest offensive strategy as opposed to weaker forces that would likely manifest defensive strategy must be analyzed. Since the offensive is recommended to be utilized by the stronger space power, it is understandable why the U.S. have strived for the establishment of the USSF, including President Trump's insistence on militarization of space.

To his desire to restore the prestige of the United States and strengthens its military institutions, especially in the face of Russia and China, as well as to use the nuclear space deterrent as an option of total destruction in the event of a global war, in addition to securing American satellites and freedom of movement to use space.

The U.S. President has said during his visit to the Miramar Air Force

⁴⁸ Ibid, p.73.

⁴⁹ Ibid, p.73.

⁵⁰ Ibid, p.75.

Base in California on August 13: “*Space is a battlefield like Earth, air, and the sea.*” He added, “We have the air force and we will have the space force.” Emphasizing that when it comes to defending America, it is not enough for us to have a presence in space. Rather, we must have dominance over it.”⁵¹ Such statement clearly manages to reflect the intention of the militarization of outer space by a single nation, however, the question of whether such concept would represent a manifestation of ensuring national security or an international crime against peace, is still open. In an attempt to legalize space militarization, Trump has attempted to interpret Chapter 51 of the UN Charter, which stipulates that “the state can use military force to protect itself from hostilities,” as well as Chapter III of the OST, which states that “the International Law and the Charter of the United Nations allow the exploration and use of outer space”, justifying the endeavors of any country to apply space power to protect its security and interests.⁵² However, both excerpts seem contrasting by theoretical content and purpose. First of all, Chapter III of the OST specifies that the exploration and use of outer space is to be conducted for peaceful purposes. What’s more, Chapter 51 provides that military force utilization could only occur after manifestations of hostility. According to the DoD Dictionary of Military and Associated Terms, a hostile act is defined as follows: an attack or other use of force against the United States, United States forces, or other designated persons or property to preclude or impede the mission and/or duties of the United States forces, including the recovery of United States personnel or vital United States Government Property.

While this definition implies that while hostilities are understood as acts of warfare, stronger space-faring nations could recognize “unfriendly” conducts of foreign space-faring nations against their interests, the USSF or any personnel or objects in outer space as hostilities. Another presumption concerns individual and state liability for international crimes against peace particularly conducted by nationally established space forces. The proposed structure for a U.S. Space Force included a Space Operations Force operating under the Space Command of a four-star general or flag officer, along with an economically and technologically focused Space Development Agency, as well as Service and Support department.⁵³ Military personnel of such ranks would supposedly be held responsible as natural persons regarding international crimes against peace channeled through the U.S. Space Force in the case of deliberate manifestations of threat or use of force against foreign nations. The 1991 Draft Code of Crimes states in Article 3(1) that “an individual who commits a crime against the peace and security of mankind is responsible therefore and is liable to punishment.”⁵⁴ Moreover, state liability is also

⁵¹ Amr Soliman, *Space Force*, A G Printing and Publishing LTD, Middlesex, 2020, n.p.

⁵² Ibid.

⁵³ Adam Irish, *The Legality of a U.S. Space Force*, Opinio Juris, 2018, available at <http://opiniojuris.org/2018/09/13/the-legality-of-a-u-s-space-force/> (last accessed May 30, 2021)

⁵⁴ Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press: Cambridge, 1999, p.541.

considered, as the 1996 Draft Code of Crimes further addresses the Responsibility of States in Article 4, which states: “The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.”⁵⁵ Even so, national criminal law principles should influence notions of both individual and state liability. Whether criminal responsibility arises or not depends on the existence of a proscribing norm commonly contained in the “special part” of national criminal codifications and on the norms establishing the basis for the responsibility of an accused in accordance with the requirements of what is commonly contained in the “general part” of national codifications.⁵⁶

6. Conclusion

Principles of legality dictate military-related operations of national space forces and their purpose of excuse in relation to extraterrestrial militarization. Considering such manifestations as crimes against peace, according to international criminal law, the conduct of space warfare significantly endangers the quality of life on Earth. Moreover, the concept of utilizing near-Earth orbits as potential war-fighting zones should not be supported. The use of the word ‘aggression’ introduced a new perspective on warfare. It signaled that a nation was not being punished for losing a war, as had traditionally been the case, but for starting one.⁵⁷ However, aggression is on its face a threat to peace and security, but not all acts of aggression factually threaten the peace and security of mankind.⁵⁸

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⁵⁵ Ibid, p. 439.

⁵⁶ Ibid, p. 394.

⁵⁷ Kirsten Sellars, *‘Crimes against Peace’ and International Law*, Cambridge University Press: Cambridge, 2013, p.8.

⁵⁸ Cherif, Bassiouni, *International Criminal Law: Sources, Subjects and Contents*, Brill Publishers, Leiden, 2008, p.176.

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General issues regarding the risk of water pollution

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Abstract

Global water resource protection policy has, over time, undergone a constant process of transformation and adaptation, in the sense that it has faced a number of challenges and uncertainties dominated by economic, political, cultural, climatic and to solve the problems generated by humanity through the actions taken for its survival and well-being on earth. For its welfare there has been a substantial increase in civilization, for some states, and an accepted technological and scientific progress, but which over time have unbalanced and degraded the environment and especially there have been massive pollution of water resources. This material discusses general elements on the risks of water pollution with a summary classification of forms of pollution and a summary of the legal instruments governing the area in question, with a presentation of the risks to humanity and the environment in general. The protection against any forms of degradation and pollution of water resources is done by sustaining and streamlining the field with the involvement of all actors in the world, from the public to the private sector.

Keywords: *water resources, pollution, degradation, environment, scientific progress.*

JEL Classification: K32, K33

1. Introduction

"Humanity in order to have a stable and favorable existence on earth must have a favorable and favorable living environment that allows it to develop in moral, social, intellectual parameters, in order to obtain progress and well-being for the present and without it compromises the needs of future generations.

In the desire for progress, man through his ability to capitalize on his experience, to continue to discover, invent, create, prove fit and transform the environment, being able to achieve benefits but also incalculable damage, when this power is used abusively, without reason, without man's knowledge of nature, its laws, and without their strict observance. Ignoring for a long time, the fact that the environment has changed in a negative way as a result of the forced intervention, there were major damages, unprecedented and without the possibility of remedying them. Over time, the world's population has experienced major increases, which in turn produce waste, residues and manure that contribute significantly to the development of the pollution phenomenon."²

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² Lidia Lenuța Bălan, *Environmental protection in the context of pollution prevention and control*, vol. I, University Publishing House, Bucharest, 2014, p.13.

The phenomenon of pollution has become at this time an extremely important topic for humanity, in view of the fact that humanity and the environment are inseparable entities, the existence of the individual on earth being in a relationship of total dependence on the environment, and environmental factors such as: air, water and soil have suffered and are suffering from a series of changes and mutations as a result of excessive use of activities undertaken for human well-being and the achievement of scientific progress.

As we observe, "pollution is, first of all, the work of man, himself a structural element of paramount importance to the environment, which benefits from the positive results of its activity, but which also bears its negative consequences."³

The positive results of human activity, in fact, represent a scientific progress, a development of society with everything that means the economic, social, political, cultural, moral, religious and last but not least the educational component, which over time have represented the basic pillars for survival and ensuring human well-being and scientific progress on earth.

2. The risk of water pollution

Humanity being in a permanent process of development and scientific progress to ensure the well-being of present and future generations has failed to take into account the possibility that all this in time will have side effects on health and life, but also on the environment, essential for the existence of the individual on earth.⁴

Through these activities undertaken by the individual, it could be seen that there has been an increase in human population, a development of the urban, industrial and transport sector ultimately generating excessive pollution of everything that means the environment, for its components: water, atmosphere and soil, substantially and significantly altering the natural state of the environment creating serious and alarming imbalances and degradations for humanity and the environment⁵.

"Pollution designates an activity through which man ruins himself, defiles his own ambiance. Such an action is not characteristic only of man who has entered a period of accelerated development, of contemporary man and not even of man in general. It is a general natural law according to which any living being produces waste which, unlimited in their living environment, makes it impossible

³ Ernest Lupan, *Treaty on Environmental Protection Law*, C.H. Beck, Bucharest, 2009, p. 8.

⁴ Daniela Marinescu, *Treaty on environmental law*, Juridical Universe Publishing House, 4th edition - revised and added, Bucharest, Romania, 2010, p. 76.

⁵ Corneliu Răuta, Stelian Cârstea, *Prevention and control of soil pollution*, Ceres Publishing House, Bucharest, Romania, 1983, p. 142.

for them to continue their activity and even life itself."⁶

"Against the background of major ecological imbalances and disasters recorded worldwide, such as: the sinking of the oil tanker Torrey Canyon and Amoco Cadiz, the first alarm signals were raised on the awareness of the reality of the consequences of environmental pollution that led to the development and adoption of legal instruments that aimed to act through clear measures and rules to prevent and combat pollution."⁷

"Against the background of these disturbances, but in full industrial and urban development and a general state dominated by a depletion of natural factors in the process of globalization, the negative results generated on water have begun to be realized worldwide. Opportunity that determined a general influence and awareness of the human factor in the sense of the appearance in international law of some treaties, conventions concluded between riparian states which determined clear and precise legal instruments related to the obligations of states in the process of sustainable population development and society in general, in preventing, protecting and maintaining the quality of water resources."⁸

The need to ensure a prevention and protection of water resources is done because "water is one of the main factors and triggers that have generated the appearance of life on earth. The natural, vulnerable, limited source, an essential and indispensable condition for the survival and well-being of mankind, water is the fundamental resource for the essence of life in order to carry out and perform all human activities, being used in food, agriculture, industry, services, urbanism and transport. Once seen as an inexhaustible and renewable resource, water has become an inexhaustible resource, an economic good, a commercial good necessary for the realization and implementation of human activities in the context of meeting human needs and ensuring the existence of humanity on earth."⁹

Of all the components of the environment, we note that over time, water resources have been most affected, only if we consider the events occurring in the naval infrastructure, such as: the sinking of the oil tanker Torrey Canyon, 1967 and Amoco Cadiz, since 1987, Erika, since 1999, Prestige, since 2002 and Deepwater Horizon, since 2010 in the Gulf of Mexico. All these examples, highlighted, illustrated significant risks for the aquatic environment, coastal areas and for humanity in general, as a result of oil spills most often caused by oil and gas installations and exploratory drilling.

⁶ Lucian Ghinea, *Nature Defense*, Scientific and Encyclopedic Publishing House, Bucharest, 1978, p. 5.

⁷ Lidia Lenuța Bălan, *Reflection of international and European legislation on the protection of the atmosphere, water and soil in the Romanian legislation. Protection of the atmosphere, water and soil at international, European and national level*. University Publishing House, Bucharest, Romania, 2014, p. 16.

⁸ Lidia-Lenuța Bălan; Anca-Marina Vijdea, *General reflections on the legal protection of waters in Romania*, 6th SWS International Scientific Conference on Arts and Humanities, Conference Proceedings, 2019 Volume 6, ISBN: 9786197408966; DOI: 10.5593/SWS.ISCAH.2019.2, p. 275.

⁹ *Ibid*, p. 275.

In the text above, a first source of pollution of water resources was highlighted, that of oil discharges, but if we refer to the source of pollution, we notice that the pollution of watercourses is represented by a series of sectors of activity, such as: human settlements, industry, agriculture, transport, tourism, as well as mining activities for the extraction and recovery of mineral substances.

The mining activities regarding the extraction and capitalization of the necessary mineral substances have determined the increase of the level of civilization for humanity, of technical progress and of scientific progress, but also well-being for many states of the world, including Romania, but which, over time, have created a series of imbalances and degradations for water resources, for the air component and for the soil component, representing significant and lasting risks for the aquatic environment, humanity and the environment in general.

The question is how can pollution be described and how can it be classified? Studies and research undertaken by doctrinaires have illustrated that "depending on the mode of pollution, environmental pollution can be classified as follows: natural pollution caused by waste and residues of the activity of all living things that facilitate the permanent development of parasitic elements such as lice, worms, bacteria, microorganisms; voluntary pollution caused by human activity voluntarily; accidental pollution that occurs completely by accident.

Depending on the area of expansion we encounter local pollution, regional pollution, global or global pollution. Depending on the effects of pollution, environmental pollution can be classified as follows: biological or bacteriological pollution is generated by infection of absorbent and ingested spaces, which involve metamorphosis of biocenoses and invasions of animal and plant species; physical pollution, which in turn can be classified into: mechanical pollution and thermal pollution; chemical pollution is caused by elements such as carbon, nitrogen, sulfur and their derivatives, heavy metals, plastics, organic matter with a high content of fermentation and pesticides."

But most of the time there are situations that create a series of associated risks, such as accidentally generated pollution that endangers human health and life, the aquatic environment, as well as the major objectives of water supply systems, those with major impact on the transboundary space, of the water resources and those located in the coastal area.

All these pollutions, whether generated directly or indirectly, pose a series of risks to the population, to human health and life, to their movable and immovable property, to life and animal safety, to social, administrative objectives heritage and cultural.

In addition to these highlighted risks, the objectives of economic importance must be protected and protected, as they are necessary in the process of carrying out economic activities for society and humanity. These objectives of economic importance are represented by: commercial entities, industrial platforms, power plants, agro-industrial farms, zootechnical farms, fishing facilities,

ports, dams, dams, as well as other hydrotechnical works that present risk elements in the event of incidents/accidents/damages for the water resources sector.

Also, the naval, road and railway infrastructure, electricity supply networks, gas, water supply and sewerage systems and systems, water treatment and purification pumps, telecommunication networks, are extremely relevant objectives for the sphere to combat the accidental risks of water resources pollution in the context of the prevention and protection of water resources.

Besides all the mentioned, the natural environment is the most affected only if we refer to the aquatic and terrestrial ecosystems, the forest fund, agricultural lands located outside the built-up area and within the built-up areas of the localities.

Major awareness of the economic, social and environmental impact of water resources degradation through oil spills and waste generated by human settlements, industry, agriculture, transport, tourism, as well as mining activities, spread in the aquatic environment have determined a progress for the training and intervention structures for the states of the world.

Thus, humanity through its decision-makers, faced with ecological disasters, regardless of their form of production, accidental or otherwise, which have serious repercussions on the quality of water resources, on the quality of the atmosphere, soil, life, health and the environment in general, has developed, over time, a series of instruments with a universal legal vocation designed to prevent and combat, where possible, the pollution of water resources. Among these instruments with a legal vocation, I mention:

"The 1972 United Nations Conference on the Environment in Stockholm, which does not explicitly provide for concrete measures to protect inland waters against any form of pollution, does contain, among other things, five recommendations with an action plan. which aims to intensify international cooperation between states and the protection of inland waters against pollution. The Conference established a generally binding principle on forms of pollution, such as: residues of toxic or other materials, heat emissions, and other concentrations that their quantity, quality and content cannot be stopped by nature.

The UN Conference on Water in Mar del Plata, (Argentina), 1977, discussed efficient management of border water resources, in the context of an international cooperation between states, which would allow the start of programs and mechanisms for the rational management of water resources.

The Final Document of the Vienna Meeting, adopted at the Conference on Security and Co-operation in Europe (CSCE) in 1989, provided for the fight against all forms of pollution for the protection of transboundary waters and the imposition of States Parties on commitments to co-operate elaboration and adoption of treaties and framework conventions in the field and promotion of a reciprocal exchange of data and information related to the existence of hazardous chemicals in the aquatic environment."

Relevant connotations for the protection of watercourses and international lakes were also registered on the occasion of the initiation of international programs, such as:

- the UNESCO International Hydrological Program which aimed to increase the contribution of hydrology and other matters in the field of water resources protection regarding the adoption of action plans for sustainable water development.

- the draft European Convention for the Protection of International Watercourses against Pollution, in Strasbourg, of 1973, which stipulates the general duty of riparian countries to the same international watercourse to work together to prevent and limit their pollution. This document aimed at a complex approach to the prevention of water pollution in order to establish generic and special duties assigned to countries in order to comply with water quality regulations and discharges into international watercourses of dangerous substances.

3. Conclusions

When we refer to the component of water resources, we notice that over time they have represented and still represent true collectors of residues and wastes that unfortunately have exceeded the natural force of change and integration into environmental components that thus become insufficient and unusable for humanity.

In recent years, although there have been no major disasters and imbalances in the field of water resources, progress has been made in the areas of prevention and safety of the aquatic environment, due to the involvement of the private and public sectors through adaptations to regulations international and European texts by uniform application of applicable standards and regulations.

However, we note that in order to ensure an efficient and lasting protection of water resources, against any forms of pollution and degradation of the aquatic environment worldwide and nationally, we need a general regulatory framework that provides concrete, relevant and efficient solutions. in preventing and combating water resources pollution.

In order to have a sustainable and lasting protection of water resources, regardless of whether we are talking about water resources worldwide, European and national, it is necessary to adopt effective measures to reduce pressures on the environment, water, atmosphere, soil by limiting climate change of pollution regardless of the source of their production, but which have the role of prevention, protection and restoration of aquatic ecosystems, biodiversity in terms of sustainable use of water resources.

The European Union's new biodiversity strategy for 2030 aims to strengthen ecosystems for human well-being and economic prosperity, this instrument has clear objectives, but it all depends on us how much we can involve through our actions to ensure prevention and long-term control of degradation of

the aquatic environment.

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International Criminal Court, restorative or retributive justice?

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Abstract

This study examines the impact of the rigors of international justice on a community accustomed with informal, “authentic” means of resolving conflicts. The elements of this impact are assessed in relation to the interaction between the traditional restorative justice and the retributive justice specific to the International Criminal Court, especially with regard to the conflict in northern Uganda, which is the object of a lawsuit pending before this court. National jurisdictions and the International Criminal Court cannot be analyzed as opposing, alternative institutions, but only as complementary institutions, acting to restore peace and maintain security. Justice and peace are common goals of both jurisdictions. Peace can only be restored through justice, be it national or international. By analyzing the principle of complementarity, and the role of national restorative measures, we conclude that their interference in the proceedings of the International Criminal Court is impossible, both in relation to the provisions of the Statute and to their nature, their character being eminently ethnic, tribal.

Keywords: *International Criminal Court, retributive justice, restorative justice, customary practice of justice, alternative punishments.*

JEL Classification: K33

1. Introduction

In a recent ruling, the Trial Chamber of the International Criminal Court² sentenced Dominic Ongwen, a former commander of the Lord’s Resistance Army (LRA) guerrilla movement in Uganda, to 25 years in prison for war crimes and crimes against humanity. Dominic Ongwen was one of the rebel leaders of the Lord’s Resistance Army involved in the civil war in northern Uganda, which, between 1987 and 2007, under the pretext of imposing its own religious ideology based on the 10 commandments, launched multiple attacks on the civilian population of northern Uganda (of the Acholi ethnic group), resulting in the killing of thousands and the abduction of more than 20,000 children, to be recruited in the group from a young age.

Initially, the intervention of the International Criminal Court was perceived by the Ugandan government as the only chance to dismantle the Lord’s Resistance Army group. Subsequently, the Ugandan government requested the rejection of the prosecutor’s request to open an investigation into the acts

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² ICC, Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, 6 May 2021.

committed by the leaders of the Lord's Resistance Army group, namely the disinvestment of the international court in favour of the traditional Acholi justice system, the only justice system recognized by the population from northern Uganda. The Ugandan government stressed that any intervention by the International Criminal Court would undermine the peace negotiations and annihilate the hard-won amnesty³, after 20 years of armed conflict between the Ugandan government and the Lord's Resistance group.

It has been again brought before the International Criminal Court the issue that international justice is a foreign justice mechanism that is not suitable for African states, which know and recognize only their traditional forms of justice that have been transmitted to them orally, and which were, gradually, legally regulated. The "mato oput" ritual is a form of sanction aimed at repairing the moral, relational and social damage caused as a result of committing a crime.

During the trial before the International Criminal Court, the defence made several requests asking that the court order *a sentence of time served* or a maximum suspended sentence⁴ of 10 years imprisonment⁵, so that Dominic Ongwen can be subjected to the ritual "mato oput" imposed by Ker Kwaro Acholi, the only punishment recognized by the Acholi ethnic group from northern Uganda, the victim of the acts of violence.

In the opinion of the defence, the application of a restorative measure can be ordered only outside the criminal matrix, being completely distinct from the "Western" model of justice. The defence argued that only the traditional minimalist justice could give criminals and victims a central role in resolving conflicts.

The International Criminal Court, despite the fact that it could have rejected the defence's requests under Art. 23 of the Statute, regulating the principle of the legality of incrimination, as well as under Art. 77, which regulates the punishments that may be ordered, however, understands to further motivate their rejection, invoking the fact that "*it may appear from the Defence submissions, if taken at face value, that the Chamber is insensitive to established cultural norms and processes*".

³ *Uganda's Amnesty Act of 2000* provides for the amnesty of those members of the Lord's Resistance Army who abandon the group and give up any form of support for the civil war waged by this group against the Ugandan government since January 26, 1986. According to Art. 3 of *Uganda's Amnesty Act of 2000*, those pardoned will benefit from "a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State". The document is available online at: <https://www.c-r.org/accord/northern-uganda/reconciliation-and-justice-%E2%80%98mato-oput%E2%80%99-and-amnesty-act-2002> [last accessed on 13.06. 2021].

⁴ ICC, ICC-02/04-01/15, *op. cit.*, para. 15.

⁵ ICC, ICC-02/04-01/15, *op. cit.*, para. 17: "in the event that the Chamber found Dominic Ongwen guilty punishment be suspended and that the Court should [...] order Mr Ongwen to be placed under the authority of the Acholi justice system to undergo the Mato Oput process of Accountability and Reconciliation as the final sentence for the crimes for which he is convicted".

2. International Criminal Court. The principle of complementarity

The jurisdiction of the International Criminal Court is complementary to national criminal jurisdictions. According to Art. 17 of the Statute, the Court may exercise its own *ius puniendi* only in the cases expressly provided in the Statute, namely in the situation where a state does not have the will, is in real incapacity to complete the investigation or prosecution, decided not to pursue the person concerned or has already tried the person concerned. The will of the state to investigate a person results from the veracity of the procedures carried out. As indicated by the Court of Justice of the European Union in *Commission v. Spain*, when considering the principle of complementarity, i.e. the prosecutor's request to open an investigation, the good faith of the national authorities must be taken into account⁶.

The International Criminal Court is an institution complementary to national jurisdictions, but its jurisdiction is rather subsidiary, as long as it intervenes only when a state has no will or is in a real incapacity to put under trial a person suspected of committing international crimes. Consequently, the principle of complementarity suggests an intervention of the International Criminal Court only in the event of a failure of the national courts and "forces it to act where the national judicial system has neither the capacity, nor the political support to conduct an investigation"⁷.

In relation to the provisions of Art. 17 of the Statute and, obviously, at the request of the Ugandan Government to put under trial Dominic Ongwen according to traditional restorative justice, the question arose whether, in the Court's view, the out-of-court procedure has the same value as the judicial procedure, as long as it seeks to prosecute the person guilty of committing the crime. This raises the question of the relationship between jurisdictions and, evidently, whether the will of the state to hold a person accountable is sufficient to change the legal basis of the principle of complementarity.

However, Art. 17 letter (a) of the Statute also establishes the requirement for a state to have the real capacity to complete the investigation or prosecution and, implicitly, the conviction of those who are guilty of committing crimes. Also, according to Art. 17 point (2) letter (c), the internal procedure must be compatible with the intention to sue. The "mato oput" ritual invoked by the Ugandan government as a sanction that might be imposed in the case of Dominic Ongwen consists in the obligation to drink a potion obtained from the root of the oput tree, a potion with a very bitter taste, similar to the harm caused by committing the crime and stepping on a raw egg (process known as *nyouo tong gweno*). The purified one also has the obligation to reconcile with the victim and

⁶ Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*, Leiden, Brill, 2008, p. 159.

⁷ Marie Gibert, *La cour pénale internationale et l'Afrique ou l'instrumentalisation punitive de la justice internationale?*, "Revue internationale et stratégique", no. 1/2015, p. 117.

to promise in front of the community that s/he will no longer do any other harm to society. She will be held liable for the material and moral damage caused to the victim. The “mato oput” procedure does not seek to ascertain the guilt of the perpetrator, but rather to restore peace and social harmony within the community.

Traditional Ugandan justice resorts to substitution mechanisms, such as customary justice practices, and not to judicial prosecution mechanisms recognized by the International Criminal Court. These mechanisms are focused exclusively on intra-community conflicts and are motivational exclusively at the local level, for ethnic, religious groups, etc. who share the same culture, the same religion. These social practices seem to be a negotiation for the restoration of peace, rather than a form of sanction and eradication of the criminal phenomenon. These are, in turn, the theatre of social conflicts, in view of the abuses of power of those who are in charge of organizing such purification ceremonies, these informal means of resolving conflicts.

The community, through its elderly leaders, will be involved in establishing the procedures for performing the rituals, in determining the degree of guilt and the amount of damages due, which gives this procedure a political or religious nature, but not a legal one, as well as a fairly high level of discretion. Traditional restorative justice is a pure, informal strategy, devoid of the rigors of the law, and which cannot be completed with the application of a custodial sentence.

International criminal courts are reshaping the idea of individual liability in international law. The sanctions under international law, by analogy with Western national models, will be applied to the individual, most often for a conduct generated and attributable to the state or a group, as in the case of the Lord’s Resistance Army. Consequently, international justice ignores the political and moral responsibility of the state or group on whose behalf the individual had acted.

In case the International Criminal Court has decided to exercise its jurisdiction over an international crime, it shall adjudicate on the basis of the guarantees of a fair trial, recognized by international law, under its own Statute, the Rules of Procedure and Evidence, international treaties, the rules and principles of international law⁸. The principle of complementarity does not allow a state, after the opening of an investigation, respectively after the beginning of the trial, to request a trial of the deed and a pronouncement of a sentence that takes into account the domestic law of the state whose citizen is subject to the jurisdiction of the Court. In this sense, the defence’s request that “*a referral to the traditional justice system should be ordered by the Chamber instead of the sentence*”⁹ exceeds the procedural framework. Moreover, the provisions of Art. 23 of the Statute stipulate that “a person who has been convicted by the Court

⁸ Art. 21 point (1) of the International Criminal Court’s Statute.

⁹ ICC, ICC-02/04-01/15, *op. cit.*, para. 25.

may be punished only in accordance with the provisions of this Statute”.

In support of the request for the application of a traditional restorative sanction, the defence invokes as a basis the provisions of Art. 76 of the Statute, according to which “in the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence”. This prerogative of the Trial Chamber cannot be interpreted in the sense invoked by the defence, as the provisions of this article must be corroborated with the provisions indicated hereabove, respectively with the provisions of Art. 23 of the Statute, which regulate the principle of the legality of incrimination, as well as with the provisions of Art. 77, which regulate punishments and which are of strict interpretation.

The only sanctioning regime recognized by international criminal tribunals is imprisonment. Any other sanctioning regime provided for in domestic law for international crimes is incompatible with the intention of the state to act in court in an independent and impartial manner and in compliance with the guarantees provided by international law.

According to Art. 77 of the International Criminal Court’s Statute, the Court may impose in the case of a convicted person a prison sentence to which they may add ancillary pecuniary sanctions, such as a fine and forfeiture of assets. We observe that, unlike the internal regulations of the states, the Statute of the Court limits itself to indicate the type of punishment and the provision of a maximum amount, namely “imprisonment for a specified number of years, which may not exceed a maximum of 30 years” or life imprisonment, but without indicating a minimum limit, which empower the judges of the Court with a wide margin of appreciation.

And with regard to the Statutes of the *ad-hoc* criminal tribunals, the only reference to the sanctioning regime is the indication of imprisonment as type of punishment that can be ordered by the international court. As regards the scale of the sentence limits, the Statute of the Tribunal for the former Yugoslavia and the one for Rwanda operate with an indirect criterion for determining the quantum of the sentence, by having recourse to the internal rules¹⁰, the general scale of prison sentences provided in the national law and the practice of the national courts, without actually setting a minimum or maximum penalty limit.

According to Art. 20 point (3) letter (b) of the Statute, even in the case of a previous national trial, the International Criminal Court may retrial in the event that “the proceedings in the other court were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances,

¹⁰ Art. 24 para. (1) Statute ICTY: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”. Art. 23 para. (1) Statute ICTR.

was inconsistent with an intent to bring the person concerned to justice.”

The defence draws attention to the fact that “*recognizing and using the traditional mechanisms in Acholi shall stop Mr Ongwen from being punished twice for what he is convicted*”¹¹. The principle of complementarity established in the International Criminal Court’s Statute provides for a hierarchy of jurisdiction, which, once established, shall act according to its prerogatives, and its decision shall enjoy *res judicata*, so that further intervention by the national courts would be inadmissible.

On the other hand, it is obvious that the ritual “mato oput” is not a sanction that respects the guarantees provided by international law, especially since it is only a form of sanction recognized exclusively at the local level.

3. Restorative justice *versus* retributive justice

Restorative justice is a relatively new concept, but, in recent years, it has become more prevalent in the sphere of criminal justice and is defined as “*a process whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future*”¹².

In the current interpretation, restorative justice is different from traditional justice, the latter being a retributive one. In the case of *The Prosecutor v. Dominic Ongwen*, international justice is considered as being eminently retributive, compared to the African national justice, which is defined as a traditional restorative justice in terms of its role and prerogatives, this being the vector of that community’s identity.

Before the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, one of the issues discussed was the disinvestment of the International Criminal Court in favour of a traditional restorative justice. We find, therefore, not only a cultural difference, but also a structural one between the African concept of justice and the “Western” concept of justice of the International Criminal Court, and, furthermore, between the African concept of justice and the common law and civil law systems, where traditional justice is a retributive justice.

In the traditional African restorative justice, the emphasis is placed on the collective dimension of the act. The community will be directly involved in the trial of the deed, in determining the damage and in assisting the victims of the crime¹³. Society will be involved in restoring peace and maintaining this climate.

¹¹ ICC, ICC-02/04-01/15, *op. cit.*, para. 34.

¹² Tony Marshall, *The Evolution of Restorative Justice in Britain*, “European Journal of Criminal Policy and Research”, no. 4/1996, vol. 4, p. 37.

¹³ Luc Huyse in *Justice traditionnelle et réconciliation après un conflit violent: la richesse des expériences africaines*, Luc Huyse, Mark Salter (eds.), International Idea, Stockholm, 2009, p. 17.

In *Defence Brief on Sentencing*¹⁴, the defence points out that the Acholi justice system, which includes the “mato oput” ritual, considers “*the physical, psychological and divine justice, [and] leaves no room for one to fail to account for one’s decisions and actions or failure to account led to dire consequences that included divine retribution*”.

The model of restorative justice has a certain degree of malleability in resolving social conflicts, with an impact on the transformation of social relations.

In international law, the infliction of a punishment for committing an international crime is justified rather by the idea of social justice and the need to restore social order and peace, than by the idea of social reconciliation¹⁵. Therefore, the punishment has an eminently retributive character, referring, first of all, to the gravity of the crime (*malum passionis propter malum actionis*) and only in a subsidiary way to the social reintegration of the perpetrator.

The doctrine of international criminal law has been more focused on the conceptualization of the normative forms of international crimes and the procedural conditions in which they can be imputed to the perpetrators than on the conceptualization of the functions of punishment and the sanctioning regime of these crimes¹⁶.

At the international level, the sanctioning of individuals by a supranational institution could not be easily accepted, as it certainly undermined the sovereignty of a state, and “*justice could have been a destabilizing factor in the process of restoring peace*”¹⁷.

The socio-political context in which international crimes are committed, which requires the intervention of an international jurisdiction, justifies the infliction of a punishment for reasons other than those pursued in national criminal law. International justice was perceived as a process of delegitimizing the judging of international crimes by those directly targeted by the crime. Moreover, according to Art. 6 of the European Convention on Human Rights, a fair trial encompasses at the same time the right to an independent and impartial judge as well as the right to a public trial.

A traditional restorative justice, at least in the conception of the Acholi justice system, deviates from the idea of an independent and impartial institution, as long as the ritual was agreed upon by the prominent members of society. The crime thus acquires a collective dimension. The guilt, the punishment, the compensation of the victim are aspects that affect the entire community, which

¹⁴ ICC, Trial Chamber, *The Prosecutor v. Dominic Ongwen, Corrected Version of Defence Brief on Sentencing, filed on 1 April 2021*, ICC-02/04-01/15, 4 April 2021, para. 33.

¹⁵ Emanuela Fronza in *Introduzione al diritto penale internazionale*, 3rd edition, Enrico Amati et al., G. Giappichelli Editore, Turin, 2016, pp. 252-253.

¹⁶ Ioana - Celina Pașca, *Drept penal internațional*, Universul Juridic, Bucurest, 2020, p. 76.

¹⁷ Dindio Konaté, *La Cour pénale internationale. Entre nécessité de justice et impératif de paix*, L’Harmattan, Paris, 2018, p. 18.

will thus take upon itself the blame of the perpetrator and will get actively involved in compensating the victim.

The system of retributive justice considers exclusively the individual responsibility and ignores the moral and political responsibility of the group or community to which the perpetrator belongs. Retributive justice contemplates the legal consequences of the crime, not its cultural or moral repercussions.

4. Conclusions

The interference of national restorative measures in the proceedings of the Court is impossible. In fact, the terminology used is also discouraging. The term “measure” is not specific to the sanctioning treatment of international crimes. The “mato oput” ritual is not a sanction in itself, but an ethno-tribal measure of accountability and spiritual purification of criminals.

In the opinion of the International Criminal Court, the punishment is not a form of revenge, but “*an expression of the international community’s condemnation of the crimes and an acknowledgement of the harm caused to the victims by issuing a proportionate sentence*”¹⁸.

The liability of individuals in international law has been practically enshrined through the adoption of the Statutes of the *ad-hoc* criminal tribunals. The recognition of this form of liability was appreciated as a real rotating movement of international law, given the abandonment of the traditional mechanisms of liability in international law. The individual was thus removed from tutelage of the state, becoming the recipient of international legal norms.

By establishing international jurisdictions, these have been granted a right to interfere in the affairs of states. This change in the nature of state sovereignty was allowed only in the manner of sanctioning individuals.

Given the evolution of criminal policy, from a liability of the individual/natural person towards the liability of the legal person, in most national criminal laws, the same considerations would justify the establishment of a criminal liability of the legal person before the International Criminal Court, having the same rationale to complete the will of the state that is inactive or incapable of acting in order to hold accountable entities in its area of competence.

The jurisdiction of the International Criminal Court is complementary to the national criminal jurisdictions, but, if it were to be priority, it would probably ensure a better repression of international crimes and, implicitly, a better legal protection of the values protected through the international norms, which was, as a matter of fact, the intention behind the establishment of an international criminal jurisdiction.

In the opinion of the supporters of the establishment of an international jurisdiction, the sovereignty of the state, perceived as a right which cannot be

¹⁸ ICC, *Corrected Version of Defence Brief on Sentencing*, *op. cit.*, para. 5.

restricted, is “the very negation of international law”¹⁹. The Statutes of the international criminal tribunals have, for the first time, established the possibility of inflicting a punishment by a supranational authority, not subject to the control of the other state powers.

Partisans of the restorative justice have tried to tip the balance of complementarity in favor of national justice, arguing that the international trial is a post-conflict trial, totally different from the one known to the participants in the crime. Restorative justice would be the only one able to create the proper security space for a “face to face” confrontation between the perpetrator and the victim, and, thus, to ensure a real confrontation of the offender with the consequences of their act.

Analyzing the distinctions between the two forms of justice, namely between traditional restorative justice, which would lead through purification to restoring peace in the community, and retributive international justice, which would contribute to international security, we appreciate that the dichotomy between them is overestimated. As long as there are still voices claiming that international justice is incapable of avoiding mass crime and human suffering, there will always be a tendency to seek a competitive path to justice.

Justice is a fundamental element of peace, and, compared to the two forms of justice analyzed in this paper, there is a false distinction between the interests of justice and those of peace, “*peace and justice are two sides of the same coin. The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously*”²⁰.

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¹⁹Louis Le Four, *Philosophie du droit international*, “Revue générale de droit international public”, Paris, 1922, p. 580 *apud* Véronique Michèle Metangmo, *Le crime d’agression: recherches sur l’originalité d’un crime à la croisée du droit international pénal et du droit international du maintien de la paix*, Ph.D. thesis, Université Lille II, 2012, p. 20 [unpublished].

²⁰Fatou Bensouda, *International Justice and Diplomacy*, The New York Times, 19 March 2013, available online at: <https://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html> [last accessed on 13.06.2021].

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The impact of the recognition and enforcement of the European confiscation order on the third parties of good faith

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Abstract

This study aims to bring to the attention of specialists the laudable approach of the Union co-legislator on the adoption of Regulation (EU) 2018/1805 on orders of unavailability and confiscation, a legal step taken to harmonize the legislation on the subject of analysis. The research methods used in our study are: a) the logical-concretized method by using the union and national framework norms in the matter of confiscation; b) the comparative method - in order to perform a comparative analysis of the main institutions of material and procedural law. We note, however, that the provisions of this Regulation are in accordance with the obligation to respect fundamental rights and legal principles enshrined in Article 6 of the Treaty on European Union (TEU² in the sense that fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms constitute general rules of Union law. The Union norm that represents the theme of this study aims at ensuring the effectiveness of the recovery process of the assets derived from the commission of crimes, respecting the fundamental rights, especially of the third parties in good faith. Specifically, we refer to those exceptional situations, when there are good reasons to believe that, based on specific and objective evidence, the recognition and enforcement of a confiscation order would lead to a manifest violation of a relevant fundamental right of a third party of good faith. For such a situation, the judicial authority of the executing State must reconsider the automatic recognition of the confiscation order, relevant being the fundamental rights, in particular, the right to an effective remedy, the right to a fair trial and the right to defence and not least the right to the guarantee of private property.

Keywords: *confiscation order, good faith third party, non-recognition, state of execution, fundamental rights, procedural guarantees.*

JEL Classification: K14, K33

1. Introduction

According to EUROPOL estimates, in the European Union only 2% of

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²Article 6 (1) TEU-Consolidated Version "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000" (2) "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms"; the document is available online at <https://eur-lex.europa.eu>, last accessed on 14.06.2021.

the proceeds of crime are frozen and only 1% are confiscated³. The unavailability and confiscation of criminal instruments and products are among the most important ways to combat crime. Confiscation is the main element of coercion against the *raison d'être* of organized crime, respectively the maximization of income through illicit means. Against this scourge, legislative instruments aimed at confiscating the proceeds of crime have been regulated.

At Council of Europe level, we note the 1990 Strasbourg Convention on the Laundering, Detection, Seizure and Confiscation of the Proceeds of Crime, ratified by all 27 member states of the European Union. Over time, at the level of the European Union⁴, the legislative framework has undergone changes in the field of unavailability and confiscation, considering that both Framework Decision 2003/577/JHA on the execution in the European Union of orders to freeze goods or evidence and Decision - Framework 2006/783/JHA on the application of the principle of mutual recognition of confiscation orders have not been fully effective, in the sense that those decisions have not been transposed and applied uniformly at Member State level which has led to cross-border cooperation under expected level.

Starting with December 19, 2020, the Union legislative instrument governing the unavailability and confiscation of the proceeds of crime is represented by Regulation (EU) 2018/1805⁵.

Currently, Regulation (EU) 2018/1805, repealing the above-mentioned Framework Decisions, was born out of the need to correct the implementation of existing legal instruments until its entry into force.

We cannot fail to notice the difference in application between the previous framework decisions and the present regulation, it being known that the latter is a source of derived⁶, Union law characterized by its general and uniform applicability, as well as by the direct effect it produces on national law of the 27 Member States. Specifically, the regulation establishes an adequate legal regime, in the sense that it brings significant changes and novelty elements.

³ The document is available online at <https://europol.europa.eu/publications-documents/does-crimes-still-pay>, quoted by Rapport de la Commission au Parlement Européen et au Conseil "Recouvrement et confiscation d'avoires": Garantir que le crime ne paie pas, Bruxelles, le 2.6.2020 COM(2020) 217 last accessed on 17.06.2021.

⁴ Ioana Nely Militaru, *European Union law, Timeline. Springs. Principles. Institutions. Internal market of the European Union. Fundamental freedoms*, 3rd edition, revised and added, Universul Juridic, Bucharest, 2017, p. 75.

⁵ Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of unavailability and confiscation orders. According to Article 39 of the Regulation, it replaces Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders to freeze goods or evidence (OJ L 190.02.08.2003, p. 45) and Decision - Council Framework Regulation 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders (JO L 328,24.11.2006, p. 59).

⁶ Ioana Nely Militaru, *European Union law, Timeline. Springs*, 2nd edition, revised and added, Universul Juridic, Bucharest, 2011, p. 141.

In Romania, the transposition of this issue is found in Law no. 302/2004⁷ on international judicial cooperation in criminal matters and the innovative elements brought by this regulation have led to the completion of the text of the national norm by Law no. 51/2021.

2. The issue of recognition and execution of a confiscation order by the enforcement authorities in Romania

The general legal framework of this issue is the provisions of Regulation (EU) 2018/1805, while the amended and updated law 302/2004 generates the appropriate concrete framework for the Romanian judicial system and the Romanian society.

In Chapter I of the above-mentioned Union norm, entitled “Object, definitions and scope of regulation” we find in Art 2 defined the concept of “confiscation order” term which is a creation of the Union law with transnational implications. Its specificity is the fact that it always involves in a criminal case with a supranational element, a state issuing the confiscation order and a state of execution, both being member states of the European Union. Thus, the confiscation order is defined as being “a penalty or a definitive measure ordered by a court during a procedure initiated as effect of the commission of an offence, resulting in the permanent deprivation of a natural or legal person of the respective good”.

Regarding the scope, the Preamble to the Regulation states that it is not limited to particularly serious cross-border crimes, not excluding any criminal behavior, though Art. 3 states that confiscation orders shall be executed without verification of the double criminality of the acts giving rise to such orders, where those acts are punishable in the issuing State by a custodial sentence of a maximum of at least three years and constitute one or more of the following criminal offences under the law of the issuing State: participation in a criminal organization, corruption, fraud, including fraud and other criminal offences affecting the Union’s financial interests as defined in Directive (EU) 2017/1371⁸, etc.

⁷ Republished pursuant to art. II of Law no. 236/2017 for the amendment and completion of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette of Romania, Part I, no. 993 of December 14, 2017, giving the texts a new numbering; it was also republished in the Official Gazette of Romania, Part I, no. 377 of May 31, 2011, and subsequently amended and supplemented by: a) Law no. 300/2013 for the amendment and completion of Law no. 302/2004 published in the Official Gazette of Romania, Part I, no. 772 of December 11, 2013; b) by Law no. 318/2015 for the establishment, organization and functioning of the National Agency for the Administration of Unavailable Goods and for the modification and completion of some normative acts, published in the Official Gazette of Romania, Part I, no. 961 of December 24, 2015; c) by Law no. 51/2021 of March 26, 2021, published in the Official Gazette. no. 310 of March 26, 2021, regarding the completion of Law no. 302/2004 regarding the international judicial cooperation in criminal matters.

⁸ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (OJ L 198, 28 July 2017, p. 29).

The two instruments mentioned above establish rules according to which a Member State of the European Union recognizes and executes on its territory an order issued by another Member State within a "criminal procedure"⁹.

Thus, at Point 13 of the Preamble of Regulation (EU) 2018/1805 on the mutual recognition of orders of unavailability and confiscation, it is provided that "criminal proceedings" is an autonomous notion of Union law with jurisprudential origins, interpreted by the Court of Justice of European Union, in the sense that the notion includes all types of confiscation orders issued following proceedings initiated as a result of a crime, not only orders that fall under Directive 2014/42/EU.

Thus, it is considered as a confiscation order issued in a criminal procedure, the order issued in the absence of a final conviction (*procedure in absentia*)¹⁰ or the order issued by a competent law enforcement authority in criminal matters that is not a judge or a court. Even if such an order did not exist in the legal system of the executing State, it should be able to recognize and enforce it.

The regulatory field of the union norm is constituted by the different typologies of confiscation, such as, for example, confiscation by equivalent, extended confiscation, confiscation from third parties, confiscation without conviction.

It is imperative to recall that the regulation of the concepts of "extended confiscation" and "extended confiscation from a third party" was carried out for the first time at Union level by Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, while the implementation of this Directive is found in Art. 112¹ of Criminal Code on the "extended confiscation", but also in the Law no. 302/2004.

Specifically, Art. 5 of the Directive 2014/42/EU states the "extended confiscation" as being the procedure of confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct. In other words, the belongings subjected to an extended confiscation are different than the ones used by the convict to commit the offence

⁹ The text of art.307 of Law no. 302/2004 amended and updated is not in accordance with the text of art.1 of the Regulation in the sense that, while at the union level we identify the concept of "criminal procedure", the text of art.307 is reduced to "criminal procedure" a concept that does not involve preventive confiscation, or confiscation without conviction, although we find that the Romanian legislator enshrined in the provisions of Article 549 C.pr.pen, confiscation without conviction; therefore, we believe that it is necessary to harmonize the text of the special law with that of the union regulation.

¹⁰ See Point 15 of the Preamble to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crime committed in the European Union.

or acquired during/as effect of the offence.

Also, the above-mentioned directive states the measure of the “extended confiscation from a third party”. Thus, it is identified the case in which a suspect or defendant in a criminal case transfers the assets to a third party, the latter one being aware of the fact that the suspect or defendant avoids the identification of those assets and their freezing by the judicial authorities (the defendant or the suspect implicitly tries to induce to the criminal investigation or trial bodies the idea either that these goods never belonged to him or that they were obtained legally). The acquisition by third parties of these goods refers, for example, to the situation in which the good was acquired directly or indirectly by the third party.

The national legislation states the special confiscation in Art 112 of the Criminal Code in the chapter “Regime of safety measures”.

The special confiscation is stated by Art 112 of the Criminal Code and is a criminal law sanction consisting in the forced and gratuitous transfer of the property right over some goods from the patrimony of the person who committed an act provided by the criminal law, unjustified, in the patrimony of the state, given the connection of these goods with the committed action or because of their nature further by that person would present the danger of committing new acts provided by the criminal law.

Starting with April 22nd, 2012, the measure of “extended confiscation” was inserted by Art 112¹ of the Romanian criminal law by the Law no. 63/2012 with the purpose of transposing the Framework-Decision 2005/212/JHA of the Council of 24 February 2005 confiscation of crime-related proceeds, instrumentalities and property related to the offence. The extended confiscation is considered as a specie of the special confiscation.

By Law no. 228/2020 which entered into force on November 5th, 2020, were brought modifications to the very essence of the institution of “extended confiscation” mainly generated by the need to transpose the Directive 2014/42/EU.

Thus, by considering the modifications of Art 112¹ of the Criminal Code we note as goods subject to extensive confiscation:

- and other goods than those mentioned in Art 112, in case the person is convicted for committing any crime, if the offence is likely to provide him with a material benefit and the punishment provided by law is imprisonment of 4 years or more. We ascertain that the Law no. 228/2020 has modified the text of the Criminal Code regarding the categories of offences for which is applied the extended confiscation applies so that if the previous text regulated a set of 17 crimes for which the extended confiscation was incident, according to the amendment, the limiting list of crimes for which extended confiscation applies;

- the extended confiscation is ordered if the following conditions are cumulatively fulfilled: a) the value of the goods acquired by the convicted person, in a period of 5 years before and, if necessary, after the crime, until the date of

issuing the court notification, exceeds obviously the income obtained by it lawfully; b) the court is convinced that the respective goods come from criminal activities;

- the value of the goods transferred by the convicted person or by a third party to a family member or a legal person over which the convicted person has control will also be taken into account;

- also confiscated are the goods and money obtained from the exploitation or use of the goods subject to confiscation, as well as the goods produced by them.

An important novelty brought by the new regulation in the area of extended confiscation is represented by the possibility of confiscating the goods from third parties, if they were aware or should have been aware that the purpose of the transfer was the avoidance of confiscation. It should be emphasized on this occasion that Art. 6 of Directive 2014/42/EU has not been properly transposed into the new regulation, but the obligation to interpret the directive properly requires national courts to ensure that the measure of confiscation from third parties is not always prejudicial to the rights of bona fide third parties, being an obligation expressly provided in Art. 6 Para. 2 of Directive 2014/42/EU.

Point 15 of the Preamble of Regulation (EU) 2018/1805 mentions that regardless of the method of confiscation, the cooperation between the issuing state and the executing state, “the rights of persons who are affected by a confiscation order” must be maintained. Among such affected persons, natural or legal, must be “third parties whose rights in relation to the property are directly affected by this order, including good faith third parties.”

In order to strengthen the perspective of maintaining the guarantees and rights of “affected persons”, at Point 19 it is added that the union norm ensures the efficiency of the recovery process of the assets derived from committing a crime but with the guarantee of respecting the fundamental rights.

Regarding the recognition and execution procedure, we make the following clarifications: when the Romanian court receives a confiscation order, within 24 hours from the date of receipt, it verifies whether the confiscation order is accompanied by a translation into Romanian. If the confiscation order is not translated, the court shall request the competent authority of the issuing State to remit the translation within a maximum of 5 days¹¹.

The distribution of the case is made, in accordance with the applicable legal provisions in the matter, to a panel composed of a single judge, the established trial term cannot be longer than 5 days. The competence of recognition belongs to the Tribunal where the goods are to be confiscated.

The confiscation order issued by a competent authority in a Member State is recognized in Romania without the need for any other formality, unless one of

¹¹ See in this sense art.317 of Law no. 302/2004 amended and republished, respectively art 14 of Regulation (EU) 2018/1805.

the reasons for non-recognition is incidental. Specifically, according to art. 321 of Law no. 302/2004, “the recognition and execution of the confiscation order may be refused if:

a) the certificate provided in art. 308 is not attached, is incomplete or does not obviously correspond to the confiscation order;

b) the execution of the confiscation order would be contrary to the principle *non bis in idem*;

c) the Romanian legislation provides an immunity or a privilege that makes impossible the execution of the confiscation order;

d) the rights of any interested party, including the rights of bona fide third parties, make it impossible to enforce the confiscation order, including where this is a consequence of the application of the provisions for the legal protection of rights under Article 326;

e) the person was not present in person at the trial of the case, unless, from the certificate provided in annex no. 4, it follows that: (i) he/she has been notified, in due time, by a written summons issued in person or by telephone, fax, e-mail or any other such means, regarding the day, month, year and place of appearance and the legal consequences in case of non-appearance; or (ii) having knowledge of the day, month, year and place of appearance, has mandated his or her chosen or appointed lawyer to represent him or her, and legal representation and defence before the court have been effectively performed by the lawyer respectively; or (iii) after the conviction has been handed over to him/her personally and he/she has been informed that, according to the law, the case may be retried or that the judgment is subject to appeal and may be verified even on the basis of new evidence, and in the event of admission of appeal, it may be revoked, the convicted person either expressly waived the retrial of the case or the exercise of the appeal, or did not request retrial or did not declare, within the term provided by law, the respective appeal;

f) the confiscation order is based on criminal proceedings regarding offenses which: - according to the Romanian legislation are considered to have been committed, in whole or in part, on the territory of the Romanian state; or– have been committed outside the territory of the issuing state, and the Romanian legislation does not allow the taking of measures against the crimes that have been committed outside the territory of the Romanian state;

g) the execution of the confiscation order infringes the constitutional principles;

h) the execution of the confiscation order was prescribed according to the Romanian law, provided that the offenses are within the competence of the Romanian authorities according to the internal criminal legislation;

i) the confiscation decision was pronounced on the basis of the extended confiscation competencies that are not compatible with the provisions of the Romanian legislation in the matter”.

Thus, in case of refusal of recognition, the court examines the possibility

to consult with the competent authority of the issuing state, prior to pronouncing a decision in this regard, stating that if the non-recognition of the confiscation order is due to violation of the rights of any stakeholders, including the rights of good faith third parties' consultation with the issuing competent authority is mandatory.

Any decision to refuse recognition and enforcement shall be taken and notified as soon as possible to the competent authorities of the issuing State.

Beyond the power granted to the Romanian court of execution to refuse recognition of the order under Article 321, it may order the postponement¹² of the execution of the confiscation order by drawing up, in this regard, a report on the causes and duration of the postponement. Among the cases of postponement, we mention the case of declassifying actions by any interested party, including bona fide third parties, in case of violation of their rights by recognizing and executing a confiscation order.

How does the Romanian state dispose of the confiscated goods?

The Romanian state disposes of the confiscated goods by capitalizing on them:

a) directly, by public auction by the National Agency for the Administration of Unavailable Goods with a role in the recovery and management of receivables;

b) by specialized entities or companies, selected in compliance with the legal provisions regarding public procurement;

c) through bailiffs, according to their own procedures;

d) by the fiscal bodies, according to their own capitalization procedures¹³.

If the sums of money obtained following the execution of a confiscation order have a value below 10,000 euros or the equivalent in RON of this amount, they are made revenue to the state budget. If, following the capitalization, the amount obtained is over 10,000 euros, from what exceeds this amount, 50% of it will be transferred to the issuing state.

3. Brief considerations regarding the way in which Regulation (EU) 2018/1805 as well as Law no. 302/2004 confer guarantees to third parties in good faith (affected persons)

a) A first element that retains the attention in the issue deduced from the analysis, consists in defining the concept of "*affected person*" which means the

¹² See in this sense art. 322 of Law no. 302/2004 amended and republished.

¹³ See art. 29 paragraph (5) of Law no. 318/2015 for the establishment, organization and functioning of the National Agency for the Administration of Unavailable Goods and for the modification and completion of some normative acts, the national norm adopted in accordance with Decision 2007/845/JHA of the Council of 6 December 2007 on cooperation between the debt collection offices of the Member States in the pursuit and identification of the proceeds of crime or other criminal offenses.

natural or legal person against whom a confiscation order was issued, or the natural or legal person who owns the property is the subject of that order, as well as any *third parties whose rights in relation to the property in question are directly affected by that order under the law of the executing State*.

The text of art. 2, paragraph 9 shapes a meaning which surpasses the “person aimed in a criminal matter” term, starting from the attention the legislator awards to the special situation of the good faith third party and in connection with whom the Romanian legislator did not remain indifferent.

b) In other words, the regulation aims at facilitating the recovery of the proceeds of crime by accelerating and simplifying the confiscation procedure, for which in the current regulation we identify a term of 45 days of execution.¹⁴

We cannot help but wonder if the 45 days are enough for the good faith third party to make its presence visible, to formulate its defence. We consider that in the given situation the full court will have to make the provisions of Article 21 paragraph (1) letter (d) applicable by ordering the postponement of the execution of the confiscation order on the grounds that an appeal was invoked against the recognition and execution of the confiscation order.

However, in support of the bona fide third party, the text establishes a derogating case, namely the situation in which one of the reasons for non-recognition and non-execution provided in Article 19 paragraph (1) letter (e) is invoked, “execution of the confiscation order is not possible under the law of the executing State on account of *the rights of the persons concerned*, including where the impossibility arises from the exercise of remedies in accordance with Article 33”.

Thus, according to Article 33 of the Union norm, *the affected person - the third party in good faith* has the right to appeal against the decision on the recognition and execution of the confiscation order. The right to appeal shall be invoked before the competent court of the executing State and may have suspensory effect.

The rights of affected persons are also enshrined in Article 8 of Directive 2014/42/EU entitled “Guarantees” which provides in paragraph 1 that Member States shall take the necessary measures to ensure *that persons affected* by the measures provided for in this Directive are entitled to an effective redress and fair trial in order to exercise their rights. Paragraph 8 states that “Member States shall take the necessary measures to ensure that any decision to confiscate property is reasoned and that it is communicated to the affected person. Member States shall provide for the person against whom the confiscation is ordered the effective possibility to challenge the confiscation order before a court”.

In the concrete application of the above texts, Law no. 302/2004 establishes the situation in which Romania is a state of execution, one being able to

¹⁴ According to art. 20 of the regulation, the executing authority pronounces the decision of recognition and execution of the confiscation order without delays and without prejudice to paragraph (4), within a maximum of 45 days.

apply the following texts, which at least theoretically confer to the third party in good faith the guarantee of a fair trial and an adequate right to defence.

Specifically, Article 319 of Law no. 302/2004 provides that *"the execution of confiscation orders is governed by Romanian law, the Romanian authorities being the only ones able to decide on the execution of confiscation."*

Moreover, the provisions of the internal norm, respectively article 320 paragraph (1) letter (d) regulate, in support of the interests of bona fide third parties, the non-recognition of a confiscation order, on the grounds that their rights make it impossible to execute the confiscation order, text in accordance with Article 19 (1) (e) of the Regulation.

In the very special case, in which the rights of the third party in good faith have been violated, by recognizing and executing the confiscation order, pursuant to article 326, its right to request compensation is provided, in accordance with the law.

Moreover, Article 322 guarantees to the bona fide third party the postponement of the execution of the confiscation order while a damages action is brought under Article 326.

However, we wonder if the current national legislation allows the right to a fair trial and to guarantee the right to private property to the person who is in possession/detention of the proceeds of crime?

We believe that explicit texts are needed regarding:

a) *The need to notify the good faith third party concerning that part of the file related to the incidence of the confiscation measure.* Such a procedure is not provided in Law no. 302/2004 and then we wonder what happens in the event that due to error or even bad faith, the issuing authority did not insert in the confiscation certificate (Annex II) section D identification elements that targets affected people.

So, what is the mechanism by which the court invested with the recognition and execution of a confiscation order retains the existence of these third parties, given the lack of mentions in the certificate?

What is the concrete way in which they will take note of the imminent dispossession of property as a result of the recognition of the order. How can they formulate their appeal?

b) Granting the facility to prepare the defence regarding the explanation of the way of acquiring the title that justifies the possession/detention of the good.¹⁵

¹⁵ Camelia Bogdan, "Brief considerations regarding the impact of Regulation (EU) 2018/1805 of November 14, 2018 regarding the mutual recognition of the orders of unavailability and confiscation on the obligations of the Romanian state in the matter of recovering the proceeds of crime. Remedies for guaranteeing the right of every citizen of the European Union to an area of freedom, security and justice" the document is available online at <https://www.juridice.ro/709145/succinte-consideratii—privind-iscare-asupra-obligatiilor-statului-roman-in-materie-rec-htmlast>, accessed on 14.06.2021.

We are of the opinion that the text of article 326 paragraph (3), “*the substantive reasons that were the basis for issuing the confiscation order cannot be challenged before the Romanian court of execution*” is far too categorical. To explain this opinion, we exemplify the following case.

Defendant N.I. was sentenced in Italy for organized crime to 16 years in prison with execution and ordered the extensive confiscation of all property detained in the indictment. During the criminal investigation, the judicial authorities issued an order of unavailability on the assets he owned in Romania, in a personal capacity as well as on the entire patrimony of the company he owned as sole shareholder.

Specifically, the prosecutor of the court within the district in which the goods were located considered it appropriate to recognize and execute the order of unavailability, so he ordered by ordinance the seizure of real estate which were in fact the pre-contracts concluded between the company and promising buyers of good faith.

Although at the time of the seizure some properties were paid in full, but without an authentic form of the contract of sale, the transfer of ownership did not operate in CF and implicitly in the cadastral scripts, the company still listed as owner, thus the case prosecutor justifying the approach.

The buildings of the promising bona fide buyers in their possession and which they paid in full remained seized throughout the trial of the defendant NI, although separate from the merits, the promisors addressed the Italian judicial authorities requesting the revocation of the seizures.

The solutions of the respective court of first instance were of rejection, although they always proved good faith, effective possession and full payment of the real estate price.

In the merits of the case, the final sentence was imprisonment and the extended confiscation of all the goods in relation to which it was ordered in the conditions mentioned above, the measure of unavailability.

The decision on the extended confiscation was maintained at the level of the appellate court, so that it became final and enforceable.

In relation to the case deduced from the analysis, we wonder to what extent the above-mentioned legislation confers to the bona fide promisors - third parties the guarantee of a fair trial and the guarantee of the property right over the real estates.

What are the limits of the admitted probation, how much is considered the „merits of the case”? What judicial levers do the promising buyers have at their disposal in the situation when in the confiscation certificate the Italian judicial authority will not refer to the concrete situation of the buildings, not mentioning their quality of affected persons.

4. Conclusions

We unequivocally admit that there are situations in which in order to effectively fight an organized criminal activity, in addition to criminal conviction and confiscation, both the assets related to the specific crime and other assets considered by the court as the result of criminal activities are required.

Thus, the court analyses the evidence based on the specific circumstances of the case and concludes whether the goods come from lawful activities or not. Its conviction is deduced from the fact that the value of a person's assets is clearly disproportionate to the legal income. We are therefore in a situation of extensive confiscation.

We cannot fail to mention the extensive confiscation of third parties. The practice by which a suspected or accused person transfers property to a knowledgeable third party in order to avoid confiscation is common and increasingly common. We are considering here confiscation of goods transferred to or acquired by third parties directly or indirectly, for example through an intermediary, by a third party from a suspected or accused person, including when the crime was committed in his name or for his benefit and we should notice that the accused person has no property that can be confiscated.

We must remember that in such a situation the institution of extended confiscation operates on third parties only if they knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation (the transfer took place free of charge or in exchange for a sum of money) significantly lower than the market value of their goods.

The above realities are undeniably clear reasons for the judicial systems of the Member States to take a stand in order to reduce this scourge.

However, we strongly argue that regardless of the types of confiscation, extensive or extensive on third parties, the presumption of good faith¹⁶ of the latter must prevail, and in no case should their rights be infringed.

Also, we consider that the existing legislative texts do not confer sufficient protection to their rights, and an amendment of the special criminal legislation would be opportune.

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¹⁶ Ioana Nely Militaru, *Protection of Fundamental Rights in the European Union*, „Perspectives of Law and Public Administration”, volume 8, issue 2, December 2019, p. 352-357.

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Tourism in the European Union in the context of the Covid-19 Pandemic crisis

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Abstract

Tourism has as its legal basis the Treaty on the Functioning of the European Union of December 2009, a relatively recent date, given the importance of this area. Although it does not have a separate budget in the multiannual financial framework (MFF), it contributes significantly to the European Union's Gross Domestic Product and remains a good job seeker. The special measures at EU level, which have been taken in the field of tourism, concern: the interest of travelers and/or tourists, the interest of the tourism sector and regions. This area remains the most affected by the COVID Pandemic 19.

Keywords: *tourism, budget, jobs, multiannual financial framework, travelers, tourist.*

JEL Classification: K22, K33

1. Preliminary clarifications

Tourism, compared to other policies, is regulated relatively recently in the Treaty on the Functioning of the European Union - TFEU, in 2009, the year of entry into force of the treaty.

Tourism does not have its own budget, in the multiannual financial framework - MFF - neither for the period 2014-2020, nor for the current framework, respectively 2021-2027², given that the tourism industry has been and is a good provider of jobs, having a contribution to the GDP of the European Union of 10,3%, a fairly consistent contribution³.

The paradox of this situation is that, although it does not have its own budget, it contributes to its formation.

The special measures at the level of the European Union that have been taken regarding the tourism policy are:

1. the interest of the citizens and/or of the tourists - the beneficiaries of the tourism services.
2. the interest of the tourism sector and of the regions that can be a tourist

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² <https://www.consilium.europa.eu/ro/press/press-releases/2020/12/17/multiannual-financial-framework-for-2021-2027-adopted/>, consulted on 1.06.2021.

³ Elise Valcu, *Sustainable Development and Sustainable Tourism in the European Union*, „The Annales of the "Ștefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration”, Vol. 9.2009, Special, p. 66-70.

destination or have a tourist potential.

The legal basis of the tourism policy is TFEU, articles 6 letter d) and art. 195.

In its classical sense, tourism means a provider of services, travel and tourism, offering a fairly large number of jobs, one can speak of the tourism industry, given that one of the companies in the non-financial sector operates in this industry⁴. Moreover, close, contractual links are established between the tourism sector and the other sectors of activity, respectively sale-purchase, rental, services, intermediation, etc. This rather wide contractual range has led to a contribution to the GDP of the European Union of 10% and a participation of 27.3 million workers in the European Union (workers under the TFEU), with all the rights and obligations arising from the freedom of their circulation in the Union space.

We note these figures in order to highlight the negative impact of the health crisis caused to tourism, in each Member State, respectively at the level of the European Union, among them we mention travel bans, possibly conditioning certain health obligations, which represent the most negative effect.

2. Tourism policy in the European Union⁵

Some historical aspects that the European Union institutions have addressed to Tourism, even before it is regulated in the TFEU.

Thus, the reference year is 1999 (June 21) when the European Council to pay attention. Tourism, and the European workforce, facilitates the free movement of workers for this purpose⁶, so that in 2002 - the Council Resolution to focus on cooperation between the public and private sectors so that Europe becomes the main tourist destination.

The measures taken on this occasion are:

1. Satellite accounts in the field of tourism for each Member State,
2. Portal for the promotion of Europe from the perspective of its tourist destination,
3. Starting in 2002, to organize a European forum for tourism, with the country holds the Presidency of the Council of the European Union in the second half of the year. In 2019 it was organized in Helsinki (Finland) with the theme "Digital transformation as an engine of sustainable growth of the tourism sector in the European Union". In 2020, the forum was held in Berlin and focused on

⁴ Elise Valcu, *Brief consideration of the impact of the regional development policy on tourism in Romania*, „The Annales of the "Ștefan cel Mare" University Suceava. Fascicle of the University of Economics and Public Administration", Vol. 9.2009, Special, p. 60-65.

⁵ Davide Pernice, Ariane Debyser, https://www.europarl.europa.eu/factsheets/ro/sheet/126/turismul_05-2021.

⁶ Communication from the Commission (COM (2001) 0665) "Working together for the future of European tourism".

how to resolve the crisis and reorient tourism in Europe.

In 2007, 2010, 2012, 2014 were the years in which the Commission published several communications for the tourism development segment, namely:

1. The Agenda for Sustainable and Competitive European Tourism⁷,
2. Europe, the world's favorite tourist destination - a framework policy for European tourism⁸,
3. Implementation and development of the common visa policy to stimulate economic growth in the European Union⁹,
4. A European strategy for boosting growth and creating jobs in maritime and coastal tourism¹⁰.

The special measures taken at the level of the European Union after the regulation of this policy in the TFEU - art. 6 letter d) and art. 195 are:

1. Those that concern, as we showed at the beginning of the paper, travelers and/or tourists, beneficiaries of tourist services. Thus, measures have been taken to facilitate the crossing of borders and the protection of the health and safety of tourists, including their material interests, through the directives of 2008, 2015.

An initiative of the Commission at the request of the European Parliament took the form of training programs - on European tourism. For example, the "Eden" initiatives, which focus on European tourism destinations of excellence (i.e. those on the rise or less known), have been completed, but the Commission has continued this initiative through the "Program for the Competitiveness of Small and Medium-sized Enterprises" and medium.

Another Commission action called "Calypso" targets tourists: older people, young people without opportunities, disadvantaged families and people with reduced mobility. These are just a few.

The European Union co-finances sustainable cross-border tourism projects to diversify the European tourism offer, for example the COSME Program, which has the following initiatives in support:

- competitive and sustainable growth in the tourism sector (2017);
- promoting and developing products and services in the field of sport and wellness, and supporting Europe's cultural and industrial heritage (2019);
- facilitating transnational tourist flows in the European Union (2014);
- improving as much as possible the synergies between tourism and the top and creative industries.

2. Tourism and regional sector. The phrase "responsible tourism" is introduced.

In the year in which the TFEU entered into force, as a preliminary moment of this treaty, an "open network of European tourist regions" was created,

⁷ Commission Communication (COM (2007) 0621 of 19 October 2007.

⁸ Commission Communication (COM (2010) 0352 of 10 June 2010.

⁹ Commission Communication (COM (2012) 0649 of 7 November 2012.

¹⁰ Commission Communication (COM (2014) 0086 of 20 February 2014.

which served as a platform for the exchange of information and solutions for competitive and sustainable tourism.

In this regard, the European Union has provided a number of sources of funding to help tourism - in terms of development and employment in a region, namely:

- European Regional Development Fund (ERDF) - for financing sustainable tourism projects, respectively the "Interreg" program.

- Cohesion Fund, for financing infrastructure (in the field of environment and transport), because you cannot have real tourism without infrastructure in tourism.

- European Social Fund (ESF), for employment, and the Leonardo da Vinci program for vocational training.

- European Fund for Rural Development (EAFRD), for the diversification of the rural economy, respectively "agrotourism" - in Romania.

- Ecological tourism - EFF, the transition to ecological tourism, respectively the program for competitiveness and innovation. Here we consider the Multiannual Financial Framework (MFF) 2014-2020 and the Horizon 2020 initiative, which continues.

3. 2018 - The European Union has decided the EU-China Tourism Year, China being one of the largest and most dynamic source markets for the European Union.

3. The impact of the health crisis on tourism

The impact of the global health crisis is increasingly evident, with the growth of the European tourism sector expected to remain below 2019 levels by 2023.

The impact of the health crisis means:

- a decrease in the number of international tourists compared to period of 2019;

- job losses, by restricting the free movement of workers in the field of tourism.

The Commission has taken steps to:

- a proposal to suspend rules forcing airlines to use their time slots allocated at European Union airports¹¹;

- guidelines on passenger rights in the European Union¹²;

- border controls¹³ and assistance for the repatriation of passengers from the European Union during travel restrictions between March and May 2020.

The European Parliament has also taken a position on three legislative

¹¹ COM (2020) 111.

¹² COM(2020) 1830.

¹³ COM(2020) 1753.

proposals: launching the Coronavirus Response Investment Initiative¹⁴, expanding the EU Solidarity Fund to cover public health¹⁵ emergencies and temporarily suspending airport slot rules. Parliament adopted in June 2020 its resolution¹⁶ on "Tourism and transport in 2020 and beyond", calling for "rapid short-term and long-term support for the transport and tourism sectors in order to ensure their survival and competitiveness". and emphasized that this crisis is a historic opportunity to modernize tourism in the European Union so that it becomes more sustainable and accessible for people with disabilities.

The following year, 2021, the European Parliament adopted an own-initiative report "Establishing an EU strategy for sustainable tourism¹⁷". Through this report, Parliament calls on the Member States to implement common and coordinated criteria for safe travel. It includes a common vaccination certificate and a system for the mutual recognition of vaccination procedures for medical purposes. The EU passenger location form, in digital format, should also be introduced where possible.

4. Conclusions

The European Parliament calls on the Member States to establish a common and non-discriminatory EU protocol on health security. The protocol requires compliance with the following requirements: pre-departure testing, including rapid testing technologies, PCR testing and others. Member States are recommended to set, at least temporarily, reduced VAT rates for travel and tourism services, accompanied by incentives for micro-enterprises and SMEs for the period 2020-2024¹⁸.

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¹⁴ P9_TA(2020)0042.

¹⁵ P9_TA(2020)0043.

¹⁶ 2020/2649(RSP).

¹⁷ P9_TA(2021)0109.

¹⁸ Davide Pernice, Ariane Debyser, [https://www.europarl.europa.eu/factsheets/ro/sheet/126/turis mul, 05-2021](https://www.europarl.europa.eu/factsheets/ro/sheet/126/turis%20mul,05-2021).

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European cooperation rather than EU integration. Iceland and the European Union

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Abstract

Why some European countries prefer cooperation than integration? In 2019 Iceland celebrated twenty-five years of cooperation with the European Union (EU) under the European Economic Agreement (EEA). Since 1992-1994, this country has preferred international/regional cooperation rather than full supranational integration. This study summarizes some important dates and facts which explain some of the most important reasons why integration in the EU does not seduce Icelanders. Methodology is both descriptive (informative) and analytical (critical comment). All legal issues are approached from a wider economic, political and sociological context (law in context approach). A provisional finding is that the European legal integration project (and general pooling of sovereignty) will probably never fully convince Iceland for historic, geographic, legal, political and economic reasons. Lacking a history of nation-wars and situated geographically as the ultra-periphery of Europe, for this small nation rich in natural resources and scarce in population; supranational integration is neither a political imperative nor an economic necessity in ordinary circumstances. With the exception of the years 2009-2013, after a major financial crisis when Iceland was a candidate country to the EU....the EEA Agreement and European cooperation are preferable to full EU legal integration unless a situation of national emergency happens again....

Keywords: Iceland, European Union, integration, European Economic Area, co-operation.

JEL Classification: K33

1. Introduction

Iceland is a member of several European treaties: the Council of Europe and European Convention of Human Rights, the European Free Trade Association (EFTA), the European Economic Area (EEA) and the Schengen area to name the most important ones. In 2015 its government decided to withdraw its EU membership application from 2009. In 2019 Iceland celebrated twenty-five years of cooperation with the European Union under the European Economic Agreement (EEA) signed in Oporto in 1992 that entered into force on 1 January 1994². There is general consensus in the country that this treaty that extends the

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² Agreement on the European Economic Area (EEA), (OJ 1993 L 1) entered into force on 1.1.1994 and Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice with protocols (SCA) OJ L 344, 31.12.1994. For a recent commentary see Arnesen, Finn, Fredriksen, Harvard Haukeland, Graver, Hans Peter, Mestad, Ola og Vedder, Christoph

internal market and other European Union (EU) policies to Norway, Liechtenstein and Iceland has been a key pillar of its recent history. All in all, most agree with the outcome of general success of a difficult experiment in international/European law that some predicted almost impossible in practice (EEA law is a sort of hybrid between public international law and Community/EU law)³.

However, as any other relationship, this form of European cooperation is far from perfect. One of the most famous crises between EU and EEA partners revolved around the Icesave dispute (bail-in or bail-out of Landsbanki) with national referenda required constitutionally (2010 and 2011). The question was a claim in EU law to a sovereign debt guarantee vs. the use of national winding procedure/national bankruptcy rules for the reimbursement of deposits of a failed bank. This question opposed Icelanders (not their Parliament nor the Government) to the EU, UK and Holland and ended in 2013 with a ruling in favor of Icelandic citizens (and State) by the EFTA Court⁴. Since the bank had private assets to cover the debt through the application of national insolvency law, EEA law could not impose State liability nor an obligation to convert this debt into sovereign debt. In the process, the desire for supranational integration in the EU died and the trust in the Icelandic Parliament and Government collapsed⁵.

The history of Iceland shows how isolation and survival can rime with prosperity, how internal/external events shape this history and how society is sometimes divided around some difficult issues such as EU accession. In this paper we will learn how Iceland has had a short life as an EU candidate country. After a financial crisis that shattered the society, led to massive protest and brought a new center-left coalition, the Icelandic Parliament sent an application to join the EU in 2009. This application was later withdrawn unilaterally by the Foreign Affairs Minister of the following consecutive government of a center-right coalition in 2015, after having failed to secure the consent of Parliament during 2014. The Minister declared the national interests better served outside the Union. The letter that froze or killed the application was also sent in spite of

(eds.). *Agreement on the European Economic Area: A commentary*. C. H. Beck- Hart-Nomos, Munchen, 2018.

³ Iceland. Ministry of Foreign Affairs. Report of the Working Group of the EEA. Reykjavík, 2019. The English executive summary is available online at <<https://www.government.is/library/01-Ministries/Ministry-for-Foreign-Affairs/PDF-skjol/EEA%20report%20executive%20summary.pdf>> last accessed 25.9.2020.

⁴ EFTA Court, Judgment in Case E-16/11 – ESA v Iceland (“Icesave”) of 28.1.2013 available at <https://eftacourt.int/press-publications/pr-02-13-judgment-in-case-e-16-11-esa-v-iceland-icesave/>.

⁵ Méndez-Pinedo, M.E. “The Icesave Dispute in the Aftermath of the Icelandic Financial Crisis: Revisiting the Principles of State Liability, Prohibition of State Aid and Non-discrimination in European Law“, *European Journal of Risk Regulation*, 2011, vol. 2 (3) , pp. 356-372, republished online by Cambridge University Press on 20 January 2017, available online at <<https://doi.org/10.1017/S1867299X00001379>>. And Méndez-Pinedo, M. E., “The Icesave saga: Iceland wins battle before the EFTA Court“, Symposium on Multi-level Adjudication of EU financial crisis reforms: Constitutional Questions in Comptemporary EU Law. *Michigan Journal of International Law*, 2013, pp. 101-11.

demonstrations and a collection of 53.355 citizen's signatures demanding the authorities to deliver a promise done during 2013 legislative elections: a national referendum on the question of EU accession⁶.

As many other electoral promises, the referendum was never held. In this sense, the political and legal elite seem to consider important protests, recent citizen's initiatives and even the national referenda on the new 2012 Constitution all alike: as non-binding survey/opinion polls that do not challenge the principle of Parliamentary supremacy. Iceland has not yet transitioned to the constitutional supremacy regime where citizens have their ultimate say in constitutional-law making⁷.

Tensions, crisis and paradoxes also exist in continental Europe, so Iceland is not unique in this sense. However, the fundamental question remains still pending, waiting to be explored, researched and clarified at least for this generation. What are the deep reasons behind the fact that the EU does not seduce average Icelanders? Why the EEA Agreement is still politically accepted in spite of its shortcomings? These are questions that go beyond the scope of legal discipline and engage other fields such as history, geography, economy, political science, sociology and even anthropology⁸.

This paper aims to provide an overview of the possible replies to this difficult question from a broad social sciences perspective (combining legal, po-

⁶ All references to the official documents are found in section 1. On the petition of EU referendum by 53.355 Icelandic voters in 2014 see Arnadóttir, N. "50.000 sign petition on EU referendum". Grapevine, available at <<https://grapevine.is/news/2014/03/17/50-000-sign-petition-on-eu-referendum/>> and GRAPEVINE. Thousands Protest Breaking EU Talks. Reykjavík, 15 March 2015, available at <<https://grapevine.is/news/2015/03/15/thousands-protest-breaking-eu-talks/>>, both last accessed 10.6.2021.

⁷ Méndez-Pinedo, M.E. "Primacy/Supremacy". *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL], Max Planck Foundation for International Peace and the Rule of Law. Oxford Constitutional Law 2017, accessible online at <<http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e488>> last accessed 10.6.2021.

⁸ In the field of political science Baldur Thorhaldsson, University of Iceland, has written extensively on this topic. In the words of Thorhallsson: "Iceland's European policy is a puzzle. Iceland is deeply embedded in the European project despite its non-EU membership status". This author has explained extremely well in recent publications the contradiction of a deep-rooted Euro-skepticism by Icelandic politicians and the decisive steps that Icelandic governments have taken in order to participate in European cooperation and integration processes. See Thorhallsson, B., "A small state in world politics: Iceland's search for shelter". *Vefímaritið Stjórnmal og stjórnsýsla*, 2018, vol. 14. 61-82; "Iceland and European integration", Oxford Research Encyclopedia of Politics, 2019. Oxford University Press, Online Publication 30 Oct 2019 available in internet at: <<https://doi.org/10.1093/acrefore/9780190228637.013.1035>> and "Iceland: The Dominant Party in Thrall to Its Past Discourse" in book Stegmann McCallion, Malin & Brianson Formerly Warleigh-Lack, Alex., 2018. *Nordic States and European Integration. Awkward Partners in the North?*. available in internet at: <<http://uni.hi.is/baldurt/files/2017/10/Iceland-The-Dominant-Party-in-Thrall-to-Its-Past-Discourse-by-Thorhallsson.pdf>>, both last accessed 10.6.2021.

litical, economic, geographical, historical arguments in a “law-in-context approach”⁹). It revises all important facts of the short accession process to the EU (now frozen) in section 1. It describes the status quo of the cooperation vs. integration question and some paradoxes in 2021 (section 2). It explains key geographical, historical and economic reasons behind the preference for European cooperation in the EEA (section 3). And, last but not least, it refers to some important factors that make accession to this supranational organization rather difficult (section 4). Some final thoughts are added as conclusion.

The novelty of the paper relies mostly on the perspective used, a recent survey of literature and its finding (historical and geographical factors out of any social-political control are a key explanation of Euroscepticism, together with other legal constitutional reasons which are also important). Furthermore, although the relationship Iceland-EU has been covered mostly by political science scholars in Iceland, there is a research gap in the legal field. European legal scholars have hardly contributed recently to the debate¹⁰.

2. Iceland and Europe/the EU: the everlasting political dilemma

Iceland's application for EU membership was submitted on 17 July 2009 by its Parliament/*Althingi* (majority of social democrats and left wing party at the time). At a meeting on 17 June 2010, the European Council decided, once a positive opinion from the Commission had been expressed; that accession negotiations should be opened. A framework for negotiations with Iceland was approved by the Council on 26 July 2010.¹¹

However, Iceland held new parliamentary elections on 27 April 2013 that resulted with a victory for the two centre-right opposition parties, the Independence Party and Progressive Party, which subsequently formed a coalition government. Contrary to the previous government that sought EU accession, these parties were Eurosceptic. This led to a halt of partially completed negotiations with the European Union regarding Icelandic membership. During the campaign, both parties had promised nevertheless the citizens to hold a referendum on continuing

⁹ For different approaches in legal research, see Chynoweth, P. “Legal Research”, in Knight, A. & Ruddock, L. (eds.) *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, 2008, pp 28-38. On the “law in context” approach see for instance the definition of the European University Institute, Law Department, at <<https://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/Law-in-Context>> last accessed 10.6.2021.

¹⁰ Most recent publications on the topic by European scholars are not written strictly in the legal field. See Kobza, P. “Accession of Iceland to the European Union: A Failure Beyond Repair?”, *European Foreign Affairs Review*, 2017, no. 22, Issue 2, pp. 129-145 and Gemers, T., “Brussels and Reykjavík: Drifting Further Apart? Explaining the Icelandic Public Opposition towards EU Membership”, EU Diplomacy Paper 04/15, College of Europe, Brugge-Natolin, 2015.

¹¹ European Council, see all documents relating to the enlargement process and Iceland for the period 2009-2015 at <https://www.consilium.europa.eu/en/policies/enlargement/iceland/>, last accessed 10.6.2021.

the negotiations if they formed government. This promise was never fulfilled.

On 17 December 2013, the European Council took note of the new Icelandic Government's decision to put accession negotiations on hold. The Council underlined its belief that Iceland's accession was a matter of mutual benefit. It also indicated that the EU was ready to continue the negotiations, should Iceland decide to resume them.¹²

On 12 March 2015, Foreign Minister of Iceland Gunnar Bragi Sveinsson sent a letter to the Latvian Presidency of the Council and EU Commissioner for Enlargement declaring that the government had no intention to resume its accession talks and thus suspending the application for membership, without the approval of the Parliament/*Althingi*. The Foreign Minister reiterated the importance of continued close relations and cooperation between the EU and Iceland based, in particular, on the EEA Agreement. The content of the letter led the European Union to state that Iceland had frozen but not formally withdrawn the EU application.¹³

In 2017, Iceland's newly elected government announced that it would hold a vote in parliament on whether to hold a referendum on resuming EU membership negotiations. However, in November 2017 that government was replaced by a coalition of the Independence Party, the Left Green Movement and the Progressive Party; all of whom oppose EU membership. The referendum promise was, once more, quickly forgotten.

New legislative elections are to be held in the autumn 2021. The status quo concerning the EU accession remains the same. Although a member of the European Economic Area, if negotiations were ever to resume or a process of application to the EU reactivated, Iceland would still face controversial issues (ie. access to fisheries, subsidies in farming, connection to the European energy network) which could potentially lead to problems to reach a perfect agreement or draft accession treaty. If, however, such an agreement were ever to be concluded, it would still require a national referendum in Iceland as well as ratification by every EU Member state.

3. The status quo in 2021: paradoxes remain with some tensions under peaceful waters

From a legal perspective, some important issues must be noted regarding the last decades of European cooperation. In the context of occasional

¹² Ibid. See also European Parliament. Reply to the written questions in Iceland at the European Parliament < https://www.europarl.europa.eu/doceo/document/E-8-2015-004741-ASW_EN.html > and < https://www.europarl.europa.eu/doceo/document/E-8-2015-012512-ASW_EN.html >, both last accessed 10.6.2021.

¹³ See Reply of the Council of the European Union. Letter of 17 April 2015 to Iceland. Doc. 7864/15. Draft available at < <https://data.consilium.europa.eu/doc/document/ST-7864-2015-INIT/en/pdf> > last accessed 10.6.2021.

constitutional resistance to international and European Union (EU) law in other countries¹⁴, we find a similar tension in Iceland between the European Economic Area (EEA) Agreement and the Icelandic constitutional/statutory domestic system (EEA Act no 2/1993). There is a permanent tension between the need to respect independence, legal autonomy and the domestic constitutional system versus the obligation to guarantee reciprocity, homogeneity and effectiveness of the legal order and the rights granted by the EU/EEA¹⁵.

Having this tension in the background, it has been noted how the authority and effectiveness of EEA law seem disregarded in the country with negative consequences for the judicial protection of individual rights¹⁶. EEA scholarship has referred to a sort of judicial, legislative and/or constitutional resistance to EEA law in Iceland¹⁷ and has argued that the use of concepts such

¹⁴ See chapter 5 “The authority of EU law” in Chalmers, D., Davies, G., and Monti, G., *European Union law*, 4th edition, Cambridge University Press, Cambridge, 2019, pp. 202-248.

¹⁵ Méndez-Pinedo, M.E., “Constitutional/judicial resistance to European Law in Iceland. Sovereignty and constitutional identity vs. access to justice under the EEA Agreement”, *Juridical Tribune – Tribuna Juridica*, vol. 10, issue 3, December 2020, pp. 390-418. For other EFTA-EEA countries see Damen, M., „Balancing integration and autonomy. How EFTA countries reconcile EU-approximation and independence?”. Policy Department for External Relations Directorate General for External Policies of the Union. European Parliament. Doc. PE 639.315- February 2020 available online at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/639315/EXPO_STU\(20\)639315_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/639315/EXPO_STU(20)639315_EN.pdf)> last accessed 10.6.2021.

¹⁶ The EFTA Surveillance Authority (ESA) has sent official letters to Iceland in 2015, 2016, 2017 and 2020 concerning two constitutional issues: 1) the authority of EEA implemented law vis-a-vis pure national law (Protocol 35 of the EEA Agreement and Article 3 Icelandic Act on the EEA no. 2/1993 and 2) potential State liability for judicial breaches of EEA law (Article 3 EEA Agreement). In its view, in too many recent cases, the Supreme Court has discarded and set aside validly implemented EEA law in order to give precedence to conflicting Icelandic law. In some cases, individuals have no proper remedy to exercise their European rights (State liability for judicial breaches of EEA law not admissible). It is uncertain at this time whether actions for infringement of EEA law will be brought by ESA to the EFTA Court. EFTA Surveillance Authority (ESA). Letter of Formal Notice of 17 June 2015 (Doc. No 752617); followed by Reasoned Opinion (Case No: 75004, Document No. 775380, 20 January 2016) available at <<https://www.eftasurv.int/cms/sites/default/files/documents/gopro/2405-775380.pdf>>; EFTA Surveillance Authority (ESA). Letter of Formal Notice to Iceland from 17 December 2017 on application of Protocol 35 EEA Agreement available online at <<http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=4071>> followed by Reasoned Opinion. Letter to Iceland from 30 September 2020 available online at <https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Reasoned%20opinion%20-%20Own%20initiative%20case%20against%20Iceland%20concerning%20the%20incorporation%20of%20Protocol%2035.pdf>. All documents from EFTA Surveillance Authority (ESA) have been last accessed 10.6.2021.

¹⁷ Hannesson, O.I. „Advisory Opinions in the EEA: The Icelandic Supreme Court and the EFTA Court”, *European Law Review*, 2018, vol. 43 (6) pp. 858 et seq. More recently see Franklin, Christian; Hannesson, Ólafur Ísberg; Berg Rúnarsson, Ómar; Baur, Georges; Steiner, Enya. „Norway (including Iceland and Liechtenstein)”. In: *National Courts and The Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order*. The Hague: The XXIX FIDE Congress in The Hague, 2020 Congress Publications, Vol. 1, S. 337-383 available in internet at

as sovereignty (public international law) and constitutional identity (EU law) can never justify the denial of access to justice and effective judicial protection under the EEA Agreement¹⁸.

This legal/constitutional resistance against EEA law (and the dual contradictory political strategy with two opposite speeches, a European tone in Brussels vs. an Icelandic nationalistic one in Reykjavík); also show a serious fracture between its elite institutions and its citizens. A constitutional silent crisis is still ongoing in Iceland after the Parliament set aside the new project of a constitution drafted primarily by elected citizens and voted on a national referendum on 20 October 2012¹⁹. At the moment, Iceland seems trapped in a process of a difficult transition from legislative supremacy (Parliament seat of sovereignty) to constitutional supremacy (the nation and the will of the people are the sovereigns and constitutional legislators)²⁰. With the exception of the Icesave referenda held in 2010 and 2011, where the Constitution did foresee a referendum for the refusal of the President to sanction the parliamentary laws; Icelandic political and legal elite seem to regard major protests, citizens' initiatives and the national referendum on the new Constitution as non-binding polls that do not challenge the tradition of parliamentary sovereignty in their representative democracy.²¹ Ten years later, the refusal of Parliament to adopt the "new Constitution" drawn up by the citizens elected in a constituent process in 2010 (Constitutional Council) shows that legality prevails over legitimacy²², as following the maxim "Everything for the people but without the people." At the time of writing the Prime Minister Katrín Jacobsdóttir has presented to the Parliament a proposal for partial reform of some articles but is not intending to honour the results of the 2012 referendum.

Other paradoxes are visible, typical of an era of transition between the old 20th century that has not yet gone and the new 21st century that has not yet

<<https://boeken.rechtsgebieden.boomportaal.nl/publicaties/9789462361287#365>> last accessed 10.6.2021.

¹⁸ Méndez-Pinedo, M.E. "Constitutional/judicial resistance to European Law in Iceland. Sovereignty and constitutional identity vs. access to justice under the EEA Agreement", *Juridical Tribune*, vol. 10, issue 3, December 2020, pp. 390-418.

¹⁹ See new Constitution from 2011-2012 and all documents at the website of the Constitutional society of Iceland, available in internet at: <https://stjornarskrarfelagid.is/?page_id=2598> last accessed 10.6.2021.

²⁰ Méndez Pinedo, M.E. "Supremacy/Primacy". Oxford-Heidelberg: Oxford Constitutional law. Max Planck Encyclopedia of Comparative Constitutional law. 2016. Available at <<https://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e488?prd=MPECCOL>> last accessed 10.6.2021.

²¹ Constitutional Society of Iceland (Stjórnskrárfélagið 2011-2021) at <https://stjornarskrarfelagid.is/?page_id=2598> last accessed 10.6.2021.

²² The word "legitimacy" does not have a direct translation or specific unique word in Icelandic language, and the translation term used is that of "substantive legality" which proves that the concept of legitimacy is not considered relevant at least by legal scholarship. See Méndez-Pinedo, M.E. "Lögmæti og þjóðmæti". Article in journal *Stundin* 6 April 2016 (in Icelandic) available at <<https://stundin.is/pistill/logmaeti-og-thjodmaeti/>> last accessed 10.6.2021.

arrived. The most important challenge is the impossibility of ensuring at the same time economic integration in a globalized world, national sovereignty and democracy (the classic Rodrik trilemma²³). Complicating the matter is that Icelanders mostly have an emotional understanding of the sovereignty that they formally defend despite having *de jure* and *de facto* ceded the right to participate in the European legislative process since the EEA Treaty does not grant them the right to formal participation or to vote²⁴. Paradoxically, from a pragmatic point of view, they seem to take for granted most of their rights as citizens and economic operators in the European internal market, ignoring the cost of their participation in the EEA: a significant democratic deficit²⁵.

So here is the main research question of the paper. What are the deep reasons behind the fact that the EU does not seduce Icelanders? Why is the EEA Agreement still politically accepted despite its shortcomings (fiction of sovereignty, strong democratic deficit, non-participation in law-making and the rising tide of EU law pushing constitutional limits)? An attempt to reply to this question follows.

4. European cooperation but not integration: geographical, historical and economic reasons

Iceland is a large country in terms of geographical size, but tiny in terms of population (in 2021 it has around 368,000 inhabitants of which around 55,000 are foreigners or 15% of population)²⁶. It has a different history from Europe, it is by tradition and conviction a peaceful nation that trusts its defense policy on NATO and does not have a national army. It has traditionally been an island country isolated by the Atlantic Ocean and protected by other cultural barriers (i.e. more preserved ancient language rooted in Old Norse/Germanic). It acquired the status of a full independent sovereign nation in 1944 so that nationalist sentiments are still strong and exploited by political parties.

In this context, this paper claims that Reid's thesis regarding the imitation and failure of the economic and political integration process in Latin America is also applicable to Iceland. Two fundamental factors are missing for a legal supra-national integration to be politically imperative and economically justified: a sec-

²³ Rodrik, D. *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Coexist*, Oxford University Press, 2011.

²⁴ Bergmann, E., „Sense of Sovereignty. How national sentiments have influenced Iceland's European policy”. *Icelandic Review of Politics & Administration*, 2009, vol. 5. 203. See also Andenas, M. „Sovereignty“, in book Baudenbacher, C. *Fundamental Principles of EEA Law*, Springer, 2017, pp. 91-108.

²⁵ Méndez Pinedo, M.E. “Iceland at the crossroads: a dilemma in European integration”, 16 pages, *Pjóðarspeggill, Félagsvísindirannsóknir, Háskóla Íslands*, 30th October 2009, pp. 329-340.

²⁶ Iceland. Statistics Office (Hagstofa). Data on population available in internet at <https://statice.is/>.

ular history of wars between neighboring nation-states and a compact geography.²⁷

Similarly, despite being a country with a high standard of living and a developed economy in terms of GDP, it shares other important constraining factors that bring it closer to the South American continent. In contrast to the mature European economy, it is an emerging economy based on undiversified export pillars and natural resources (fishing, aluminum processing and tourism). It has the smallest currency in the world, the Icelandic krone (ISK), chronically affected by inflation and instability. Like any other ultra-peripheral region of Europe, it presents great vulnerability and special limitations: remoteness, insularity, small size, difficult topography and climate, and economic dependence on a few products or economic sectors²⁸.

All these factors lead to the prevailing and pragmatic national interest not to alter the status quo, that is to say, to remain in the EEA which grants access to the internal market and not to join the EU which would mainly limit its fisheries sovereignty and its monetary policy independence and flexibility. It is not clear whether the current process of European integration suits Iceland's needs²⁹.

However, history is not written. Any future internal or external event, catastrophic for the country, could lead Icelanders to seek refuge in the EU port, as Thorhallsson has always noted³⁰. If that ever happens, the question of whether a new EU-Iceland relationship is preferable to the EEA will re-emerge strongly. At the end of the day, it is difficult to predict how history will develop. What is for sure is that only a national referendum on a specific Accession Treaty to the EU would finally tell whether Icelanders would favour a deeper legal integration process or not.

5. Some other key issues that make EU accession difficult in the light of the “*acquis communautaire*”

The crucial question that divides partisans and opponents of European integration seems to be the theoretical and potential flexibility of the EU legal

²⁷ Reid, M. *Forgotten Continent: The Battle for Latin America's Soul*. Yale University Press, 2007, p. 348 accessible at <<http://www.jstor.org/stable/j.ctt1npqv7>> last accessed 10.6.2021.

²⁸ Those are the vulnerabilities usually signaled by international sovereign credit rating agencies such as Fitch, Standard & Poors and Moody's and regular reports done by the International Monetary Fund.

²⁹ On this topic, see Hilmarsson, H. Þ. "Should Iceland Seek European Union and Euro Area Membership?." *Regional Formation and Development Studies*, 2021, vol 21 no. 1, pp. 53-67. Available online at <<https://doi.org/10.15181/rfds.v21i1.1409>>.

³⁰ Thorhallsson, B., "A small state in world politics: Iceland's search for shelter". *Veffimarið Stjórnmal og stjórnsýsla*, 2018, vol. 14., pp 61-82; and "Iceland and European integration", Oxford Research Encyclopedia of Politics. Oxford University Press, Online Publication 30 Oct 2019 available in internet at : <<https://doi.org/10.1093/acrefore/9780190228637.013.1035>>.

and political system to accommodate the specific needs of Iceland. To what extent could the EU be able to respect specific Icelandic interests without breaking the principle that there are no exceptions to the *acquis communautaire*?

Wallis has argued that the history of the EU shows that, despite tough bargaining, there is a sense of common values and a shared destiny that prevails. In her view, where there are common values and interests there can surely be a common solution.³¹ On the other hand, while the financial crisis struck Iceland harshly and even challenged the existence and survival of the European Economic Area (EEA) legal order; it is also true that full European integration does not seem to seduce Icelanders in general.

The EU legal integration project (and general transfer/share or pooling of sovereignty) will probably never fully convince Iceland for historic, geographic, political and economic reasons. As Damen has pointed recently: “reasons for the strong desire for autonomy can partly be found in geographic or historic factors, but these cannot explain their position entirely, as existing EU Member States may also have such particularities. That all EFTA countries have a strong economy based on specific sets of natural resources and/or financial legislation, certainly is another element that explains the desire to keep matters in their own hands as far as possible. Strong consensus oriented democratic systems with components of direct democracy complete the picture.”³²

Apart from general preference for autonomy and the impact of the Icesave dispute with the Netherlands and the UK (and all other EU Member States)³³; most prominent academics in the fields of political science and history have proposed these explanations for the EU/Euroscepticism in Iceland:

- the importance of the fishing industry to Iceland's economy and the fact and/or perception that EU membership (and its Common Fisheries Policy) might have an adverse effect on this sector.³⁴ This would obviously depend on final

³¹ Wallis, D., *The Forgotten Enlargement. Future EU Relations with Iceland, Norway and Liechtenstein*, Centre for Reform, London, 2002.

³² Damen, M., „Balancing integration and autonomy. How EFTA countries reconcile EU-approximation and independence”. Policy Department for External Relations Directorate General for External Policies of the Union. European Parliament. Doc. PE 639.315- February 2020 available online at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/639315/EXPO_STU\(2020\)639315_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/639315/EXPO_STU(2020)639315_EN.pdf) last accessed 10.6.2021.

³³ The EU leaders, who took a position in the Icesave crisis with the financial sector vis-à-vis Icelandic civil society, did not understand well the window of opportunity, unique in recent history, in which public opinion was favorable to the accession to the EU (2009). This crisis showed the worst of European economic governance (solidarity being an empty shell term in the EU Treaties at the time). Icelanders understood that they had no other chance but to unite and fight adversity, without the help of Europe/European Union.

³⁴ It does not help either that the management of maritime biological natural resources is an exclusive competence of the EU and the rule of qualified majority voting in the Council to decide on quotas/TACs or total allowable catches. See Bergmann, Eiríkur. "Iceland: Ever-Lasting Independence Struggle". *Nordic Nationalism and Right-Wing Populist Politics*. Palgrave Macmillan UK, January 2017, pp. 93–124, available at <doi:10.1057/978-1-137-56703-1_4. ISBN

negotiations for accession and political decisions taken by the EU on the basis of the so called “*acquis communautaire*“ or consolidated legal European *corpus iuris* for more than 60 years and historic use of maritime resources in the 200 miles under Icelandic jurisdiction for the same period.

- the fact and/or perception that EU membership will have an adverse effect on Iceland's agricultural sector strongly subsidized in Iceland and protected from foreign competition by custom duties (also subject to eventual outcome after negotiations for accession).³⁵

- Iceland's strong ties with the United States during last 50 years, which included significant economic, diplomatic and military assistance (even a military US Navy Station with once 5000 troops which left Iceland in 2006) and therefore decreased Iceland's needs for reliance on European countries for these policies.³⁶

- the victories in the Cod Wars against the UK which may have strengthened Icelandic nationalism and boosted the perception that Iceland can better succeed through unilateral or bilateral negotiations rather than compromising in multilateral frameworks where it sits as a small nation.³⁷

- the Icelandic electoral system favours rural areas which are traditionally more Eurosceptic and tend to vote for anti-EU political parties (rural votes count almost double as those in Reykjavík reflecting a long-standing problem of the lack of equality of the vote criticized by international organisation OSCE).³⁸

- the tendency for Icelandic elites to pursue education in the United States or Eurosceptic European countries (such as the United Kingdom or the Nordic countries), and to cooperate more closely with political elites from those countries.³⁹

9781137567024>. See also on Iceland and the EU, Ingebritsen, Christine. *The Nordic States and European Unity*. Cornell University Press, 1998; and Thorhallsson, Baldur *Iceland and European Integration: On the Edge*. Routledge, 2004, specially on pp. 67-102, a chapter entitled “Life is first and foremost saltfis“, together with Hjalti Thor Vignisson.

³⁵ Thorhallsson, Baldur. *Iceland and European Integration: On the Edge*. Routledge. 2004.

³⁶ Ibid. See specially chapter entitled “The special relationship between Iceland and the United States of America“, with Hjalti Thor Vignisson, on pp. 103-127. Although the US left Keflavík base in 2006, a new project is under way in 2020 for the US Navy and US Air Force. The project and work's goal is to improve facilities for NATO maritime patrol aircraft.

³⁷ Thorhallsson, Baldur, *op. cit.*, specially on pp 1-18 and 185-208. In this regard, it must be noted that the victory against the UK preceded the signature of the United Nations Convention on the Law of the Sea in Montego Bay, Jamaica, 1982 where the rule of national jurisdiction over exclusive economic zones of 200 nautical miles was consequently approved in public international law.

³⁸ Considerable differences in the number of votes needed to elect a candidate within different constituencies remain. Office for Democratic Institutions and Human Rights (OSCE). Iceland Parliamentary Elections 27 April 2013. Mission Report 25-28 February 2013, on p. 5. See <https://www.osce.org/files/f/documents/6/4/100321.pdf> and (OSCE). Iceland Early Parliamentary Elections 28 October 2017, on p. 6, available at <<https://www.osce.org/files/f/documents/0/6/348621.pdf>>; both last accessed 10.6.2021.

³⁹ Thorhallsson, Baldur. *Iceland and European Integration: On the Edge*. Routledge, 2004. See specially chapter entitled “The Euro-sceptical political elite“, together with Gunnar Helgi Kristinnsson, on pp. 145-160.

- Icelandic ever present soft nationalism and the legacy of Iceland's past as a colonial entity in Scandinavia.⁴⁰

All these factors explain the paradox during the last decade. While regular polls have shown that the majority of Icelanders (more than 60%) would oppose formal, EU membership; at the same time, many citizens have over the years have supported a national referendum on the issue⁴¹. So the situation in 2021 can be summarized in a nutshell: While a majority is, in principle, against EU supranational integration and final EU membership; a very significant number of voters would like to decide upon the issue in a national referendum and not theoretically but on the basis of a draft accession treaty if the EU accession was ever back on the table.⁴²

6. Conclusions

Whereas Iceland could probably relatively easily fulfil the EU accession criteria, it has decided not to complete its accession application from 2009 and keep its relative independence, sovereignty and autonomy by preferring to stay in the EEA Agreement. Lacking a history of nation-wars and situated geographically as the ultra-periphery of Europe, for this small nation rich in natural resources and scarce in population, the supranational integration into the EU is neither a political imperative nor an economic necessity. This confirms a similar thesis pointed by Reid on South America.

Based on these premises, and in normal times; the EEA Agreement looks therefore like a sensible pragmatic compromise on the matter. A legal technical solution to secure access to the internal market and citizens/companies' European rights without a difficult share of sovereign/constitutional power. Legal reasons based on its constitutional law are also important since Icelanders have a strong desire to preserve their legal autonomy and independence as much as possible under public international law.

Icelanders, furthermore, do not seem to share some common European foundational values which constitute the political aspirations and goals of the Eu-

⁴⁰ Bergmann, Eiríkur. "Iceland: A postimperial sovereignty project". *Cooperation and Conflict*, 2014, vol. 49 (1), pp. 33–54, available at <doi:10.1177/0010836713514152. ISSN 0010-8367> and from historian Hálfdanarson, Guðmundur. *Íslenska þjóðríkið – uppruni og endimörk*. Reykjavík: Hið íslenska bókmenntafélag og ReykjavíkurAkademían, Reykjavík, 2001. (Translation of the title: Icelandic nation-state: origins and limits).

⁴¹ A petition from 53.355 citizens in 2015 delivered to authorities was ignored by political institutions. See also Grapevine. Thousands Protest Breaking EU Talks. Reykjavík, 15 March 2015, available at <https://grapevine.is/news/2015/03/15/thousands-protest-breaking-eu-talks/>. See also news RÚV (national TV). "7000 people protest in Austurvelli square". News from 15.03.2015 available at <https://www.ruv.is/frett/um-7000-motmaeltu-a-austurvelli>, both last accessed 10.6.2021.

⁴² For a compilation of different opinion polls on Iceland-EU relations see <https://en.wikipedia.org/wiki/Iceland%E2%80%93European_Union_relations> last accessed 10.6.2021.

European integration process. Domestic discussions on EU accession/European integration never ask or question whether they see themselves as European citizens (“We, the peoples of Europe”). Attraction is more of an economic and pragmatic nature, a sort of shelter harbour when the ocean gets rough, as political scientist from Thorhallsson has described. The emotional discussions on independence, self-determination and sovereignty always complicate the matter and reflect a strong national identity, a particularity studied by another political scientist, Bergmann.

All in all, these factors explain the status quo, that is to say, general preference for the EEA (European cooperation) rather than the EU (European integration). As the Working Group on the EEA Agreement noted in its Final Report from 2019, Icelanders are usually divided on this political choice. For too many, it is quite unclear whether the current European integration and the eurozone rules suit the needs of Iceland. The only time in recent history where public opinion was favorable on EU accession and a window of opportunity for integration opened (2009); this was not well understood by EU, who took stand with the financial sector and not with the well-founded claims of Icelandic civil society. The so-called Icesave crisis unfortunately showed the worst side of the EU and Icelanders understood they could not expect assistance from this supranational organization.

However, the future of the European integration and cooperation processes is far from written. Any internal or external future crisis, potentially difficult and/or catastrophic for the country, might lead to a change of public opinion and Icelanders wanting to seek accession again. If that ever happens, the question whether a new relationship EU-Iceland is preferable to current EEA will be again on the table. And, with all probability, citizens would again claim a referendum on the issue, a promise never fulfilled so far.

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