

UNIVERSITATEA ”CONSTANTIN BRANCOVEANU” DIN PITEȘTI
FACULTATEA DE ȘTIINȚE ECONOMICE ȘI JURIDICE
CENTRUL DE CERCETĂRI JURIDICE ȘI ADMINISTRATIVE

Proceedings of the Annual Scientific Conference ”LAW AND PUBLIC ADMINISTRATION” - XVI Edition -

"*THE IMPACT OF LEGISLATIVE CHANGES ON THE LEGAL AND ADMINISTRATIVE MECHANISMS FOR GUARANTEEING EU FUNDAMENTAL RIGHTS*"

Editura Independența Economică
Piteşti, 2026

© Editura „Independenţa Economică”
Piteşti, Calea Bascovului nr. 2A
Tel./Fax: 0248/21.64.27

Editură acreditată de către C.N.C.S.I.S.

Niciun material nu poate fi reprodus fără permisiunea scrisă a Editurii.

ISSN 3119 - 9615
ISSN–L 3119 - 9615

SCIENTIFIC COMMITTEE:

Prof. univ. dr. Nicoleta Elena Hegheș,
Universitatea Creștină ”Dimitrie Cantemir” din București
Prof. univ. dr. Iulian Nedelcu,
Universitatea Constantin Brâncoveanu din Pitești
Prof. univ. dr. Carmen Paraschiv,
Universitatea Titu Maiorescu
Dr. Daniela Pojar,
Universitatea Tehnică a Moldovei, Republica Moldova, Prorector
Prof. univ. dr. Vitalie Rusu,
Universitatea de Stat ”Alecu Russo” din Bălți, Republica Moldova, Decan
Prof. univ. dr. Tatiana Vizdoaga,
Universitatea de Stat din Moldova
Conf. univ. dr. Gheorghe Bonciu,
Universitatea Constantin Brâncoveanu din Pitești
Conf. univ. dr. Doina Marinela David,
Universitatea ”Dimitrie Cantemir” din Târgu Mureș, Prorector
Conf. univ. dr. Adriana Eșanu,
Universitatea de Stat din Moldova
Conf. univ. dr. Nicolae Grădinaru,
Universitatea Constantin Brâncoveanu din Pitești
Conf. univ. dr. Vitalie Jitariuc,
Universitatea de Stat „Bogdan Petriceicu Hașdeu” din Cahul, Decan
Conf. univ. dr. Ion Mihalcea,
Universitatea Constantin Brâncoveanu din Pitești
Conf. univ. dr. Nelu Niță,
Universitatea „George Bacovia” din Bacău
Conf. univ. dr. Elvira Mihaela Pătrăuș,
Universitatea din Oradea
Conf. univ. dr. Nelu Dorinel Popa,
Universitatea ”Dimitrie Cantemir” din Târgu Mureș
Conf. univ. dr. Viorica Ursu,
Universitatea Tehnică a Moldovei
Conf. univ. dr. Andreea Uzlău,
Universitatea Titu Maiorescu
Lect. univ. dr. Iulia Bria,
Universitatea Tehnică a Moldovei, Centrul Universitar „Bogdan Petriceicu Hașdeu” din Cahul, Republica Moldova
Lect. univ. dr. Iuliana Cebuc,
Universitatea Constantin Brâncoveanu din Pitești, Director Departament
Lect. univ. dr. Daniela Dima,
Universitatea „George Bacovia” din Bacău
Lect. univ. dr. Simona Franguloiu,
Universitatea Constantin Brâncoveanu din Pitești

Lect. univ. dr. Raluca Lixandru,
Universitatea Constantin Brâncoveanu din Pitești
Lect. univ. dr. Alina Popescu,
Universitatea Constantin Brâncoveanu din Pitești
Lect. univ. dr. Daniel Radu,
Universitatea Constantin Brâncoveanu din Pitești
Lect. univ. dr. Isabela Stancea,
Universitatea Constantin Brâncoveanu din Pitești, Prodecan
Lect. univ. dr. Ion Stoica,
Universitatea Constantin Brâncoveanu din Pitești
Lect. univ. dr. Ana Maria Vasile,
Universitatea Constantin Brâncoveanu din Pitești
Dr. Domnița Vizdoaga,
Universitatea de Stat din Moldova
Asist. univ. dr. Daniel Paraschiv,
Universitatea Constantin Brâncoveanu din Pitești

CONTENTS

SECTION I - PUBLIC LAW.....7

FAIRNESS OF CONTRAVENTIONAL PROCEEDINGS AS A REQUIREMENT OF THE RULE OF LAW AND A MECHANISM FOR GUARANTEEING FUNDAMENTAL RIGHTS.....7
Sergiu BODLEV

CONSTITUTIONALISM AND EUROPEAN INTEGRATION: RECONFIGURING THE MECHANISMS FOR GUARANTEEING FUNDAMENTAL RIGHTS IN THE REPUBLIC OF MOLDOVA 20
Paula BODLEV
Sergiu BODLEV

ORGANIZATION AND FUNCTIONING OF PUBLIC SERVICES FOR ADMINISTRATION OF THE PUBLIC AND PRIVATE DOMAIN OF LOCAL INTEREST IN 2026 33
Angelica BRATU

SOME CONSIDERATIONS ON THE CRIMINAL PROTECTION OF THE RIGHT TO LIFE IN ROMANIA.....38
Raluca LIXANDRU

REGULATIONS OF THE RULE OF LAW PRINCIPLE IN EUROPEAN DOCUMENTS.....45
Iulian NEDELCU

PRIMARY AND DERIVATIVE EUROPEAN LAW.....53
Paul Iulian NEDELCU

TAX SECRECY – BETWEEN TRANSPARENCY AND THE PROTECTION OF PRIVACY AND COMMERCIAL CONFIDENTIALITY 64
Alina V. POPESCU

EUROPEAN PRACTICE REGARDING THE PRINCIPLE OF TRANSPARENCY UNDERLYING THE AWARD OF PUBLIC PROCUREMENT CONTRACTS 81
Daniel RADU

GENERAL PRINCIPLES UNDERLYING THE AWARD OF PUBLIC PROCUREMENT CONTRACTS – LEGISLATIVE FRAMEWORK, APPLICABILITY AND DEFINITIONS.....93
Daniel RADU

MAGISTRATES AND THE RIGHT TO FREEDOM OF EXPRESSION THROUGH THE PERSPECTIVE OF THE EUROPEAN HUMAN RIGHTS SYSTEM 101
Radu IOSOF

FORENSIC CHARACTERISTICS OF INFANT HOMICIDE CRIMES 118
Lucia RUSU
Ioan Sorin TUDORACHE

SECTION II – PRIVATE LAW 137

PARTICULARITIES OF MEDIATION IN FAMILY DISPUTES INVOLVING MINOR CHILDREN 137
Constantin MIHALESCU

LEGAL ASPECTS REGARDING THE INVESTIGATION OF EVENTS IN THE SPHERE OF EMPLOYMENT RELATIONS 146
Isabela STANCEA

THE SUSTAINABLE DEVELOPMENT OF THE EUROPEAN UNION TOWARDS 2030, THE ACCESSION PROCESS OF THE REPUBLIC OF MOLDOVA, AND ITS LEGISLATIVE IMPACT ON THE ECONOMIES OF ROMANIA AND UKRAINE 151
Mihai SUSANU,
Corneliu TUNI

THE HISTORY AND ADVANTAGES OF MEDIATION AS AN ALTERNATIVE METHOD FOR RESOLVING PRIVATE-LAW DISPUTES .. 163
Corneliu TUNI,
Mihai SUSANU

INHERITANCE OF DIGITAL IDENTITY – LEGAL IMPLICATIONS ON PERSONALITY RIGHTS AFTER DEATH 174
Ana-Maria VASILE

THE FORCED HEIRSHIP RESERVE BETWEEN FAMILY PROTECTION AND FREEDOM OF DISPOSITION – CURRENT CHALLENGES IN JUDICIAL PRACTICE 187
Ana-Maria VASILE

FAIRNESS OF CONTRAVENTIONAL PROCEEDINGS AS A REQUIREMENT OF THE RULE OF LAW AND A MECHANISM FOR GUARANTEEING FUNDAMENTAL RIGHTS

Sergiu BODLEV[1]

Abstract: *This article examines the fairness of contraventional proceedings in the Republic of Moldova and Romania as a structural requirement of the rule of law and as an instrumental mechanism for guaranteeing the fundamental rights of the person subjected to contraventional liability. Building on the autonomous concept of "criminal charge" developed by the European Court of Human Rights and on the comparative analysis of the Contraventional Code of the Republic of Moldova (Law No. 218/2008) and the Romanian Government Ordinance No. 2/2001 on the legal regime of contraventions, the study identifies the core procedural guarantees, namely the presumption of innocence, the adversarial principle and equality of arms, the right to defence, the reasoned character of judicial decisions, and access to an effective remedy, and evaluates the degree to which these guarantees are observed within the ordinary and extraordinary avenues of contraventional appeal. The article further discusses the effect of the digitalisation of contraventional procedure on procedural fairness and formulates several de lege ferenda proposals aimed at reinforcing the coherence between contraventional law and the constitutional and conventional standards of a fair trial.*

Keywords: *contraventional proceedings; fair trial; rule of law; ECHR; presumption of innocence; procedural guarantees; Republic of Moldova; Romania.*

1. Introduction

The fairness of contraventional proceedings is not a mere technical requirement of judicial organisation, but a structural dimension of the rule of law, insofar as the contraventional sanction, although formally excluded from the sphere of criminal law, retains a repressive and deterrent function comparable, in many respects, to that of a criminal sanction. The person sanctioned at the contraventional level, whether a driver fined for a minor road traffic offence or a trader sanctioned for failing to comply with certain tax obligations, is directly confronted with the coercive apparatus of the state and has the legitimate right to know and to invoke a body of procedural guarantees capable of limiting the arbitrariness of public authority. This human dimension of the contraventional relationship, often overlooked in a purely dogmatic approach to the institution, justifies an in-depth study of procedural fairness as a mechanism for protecting the fundamental rights of

[1] Lecturer, PhD in Law Technical University of Moldova, Cahul University Center, Email: sergiubodlev@yahoo.com, ORCID ID: 0000-0002-9903-8732

an ordinary person placed in a position of manifest inequality vis-à-vis the authority that applied the sanction.

The present study aims, through a comparative approach, to analyse the manner in which the legislation of the Republic of Moldova, namely Contraventional Code No. 218 of 24 October 2008, and the legislation of Romania, namely Government Ordinance No. 2 of 12 July 2001 on the legal regime of contraventions, reflect and implement the fairness standards enshrined in Article 6 of the European Convention on Human Rights, as developed by the case law of the European Court of Human Rights. The analysis is structured on three levels: the historical evolution of procedural guarantees in contraventional matters, the conceptual foundations of the fairness of contraventional proceedings, and the comparative regulatory framework of the two states, followed by a section devoted to the standards of Convention case law, a discussion of the impact of the digitalisation of the procedure on fairness, and a section dedicated to the contribution of Moldovan and Romanian legal scholarship to the clarification of these institutions.

The hypothesis underlying the research is that the mechanism for guaranteeing fundamental rights in contraventional matters cannot be reduced to a mere formal transposition of Convention requirements into statutory text, but presupposes a functional correlation between the general principles of procedure, the structure of the avenues of appeal, and the actual practice of the courts, so that the sanctioned person benefits from a real and effective remedy, rather than a merely declaratory guarantee devoid of practical content.

2. Historical evolution of procedural guarantees in contraventional matters

The legal regime of contraventions in both the Romanian and the Moldovan space originates in an administrative-punitive model inherited from the period preceding 1989 and 1991 respectively, in which the sanctioned person was treated, in essence, as a mere object of administrative authority, while judicial review of the sanction applied was either non-existent or confined to exceptional situations. In Romania, Decree No. 184/1954 and, subsequently, Law No. 32/1968 on the establishment and sanctioning of contraventions set up a mechanism in which the ascertaining agent concentrated both the power to establish the offence and the power to sanction it, while the judicial remedy remained rudimentary in character. In the Republic of Moldova, the 1985 Code on Administrative Contraventions, adopted during the Soviet period, reflected a similar approach, centred on the administrative efficiency of repression rather than on safeguarding the rights of the sanctioned person.

The constitutional reforms following 1989 and 1991 gradually imposed a recognition of the need to align contraventional procedure with the general requirements of a fair trial. In Romania, Government Ordinance No. 2 of 12 July 2001 on the legal regime of contraventions replaced Law No. 32/1968, introducing an ordinary judicial remedy, namely the contraventional complaint, brought before the competent court. Nevertheless, even this reformed framework initially retained an element of administrative filtering of access to justice, since Article 32(1) of Government Ordinance No. 2/2001 required the complaint to be lodged with the authority to which the ascertaining agent belonged, without expressly providing for the alternative possibility of directly seising the court. The Constitutional Court of Romania, through Decision No. 953 of 19 December 2006, published in the Official Gazette of Romania, Part I, No. 53 of 23 January 2007, found this restriction unconstitutional, holding that the provision limited free access to justice insofar as it failed to offer, as an alternative, the possibility of lodging the complaint directly with the court (Constitutional Court of Romania, 2007).

In the Republic of Moldova, the adoption of Contraventional Code No. 218 of 24 October 2008 marked a similar paradigm shift, by organising contraventional procedure on quasi-jurisdictional bases, with general principles expressly formulated in Articles 5 to 8, namely the principle of legality, the principle of equality before the law, the principle of fairness, according to which a person may be sanctioned only for the contravention in respect of which their guilt has been proven, and the principle of the personal character of contraventional liability (Contraventional Code of the Republic of Moldova, 2008, Arts. 5-8). The introduction of these general principles, together with the distinct structuring of the ascertainment phase, the trial phase, and the ordinary and extraordinary avenues of appeal, brought the Moldovan model appreciably closer to the requirements of a fair trial, although, as in the case of Romania, the effective application of these principles has, over time, required the corrective intervention of the constitutional court and the direct influence of the case law of the European Court of Human Rights.

3. Conceptual foundations of the fairness of contraventional proceedings

The starting point of any analysis of the fairness of contraventional proceedings is the autonomous concept of a ‘criminal charge’, developed by the European Court of Human Rights independently of the classification which domestic law attributes to a given act or sanction. In Engel and Others v. the Netherlands of 8 June 1976, the Court established three alternative criteria for determining the criminal nature of a charge within the autonomous meaning of the Convention, namely the classification of the offence under

domestic law, the nature of the offence itself, and the nature and degree of severity of the applicable sanction (Engel and Others v. the Netherlands, 1976). Applying these criteria to a minor road traffic contravention, the Court held, in Öztürk v. Germany of 21 February 1984, that the mere formal decriminalisation of an act, through its transfer from the sphere of criminal law to that of contraventional law (Ordnungswidrigkeit), cannot deprive the sanctioned person of the guarantees of Article 6 of the Convention, so long as the sanction retains a punitive and deterrent purpose (Öztürk v. Germany, 1984). This approach was confirmed with respect to the Republic of Moldova in Ziliberberg v. Moldova of 1 February 2005, in which the Court held that the sanctioning of the applicant for participating in an unauthorised gathering, under Article 174/1 of the then-applicable Code on Administrative Contraventions, fell within the criminal limb of Article 6, since the sanctioning norm served a preventive and deterrent, rather than a reparatory, function (Ziliberberg v. Moldova, 2005). With respect to Romania, Anghel v. Romania of 4 October 2007 confirmed the same line of interpretation, the Court holding that the contraventional regime established by Government Ordinance No. 2/2001 falls, functionally, within the autonomous notion of a criminal charge, with the direct consequence of shifting onto the state the burden of demonstrating compliance with the procedural guarantees specific to this field, including as regards the allocation of the burden of proof (Anghel v. Romania, 2007).

The principle of adversarial proceedings and that of equality of arms, developed by the European Court of Human Rights including by analogy with civil matters, in particular through Dombo Beheer B.V. v. the Netherlands of 27 October 1993, require that each party to contraventional proceedings be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis the authority that applied the sanction (Dombo Beheer B.V. v. the Netherlands, 1993). In the Republic of Moldova, this requirement is directly reflected in Article 452(1) of the Contraventional Code, according to which the trial of a contraventional case is conducted in a public hearing, orally, directly and on an adversarial basis (Contraventional Code of the Republic of Moldova, 2008, Art. 452(1)). The express enshrinement of the adversarial principle as a governing rule of the trial is not a mere rhetorical formula, but has concrete procedural consequences, since it obliges the court to ensure that the parties have a genuine opportunity to become acquainted with the opposing evidence and arguments and to formulate a useful response before judgment is delivered.

The presumption of innocence, expressly enshrined in Article 21 of the Constitution of the Republic of Moldova and Article 23(11) of the Constitution of Romania, finds a specific expression in contraventional

matters through the principle of fairness, set out in Article 7 of the Contraventional Code of the Republic of Moldova, according to which a person may be sanctioned only for the contravention in respect of which their guilt has been proven, in accordance with the provisions of the Code (Contraventional Code of the Republic of Moldova, 2008, Art. 7). Correspondingly, Article 8 of the same Code enshrines the principle of the personal character of contraventional liability, according to which a person is subject to contraventional liability only for acts committed with guilt, in the form of intent or negligence (Contraventional Code of the Republic of Moldova, 2008, Art. 8). Read together, these two principles exclude any form of strict, objective contraventional liability based solely on the material ascertainment of the act, without proof of the sanctioned person's guilt, thereby bringing the contraventional regime closer to the requirements specific to criminal matters, as outlined in the case law referred to in Anghel v. Romania (2007).

The right to defence of the person sanctioned at the contraventional level entails, among other things, the genuine possibility of challenging, before the court, the findings of the agent who drew up the report ascertaining the contravention. Article 455 of the Contraventional Code of the Republic of Moldova establishes, in this respect, the obligation for the ascertaining agent, or, as the case may be, the prosecutor, where the latter is a party to the proceedings, to be present at the hearing of the contraventional case, and the unjustified absence thereof, although it does not prevent the case from being tried, may result in a judicial fine, pursuant to the reference made to Article 201 of the Code of Criminal Procedure (Contraventional Code of the Republic of Moldova, 2008, Art. 455). This legislative solution seeks to ensure a reasonable balance between the need to avoid the unjustified delay of proceedings through the repeated absence of the ascertaining agent and the right of the sanctioned person to confront directly the author of the ascertaining act, an essential component of the adversarial principle and, implicitly, of the right to defence.

The reasoned character of judicial decisions and the existence of a two-tier system of jurisdiction constitute structural guarantees of the fairness of contraventional proceedings, since they enable the effective exercise of the right to a remedy. In the Republic of Moldova, the ordinary remedy is the appeal (recurs) governed by Articles 465-474 of the Contraventional Code, while the extraordinary remedies include revision, governed by Articles 475-477 of the same Code, the latter having a subsidiary corrective function, applicable exclusively in the situations expressly and exhaustively provided for by law, precisely so as not to undermine the principle of legal certainty (Contraventional Code of the Republic of Moldova, 2008, Arts. 465-477).

The existence of an extraordinary remedy, distinct from the ordinary appeal and subject to stricter admissibility conditions, reflects the legislature's legitimate concern to reconcile two apparently competing values, namely the stability of final judicial decisions and the possibility of correcting serious judicial errors, a balance which the European Court of Human Rights examined, among others, through the lens of Brumărescu v. Romania (1999).

4. Comparative regulatory framework: the Republic of Moldova and Romania

The Contraventional Code of the Republic of Moldova No. 218 of 24 October 2008 structures contraventional matters around two main components, namely a General Part, comprising the fundamental principles, the typology of sanctions and the subjects of contraventional proceedings, and a Special Part, describing specific contraventional acts. From the standpoint of procedural fairness, the relevant sections concern, first, the phase of ascertaining the contravention, governed by principles of lawful evidence-gathering; second, the phase in which the case is tried by the court, governed by the principles of publicity, orality, directness and adversarial proceedings enshrined in Article 452(1); and third, the system of remedies, structured around the ordinary appeal, governed by Articles 465-474, and extraordinary revision, governed by Articles 475-477 (Contraventional Code of the Republic of Moldova, 2008). The internal coherence of this system depends, to a considerable extent, on the uniform application of the general principles set out in Articles 5-8 throughout the entire procedure, including the stages preceding referral to the court, since any disconnect between the declared principles and the administrative practice of ascertainment risks compromising the overall fairness of the proceedings.

One aspect worth emphasising concerns the relationship between the severity of the applicable sanction and the intensity of the procedural guarantees afforded to the sanctioned person. Thus, the application of sanctions of a pecuniary nature raises a distinct problem of substantive fairness, since their payment may, in the case of persons lacking financial resources, practically diminish the effect of the sanction, which calls for further reflection on the manner in which the principle of equality before the law, enshrined in Article 6 of the Contraventional Code, applies differently depending on the financial situation of the sanctioned person (Guțuleac, 2009).

Government Ordinance No. 2 of 12 July 2001 on the legal regime of contraventions regulates, in Articles 31-36, the remedy of the contraventional complaint, which is settled by the court in whose territorial jurisdiction the contravention was committed. As noted above, the Constitutional Court of

Romania intervened, through Decision No. 953 of 19 December 2006, to remove an unjustified restriction on the manner of seising the court (Constitutional Court of Romania, 2007). Subsequently, through Decision No. 500 of 12 July 2012, concerning the plea of unconstitutionality of the provisions of Article 118(31) of Government Emergency Ordinance No. 195/2002 on traffic on public roads, read together with Article 34(2) of Government Ordinance No. 2/2001, the Constitutional Court examined the proportionality of the differentiated treatment applied to persons sanctioned for road traffic contraventions as compared with persons sanctioned for other categories of contraventions, as regards the scope of judicial review exercised by the court over the reports ascertaining the contravention (Constitutional Court of Romania, 2012). Both decisions illustrate the essential role played by the constitutional court, within the Romanian system, in correcting the fairness deficiencies of a regulatory framework conceived, in essence, from an administrative rather than a jurisdictional standpoint.

The comparison of the two regulatory systems reveals a progressive convergence, driven directly by Convention standards: both the Contraventional Code of the Republic of Moldova and Government Ordinance No. 2/2001, as interpreted by the Constitutional Court of Romania, tend to ensure that the sanctioned person has effective access to an independent and impartial tribunal, the possibility of challenging the findings of the ascertaining agent, and the right to a full judicial remedy, although the technical mechanisms through which these guarantees are implemented remain, to this day, different in terms of institutional structure and terminology.

5. Additional standards derived from the case law of the European Court of Human Rights

Beyond the autonomous notion of a criminal charge, the case law of the European Court of Human Rights has developed a series of further standards, applicable by analogy to contraventional procedure, which contribute to the harmonisation of procedural guarantees at the European level. Thus, with respect to the reasonable length of proceedings, König v. Germany of 28 June 1978 and Eckle v. Germany of 15 July 1982 established the criteria for assessing the reasonableness of the length of proceedings, namely the complexity of the case, the applicant's conduct, and the conduct of the competent authorities (König v. Germany, 1978; Eckle v. Germany, 1982), criteria which remain fully applicable to contraventional proceedings, given the significant caseload of contraventional matters pending before the courts of the Republic of Moldova and Romania.

As regards the guarantees relating to access to evidence and the genuine possibility of challenging the basis of the charge, A. and Others v. the United Kingdom of 19 February 2009, delivered by the Grand Chamber, emphasised the need for the person concerned by a restrictive measure to be given sufficient information about the accusations against them, so as to enable them to give effective instructions to their representative and to challenge, in a meaningful way, the grounds for the measure applied (A. and Others v. the United Kingdom, 2009). An analogous standard, applicable to the technical means of conducting hearings, follows from Marcello Viola v. Italy of 5 October 2006 and Sakhnovskiy v. Russia of 2 November 2010, delivered by the Grand Chamber: the participation of the accused by videoconference at the hearing is, in principle, compatible with Article 6 of the Convention, provided that it is accompanied by adequate technical and procedural safeguards, including the possibility of confidential and effective consultation with defence counsel, the absence of such safeguards being liable to give rise to a finding of a violation of the right to defence (Marcello Viola v. Italy, 2006; Sakhnovskiy v. Russia, 2010). The relevance of these two cases to contraventional matters has grown considerably with the expansion of the practice of remote hearings, discussed in Section 6 of this article, in the context of the digitalisation of the procedure.

Lastly, with respect to extraordinary remedies and their relationship with the principle of legal certainty, Brumărescu v. Romania of 28 October 1999, delivered by the Grand Chamber, held that the exercise of an extraordinary remedy, whereby a final and irrevocable judicial decision is called back into question in the absence of a substantial and compelling reason, undermines the principle of legal certainty, an implicit component of the right to a fair trial (Brumărescu v. Romania, 1999). This requirement was refined, with respect to revision in contraventional matters, in Mihalache v. Romania of 8 July 2019, likewise delivered by the Grand Chamber, which examined the compatibility of the reopening of proceedings with the ne bis in idem principle enshrined in Article 4 § 2 of Protocol No. 7 to the Convention, holding that the reopening of proceedings is permissible only where the strict conditions laid down by that Convention provision are met, namely the existence of new or newly discovered facts or a fundamental defect in the previous proceedings (Mihalache v. Romania, 2019). Taken together, these cases outline a coherent Convention standard, according to which any extraordinary remedy in contraventional matters must remain exceptional, strictly circumscribed by clear admissibility conditions, precisely so as not to compromise the stability of legal relations that legal certainty presupposes.

6. The impact of the digitalisation of contraventional procedure on procedural fairness

The digitalisation of contraventional procedure, embodied in the Republic of Moldova through the development of the MCabinet governmental electronic services platform and through the adoption of the Regulation approved by Government Decision No. 146 of 26 February 2025, which governs the use of the simple electronic signature within administrative and contraventional procedures, opens up a further dimension for the analysis of procedural fairness (Government of the Republic of Moldova, 2025). On the one hand, digitalisation has the potential to speed up and streamline the ascertainment and communication of procedural acts, reducing the risk of unjustified delay and increasing the transparency of the entire process. On the other hand, the generalisation of electronic tools raises a distinct problem of substantive fairness, namely the risk of digital exclusion of vulnerable categories of the population, in particular elderly persons or persons who lack stable access to electronic means of communication, who could be disadvantaged as regards their genuine ability to become acquainted with procedural acts and to exercise their right to defence within the statutory time limits.

The standards outlined in Marcello Viola v. Italy (2006) and Sakhnovskiy v. Russia (2010), discussed in Section 5, offer a useful benchmark for assessing the compatibility of new digital tools with the requirements of a fair trial: the mere technical availability of an electronic solution is not sufficient; it must be accompanied by adequate procedural safeguards ensuring that the sanctioned person has a genuine and effective opportunity to exercise their right to defence, including through access to legal assistance and through the possibility, where appropriate, of requesting a return to a traditional means of communication or participation in the hearing. In the absence of such safeguards, digitalisation risks turning an administrative measure intended to simplify the procedure into a further obstacle to effective access to justice, thereby contradicting the very fairness objective that the reform pursues.

7. Contributions of Moldovan and Romanian legal scholarship

Moldovan legal scholarship has contributed substantially to the conceptual clarification of the fairness of contraventional proceedings. Victor Guțuleac, in his reference treatise on contraventional law, emphasised the need to functionally differentiate between contraventional and criminal liability, insisting that, although formally distinct, the two forms of legal liability must observe a common core of procedural guarantees, failing which contraventional law would be transformed into an instrument of administrative repression devoid of effective judicial control (Guțuleac,

2009). Along the same lines, a scientific paper presented at the 'Bogdan Petriceicu Hasdeu' State University of Cahul examined the liability of public authority as a guarantee of legal fairness within the state, highlighting that procedural fairness cannot be dissociated from the corresponding liability of the authority applying the sanction, the latter being, in turn, subject to judicial review designed to prevent the abuse of discretionary power (Bodlev, 2020). The editorial contribution of Vitalie Ionașcu, Dean of the Faculty of Law, Public Administration, Order and Security within the 'Ștefan cel Mare' Academy of the Ministry of Internal Affairs of the Republic of Moldova and deputy editor-in-chief of the scientific-practical publication 'Legea și Viața', has likewise sustained a lasting academic forum on the procedural standards applicable to the intervention of public authority vis-à-vis private individuals, a forum within which the question of procedural guarantees specific to contraventional matters naturally finds its place (Ionașcu, 2023).

Romanian legal scholarship has, in turn, developed an in-depth analysis of the relationship between contraventional law and administrative law. Ovidiu Podaru, together with Anda Bachiș, proposed a didactic systematisation of the institutions of contraventional law which places particular emphasis on the jurisdictional character of the review exercised by the court over the report ascertaining the contravention, stressing that such review cannot be reduced to a mere formal verification of the lawfulness of the act, but must also encompass an effective assessment of the merits of the accusation (Podaru and Bachiș, 2016). Verginia Vedinaș, in her treatise on administrative law, analysed the contravention as a form of administrative liability, situating it in a relationship of complementarity with the other forms of legal liability specific to public law, while Antonie Iorgovan, in his treatise on administrative law, which remains a reference work of Romanian legal scholarship, emphasised the importance of judicial review over administrative acts of a sanctioning nature as an essential component of the rule of law (Vedinaș, 2021; Iorgovan, 2005). Lastly, Mircea Ursuța, in a study published in the journal Curierul Judiciar in 2008, devoted to the application of the case law of the European Court of Human Rights in Romanian contraventional procedure, argued that such procedure may be classified as falling within the autonomous notion of 'criminal matters' within the meaning of the Convention, which requires full compliance with the guarantees specific to that field, including as regards the allocation of the burden of proof and the right to silence (Ursuța, 2008).

The convergence of these Moldovan and Romanian scholarly contributions alike confirms the existence of a solid academic consensus in favour of an extensive interpretation of the procedural guarantees applicable to contraventional matters, a consensus which, although devoid of binding legal

force, exerts a significant influence on subsequent legislative and judicial developments, thereby contributing to the strengthening of systemic coherence between domestic contraventional law and European fair trial standards.

The analysis undertaken in this article confirms the initial hypothesis, according to which the fairness of contraventional proceedings constitutes a structural requirement of the rule of law, rather than a mere accessory procedural requirement. The autonomous notion of a criminal charge, developed by the European Court of Human Rights beginning with Engel and Others v. the Netherlands (1976) and confirmed, with respect to the two states under analysis, by Ziliberberg v. Moldova (2005) and Anghel v. Romania (2007), requires the extension of the guarantees specific to criminal matters over the entirety of contraventional proceedings, from the ascertainment of the act to the exhaustion of ordinary and extraordinary remedies.

The comparative analysis of the Contraventional Code of the Republic of Moldova and Government Ordinance No. 2/2001 of Romania reveals a progressive convergence of the two regulatory systems towards a model of procedural fairness defined by four essential coordinates: the presumption of innocence and the principle of fairness; adversarial proceedings and equality of arms; the right to defence, including the possibility of confronting the ascertaining agent; and the effective character of the remedies available, structured around an ordinary appeal and an extraordinary revision, strictly circumscribed by admissibility conditions, in line with the principle of legal certainty enshrined in Brumărescu v. Romania (1999) and refined in Mihalache v. Romania (2019).

Building on these findings, we put forward, in a personal capacity, three de lege ferenda proposals. First, we consider it necessary to introduce, in both the Contraventional Code of the Republic of Moldova and Government Ordinance No. 2/2001, explicit statutory criteria for differentiating the intensity of procedural guarantees according to the severity of the applicable sanction, particularly with respect to pecuniary sanctions liable to affect disproportionately those persons lacking financial resources. Second, we propose supplementing the regulatory framework on the digitalisation of contraventional procedure with express safeguards designed to prevent the digital exclusion of vulnerable population groups, including the statutory possibility of requesting a return to a traditional means of communication or participation in the hearing. Third, we advocate for a closer correlation, at both doctrinal and jurisprudential level, between the standards developed by the European Court of Human Rights in criminal matters and their application by analogy to contraventional matters, through a uniform judicial practice capable of avoiding divergent interpretations of the same fundamental guarantees in the two states under analysis. Only such an integrated approach,

coherently linking general principles, the domestic regulatory framework, and Convention standards, can ensure that contraventional proceedings truly function as a mechanism for guaranteeing the fundamental rights of the person, rather than as a mere instrument of administrative repression.

References

A. and Others v United Kingdom (2009) Application No. 3455/05. ECtHR, Grand Chamber, 19 February 2009.

Anghel v Romania (2007) Application No. 28183/03. ECtHR, 4 October 2007.

Bodlev, S. (2020) 'Responsabilitatea autorității publice – garanție a echității juridice în stat', in Materialele Conferinței Științifice „Probleme actuale ale dreptului și administrației publice". Cahul: Universitatea de Stat „Bogdan Petriceicu Hasdeu" din Cahul.

Brumărescu v Romania (1999) Application No. 28342/95. ECtHR, Grand Chamber, 28 October 1999.

Contravention Code of the Republic of Moldova (2008) Law No. 218 of 24 October 2008. Official Gazette of the Republic of Moldova, No. 3–6/15, 16 January 2009.

Constitutional Court of Romania (2007) Decision No. 953 of 19 December 2006. Official Gazette of Romania, Part I, No. 53, 23 January 2007.

Constitutional Court of Romania (2012) Decision No. 500 of 12 July 2012. Official Gazette of Romania, Part I, No. 492, 18 July 2012.

Dombo Beheer B.V. v Netherlands (1993) Application No. 14448/88. ECtHR, 27. 10.1993.

Eckle v Germany (1982) Application No. 8130/78. ECtHR, 15.07.1982.

Engel and Others v Netherlands (1976) Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72. ECtHR, 8 June 1976.

Government of the Republic of Moldova (2025) Decision No. 146 of 26 February 2025 on the Regulation on the Use of the Simple Electronic Signature. Official Gazette of the Republic of Moldova.

Government Ordinance No. 2/2001 (2001) on the Legal Regime of Contraventions. Official Gazette of Romania, Part I, No. 410, 25 July 2001.

Guțuleac, V. (2009) Tratat de drept contravențional. Chișinău: E.F.-P. „Tipografia Centrală".

Ionașcu, V. (2023) Legea și Viața. Publicație științifico-practică. Chișinău: Academia „Ștefan cel Mare" a Ministerului Afacerilor Interne al Republicii Moldova.

Iorgovan, A. (2005) Tratat de drept administrativ. 4th edn. București: All Beck.

König v Germany (1978) Application No. 6232/73. ECtHR, 28 June 1978.

Marcello Viola v Italy (2006) Application No. 45106/04. ECtHR, 5 October 2006.

Mihalache v Romania (2019) Application No. 54012/10. European Court of Human Rights, Grand Chamber, 8 July 2019.

Öztürk v Germany (1984) Application No. 8544/79. ECtHR, 21 February 1984.

Podaru, O. and Bachiș, A. (2016) Drept contravențional. Caiet de seminar. București: Hamangiu.

Sakhnovskiy v Russia (2010) Application No. 21272/03. ECtHR, Grand Chamber, 02.11.2010.

Ursuța, M. (2008) 'Jurisprudența Curții Europene a Drepturilor Omului și procedura contravențională română', Curierul Judiciar, (2), pp. 77–82.

Vedinaș, V. (2021) Drept administrativ. 13th edn. București: Universul Juridic.

Ziliberberg v Moldova (2005) Application No. 61821/00. ECtHR, 1 February 2005.

CONSTITUTIONALISM AND EUROPEAN INTEGRATION: RECONFIGURING THE MECHANISMS FOR GUARANTEEING FUNDAMENTAL RIGHTS IN THE REPUBLIC OF MOLDOVA

Paula BODLEV[1]
Sergiu BODLEV[2]

Abstract

This article analyses the impact of recent legislative transformations on the constitutional order of the Republic of Moldova, focusing on the alignment of its legal and administrative mechanisms with European Union standards regarding fundamental rights. Following the acquisition of EU candidate status and the initiation of accession negotiations, legislative harmonisation is no longer merely a technical obligation, but a profound reconfiguration of democratic values and constitutional guarantees. Utilising a comparative and analytical methodology, this study evaluates how judicial reforms, shifts in institutional jurisdiction, and the transposition of the Court of Justice of the European Union's jurisprudence influence the efficiency of national institutions, particularly the Constitutional Court and administrative monitoring authorities. The paper examines current structural vulnerabilities in applying European standards, alongside the conceptual dualism between human rights protection at the national level and the mandates of the EU Charter of Fundamental Rights.

Keywords: *constitutional order; Republic of Moldova; fundamental rights; legislative harmonisation; European integration.*

1. Introduction

For legal systems undergoing transition or consolidation, the process of European integration represents both a foreign policy option and a genuine catalyst for structural transformation at the constitutional level. Traditionally, constitutionalism has been regarded as an internal effort to compartmentalise state power and to guarantee civic freedoms through a rigid fundamental law. However, the dynamics of contemporary law require moving from an isolated, strictly national model towards what legal scholarship terms 'multilevel constitutionalism' (Pernice, 2002). Within this new paradigm, the domestic legal order, the system of the European Convention on Human Rights, and European Union law no longer function as separate spheres, but as interconnected mechanisms of protection, a fact likewise confirmed by the theory of constitutional pluralism, which describes the coexistence, in a heterarchical rather than hierarchical order, of several distinct constitutional sites (Walker, 2002).

[1] Master's student, 'Dunărea de Jos' University of Galați, Email:paula.s.bodlev@gmail.com ORCID: 0009-0009-2400-7745

[2] Lecturer, PhD in Law Technical University of Moldova, Cahul University Center, Email: sergiubodlev@yahoo.com, ORCID ID: 0000-0002-9903-8732

Fundamental human rights represent one of the basic pillars of any democratic state. As I. Deleanu points out, fundamental human rights and freedoms constitute the backbone of democracy: ‘it has likewise become commonplace to observe that the constitutional edifice of any country is certainly destined to collapse if its main supporting pillar, the rights and freedoms of the human being and of the citizen, is not real and durable’ (Deleanu, 1996, p. 156).

For the Republic of Moldova, obtaining EU candidate status in June 2022 and the opening of accession negotiations in June 2024 mark a historic turning point, with profound implications for the way in which fundamental rights are perceived and guaranteed. The legal basis of this path is found in Article 49 of the Treaty on European Union, which makes accession conditional upon respect for the values set out in Article 2 of the same Treaty, namely human dignity, freedom, democracy, equality, the rule of law and respect for human rights, as well as upon fulfilment of the political, economic and institutional criteria established by the European Council in Copenhagen in 1993. From a legal standpoint, this stage goes beyond the mere obligation of technical harmonisation of economic legislation: it requires a substantive reconfiguration of domestic institutions and judicial structures. Although the 1994 Constitution of the Republic of Moldova contains particularly open and receptive clauses, in particular through Article 4, which gives priority to international human rights treaties, practical reality has often shown a gap between the declared standards and the effective mechanisms of protection, a gap felt directly by the ordinary citizen who sometimes waits for years for a case pending before an overburdened first-instance court to be resolved.

This paper aims to analyse the manner in which the vector of European integration reconfigures the instruments for guaranteeing human rights in the Republic of Moldova, assessing the extent to which the pressure of EU standards can accelerate domestic reforms, particularly in sensitive areas such as judicial independence, freedom of expression and data protection. The central hypothesis of the article is that Moldova's connection to the European legal space does not dilute national constitutional sovereignty, but, on the contrary, provides the courts and the Constitutional Court with the tools necessary to transform fundamental rights from abstract concepts into directly applicable and effectively protected legal realities, with effects concretely felt in the everyday life of the person in their relationship with public authority.

Using a comparative and analytical methodology, the article examines the interaction between the case law of the Constitutional Court in Chișinău, the decisions of the European Court of Human Rights, and the standards imposed by the Charter of Fundamental Rights of the European Union,

offering a critical analysis of the challenges and opportunities marking this path of constitutional reconfiguration.

Methods Applied

In order to capture the dynamics of the reconfiguration of fundamental rights in the Republic of Moldova, the research drew on several complementary methodologies, intersecting constitutional theory and the judicial practice relevant to the subject. The comparative method constitutes one of the central pillars of the paper, used, on the one hand, to analyse the interaction between the Constitution of the Republic of Moldova, the case law of the European Court of Human Rights, and the Charter of Fundamental Rights of the European Union, and, on the other hand, by reference to the current reforms of the justice system in the Republic of Moldova and to other models of constitutional transition already undergone by other Central and Eastern European states previously admitted to the European Union.

The analytical method was applied in assessing domestic normative texts and constitutional case law, seeking to identify the correspondence, or the gaps, between the declared principles and the effective institutional mechanisms. Finally, through the historical and socio-legal method, the evolution of these mechanisms is placed within the domestic socio-political context, allowing an assessment of the real impact of the reforms on citizens, beyond the formalism of statutory texts.

2. Conceptual Framework

In the current contemporary legal configuration, sovereignty and constitutionalism can no longer be analysed separately, exclusively within the borders of a national state. In European scholarship, the concept of 'multilevel constitutionalism' was established by Ingolf Pernice, director of the Walter Hallstein Institute for European Constitutional Law at Humboldt University Berlin, explaining how national and supranational legal systems intertwine and cooperate in governing the same community of citizens (Pernice, 2002).

Within this paradigm, the constitutional structure of a state is no longer an isolated system, but becomes part of an extended legal network. Fundamental rights are no longer guaranteed by a single authority, such as the national Constitution, but benefit from successive and complementary layers of protection. For a state in the midst of the European integration process, such as the Republic of Moldova, this conceptual model offers the ideal theoretical tool for explaining how domestic norms engage in dialogue with, yield to, or expand under the influence of European standards, without this process entailing a dissolution of national constitutional identity (Walker, 2002). Romanian legal scholarship has, in turn, developed a related concept,

that of the ‘bloc of constitutionality’, denoting the body of norms and principles of constitutional value which complement the text of the Constitution itself, including through international human rights treaties (Muraru and Tudorean, 2020), a concept transferable, by analogy, to the situation of the Republic of Moldova, given the opening clause of Article 4 of the Constitution.

The reconfiguration of human rights protection in the Republic of Moldova takes place through the intersection and cooperation of three distinct, yet deeply interconnected, legal pillars. This interaction is not strictly hierarchical, but rather a network-based one, governed by the principle of the most favourable protection of human rights.

The first pillar is the Constitution of the Republic of Moldova, the fundamental act of the state from which any reform originates. The Moldovan constitutional text has a remarkable opening clause through Article 4, entitled ‘Human Rights and Freedoms’. This provision establishes not only that constitutional provisions are to be interpreted in accordance with the Universal Declaration of Human Rights and the treaties to which the Republic of Moldova is a party, but also sets out the principle of the priority of international regulations in the event of inconsistencies (Constitution of the Republic of Moldova, 1994, Art. 4). This article represents the gateway through which the other two fundamental European pillars for guaranteeing and protecting human rights and freedoms enter and reconfigure the domestic legal order.

The Council of Europe system, through the European Convention on Human Rights, has for over three decades constituted the pillar of stability and the mandatory minimum standard for the Republic of Moldova. The case law of the Strasbourg Court has become a direct source for the interpretation of the national Constitution, being fully integrated into judicial practice in Chișinău, as the Constitutional Court itself held in Judgment No. 55 of 14 October 1999, which recognised the Convention's case law as an instrument for the harmonisation of national legal regimes by reference to the minimum standard of protection, and established the superior legal force of the Convention over domestic norms (Constitutional Court of the Republic of Moldova, 1999).

The interaction between the Constitutional Court of the Republic of Moldova and the European Court of Human Rights has thus created a genuine bloc of constitutionality, within which the rights guaranteed at the domestic level are continuously recalibrated to correspond to the dynamic standards established in Strasbourg in the interpretation of the right to a fair trial, freedom of expression, or the right to property.

With a view to accession to the European Union, the Charter of Fundamental Rights of the European Union represents the third pillar, the newest and most dynamic, reconfiguring the guarantee mechanisms. Unlike the European Convention, which sets a minimum threshold of civil and political protection, the EU Charter brings a broader range of guarantees, including social and economic rights and rights adapted to technological development, such as the strict protection of personal data, which provides, in paragraph (1), that 'everyone has the right to the protection of personal data concerning him or her' (Charter of Fundamental Rights of the European Union, 2012, Art. 8), a right which has become a genuine battleground in the current digital era between the European Union and major digital companies regarding compliance with it. It should also be noted that the Charter draws, in Articles 51-52, a distinction between rights and principles, a distinction on which the intensity of the direct justiciability of each guarantee before national courts depends.

Although the Republic of Moldova is not yet a Member State of the European Union, the pre-accession process requires the progressive transposition of the EU acquis, which means that national courts and public institutions must guide their decisions according to the standards of the Charter, insofar as they are relevant to matters already falling within the scope of Union law. This third pillar introduces the principle of the autonomy and primacy of European Union law, preparing the judicial system in Chișinău for the moment when the national judge will assume, alongside their domestic constitutional role, functions specific to an ordinary Union judge.

3. Current Guarantee Mechanisms in the Republic of Moldova and Their Limits

Despite a solid conceptual framework, the practical functioning of the current guarantee mechanisms in the Republic of Moldova reveals a profoundly dual reality, marked by a striking contrast between the performance of high-level institutions and the systemic blockages at the base of the judicial system. At the level of constitutional review, the Constitutional Court has established itself as the main engine of the Europeanisation of domestic law. Using the openness afforded by Article 4 of the Constitution, the Constitutional Court of the Republic of Moldova has gone beyond the formal application of the text of the supreme law and firmly established, as early as Judgment No. 55/1999, that the case law of the European Court of Human Rights represents the mandatory minimum standard below which national protection cannot fall, integrating the Strasbourg decisions directly into the reasoning of its judgments (Constitutional Court of the Republic of Moldova, 1999).

In addition to these jurisdictional mechanisms, the domestic system comprises essential non-jurisdictional pillars, such as the Ombudsman and the Council on Equality. The Ombudsman institution, governed by Law No. 52 of 3 April 2014 on the Ombudsman (People's Advocate), acts as a critical early-warning and mediation mechanism, holding an important mandate in monitoring abuses and preventing torture in places of detention (Law No. 52/2014). Nevertheless, its main limitation lies in the recommendatory character of its acts, the effectiveness of the institution depending to a large extent on the political openness of the authorities concerned. Similarly, the Council on Equality has distinguished itself through the quality of its analyses in combating discrimination, but its limited powers to directly apply contraventional sanctions diminish its coercive impact, often forcing citizens to resort to the lengthy and cumbersome route of the courts.

Nonetheless, the judicial power continues to represent the central pillar in the process of legally guaranteeing and protecting the rights and freedoms of the individual and citizen, being one of the most effective mechanisms for guaranteeing these rights (Țurcan, 2016, p. 216). This attribute of rights guarantee is enshrined in the Constitution of the Republic of Moldova, under Title II, 'Fundamental Rights, Freedoms and Duties', Chapter II, 'Fundamental Rights and Freedoms'. As also noted in legal scholarship, 'it can be deduced from the content of the Constitution of the Republic of Moldova that the function of defending human rights is specific to all branches of state power' (Costachi, 2025, p. 746).

The historical vulnerability of the ordinary courts in the Republic of Moldova is not a mere theoretical hypothesis, but is confirmed by the official data of the European Commission's Country Report on the Republic of Moldova for 2024. Cultural resistance to reform and integrity became visibly manifest through the resignation, in May 2024, of half of the judges of the Chișinău Court of Appeal, in protest against the extraordinary integrity assessment procedures known as vetting (European Commission, 2024, p. 27). At the same time, the excessive formalism of first-instance courts, which do not always apply the standards of the European Convention directly, is evidenced by the maintenance under enhanced supervision of 26 cases before the Committee of Ministers of the Council of Europe, as well as by indicators concerning deprivation of liberty: the average duration of pre-trial detention increased from 2.75 months in 2022 to 3.75 months in 2023, and an administrative case at first instance takes, on average, 544 days to be resolved (European Commission, 2024, pp. 29-35). These gaps demonstrate that, while the constitutional elite adheres to European values, the lower courts continue to function according to a formalistic logic that resists change.

This structural deficiency is directly reflected in the high number of condemnations recorded by the Republic of Moldova in Strasbourg: according to the same report, 14 of the 34 violations of the Convention found in judgments delivered in 2023 concern precisely the right to a fair trial (European Commission, 2024, p. 41). Moreover, the systemic failure is flagrantly manifest in the execution phase of European Court judgments: although the state promptly pays financial compensation to victims, the authorities frequently fail to adopt general measures, namely the reform of the legislation or the defective administrative practices that generated the initial abuse. This evident rift between the high standards proclaimed by the Constitutional Court and the legal reality within the first-instance courts explains why the vector of European integration can no longer be regarded as a mere legislative adaptation, but as an imperative necessity to fundamentally reconfigure the functioning of everyday justice in the Republic of Moldova.

4. Reconfiguring the System under the Impact of European Integration

The pre-accession process requires the Republic of Moldova to undertake a profound transformative effort, going beyond mere technical legislative harmonisation, often understood mechanically as a translation and transposition of European directives. The real stakes of this process lie in the substantive assimilation of the fundamental values enshrined in Article 2 of the Treaty on European Union, with an emphasis on the rule of law and the protection of human rights, values whose observance is constantly assessed by the European Commission in its annual country reports, in accordance with the enlargement methodology established following the experience of the Central European states admitted in previous waves. This axiological transposition entails both the updating of the normative framework and the reconfiguration of the institutional and legal culture in Chișinău, a process that assimilates European standards as active principles of the domestic public order.

At the heart of this transformation lies the reform of justice, implemented through the extraordinary mechanisms for assessing the integrity of magistrates, known as pre-vetting and vetting. Viewed through the lens of human rights, the elimination of corruption from the judicial system represents a measure of institutional security and the central pillar for guaranteeing fundamental rights, since it is the effectiveness of the act of justice that gives substance to protective legal norms. Consequently, the vetting of the ethical and financial integrity of candidates for the Superior Council of Magistracy and the Superior Council of Prosecutors, followed by the assessment of judges of the Supreme Court of Justice and of the courts of appeal, reconditions the pillar on which the correct application of the law

rests. However, the Venice Commission emphasised, in the joint opinion prepared together with the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law on the Supreme Court of Justice, adopted on 21 October 2022, that, although full vetting may be justified and should not be repeated in the future, it carries genuine risks for the independence and efficiency of the judicial system and the prosecution service, risks that can be mitigated only through adequate procedural safeguards (Venice Commission, 2022). This drastic procedure, although it generated major institutional tensions, remains legitimised by the overriding public interest in building a predictable and independent justice system, capable of ensuring genuine protection for citizens against abuse.

This structural reform paves the way for the greatest doctrinal and practical challenge of integration, namely the recognition of the direct effect and the primacy of European Union law. The ordinary courts of the Republic of Moldova must undergo a transformation of professional mindset in order to assimilate the Simmenthal principle, according to which the national judge is required to apply Community law immediately and to disapply any conflicting domestic norm, without waiting for its repeal by the legislature or the constitutional court (Court of Justice of the European Communities, 1978). Adapted to Moldovan realities, this principle means that a judge in a local-level court will no longer be able to rely on the formalism of national laws, but will have to apply directly, in the relevant matters, European Union regulations and the decisions of the Court of Justice in Luxembourg, thereby gradually assuming an additional European dimension to their jurisdictional function.

5. Key Areas Undergoing Reconfiguration

Guaranteed by Article 6 of the European Convention on Human Rights and reaffirmed by European Union standards, the right to a fair trial is undergoing a qualitative shift in the Republic of Moldova in the context of the new justice-system reforms. The institutional reconfiguration effort is based on the evolution of the self-governance model of the Superior Council of Magistracy towards a mixed formula, integrating magistrates and non-judicial experts assessed against consolidated integrity criteria, thereby ensuring a superior balance between independence and public accountability. From this angle, the concept of a fair trial goes beyond the purely formal framework of compliance with procedural codes, placing emphasis on the qualitative dimension of the act of judging and on the requirement that the magistrate be fully independent, impartial, and immune to outside interference (Kosař, 2016, p. 19). As emphasised in specialised legal scholarship, an international convention ‘can generate rights for individuals, by virtue of which they may

apply to national tribunals' (Ghegheș, 2025, p. 174), and elevating these guarantees to constitutional rank 'does nothing more than place it on a higher level' (Slusarenco, 2026, p. 71).

With regard to freedom of the press and the fight against disinformation in the context of regional security, the geopolitical position of the Republic of Moldova and the security context in Eastern Europe have brought to the forefront a classic tension of constitutional law, namely the limitation of freedom of expression, guaranteed by Article 10 of the European Convention, in the name of national security and the fight against hybrid warfare. The reconfiguration of this area has required harsh restrictive measures, such as the suspension of broadcasting licences for media outlets propagating disinformation. The major challenge for the authorities in Chișinău consists in aligning these exceptional measures with European standards of proportionality and legality, demonstrating that the fight against propaganda does not slide into censorship, but respects the strict criteria developed by Strasbourg case law and the standards of the European Media Freedom Act, adopted by the European Union in 2024. In this respect, European practice recalls that 'democracy does not simply mean that the views of the majority must always prevail' (Slusarenco, 2026, p. 72), which is why 'the application of the principle of proportionality requires the identification of conciliatory solutions' (Slusarenco, 2026, p. 76) between national security and freedom of expression.

With regard to the protection of personal data and alignment with the standards of the General Data Protection Regulation, the digital transition of public institutions in the Republic of Moldova and their interconnection with European systems require a radical modernisation of the framework for protecting private life. At the domestic level, this matter is regulated by Law No. 133 of 8 July 2011 on the Protection of Personal Data, which establishes the National Centre for Personal Data Protection as an independent supervisory authority (Law No. 133/2011). Aligning this framework with the European Union's General Data Protection Regulation represents a qualitative leap from the old formal, bureaucratic system to a genuine culture of accountability. This transformation reconfigures the right to private life, guaranteed by Article 8 of the European Convention and Article 8 of the EU Charter, requiring both economic operators and state structures to guarantee citizens' right to data portability and informed consent, under the supervision of an independent national authority equipped with genuine oversight mechanisms. In accordance with the case law of the European Court of Human Rights, the unjustified storage of personal data is strictly prohibited, it being held that 'the recording by a public authority of data relating to an individual's private life amounts to an interference within the meaning of

Article 8' (Gheghеș, 2025, p. 178), while the rigorous application of these guarantees and 'guaranteeing confidentiality [...] represent positive obligations' (Cheptene, 2025, p. 600) that are indispensable within a state governed by the rule of law, as demonstrated, in the prison context, by the case of Machina v. Moldova, in which the Strasbourg Court found a violation of Article 3 of the Convention as a result of medical negligence and the lack of an effective investigation into the infection with the hepatitis virus of a person deprived of liberty (Machina v. Moldova, 2023).

6. Conclusions

The evolutionary and structural analysis of Moldova's constitutional dynamics demonstrates with certainty that the path of European integration generates a profound and irreversible reconfiguration of the entire system for guaranteeing fundamental rights. We are, in essence, witnessing a historic and conceptual transition from a strictly national legal model, often isolated and self-referential in its everyday practices, towards an open, interconnected and multilevel system. In this new three-dimensional paradigm, the Constitution of the Republic of Moldova neither loses its fundamental value as supreme law nor dilutes its legal force in favour of supranational entities. On the contrary, the constitutional text fulfils its genuine democratic vocation and transforms Article 4 from a mere declaration of intent into an organic and dynamic bridge to the case-law standards of the European Court of Human Rights and to the emerging legal order of the European Union. This controlled openness allows domestic law to evolve at the same pace as European values, offering the citizen successive and far more effective layers of judicial protection.

However, for this systemic reconfiguration to become fully functional at all levels of society, rather than remaining a mere elite theoretical exercise, an urgent paradigm shift is required in domestic legal policy. First, the legislature in Chișinău must definitively abandon the harmful technique of mechanical transposition and formal copying of European directives and regulations, a practice that has often generated a phenomenon of rejection of the norm in practice. New laws, adopted in the context of the accession negotiations, must be grounded in rigorous impact studies, adapted to the domestic social specificity. It is essential that newly created or reformed institutions be equipped with clearly shared competences, substantial autonomous budgets, and dissuasive coercive mechanisms, thereby avoiding the historical trap of building purely decorative authorities, with precarious budgets and no real impact in the non-jurisdictional sphere.

Second, an enormous responsibility falls on the magistrates of the ordinary courts, who form the citizen's first line of contact with the act of

justice. The judicial corps of the courts of first instance and courts of appeal must assume, with far greater courage, the role of direct enforcer of European standards. In this new stage of public law, continuous professional training, carried out through the National Institute of Justice, can no longer be reduced to the mere memorisation or exegetical study of national statutory texts. Training programmes must be decisively reoriented towards mastering the methodology specific to European law, towards acquiring advanced techniques of teleological interpretation, and, above all, towards the direct and correct application of the principle of proportionality in every case concerning human rights. Only by overcoming excessive formalism can the direct application of the EU acquis be ensured to the detriment of contrary or ambiguous domestic norms, and the ordinary citizen, the one awaiting a resolution in an administrative or contraventional case, will concretely feel, through shorter time limits and thoroughly reasoned judgments, the real benefits of this transformation, rather than merely its abstract promise.

Looking towards the coming years, the ultimate stake of this extensive reform process directly concerns the redefinition and consolidation of the constitutional identity of the Republic of Moldova within a continuously expanding European Union. This identity should not be understood as a form of nationalist or sovereigntist resistance to the Europeanisation process, but as a specific, mature and deliberate contribution to the common space of democratic values and the rule of law. By definitively overcoming the historical vulnerabilities linked to systemic corruption in the justice system and by successfully completing the institutional cleansing processes, the Republic of Moldova has the unique opportunity to transform its entire winding pre-accession journey into a genuine model of regional success. This journey will demonstrate how a deeply European aspiration can fundamentally reshape a state's institutions, genuinely guaranteeing, not merely on paper, the supremacy of law, legal certainty, and the inalienable dignity of human rights.

References

1. Charter of Fundamental Rights of the European Union (2012) Official Journal of the European Union, C 326, 26 October 2012.
2. Cheptene, V. (2025) „Analiza hotărârii CEDO de constatare a încălcării art. 3 de către Republica Moldova prin pretinsa contaminare a deținutei cu hepatită în sistem penitenciar”, in Statul, securitatea și drepturile omului în era digitală. Chișinău: Institutul de Cercetări Juridice, Politice și Sociologice, Universitatea de Stat din Moldova.
3. Constitution of the Republic of Moldova (1994) adopted on 29 July 1994. Official Gazette of the Republic of Moldova, No. 1, 12 August 1994.

4. Constitutional Court of the Republic of Moldova (1999) Judgment No. 55 of 14 October 1999 on the interpretation of certain provisions of Article 4 of the Constitution of the Republic of Moldova. Official Gazette of the Republic of Moldova.
5. Costachi, Gh. (2025) Justiția și drepturile omului în statul de drept. Monografie. Chișinău.
6. Court of Justice of the European Communities (1978) Amministrazione delle Finanze dello Stato v Simmenthal SpA, Case 106/77, ECLI:EU:C:1978:49. Judgment of 9 March 1978.
7. Deleanu, I. (1996) Drept constituțional și instituții politice: Tratat. București: Europa Nova.
8. European Commission (2024) Republic of Moldova 2024 Report, SWD(2024) 698 final. Brussels: European Commission, 30 October 2024.
9. Ghegheș, C. (2025) „Contribuția jurisprudenței internaționale la definirea statutului juridic al individului", in Promovarea valorilor social-economice în contextul integrării europene, ediția a 8-a. Chișinău: Universitatea de Studii Europene din Moldova.
10. Kosař, D. (2016) „Perils of Judicial Self-Government in Transitional Societies." Cambridge: Cambridge University Press.
11. Law No. 52 of 3 April 2014 on the Ombudsman (People's Advocate) (2014). Official Gazette of the Republic of Moldova, No. 110–114, 9 May 2014.
12. Law No. 133 of 8 July 2011 on the Protection of Personal Data (2011). Official Gazette of the Republic of Moldova, No. 170–175, 14 October 2011.
13. Machina v Moldova (2023) Application No. 69086/14. ECtHR, 17 January 2023.
14. Pernice, I. (2002) „Multilevel Constitutionalism in the European Union", European Law Review, 27(5).
15. Slusarenco, S. (2026) „Dimensiunea constituțională a libertății de conștiință în statele democratice", in Științe juridice: alte comunicări. Chișinău.
16. Treaty on European Union (consolidated version) (2012). Official Journal of the European Union, C 326, 26 October 2012.
17. Țurcan, O. (2016) „Protecția drepturilor și libertăților omului, funcție importantă a puterii judecătorești", in Rolul instituțiilor democratice în protecția drepturilor omului. Materialele mesei rotunde cu participare internațională din 10 decembrie 2015. Chișinău: Academia „Ștefan cel Mare" a MAI.
18. Venice Commission (2022) Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI)

of the Council of Europe on the Draft Law on the Supreme Court of Justice of the Republic of Moldova, CDL-AD(2022)024. Strasbourg: Council of Europe, 21 October 2022.
19. Walker, N. (2002) „The Idea of Constitutional Pluralism", Modern Law Review, 65(3).

ORGANIZATION AND FUNCTIONING OF PUBLIC SERVICES FOR ADMINISTRATION OF THE PUBLIC AND PRIVATE DOMAIN OF LOCAL INTEREST IN 2026

Angelica BRATU[1]

Abstract:

This article aims to highlight the need to adapt legislation to the needs of society - namely the use of green energy on the territory of administrative-territorial units through electric scooters, as well as the charging infrastructure for electric vehicles and cars. The projects carried out with European funds have allowed Romania to change the paradigm towards fuels used in collective and individual public transport, noting a positive evolution in protecting the environment and implicitly the health of the community's citizens. Although this change was enthusiastically received, the administration of the infrastructure that serves the installation, arrangement, organization and operation of charging points was not legislated, thus giving the possibility of refusal to take over the administration by the public services specially established for the administration of the public and private domain.

In the Municipality of Braila, after the completion of the project through the PNRR and the reception of six car charging stations, an attempt was made to hand them over to SUPAGL for administration. This public service created for the purpose of administering the public and private domain of the Municipality of Braila agreed to refuse the takeover, citing the lack of a legal basis and a regulation. With the adoption of GEO 7/2026, letter m^1 of art 3 paragraph 1, but also letters k) and l) of art 5 point 2. The CLM will adopt in the next meeting the decision to hand over the electric vehicle charging infrastructure from the public domain to SUPAGL

Keywords: *reorganization, digitalization, capacity*

JEL R42,L94,R40

Introduction. Description of the factual situation

Taking into account the address no. 52331/19.03.2026, which informs that Government Ordinance no. 71/2002 on the organization and operation of public services for the administration of the public and private domain of local interest, which was supplemented by OUG no. 7/2026 art. IV article 3 paragraph (1), letter m1 "installation, arrangement, organization and operation of electric scooter and bicycle rental points, as well as of the charging infrastructure for electric vehicles and motor vehicles" and art. 5 letter l) "arrangement, maintenance and operation of the charging infrastructure for electric vehicles and motor vehicles".

As well as the address of the Directorate of Strategies, Programs, Projects for Economic Development, International Relations with no.

[1] PhD Lecturer, „Constantin Brâncoveanu" University of Pitești, Faculty of Management – Marketing in Economic Affairs, Brăila, România, e-mail: angelicabratu7@gmail.com

46664/12.03.2026 requesting information regarding the transfer of the 2 recharging stations to the administration.

By address no. 546328/28.10.2025, the Directorate of Strategies, Programs, Development Projects, International Relations, supplemented by addresses no. 3767/15.01.2026 and no. 3767/02.02.2026, requested the transfer to the administration of the Public Utility Service for Local Administration and Management of Brăila of the two stations completed within the project "Recharging stations for electric vehicles in the Municipality of Brăila".

Within this project, the Municipality of Brăila purchased and installed two recharging stations for electric vehicles, located in the Monument Park, on the Park Alley, in the vicinity of the swimming pool.

The works were carried out under contract no. 24867/10.08.2022, concluded between the Municipality of Brăila and Evgo Green Motian SRL, having as its object: "Supply and installation of equipment, design services of technical and economic documentation phase II, as well as ensuring technical assistance from the designer within the project 'Recharging stations for electric vehicles in the Municipality of Brăila" and the Building Permit no. 846 of 11.11.2022.

The investment was substantiated by the General Estimate of the investment objective and was approved by the Decision of the Brăila Municipal Local Council no. 669/28.11.2019, which had as its subject: "Approval of the project 'Recharging stations for electric vehicles in the Municipality of Brăila', of the technical and economic documentation phase I, of the technical and economic indicators, as well as its submission within the framework of the Program on the reduction of greenhouse gas emissions in transport, by promoting infrastructure for energy-friendly road transport vehicles: recharging stations for electric vehicles in the county seat municipalities."

Decision of the Brăila Municipal Local Council no. 584 of 30.10.2025 regarding: "Completion of the Inventory of the Public Domain of the Municipality of Brăila, in Section II "Movable Goods", annex no. 1, with position no. 60, according to the minutes of reception upon completion of works no. 359572/24.06.2025, as well as declaring them as local public use assets".

Necessity and opportunity

The adoption of this decision results from the fact that the electric vehicle charging stations built within the project "Electric vehicle charging stations in the Municipality of Brăila" were received and put into operation in accordance with the contractual and legal provisions, it being necessary to establish a clear framework for their administration, operation and maintenance, in order to ensure their continuous and efficient operation.

The transfer of the charging stations to the administration of the Public Utility Service for Local Administration and Management of Brăila is justified by reference to its object of activity, as regulated by the HCLM Brăila no. 326 of 21.06.2024 on the approval of the measures necessary for the implementation of the provisions of Law no. 296/2023, at the level of the Public Utility Service for Local Administration and Management of Brăila.

In accordance with the provisions of art. 5 letter d) of the aforementioned administrative act, the service has responsibilities regarding the management of parking lots within the municipality of Brăila through direct management, and the recharging stations are located within these parking lots, which determines a direct functional link between them and the activity of the service.

Consequently, the assignment of the management of the recharging stations to the aforementioned service is opportune and justified from the perspective of legal competences and ensuring a unitary and efficient management of the infrastructure related to public parking lots.

The project is aligned with the urban development strategy of the Municipality of Brăila, which provides for concrete measures for green urban mobility, digitalization and energy efficiency, contributing to the medium and long-term objectives of the local administration.

Considering the aforementioned and taking into account given that the electric vehicle charging stations have been received and put into operation in accordance with the contractual and legal provisions, it is required to transfer them for administration, operation and maintenance to the Public Utility Service for Local Administration and Management of Brăila, according to the assets provided in the annex:

No. crt. Classification code Name of the asset Identification elements Year of acquisition and/or putting into use Inventory value lei Current legal situation 60 2.1.16.5 Recharging station for vehicles Aleea Parcului 2 recharging stations, consisting of 2 recharging points, fast type DC EXP 60K2-FT, 2 parking spaces for each station Cadastral number 102519 2025 347,808.10 H.C.L.M. Brăila no. 584/2025 Land Register no. 102519 Brăila H.C.L.M. Brăila no. 669/2019

From the total investment in the amount of 348,355.50 lei:

Inventory items in the amount of 547.40 lei will be transferred for administration, operation and maintenance to the Public Utility Service for Local Administration and Management of Brăila;

Fixed assets in the amount of 347,808.10 lei will be transferred for administration, operation and maintenance to the Public Utility Service for Local Administration and Management of Brăila, according to the provisions of the Non-Reimbursable Financing Contract no. 1/GES/ of 02.09.2021.

Recharging stations for vehicles are provided for in position no. 60 of Annex no. 1 – Section II “Movable Assets” of the Inventory of the Public Domain of the Municipality of Brăila.

The Public Utility Service for Local Administration and Management of Brăila will ensure the preparation and submission for public debate of the "Regulation for the use, operation and exploitation of electric vehicle recharging stations in the municipality of Brăila".

The transfer to the administration, operation and maintenance of the Public Utility Service for Local Administration and Management of Brăila of the electric vehicle recharging stations built within the project financed by the Non-Reimbursable Financing Contract no. 1/GES of 02.09.2021, assets belonging to the public domain of the Municipality of Brăila, is approved.

At the same time, the assets will be handed over to the Public Utility Service for Local Administration and Management of Brăila, in order to administer, manage, maintain and exploit them, in accordance with the provisions of the Non-Reimbursable Financing Contract no. 1/GES/ of 02.09.2021, based on a handover-receipt report.

The public utility goods resulting from the implementation of the project "Recharging stations for electric vehicles in the Municipality of Brăila" will be handed over to the Public Utility Service for Local Administration and Management of Brăila based on a handover-receipt report, concluded between the designated representatives of the Mayor of Brăila, respectively the project management team, and the representatives of the Public Utility Service for Local Administration and Management of Brăila.

The handover of the goods will be carried out within 30 days from the date of adoption of the Decision of the Local Council of Brăila Municipality.

In accordance with the provisions of:

- Government Ordinance no. 71/2002 on the organization and operation of public services for the administration of the public and private domain of local interest, which was supplemented by O.U.G. no. 7/2026.
- Considering the provisions of art. 554, art. 858, art. 861 paragraph (3) and art. 863 letter a), art. 867-870 of Law no. 287/2009 on the Civil Code, art. 286 paragraph (1) and (4), art. 287 letter b) art. 289, 297 paragraph (1) letter a), art. 299 and art. 300 of OUG no. 57/2019 on the Administrative Code.
- Based on art. 129 paragraph (6), of OUG no. 57/2019 on the Administrative Code, with subsequent amendments and completions.Based on art. 139 paragraph (1) and (3) letter g), in conjunction with art. 196 paragraph (1) letter a), of the Emergency

Ordinance no. 57/2019 on the Administrative Code with subsequent amendments and completions, the Executive Order no. 1917/2005 for the approval of the methodological norms regarding the organization and management of accounting of public institutions, the Chart of Accounts for public institutions and the Instructions for their application with subsequent amendments and completions.

Taking into account the above, the present specialized report is submitted to the Brăila Local Municipal Council for analysis and debate regarding: the transfer of the administration, operation and maintenance to the Brăila Public Utility Service for Local Administration and Management of the recharging stations for electric vehicles, carried out according to the Non-Reimbursable Financing Contract no. 1/GES/ of 02.09.2021.

References:

- Law no. 287/2009 on the Civil Code;
- Emergency Ordinance No. 57/2019 on the Administrative Code
- Emergency Ordinance No. 7/2026 on amending and supplementing certain normative acts, as well as on adopting certain measures to increase the financial capacity of administrative-territorial units
- Government Ordinance no. 71/2002 on the organization and operation of public services for the administration of the public and private domain of local interest
- Order no. 1917/2005 for the approval of the Methodological norms regarding the organization and management of accounting of public institutions, the Chart of Accounts for public institutions and the instructions for its application

SOME CONSIDERATIONS ON THE CRIMINAL PROTECTION OF THE RIGHT TO LIFE IN ROMANIA

Raluca LIXANDRU[1]

Abstract:

In Romanian criminal law, the life of the person is protected by criminalizing offences that infringe the right to life, offences regulated by the Criminal Code, Title I, Special Part, Chapter IV of the same title. The current Criminal Code highlights the concern of the Romanian legislator to protect the right to life of the foetus as a social value, protection that intervenes from the moment of conception, but under certain conditions. The Romanian legislator has set a standard of protection of human rights even higher than the European Convention on Human Rights, at least in the matter of unborn children, by criminalising unlawful acts that can be committed against the products of human conception, from embryo to newborn.

Keywords: right to life, crime, Criminal Code.

JEL classification: *K 14*

The present study aims to highlight the protection of personal life in Romanian criminal law. The offences that infringe the right to life are found in the Criminal Code, Title I, Special Part, Chapter IV of the same title.

The criminalisation of the offence of termination of pregnancy under Article 201 of the Criminal Code emphasises the protection of the life of the embryo. This protection is achieved under certain conditions. If the interests of the product of conception conflict with the interests of the mother, the mother is allowed to terminate the life of the embryo, that is to say to abort it up to and including 14 weeks.

During the period from the beginning of pregnancy until the embryo reaches 14 weeks of age, it becomes a foetus and its life and bodily integrity are protected by the offence of harm to the foetus under Article 202 of the Criminal Code.

The offence of foetal harm covers all conduct against the foetus from the beginning of pregnancy up to and including 14 weeks, whether committed intentionally or negligently.

In doctrine (Sergiu Bogdan, Doris Alina Șerban, George Zlati, 2014) it has been appreciated that the approach is an example of originality of the Romanian legislator, who created an "intermediate being", which is neither a person nor an unborn being, but a foetus in the course of birth. The interpretation of the notion of "living person" as found in almost all European legal systems would have been much more useful.

[1] PhD Lecturer, Constantin Brâncoveanu University of Pitești

It is protected both during pregnancy, 3 months after conception, against the actions of third parties, and during the birth process until it is completed by detachment from the mother's body when the foetus becomes a newborn. The newborn becomes a "person" who is protected by criminal law through the criminalisation of other offences such as murder.

It should be noted that harming the foetus by the mother during pregnancy is criminalised by criminal law, that is, it constitutes a crime, but not punishable (Valentin Gheorghe Toduța, 2017). However, if the mother harms the foetus during birth, then this will be punishable by law.

In addition to these two incriminations, the Criminal Code also provides for the crime of killing or harming the newborn by the mother, an act provided for in Article 200 of the Criminal Code.

The protection of the right to life of a child who dies after birth as a result of an assault or culpable conduct committed against him/her during pregnancy or birth, that is to say before he/she has become a person within the meaning of the Romanian criminal law is noteworthy (Article 202(3) of the Criminal Code).

The old Criminal Code did not protect these aspects because the criminal act was directed against a social value which did not exist at the time of the commission of the crime because there was no right to life. The consequence of such conduct was the death of the unborn child.

From the aspects analysed above, it follows that the product of conception, from embryo to foetus, is not considered a "person" enjoying all legal rights, like the newborn. The legislator regards it as an incipient phase of human life which must also be protected by criminal law.

In fact, the traditional solution of the Romanian criminal law, according to which the right to life begins to be protected at the end of the birth process, is maintained.

Following an analysis of the provisions of the Romanian Criminal Code, it is noted that they are in line with the case-law of the European Court of Human Rights with regard to Article 2 of the European Convention on Human Rights. The Romanian legislator tried to strike a balance between the interests of the mother and the interests of society and the unborn child (Valentin Gheorghe Toduța, 2017).

The Romanian legislator has set a standard of protection of human rights even higher than the European Convention on Human Rights, at least in the matter of unborn children, by criminalising unlawful acts that can be committed against the products of human conception, from embryo to newborn.

Romanian criminal law, like most criminal laws, does not criminalise suicide, that is to say the taking of life by the subject himself, even in the case of an unsuccessful act of suicide.

Instead, the offence of determining or facilitating suicide is criminalised (Article 191 of the Criminal Code), and anyone who determines or facilitates the suicide of a person, if the suicide or attempted suicide has taken place, is punished.

In doctrine (Alexandru Boroi, 1998) it has been considered that what is incriminated is not so much the action of a person who directly and directly suppresses the life of another person, since suicide does not constitute a violation of the right to life, but what is in fact incriminated is a contribution to homicide, considering that such acts are prejudicial to the right to life of another person.

With regard to coercion to suicide, the High Court of Cassation and Justice held that: "In the case of coercion to suicide there can be no determination or facilitation, since the victim is not free to decide. Therefore, the act of the defendant who forced his wife to throw herself from the fourth floor, with the consequence of her death, constitutes the offence of aggravated murder provided for in Article 174 in conjunction with Article 175 pargraph (1) letter c) of the Criminal Code, and not the offence of causing suicide" (High Court of Cassation and Justice, Criminal Division, Decision No 6567/2004, available at www.scj.ro).

We emphasise that the death penalty in our country was abolished by Decree-Law No 6 of 7 January 1990 and was replaced by life imprisonment.

The original version of the European Convention on Human Rights did not exclude the death penalty, provided that the principle of legality was respected. Death could only be caused intentionally in execution of a death sentence passed by a court of law for an offence punishable by law by such a penalty.

The death penalty was also not prohibited because at the time – the date of the signing and entry into force of the European Convention on Human Rights – the death penalty was stipulated in most Council of Europe member states' domestic criminal legislation.

Following Protocol No 6 to the European Convention on Human Rights (Article 1), concluded in Strasbourg on 28 April 1983, the death penalty was abolished. The Protocol fully and irrevocably enshrines the right to life and removes the possibility for signatory states to continue to provide for capital punishment in their law enforcement systems. Thus, no person may be sentenced to such a penalty, no person may be executed.

As of 1 December 2007, this protocol had been ratified by 45 Council of Europe member states. The Russian Federation was the only member country which had not ratified the Protocol by that date. Subsequently, they ratified the protocol and last year they applied to leave the Council of Europe (which was approved) to introduce the death penalty into their legislation.

Doctrine (Mihail Udroiu, Ovidiu Predescu, 2008) has noted a quote from 1764 by Cesare Beccaria, a statement that has become famous with the passage of time: "(...) the death penalty is not a right (...), but is a war of the nation against a citizen, because it considers it necessary or useful to eliminate his/her being. If I succeed in proving that death is neither useful nor necessary, I will be able to consider myself victorious in pleading the cause of humanity."

It should be noted that Protocol No. 6 prohibits the death penalty in peacetime and Protocol No. 13 signed in Vilnius in 2002 and entered into force on 1 July 2003 provides for the abolition of the death penalty in all circumstances.

Protocol No 13 was adopted against the background of the trend of opinion in Council of Europe member states in the early 1990s calling for the abolition of the death penalty in all circumstances.

As far as our legislation is concerned, this hypothesis of limiting the protection of life is no longer relevant to our legislation, which abolished the death penalty and replaced it with life imprisonment (Decree-Law No 6/1990).

The prohibition of the death penalty was subsequently regulated in Art. 22 paragraph (3) of the Romanian Constitution (The Romanian Constitution was revised by Law No 429/2003, approved by national referendum of 18-19 October 2003, confirmed by Constitutional Court decision No 3 of 22 October 2003. The revised text of the Romanian Constitution was published in the Official Gazette no. 767 of 31 October 2003) of 1991 and was included among the fundamental principles of the rule of law in Romania.

Article 2 paragraph 2 of the European Convention on Human Rights provides for three other hypotheses in which death is not considered to have been caused in violation of this article, namely:

- Recourse to force considered as absolutely necessary – to ensure the defence of the person against any unlawful violence;
- Use of force absolutely necessary to effect a lawful arrest or to prevent the escape of a detained person;
- Use of force absolutely necessary to suppress, in accordance with the law, a riot or insurrection.

The European Convention on Human Rights strictly and restrictively lists the situations in which state organs may use lethal force, namely: to defend a person against unlawful violence; to make an arrest under the law or to prevent the escape of a person lawfully detained; to suppress violent disturbances in accordance with the law.

With regard to the correspondence of Article 2 letter (c) of the European Convention on Human Rights in domestic criminal law, it is noted that there is no special law providing for the possibility of intervention by

State organs in the form of the use of lethal means to suppress, in accordance with the law, an uprising or insurrection.

Our country's legislation explicitly provides for the possibility of using lethal means. Such examples are: the immobilisation of criminals who, after committing crimes, attempt to flee; the immobilisation or detention of persons in respect of whom there is evidence or strong indications that they have committed a crime and who retaliate or attempt to retaliate with a weapon or other objects that may endanger the life or physical integrity of the person; to prevent escape from escort or escape of those who are legally detained and who do not respond to summons.

Law 17/1996 on the regime of firearms and ammunition also stipulates that the use of a firearm shall be done in such a way as to immobilise the person against whom the firearm is used, by firing as far as possible, at their feet, in order to avoid their death (article 51).

With regard to Article 15 paragraph 2, the European Convention on Human Rights authorises death resulting from lawful acts of war. This exception is part of a system that allows states, in the event of war or other public danger threatening the existence of the nation, to depart from and even override the text of the Convention and take derogatory measures. This provision refers to the rules of humanitarian law. We can say that humanitarian law humanises war. Humanitarian law is developed in the four Geneva Conventions of August 1949 and their protocols.

Conclusions

Analyzing the current society in Romania, we notice that since 1990, the crime against life in our country has causes and motivations closely related to the crisis period we are still going through.

The first of these causes is specific to revolutionary events in general and lies in the triggering of an abnormal overall state, with consequences that are difficult to assess in the medium and long term.

The state of social abnormality caused by major crises leads to a devaluation of the system of norms and values which seem to belong to a bygone era.

Another cause was the lack of reaction of the power factors related to some social, political and economic tensions, a fact that allowed the initiation, unfolding and amplification of major conflicts, resulting in deaths and injuries. These include the political conflicts in the streets, the inter-ethnic ones as well as the serious economic conflicts (the miners' strikes).

The post-revolutionary social fabric is also characterised by the emergence of an increasingly pronounced economic causality, driven on the

one hand by the "devastating fury" of the rush for rapid enrichment and, on the other hand, by the actual lack of livelihood in certain cases.

Other causes of violent crimes are of individual nature (such as alcoholism, interpersonal conflicts, etc.).

In the future, much more attention should be paid to legal means in combating anti-social crimes, especially those against life, as our criminal law is an effective means of protecting the legitimate interests of personal security.

In the resolution of cases, it is necessary to clarify all aspects related to the concrete content of the offence committed and the circumstances of its commission, on the one hand, as well as the consequences and the purpose pursued, and, on the other hand, to examine more thoroughly the person of the perpetrator, which is likely to help establish penalties that correspond to the needs of the defendant.

Murder, as defined in Article 188 of the Criminal Code, consists in the killing of a person, a way of expression which is nothing more than a more precise explanation of the marginal name of the offence (murder), without representing an explicit description of all the constituent elements of the offence.

The material element of the offence of murder is objectively achieved by the killing of a person, namely any material activity resulting in the death of a person. The material element may consist of an act (commission) or an inaction (omission); in either case, these relate to the offence and not to the specific act, since the act must possess a certain destructive force, that is to say it must be objectively capable of causing the death of a person in the given circumstances. Such destructive force exerted on the victim may take the form of physical-mechanical actions (strangulation, beating, cutting, shooting, pricking, electrocution, etc.), chemical actions (poisoning), mental actions (mental shock), etc.

The question of the distinction between the crime of murder and assaults or injuries causing death, where the death of the victim is attributable to the perpetrator on the basis of intent, is frequently encountered in legal practice. The main elements of differentiation between the two offences relate to: the area of the body where the blows are applied, in the sense of whether it is a vital area or not; the instrument used in committing the offence, in the sense of whether it has the capacity to produce that result; the number and intensity of the blows inflicted on the victim; the attitude of the perpetrator after committing the offence; any pre-existing relationships between the perpetrator and the victim.

References:

1. C. Beccaria, Dei dellitti e delle pene (Despre infracțiuni și pedepse) [On Crimes and Punishments], (2007), București;
2. Sergiu Bogdan, Doris Alina Șerban, George Zlati, Noul Cod penal. Partea specială. Analize, explicații, comentarii. Perspectiva clujeană [The New Criminal Code. Special Part. Analysis, explanations, comments.], (2014), București;
3. Alexandru Boroi, Infracțiunea de determinare sau înlesnire a sinuciderii [Offence of determining or facilitating suicide], (1998), în revista Dreptul nr. 7/1998;
4. Valentin Gheorghe Toduța, Dreptul la viață. Momentul de la care viața începe să curgă, în jurisprudența Curții Europene a Drepturilor Omului, precum și impactul acesteia asupra legislației penale românești [The right to life. The moment from which life begins to flow, in the jurisprudence of the European Court of Human Rights, and its impact on the Romanian criminal law], (2017), în revista Dreptul, nr. 8/2017;
5. Mihail Udroiu, Ovidiu Predescu, Protecția europeană a drepturilor omului și procesul penal român. Tratat [European protection of human rights and the Romanian criminal process. Treaty], (2008), București.
6. Lixandru Raluca, Unele aprecieri privind protecția penală a dreptului la viață în România, (Considerations on the criminal protection of the right to life in Romania), (2023), in Management strategies, year XV, no. IV (62)/2023.

REGULATIONS OF THE RULE OF LAW PRINCIPLE IN EUROPEAN DOCUMENTS

Iulian NEDELCU[1]

Abstract:

In the European construction, the rule of law is considered the foundation of all the values on which the European Union is based, and its respect is an indispensable condition for respecting the other values of the union, in other words, for its existence. In the content of article 2 of the Treaty on European Union we find the provision according to which the rule of law is one of the fundamental values on which the Union is founded, this being joined in the text by respect for human dignity, freedom, democracy, equality and respect for human rights, including the rights of persons belonging to minorities. Given the importance given to this principle, it is natural to be continuously concerned with preserving it unaltered and to constantly monitor its observance, organization and implementation by all Member States, equally.

1. Regulations of the Rule of Law Principle in European Documents

Within the framework of European integration, the rule of law is regarded as the foundation of all the values upon which the European Union is built, and compliance with it represents an indispensable condition for the respect of the Union's other values and, ultimately, for its very existence.

Article 2 of the Treaty on European Union (TEU) provides that the rule of law is one of the fundamental values upon which the Union is founded. It is listed alongside respect for human dignity, freedom, democracy, equality, and human rights, including the rights of persons belonging to minorities.

Consequently, there is a continuous obligation to preserve the integrity of the rule of law and to ensure its observance, organization, and implementation by all Member States on an equal basis.

In recent years, against the backdrop of complex international developments and the global economic crisis, a number of political actions considered to be at the limits of legality have occurred in various states. These actions have been regarded as affecting the rule of law. As a result, the European Union has been compelled to adopt concrete measures aimed at strengthening the rule of law in order to prevent democratic backsliding that could endanger the stability of the European project.

The following analysis refers to the provisions contained in the Treaty of Lisbon that are applicable in situations involving departures from the rule of law principle.

[1] „Constantin Brâncoveanu" University of Pitești, Faculty of Economic and Legal Sciences, România, Attorney, Dolj Bar

Article 2[1] of the Treaty of Lisbon identifies the values upon which the European project is founded, namely: human dignity, equality, the rule of law, and human rights. In order to ensure compliance with these fundamental values, the European Union has at its disposal a number of mechanisms established by the Treaties. In this context, we shall briefly examine the procedure for determining a failure to fulfil obligations, as regulated by Article 7 of the Treaty of Lisbon.

The procedure may be initiated by any of the European institutions, although different voting requirements apply. A reasoned proposal may be submitted to the Council by one-third of the Member States, the European Parliament, or the European Commission, subject to the prior consent of the Parliament. The Council examines the situation, hears the Member State concerned, and may issue recommendations. Only thereafter may it determine, by a four-fifths majority of its members, the existence of a clear risk of a serious breach of the Union's values.

The same actors may also submit a proposal to the European Council, which may determine the existence of a serious breach only by unanimity, after inviting the Member State concerned to present its position. If the proposal and the determination have been made in accordance with the conditions described above, the Council may, acting by a qualified majority, suspend certain rights of the Member State concerned, including the voting rights of its government representative in the Council. Subsequently, acting by the same majority, it may amend or revoke the measures adopted, in whole or in part, depending on developments in the situation.

The member of the European Council or the Council representing the state concerned does not participate in the vote, and the Member State in question is not taken into account when calculating the one-third threshold required to initiate the procedure[2].

The rule of law will always constitute a major challenge for any modern society because it represents the culmination of humanity's most advanced achievements: human dignity, democracy, freedom, equality, and tolerance. All these elements constitute the pillars of a political and legal structure designed to remain permanently functional for the benefit of the citizen.

Everything depends on the importance attached to this principle. Therefore, effective mechanisms for intervention and correction must be

[1] Article 2 of the Treaty of Lisbon provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men."

[2] Article 354 of the Treaty of Lisbon (http://www.presidency.ro/static/Versiunea_consolidata.pdf)

developed simultaneously in order to address possible instances of deviation. For this reason, all actors involved recognize the necessity of close cooperation among Member States, the European Parliament, the European Commission, and the Council, so that, through joint efforts, the guarantees ensuring the proper functioning of the rule of law may be continuously strengthened.

2. The Rule of Law Crisis in the Contemporary Period: The European Union's Perspective

Within the European Union, situations occasionally arise in several Member States where these values and principles are not respected or effectively implemented in practice, and where fundamental rights are not equally protected.

Under such circumstances, the Union realized that it needed a more effective and legally binding instrument, capable of achieving more than Article 7 TEU, in order to address situations in which Member States fail to comply with Article 2 TEU. The same rationale was shared by several European institutions which, fully aware of the particular importance of the rule of law and, consequently, of the dangers posed to the European project by its non-observance, have repeatedly taken a position on this issue. Among the most significant examples are those presented below.

The European Parliament has repeatedly called for the establishment of a mechanism for monitoring and verifying compliance with the rule of law. Particular reference should be made to the Resolution of 27 February 2014[1] on the situation of fundamental rights in the European Union.

On that occasion, Parliament reaffirmed that the European project was and continues to be aimed at anchoring European states in democracy and the rule of law, thereby ensuring the protection and promotion of fundamental human rights. This objective can only be achieved through the promotion of a substantial and active role for the rule of law.

Furthermore, Parliament advocated the launch of special and objective investigations and, where appropriate, the initiation of infringement procedures. It even proposed the development of a new "Copenhagen Mechanism"[2] designed to ensure the respect, protection, and promotion of the Union's values.

---

[1] European Parliament Resolution on the situation of fundamental rights in the European Union, adopted on 27 February 2014.

[2] A set of criteria adopted in Copenhagen, which concern the accession of a state as a full member of the European Union. These criteria refer to a democratic system of governance, appropriate freedoms and institutions, and respect for the principle of the rule of law.

According to the Resolution, the future mechanism should incorporate an early-warning system, political and technical dialogue, formal notification letters, and a freezing procedure, as requested by Parliament, in order to guarantee that Member States, at the request of EU institutions, suspend the adoption of legislation that could disregard or violate fundamental rights or the legal order of the European Union.

Following the aforementioned Resolution, on 11 March 2014, the European Commission issued a Communication proposing a framework for strengthening the rule of law. Subsequently, on 16 December 2014, the Council decided to initiate an annual rule of law dialogue. In our view, however, this initiative remains insufficient to meet the need for an effective mechanism capable of periodically assessing Member States' compliance with the European Union's fundamental values, as repeatedly requested by the European Parliament.

A new mechanism, operating on the basis of objective criteria and clear indicators, would help avoid the application of double standards when assessing problematic legal situations that may arise in the future.

In our opinion, cases involving breaches of obligations may even justify sanctions affecting access to European funds. Indeed, initial steps in this direction have already been taken, as Members of the European Parliament have called for the establishment of a committee composed of experts specialized in fundamental rights.

In recent years, an excessive degree of flexibility has been observed within the legal institutions of several states. This phenomenon became particularly concerning when institutional laxity contributed to weakening the European project by undermining the rule of law, a defining element of the European legal and political framework.

We shall now attempt to identify several such situations that emerged in various European states and ultimately attracted the attention of European institutions.

The starting point is the understanding that the rule of law means that both citizens and those who govern them are subject to and comply with the law. In relatively young democracies, however, differences of opinion often arise concerning the extent to which regulation should intervene in society. In other words, during periods of democratic development and institutional consolidation, disagreements between supporters of the welfare state—who advocate extensive governmental regulation—and proponents of the liberal state—who favour a more limited governmental role—become significantly more pronounced.

These ideological differences often generate heightened political tension and encourage attempts to push legal boundaries to their limits, as

each side seeks to validate its own perspective. When combined with the relative immaturity of institutions in such states, these circumstances inevitably expose weaknesses within structures that had previously appeared to function adequately.

Indeed, the true test of the rule of law does not occur during normal times but rather during periods of crisis[1], when any institutional framework is forced to test its limits. Whether welcomed or not, such periods can contribute significantly to social and civic development by revealing structural deficiencies which, once properly analyzed, may ultimately strengthen existing institutional mechanisms. As an old Romanian saying goes: "What does not destroy you makes you stronger."

European institutional structures and mechanisms, particularly those relating to the rule of law, are expected to function properly over long periods of time, even while tolerating occasional minor excesses. Problems arise, however, when such excesses become increasingly frequent and begin to constitute warning signals. These warnings become all the more serious in the context of an existing economic and financial crisis, which makes the resolution of institutional problems considerably more difficult.

In recent years, several Member States have experienced incidents that were far from isolated or insignificant. These events have been regarded as genuine crises that have tested—and continue to test—the rule of law. They have also been the subject of analysis within European institutions and have been described at EU level as "issues revealing systemic rule of law problems."[2]

Among the most notable examples are:

The French Roma Crisis (2010) – It was argued that the rights of persons belonging to a minority group had been placed at risk, particularly with regard to the right to free movement enjoyed by European citizens[3].

The Hungarian Crisis (2011) – Concerns expressed by European officials[4] focused on judicial independence and arose from legislative

[1] A statement repeatedly made by several European leaders, such as Manuel Barroso and Viviane Reding, who, together with other Members of the European Parliament, have on various occasions supported the need to adopt concrete measures to prevent situations in which political events in Member States may endanger the institutions of the rule of law.

[2] Viviane Reding, European Commissioner for Justice

[3] In this case, the European Commission initiated infringement proceedings against the French State on 29 September 2010, issuing an ultimatum on 13 October 2010. As a result of this position, France decided to amend its migration law, thereby complying with the European requirements. Consequently, the shortcomings were considered to have been remedied and the procedure was withdrawn.

[4] See the report of the European Commission for Democracy through Law (Venice Commission) of 19 March 2012 (http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dt/923/923929/923929ro.pdf).

measures that restricted minority rights, affected the right to a fair trial, and revealed significant deficiencies in legal and even constitutional regulation.

The Romanian Rule of Law Crisis (2012) –It was considered[1] that the events that occurred in July 2012 during the procedure for the suspension of the President of Romania led to a series of measures adopted in rapid succession which, both individually and collectively, raised serious concerns regarding constitutionality and the rule of law.

3. Current Approaches of the European Union Regarding the Rule of Law

Convinced that the European Union is a unique political and legal construction whose members are held together not by a common army but by the strength of the rule of law, European officials closely monitor institutional developments within the Member States, taking positions and intervening whenever necessary.

As previously mentioned, the institutions of the Union did not remain passive observers once threats to the rule of law began to emerge. Following extensive discussions, debates, and consultations, they adopted a new regulatory framework designed to address systemic threats to the rule of law in any Member State[2].

The new Rule of Law Framework was conceived as a complement to infringement procedures in cases where EU law has been violated, as well as to the so-called "Article 7 procedure"[3] established by the Treaty of Lisbon. This procedure, which provides for the most severe sanction available under the Treaties, allows for the suspension of voting rights where a Member State is found to have committed a serious and persistent breach of the values upon which the European Union is founded.

Under the new framework, the objective is to identify potential threats to the rule of law at the earliest possible stage through the establishment of an early warning mechanism. This mechanism enables the European Commission to initiate a dialogue with the Member State concerned in order to prevent the emergence of systemic threats to the rule of law. Should the proposed measures prove insufficient or unsatisfactory, the legal mechanisms provided for under Article 7 of the Treaty on European Union may ultimately be invoked as a measure of last resort.

---

[1] See the report of the European Commission for Democracy through Law (Venice Commission) of 17 December 2012 (http://www.ccr.ro/uploads/aviz_ro.pdf).

[2] See the Framework for strengthening the rule of law in the EU, presented by the European Commission on 11 March 2014 (de_drept_ro.htm).

[3] Article 7 of the Treaty of Lisbon.

The Commission begins by adopting a broad definition of the rule of law as "a system in which laws are applied and compliance with them is ensured." The application and observance of the law are reflected in principles established by the case law of the European courts, principles which are also common to the constitutional traditions of the Member States. These include the principle of legality, legal certainty, independent and effective judicial review, the right to a fair trial, and the separation of powers.

In order to achieve the objective of preventing threats to the rule of law, a three-stage process has been proposed:

First stage: The Commission carries out an assessment. After gathering all relevant information, it determines whether there are indications of a threat to the rule of law. If such indications exist, the Commission initiates a dialogue with the Member State concerned, which serves as an initial warning.

Second stage: The Commission issues a Recommendation, which is made public and addressed to the Member State concerned. The Recommendation identifies the problems detected, establishes a deadline for remedying them, and requires the Member State to provide information regarding the measures adopted throughout the process.

Third stage: The Commission monitors the measures implemented by the Member State. If no action is taken, or if the measures adopted are considered inadequate, the Commission may resort to one of the mechanisms provided for under Article 7 TEU.

In our view, the new framework proposed at the level of the European Union does not confer new powers upon the Commission. However, it does increase transparency regarding the manner in which the Commission exercises its role under the Treaties. We support the European legislator's effort to identify mechanisms capable of detecting and remedying, at an early stage, situations deemed dangerous to the rule of law, democracy, and ultimately to the existence and stability of the Union itself.

In concluding this analysis, it is worth mentioning[1] a developing school of thought, currently regarded with a degree of skepticism, advocating the revision of the Treaties and the repeal of Article 51[2] of the Charter of

[1] Opinion of the European Commissioner Viviane Reding, presented, inter alia, at the Centre for European Policy Studies (http://www.zeit.de/2013/44/interview-viviane-reding).

[2] The text of Article 51 of the Charter of Fundamental Rights of the European Union is as follows: "(1) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law. They shall therefore respect the rights and observe the principles set out therein and promote their application in accordance with their respective powers and within the limits of the competences conferred on the Union in the Treaties.

Fundamental Rights of the European Union. The purpose of such reform would be to render all fundamental rights directly applicable within the Member States. This would grant the Commission the possibility of intervening whenever a Member State is found to have violated fundamental rights, by initiating infringement proceedings even in situations not directly connected with the implementation of European Union legislation.

All these developments lead us to conclude that the European Union represents the most ambitious political and social project undertaken by the nations of this part of the world. It is a project that continuously generates new aspirations and challenges and must remain dynamic and adaptable, constantly evolving alongside each nation that forms part of it.

References

1. ***Treaty of Lisbon (http://www.presidency.ro/static/Versiunea_consolidata.pdf)
2. European Parliament, Resolution on the situation of fundamental rights in the European Union, adopted on 27 February 2014
3. European Commission for Democracy through Law (Venice Commission) of 19 March 2012 (http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dt/923/923929/923929ro.pdf).
4. European Commission for Democracy through Law (Venice Commission) of 17 December 2012 (http://www.ccr.ro/uploads/aviz_ro.pdf).
5. European Commission, Framework for strengthening the rule of law in the EU, presented on 11 March 2014 (de_drept_ro.htm).
6. Opinion of the European Commissioner Viviane Reding, presented, inter alia, at the Centre for European Policy Studies (http://www.zeit.de/2013/44/interview-viviane-reding).
7. ***Charter of Fundamental Rights of the European Union

(2) This Charter does not extend the field of application of Union law beyond the powers of the Union, does not establish any new power or task for the Union, nor does it modify powers and tasks defined in the Treaties."

PRIMARY AND DERIVATIVE EUROPEAN LAW

Paul Iulian NEDELCU[1]

Abstract:

If the Lisbon Treaty maintains the principle of the supremacy of Community law over national law, we consider it necessary to present the European legal order or, in other words, European law. European law consists of the three founding treaties of the Union and the amending treaties, which have adapted to the new realities that have emerged in European life and which, moreover, underline the dynamic and unpredictable nature of European integration. The treaties represent the fundamental part of European law and the legal system of the European Union because, on the basis of and in accordance with them, all the norms that make up all secondary legislation, as well as other acts, are generated.

Based on the arguments presented so far and considering that, under the Treaty of Lisbon as well, the principle of the supremacy of Community law over national law continues to be maintained, we consider it necessary to provide, in this section, a brief presentation of several elements of European law.

The European legal order, or in other words European law[2], consists of a series of structured and hierarchical rules. European law is composed of the three founding treaties of the Union[3] and the amending treaties, which have adapted to the new realities that have emerged in European life and which, moreover, emphasize the dynamic and unpredictable[4] nature of European integration. The

---

[1] „Spiru Haret" University, Romania, Faculty of Legal, Economic and Administative Sciences Craiova, Attorney, Dolj Bar

[2] Professor Augustin Fuerea, a renowned specialist in the field, stated that the Community legal order is understood, in a broad sense, as the body of rules governing the relations involving the European Communities and, in a narrower sense, as the relations between the European Communities and the Member States, the relations between natural and legal persons belonging or not belonging to the Member States, and the relations between the European Communities and other international organizations, in *Manualul Uniunii Europene* (*Handbook of the European Union*), 4th ed., Universul Juridic Publishing House, Bucharest, 2010, p. 133; for other definitions of Community law, see D. Mazilu, *Integrare europeană, Drept comunitar şi instituţii europene* (*European Integration, Community Law and European Institutions*), Lumina Lex Publishing House, Bucharest, 2008, p. 54; O. Ţinca, *Drept comunitar general* (*General Community Law*), Didactică şi Pedagogică Publishing House, Bucharest, 1999, p. 200; V. Marcu, *Community Institutional Law*, 3rd ed., Lumina Lex Publishing House, Bucharest, 2002, p. 32; B. Andreşan-Grigoriu and T. Ştefan, *Community Law*, C.H. Beck Publishing House, Bucharest, 2007; N. Diaconu, *European Union Law – Treatise*, Lumina Lex Publishing House, Bucharest, 2008, p. 55; G.L. Ispas, *The European Union – Evolution, Institutions, Mechanisms*, Universul Juridic Publishing House, Bucharest, 2012, p. 55.

[3] At present, only two of them remain in force, having been signed in Rome on 25 March 1957 and having entered into force on 1 January 1958.

[4] B. Andreşan-Grigoriu and T. Ştefan, Tratatele Uniunii Europene, Hamangiu Publishing House, Bucharest, 2011, p. 3.

treaties represent the fundamental part of European law and of the EU legal system because, on the basis of and in accordance with them, all the rules that make up the entire body of secondary legislation, as well as the other acts of the European Union, are generated.

Primary legislation constitutes the essence of the constitutional framework of the Union and, together with the principles of law, occupies the highest position in the hierarchy of the sources of Community law.

This category includes the Single European Act[1], the Treaty on European Union signed at Maastricht[2], the Treaty of Amsterdam[3], the Treaty of Nice[4], and the Treaty of Lisbon[5]. Also included in this category, as an

---

[1] It was signed on 17 February 1986 in Luxembourg by 9 of the 12 Member States existing at that time and, on 28 February 1986, by the remaining three Member States (Italy, Denmark, and Greece), subsequently entering into force on 1 July 1987. The Act introduced several major institutional reforms: it officially recognized the European Council, established the Court of First Instance, which assumed part of the powers previously exercised by the Court of Justice, and transformed the entire Community decision-making process through the creation of the new legislative cooperation procedure provided for in Article 252 EC. The comitology procedure was also introduced into the Community legal order, according to which the Council may authorize the Commission, under certain conditions, to implement decisions adopted by the Council of the European Union. See P. Craig and G. de Búrca, *European Union Law*, Hamangiu Publishing House, Bucharest, 2009, p. 16.

[2] Adopted on 10 December 1991, signed on 7 February 1992, and entering into force on 1 November 1993, it represented the second fundamental revision of the founding treaties. Through this treaty, several fundamental changes were introduced into the European construction. Three "pillars" may be distinguished: the first, the Community pillar; the second, the Common Foreign and Security Policy; and the third, Justice and Home Affairs. See A. Fuerea, *op. cit.*, p. 44.

[3] Signed on 2 October 1997 and entering into force on 1 May 1999, the Treaty of Amsterdam amended and supplemented the Maastricht Treaty, particularly with regard to the role accorded to employment and citizens' rights and to the removal of barriers to the free movement of goods and services. In this respect, each Member State was required to cooperate more concretely within Europol, while the European Union was granted the possibility of making its voice more effectively heard within international institutions. Furthermore, institutions and procedures capable of ensuring the proper functioning of an enlarged Union were established.
See J. Rideau, *Droit institutionnel de l' Union et des Communautés Europeennés*, ed a 5-a, LGDJ Montchrestien, Paris, 2006 p. 72.

[4] Signed on 26 February 2001 and entering into force in January 2003, it represented the first amendment adopted after the change of regime in Eastern Europe and the dissolution of the Soviet Union. The Treaty contains provisions intended to improve the decision-making mechanism, taking into account the envisaged enlargement of the Union to 27 Member States.
See O. Tinca, "The Treaty of Nice," *Dreptul*, no. 9/2001, p. 14.

[5] Concluded in December 2007 and entering into force on 1 December 2009, after a ratification process marked by considerable political uncertainty, the Treaty of Lisbon introduced several significant changes. Among the most important was the introduction of

element of EU primary law, are the accession treaties of new Member States, together with their annexes and accompanying protocols, which have the same legal value as the acts they accompany and may establish additional regulations applicable to all Member States[1].

Legal doctrine[2] considers that the founding treaties perform the function of a constitution for each Member State of the European Union, insofar as they regulate the relations between institutions, their powers, and the cases in which powers are shared between the institutions of the Union and the Member States.

The provisions contained in the founding treaties of the European Union cannot be subject to judicial review or derogation except where the treaties themselves contain an authorized procedure for that purpose[3].

Within the European legal order, the power to create legal rules belongs to certain bodies that exercise this competence according to a predetermined procedure, which constitutes one of the main characteristics of the European Union.

EU law grants its institutions the power to adopt binding legal rules in accordance with the European interest, which prevails over the national interests of the Member States. The Court has emphasized, in a landmark case[4], that the European institutions established by the founding treaties exercise sovereign rights transferred by the Member States, adopting legislation directly, but only within the limits laid down by the treaties of the Union.

In order to perform the tasks conferred upon them by the founding treaties, the institutions of the Union adopt unilateral acts.

---

the system of "delegated acts," which authorizes the Commission to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act. This mechanism replaced the comitology procedure, which had long been criticized for its complexity and lack of transparency. The new regulation established a clear distinction between legislative and non-legislative acts.

For further details regarding the Treaty of Lisbon, see M. Voicu, *The European Union Before and After the Treaty of Lisbon*, Universul Juridic Publishing House, Bucharest, 2009; E. Dragomir and D. Niță, *The Treaty of Lisbon*, Lumina Lex Publishing House, Bucharest, 2010.

[1]. The Statute of the Court of Justice, the privileges and immunities of the Communities, the statutes of the two European systems of central banks, the role of national parliaments, and the conditions regarding the application of the principles of subsidiarity and proportionality were established.

[2]. J. Rideau, Droit institutionnel de l'Union et des Communautés Européennes, 5 éd., LGDJ Montchrestien, Paris, 2006, p. 106.

[3]. J. Rideau, op. cit., p. 240.

[4]. JUE, C-6/64, Costa c. Enel, a se vedea P. Moreau Defarges, Les Institutions euro-péennes, 6 éd., Armand Colin, Paris, 2002, apud D.C. Dragoş, Uniunea Europeană, Instituții, Mecanisme, Ed. All Beck, Bucureşti, 2005, p. 97.

We may therefore state that we are dealing with a body of enacted law, consisting of rules adopted in and for the implementation of the treaties. In the normative hierarchy of the Union, these rules constitute secondary sources of European law. Their secondary normative character lies in the impossibility of contradicting primary sources and the general principles of European law developed by the Court of Justice through its case-law[1].

Although these institutions possess normative powers comparable to legislative powers, the founding treaties do not use the terms "law" or "legislation." The Court of Justice nevertheless altered established usage by employing notions such as the "legislative system of the Communities[2]" and the "legislative power of the Community." A more natural terminology was restored with the Treaty of Amsterdam, which refers to the Council's role as a "legislator."

A regulation is the principal source of derived Community law and represents the legislative power of the Communities.

The Treaty defines it comprehensively[3], stating that it has general application, is binding in its entirety, and is directly applicable in all Member States[4] without the need for national implementing legislation. Its entry into force and its legal effects within the national legal order occur independently of any measure of incorporation into domestic law.

Accordingly, all citizens may rely directly on the provisions of a regulation and, as the Court has stated in its case-law[5], the only obligation imposed on the Member States is not to obstruct the direct application of regulations[6].

Comparable in legal force to a national statute, a regulation contains general and impersonal provisions of an abstract nature, which is why regulations are regarded as the most important legal acts that may be adopted by the institutions of the European Union. They have general application, are binding in all their elements, and are directly applicable in all Member States[7].

From the material point of view, that is, with regard to the legal force of the provisions they contain, the case-law of the European courts has distinguished between basic regulations and implementing regulations[8].

---

[1] A. Fuerea, Community Business Law, Universul Juridic Publishing House, Bucharest, 2006, p. 25; O. Manolache, Community Law, 5th ed., C.H. Beck Publishing House, Bucharest, 2006, p. 23.

[2] CJUE, C-25/70, Köster.

[3] Art. 288 (ex-art. 249 TCE).

[4] Art. 288 (ex-Art. 249 TEC), in B. Andreşan-Grigoriu, T. Ştefan, op. cit., p. 288.

[5] CJUE, C-43/71, Politi.

[6] J. Rivero, J. Waline, op. cit., p. 241.

[7] A regulation is, for example, the Community act that regulates the prices of a category of products or imposes certain obligations on automobile manufacturers in the European Union.

[8] J. Rideau, op. cit., p. 156; A. Fuerea, op. cit., pp. 141–142.

Basic regulations are those adopted by the Council[1] according to the procedure laid down in the Treaty. Implementing regulations are adopted by the Commission[2] under authorization from the Council or, in certain cases, by the Council itself. Their defining characteristic is that they may be reviewed and annulled if they infringe the basic regulations. Regulations enter into force only after publication in the Official Journal of the European Communities; failure to publish deprives them of binding force, although it does not render the regulation unlawful[3].

A European directive represents a two-stage legislative technique through which objectives to be achieved by the Member States are established, while leaving to the national authorities the choice of the most appropriate means for attaining those objectives.

The provisions of a directive may become directly binding if they are addressed to one[4], several, or all Member States. In order for the principles laid down in a directive to produce effects for individuals, the national legislature must adopt an act specific to the legal system of the respective State, with a clear and unequivocal content[5], through which the content of the directive enters the national legal order.

Transposition into national legislation must be adapted to the objectives defined in the directive. It is not necessary to reproduce its content formally; in some cases, a general legal framework may be more appropriate if it ensures that the provisions of the directive are applied in a sufficiently precise and clear manner[6].

A directive provides for a period within which it must be transposed into national legislation; however, Member States enjoy a margin of discretion that allows them to take account of national particularities. If the

---

[1] Council Regulation (EC) No 1293/2007 of 30 October 2007 repealing the anti-dumping duties imposed by Regulation (EC) No 1050/2002 on imports of recordable compact discs originating in Taiwan and authorising their repayment or remission, and repealing the countervailing duties imposed by Regulation (EC) No 960/2003 on imports of recordable compact discs originating in India, authorising their repayment or remission and terminating the proceeding concerned (OJ L 288, 6.11.2007, pp. 17-19).

[2] Commission Regulation (EC) No 639/1999 of 25 March 1999 concerning the authorisation of a new additive in feedingstuffs (OJ L 82, 26.3.1999, pp. 6-7).

[3] CJUE, C-185/73, Hauptzollant Bielefeld c. Konig.

[4] Article 288 of the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (ex-Article 249 TEC) (OJ C 83 of 30 March 2010) (http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:RO:HTML).

[5] See CJEC, Case C-291/84, Commission v. the Netherlands.

[6] T. Ștefan and B. Andreșan-Grigoriu, Community Law, C.H. Beck Publishing House, Bucharest, 2007, p. 120.

prescribed period is not respected, infringement proceedings for breach of European Union law are initiated against the Member State concerned.

It should be noted that Member States are not obliged to adopt transposition measures before the expiry of the prescribed deadline. Nevertheless, according to the case-law of the Court of Justice of the European Union[1], they must refrain from adopting measures that would seriously compromise the result prescribed by the directive[2].

Failure to implement a directive constitutes a serious breach of European Union law[3] and has a negative impact on the process of European integration. Such conduct is interpreted as opposition by the Member State concerned to the uniform application of the law and may create discrimination between citizens through the denial of the rights conferred by the directive.

It nevertheless occurs that certain transpositions are incorrect or are carried out belatedly, not because of opposition by the Member States to implementation, but because of legal or administrative difficulties encountered in the process. Even such situations constitute breaches of the obligations incumbent upon Member States and may give rise to liability proceedings initiated by the Commission pursuant to Articles 226–228 of the EC Treaty[4].

It has been observed that this type of breach of the European legal order occurs rather frequently, which is why the Court has developed a body of case-law intended to encourage Member States to exercise greater diligence in the transposition of directives.

At the beginning of the 1960s, the Court of Justice of the European Communities developed two principles governing the relationship between Community legislation and the national legislation of the Member States: the principles of "direct effect" and "supremacy." These two principles derive from the nature of the Treaty establishing the European Communities, which, according to the Court, created a "new legal order" of international law to which both the Member States and their citizens are subject.

---

[1] CJEC, Case C-129/96, Inter-Environnement Wallonie ASBL v. Région wallonne (http://curia.eu.int/en/content/juris/index.html).

[2] CJEC, Case C-147/77, Commission v. Italy.

[3] CJEC, Case C-1/00, Commission v. France.

[4] Article 226 EC: "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

According to the principle of direct effect[1], a provision of the Treaty establishing the European Communities or of a secondary legislative act (a regulation, directive, or decision) that confers rights on individuals may, under certain conditions, be invoked directly before national courts[2]. In other words, if a legal rule benefits a category of individuals, it also benefits each individual within that category, even where the provision does not expressly state this[3].

According to European case-law, national judges are under an obligation to ensure the effective protection of those rights. The underlying rationale of the principle of direct effect[4] is primarily the protection of individual rights, which constitutes an element of the rule of law. Furthermore, the principle guarantees the effective application of European Union law within the national legal order through national courts and through individuals seeking recognition of their rights. A provision of European Union law may produce direct effect only if it is clear, precise, and unconditional[5].

According to the principle of supremacy, whenever European Union legislation is adopted, it takes precedence over domestic legislation[6]. The principle of supremacy applies to the entire body of EU law, regardless of its nature: the Treaties, secondary legislation (in particular directives, regulations, and decisions), international agreements, and the general principles of European law. European Union law prevails over national law, regional and local rules, and even over the constitutions of the Member States.

---

[1] The principle of "direct effect" should not be confused with the principle of "direct applicability." In Community law, direct applicability means that no intervention by the Member States is required for the application of a legal measure; consequently, a "directly applicable" measure does not need to be transposed into national law. This obligation is expressly established in the case of "regulations," which, according to the Treaty, are "directly applicable." Regulations become applicable without any further legislative action, such as the adoption of a national transposition measure, since they already form part of the legal order of the Member States. Although regulations are not transposed, they must nevertheless be implemented in practice.

[2] CJUE, C-26/62, Van Gend en Loos c. Administratie der Belastingen.

[3] CJUE, C-24/66, Kampffmeyer c. Comisia.

[4] "Direct effect" may be invoked by individuals before a national court against a Member State (the so-called "vertical direct effect") or against another individual (the so-called "horizontal direct effect"). In order for individuals to benefit from the "direct effect" of provisions of European Union legislation, there must be a guarantee that national courts will give priority to European Union law rather than to national legislation.

[5] CJUE, C-26/62, Van Gend en Loos c. Administratie der Belastingen

[6] CJUE, C-6/64, Costa c. E.N.E.L.

Moreover, during the 1960s and 1970s, the judicial contribution to the supranational dynamism of the European States proved to be of particular importance.

During this period, while European political development was less active or even in crisis, the Court contributed in various ways to legislative development and to the process of integration.

An illustrative example is the situation in which the Court authorized an extensive application of Article 308 EC, thereby expanding the sphere of competence of the Union. In doing so[1], it relied on the principle of direct effect in order to increase the effectiveness of European policies whose implementation was not adequately ensured either by the Member States or by the European institutions[2].

Another characteristic of European Union law is that its rules create obligations for every level of national authority. Thus, judges must set aside national measures that are contrary to European Union law, while administrative authorities must refrain from applying national measures incompatible with EU law. The legislature of the Member State must repeal such measures. Furthermore, where there is doubt concerning the interpretation of national legislation, national courts must interpret it in the light of the relevant EU directive[3].

This obligation applies both where the national provisions in question were adopted before or after the relevant EU directive and where the proceedings before the national court are "vertical" or "horizontal"[4].

It is also applicable where the national measure operates only during a transitional period or where the interpretation concerns national case-law.

Another category of acts based on primary law is the decision, which is binding in all its elements upon those to whom it is addressed.

Such acts do not have general application; by their nature they are individual acts producing effects for one or more addressees. From the perspective of direct applicability, a decision addressed to a Member State may require that State to adopt measures necessary for its implementation. Decisions are directly applicable to their addressees, a fact that has also been recognized in practice.

Where a decision is addressed to one or more Member States, it may create rights or obligations for individuals. In such a case, in order to preserve

---

[1] J. Weiler, "The Transformation of Europe," (1991) 100 Yale Law Journal 2403, pp. 2431–2453, cited in P. Craig and G. de Burca, op. cit., p. 130.

[2] Idem, p. 343.

[3] CJEU, Case C-14/83, Von Colson and Kamann v. Land Nordrhein-Westfalen — the principle of "consistent interpretation" ("principle of consistent interpretation").

[4] CJEU, Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentación SA.

the useful effect of the decision, individuals may invoke it before national courts.

Decisions are adopted by the Council on a proposal from the Commission or, in exceptional cases, on its own initiative. The Commission may, in certain circumstances, adopt decisions either on its own initiative or pursuant to authorization granted by the Council.

A decision is binding in all its elements[1], a characteristic that makes it similar to a regulation and distinguishes it from a directive. It is therefore an individual act through which European Union law is implemented[2].

Unlike the other acts listed in the Treaty, recommendations and opinions are not legally binding; nevertheless, they constitute useful instruments for guiding national legislation.

Recommendations issued by the Council and the Commission are most often invitations addressed to Member States[3] to amend their national legislation and adapt it to a proposed general framework. In many cases, recommendations precede binding acts and play the role of a preliminary procedure in European legislation, based on the assumption that their addressees will exercise self-discipline.

However, a recommendation is not entirely devoid of legal effects. The Court of Justice of the European Union has held that national courts must use recommendations as an interpretative tool when applying national measures adopted for their implementation or where a recommendation supports other binding measures adopted by the institutions of the European Union.

The Commission, having regard to the content of a previous directive[4] and having found, following meetings between the parties, that certain interpretations by the Member States concerning the content of that directive differed, considered that this situation could create the risk that the national implementing rules would lead to divergent applications in the Member States, which would be contrary to the very purpose of the directive, namely to recommend a particular legal conduct to the Member States.

Through the content of the act[5] referred to in the case mentioned above, the Commission recommends that, when authorizing the

---

[1] Article 288 (formerly Article 249 EC), in B. Andreșan-Grigoriu and T. Ștefan, op. cit., p. 288.
[2] CJEC, Case C-16/62, in Historical Case-law of the Community Courts, Romanian European Institute, Bucharest, 2010.
[3] Commission Recommendation 2010/167/EU of 19 March 2010 on the authorization of systems for mobile communication services on board vessels (MCV services) (OJ L 72, 20 March 2010).
[4] Directive 2008/57/EC of 17 June 2008 on the interoperability of the rail system within the Community (OJ L 191, 18 July 2008).
[5] Commission Recommendation of 29 March 2011 concerning the authorization for placing in service structural subsystems and vehicles under Directive 2008/57/EC (OJ C 95, 8 April 2011).

commissioning of the characteristic elements, the Member States should ensure that the principles and guidelines established by the provision are duly taken into account.

References

1. Andreșan-Grigoriu B. and Ștefan T., *Community Law*, C.H. Beck Publishing House, Bucharest, 2007
2. Andreșan-Grigoriu B. and T. Ștefan, *Tratatele Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2011;
3. Craig P. and G. de Búrca, *European Union Law*, Hamangiu Publishing House, Bucharest, 2009;
4. Diaconu N., *European Union Law – Treatise*, Lumina Lex Publishing House, Bucharest, 2008;
5. Dragomir E. and D. Niță, *The Treaty of Lisbon*, Lumina Lex Publishing House, Bucharest, 2010;
6. Dragoş D.C., *Uniunea Europeană, Instituţii, Mecanisme*, Ed. All Beck, Bucureşti, 2005;
7. Fuerea A., *Manualul Uniunii Europene* (*Handbook of the European Union*), 4th ed., Universul Juridic Publishing House, Bucharest, 2010;
8. Fuerea A., *Community Business Law*, Universul Juridic Publishing House, Bucharest, 2006;
9. Ispas G.L., *The European Union – Evolution, Institutions, Mechanisms*, Universul Juridic Publishing House, Bucharest, 2012:
10. Manolache O., Community Law, 5th ed., C.H. Beck Publishing House, Bucharest, 2006;
11. Marcu V., *Community Institutional Law*, 3rd ed., Lumina Lex Publishing House, Bucharest, 2002;
12. Mazilu D., *Integrare europeană, Drept comunitar şi instituţii europene* (*European Integration, Community Law and European Institutions*), Lumina Lex Publishing House, Bucharest, 2008;
13. Rideau J., *Droit institutionnel de l' Union et des Communautés Europeennés*, ed a 5-a, LGDJ Montchrestien, Paris, 2006
14. Ținca O., *Drept comunitar general* (*General Community Law*), Didactică şi Pedagogică Publishing House, Bucharest, 1999, p. 200;
15. Tinca O., "The Treaty of Nice", in *Dreptul*, no. 9/2001

The Recommendation provides that a single authorization for placing vehicles in service should be sufficient for the entire railway network of the European Union. Vehicle authorization procedures are harmonized and include certain clearly defined stages with fixed deadlines established by the competent authorities. The technical rules applicable to the granting of authorizations for placing in service must be stable, transparent, non-discriminatory and, as far as possible, harmonized. In order to ensure interoperability, it is necessary for the safe integration and technical compatibility between the vehicle and the network to be demonstrated through a rules-based approach.

16. Voicu M., *The European Union Before and After the Treaty of Lisbon*, Universul Juridic Publishing House, Bucharest, 2009;

***

17. Court of Justice of the European Union (CJEU) cases
18. Commission Recommendation 2010/167/EU of 19 March 2010 on the authorization of systems for mobile communication services on board vessels (MCV services) (OJ L 72, 20 March 2010)
19. Commission Recommendation of 29 March 2011 concerning the authorization for placing in service structural subsystems and vehicles under Directive 2008/57/EC (OJ C 95, 8 April 2011)
20. Commission Regulation (EC) No 639/1999 of 25 March 1999 concerning the authorisation of a new additive in feedingstuffs (OJ L 82, 26.3.1999, pp. 6-7)
21. Council Regulation (EC) No 1293/2007 of 30 October 2007 repealing the anti-dumping duties imposed by Regulation (EC) No 1050/2002 on imports of recordable compact discs originating in Taiwan and authorising their repayment or remission, and repealing the countervailing duties imposed by Regulation (EC) No 960/2003 on imports of recordable compact discs originating in India, authorising their repayment or remission and terminating the proceeding concerned (OJ L 288, 6.11.2007, pp. 17-19).
22. Directive 2008/57/EC of 17 June 2008 on the interoperability of the rail system within the Community (OJ L 191, 18 July 2008).

TAX SECRECY – BETWEEN TRANSPARENCY AND THE PROTECTION OF PRIVACY AND COMMERCIAL CONFIDENTIALITY

Alina V. POPESCU[1]

Abstract:

From the perspective of the concept of professional secrecy, tax secrecy provides legal protection for information that constitutes trade secrets, information not intended for public disclosure, or personal data. However, in practice, the need for transparency in tax policies is increasingly invoked, justified by various reasons.

Over time, the concept of tax secrecy has given rise to controversy regarding the perspective from which it is analyzed. Thus, on the one hand, taxpayers or payers have invoked the need to protect sensitive information and have sometimes even perceived tax secrecy as an opportunity to circumvent financial and tax regulations; on the other hand, state authorities seek to narrow the scope of tax secrecy, citing fair competition, the prevention and combating of tax fraud and evasion or money laundering, and increasing the collection of revenues due to the state budget, among other reasons.

This study aims to analyze how the legal framework governing tax secrecy in Romania has evolved since 1990 and to compare it with other legal systems regarding the regulation of this area.

Keywords: *tax secrecy, taxation, transparency, trade secrets*

I. General considerations

We will bear in mind that confidentiality, in general, should be the exception – one that is well-founded – and that in practice it takes various forms, depending on the social value being protected, as follows: professional secrecy, the secrecy of judicial proceedings or other internal institutional procedures, trade secrets, the secrecy of correspondence, the secrecy of assets, the secrecy of classified information, and the confidentiality of certain information not intended for public disclosure, etc. Thus, we observe that some secrets protect values that represent the public interest, others the private interest, and still others may protect both public and private interests (e.g., the secrecy of judicial proceedings), and the legal norms governing them, their foundations, and their scope of application vary greatly.

A new approach can be observed in the field of taxation, with the current trend moving toward greater transparency at the expense of any form of secrecy. Of course, this way of handling the issue may create a negative perception among taxpayers, as they may feel that their fundamental rights are being violated.

[1] University lecturer, Ph.D., Constantin Brâncoveanu University of Pitești, avpalina_16@yahoo.com

It is very important to analyze the distinction between this type of professional secrecy and the concept of transparency. In its current understanding, the concept of public transparency must be linked primarily to the transparency of tax policies implemented by the state to regulate business practices, ensure fair competition, or combat tax fraud and evasion. However, authorities are increasingly applying this concept of transparency to taxpayers' obligations as well. In this way, new legislative regulations are capable of undermining this professional – tax – secrecy, whose very purpose is to prevent the excesses of transparency generated by an ever-increasing number of new disclosure obligations.

Of course, tax secrecy enjoys only relative legal protection; it can be set aside by such legislative provisions and cannot be weighed against the professional secrecy of a doctor, lawyer, or clergyman.

However, limiting the scope of information protected by tax secrecy and transforming it into public information – coupled with the development of new information technologies – may create a legal imbalance and pose risks to taxpayers' rights and freedoms.

From a legal standpoint, it is necessary to analyze where the boundary lies between the sphere of private life and that of public affairs (where the issue arises in terms of operational capacity[1]). Guy Carcassonne argues that: "Any excess always ends up generating the opposite excess. We have abandoned a maniacal secrecy only to slip into a neurosis of transparency."[2]

Of course, we cannot advocate for unjustified secrecy – such as classifying information that could be made public – merely in the name of a "morbid secrecy," or a world in which opacity becomes more of a habit than a true necessity.

There are also authors[3] who believe that "the business world seemed to be characterized more by secrecy, or even a certain opacity, than by transparency," with secrecy being the rule in commercial matters. In this regard, it is necessary to distinguish between tax secrecy concerning individuals and that concerning legal entities.

We can conclude that the disclosure of tax secrecy affects the rights of individuals to a greater extent, whereas, in the case of legal entities, it ensures a transparent business environment.

However, we cannot fail to note that, even with regard to legal entities, the disclosure of certain tax secrets may affect their proper functioning, may

[1] Guy Carcassonne – „Le trouble de la transparence", Pouvoirs n°97 - Transparence et secret - avril 2001 - p.17-23 https://revue-pouvoirs.fr/le-trouble-de-la-transparence/

[2] Guy Carcassonne – Op. cit.

[3] Denis Kessler – „L'entreprise entre transparence et secret", Pouvoirs n°97 - Transparence et secret - avril 2001 - p.33-46 https://revue-pouvoirs.fr/l-entreprise-entre-transparence-et/

reveal certain trade secrets, and may disrupt the proper functioning of the market.

At the same time, professional secrecy is also linked to the concepts of transparency and legality. It is generally believed that what is transparent is legal, and that where transparency is avoided, illegal activities may be concealed. However, a distinction must be made between protecting certain concepts under the umbrella of professional – and, by extension, tax – secrecy, and transparency. Maintaining secrecy involves not disclosing knowledge and information that the holder is not permitted to reveal.

Secrecy is viewed as the opposite of transparency, but transparency is viewed primarily through an institutional lens and in relation to the concept of democracy: "Secrecy, transparency, democracy: all three undoubtedly encompass diverse and ever-changing realities."[1] We therefore conclude that the concept of transparency can be applied to an individual only when that person is connected to public institutions – which are obligated to transparency – and not to private individuals. Consequently, we can argue that the disclosure of information constituting a tax secret cannot be justified by the need to ensure transparency, but rather constitutes an intrusion into private life.

In tax matters, three concepts are at play: publicity, secrecy, and transparency, each of which takes precedence over the other two at any given time. "No one can ignore taxes, within the limits of the shared secrecy between the taxpayer and the tax administration. The requirement of confidentiality itself must, in turn, be subject to the principle of transparency."[2]

We can observe that these three social values invoked in tax matters do not have a constitutional origin; their source lies in the legal sources of tax law, so that their applicability becomes relative and variable, depending on the will of the legislature at that time.

II. Transparency and the protection of privacy and commercial confidentiality

French legal doctrine cites the legislative regulation of tax disclosure[3], and, subsequently, tax confidentiality, to protect taxpayers from potential administrative abuses. Romanian law does not regulate the disclosure of taxes in general, but only certain principles applicable in this area: the neutrality of

[1] Jean-Denis Bredin – „Secret, transparence et démocratie", Pouvoirs – nr. 97, 2001, https://revue-pouvoirs.fr/secret-transparence-et-democratie/

[2] Sébastien Ferrari – „Les mythes de la publicité et du secret à l'épreuve de la transparence en droit fiscal", dans Gestion & Finances Publiques 2021/1 N° 1, pages 91 à 97, Éditions JLE, https://droit.cairn.info/revue-gestion-et-finances-publiques-2021-1-page-91?lang=fr

[3] Sébastien Ferrari – op. cit – The Caillaux Law of July 15, 1914 on the adoption of the general budget of revenues and expenditures for the fiscal year 1914: Official Gazette, July 19, 1914, p. 6448

tax measures, certainty of taxation, fairness of taxation, efficiency of taxation, and predictability of taxation. However, the Romanian Tax Procedure Code does regulate one form of disclosure, namely the publication of lists of debtors with outstanding tax liabilities (individuals or legal entities).

Thus, Romanian law requires tax authorities "to publish on their website a list of debtors – both individuals and legal entities – who have outstanding tax liabilities, as well as the amount of those liabilities."[1]

The law also requires the tax authority to publish, on its website, lists of taxpayers – legal entities – that have no outstanding tax obligations: "who have filed their tax returns and paid their tax obligations by the due date and who have no outstanding tax obligations."[2]

With regard to transparency, it is considered that, together with confidentiality, these constitute the two sides of the same "fundamental ethical dilemma."[3] We agree with the author, as we believe that while ensuring transparency in the activities of public institutions is indispensable, special attention must be paid to maintaining professional confidentiality – in this case, tax confidentiality.

The unauthorized disclosure of financial and tax information can cause harm to individuals by infringing upon their right to privacy – a constitutionally protected right – as well as to legal entities by revealing trade secrets or fostering unfair competition. Transparency is a fundamental principle in public affairs, a guarantee of good governance and the efficient management of public resources. It is generally accepted that citizens have the right to be informed or to request information regarding the activities of public officials; however, we believe that this transparency should not be extended to individuals and legal entities unless it is demonstrated that such disclosure interferes with the general interests of society.

On the other hand, it must also be borne in mind that tax secrecy is a relative social value that may be compromised only under conditions strictly prescribed by law.

The disclosure of certain financial and tax information must take into account the confidentiality of tax bases and the amount of corporate income tax, in order to protect trade secrets, because the mere disclosure of this data can provide competitors with important business information. On the other hand, publishing the names of businesses that owe money to the state budget can help foster a more secure business environment.

---

[1] Article 162, paragraph 1 of Law No. 207/2015, published in the Official Gazette of Romania, Part I, No. 547 of July 23, 2015, as subsequently amended and supplemented

[2] Art. 162[1], paragraph 1 of Law No. 207/2015, published in the Official Gazette of Romania, Part I, No. 547 of July 23, 2015, as subsequently amended and supplemented

[3] Sébastien Ferrari – op. cit – Conseil d'État, La transparence et le secret. Rapport public 1995: La Documentation française 1996, coll. Études et documents, n° 47, p. 18.

In the context of analyzing tax secrecy, we must also take into account citizens' right to information. According to Article 11 of the Tax Procedure Code – Tax Secrecy, paragraph 3: "The tax authority may disclose the information in its possession: …

d) to any requester, with the express and unequivocal consent of the taxpayer/payer regarding whom the information was requested. Responsibility for how the information thus obtained is used rests with the requester; …"[1].

We note that the legislature makes no distinction between taxpayers who are natural persons and those who are legal entities, and makes the disclosure of tax secrets contingent upon "the express and unequivocal consent of the taxpayer/payer."

We believe that the rationale behind this legal provision is precisely to ensure a balance between citizens' right to information and the right to privacy and protection of personal data for individual taxpayers, or the right to protection of trade secrets for corporate taxpayers/payers.

Furthermore, the text of the law establishes safeguards for taxpayers whose information is disclosed to third parties with their consent, in that the party requesting the information is fully responsible for how it is used and for the level of protection it provides.

For taxpayers – whether individuals or legal entities – tax confidentiality is of great importance; however, it cannot be invoked against tax authorities regarding the inter-agency exchange of information, particularly in the fight against tax fraud, tax evasion, money laundering, etc. In these areas, international organizations (the EU, the OECD) have established the principle of cross-border exchange of financial information to combat criminal activity. In such situations, taxpayers cannot object to the tax authorities' decisions to transmit such financial information to other bodies with jurisdiction in this area.[2]

Doctrine[3] it recognizes that transparency reduces the scope of secrecy and, conversely, according to the principle of communicating vessels. Tax law must adapt to technological factors (the new challenges posed by information technology, the digitization of institutions, the use of artificial intelligence, etc.) and geographical factors (the internationalization of business models, as well as the procedures of international organizations).

---

[1] Art. 11 of Law No. 207/2015, published in the Official Gazette of Romania, Part I, No. 547 of July 23, 2015, as subsequently amended and supplemented

[2]Sébastien Ferrari – op. cit – CJUE, Gr. Ch., 6 oct. 2020, État luxembourgeois c/ B e.a., aff. jointes C 245/19 et C 246/19.

[3] Sébastien Ferrari – op. cit – P. Escaut, « La transparence fiscale: nouvelle contrainte ou opportunité? » : RDF 2016, comm. 443.

III. History of tax secrecy in Romania (1990 – present)

This study examines how tax secrecy has been regulated following the legislative changes that took place in the 1990s up to the present. The structural changes that have occurred within the Romanian state have led to numerous legislative amendments in an effort to align legal norms with European legislation. During this period, new laws were enacted to regulate the financial and tax sectors. The first Tax Code was not adopted until 2003, and it expressly regulated "tax secrecy." However, legal provisions protecting taxpayer information had existed previously, particularly in the context of tax audits.

Thus, under Government Ordinance No. 70/1994 on corporate income tax[1], Article 28 establishes the obligation of tax officials to maintain the confidentiality of professional information, as follows:

"(1) Public officials within tax agencies, including individuals who no longer hold such a position, are required to maintain the confidentiality of information they possess as a result of performing their official duties with respect to a taxpayer.

(2) Information concerning a taxpayer may be disclosed only in the following situations:

a) to other authorities with tax responsibilities, for the purpose of fulfilling obligations arising from the application of a tax law;

b) to a labor and social protection authority that makes social insurance payments or other similar payments;

c) to the tax authorities of another country, pursuant to a double taxation treaty;

d) the competent judicial authorities, in accordance with the law.

(3) Any person who receives tax information pursuant to paragraph (2) is required to maintain tax confidentiality regarding the information received.

(4) Information concerning a taxpayer may be disclosed to another person only with the taxpayer's written consent.

(5) Failure to comply with the obligation to maintain tax secrecy is punishable under criminal law."

We note that the legislature has regulated the maintenance of professional tax secrecy even after the tax official's employment has ended, without establishing a time limit; thus, in our opinion, the prohibition on disclosure is absolute. Furthermore, the text expressly establishes a non-disclosure obligation for individuals within other institutions who receive such information. At the same time, the legal text regulates the disclosure of information to third parties only with the taxpayer's written consent.

[1] Published in the Official Gazette No. 246 of August 31, 1994

Government Ordinance No. 70/1994 has been republished[1], in 1997, when the provisions were renumbered. Article 28 of the legislative act became Article 27, but its content remained unchanged. Although the ordinance underwent further amendments, the provisions regarding tax secrecy remained unchanged until the legislative act was repealed [2].

And Government Ordinance No. 11/1996 on the Enforcement of Budgetary Claims[3] contains provisions regarding the protection of professional secrecy in tax matters, on the one hand for tax collection authorities and, on the other hand, for tax officials.

Thus, Article 31, paragraph 1 of Government Ordinance No. 11/1996 stipulated:

"At the request of the enforcement authority, banks are required to provide it in writing with the requested information necessary for pursuing debtors through garnishment, as well as for taking other measures regarding the collection of budgetary claims, in compliance with the rules on bank secrecy."

This regulatory approach equates tax information with professional secrecy in the banking sector. Subsequently, the law was amended by Law No. 108/1996[4], with paragraph 1 of Article 31 being amended as follows:

"At the request of the enforcement authority, banks are required to provide in writing the requested information necessary for pursuing debtors through garnishment, as well as for taking other measures regarding the collection of budgetary receivables. Enforcement authorities are required to ensure the confidentiality of the information received."

Thus, the legislature expanded the scope of professional secrecy for enforcement authorities, so that it is no longer limited to bank secrecy but encompasses all information received regarding tax claims.

Article 31 of the ordinance subsequently underwent another amendment, which, however, did not affect the scope of tax secrecy. With regard to tax officials, Article 111 of Government Ordinance No. 11/1996 provided that:

"Civil servants within the Ministry of Public Finance and its subordinate bodies, including persons who no longer hold such status, are required to maintain confidentiality regarding the information they possess as a result of performing their official duties.

---

[1] Published in the Official Gazette No. 40 of March 12, 1997, republished pursuant to Article II of Law No. 73 of July 12, 1996, published in the Official Gazette of Romania, Part I, No. 174 of August 2, 1996

[2] Under Law No. 414/2002 on Corporate Income Tax, published in the Official Gazette No. 456 of June 27, 2002

[3] Published in the Official Gazette No. 23 of January 31, 1996

[4] Law No. 108/1996 approving Government Ordinance No. 11/1996 on the enforcement of budgetary claims, published in the Official Gazette No. 251 of October 17, 1996

Information regarding taxpayers, taxes, fees, and other budgetary obligations may be disclosed only in the following situations:

a) to other bodies with tax authority, for the purpose of fulfilling obligations arising from the application of a law;

b) to a body in the field of labor and social protection that makes social insurance payments or other similar payments;

c) the tax authorities of other countries, pursuant to a double taxation treaty;

d) the competent judicial authorities, in accordance with the law. The agency or authority receiving tax information is required to maintain the confidentiality of the information received.

Information regarding payers may also be disclosed to bodies or authorities other than those specified in paragraph 2 that request such information, but only with the payer's written consent.

Failure to comply with the obligation to maintain tax confidentiality shall result in liability in accordance with the law."

We note that the scope of this regulation is similar to that of Government Ordinance No. 70/1994, except that the duty of confidentiality extends to the body or authority that receives tax information, not just to the individual within that body or authority who is the recipient of the information in the course of their official duties.

In this legal provision, the legislature has also included the consequences of breaching professional secrecy, namely holding accountable those who disclose tax information.

Article 111, paragraph 2, subparagraph (a) was amended by Emergency Ordinance No. 113/1999 [1], with the following wording, as amended: "a) other authorities, for the purpose of fulfilling obligations arising from the application of a law;"

In this provision, the legislature has expanded the scope of authorities that may receive tax information, no longer limiting it solely to authorities with tax responsibilities.

In 2003, the Tax Procedure Code was adopted by Government Ordinance No. 92/2003[2], which, in Article 9, provided:

"Tax secrecy

(1) Public officials within the tax authority, including individuals who no longer hold such a position, are required, in accordance with the law, to

[1] Government Emergency Ordinance No. 113/1999 amending and supplementing certain legislative acts pursuant to Government Emergency Ordinance No. 61/1998, published in the Official Gazette No. 315 of June 30, 1999

[2] Government Ordinance No. 92/2003 on the Code of Tax Procedure, republished in the Official Gazette of Romania, Part I, No. 513 of July 31, 2007

maintain the confidentiality of information they possess as a result of performing their official duties.

(2) Information regarding taxpayers' taxes, fees, and other tax obligations may be disclosed only to:

a) to public authorities, for the purpose of fulfilling obligations prescribed by law;

b) to the tax authorities of other countries, on a reciprocal basis pursuant to agreements;

c) to the competent judicial authorities, in accordance with the law.

(3) The authority receiving tax information is required to maintain the confidentiality of the information received.

(4) The transmission of tax information is permitted in situations other than those provided for in paragraph (2), provided that it is ensured that such information does not reveal the identity of any natural or legal person.

(5) Failure to comply with the obligation to maintain tax confidentiality shall result in liability in accordance with the law."

Under the law[1] approving the Government Ordinance 92/2003, paragraph 2 of Article 9 was amended as follows:

"(2) Information regarding taxes, fees, contributions, and other amounts owed to the consolidated general budget may be disclosed only:

a) to public authorities, for the purpose of fulfilling obligations prescribed by law;

b) to the tax authorities of other countries, on a reciprocal basis pursuant to agreements;

c) to the competent judicial authorities, in accordance with the law;

d) in other cases provided for by law."

We can observe that the legislature has broadened the scope of tax secrecy disclosure through the generic phrase "in other cases provided by law," given the dynamic nature of legislative changes and to avoid the impossibility of disclosure, even though another legislative act might have permitted it.

Following the republication of Government Ordinance No. 92/2003, Article 9 became Article 11; the ordinance was republished again in 2005, with no further changes regarding tax secrecy. Subsequently, the text of the article underwent successive amendments as follows:

By Government Ordinance No. 47/2007[2] was added paragraph 4^1:

[1] Law No. 174/2004 approving Government Ordinance No. 92/2003 on the Code of Tax Procedure, published in the Official Gazette No. 465 of May 25, 2004

[2] Government Ordinance No. 47/2007 on the Regulation of Certain Financial and Tax Measures, published in the Official Gazette No. 603 of August 31, 2007

„(4[1]) Notwithstanding the provisions of paragraph (4), cases of noncompliance with financial and tax laws may be made public through the media."

We believe that the wording of paragraph 4[1] was a general provision that was open to abuse, as it allowed for the disclosure of information not intended for public release and that could infringe on privacy and trade secrets. The provision was far too permissive, since not every violation of financial and tax laws was intended to be publicized. The provision was repealed by the law approving Government Ordinance No. 47/2007[1].

Article 11 was amended by Government Ordinance No. 29/2011[2], with the addition of two new paragraphs:

„(3[1]) Information of the type specified in paragraph (1) may be disclosed, including for the period during which the taxpayer held that status:

(a) to the taxpayer himself or herself;

(b) to his or her successors.

(3[2]) "For the purposes of applying the provisions of paragraph (2) (a), public authorities may enter into agreements regarding the exchange of information."

This legal provision was necessary to prevent tax officials from abusing their authority by denying taxpayers and their successors access to tax information on the grounds of protecting tax secrecy, which would have been an anomaly.

In addition, Article 11, paragraph 2, was amended by Emergency Ordinance No. 8/2014[3], thus:

"(2) Information regarding taxes, fees, contributions, and other amounts owed to the consolidated general budget may be disclosed to:

a) public authorities, for the purpose of fulfilling obligations prescribed by law;

b) tax authorities of other countries, on a reciprocal basis pursuant to agreements;

c) to the competent judicial authorities, in accordance with the law;

d) to any requester, with the written consent of the taxpayer in question;

e) in other cases provided for by law."

In this case, the possibility of providing tax information to third parties, with the written consent of the taxpayer in question, was reintroduced—a provision that had previously existed, as we have shown.

---

[1] Law No. 52/2009 approving Government Ordinance No. 47/2007 on the regulation of certain financial and tax measures, published in the Official Gazette No. 224 of April 7, 2009

[2] Government Ordinance No. 29/2011 amending and supplementing Government Ordinance No. 92/2003 on the Code of Tax Procedure, published in the Official Gazette No. 626 of September 2, 2011

[3] Government Emergency Ordinance No. 8/2014 amending and supplementing certain legislative acts and introducing other fiscal and budgetary measures, published in the Official Gazette No. 151 of February 28, 2014

The Tax Procedure Code currently in effect was adopted in 2015[1] and has undergone numerous amendments. With regard to tax secrecy, we note that, as of the date of publication, the legal provision was worded as follows in Article 11 of the legislative act:

"(1) Personnel within the tax authority are required to maintain the confidentiality of information that comes to their knowledge as a result of the performance of their official duties.

(2) Information considered to be tax secrets includes data concerning the taxpayer/payer, such as: identification data, the nature and amount of tax obligations, the nature, source, and amount of income, the nature, source, and value of assets, payments, accounts, transaction volumes, cash transfers, balances, receipts, deductions, credits, liabilities, the value of net assets, or any information obtained from returns or documents submitted by the taxpayer or payer or by third parties.

(3) The tax authority may disclose the information in its possession:

a) to public authorities, for the purpose of fulfilling obligations provided by law;

b) to the tax authorities of other countries, on a reciprocal basis, pursuant to international legal instruments signed by Romania that contain provisions regarding administrative cooperation in tax matters and/or the recovery of tax claims;

c) to the competent judicial authorities, in accordance with the law;

d) to any requester, with the written consent of the taxpayer/payer regarding whom the information was requested;

e) in other cases expressly provided for by law.

(4) The authority receiving tax information is required to maintain the confidentiality of the information received.

(5) The disclosure of information of the nature specified in paragraph (1) is permitted, including for the period during which the individual held the status of taxpayer/payer:

a) the taxpayer/payer themselves;

b) their successors, as well as persons entitled to inherit, whose status is proven in accordance with the law.

(6) For the purpose of applying the provisions of paragraph (3)(a) and (c), public authorities may enter into a protocol regarding the exchange of information with the tax authority holding the information to be transmitted.

(7) The transmission of tax-related information is permitted in situations other than those provided for in paragraph (3), provided that it is

[1] Law No. 207/2015, published in the Official Gazette of Romania, Part I, No. 547, dated July 23, 2015

ensured that such information does not reveal the identity of any natural person, legal entity, or unincorporated entity.

(8) The tax authority may make the information in its possession public: (a) whenever the information is classified by law as public; (b) whenever, through administrative acts or final court decisions, violations of the obligations set forth in tax legislation are established.

(9) The procedure for making information held by the central tax authority public is approved by order of the president of the National Agency for Fiscal Administration (ANAF), and the procedure for making information held by the local tax authority public is approved by a joint order of the Minister of Regional Development and Public Administration and the Minister of Public Finance.

(10) The processing of personal data by central and local tax authorities shall be carried out in compliance with the provisions of Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, as subsequently amended and supplemented."

An analysis of the legal text highlights that provisions from previous legislation were incorporated but were supplemented with new elements related to the rules on the disclosure of information of public interest, the protection of personal data, the protection of privacy, and trade secrets. The text of Article 11 has been amended repeatedly since the enactment of the law, and these amendments were driven by changes in legislation in other areas, necessitating legislative alignment.

We will highlight what we believe to be the most significant change, which took effect in 2026 through Emergency Ordinance No. 7/2026[1], whereby paragraph 2 of Article 11 reads as follows:

"Information considered to be tax secrets includes data relating to the taxpayer/payer, such as: payments, accounts, transaction volumes, cash transfers, balances, receipts, deductions, credits, liabilities, net worth, or any information obtained from returns or documents submitted by the taxpayer/payer or third parties."

This amendment narrows the scope of tax secrecy by excluding the following information: identification data; the nature and amount of tax liabilities; the nature, source, and amount of income; and the nature, source, and value of assets. From a historical perspective, we believe that this amendment represents a legislative step backward, likely to affect the privacy of citizens and the commercial interests of economic entities.

[1] Government Emergency Ordinance No. 7/2026, published in the Official Gazette of Romania, Part I, No. 146, dated February 25, 2026

As for the liability of persons who disclose economic secrets, it may be civil, disciplinary, or criminal, depending on the circumstances surrounding the act.

The Penal Code[1], article 227 defines the offense of Disclosure of Professional Secrets as follows:

"(1) The unauthorized disclosure of data or information concerning a person's private life, of a nature likely to cause harm to that person, by a person who has become aware of such data or information by virtue of their profession or position and who is under an obligation to maintain confidentiality regarding such data, is punishable by imprisonment for a term of 3 months to 3 years or by a fine.

(2) Criminal proceedings shall be initiated upon a prior complaint by the aggrieved person."

IV. Elements of comparative law

A. France

The French Tax Code[2] includes a section dedicated to the scope and limits of the rules on professional secrecy (art. L103 – L112B)

Article L103 regulates tax confidentiality, framing it within the general concept of professional secrecy, as follows:

"The obligation to maintain professional secrecy, as defined in Articles 226-13 and 226-14 of the Penal Code, applies to all persons called upon, in the course of their duties or responsibilities, to participate in the determination of the tax base, the audit, the collection, or disputes concerning the taxes, duties, fees, and royalties provided for in the General Tax Code or the Goods and Services Tax Code.

This confidentiality extends to all information collected in the course of these operations. With regard to information collected during a cross-examination of an individual's tax situation, the obligation to maintain professional secrecy – necessary to respect privacy – applies to the auditor with respect to all persons, except those who, by virtue of their duties, have access to the file."[3]

Article L103 A establishes the obligation for persons with expertise who are involved in analysis, audit, tax assessment, or appeal review missions to respect professional secrecy under the conditions set forth in Article L. 103.

---

[1] Law No. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, No. 510 of July 24, 2009, as subsequently amended and supplemented

[2] https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069583/LEGISCTA000006147334/

[3] Author's Translation (t.a.)

The following articles set forth the circumstances under which tax authorities may disclose information to other authorities without breaching professional secrecy.

B. Germany

German Tax Code[1], regulates tax confidentiality in Article 30[2], Paragraph 1 provides that: "Public officials are required to maintain tax confidentiality."

The situations in which a public official violates this obligation are regulated as follows:

„A public official violates tax confidentiality when he or she discloses or uses protected data without authorization:

1. the personal data of another person that has been disclosed to him or her

a) in the context of an administrative proceeding, an audit proceeding, or a judicial proceeding in tax matters,

b) in the context of criminal proceedings for a tax offense or administrative sanction proceedings for a tax violation,

c) in the context of further processing in accordance with Article 29c(1), first sentence, points 4, 5, or 6, or for other official reasons, in particular through disclosure to a tax authority or through the submission, as provided by law, of a tax decision or a certificate regarding findings made in the context of taxation, or

2. a trade secret or business secret of a third party, which it became aware of in the course of one of the proceedings referred to in paragraph 1, or

3. accesses protected data without authorization by automated means, if such data is stored in an automated file system for one of the procedures referred to in paragraph 1."

Paragraph 3 of Article 30 defines the persons who are treated as civil servants for the purposes of tax professional secrecy: persons who have special obligations to the public service, certain persons within the judicial system, experts summoned in an official capacity, and officeholders within churches and other religious communities that are legal entities under public law.

Paragraph 4 sets forth the conditions under which the disclosure or use of protected data is permitted: in the context of an administrative proceeding, an audit proceeding, or a judicial proceeding in tax matters; in the context of a criminal proceeding; if it serves the purposes of processing by tax authorities or the conduct of proceedings to impose administrative sanctions in the area of personal data protection; if the data subject gives consent; if

[1] t.a.

[2] https://www.gesetze-im-internet.de/ao_1977/__30.html

disclosure is expressly permitted by federal law or European Union law; if there is an overriding public interest (which it explicitly defines); and so on.

Paragraph 6 provides safeguards for accessing data from automated databases and the possibility of interconnecting databases among different tax authorities – paragraph 8 – as well as safeguards regarding the protection of certain special categories of personal data[1]

C. Spain

Law No. 58/2003 on Taxes[2] regulates in Article 95 – The Confidentiality of Tax-Related Data[3]. Paragraph 1 provides that:

"Data, reports, or information obtained by the tax administration in the exercise of its duties are confidential and may be used only for the purpose of the effective enforcement of taxes or the management of resources entrusted to it, as well as for the imposition of appropriate penalties; they may not be disclosed or communicated to third parties, unless the disclosure is for the purpose of…". The situations in which this data may be disclosed are exhaustively listed (items a–n), relating primarily to the conduct of criminal, administrative, and misdemeanor proceedings, cooperation with other tax authorities or other public authorities, etc.

Paragraph 3 sets forth the obligations of the tax administration to ensure the confidentiality of tax information and its proper use, as well as the legal liability of officials who have knowledge of such data, reports, or information (criminal, civil, or disciplinary liability – which is considered a very serious disciplinary offense).

Article 95 also provides for the possibility of disclosing tax information in other cases expressly provided for by Spanish law or European Union legislation, as well as in the context of cross-border cooperation.

V. Conclusions

With regard to the regulation of tax secrecy in Romania, we can observe that the legal framework has undergone changes due to various factors: political, economic, social, international, etc. We can see that Romanian legislation is aligned with that of the European countries whose regulations we have analyzed.

We believe that in this area as well – that of tax secrecy – the legislature must maintain a balance, as far as possible, between the general interests of society and the individual interests of natural and legal persons. No matter how strongly we advocate for the protection of tax secrecy, we cannot overlook the

[1] within the meaning of Article 9(1) of Regulation (EU) 2016/679

[2] https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186

[3] t.a.

fact that the exchange of information among law enforcement agencies is legitimate to the extent that it is justified by the public interest arising from the fight against tax evasion and fraud, money laundering, etc.

In analyzing the concept of tax secrecy, we must take into account the evolution of information technology and the phenomenon of economic and financial globalization. The development of e-commerce and the ability of legal entities to establish headquarters in tax havens or countries with more favorable tax regimes have made cross-border cooperation and the exchange of financial and tax information necessary. However, we remain more cautious regarding the disclosure of tax secrecy when it comes to individuals who have not committed criminal or administrative offenses.

As a proposal for *lege ferenda*, we believe that the procedure for disclosing the list of debtors, known as "name and shame," should apply only to serious violations of tax obligations or serious acts of tax fraud, with the publication of the nature and amount of taxes and fees evaded, as well as the penalties imposed on offending legal entities (except in cases subject to criminal proceedings, which are not public during the criminal investigation phase). This type of regulation could serve as a deterrent and a preventive measure, and could also damage the reputation of a legal entity that has committed financial or tax fraud. However, unjustifiably damaging a business's reputation is likely to undermine fair competition.

At the same time, we believe it is imperative that the legislature amend the legal framework once again and exclude individuals from the scope of Article 162 of the Code of Criminal Procedure – except, of course, in cases where they have evaded payment of taxes, duties, and contributions owed to the national budget.

References

1. Bredin Jean-Denis – „Secret, transparence et démocratie", Pouvoirs – nr. 97, 2001, https://revue-pouvoirs.fr/secret-transparence-et-democratie/
2. Carcassonne Guy – „Le trouble de la transparence", Pouvoirs n°97 - Transparence et secret - avril 2001 - p.17-23 https://revue-pouvoirs.fr/le-trouble-de-la-transparence/
3. Ferrari Sébastien – „Les mythes de la publicité et du secret à l'épreuve de la transparence en droit fiscal", dans Gestion & Finances Publiques 2021/1 N° 1, pages 91 à 97, Éditions JLE, https://droit.cairn.info/revue-gestion-et-finances-publiques-2021-1-page-91?lang=fr
4. Kessler Denis – „L'entreprise entre transparence et secret", Pouvoirs n°97 - Transparence et secret - avril 2001 - p.33-46 https://revue-pouvoirs.fr/l-entreprise-entre-transparence-et/
5. Regulation (EU) 2016/679

6. The Constitution of Romania
7. Law No. 108/1996 approving Government Ordinance No. 11/1996 on the enforcement of budgetary claims
8. Law No. 414/2002 on corporate income tax
9. Law No. 174/2004 approving Government Ordinance No. 92/2003 on the Code of Tax Procedure
10. Law No. 52/2009 approving Government Ordinance No. 47/2007 regulating certain financial and tax measures
11. Law No. 286/2009 on the Criminal Code,
12. Law No. 227/2015 on the Tax Code
13. Law No. 207/2015 on the Tax Code
14. Government Emergency Ordinance No. 113/1999 amending and supplementing certain legislative acts pursuant to Government Emergency Ordinance No. 61/1998,
15. Government Emergency Ordinance No. 8/2014 amending and supplementing certain legislative acts and other fiscal and budgetary measures,
16. Government Emergency Ordinance No. 7/2026,
17. Government Ordinance No. 70/1994 on corporate income tax,
18. Government Ordinance No. 11/1996 on the enforcement of budgetary claims
19. Government Ordinance No. 92/2003 on the Code of Tax Procedure,
20. Government Ordinance No. 47/2007 regulating certain financial and tax measures,
21. Government Ordinance No. 29/2011 amending and supplementing Government Ordinance No. 92/2003 on the Code of Tax Procedure,
22. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069583/LEGISCTA000006147334/
23. https://www.gesetze-im-internet.de/ao_1977/__30.html
24. https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186

EUROPEAN PRACTICE REGARDING THE PRINCIPLE OF TRANSPARENCY UNDERLYING THE AWARD OF PUBLIC PROCUREMENT CONTRACTS

Daniel RADU[1]

Abstract:

As regards the principle of transparency, which is the corollary of the principle of equal treatment, it essentially aims to ensure that the risk of favoritism and arbitrariness on the part of the contracting authority is eliminated. It requires that all the conditions and arrangements for the award procedure be set out clearly, precisely and unambiguously in the contract notice or in the specifications (judgment in Commission v CAS Succhi di Frutta, paragraph 113, paragraph 111). In the same vein, the first subparagraph of Article 131(1) of the implementing rules provides that "technical specifications must allow equal access for candidates and tenderers and must not have the effect of creating unjustified obstacles to competitive bidding".

The principle of transparency entails making all information relating to the application of the award procedure known to the public, in order to ensure the elimination of the risk of favoritism and arbitrary conduct on the part of the contracting authority. In the case law of the CJEU, the principle of transparency and the principle of non-discrimination have been weighed against the principle of proportionality. In Case C-213/07, concerning a request for a preliminary ruling submitted under Article 234 EC by Symvoulio tis Epikrateias (Greece), in which it was stated that[2]:

"The exhaustive listing in Article 24 first paragraph of Directive 93/37 does not, however, exclude the possibility for Member States to maintain or adopt substantive rules intended in particular to ensure, in the field of public procurement, compliance with the principle of equal treatment, as well as with the principle of transparency which the latter entails and which is required of contracting authorities in any procedure for the award of such a contract.[3]"

The principles mentioned, which are particularly significant in that bidders must be in a position of equality both at the time when they prepare their tenders and at the time when those tenders are assessed by the contracting authority[4], in fact constitute the direct basis of the directives on

[1] PhD Lecturer, Constatin Brancoveanu University of Pitesti, Lawyer, Argeș Bar

[2] Par.44, 45, 54-56

[3] See, to that effect, ARGE, paragraph 24, and Case C-421/01 Traunfellner [2003] ECR I-11941, paragraph 29.

[4] See, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 34, and Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, paragraph 47

procedures for the award of public procurement contracts[1], and the obligation on contracting authorities to ensure that those principles are complied with corresponds precisely to the very essence of these directives[2].

Coordination of procedures for the award of public procurement contracts seeks in particular to rule out both the risk of preference being granted to domestic bidders when a contract is awarded and the possibility that a public contracting authority may allow itself to be guided by considerations unrelated to the contract in question[3]. In that context, as the Advocate General stated in point 30 of his Opinion, the Member States must be allowed a certain margin of discretion in adopting measures designed to guarantee the principles of equal treatment of tenderers and transparency, which, as recalled in paragraph 45 of this judgment, constitute the basis of the Community directives on the award of public contracts.

Indeed, each Member State is best placed to identify, in the light of its own historical, legal, economic or social considerations (see, to that effect, the judgment in La Cascina and Others, cited above, point 23), the situations in which conduct of a kind that may lead to non-compliance with those principles arises.

* * *

Another example of the application of this principle in the case-law of the CJEU, together with the principle of equal treatment, is Case T-437/05, Brink's Security Luxembourg SA, in which the Court ruled on a Community invitation to tender procedure concerning the security and surveillance of the Commission buildings in Luxembourg. The actual situation was as follows:

Brink's Security Luxembourg SA ("the applicant"), a company established in Luxembourg, was tasked with the surveillance and guarding of the buildings of the Commission of the European Communities from the mid-1970s onward.

In 2000, the applicant entered into a surveillance and guarding contract with the Commission for its buildings located in Luxembourg and placed under the responsibility of the Luxembourg Infrastructure and Logistics Office (OIL), the Publications Office of the European Union and the Translation Centre for Bodies of the European Union. That contract, which did not provide for its extension beyond its fifth year, expired on 31

---

[1] See, inter alia, Universale Bau and Others, cited above, paragraph 91, and Case C-315/01 GAT [2003] ECR I-6351, paragraph 73.

[2] See in this regard Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, paragraph 81, and Case C-21/03 and C-34/03 Fabricom [2005] ECR I-1559, paragraph 26.

[3] see, to that effect, Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraph 17; Case C-237/99 Commission v France [2001] ECR I-939, paragraph 42; and Lombardini and Mantovani, cited above, paragraph 36.

December 2005. By the notice of intention published in the Supplement to the Official Journal of the European Union of 19 March 2005 (OJ S 56), the Commission made known that the scheduled date for initiating a procedure for the award of a security and surveillance contract for the buildings referred to in point 13 above was 15 May 2005. By the contract notice published in the Supplement to the Official Journal of the European Union of 1 September 2005 (OJ S168), the Commission published the invitation to tender 16/2005/OIL for the security and surveillance contract in question (hereinafter the "invitation to tender"). The deadline for submission of tenders was 13 October 2005. The opening of the bids took place on 18 October 2005, and their evaluation was carried out on 11 November 2005.

On 30 November 2005, the Commission informed the applicant that it had not been awarded the contract, its tender having not obtained the highest final score in the qualitative and financial evaluation of the tenders. By the same letter (hereinafter referred to as the 'rejection decision'), the Commission informed the applicant that it was entitled to obtain further information on the reasons for the rejection of its tender. By letter of 1 December 2005, the applicant requested the Commission to inform it of the reasons for the rejection of its tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer.

By letter of 5 December 2005, the Commission informed the applicant that the successful tenderer was Group 4 Falck – Société de surveillance et de sécurité SA, now G4S Security Services SA (hereinafter 'Group 4 Falck' or 'the intervener'), and communicated to it the comparative elements for the assessment of its tender in relation to the tender submitted by Group 4 Falck. By three letters of 5 December 2005, the applicant requested the Commission to review its award decision of 30 November 2005 ('the award decision') and to award the contract to it, setting out in that letter the reasons why, in its opinion, the tender submitted by Group 4 Falck should not have been accepted. By letter of 7 December 2005, the Commission replied to the applicant's letters of 5 December 2005.

By letter of 8 December 2005, the applicant requested from the Commission the names, first names, grades, seniority and classification of the members of the tender evaluation committee, as well as additional arguments, considering that the reasons given by the Commission were insufficient.

By letter of 14 December 2005, the Commission, citing reasons of confidentiality, protection of private life and the integrity of individuals, refused to provide the information requested by the applicant concerning the members of the tender evaluation committee. However these, the Commission provided the applicant with additional information regarding the

reasons for rejecting its tender. By letter of 14 December 2005, Group 4 Falck informed the applicant of its intention to recruit part of its staff.

The applicant requested the annulment of the Commission Decision of 30 November 2005 rejecting the tender submitted by the applicant in the framework of the restricted invitation to tender procedure 16/2005/OIL (building security and surveillance), of the Commission Decision of 30 November 2005 awarding the contract to another tenderer, of an alleged implied decision of the Commission by which it refuses to withdraw the two decisions mentioned above, as well as of the two letters from the Commission of 7 and 14 December 2005, by which it replies to the requests for information submitted by the applicant. The applicant complained that the rejection of her offer was due to a lack of equal treatment in terms of access to documents.

The applicant put forward seven pleas in law in support of its action for annulment, namely infringement of the principle of equal treatment in that the Commission did not provide in the tender specifications for the takeover of the employment contracts of the agents assigned by the applicant for the performance of the supervision contract, infringement of the provisions of the Law of 19 December 2003 and of Directive 2001/23, which it transposes, infringement of the principle of equal treatment by reason of the fact that the intervener was in possession of privileged information, infringement of the Commission decision of 28 May 2004 and of the competition rules, infringement of the obligation to state reasons, of the principle of transparency and of the right of access to the institutions' documents, infringement of the rules on procurement and of the tender specifications as regards the assessment of the criterion relating to basic training as a first-aider or as a volunteer firefighter and the existence of a manifest error of assessment, and infringement of the principle of transparency and of the right of access to the institutions' documents.

In this context, the Court stated (paragraphs 113-124, 211-216): "Thus, according to settled case-law, the contracting authority is required, at each stage of a tendering procedure, to comply with the principle of equal treatment of tenderers and, consequently, to respect equal opportunities for all tenderers (Judgment of the Court of Justice of 29 April 2004, Commission/ CAS Succhi di Frutta, C 496/99 P, ECR I-3801, paragraph 108, Judgment of the Court of First Instance of 17 December 1998, Embassy Limousines & Services v European Parliament, T 203/96, ECR II-4239, paragraph 85, and Judgment of the Court of First Instance of 12 July 2007, Evropaïki Dynamiki/Commission, T 250/05, ECR I-3801, paragraph 108). II 85*, paragraph 45).

The principle of equal treatment between tenderers, which aims to promote the development of fair and effective competition between undertakings

participating in a public procurement procedure, requires that all tenderers have the same opportunities in drawing up their tenders and therefore requires that they be subject to the same conditions as all competitors (see judgment of the Court of First Instance of 12 March 2008 in Case T-332/03 European Network/ Commission [2008] ECR II 32*, paragraph 125).

As regards **the principle of transparency**, which is the corollary of the principle of equal treatment, it is essentially intended to ensure that the risk of favouritism and arbitrariness on the part of the contracting authority is eliminated. It requires that all the conditions and detailed rules of the award procedure be set out clearly, precisely and unambiguously in the contract notice or in the specifications (judgment in Commission v CAS Succhi di Frutta, point 113, point 111).

In the same vein, the first subparagraph of Article 131(1) of the Implementing Rules provides that 'technical specifications must allow equal access for candidates and tenderers and must not have the effect of creating unjustified obstacles to competitive tendering'. In the present case, the claimant argues that, by requiring a minimum of one year of professional experience in the terms of reference, the request for bids does not make it possible to ensure equal treatment of tenderers. It must be found that, without distinction, the condition of professional experience in the field of guarding of at least one year for agents applies to all tenderers, a condition provided for in point 21 of the terms of reference.

On the other hand, this condition was formulated clearly, precisely and unequivocally. Furthermore, the requirement of at least one year of professional experience does not appear to be inappropriate in view of the supervisory tasks to be carried out in the context of the performance of the contract. It should be noted that, for the posts of guarded facility manager and team leader, the specifications required a minimum of five years of professional experience in the field of security, of which at least two years as a security team manager, and a minimum of three years of professional experience for security checkpoint operators. The provisions of the specifications relating to the professional experience of the agents therefore show the intention of the contracting authority to adapt the requirements concerning professional experience to the characteristics of the post to be filled. Furthermore, the applicant does not dispute that the requirement of at least one year of professional experience was perfectly suited to the characteristics of the task to be performed.

In any event, as the applicant points out, by imposing a professional experience requirement of more than one year, the Commission contributed to reducing the number of potential tenderers and thus restricted the development of effective competition, without it being justified by the

requirements of the task. Such a condition would have constituted an unjustified obstacle to competitive tendering within the meaning of Article 131 of the implementing rules. It should also be noted that Directive 2001/23, transposed into Luxembourg law by the Law of 19 December 2003, has a specific scope. Since the conditions for the transfer of an undertaking were not met (see paragraphs 89 to 97 above), it was not within the Commission's power to require the takeover of employment contracts.

Indeed, the Commission has no power to compel a company to transfer its employment contracts, and even less to employ people whom it has not chosen. Therefore, it must be concluded that, pursuant to the **principle of equal treatment of tenderers**, it was not for the Commission to require, as a minimum, more than one year of professional experience, nor to require the transfer of the agents assigned by Brink's for the performance of the procurement contract. It must therefore be determined whether the exception laid down in Article 4(1)(b) of Regulation No 1049/2001, relating to the protection of private life and the integrity of the individual, could serve as a basis for the Commission's response. According to settled case-law, exceptions to the principle of the right of access to documents of the institutions must be interpreted restrictively (judgment of the Court of Justice of 11 January 2000 in Netherlands and van der Wal v Commission, C 174/98 P and C 189/98 P, ECR I-1, paragraph 27; judgment of the Court of First Instance of 7 February 2002 in Kuijer v Council, T 211/00, ECR II-485, paragraph 55; and judgment of the Court of First Instance in Franchet and Byk v Commission, paragraph 70 above, paragraph 84).

According to settled case-law, the examination required for the purpose of deciding on an application for access to documents **must be specific**. Thus, the mere fact that a document concerns an interest protected by an exception is not sufficient to justify the application of the latter[1]. Such application can in principle only be justified if the institution has previously assessed whether access to the document was likely to prejudice the interests of the person concerned. adversely affect in a concrete and effective manner the interest protected. In addition, for it to be invoked, the risk of causing harm to a protected interest must be reasonably foreseeable, and not purely hypothetical[2].

To determine whether the exception provided for in Article 4(1)(b) of Regulation No 1049/2001 applies, it must therefore be examined whether the applicant's access to the composition of the evaluation committee (name, grade,

[1] Judgment of the General Court of 13 April 2005, Verein für Konsumenteninformation v Commission, T 2/03, ECR II 1121, paragraph 69; see also, to that effect, Judgment of the General Court of 26 April 2005, Sison v Council, T 110/03, T 150/03 and T 405/03, ECR II 1429, paragraph 75

[2] see in this regard Judgment of the Court of 1 July 2008, Sweden and Turco v Council, C 39/05 P and C 52/05 P, ECR I-4723, paragraph 43

length of service, and the allocation of members) is likely to adversely affect in a concrete and effective manner the protection of the privacy and the integrity of the members of the evaluation committee were appointed in their capacity as representatives of the services concerned and not in a personal capacity.

It must be noted that the members of the evaluation committee were appointed as representatives of the services concerned and not in their personal capacity. In these circumstances, disclosure of the composition of the evaluation committee does not endanger the private life of the individuals concerned. Mere membership of that committee, as a representative of the entity concerned, does not constitute such harm, and the protection of the privacy and integrity of the persons covered is not compromised.

It is therefore not proven that, by communicating the composition of the evaluation committee, the privacy and integrity of the persons concerned could have been affected within the meaning of Article 4 of Regulation No 1049/2001. The Commission's decision of 14 December 2005 by which it refused to communicate to the applicant the composition of the evaluation committee must therefore be annulled." Another case in which the CJEU applied the principles of transparency and equal treatment is case T-50/05, Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, in which it was stated that:

In accordance with Article 89(1) of the Financial Regulation, all public contracts financed in whole or in part from the budget shall comply with the **principles of transparency, proportionality, equal treatment and non-discrimination.** Thus, according to settled case-law, the contracting authority is required to ensure, at each stage of a tendering procedure, compliance with the principle of equal treatment and, consequently, equality of opportunity for all tenderers (Case C-496/99 P Commission v CAS Succhi di Frutta [2004] ECR I-3801, paragraph 108; Case T-203/96 Embassy Limousines & Services v European Parliament [1998] ECR II-4239, paragraph 85; and Case T-203/96 AFCon Management Consultants and Others v Commission [2005] ECR II-4239, paragraph 85). 160/03, ECR II-981, paragraph 75).

The principle of equal treatment between tenderers, which aims to promote the development of fair and effective competition between undertakings participating in a public procurement procedure, requires that all tenderers have the same opportunities in drawing up their tenders and therefore requires that their tenders be subject to the same conditions for all tenderers (see, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 34, and Case C-470/99 Universale Bau and Others [2002] ECR I-11617, paragraph 93).

It is also clear from the case-law that the principle of equal treatment implies an obligation of transparency in order to enable its observance to be verified (Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 34,

and Case C-470/99 Universale Bau and Others [2002] ECR I-11617, paragraph 93). of the Court of 18 June 2002, HI, C 92/00, ECR I-5553, paragraph 45, and Universale Bau and Others, paragraph 56, paragraph 91).

This principle of transparency is essentially intended to guarantee that the risk of favoritism and arbitrariness on the part of the contracting authority is eliminated. This It presupposes that all conditions and modalities of the award procedure are formulated clearly, precisely and unambiguously in the contract notice or in the tender specifications (Judgment of the Commission/CAS Succhi di Frutta, point 55, point 111).

Therefore, the principle of transparency presupposes that all technical information relevant for the proper understanding of the contract notice or the tender specifications is, as soon as possible, made available to all economic operators participating in a public procurement procedure, so that, on the one hand, it enables all properly informed tenderers who show normal diligence to understand their exact content and interpret it in the same way and, on the other hand, it allows the contracting authority to verify whether the tenders submitted by tenderers actually correspond to the criteria governing the contract in question (Judgment of the Evropaïki Dynamiki/Commission, point 52, point 145)."

The principle of transparency was also addressed in case C-91/08, in which the Court stated (paras. 36-37, 69-70): The obligation of transparency incumbent on public authorities concluding a service concession contract involves ensuring, in favour of any potential tenderer, an adequate level of publicity enabling competition in the field of service concessions to take place, and also monitoring the impartiality of the award procedures (see the judgments cited above in Telaustria and Telefonadress, paragraphs 60 to 62; Parking Brixen, paragraphs 46 to 49; and ANAV, paragraph 21).

In order to ensure the transparency of procedures and equal treatment between tenderers, substantial amendments to the essential provisions of a service concession contract may, in certain circumstances, require the award of a new concession contract if they present characteristics which are substantially different from those of the initial concession contract and are therefore capable of demonstrating the parties' intention to renegotiate the essential terms of that contract (see, by analogy with public procurement, Case C-337/98 Commission v France [2000] ECR I-8377, paragraphs 44 and 46, and Case C-454/06 pressetext Nachrichtenagentur [2008] ECR I-4401, paragraph 34).

In that regard, it must be noted that the obligation of transparency arises from EU law and in particular from Articles 43 EC and 49 EC (see, to that effect, Coname, paragraphs 17 to 19). Those provisions, compliance with which is ensured by the Court, have direct effect in the internal legal order of the Member

States and prevail over any contrary provision of national law. In particular, under Article 4(3) TEU, it is for all the authorities of the Member States to ensure compliance with the rules of EU law within the scope of their powers (see, to that effect, judgment of 12 February 2008 in Kempter, C-2/06, ECR I-411, paragraph 34 and the case-law cited).

It is for the national court to give the national law which it must apply, to the greatest extent possible, an interpretation which is consistent with the requirements of Union law and which enables, in particular, compliance with the obligation of transparency to be ensured (see, to that effect, Case C-327/00 Santex [2003] ECR I-1877, paragraph 63 and the case-law cited).'

On 23 June 2006, the Commission of the European Communities adopted an interpretative communication on the '**Community law applicable to procedures for the award of contracts not or only partly subject to the provisions of the public procurement directives'** (hereinafter referred to as 'the communication').

As regards the rules and principles of the EC Treaty (point 1.1 of the communication) applicable to the award of a public contract having an interest in the internal market, the communication sets out in point 2.1 the fundamental rules applicable to advertising. In this regard, point 2.1.1 is entitled 'Obligation to ensure adequate advertising' and provides as follows: "According to the Court, the principles of equal treatment and non-discrimination imply an obligation of transparency which consists in guaranteeing, in favour of any potential tenderer, an appropriate degree of publicity enabling a competitive environment to be ensured".

The obligation of transparency requires that an undertaking established in the territory of another Member State should be able to have access to the relevant information concerning the contract before it is awarded, so that, if it so wished, it would be in a position to express its interest in obtaining the contract.

The Commission considers that the practice of contacting a certain number of potential tenderers is not sufficient in that regard, even if the contracting entity addresses undertakings from other Member States or endeavours to contact all potential suppliers. A selective approach of this nature cannot exclude any discrimination against potential tenderers from other Member States and in particular against new entrants to the market. The same applies to any form of "passive" advertising, where a contracting entity does not provide a active advertising, but responds to requests for information from candidates who have discovered the existence of a contract by their own means. Similarly, a simple reference to articles or reports in the media, to parliamentary or political debates or to events such as congresses as sources of information would not constitute adequate advertising. Consequently, the

only way to comply with the requirements defined by the [Court] is to publish sufficiently accessible advertising before the award of the contract. That advertising must be published by the contracting entity in order to ensure a competitive environment for the contract in question.

This interpretative communication was the subject of an action for annulment brought by the Federal Republic of Germany before the Court of First Instance in Case T-258/06, in which several Member States and the European Parliament applied to intervene. The Court, however, dismissed the action as inadmissible and made some extremely interesting conclusions on the application of this principle (paragraphs 70, 76-80): "The first two paragraphs of point 2.1.1 of the communication reproduce the case-law of the Court of Justice in the judgments in Telaustria, Coname and Parking Brixen, paragraph 36 (...) The principles of equal treatment and non-discrimination on grounds of nationality imply, as the Court has consistently held, inter alia, an obligation of transparency which enables the granting public authority to ensure that those principles are observed (judgments of the Court in Unitron Scandinavia and 3 S, paragraph 74, paragraph 31, and Telaustria, paragraph 36, paragraph 61, Judgment of the Court of 18 June 2002, HI, C 92/00, ECR I-5553, paragraph 45, Judgments of the Court in Parking Brixen, paragraphs 36, 49, and ANAV, paragraph 74, 21), this obligation being confirmed by recital (9) of Directive 2004/17 and by recital (2) of Directive 2004/18. Consequently, the Member States and their contracting entities must comply with this obligation of transparency, as interpreted by the Court, for the award of all public contracts.

The Court further stated that this obligation of transparency incumbent on the contracting authority consists in ensuring, in favour of any potential tenderer, an appropriate level of publicity enabling a competitive environment to be ensured for public service contracts and in monitoring the impartiality of the award procedures[1]. According to the Court, the obligation of transparency incumbent on the contracting authority involves, in particular, requirements such as to enable an undertaking established in the territory of a Member State other than that concerned to have access to appropriate information concerning the public contract in question before it is awarded, so that, if that if that undertaking had wished, it would have been in a position to express its interest in obtaining that public procurement contract[2].

(...) Thus, according to the Court's case-law, on the one hand the obligations automatically arising from primary law regarding equal treatment

[1] Judgments in Telaustria, paragraph 36, paragraph 62, Parking Brixen, paragraph 36, paragraph 49, and ANAV, paragraph 74, paragraph 21

[2] see in this regard the Coname judgment, paragraph 36, paragraph 21

and transparency as regards contracts which are nevertheless excluded from the scope of the directives on public procurement contracts having a certain cross-border interest [see, in that regard, in connection with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, p. 1) and a contract with a value below the threshold laid down in that directive, the Court's judgment of 14 June 2007, Medipac-Kazantzidis, C-6/05, Rep., p. I-4557, paragraph 33; as regards Council Directive 92/50/EEC of 18 June 1992 coordinating procedures for the award of public service contracts (OJ L 209, p. 1, Special Edition 06/Vol. 2, p. 50) and a contract falling within Category II B, the judgment Commission/Ireland, paragraph 57 above, paragraphs 30, 31 and 32; and as regards Directives 92/50 and 93/36, and Council Directive 93/37/EEC of 14 June 1993 coordinating procedures for the award of public works contracts (OJ L 199, p. 54), and Council Directive 93/38/EEC of 14 June 1993 coordinating procurement procedures in the sectors of water, energy, transport and telecommunications (OJ L 199, p. 84), the Court's judgment of 21 February 2008, Commission/Italy, C-412/04, Rep., p. I-619, paragraphs 66, 81 and 82]. On the other hand, in the Court's view, ex post publicity cannot guarantee adequate publicity within the meaning of the case-law of Telaustria and Telefoname, paragraph 36 above, which means that the transparency obligation resulting from the EC Treaty principles implies that the invitation to tender must be the subject of prior publicity, carried out before the award (Commission/Ireland, paragraph 57 above, paragraphs 30 and 32)."

References

- Court of Justice of the European Union cases (https://eur-lex.europa.eu/browse/institutions/justice.html?root_general-court-judgements=root%3Dgeneral-court-judgements)
- Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), the Official Journal of the European Union (OJ EU), Series C
- Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts
- Directive 2001/23 (Directive 2001/23, transposed into Luxembourg law by the Law of 19 December 2003)
- Directive 2004/17 (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

- Directive 2004/18 (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

GENERAL PRINCIPLES UNDERLYING THE AWARD OF PUBLIC PROCUREMENT CONTRACTS – LEGISLATIVE FRAMEWORK, APPLICABILITY AND DEFINITIONS

Daniel RADU[1]

Abstract:

According to settled case-law, the fact that the value of a contract does not reach the threshold provided for by EU rules does not mean that this contract falls completely outside the scope of Union law, and in the award of such a contract the fundamental rules of the Treaty must be respected and, in particular, the principle of equal treatment. The Court underlines that the element of differentiation in relation to contracts whose value exceeds the threshold established by the provisions of Directive No. 18/2004 is that only the latter are subject to the special and rigorous procedures provided for by those provisions.

1. Introduction. Principles governing public procurement – the European legislative framework and the transposition of EU directives into national procurement legislation

The legislative package governing the field of public procurement at European level was adopted on 15 January 2014 by the European Parliament, including:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing
- Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing
- Directive 2004/17/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts)

The purpose of these directives, according to the European Commission, was to simplify and make public procurement legislation more flexible. This latter objective was intended to be achieved by setting shorter time limits and higher thresholds, or by enabling a wider application of the procedures for negotiated procurement with prior publication and competitive dialogue. The legislative package also aimed to have a positive impact by reducing the degree of uncertainty and risk regarding compliance with transparency obligations for the award of contracts that exceed the scope of

[1] PhD Lecturer, Constatin Brancoveanu University of Pitesti, Lawyer, Argeș Bar

the directives, but to which the provisions of the Treaty on the Functioning of the European Union may apply.

The principles underlying these regulations are the following:

– value for money (making the most of public funds): under the award procedure, the criterion "the most economically advantageous tender" was introduced, which puts an end to price dictatorship and places the emphasis on value for money;

– innovative solutions;

– less bureaucracy for tenderers and easier access for small businesses; – stricter rules on subcontracting;

– the privatisation of public undertakings providing services to the public is not forced; Member States are free to choose the method by which public services and works are carried out.

In transposing these directives, Romania adopted a legislative package including:

- Law no. 98/2016 on public procurement;
- Law no. 99/2016 on sectoral procurement;
- Law no. 101/2016 on remedies and legal actions in matters relating to the award of public procurement contracts, sectoral contracts and contracts also for the organization and operation of the National Council for the Settlement of Disputes.

The Romanian legislative framework, in Article 2(2) of Law 98/2016, in implementing the European rules, sets out six principles for public procurement:

a) non-discrimination;
b) equal treatment;
c) mutual recognition;
d) transparency;
e) proportionality;
f) accountability.

Although it is not a principle, but rather an objective of European public procurement policies, openness to competition must also be mentioned in this context. In this regard, the CJEU also ruled in Case C-305/08[1]:

"Thus, the Court held that one of the objectives of the Community rules on public procurement is to open up to competition as broad as possible[2], and that it is in the interest of Community law to ensure the widest possible

[1] Par.37-39

[2] See, inter alia, to that effect Judgment in Bayerischer Rundfunk and Others, cited above, paragraph 39

participation by tenderers in a request for tenders[1]. It should be added in this respect that this opening up to competition as broad as possible is considered not only in relation to the Community interest in the free movement of goods and services, but also in the self-interest of the contracting authority involved, which will thus have a wider choice as to the most advantageous tender and the one best suited to the needs of the public concerned.[2]" In this spirit of opening up public procurement to competition as widely as possible, the Court has also held that the Community rules governing the matter apply where the entity with which a contracting authority intends to conclude an onerous contract is itself a contracting authority[3].

Under Article 1(9) of Directive 2004/18, a contracting authority is an entity which fulfils a function of general interest, of an other than industrial or commercial nature. Such a body does not, in the main, carry out profit-making activities on the market. Similarly, the Court has held that the Community rules preclude any national regulation which excludes from the award of public service contracts the value of which exceeds the threshold for application of the directives candidates or tenderers who are authorised under the legislation of the Member State in which they are established to provide the service in question, solely on the ground that those candidates or tenderers do not have the legal form corresponding to a category of legal persons determined by that State.[4]"

2. Applicability of EU law principles in the event of non-compliance with the rules on the award of a public procurement contract with an estimated value below the thresholds laid down in the directives

In the case-law of the European courts, the question has been raised whether the principles laid down in the Treaty—in particular the principle of the free movement of goods, the freedom of establishment and the freedom to provide services—and the principles deriving from them, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency, must also be observed where the value of a contract does not reach the threshold provided for by the EU rules.

---

[1] Judgment of 19 May 2009, Assitur, C- 538/07, not yet published in the Reports, paragraph 26

[2] See, as regards abnormally low tenders, the judgment of 15 May 2008, SECAP and Santorso, C-147/06 and C-148/06, Rep., p. I-3565, paragraph 29

[3] For this purpose, see the judgment in Stadt Halle and RPL Lochau, cited above, paragraph 47, and the case-law cited;

[4] For this purpose, see the judgment of 18 December 2007, Frigerio Luigi & C., C-357/06, Rep., p. I-12311, paragraph 22

According to settled case-law[1], the fact that the value of a contract does not reach the threshold laid down in the EU rules does not mean that such a contract falls completely outside the scope of EU law, and that, in the award of such a contract, it is therefore necessary to comply with the fundamental rules of the Treaty and, in particular, the principle of equal treatment. The Court emphasizes that the differentiating factor compared with contracts whose value exceeds the threshold set out in Directive No 18/2004 is that only the latter are subject to the special and rigorous procedures provided for by those provisions. Furthermore, the Court has held that, although the estimated value lies below the de minimis thresholds, "the fundamental rules and the general principles of the Treaty apply provided that the contract in question presents a certain cross-border interest, in particular taking account of the importance and the place of performance of that contract."

The Court ruled that it is for the referring court to assess the existence of such an interest and, if it considers that there is a clear cross-border interest, that the fundamental rules and general principles referred to apply to the main proceedings[2].

In making this assessment, the courts have at their disposal the *Commission's Interpretative Communication on the Community rules applicable to the award of contracts not subject to or partially subject to the provisions of the Public Procurement Directives*[3], which, although it does not contain rules for the award of public contracts that go beyond the obligations resulting from EU law existing at the time of its issuance, recalls the fundamental rules applicable to the award of public contracts that would result directly from the rules of the EC Treaty, as interpreted by the Court in its case-law, explains the Commission's interpretation of the Court's case-law and suggests a number of good practices with a view to helping Member States to take full advantage of the internal market also in the case of contracts that do not fall within the scope of the Public Procurement Directives.

It should be noted that this interpretative communication was the subject of an action for annulment brought in 2000 by the Federal Republic

---

[1] See, to that effect, the Court's judgments in Case C-358/12, Consorzio Stabile Libor Lavori Pubblici, paragraph 25; in Case C-376/08, Serrantoni and Consorzio stabile edili, paragraphs 21 and 22; in the joined cases C-147/06 and C-148/06, SECAP and Santorso, paragraphs 19 and 20.

[2] The rulings of the Court in Case C-358/12, Consorzio Stabile Libor Lavori Pubblici, paragraph 24, in Case C-159/11, Ordine degli Ingegneri della Provincia di Lecce and Others, paragraph 23, and in Case
C-221/12, Belgacom, paragraph 30, and the case-law cited

[3] Published in the OJ EU, Series C, No 179 of 1.08.2006, p. 2

of Germany before the Court of First Instance in Case T-258/06, in which several Member States and the European Parliament have made requests for intervention. The Court dismissed the action as inadmissible, but made some particularly interesting conclusions (paras. 73-75):

"In that regard, it must first be stated that the specific and rigorous procedures provided for by the Community directives on the coordination of procedures for the award of public contracts apply only to contracts the value of which exceeds the threshold expressly laid down in each of those directives[1]. Thus, the rules of those directives do not apply to contracts the value of which does not reach the threshold laid down by those directives.

However, it cannot be inferred from this that the latter contracts are excluded from the scope of Community law[2]. Thus, according to the Court's settled case-law, in the award of contracts which, by reason of their value, are not subject to the procedures laid down by the Community rules, contracting authorities are nevertheless required to comply with the fundamental rules of the EC Treaty in general[3] and the principle of non-discrimination on grounds of nationality in particular[4].

3. Definition of the principles governing public procurement, how they are applied and effects achieved as a result of their application

Principle of non-discrimination

Non-discrimination is understood as ensuring the conditions for real competition so that any economic operator, regardless of nationality, can participate in the award procedure and have a chance to become the contracting party.

In applying this principle, the following rules must be observed:

- ✓ Contracting authorities must not discriminate against potential bidders on unjustified grounds (for example, nationality) and must not include technical specifications that could favor domestic undertakings.

[1] Vestergaard Order, paragraph 36 above, point 19, and the Commission/France Judgment, point 38 above, point 33

[2] Vestergaard Order, paragraph 38 above, point 19

[3] Regulation Vestergaard, paragraph 38 above, paragraph 20, and the Commission/France judgment, paragraph 38 above, paragraph 32

[4] See, to that effect, the Court judgment of 18 November 1999, Unitron Scandinavia and 3-S, C-275/98, ECR, p. I-8291, paragraph 29, the Court judgments Telaustria, paragraph 36 above, paragraph 62, Coname, paragraph 36 above, paragraph 16, and Parking Brixen, paragraph 36 above, paragraph 46, as well as the Court judgment of 6 April 2006, ANAV, C-410/04, ECR, p. I-3303, paragraph 18

- ✓ Contracting authorities must avoid setting qualification requirements that favor certain participants in public procurement procedures;
- ✓ Contracting authorities must avoid practices that favor a bidder by setting discriminatory conditions in the tender specifications.

The effects obtained are:

✓ The opening and development of the public procurement market;

✓ The creation of a competitive framework for obtaining the best value for public funds, which are always considered insufficient in relation to needs.

The principle of equal treatment

Complying with the principle of equal treatment means that, at any time during the award procedure, identical rules, requirements and criteria are established and applied to all economic operators, so that they benefit from equal opportunities to become contractors.

In applying this principle, the following rules must be respected:

- ✓ Elimination of subjective elements that may influence decisions in the award process for public procurement contracts;
- ✓ Providing, concurrently, to all economic operators involved in a procurement procedure, the information relating to the procedure.
- ✓ The effects of this principle are:
- ✓ All participants will have the same chances in preparing the documents associated with the procedure in question;
- ✓ Establishing a framework based on trust, integrity, fairness and impartiality throughout the entire course of the procedure;
- ✓ Promoting the development of fair and effective competition among economic operators participating in a public procurement procedure.

The principle of mutual recognition

Compliance with the principle of mutual recognition entails the contracting authority's acceptance of:

a) Products, services, works lawfully offered on the European Union market;

b) Diplomas, certificates and any documents issued by the competent authorities of other states;

c) Technical specifications, equivalent to those required at national level.

The principle of transparency

The principle of transparency requires that all information concerning the application of the award procedure be made known to the public in order

to ensure that the risk of favoritism and arbitrary conduct by the contracting authority is eliminated.

Applying this principle presupposes that:

All information regarding the procurement procedure must be formulated clearly, precisely, and unambiguously in the notice/invitation to participate and in the award documentation, providing economic operators with an equal position both at the time they prepare their tenders and at the time when these are evaluated by the contracting authority

Ensuring the visibility of the rules, opportunities, processes, records, and results related to the public procurement procedure. The effects obtained from applying this principle are:

- ✓ Clarity of the documents prepared during the procurement process;
- ✓ Understanding by potential candidates/tenderers of the objective needs of the contracting authority and how those needs are reflected in the award documentation.

The principle of proportionality

The principle of proportionality implies the correlation between:

a) The needs of the contracting authority;

b) The subject matter of the public procurement contract;

c) The requirements that must be met by bidders to satisfy the needs.

The principle of proportionality requires that:

- ✓ the acts of the institutions do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued
- ✓ where a choice between several appropriate measures is possible, recourse must be had to the least restrictive one, and the inconvenience caused must not be disproportionate to the aims pursued
- ✓ The Contracting Authority, when it is faced with an ambiguous tender, and a request for clarification regarding the content of the said tender could ensure legal certainty in the same way as the immediate rejection of the tender in question, should request clarification from the candidate concerned, rather than opting for the pure and simple rejection of his tender

The effect of this principle is to obtain the best value for public funds, which are always considered to be insufficient.

The principle of assuming responsibility

The principle of accountability implies the clear determination of the tasks and responsibilities of the persons involved in the public procurement process, ensuring the professionalism, impartiality and independence of the decisions adopted during this process.

The principle of accountability implies the obligation to report and be responsible for the consequences of the actions and decisions taken.

The application of this principle implies:

- ✓ Delegating as members of the evaluation committee the persons who have competences in the subject of the procurement procedure;
- ✓ Specifying in the award documentation, the "identification data of the persons who hold decision-making positions within the contracting authority";
- ✓ Requesting self-declarations from the members of the evaluation committee, from which it should be evident that they are not in situations of conflict of interest
- ✓ The effects obtained are:
- ✓ Limiting the occurrence of errors during the public procurement process;
- ✓ Reducing fraud and corruption.

References

- ➢ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing
- ➢ Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing
- ➢ Directive 2004/17/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts)
- ➢ Law no. 98/2016 on public procurement;
- ➢ Law no. 99/2016 on sectoral procurement;
- ➢ Law no. 101/2016 on remedies and legal actions in matters relating to the award of public procurement contracts, sectoral contracts and contracts also for the organization and operation of the National Council for the Settlement of Disputes.
- ➢ Court of Justice of the European Union cases (https://eur-lex.europa.eu/browse/institutions/justice.html?root_general-court-judgements=root%3Dgeneral-court-judgements)
- ➢ Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), the Official Journal of the European Union (OJ EU), Series C

MAGISTRATES AND THE RIGHT TO FREEDOM OF EXPRESSION THROUGH THE PERSPECTIVE OF THE EUROPEAN HUMAN RIGHTS SYSTEM

Radu IOSOF[1]

Abstract

Freedom of expression represents one of the essential foundations of a democratic society and is guaranteed both by Article 10 of the European Convention on Human Rights and by Article 11 of the Charter of Fundamental Rights of the European Union. The article highlights the European and domestic legal framework regarding freedom of expression, with reference to the Constitution of Romania, Law no. 303/2022 on the status of judges and prosecutors, and the Code of Ethics for magistrates. The limits of freedom of expression are analyzed in relation to the duty of restraint, impartiality, and the protection of the prestige of justice. From a jurisprudential perspective, the study examines relevant judgments of the European Court of Human Rights, which have consolidated European standards concerning the protection of speech on matters of public interest and the freedom of expression of magistrates. The study concludes that European standards require a restrictive interpretation of the limits imposed on magistrates' freedom of expression and the necessity of maintaining a balance between the duty of restraint and the protection of speech concerning the rule of law and democratic values.

Keywords: *ECHR, European Union, freedom of expression, judge.*

I. Introduction

Freedom of expression constitutes one of the fundamental pillars of the European constitutional order and an indispensable condition for the existence and consolidation of democratic societies. Nevertheless, the exercise of this right entails duties and responsibilities, an aspect that becomes particularly complex in relation to certain professional categories, such as members of the judiciary. In the contemporary context, marked by the rapid expansion of online communication platforms and the increasingly active involvement of judges and prosecutors in public debates concerning the rule of law, legislative reforms, and the functioning of the judicial system, the issue of the limits of their freedom of expression has acquired particular significance. The dynamics of the digital environment amplify the impact of any public statement, transforming individual opinions into subjects of widespread public debate and exposing the views of judicial officers to the scrutiny of society almost instantaneously.

This reality generates profound legal and ethical tensions within the European legal order. On the one hand, judges and prosecutors enjoy the same fundamental civil rights as other citizens and possess the expertise necessary

[1] Dimitrie Cantemir Târgu Mureș University, România, ORCID ID: 0009-0007-4858-0795

to contribute to the improvement of the legislative and institutional framework. On the other hand, their professional status is governed by the duty of restraint, a fundamental principle designed to safeguard the impartiality, independence, and authority of the judiciary in the eyes of litigants and the public. Consequently, European legal systems face a dual challenge: protecting the right of members of the judiciary to participate in democratic discourse while simultaneously preserving public confidence in the neutrality and impartiality of the administration of justice.

II. Regulation of Freedom of Expression under Romanian Domestic Law

Under Romanian law, freedom of expression is primarily guaranteed by the Constitution of Romania, as well as by the legislation governing the organization of the judicial authority and the status of judges and prosecutors.

Article 30 of the Constitution of Romania guarantees freedom of expression, providing that "freedom of expression of thoughts, opinions or beliefs, and the freedom of creations of any kind (...) shall be inviolable." With regard to members of the judiciary, Article 124(3) of the Constitution must also be taken into account, according to which "Judges shall be independent and subject only to the law" (Constitution of Romania, 2003). Furthermore, Article 125 (1) guarantees the irremovability of judges, while Article 132(1) provides that prosecutors shall carry out their activities in accordance with the principles of legality, impartiality, and hierarchical control. These constitutional provisions establish the legal framework within which the freedom of expression of members of the judiciary must be assessed, particularly in relation to the duty of restraint and the need to protect the prestige and authority of the judiciary.

Law No. 303/2022 on the Status of Judges and Prosecutors regulates the rights and obligations of members of the judiciary, including the limits governing the exercise of freedom of expression. Accordingly, Article 223 of the aforementioned law provides that judges and prosecutors are required to refrain from any acts or conduct liable to compromise their dignity, both in the exercise of their profession and in society. Furthermore, Article 234 establishes the duty of restraint with regard to public statements, particularly those capable of affecting judicial independence or creating an appearance of partiality. Judges, prosecutors, assistant magistrates, and assimilated legal specialists may contribute to publications, author articles, specialized studies, literary, artistic, or scientific works, participate in audiovisual programmes—except those of a political nature—and express their opinions regarding public policies or legislative initiatives relating to the justice system or to other matters of public interest, provided that such expressions are non-political in nature.

At the same time, Romanian law does not prohibit members of the judiciary from participating in public debates concerning the rule of law, judicial independence, or the functioning of the judicial system. Article 271(c) of Law No. 303/2022 provides that engaging in political activities or publicly expressing political convictions, whether in public or during the exercise of official duties, constitutes a disciplinary offence (Parliament of Romania, 2022).

Decision No. 328/2005 of the Superior Council of Magistracy approving the Code of Ethics for Judges and Prosecutors establishes the ethical standards applicable to members of the judiciary. Article 9 provides that: "(1) Judges and prosecutors shall be impartial in the performance of their professional duties and shall decide objectively, free from any external influence. (2) Judges and prosecutors shall refrain from any conduct, act, or manifestation capable of undermining public confidence in their impartiality" (Superior Council of Magistracy, 2005).

Article 17 further provides that judges and prosecutors are under a duty to refrain from any conduct or actions capable of compromising their dignity, both in office and in society. Likewise, Article 18(2) of the same Code stipulates that judges and prosecutors may not express opinions regarding the professional competence or moral integrity of other judges or prosecutors, irrespective of the court, prosecutor's office, or institution in which they serve.

Nevertheless, these ethical standards cannot be interpreted as completely excluding members of the judiciary from the public sphere, particularly where their statements concern matters of general public interest relating to judicial independence, the rule of law, or the proper functioning of the justice system.

III. Opinion No. 25 (2022) of the Consultative Council of European Judges (CCJE)

Opinion No. 25 (2022) of the Consultative Council of European Judges (CCJE) is a landmark European instrument that redefines the balance between judges' individual right to freedom of expression and the institutional obligations inherent in their judicial office. The Opinion marks a significant shift from the traditional culture of the completely silent judge—characterized by an absolute duty of restraint—to a model of the civically engaged judge, who bears responsibility for safeguarding democratic values. Four fundamental dimensions emerge from the Opinion:

1. The dual dimension: a fundamental right and a democratic responsibility

The Opinion reaffirms that judges enjoy freedom of expression on an equal footing with all other citizens, in accordance with Article 10 of the

European Convention on Human Rights. Its principal innovation, however, lies in recognizing not merely a right to speak, but, in certain circumstances, a duty to speak. Whenever the rule of law, the separation of powers, or judicial independence is threatened by other branches of government, judges have an ethical and constitutional responsibility to express themselves publicly. Silence in the face of democratic backsliding can no longer be regarded as neutrality but may instead amount to a failure to fulfil the judiciary's constitutional role as guardian of the rule of law.

2. The duty of restraint is qualified rather than absolute

Although Opinion No. 25 expands the scope of judicial freedom of expression, it does not abolish the duty of restraint. Instead, it places that duty within reasonable and proportionate limits. Judges are expected to exercise moderation when expressing personal opinions so as not to undermine the appearance of impartiality and the independence of the judiciary. They must refrain from commenting on pending cases, whether before themselves or their colleagues, engaging in *ad hominem* attacks, or participating in overt partisan political activity, particularly in the electoral context. Conversely, judges are encouraged to participate in public discussions concerning legislative reforms, the organization of the judicial system, legal education, and other issues of public interest relating to the administration of justice.

3. The use of social media

The CCJE devotes particular attention to the digital environment and social media. The Opinion acknowledges that the Internet significantly amplifies public messages while blurring the distinction between the public and private spheres. Judges are therefore required to exercise particular caution regarding posts, comments, or the sharing of online content that could undermine the dignity of judicial office. The standards established in Opinion No. 25 have directly influenced landmark judgments of the Grand Chamber of the European Court of Human Rights, including *Danileț v. Romania*, by establishing a clear analytical framework. Before imposing disciplinary sanctions for online expression, national courts should assess the context in which the statement was made, the judge's intention, and the proportionality of the sanction.

4. The educational role: explaining the administration of justice

The Opinion further emphasizes that judges have a responsibility to help the public understand the functioning of the justice system. In an era characterized by misinformation and increasing public criticism of courts, clear judicial communication has become an essential instrument for maintaining public confidence in the administration of justice. Public explanations of legal procedures or technical legal matters should no longer

be regarded as inappropriate but rather as an important public service contributing to transparency and public trust.

In conclusion, Opinion No. 25 (2022) demonstrates that the modern judge can no longer remain a detached observer isolated within the "ivory tower" of the judiciary. Rather, judges are expected to act as active participants in democratic society, exercising ethical self-restraint while displaying civic courage whenever the fundamental values of judicial independence and the rule of law are under threat (CCJE, Opinion No. 25, 2022).

IV. Article 11 of the Charter of Fundamental Rights of the European Union

Article 11 of the Charter of Fundamental Rights of the European Union guarantees both freedom of expression and freedom of information within the legal order of the European Union. The provision reflects the fundamental democratic values upon which the European Union is founded and safeguards the free exchange of ideas within a European public sphere based on pluralism, tolerance, and openness.

The Court of Justice of the European Union (CJEU) has consistently interpreted Article 11 of the Charter in close alignment with the case law of the European Court of Human Rights. In *Digital Rights Ireland*, the CJEU emphasized the importance of protecting fundamental rights in the digital environment and reaffirmed that any restriction imposed by Member States on individual rights must comply with the principle of proportionality.

In *Google Spain*, the Court examined the relationship between freedom of expression, the public's right to information, and the protection of privacy in the online environment. That judgment developed the concept of the "right to erasure," commonly referred to as the "right to be forgotten."

Likewise, in *Glawischnig-Piesczek v. Facebook Ireland*, the CJEU considered the responsibility of online platforms for the removal of defamatory content and reaffirmed the need to strike a fair balance between freedom of expression and the protection of individual reputation.

The Charter of Fundamental Rights and the case law of the Court of Justice therefore demonstrate that freedom of expression must be interpreted in light of the challenges posed by the digital society, particularly those arising from social media platforms and online communication services.

To date, however, the Court of Justice of the European Union has not had the opportunity to apply the provisions of the Charter in cases specifically concerning the freedom of expression of judges or prosecutors. This is largely due to the limited jurisdiction of the Court, whose involvement depends upon the interpretation or application of European Union law and is generally secured through the preliminary reference procedure or other mechanisms provided for under the Treaties.

V. Freedom of Expression under Article 10 of the European Convention on Human Rights

Article 10 of the European Convention on Human Rights constitutes one of the most significant treaty provisions safeguarding fundamental rights (Council of Europe, 1950).

Through its case law, the European Court of Human Rights (ECtHR) has developed a comprehensive European standard for the protection of freedom of expression, attaching particular importance to speech concerning matters of public interest, the activities of the press, criticism of public authorities, and debates regarding the functioning of State institutions.

The protection afforded by Article 10 is not absolute. Paragraph 2 permits restrictions on the exercise of freedom of expression only where three cumulative conditions are satisfied: the interference must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.

The Court has consistently emphasized that freedom of expression constitutes one of the essential foundations of a democratic society. In *Handyside v. the United Kingdom*, the Court famously held that freedom of expression applies not only to information and ideas that are favourably received or regarded as inoffensive but also to those that "offend, shock or disturb."

The Court has likewise afforded enhanced protection to speech concerning matters of public interest, political debate, and the functioning of State institutions. In such circumstances, the margin of appreciation enjoyed by States is considerably narrower, and any interference must be supported by relevant and sufficient reasons. Over time, the Court has progressively extended its analysis to increasingly complex situations involving freedom of expression, including cases concerning judges and prosecutors.

In ***Wille v. Liechtenstein*** (1999), the applicant, a former member of the Government, had been appointed by the Prince of Liechtenstein as President of the Administrative Court. Following a public lecture in which he expressed a constitutional interpretation that differed from that of the Prince concerning the constitutional powers of the State's fundamental institutions, the Prince declined to renew his appointment. The Court first held that this decision, adopted as a direct consequence of the applicant's expressed views, constituted an interference with his freedom of expression. It subsequently concluded that the interference could not be regarded as justified under Article 10 §2 of the Convention.

In ***Kudeshkina v. Russia*** (2009), the applicant, a judge at the Moscow City Court, participated in the adjudication of the politically sensitive *Zaytsev* case, involving a former police officer accused of abuse of office in connection with a large-scale financial fraud investigation allegedly involving

senior public officials. Following disagreements with the prosecuting authorities and an inspection initiated by the President of the Court, which the applicant considered to be an attempt to intimidate her, she was removed from the case. Subsequently, she resigned temporarily from judicial office in order to stand as a parliamentary candidate, during which she publicly advocated judicial reform and criticized the lack of judicial independence, referring, inter alia, to the pressures allegedly exerted upon her in the *Zaytsev* proceedings. After failing to secure election, she returned to the judiciary. At the same time, disciplinary proceedings were initiated against her on the basis of statements made during the electoral campaign. Ultimately, she was dismissed from judicial office, and that sanction was upheld by the domestic courts, including the Supreme Court.

The European Court strongly criticized the Russian courts for characterizing the applicant's statements as "false" without investigating whether the pressures she had described had in fact occurred. The Court found that the applicant had acted in good faith and possessed a sufficient factual basis for her allegations. It further emphasized that issues concerning judicial independence and systemic deficiencies within the judiciary transcend the ordinary duty of judicial restraint. Society has a legitimate interest in receiving information from those working within the judicial system regarding such structural deficiencies. The Court also stressed that dismissal from judicial office constitutes the most severe professional sanction that may be imposed upon a judge. Such a sanction not only destroyed the applicant's judicial career but also produced a significant chilling effect upon other members of the judiciary, fostering fear and self-censorship among judges in Russia.

The judgment in ***Kozan v. Türkiye*** (2022) represents another landmark in defining the limits of judicial freedom of expression in the digital age. The applicant, who was serving as a judge at the time, had shared, within a private Facebook group accessible exclusively to judges and prosecutors, a link to an article criticizing the policies of the Turkish Council of Judges and Prosecutors. Although the post remained within the restricted online forum, the applicant received a disciplinary reprimand on the grounds that his message had damaged the reputation of the judiciary and violated the duties of impartiality and political neutrality.

In finding a violation of Article 10, the European Court established several important principles concerning judicial freedom of expression in the online environment. First, it attached decisive importance to the fact that the post had been shared within a closed Facebook group. Although social media platforms generally constitute public means of communication, the restricted audience—consisting exclusively of legal professionals—significantly reduced

the likelihood that members of the general public would perceive the statements as compromising the judge's impartiality. Secondly, the article shared by the applicant concerned the organization of the judiciary and proposed legislative reforms. The Court reiterated that issues relating to the administration of justice are matters of considerable public interest and that judges possess both the expertise and the legitimacy to contribute to such discussions. Finally, the Court warned that even relatively minor disciplinary sanctions, such as a formal reprimand, may produce a serious chilling effect on the judiciary as a whole, encouraging self-censorship and undermining open and democratic debate within the judicial system.

The *Kozan* judgment therefore draws a clear distinction between the duty of judicial restraint—which prohibits judges from engaging in partisan political disputes or commenting on pending proceedings—and their right to express professional opinions on matters concerning judicial policy, institutional reform, and the administration of justice.

The message conveyed by the European Court of Human Rights is unequivocal: States may not invoke the protection of the "reputation of the judiciary" as a means of silencing critical voices from within the judicial system, particularly where such opinions are expressed in a controlled professional environment and contribute to debates of legitimate public interest.

In ***Baka v. Hungary*** (2016), the European Court of Human Rights found a violation of Article 10 of the Convention in relation to the premature removal of the President of the Hungarian Supreme Court following his public criticism of judicial reforms. The judgment is of fundamental importance for both the protection of judges' freedom of expression and the principle of judicial independence. András Baka was elected President of the Supreme Court of Hungary in 2009 for a six-year term. During 2011–2012, the Hungarian Government introduced a comprehensive constitutional reform that included a substantial reduction in the mandatory retirement age for judges and significant changes to the governance of the judiciary. Acting in his official capacity as President of the Supreme Court and of the National Council of Justice, Baka publicly criticized these reforms before Parliament and in the media, arguing that they posed a direct threat to judicial independence. Following the adoption of the new Constitution, the Supreme Court was abolished and replaced by a new institution, the *Kúria*. Although the remaining judges retained their positions, András Baka's mandate was terminated three years before its scheduled expiry through ad hoc transitional constitutional provisions, while the eligibility criteria for the presidency of the newly established court were drafted in such a manner as to prevent him from standing as a candidate.

The Grand Chamber of the European Court of Human Rights examined the case in light of the close relationship between Article 10 (freedom of expression) and Article 6 (right to a fair trial), particularly regarding the absence of an effective judicial remedy against the applicant's dismissal.

The Court held that issues relating to the administration of justice, the separation of powers, and constitutional judicial reforms constitute matters of the highest public interest. Accordingly, a senior judge not only enjoys the right to express opinions on such matters but may also have a professional and constitutional responsibility to speak publicly where reforms are liable to undermine the independence of the judicial system for which he or she bears institutional responsibility. The Court rejected the Hungarian Government's argument that the applicant's dismissal was merely an incidental consequence of an institutional reorganization. Instead, it concluded that the applicant's premature removal was directly attributable to the public criticism he had voiced regarding the proposed reforms. The Court further emphasized the seriousness of a situation in which a State employs constitutional legislative measures to remove an inconvenient judicial leader while simultaneously excluding any possibility of effective judicial review.

The judgment in *Baka v. Hungary* develops and reinforces the principles established in *Kozan v. Türkiye* and *Kudeshkina v. Russia* by introducing an important clarification. Whereas in *Kozan* the Court considered even a formal reprimand to be a disproportionate interference with judicial freedom of expression, in *Baka* it held that the dismissal of the President of a Supreme Court sends an exceptionally powerful message of intimidation to the entire judiciary. Such measures inevitably discourage other judges from expressing legitimate criticism concerning judicial reforms and thereby weaken democratic governance and the rule of law.

The European Court made clear that the duty of judicial restraint cannot be transformed into an instrument of governmental censorship where the very foundations of the rule of law are at stake. These judgments demonstrate that Article 10 of the Convention affords extensive protection to speech concerning the functioning of public authorities and the rule of law, including where such expression originates from judges or other institutional actors.

Having regard to the consistency of its case law and the importance of legal certainty and predictability, the Court has consistently applied a set of criteria enabling it to determine, in cases such as those discussed above, whether members of the judiciary are entitled to the protection afforded by Article 10 of the Convention.

For an interference with freedom of expression to comply with the Convention, it must be **prescribed by law**, pursue one or more of the **legitimate aims** set out in Article 10 §2, and be **necessary in a democratic society**.

In ***Danileț v. Romania*** (2024), the European Court of Human Rights reaffirmed the classical framework already established in its settled case law, namely: the existence of an interference; whether the interference was prescribed by law; whether it pursued one or more legitimate aims; and whether it was necessary in a democratic society.

With regard to the latter requirement, the Court observed in paragraph 142 that: "The fundamental principles concerning the necessity of an interference with freedom of expression in a democratic society *are well established in the Court's case-law* and have been summarized, inter alia, in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), *Morice v. France* ([GC], no. 29369/10, §124, ECHR 2015), *Delfi AS v. Estonia* ([GC], no. 64569/09, §§131–139, ECHR 2015), and *Perinçek v. Switzerland* ([GC], no. 27510/08, §§196–197, ECHR 2015)."

In paragraph 143 of *Danileț v. Romania*, the Court supplemented these principles by addressing freedom of expression on the Internet and social media, referring to the general principles summarized in *Sanchez v. France* (Grand Chamber, §§158–166). Furthermore, paragraph 144 specifically addresses the principle of judicial freedom of expression, stating that: "The general principles concerning judges' freedom of expression were set out in *Baka v. Hungary* ([GC], no. 20261/12, 23 June 2016, §§162–167)."

Accordingly, when assessing whether the freedom of expression of members of the judiciary has been violated, the following elements must be examined: whether there has been an interference; whether that interference was prescribed by law; whether it pursued a legitimate aim; whether it was necessary in a democratic society; the particular characteristics of freedom of expression on the Internet and social media; and the specific principles governing the freedom of expression of judges.

In addition, *Danileț v. Romania* introduced a number of new assessment criteria that amount to a genuine framework for balancing the competing rights and interests involved. The Court emphasized, however, that no hierarchy exists among these criteria and that they need not be examined in any predetermined order. Their relative importance depends on the particular circumstances of each individual case (Guyomar, 2026).

Accordingly, **the first element** to be examined concerns the **content and form** of the statements or other manifestations of judges' freedom of expression on social media. The Court has consistently held that issues relating to the functioning of the judiciary or judicial reforms are unquestionably matters of public interest. However, these are not the only subjects on which judges may legitimately exercise their freedom of expression under Article 10 of the Convention, as their isolation from the society in which they live is neither feasible nor desirable. The Court has recognized that, where democracy or the

rule of law is under serious threat, judges may speak publicly in defence of judicial independence, the constitutional order, and the restoration of democratic institutions, both nationally and internationally. This also includes the possibility for judges, where justified by the historical, political, or legal context of a debate involving significant political implications, to express concrete views on matters with respect to which the public has a legitimate interest in being informed. Nevertheless, such public interventions may pose risks to judicial impartiality and, in certain circumstances, even to judicial independence. It is therefore necessary to strike a fair balance between the degree of a judge's participation in public life and the need to preserve both the independence and impartiality of the judiciary, as well as the appearance of that independence and impartiality in the exercise of judicial functions (*Danileț v. Romania*, 2025, §§150–156).

As regards **the form** of statements made by judges in exercising their freedom of expression on social media, such expression is not exempt from the obligations arising from the judicial duty of restraint. For the Court, the clarity of the language used by judges wishing to exercise their freedom of expression is of particular importance. Judicial statements should be formulated in a manner that avoids ambiguity or multiple interpretations capable of undermining litigants' confidence in the administration of justice (*Danileț v. Romania*, 2025).

Secondly, the Court considers it necessary to assess the **context** in which the impugned statements were made and the **capacity in which their author acted**. At the current stage of its case-law, the Court affords enhanced protection to judges occupying particular institutional positions within the judiciary—such as court presidents, chief prosecutors, court spokespersons, representatives of judicial associations, or members of judicial councils—because their public interventions are frequently motivated by the objective of safeguarding the judicial system. Although the official capacity in which a judge or prosecutor speaks may justify broader limits of permissible expression when balancing the competing rights and interests involved, this does not imply that "ordinary" judges or prosecutors, who do not hold institutional leadership positions, are deprived of the right to express themselves publicly on matters of general public interest. Nevertheless, all members of the judiciary remain bound by the duty of restraint in relation to pending proceedings and must refrain from making comments that could reasonably be regarded as influencing the outcome of a case or compromising the fairness of judicial proceedings (*Danileț v. Romania*, §§159–160).

Thirdly, attention must be given to the **impact of the impugned statements upon the public and public confidence in the judiciary**. The Internet has become one of the principal means through which freedom of expression is exercised, providing indispensable tools for participation in political debate and discussions concerning matters of general public interest.

At the same time, however, it presents particular risks that distinguish it from traditional print media, especially in light of its unparalleled capacity to preserve, reproduce, and disseminate information. In this context, and having regard to the inherent risks associated with online communication by any individual, including judges, national courts must evaluate the full extent of the actual or potential harmful consequences arising from judicial statements published on social media. They must distinguish between statements disseminated through open social media platforms, accessible to an unlimited number of users, and those shared within closed or restricted groups accessible only to private contacts or legal professionals. As the Court observed in *Kozan v. Türkiye* (§66), the proportionality of any disciplinary measure may depend significantly upon this distinction (*Danileț v. Romania*, §§161–162).

Fourthly, domestic courts must determine whether **the severity of the sanction is proportionate to the legitimate aim pursued**. The European Court of Human Rights has repeatedly emphasized that both the nature and the severity of the penalties imposed constitute essential elements in assessing whether an interference with the right to freedom of expression under Article 10 of the Convention is proportionate. This principle applies equally to disciplinary sanctions imposed, or liable to be imposed, upon members of the judiciary. The Court has further stressed that the chilling effect which a disciplinary sanction may produce—not only upon the judge concerned but also upon the judiciary as a whole—constitutes an important factor when evaluating whether the interference was proportionate to the legitimate objective pursued (*Danileț v. Romania*, §§163–164).

Fifthly, it is necessary to examine whether **adequate procedural safeguards** were afforded to the judge or prosecutor subject to disciplinary proceedings. Whenever disciplinary proceedings are initiated against a judge, public confidence in the judiciary is itself at stake. The judicial officer concerned must therefore benefit from adversarial proceedings, enabling him or her to present observations and challenge the arguments advanced by the disciplinary authorities. National authorities are likewise under an obligation to provide relevant and sufficient reasons demonstrating that both the disciplinary proceedings and the sanctions imposed were necessary and proportionate to the legitimate aims pursued.

The five assessment criteria established by the Grand Chamber, and endorsed even by the seven dissenting judges, constitute a substantial contribution to the development of a coherent analytical framework governing the interpretation and application of Article 10 of the Convention. They significantly strengthen the emergence of principled case-law capable of serving as authoritative guidance for domestic courts (Guyomar, 2026; Voicu, 2026).

A comparative analysis of the four leading judgments demonstrates a clear evolution in the case-law of the European Court of Human Rights towards increasingly robust protection of judicial freedom of expression whenever the speech in question serves the defence of the rule of law. The differing factual contexts—from parliamentary statements in Hungary to Facebook posts in Romania—illustrate that the form of expression has become secondary to its substance. Where judicial speech concerns judicial independence, the separation of powers, or the preservation of constitutional democracy, judges enjoy enhanced protection against disciplinary sanctions. The Court has consistently condemned attempts by national authorities to invoke the judicial duty of restraint as a pretext for producing a **chilling effect** designed to foster conformity and silence within the judiciary.

VI. Principal Differences among the Four Cases

The principal distinctions among the four judgments concern the context in which the judge exercised his or her freedom of expression—whether through traditional media, social media, or an institutional forum—as well as the official capacity in which the individual was acting at the relevant time.

1. Context and Medium of Expression

Baka v. Hungary. The applicant's statements were made within a formal institutional framework. His criticism was expressed through official memoranda submitted to public authorities and through a formal address delivered before the Hungarian Parliament.

Kudeshkina v. Russia. The applicant expressed her views through traditional media, including interviews given to radio stations and the printed press. She made specific allegations concerning a high-profile criminal case over which she had presided.

Danileț v. Romania. The applicant's statements were published in the public digital sphere through a personal Facebook account accessible to the general public. The posts were informal in style, abstract in content, and consisted primarily of value judgments concerning perceived threats to the constitutional order.

Kozan v. Türkiye. The expression occurred within a private digital environment, namely a closed Facebook group reserved exclusively for judges and prosecutors. Moreover, the applicant did not author an original statement but merely shared a newspaper article without adding any accompanying comments, observations, or personal opinions.

2. Judicial Office and Institutional Position

Baka v. Hungary. The applicant occupied the highest judicial office in the country as President of the Supreme Court. He acted not as a private

citizen but pursuant to his statutory responsibilities to represent and safeguard the judiciary.

Kudeshkina v. Russia. The applicant was a first-instance judge who, at the time of the impugned statements, was participating in a parliamentary election campaign as a candidate for legislative office.

Danileț v. Romania. The applicant was a court judge who held no institutional leadership or representative position within the judiciary at the relevant time. He participated in the public debate as a judge exercising his rights as a citizen on matters of general public interest.

Kozan v. Türkiye. The applicant was a career judge who addressed only his judicial colleagues within a restricted professional online forum, exercising his freedom of expression exclusively within the legal community.

3. Nature and Severity of the Sanctions Imposed

Baka v. Hungary. The interference took the form of a legislative measure amounting to constitutional retaliation. The applicant's mandate was terminated prematurely through constitutional reforms restructuring the Supreme Court, while he was simultaneously denied access to a judicial remedy capable of reviewing the decision.

Kudeshkina v. Russia. The applicant was permanently removed from judicial office and irreversibly deprived of the right to continue exercising judicial functions. The sanction represented the most severe professional penalty that can be imposed upon a judge.

Danileț v. Romania. The applicant was subjected to a severe disciplinary sanction consisting initially of dismissal from the judiciary, subsequently resulting in an effective suspension from office during the domestic proceedings. Although not permanent, the measure produced significant professional and financial consequences over an extended period.

Kozan v. Türkiye. The applicant received the lightest form of disciplinary sanction—a written warning. Nevertheless, the European Court of Human Rights found a violation of Article 10, emphasizing that even a seemingly minor disciplinary measure is capable of producing a chilling effect upon the judiciary by discouraging judges from participating in legitimate public debate.

VII. Conclusion

The freedom of expression of members of the judiciary constitutes a particularly sensitive area of law, as it must be reconciled with the judicial duties of restraint, impartiality, and independence that are inherent in judicial office.

Judges and prosecutors, like all individuals, are entitled to the protection afforded by Article 10 of the European Convention on Human

Rights and Article 11 of the Charter of Fundamental Rights of the European Union. Nevertheless, their professional status entails certain limitations on the exercise of freedom of expression in order to preserve public confidence in the impartiality and integrity of the administration of justice.

The European Court of Human Rights has repeatedly emphasized that judges possess not only the right, but in certain circumstances also the duty, to express their views on issues concerning judicial independence and the functioning of the rule of law. In particular, where democracy or the independence of the judiciary is under threat, judicial speech is entitled to a particularly high level of protection under Article 10 of the Convention.

The Court's case law demonstrates that, when assessing interferences with the freedom of expression of members of the judiciary, it takes into account a number of interrelated factors, including: the public interest served by the speech; the context in which the statements were made; the form and tone of the expression; the impact of the statements on the authority and reputation of the judiciary; the nature and severity of the disciplinary sanction imposed; and the potential chilling effect on other judges and prosecutors.

Romanian domestic law likewise recognizes freedom of expression as a fundamental right applicable to members of the judiciary. However, the exercise of that right must be balanced against the duty of judicial restraint and the legitimate objective of safeguarding the authority, independence, and impartiality of the judicial system.

At the same time, European legal standards and recent case law clearly demonstrate that the duty of restraint cannot be interpreted so broadly as to silence judges and prosecutors when they participate in public debate concerning judicial independence, the rule of law, or the proper functioning of democratic institutions.

Danileț v. Romania constitutes an important milestone in the European jurisprudence concerning the freedom of expression of members of the judiciary. The judgment of the European Court of Human Rights reaffirms that judges are entitled to participate in public debate, particularly where issues relating to judicial independence, the rule of law, and fundamental democratic values are at stake.

Furthermore, the judgment highlights the need to maintain a fair balance between the duty of judicial restraint and the right of judges to freedom of expression. Any restriction of that right must be interpreted narrowly and justified by relevant and sufficient reasons, in accordance with the requirements of a democratic society. In this respect, Danileț v. Romania further consolidates the European standard according to which judicial independence is safeguarded not only through institutional guarantees but also through the effective protection of judges' freedom of expression whenever they contribute, in good

faith, to matters of genuine public interest concerning the administration of justice and the preservation of the rule of law.

References

1. Charter of Fundamental Rights of the European Union (2012) *Official Journal of the European Union*, C 326/02, p. 391. Consolidated version. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012P (Accessed: 20 May 2026).

2. Constitution of Romania (2003) Republished in the *Official Gazette of Romania*, Part I, No. 767, 31 October 2003.

3. Consultative Council of European Judges (CCJE) (2022) *Opinion No. 25 (2022) on the Freedom of Expression of Judges*. Strasbourg: Council of Europe. Available at: https://rm.coe.int/opinion-no-25-2022-final/1680a973ef (Accessed: 20 May 2026).

4. Council of Europe (1950) *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).* Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 25 May 2026).

5. Superior Council of Magistracy (2005) *Decision No. 328 of 24 August 2005 approving the Code of Ethics for Judges and Prosecutors*. *Official Gazette of Romania*, Part I, No. 815, 8 September 2005.

6. European Court of Human Rights (1999) *Wille v. Liechtenstein*, Application No. 28396/95. Available at: https://hudoc.echr.coe.int/eng?i=001-58338 (Accessed: 20 May 2026).

7. European Court of Human Rights (2009) *Kudeshkina v. Russia*, Application No. 29492/05. Available at: https://hudoc.echr.coe.int/eng?i=001-91501 (Accessed: 20 May 2026).

8. European Court of Human Rights (Grand Chamber) (2016) *Baka v. Hungary*, Application No. 20261/12. Available at: https://hudoc.echr.coe.int/eng?i=001-163113 (Accessed: 20 May 2026).

9. European Court of Human Rights (Grand Chamber) (2025) *Danileț v. Romania*, Judgment of 15 December 2025, published in the *Official Gazette of Romania*, No. 317, 22 April 2026.

10. Guyomar, M. (2026) 'The President of the European Court of Human Rights warns: *If, in a democratic society, anti-judicial populism succeeds in convincing the majority of people that judges act against their interests, the system will inevitably collapse*', interview published in *Adevărul*, 8 February. Available at: https://adevarul.ro/stiri-interne/evenimente/presedintele-cedo-despre-situatia-din-romania-2506569.html (Accessed: 25 May 2026).

11. Parliament of Romania (2022) *Law No. 303 of 15 November 2022 on the Status of Judges and Prosecutors*. Published in the *Official Gazette of Romania*, Part I, No. 1102, 16 November 2022, as subsequently amended.

12. Stoica, V. (2026) 'The Duty of Judicial Restraint and Freedom of Expression', *Dilema*, 12 February. Available at: https://www.dilema.ro/tilc-show/obligatia-de-rezerva-a-magistratilor-si-libertatea-de-exprimare (Accessed: 25 May 2026).

13. Voicu, M. (2026) 'The ECtHR on Judicial Activism: A "Fine-Line" Judgment and an "Ambivalent" Decision on Judges' Freedom of Expression in the Exercise of Judicial Office – *Danileț v. Romania*'. Available at: https://www.juridice.ro/essentials/11215/cedo-despre-activismul-judiciar-o-hotarare-pe-muchie-si-o-decizie-ambivalenta-privind-libertatea-de-exprimare-a-judecatorului-in-exercitiul-functiei-cauza-danile (Accessed: 25 May 2026).

FORENSIC CHARACTERISTICS OF INFANT HOMICIDE CRIMES

Lucia RUSU[1]
Ioan Sorin TUDORACHE[2]

Abstract:

The general negative trends observed in society today—which are the result of socio-economic transformations that are not always well thought out—have not spared the realm of female crime. The considerable weakening of key social institutions, primarily the family, as well as the decline in social control; rising social tensions; the proliferation of antisocial phenomena such as alcoholism, drug use, and prostitution; the deterioration of the population's economic situation and rising unemployment; and the decline in moral and ethical standards and spiritual values—all of these have led, in recent years, to a significant increase in crimes committed by women. Infanticide occupies a significant place in the structure of female crime. Of course, this problem is not new and has always existed. The specific nature of this crime leads, in practice, to a high degree of underreporting, and the lack of concrete recommendations regarding a comprehensive approach to identifying and investigating cases of infanticide results in a large number of unsolved crimes in this category. Interest in this topic stems from the fact that certain aspects and particularities of infanticide investigations influence the methodology for investigating such crimes, and these require detailed analysis. Furthermore, in recent years, the correlation between the methodological particularities of investigating certain categories of crimes and their forensic characteristics has been established and accepted; this is fully justified, since it is precisely these forensic characteristics that determine many of the specific features of criminal prosecution, including in the investigation of infanticide cases.

Keywords: *forensic characteristics, crime, circumstances of the crime, newborn, infanticide, criminal investigation, forensic information, mental disorder.*

Introduction

The doctrine concerning the forensic characteristics of crimes, as the theoretical and informational foundation for developing methodological recommendations specific to the investigation of certain categories of crimes, constitutes an essential component of the final branch of criminalistics—forensic methodology (the methodology for investigating certain categories of crimes). In contemporary specialized literature, it has become standard practice to precede the analysis of the methodological particularities of

[1] PhD Associate Professor, „Alecu Russo" State University of Bălți, Republic of Moldova, e-mail: lucia.rusu@usarb.md, ORCID ID: 0009 0000 2090 9172

[2] PhD Student, Doctoral School in Law, Political and Administrative Sciences of the National Consortium of Educational Institutions, Academy of Economic Studies of Moldova / University of European Political and Economic Studies "Constantin Stere", Republic of Moldova, e-mail: soryntudorache@yahoo.com, ORCID ID: 0000-0003-2893-6013

investigating a specific category of crimes with a presentation of its criminalistic characteristics. Such an approach is fully justified, since the criminalistic characteristics largely determine the specific nature of how the investigative process is organized and conducted.

In criminalistics doctrine, there is generally a lack of a rigorous distinction between the concept of the criminalistic characteristics of a crime and that of the circumstances to be proven during the criminal investigation. It is generally held that the former concept belongs to the field of criminalistics, while the latter belongs to the field of criminal procedure. However, such a distinction is conventional in nature, since there are no circumstances that have exclusively forensic significance or exclusively criminal procedural significance. On the contrary, they are closely interdependent and mutually conditioning. Based on these considerations, N. A. Solovyeva considers the following point to be appropriate: "The forensic characteristics of infanticide offenses should be analyzed through the lens of the circumstances to be identified, established, and proven during the investigative process, as these constitute the fundamental benchmarks for the effective organization of criminal prosecution and for achieving the objectives of evidence gathering in criminal cases"[1].

The successful detection and investigation of infanticide offenses are possible only if all relevant circumstances related to the criminal incident under investigation are accurately, completely, comprehensively, and objectively established[2].

In the vast majority of cases, the relationships between the elements of a forensic characteristic are probabilistic in nature. In this context, establishing a specific element of the forensic profile allows only for the formulation of a hypothesis—with a higher or lower degree of probability—regarding the existence of another element, and the probability of such a hypothesis is all the higher the more frequently the association between these elements is observed in criminal investigations. The specific features of the investigative methodology in a particular criminal case are determined by the nature and content of the elements of the crime's forensic profile already known to the criminal investigation authority, relating to the object of the criminal act, the manner in which the crime was committed, the offender's personality, or the consequences of the criminal event under investigation. The gradual transition from known elements of the criminalistic profile to

---

[1] SOLOVYEVA, N. A. *Methodology of Investigation of Infanticides*: Textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 7-8.

[2] *Murder: Private Investigation Methods:* Lecture Course. Ed. by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psycho-Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 453.

unknown ones, in the process of developing and applying the investigative methodology, is determined by the category of the crime and the specific circumstances in which it was committed[1].

According to author M. Ruiu, "Criminal law, as an expression of society's will, protects human life—not as an individual good, but as a social good—as the supreme value for the very existence of the community itself. This gives the legislature the right to require all citizens to protect one another's lives and to refrain from any acts that would undermine this social value—and, by extension, the vital interests of the community"[2]. The killing of a child by its mother, as noted by Groza I. L. and Astarastoaie V., "...constitutes an act of aggression that runs counter to the maternal instinct, committed against a defenseless person, a characteristic that defines this particular form of infanticide or murder"[3].

In every criminal case involving the offense of infanticide, it is necessary to determine, first and foremost, whether the newborn's life was actually taken or whether the child was stillborn. If it is determined that the newborn's death was violent in nature, it is essential to verify whether the death was not the result of an accident that occurred during childbirth. If the newborn's death was not unlawful but occurred, for example, as a result of accidental injuries sustained during childbirth, the act cannot be classified as the crime of infanticide[4].

The typical data contained in the forensic characteristics of the crime of infanticide determine the scope of the circumstances to be established and proven within the investigation of the crime[5]. The constituent elements of the crime of infanticide, as well as their reflection in the forensic characteristics of the crime, are in objective interdependence relations, governed by specific laws. The establishment of a certain element, argues N. P. Yablokov "...can provide information on the existence of one or more other elements, as well as on their characteristic signs and corresponding properties"[6].

Theoretical and methodological basis of the research

---

[1] SOLOVYEVA, N. A. *Methodology of Investigation of Infanticides*: Textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 33-34.

[2] RUIU, M. *Forensic Methodology.* Bucharest: Publishing House Legal Universe, 2013. 263 p. ISBN 978-606-673-233-8, p. 13,

[3] GROZA, I. L. and V. ASTARASTOAIE. *Introduction to Forensic Medicine for Lawyers.* Bucharest: Publishing House. C. H. BECK, 2007. 279 p. ISBN 978-973-115-089-5, p. 139.

[4] SOLOVYEVA, N. A. *Methodology of Investigating of infanticides*: A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 7-8.

[5] AVERYANOVA, T. V.; R. S. BELKIN; Yu. G. KORUKHOV and E. R. ROSSINSKAYA. *Forensic Science*: Textbook. 4th edition, revised and supplemented. Moscow: NORMA, 2016. 928 p. ISBN 978-5-91768-334-8, p. 686.

[6] *Forensic Science:* A Textbook for Universities. Responsible ed. N. P. Yablokov. Moscow: BEK, 1997. 704 p. ISBN 5-85639-046-6, p. 527.

The theoretical and methodological basis of the scientific approach is constituted by a complex set of methods and theoretical concepts used in forensic doctrine, criminal law and related sciences, which allowed for a multilateral investigation of the peculiarities of the forensic characteristic of infanticide offenses. The theoretical foundation is represented by the classical and contemporary works of doctrinaires in the field of forensics and criminal law, with an emphasis on the concepts regarding the structure of the forensic characteristic of offenses, the criminal mechanism, the peculiarities of the manner of committing acts of violence against newborns. In the process of developing the article, general and special scientific research methods were used, including the method of analysis and synthesis, induction and deduction, legal and criminal comparison, as well as the systemic method, applied to examine the component elements of the forensic characteristic as an integrated system. Also, the logical method and the generalization of judicial practice were used to identify the typical peculiarities of the mechanism of committing infanticide offenses.

Results and discussions

The conditions of committing the crime, according to researcher V. I. Kulikov, "exert a direct influence on the development and dynamics of criminal activity, influencing the mechanism of its commission and highlighting the regularities of the formation of information regarding the criminal event under investigation. At the same time, claims V. I. Kulikov, they are likely to influence the configuration of all other elements that characterize the crime, determining the nature and peculiarities of the behavior of the persons involved in its commission"[1].

We believe that information regarding the conditions of the crime constitutes, in fact, the central element of the forensic characteristic of practically any category of crime, as it concentrates data regarding the other elements of the forensic characteristic and fulfills the role of a systematizing factor within it.

For the investigation of infanticide crimes, establishing the time and place of the crime is of paramount importance. The categories of *space* and *time* are fundamental in relation to the other concepts that make up the object of forensic knowledge. Having a determining role in the discovery of the crime, these categories are essential for the formation of an objective and complete knowledge of the crime investigated in the criminal process, of other relevant events and of the persons involved. At the same time, they are

[1] KULIKOV, V. I. *The Crime Scene and Its Forensic Significance*: Abstract of a Cand. Sci. (Law) Dissertation. Moscow, 1983. 23 p., p. 14.

of particular importance for the organization of the process of identifying and discovering the crime, as well as for establishing the methods and procedures for obtaining information regarding it.

Establishing *the place of commission of the crime* in cases of infanticide crimes allows, in the opinion of N. A. Solovyeva, "to delimit from the initial stage the circle of persons who were, in one way or another, related to the investigated act. At the same time, it must be taken into account that, in most cases, the place of discovery of the newborn's body does not coincide with the place of commission of the crime. However, the place of discovery of the body constitutes a particularly important circumstance, which allows the conclusion to be drawn that the place of commission of the crime is in the immediate vicinity, taking into account the specific features of this category of crimes, as well as the physiological state of the woman after childbirth. In all cases of discovery of the body of a newborn, the first criminal prosecution action is the on-site investigation or the investigation of the place of discovery of the newborn's body, during which the respective place is thoroughly examined and analyzed. On this occasion, identified, fixed and recorded the most relevant data that characterize it. From the multitude of characteristics of the researched place, information that allows establishing its belonging to a certain territory, sector or portion of land, as well as its residential, cultural, industrial or other destination are selected, with priority"[1].

Professor M. Gheorghita mentions that "The notion of the place of the crime in the case of the crime of infanticide encompasses a fairly diverse area, generated mainly by the actions of the perpetrator from the moment of birth until the moment of concealment or abandonment of the body. The traces discovered at the scene demonstrate, by highlighting the injuries and the ways in which the acts were committed, whether the specific case is one of infanticide or murder, contributing to an appropriate legal classification. Knowing the place where the crime was committed constitutes the starting point in outlining the circle of suspected persons and in identifying witnesses"[2].

According to the opinion of I. S. Fedotov, "In order to identify the traces of the crime of infanticide, it is necessary to accurately determine the spatial boundaries of the place where the intentional suppression of the life of the newborn occurred (room, apartment, house, yard, river bank, forest, field, etc.). It should be noted in mind that the place where the body was discovered

---

[1] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides*: A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 9-10.

[2] GHEORGHITA, M. *Treatise on Forensic Methodology.* Chisinau: CEP USM, 2015. 532 p. ISBN 978-9975-71-606-2, p. 174-175; AIONITOAIE, C.; I-E. SANDU; T. BUTOI et al. *Treatise on Forensic Tactics.* 2nd ed., revised and supplemented. Oradea: Ed. Carpati, 1992. 326 p. ISBN 973-95283-6-8, p. 27.

does not always coincide with the place where the actions aimed at suppressing the life of the newborn were taken. In the situation where, by the time the criminal investigation was initiated, the body had not been discovered, it is necessary to establish the place where it was hidden"[1].

Despite the diversity of data characterizing the places where infanticide crimes were committed, they present certain essential and dominant features that differentiate them from the surrounding environment and the conditions existing in the respective area. From this perspective, N. A. Solovyeva delimits the following main groups of places where infanticide crimes were committed and places where newborn bodies were discovered:

1) Places related to the dwelling and the land related to it: apartments, individual houses, dormitories, together with the adjacent land and auxiliary buildings located on them (sheds, baths, cellars, etc.), as well as spaces located in the immediate vicinity of the dwelling from the street (the porch of the house, the gate area). The defining characteristic of this category of places consists in their spatial delimitation and in the fact that they are related to the daily life of a limited circle of people who, as a rule, have access to them. The same category also includes places that, in recent years, have become increasingly frequently used to abandon the bodies of newborns, namely household waste collection platforms set up in the courtyards of apartment buildings, waste containers or household waste discharge pipes in residential buildings[2]. Judicial practice also records cases of placing newborn babies in polyethylene bags, depriving them of the opportunity to breathe, and leaving them on the balcony[3].

2) Places related to the conduct of a certain production or professional activity, such as the territories of factories, plants, combines, production departments, farms, construction sites, administrative buildings and other similar objects. In such situations, it can be assumed that the crime was committed by one of the employees of the respective unit, within which the birth also took place (in showers, basements, toilets, auxiliary rooms, dormitories of the enterprise, etc.). Places in this category are characterized, like those in the previous group, by their spatial delimitation and by the direct connection with the production process or with the professional activity carried out within the respective unit. At

---

[1] *Murder:* Private Investigation Methods: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 459.

[2] SOLOVYEVA, N. A. *Methodology of Investigating Infanticides*: A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 10-11.

[3] Criminal case No. 2012040540, Balti Municipal Prosecutor's Office; Sentence of Balti Court of June 30, 2014, Criminal file No. 1-57/14.

the same time, the criminal activity of the guilty person is, as a rule, in direct connection with this professional activity.

3) Places of discovery of the bodies of newborns located near national roads, railway stations, ports, bus stations and other transport hubs. The discovery of the body of a newborn in such places (in a pile of snow, on the side of the road, etc.) may indicate, on the one hand, that the crime was committed, as a rule, by a person coming from another locality, and not by a resident of the respective area, and, on the other hand, it may suggest that the birth took place in a medical institution, which excludes the possibility of the termination of the life of the newborn immediately after birth, within its premises. Of particular importance for the formation of a correct representation of the place where the birth took place and the distance between it and the place of discovery of the newborn's body is the existence or absence of traces of footwear, traces of means of transport (their number, direction of travel and their individualizing particularities), as well as traces of blood (their mutual location, configuration and age), postpartum secretions and amniotic fluid[1].

Of particular importance, according to N. P. Yablokov, is "...establishing the place of death. In the event that death occurred in a medical institution, the criminal investigation may examine the versions regarding the existence of medical errors or abuse of duty committed by medical personnel. It is known that the crime of infanticide is committed, as a rule, after birth, outside medical institutions, most frequently at the home of the newborn's mother, and the body is discovered, in most cases, near the place where the birth took place"[2].

In turn, *time* is one of the fundamental elements of the criminal event and of the forensic characteristics of infanticide crimes. In the investigation process, it is of essential importance to establish the moment of committing the actions aimed at suppressing the life of the newborn, as well as the moment of death. In cases concerning the crime of infanticide, these two moments may coincide or, on the contrary, may be distinct from a temporal point of view[3].

As a rule, this element of the forensic characteristic of the crime is analyzed by reference to the season and the time of day in which the act was committed. In certain situations, argue the authors L. Ia. Drapkin and V. N. Karagodin, "the temporal factor favors the perpetrator's exploitation of the

---

[1] SOLOVYEVA, N. A. *Methodology of Investigating Infanticides*: A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 11.

[2] *Forensic Science:* A Textbook for Universities. Responsible ed. N. P. Yablokov. Москва: BEK, 1997. 704 p. ISBN 5-85639-046-6, p. 543.

[3] *Murder: Private Investigation Methods*: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 462.

conditions existing at the scene of the crime or at the place where its traces or the corpse were hidden". Thus, in their opinion, "in certain time intervals and in certain places there are no strangers who could become eyewitnesses to the crime and could prevent its commission. At the same time, a certain season can facilitate the use of methods of concealing the crime or, on the contrary, can create objective obstacles to their implementation. For example, extremely low temperatures prevent the burial of the corpse of the remains of the victim in frozen soil"[1].

Similar to place, time, in the criminal process, appears both as an object of knowledge and as a means of investigating other elements of the criminal reality, including in the process of identifying the perpetrator.

Now, the time of the commission of the crime of infanticide constitutes an essential condition for the existence of the crime and, implicitly, of guilt. For the existence of the crime of infanticide, it is necessary that the action or inaction of the mother to suppress the life of the newborn child be committed during birth or immediately after birth. Establishing the manner in which the act was committed is important not only for qualification, but also for detecting traces of the crime. Thus, in the case of infanticide committed during birth, the place of commission of the crime always coincides with the place where the birth process took place[2].

Considering the qualification of infanticide as a component of a distinct crime, the time factor, according to N. A. Solovyeva, "acquires a special significance in cases in this category, manifested in two ways:

1) the need to establish the moment of the termination of the life of the newborn in relation to the moment of birth;

2) determining the moment of the commission of infanticide in relation to certain hours of the day, a specific day, the season and other relevant temporal landmarks.

In the situation where reference is made to the termination of the life of the newborn during birth or immediately after birth, this interval means a relatively short period of time, which begins with the onset of labor and extends immediately after its completion. The final moment of the period in question is to be established in each specific case. The delimitation of infanticide from other forms of murder, as well as the exact legal qualification of the act, depends on the correct resolution of this issue. This temporal

---

[1] DRAPKIN, L. Ya. and V. N. KARAGODIN. *Forensic Science*: Textbook. Moscow: TK Velbi, Prospect Publishing House, 2007, pp. 363-364.

[2] GHEORGHITA, M. *Treatise on forensic methodology.* Chisinau: CEP USM, 2015. 532 p. ISBN 978-9975-71-606-2, p. 174; AIONITOAIE, C.; I-E. SANDU; T. BUTOI et al. *Treatise on Forensic Tactics.* 2nd ed., revised and supplemented. Oradea: Ed. Carpati, 1992. 326 p. ISBN 973-95283-6-8, p. 27.

interval is circumscribed a period of particularly intense psychophysiological suffering, caused by the birth process[1].

In practice, when investigating crimes of infanticide in this category, the medico-legal criterion of the newborn is used, as N. A. Solovyeva points out, equivalent to a period of 24 hours after birth. Outside this interval, the suppression of the child's life can no longer be qualified as a crime committed by the mother during or immediately after birth. It is important to emphasize that, within the legal framework of infanticide, it is not necessary to establish special mitigating reasons in the actions of the mother (for example, the existence of particularly difficult personal or family circumstances). However, in order to prevent and combat these crimes, it is of major importance to establish all the circumstances that preceded the commission of the act[2].

In the practical research activity of the targeted crimes, as mentioned in the specialized literature, "it is necessary to precisely indicate the time interval of the postpartum period in which the mother suppresses her child, being under the influence of a psychotraumatic situation or a mental disorder that does not exclude discernment. It is assumed that such an interval may correspond to the child's age of up to 4 weeks. This is established by specialists starting from the medical (pediatric) notion of newborn"[3].

Meanwhile, in theory and practice, no single criterion has been developed based on which the moment of cessation of the influence of the psychotraumatic situation or the state of mental disorder that does not exclude discernment, caused by birth, can be assessed. Indicating a relatively short time interval from the moment of birth, in which this category of crimes can be considered a less serious form of murder, the law does not, however, establish exact limits, leaving the solution of this issue dependent on the concrete conditions in which the suppression of the life of the newborn is committed. In the specialized literature, it is proposed that, in such situations, the pediatric criterion of the newborn, equivalent to one month, be used. Beyond this term, the suppression of the life of the child, in the opinion of some authors, should be qualified as intentional murder[4].

---

[1] Franguloiu, S., *Crimes Against the Person, Crimes Against Property; Crimes Against the Authority and the State Border*, Legal Universe Publishing House, Bucharest, 2026, p. 128.
[2] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 12.
[3] *The Great Medical Encyclopedia:* in 30 volumes. Edited by B. V. PETROVSKY. Moscow, 1981. Volume 17. 544 p., p. 26.
[4] *Commentary on the Criminal Code of the Russian Federation.* Edited by N. F. Kuznetsova. Moscow: Zertsalo, 1998. 878 p. ISBN 5-88746-031-8, p. 238.

In connection with this issue, we will emphasize the following. On the one hand, such an element of the composition of the crime of infanticide, as the duration of the woman's being in a state of mental disorder that does not exclude discernment, caused by childbirth, as well as the duration of the influence on the fetus of a psychotraumatic situation after childbirth, must be classified as evaluative elements, the determination of which depends, in each specific case, on the circumstances of the case. On the other hand, it is obvious that there is a need for a single criterion for determining the duration of the period of time within which the act is qualified as infanticide[1], to exclude subjectivism and divergent interpretations of similar notions in the process of investigating these facts.

Or, as the author N. A. Solovyeva points out "…such a criterion must meet the following main requirements:

1) to represent a time interval in which the child is characterized as newborn and viable;

2) to constitute the period in which the woman is recognized as a laity, that is, in a special psychophysiological state, determined by the birth process;

3) be a short-term period, which results directly from the meaning of the law"[2].

As is known, in pediatrics, a newborn is considered a child from the moment of birth until the age of one month. This criterion is used to establish the duration of the time interval in which the act can be qualified as infanticide.

We, like other authors, do not agree with such an approach, since the qualifying element of this type of infanticide is the mental state of the mother, determined by the birth or the existence of some psychotraumatic factors, and not the state of the child. In addition, the term of one month represents a relatively long time interval. As a rule, there are no grounds for speaking about a pathological state in which the woman would have been during childbirth and for a certain period of time after it. At the same time, a psychotraumatic situation can exist for a variable duration, both before and after childbirth.

The author Kurguzkina E. B. rightly believes that "…in the case of the suppression of the life of the newborn by the mother, not during childbirth, but at a certain time interval after it, it is necessary to use the obstetric criterion of the newborn, equivalent to seven days from the moment of birth. During this period, in obstetrics and gynecology, the woman is considered a

[1] Franguloiu, S., *Crimes Against Physical Integrity and Health*, Legal Universe Publishing House, Bucharest, 2025, p. 69.

[2] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 13-14.

laity, and the child - a newborn. If even after the expiration of this one-week period the woman is in a state of mental disorder that does not exclude discernment or in a state of heightened nervous excitement, determined by the action of a psychotraumatic situation, this fact can later be used as a mitigating circumstance, but the act will be qualified as intentional murder. Thus, argues Kurguzkina E. B., in order to delimit infanticide from other forms of murder, not only the characteristic signs of the newborn must be established, but also the time interval that has elapsed since the moment of birth. At the same time, it is not such a time interval that can be determined unambiguously, as it is strictly individual from one woman to another. Therefore, it is proposed that the element "immediately after birth" be included in the category of evaluative elements"[1].

Researcher N. A. Solovyeva states the following: “As a factor, time is characterized by minutes, hours, days, number of days, months, years, etc. From a forensic perspective, the hours of the day are of particular importance. The hours and minutes of the infanticide, in addition to the circle of persons among whom the perpetrators may be, are often correlated with witnesses who observed, near the place where the newborn’s body was discovered, at an interval close to the moment of the infanticide, the possible perpetrators of the crime. This connection is usually made through the access routes to and from the place where the crime was committed or the place where the newborn’s body was discovered. In addition to the components of the day, namely hours and minutes, for establishing the circle of persons among whom the perpetrator may be, the temporal characteristics related to seasonality are also of particular importance: the season of spring thaw or of floods waters, the season of autumn rains, of winter snowfalls. It is precisely these temporal particularities that isolate certain localities, prevent the movement of the population and, consequently, the perpetrators are most frequently located and reside in the locality where the crime was committed"[2].

The next element that must, without a doubt, be included in the forensic characteristic is *the manner of committing the crime*. It is unanimously recognized, argues G. Zuikov, “that establishing the manner of committing the crime in a specific case consists in identifying the system of movements and operations through which the actions were carried out, as well as the

[1] KURGUZKINA, E. B. *Murder of a Newborn by a Mother: Nature, Causes, Prevention*. Voronezh: Voronezh Ministry of Internal Affairs of Russia, 1999. 151 p., p. 19.
[2] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 14-15.

system of actions united by a common purpose of the activity and which form its content"[1].

The manner of committing infanticide, being an element of the object of probation, represents at the same time the way of carrying out socially dangerous acts, accompanied by a series of qualifying circumstances, constituting a means of committing the crime that determines the production of criminal consequences and the appearance of other elements of the object of probation in cases regarding infanticide[2].

The forensic understanding of the manner (way) of committing the crime in question includes three stages of carrying out the criminal activity: preparation, commission and concealment of the crime. According to M. Gheorghita, "... the following methods of preparation for the murder of a newborn committed by the mother can be highlighted: 1) actions to conceal the pregnancy from those around them; 2) obtaining the means and instruments to commit the crime; 3) choosing the place of birth and the place where the life of the newborn is to be terminated; 4) receiving help from close people. The choice of the method of committing the act of violence in the case of infanticide is determined by the conditions in which the birth took place and the personal qualities of the perpetrator. The following methods of committing active infanticide are highlighted: mechanical asphyxiation, strangulation, drowning, burial, inflicting trauma, throwing the child, etc. Passive infanticide is manifested by abandoning the newborn in cold conditions, in isolated places, failure to provide care after birth.

Methods of concealing infanticide can be divided into methods of concealing the body and methods of concealing the traces and tools of the crime"[3].

Forensic knowledge of the manner of committing a crime and the possibility of examining it as a legality of evidence formation is based on the determined and repeatable nature of the ways of committing crimes. The factors that determine the ways of committing a crime are usually divided into external factors, i.e. those in the offender's environment, and internal factors, i.e. those related to his personality. External factors have a determining role, but they act through internal factors, namely the mental states and personality traits, beliefs, feelings, thoughts and knowledge of the offender, which, in turn, are determined

---

[1] ZUIKOV, G. G. *Establishing the Method of Committing a Crime with the Help of Forensic Expertise and Research*. Moscow: Publishing House of the Higher School of the Ministry of Internal Affairs, 1970. 45 p., p. 14.

[2] *Murder: Private Investigation Methods*: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 463.

[3] GHEORGHITA, M. *Treatise on Forensic Methodology*. Chisinau: CEP USM, 2015. 532 p. ISBN 978-9975-71-606-2, p. 172-173.

by the conditions of the external environment. In the category of objective external factors that determine the manner of committing a crime, contemporary forensic literature includes the following: the particularities of the object of the crime and the object of the criminal attempt; the objective conditions of the external environment (the conditions) in which the crime is committed; the existence or non-existence of an objective connection between the offender and the object of the criminal attack.

As is known, says N. A. Solovyeva, “the victim of infanticide is the newborn child. It is difficult to identify another being more helpless and defenseless than the newborn. Applying a minimum of effort in committing these acts leads to the desired result. It is precisely this circumstance that makes it possible to commit infanticide by inaction. By the objective conditions of the external environment is meant that environment in which infanticide is committed. Most often, this is the environment of childbirth. As a rule, women who seek to get rid of the child prefer to give birth alone, outside of medical institutions. In many cases, when labor begins, they isolate themselves in the shower room, in the bathroom or in the sanitary group. Objects discovered by chance or found in close proximity are used as instruments of crime. However, sometimes, the means of committing the crime can be prepared in advance (gauze pads, strings)"[1].

According to the same author, "The subjective factors that influence the choice of the manner of committing the crime include: the motive and goals of committing the crime, the personality traits of the subject of the crime, including knowledge, abilities, skills, habits, characterological profile, as well as somatic peculiarities. In this regard, argues N. A. Solovyeva, it should be emphasized that the woman who commits the suppression of the life of the newborn outside a state of emotional tension generated by a psychotraumatic situation, in the absence of any disorders of consciousness and without the manifestation of signs of mental disorder, commits the act consciously and oriented towards a specific goal. In conditions of heightened emotional tension, determined by the action of a psychotraumatic situation, the mother's behavior is largely influenced by affective motivation, which reduces her ability to adequately assess reality and her own actions, limits the ability to control on behavior and anticipation of its possible consequences. In such situations, the mothers commit impulsive suppressions of the newborn's life,

[1] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 15-16.

followed by illogical attempts to hide the act (they hide the child under the bathtub, in the toilet bowl, throw it out the open window)"[1].

The manner of committing the crime represents a synthetic notion, which encompasses a series of conscious and voluntary actions of the person, carrying semantic information regarding the reason and purpose of committing it[2].

According to the author I. S. Fedotov, "The logical and natural dependence of the ways of committing crimes on the circumstances that determine them, as well as of the traces of the crime on the way it was committed, is the basis of the forensic doctrine regarding the way of committing the crime, which constitutes the theoretical foundation of numerous practical recommendations of forensics"[3].

Taking into account the helplessness of the newborn, as mentioned by N. A. Solovyeva, "...infanticide can be committed by inaction, that is, by not providing help to the child to maintain his life (in particular, the mother does not feed the child, does not ensure that foreign particles do not enter his respiratory tract, to prevent asphyxiation, etc.). In such cases, a distinction must be made between not providing help as a method of infanticide and not providing help as a result of special circumstances that are not causally related to the mother's actions (for example, loss of consciousness). In the latter case, the woman does not bear criminal liability. The problem of establishing cases of passive infanticide in forensic practice and criminal prosecution is one of the most difficult. Such indications as the untying and uncutting of the umbilical cord, the presence of traces of blood on the body of the newborn and vernix caseosa (in the natural folds, even after washing, it may persist for several days after birth), the failure to detach the child from the placenta, the lack of clothes prepared in advance (diapers, clothes, other items intended to protect the newborn from hypothermia), wrapping it in cloths, paper, etc. cannot, however, constitute absolute evidence of infanticide by inaction".

The author also states that "a normal, mentally healthy woman, who does not suffer from mental disorders, during pregnancy and childbirth must be aware of everything that happens to her and, therefore, assume responsibility.

---

[1] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 16.

[2] *Murder: Private Investigation Methods*: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 465.

[3] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 18.

Therefore, after birth, she can and must, if there are no serious impediments in this regard, provide help to the newborn and take care of him"[1].

According to authors S. Brinza and V. Stati "... infanticide is considered a mitigated murder, the cause of the mitigation being the psycho-physiological state in which the victim's mother is. This situation is based on the circumstances that there may be psycho-physiological states that can cause the woman a disorder that could push her to take the life of her own child. These states, although not equivalent to a state of irresponsibility, nevertheless justify the mitigation of criminal liability"[2].

Evaluating as a constitutive sign of this crime, the particular state of mental or physical disorder, it also appears as an element of the forensic model and confirms the existence or non-existence of infanticide[3].

It should be noted, argues N. A. Solovyeva, that "...for identifying the perpetrator, the manner of committing infanticide, unlike other categories of murders, is not, as a rule, of essential importance. Any manner in this case will be characterized as immoral and negative. The manner of committing infanticide can contribute to the efficiency of the investigative activity only in correlation with other elements of the forensic characteristics of the investigated crimes - with the time, place of birth and the suppression of life, as well as with other circumstances, especially those indicating the existence of a psychotraumatic situation"[4].

The motive in the case of infanticide represents the subjective internal cause that determines the criminal behavior, its meaning, which is objectively related to both the circumstances of the external environment and the stable personality traits of the perpetrator. The foundation of the motives is the needs, but needs that reflect the internal environment of the personality[5].

Practice shows that childbirth in some women can occur in unfavorable conditions even in situations where there was no intention of infanticide. The reason for not providing help to the newborn may also be the woman's lack of experience, the presence of a state of acute fear during childbirth and

---

[1] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, pp. 21-22.

[2] BRINZA, S. and V. STATI. *Criminal Law Treatise.* Special Part. Vol. I. Chisinau, 2015. 1328 p. ISBN 978-9975-53-468-0, p. 318.

[3] GHEORGHITA, M. *Treatise on Forensic Methodology*. Chisinau: USM CEP, 2015. 532 p. ISBN 978-9975-71-606-2, p. 170.

[4] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 . ISBN 5-85534-904-7, p. 25.

[5] *Murder: Private Investigation Methods*: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 466.

immediately after it. It is also possible for the newborn to not be provided with help because the woman was not fully aware of the situation, possibly confusing a living child with a dead newborn. Thus, the problem of infanticide by inaction requires a careful and complex analysis of all the circumstances, both those that preceded the birth and those that occurred after it.

In cases of suspected infanticide by inaction, the forensic medical examination must first establish the real cause of the newborn's death, exclude the possibility of active infanticide and record in the autopsy report any evidence of care and assistance provided to the newborn or, conversely, state their absence. The final assessment of the manner of death, including the existence or non-existence of infanticide by inaction, rests with the criminal investigation body, based on the evidence provided and the conclusions of the forensic medical examination[1]. The forensic examination of the newborn's corpse determines whether the child was born alive or dead, whether he was born at term or prematurely and non-viable, as well as the duration of his survival after birth, as well as other relevant circumstances[2]. An autopsy of a newborn's body can determine whether the death was pathological or violent. Violent death can be accidental or infanticide, although death can occur intrauterine (before birth), during birth, or after birth[3].

It goes without saying, as mentioned in the specialized literature, that "the intentional suppression of life by passive means will be distinguished from the negligent causing of death by omission of providing help. For the existence of intention, it is necessary for the woman not only to know the importance of a certain type of care, not only to foresee the danger of the consequences of these inactions for the life of the newborn in the specific case, but to refuse to provide help precisely for this purpose. At the same time, it should not be forgotten that the act of childbirth involves numerous risks for the young woman, so that injuries and death can be the innocent result of a complex of accidental circumstances; in such situations, more than anywhere, the fundamental principle of criminal law must be taken into account - any doubt is interpreted in favor of the accused person"[4].

---

[1] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 22.

[2] AVERYANOVA, T. V.; R. S. BELKIN; Yu. G. KORUKHOV and E. R. ROSSINSKAYA. Forensic Science: Textbook. 4th edition, revised and supplemented. Moscow: NORMA, 2016. 928 p. ISBN 978-5-91768-334-8, p. 690.

[3] GROZA, I. L. and V. ASTARASTOAIE. *Introduction to Forensic Medicine for Lawyers.* Bucharest: Ed. C. H. BECK, 2007. 279 p. ISBN 978-973-115-089-5, p. 143.

[4] SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7, p. 23.

The commission of infanticide crimes, according to I. S. Fedotov, "is characteristic of parents who have lost the ability to make a conscious choice and act consciously, who have lost control over their own impulses, yielding to the causal determinism of the internal psyche, excluding from it the parental instinct towards the child"[1].

Conclusions

Concluding the examination of the issue of the forensic characteristic of the crime of infanticide, we formulate the following conclusions:

The forensic characteristic of infanticide has an autonomous importance and must be delimited from the general forensic characteristic of murders, since it presents specific features, peculiar exclusively to this category of crimes. Through its content, the forensic characteristic of infanticide must provide an objective picture of the analyzed act, including its essential elements that serve as a starting point for the development of the investigation methodology, namely: a) the manner of committing the crime (the perpetrator's behavior, the instruments and means used, the conditions in which the act was committed, the criminal consequences, etc.); b) the places where traces of the crime and criminal activity can be identified, as well as their nature.

The content of the conditions of infanticide includes factors such as time, place, material, natural-climatic conditions and other circumstances of the environment existing at the time of the crime, which influence the manner of commission and its mechanism, manifesting itself through various categories of traces.

The forensic characteristic of infanticide represents a system of interdependent elements, the knowledge of which contributes essentially to the investigation and discovery of the crime. It has a dynamic character: at the beginning of the criminal investigation it is incomplete and includes only certain elements, but these are sufficient for the development of the initial criminal investigation plan. Each newly identified element allows the completion, and often the specification or modification of the criminal investigation plan. Finally, the practical importance of the forensic characteristic of infanticide lies in the fact that it can be used by the criminal investigation body exclusively as indicative information in the investigation process.

References:

[1] *Murder: Private Investigation Methods: Lecture Course.* Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7, p. 471.

1. AIONITOAIE, C.; I-E. SANDU; T. BUTOI et al. *Treatise on forensic tactics.* 2nd ed., revised and supplemented. Oradea: Ed. Carpati, 1992. 326 p. ISBN 973-95283-6-8.
2. BRINZA, S. and V. STATI. *Criminal Law Treatise. Special Part.* Vol. I. Chisinau, 2015. 1328 p. ISBN 978-9975-53-468-0.
3. Criminal case No. 2012040540, Balti Municipal Prosecutor's Office.
4. Franguloiu, S., *Criminal law. Special part. Crimes against the person, crimes against property; crimes against the authority and state border,* Legal Universe Publishing House, Bucharest, 2026.
5. Franguloiu, S., *Crimes against bodily integrity and health,* Legal Universe, Bucharest, 2025.
6. GHEORGHITA, M. *Treatise on forensic methodology*. Chisinau: CEP USM, 2015. 532 p. ISBN 978-9975-71-606-2.
7. GROZA, I. L. and V. ASTARASTOAIE. *Introduction to Forensic Medicine for Lawyers*. Bucharest: Ed. C. H. BECK, 2007. 279 p. ISBN 978-973-115-089-5.
8. RUIU, M. *Forensic methodology*. Bucharest: Legal Universe Publishing House, 2013. 263 p. ISBN 978-606-673-233-8.
9. Sentence of the Bălți Court of Justice of June 30, 2014, Criminal Case No. 1-57/14.
10. AVERYANOVA, T. V.; R. S. BELKIN; Yu. G. KORUKHOV and E. R. ROSSINSKAYA. *Forensic Science:* Textbook. 4th edition, revised and supplemented. Moscow: NORMA, 2016. 928 p. ISBN 978-5-91768-334-8.
11. *The Great Medical Encyclopedia*: in 30 volumes. Edited by B. V. PETROVSKY. Moscow, 1981. Volume 17. 544 p.
12. DRAPKIN, L. Ya. and V. N. KARAGODIN. *Forensic Science*: Textbook. Moscow: TK Velbi, Prospect Publishing House, 2007. 663 p. ISBN 978-5-482-01380-9.
13. ZUIKOV, G. G. *Establishing the Method of Committing a Crime with the Help of Forensic Expertise and Research.* Moscow: Publishing House of the Higher School of the Ministry of Internal Affairs, 1970. 45 p.
14. *Commentary on the Criminal Code of the Russian Federation.* Edited by N. F. KUZNETSOVA. Moscow: Zertsalo, 1998. 878 p. ISBN 5-88746-031-8.
15. *Forensic Science*: Textbook for Universities. Ed. N. P. YABLOKOV. Moscow: BEK, 1997. 704 p. ISBN 5-85639-046-6.
16. KULIKOV, V. I. *The Circumstances of a Crime and Their Forensic Significance*: Abstract of a dissertation … for the degree of Candidate of Legal Sciences. Moscow, 1983. 23 p.

17. KURGUZKINA, E. B. *Murder of a newborn by a mother: nature, causes, prevention*. Voronezh: Voronezh Ministry of Internal Affairs of Russia, 1999. 151 p.
18. SOLOVYEVA, N. A. *Methodology of Investigating of Infanticides:* A textbook. Volgograd: Volgograd State University Publishing House, 2004. 140 p. ISBN 5-85534-904-7.
19. *Murder: Private Investigation Methods*: Lecture Course. Edited by A. M. KUSTOV. Moscow: Publishing House of the Moscow Psycho-Social Institute; Voronezh: Publishing House of NPO MODEK, 2010. 879 p. ISBN 978-5-9770-0382-7.

PARTICULARITIES OF MEDIATION IN FAMILY DISPUTES INVOLVING MINOR CHILDREN

Constantin MIHALESCU[1]

Abstact:

Compared to other ways of resolving family disputes, family mediation meets a consensus among the authors of the specialized literature regarding the advantage offered, especially when, in addition to differences arising from mentality, culture, religion, patrimony whether or not arising from marriage and/or commercial business, children are also involved in the dispute. In this context, sociologists increasingly and imperatively invoke the increase in the educational function of the family and the need for social intervention to stimulate parental responsibility, and the family, as the main culprit for some of the social evils, child deviance, child delinquency, violence, etc., is the one to blame, asserting more or less veiledly, more or less justified, that it would be enough for parents to be stimulated or forced to fulfill their obligations with a greater sense of morality or, at least, of civic responsibility, for undesirable social phenomena to be diminished, if not eliminated.

Keywords: *family mediation, principle of the best interests of the child, divorce, mediation law, family, childhood.*

I. Introduction

Family mediation is a new professional area, with an innovative character, which has as its ideal application sector the family system [1, ANCHES, Diana I, 2010]. The specificity of this type of mediation lies in the fact that it does not aim to solve all the problems arising from the family conflict, but only to favor the reopening of the communication and relationship processes of the parties. Among the multiple definitions of family mediation given in the specialized literature, we retain as conclusive the one that qualifies family mediation "*as an intervention, within a dispute between two parties, of an impartial, neutral and open to concessions third person, who is not invested with decision-making authority, but who helps them reach a solution that results from the mutual and subjective satisfaction of the claims and that is common to the proposed objective*" [13, MIHALESCU C. 2022. pp. 108 – 119].

Considering that family conflicts are difficult for both spouses and children, the entire family can be affected, the family mediator has the obligation to carry out the mediation procedure in such a way that the best interest of the child is not harmed in any way.

[1] PhD student at the Doctoral School in Law, Political and Administrative Sciences of the ASEM / USPEE National Consortium "Constantin Stere"; Permanent legal advisor, authorized mediator, Email address: constantin_mihalescu@yahoo.com https://orcid.org/0000-0002-8762-0311

In all countries of the European Union, parental authority automatically belongs to the mother and, within married couples, also to the father. In most cases, parents exercise parental authority jointly. In this context, sociologists increasingly and imperatively invoke the increase in the educational function of the family and the need for social intervention to stimulate parental responsibility, and the family, as the main culprit for some of the social evils, child deviance, child delinquency, violence, etc. is the one to blame, asserting more or less veiledly, more or less justified, that it would be enough for parents to be stimulated or forced to fulfill their obligations with a greater sense of morality or, at least, of civic responsibility, for undesirable social phenomena to be diminished, if not eliminated [12. MIHALESCU C. 2025, pp. 52 – 67].

II. Research methodology

Starting from a retrospective, historical approach to the researched field, the study offers the possibility of understanding the importance of resolving disputes in the family field and the businesses carried out in this framework, regulated by civil, commercial, mediation legislation, etc., as well as the gaps and traps hidden in these legislations. At the same time, the article outlines the perspectives of this issue and helps to master its theoretical foundations and the practical applicability of this theoretical knowledge obtained.

Mediation legislation, in particular, as a distinct special legislation belonging, as a rule, to civil law, is regulated by legal norms that have as a substitute the same methods of application to legal knowledge and action as any branch of law. Mediation legislation, by its nature and destination, is a phenomenon with many and profound social and human connections and interferences.

The research of the phenomenon, part of civil law, specifically addresses aspects regarding the possibility of establishing mandatory mediation in this specific field, part of the research of the legal phenomenon, and is carried out by using the same methods used in the study of law: general methods and concrete methods.

In the study, various general methods could be used, such as: the method of generalization and abstraction, the logical method, the historical method, the comparison method, the sociological method, the method of systemic analysis and the prospective or forecasting method.

II. Legal framework in which family mediation services operate

The seat of the subject of mediation in family disputes in the Republic of Moldova is represented by the provisions of art. 27 of the Mediation Law which states:

(1) Disagreements between spouses regarding the continuation of the marriage, the exercise of parental rights and obligations, the establishment of the children's domicile, the maintenance of children and other family members unable to work, as well as any other disagreements that arise in family relations may be subject to mediation.

(2) The mediation clause may be included in the marriage contract.

(3) In family disputes that concern the interests of the child, the parties are entitled to submit the opinion of the guardianship authority.

(4) If circumstances arise during the mediation of a family dispute that create or could create a danger to the normal growth and development of the child or that harm his or her legal interests, the mediator is obliged to inform the guardianship authority and is entitled to withdraw from the mediation process.

(5) The transaction regarding the settlement of the family dispute, which concerns the normal growth and development or the best interests of the child, shall be submitted by the parties to the guardianship authority competent for information." A pertinent analysis of this aspect regarding family relations and the particularity of mediation in family disputes, in the current international context, can be done by referring to the legislation in Romania and the international treaties to which the Republic of Moldova is a party. Therefore, in Romania, the new regulations have also brought news regarding the parenting plan.

Parenting plans appeared in Romania for the first time with the mediation law which provided in articles 2 and 64 the possibility for parents, based on a mediation agreement, to decide on the way of raising and educating children after divorce.

Thus, although in Romania, until 2011, with the entry into force of the new Civil Code, only the notion of sole custody was legally applicable, in fact, before 2011, through mediation agreements, de facto arrangements of legal joint custody were made.

Due to the introduction, through the new Civil Code, of the institution of shared parental authority, the notion of a parental plan has legal support through art. 506 of the new Romanian Civil Code.

The new Civil Code, regulates family relations in Book II entitled "*On the Family*" (art. 258 -534), marking a return to the tradition of incorporating the regulations of family relations into the Civil Code, a solution established by the first modern Civil Code, the one from 1864. Consequently, through the law for the implementation of the new Civil Code, the Family Code was repealed.

In the Republic of Moldova, Article 2 of the Family Code lists the basic principles of family law, universally valid principles enshrined in Art. 48 of the Constitution as in any democratic country:

"1) The family and family relations in the Republic of Moldova are protected by the state.

2) Only marriage concluded at the state civil status bodies (hereinafter referred to as civil status bodies) generates the rights and obligations of spouses provided for by this Code.

3) Family relations are regulated in accordance with the following principles: monogamy, freely consented marriage between a man and a woman, equality of rights of spouses in the family, mutual moral and material support, conjugal fidelity, priority of child education in the family, manifestation of care for the maintenance, education and protection of the rights and interests of minor and disabled family members, amicable settlement of all problems of family life, inadmissibility of deliberate interference in family relations, free access to judicial protection of the rights and legitimate interests of family members."

Defining the concept of family raises difficulties, and can be viewed from both a sociological and a legal point of view [3.FILIPESCU, I. P. 1998].

The protection and promotion of children's rights is one of the most sensitive indicators of the health of a society and represents one of the favorite themes of the social and human sciences.

Recent studies in the sociology of childhood have highlighted the contradictory dynamics of the processes that shape childhood together with the role of the family as a natural protective environment and institution for the socialization of the child [4. FLORIAN, 2005]

In Romania, through Law no. 272/2004 on the protection and promotion of the rights of the child [5. Law no. 272/2004], and in the Republic of Moldova through Law no. 338/1994 on the rights of the child [6 Law on the Rights of the Child no. 338/1994], with provisions identical to those of the Convention, the legal framework regarding the respect, promotion and guarantee of the rights of the child was established, as well as the obligation of public authorities, authorized private entities, as well as natural and/or legal persons responsible for the protection of the child to respect, promote and guarantee the rights of the child.

The Romanian Law no. 272/2004 on the protection and promotion of the rights of the child, as well as the Moldovan Law no. 99/2010 on the legal regime of adoption [7. Law no. 99/2010 on the legal regime of adoption], also establish the adoption regime [8. Law no. 273/2004 on the legal regime of adoption and the methodological norms for its application.], in accordance with the requirements of the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, ratified by Law no. 84/1994 [9. Law no. 84/1994] .

According to these regulations, parents are responsible for the upbringing and education of children and for the administration of any assets they may have. They also have the right to represent the interests of children in court.

In all countries of the European Union, parental authority automatically vests in the mother and, in married couples, also in the father. In most cases, parents exercise parental authority jointly.

In the new Romanian Civil Code, art. 258, as well as in art. 2 of the Family Code of the Republic of Moldova, the basic principles of family law are listed, universally valid principles enshrined in art. 48 of the Constitution as in any democratic country: Regarding child protection, according to art. 260 of the New Romanian Civil Code, "*Children born outside of wedlock are equal before the law with those born within wedlock, as well as with those adopted".* The text has a counterpart in the provisions of art. 48 paragraph (3) of the Constitution, according to *which "children born outside of wedlock are equal before the law with those born within wedlock."* Similarly, art. 50 of the Constitution of the Republic of Moldova stipulates: "*Mother and child have the right to special help and protection. All children, including those born outside wedlock, enjoy the same social protection.",* a legal norm also taken over by art. 50 of the Family Code which states: Children born out of wedlock have the same rights and obligations towards their parents and relatives as those born to married persons.

Romania is also a party to the European Convention on the Legal Status of Children Born Out of Wedlock, adopted in Strasbourg on October 15, 1975 and ratified by Law no. 101/1992, and the Republic of Moldova is also a party to this Convention, which was ratified by Law no. 722/2001, in force since 15.06.2002.

IV. The prospect of creating new modern doctrinal foundations in Civil Law in the Republic of Moldova

This aim became possible with the adoption of art. 8 of the Maastricht Treaty concluded on 7 February 1992, a treaty that officially established the European Union. The Maastricht Treaty was a legal instrument necessary to accelerate European integration. Article 8 of this Treaty provides that: *"- Art. 8. (paragraph 1) The Union shall develop privileged relations with its neighbouring countries, with a view to establishing an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. - (paragraph 2) Within the meaning of paragraph (1), the Union may conclude special agreements with the countries concerned. Such agreements may include reciprocal rights and obligations and the possibility of carrying out joint actions. Their implementation shall be the subject of regular consultation."*

This legal instrument made it possible for the Republic of Moldova to be included in the European Neighbourhood Policy (ENP) since its launch in March 2003.

Along with Armenia, Azerbaijan, Belarus, Georgia and Ukraine, the Republic of Moldova participates in the Eastern Partnership (EaP) – one of the dimensions of the ENP, launched in 2009. Since 2005, the EU Delegation Office has also been located in Chisinau following the completion of the Lisbon Treaty.

With the entry into force on 1 July 2016 of the EU-Republic of Moldova Association Agreement, a new era has opened that can ensure the consolidation of principles and values common to the European space. Recently, at the European Council on 23 June 2022, EU leaders granted the Republic of Moldova the status of EU candidate country, and in this context, they invited the European Commission to submit to the Council a report on the fulfilment of the conditions set out in the Commission's opinion on the Republic of Moldova's application for accession.

Regarding the institution of mediation, the Republic of Moldova has usually given precedence to the regulations in Romania. In Romania, until 2011, with the entry into force of the new Civil Code, only the notion of sole custody was legally applicable. In fact, before 2011, through mediation agreements, de facto arrangements of legal joint custody were made.

Due to the introduction, through the new Civil Code, of the institution of joint parental authority, the notion of a parental plan assumed through mediation, has legal support through art. 506 of the new Civil Code.

Parental plans became well-known in Romania, with the mediation law which provided in articles 2 and 64 the possibility for parents, based on a mediation agreement, to decide on the manner of raising and educating their children after divorce.

The first mediation law in the Republic of Moldova, Law no. 134/2007 on mediation, did not arouse great interest among litigants, as was to be expected. Criticisms frequently appeared both from civil society and mediators, as well as from specialists from the country and abroad.

2014 was the year in which in the Republic of Moldova, legal and mediation specialists were looking for ideas, by any means, to succeed in finalizing the draft of the new law on mediation, namely Law no. 137/2015 on mediation. Articles 182^1, 182^2, 182^3, 182^4 and 182^5 of the Law on the Code of Civil Procedure no. 225 of May 30, 2003, introduced by Law no. 31 of 17.03.2017 supplemented with a new chapter XIII^1 "Judicial Mediation", in force since 05.05.2017, were also the subject of an exception of unconstitutionality and articles were written to the detriment of this legal institution, including the undersigned [12, MIHALESCU, C. Dreptul, 2025, pp.62-80]. Currently, judicial mediation is repealed. Mediation in civil

disputes and with an element of foreignness has its subject matter in art.25 of the mediation law, which provides that:

"(1) Civil disputes may be subject to mediation regarding the rights and obligations that are or may be subject to examination in court or arbitration and which the parties may freely dispose of through a transaction, under the terms of the law.

(2) Mediation in civil disputes may take place outside the judicial or arbitration process, as well as within the judicial or arbitration process."

Therefore, not all rights and obligations of the parties may be subject to mediation. The contractual legal nature of mediation has determined the legislator to limit the scope of this institution only to those conflicts that concern the subjective rights that the parties may have.

Art. 25 paragraph 1) of Law no. 137/2005 on mediation in Moldovan law, provides that: *"Civil disputes regarding the rights and obligations that are or may be subject to examination in court or arbitration and that the parties may freely dispose of through a transaction, under the terms of the law, may be subject to mediation."*

Related to the topic of this article, in the Republic of Moldova, there are in the Republic of Moldova, we have the provisions contained in Law No. 137/2015 on mediation and the Council of Europe Directives and Recommendations on mediation activity, and references to other normative acts or those affecting the mediation procedure come from the regulations of the Civil Code, the Civil Procedure Code, the Labor Code, the Consumer Protection Law, the Administrative Litigation Law, etc.

V. Conclusions

Compared to other ways of resolving family disputes, family mediation meets a consensus among the authors of the specialized literature regarding the advantage offered, especially when, in addition to the differences arising from mentality, culture, religion, patrimony from marriage and/or commercial affairs, children are also involved in the dispute.

A first advantage is the fact that important decisions are made directly by those affected, and not by another person. Another advantage is that the parties are in control, in the sense that, by doing so, they regain their dignity and self-respect, and the law ensures, in principle, protection against various aggressions or state intrusions, but, at the same time*, "this encourages isolation and increases the need to establish this protection"*[2 AUERBACH, J., 182 p.]

An advantage of family mediation is that even if the parties do not reach an agreement, there is the possibility of improving communication opportunities, of saving the relationship, and if a mediation agreement is

reached, there are greater chances of it being respected by the parties than if there were an imposed solution.

At the same time, various means of evidence can be used throughout the mediation process, including expert reports, child psychologists, financial analysts, etc., and once mediation is used to reach an understanding on the issues, the path to divorce before the courts will be simplified, and the procedure will no longer be contested in court. However, mediation does not work for everyone, as there are people who prefer the judicial path but there are situations, such as the case where one of the spouses works abroad, and one or both can be represented before the mediator by another person, the mediator with tact and patience can manage to resolve an amicable divorce in which minor children are also involved and in which it was necessary to draw up a detailed parenting plan to be approved by the court.

References

- 1. ANCHEȘ, Diana- Ionela, Mediation in social-political life. Foreword by prof. univ. dr. Liviu-Petru Zăpârțan. Bucharest: Editura Universitară, 2010, 386, ISBN 978-606-591-083-6.
- 2. AUERBACH, J. S. Justice Without Law?. In: AUERBACH J. S., Justice Without Law? Oxford: Oxford University Press, 1983, ISBN-13: 978-0195034479, ISBN-10: 0195034473, 182 p.
- 3. FILIPESCU, Ion P. Treatise on Family Law. Bucharest: ALL Educațional SA Publishing House, 1998.
- 4. FLORIAN, E. Protection of Children's Rights. Bucharest: ALL Beck Publishing House, 2005
- 5. Law no. 272/2004 on the protection and promotion of children's rights. Published in the Official Gazette no. 557 of June 23, 2004 and entered into force on January 1, 2005, with the exception of the provisions of art. 17 paragraph 2, art. 19 paragraph 3, art. 84 paragraph 2, art. 104 paragraph 2, art. 105 paragraph 5, art. 107 paragraph 2 and 117, which entered into force 3 days after the date of publication of the law.
- 6. Law on the Rights of the Child no. 338/1994. [cited 21.02.2026]. Available: https://www.legis.md/cautare/getResults?doc_id=94939&lang=ro
- 7. Law no. 99/2010 on the legal regime of adoption. [cited 12.12.2022]. Available: https://www.legis.md/cautare/getResults?doc_id=133275&lang=ro#
- 8. Law no. 273/2004 on the legal regime of adoption and the methodological norms for its application. [cited 21.02.2026]. Available: http://legislatie.just.ro/Public/DetaliiDocument/52896
- 9. Law no. 84/1994. Published in the Official Gazette no. 298 of 21 October 1994. Available: http://legislatie.just.ro/Public/DetaliiDocumentAfis/4338

▪ 10. MIHALESCU Constantin, The Culture of Mediation in the Romanian Area. Past, Present, and Future Trends - Magazine, Dreptul – Law Review no.2, ISSN index, Bucharest, Romania, 2021 https://www.internationallawreview.eu/article/the-culture-of-mediation-in-the-romanian-area-past-present, pp 83-96.

▪ 11. MIHALESCU Constantin, "Considerations on the Origin and Evolution of Conflict Mediation in Social Life (SDGs)", in Journal of Lifestyle and SDG,s Review, Florida, USA, Vol 5, pe06437, pag:,1 -19, 2025, DOI: https://doi.org/10.47172/2965-730X.SDGsReview.v5.n04.pe06437

▪ 12. MIHALESCU Constantin, Introduction of mandatory mediation in disputes between traders from Romania and the Republic of Moldova, in the magazine Dreptul, no. 5, 2025, pp. 52 – 67, Romania,

▪ 13. MIHALESCU Constantin, Arguments regarding the introduction of mandatory mediation in certain of disputes, Magazine Supremația Dreptului, no. 2, 2022, Chișinău, Republic of Moldova, p.p. 108 – 119, available at. https://doi.org/10.52388/2345-1971.2022.e2.10

LEGAL ASPECTS REGARDING THE INVESTIGATION OF EVENTS IN THE SPHERE OF EMPLOYMENT RELATIONS

Isabela STANCEA[1]

Abstract:

Occupational health and safety is a fundamental area of labor law, with the main objective of preventing occupational accidents and occupational diseases, as well as protecting the physical and mental integrity of workers. In Romania, the main regulatory framework is Law no. 319/2006 on occupational safety and health, supplemented by Government Decision no. 1425/2006, which establishes the methodological rules for application.

This area has an eminently preventive nature, but in practice, situations frequently arise in which, after an event occurs, complex legal issues arise related to the investigation of the accident, the establishment of liability and the recognition of legal consequences.

Keywords: *health, safety, occupational accident, term.*

Occupational health and safety is a fundamental area of labor law, with the main objective of preventing occupational accidents and occupational diseases, as well as protecting the physical and mental integrity of workers. In Romania, the main regulatory framework is Law no. 319/2006 on occupational safety and health, supplemented by Government Decision no. 1425/2006, which establishes the methodological rules for application.

This area is eminently preventive in nature, but in practice, situations frequently arise in which, after an event occurs, complex legal issues arise related to the investigation of the accident, the establishment of liability and the recognition of legal consequences.

This paper aims to analyze not only the general framework of occupational health and safety and the procedure for investigating occupational accidents, but also the limiting nature of the situations in which the law allows the extension of the investigation to the higher hierarchical forum, as well as other legislative gaps, such as: the lack of a clear procedure in the event of disability, following the approval of the file by the labor inspectorate.

As we have shown, occupational health and safety are mainly regulated by Law no. 319/2006 on occupational health and safety, as amended and supplemented, and by Legislative Decree no. 1425/2006, respectively the methodological rules for the application of this law, as well as Law no. 346/2002 on insurance for occupational accidents and occupational diseases.

According to the law, the employer has a general obligation to ensure the safety and health of workers in all aspects related to work, including through the prevention of occupational risks and training of personnel.

[1] University lecturer, PhD, "Constantin Brâncoveanu" University of Pitești

Work accidents are classified according to the consequences:

- accidents with temporary incapacity for work;
- accidents with disability;
- fatal accidents;
- collective accidents.

The law establishes the imperative obligation to communicate any event. However, not in all cases, the investigation is mandatory, but it is carried out depending on the severity of the consequences, as follows:

- by the employer for accidents that have caused temporary incapacity for work;
- by the territorial labor inspectorates for accidents that have caused disability, death or collective accidents.

This obligation has the role of establishing the circumstances of the accident, identifying its causes, determining any responsibilities regarding its occurrence, but, above all, of ordering preventive measures.

The result of the investigation is materialized in a file and a report, based on which the accident is registered.

The investigation procedure is detailed in the methodological norms. This includes:

- communication of the event;
- establishment of the investigation commission;
- collection of evidence;
- preparation of the investigation file;
- approval by the Labor Inspectorate.

The research file must contain multiple documents (statements, medical documents, sketches, etc.), according to methodological norms.

The deadlines are, in principle, short. For example, the investigation of an event resulting in temporary incapacity must be completed within a maximum of 10 working days.

An essential aspect is the fact that the law and methodological norms only provide in a restrictive manner the situations in which the investigation can be extended.

Although the legal texts do not provide an exhaustive formulation in a single article, the systematic interpretation of the norms leads to the conclusion that the deadlines are strictly established, the extension of the investigation can only be requested in a very exceptional manner, it can only intervene in justified cases, such as:

- the need to obtain additional documents;
- technical or medico-legal expertise;
- the impossibility of hearing the persons involved.

In practice, however, labor inspectors do not have unlimited discretion, but must fall within these situations, which reflects the principle of legality and celerity of the procedure.

This limiting nature is essential for protecting the rights of victims, avoiding delaying the investigation and ensuring a correct record of accidents.

The text correctly highlights the fact that the activity of labor inspectors is governed by the principle of legality, as they do not have absolute discretion regarding the extension of the investigation of events. Regulating the limiting nature of the situations in which an extension of the investigation period may be ordered has the role of ensuring procedural discipline and preventing possible abuses or unjustified delays. At the same time, this limitation contributes to the implementation of the principle of celerity, which is extremely important in the field of work accidents, where the rapid establishment of the circumstances and liability has direct implications for the rights of victims.

However, the analysis of this rule cannot be carried out exclusively from a theoretical perspective, as it is also necessary to report on the practical realities of the activity of the territorial labor inspectorates.

In particular, there are numerous situations in which labor inspectors are objectively unable to comply with the legal deadline for completing the investigation, of 15 days, without these circumstances falling within the limiting cases provided for by law for extension. Such situations include, for example, the temporary absence of the inspector for legal reasons (vacation leave, sick leave), staff turnover, as well as the high volume of activity, especially during periods when a large number of events, campaigns or inspections are recorded.

This reality generates an obvious tension between the requirements of the law and the concrete possibilities of its application. On the one hand, the legal norm requires strict compliance with the deadlines and drastically limits the possibility of extension, in order to protect victims and ensure a quick and efficient procedure. On the other hand, the lack of minimum flexibility in the regulation may lead to situations in which inspectors are either forced to complete investigations formally, without a complex analysis, or risk violating legal deadlines for reasons beyond their control.

In this context, the limiting nature of the cases of extension, although justified in principle, may become excessively rigid in practice. The lack of provisions allowing for the consideration of objective impediments of an administrative or organizational nature creates the risk of affecting the quality of the investigation. However, the main purpose of the procedure is not only the speed, but also the accuracy of establishing the causes and responsibilities, essential elements for preventing similar events in the future.

In addition, this regulatory rigidity may also have indirect consequences on the rights of victims. A lapidary or incomplete investigation

may lead to an erroneous classification of the accident or to the omission of relevant factors, which may subsequently affect access to compensation or other legal rights. Thus, paradoxically, a regulation designed to protect victims may produce contrary effects in certain situations.

In conclusion, although the principle of limiting the cases of extension of the investigation correctly reflects the requirements of legality and speed, it should be correlated with a more flexible approach, allowing for the consideration of objective impediments. A possible legislative intervention could introduce additional cases or a general clause that would allow for the justification of the extension in well-founded situations, without affecting the fundamental purpose of the regulation.

After the investigation is completed, the file is sent for approval to the Labor Inspectorate. The procedure involves verifying the legality of the investigation, confirming or denying the classification as a work accident, and requesting any additional information. After approval, the file produces legal effects, being used for the official registration of the accident, granting social security rights and establishing liability. The norms also provide for situations of completing the file and re-approval.

The proposed text captures a real and frequently encountered problem in practice, namely the lack of clear regulation regarding the situation in which the consequences of a work accident worsen after the completion and approval of the initial investigation. The observation that an event can initially be classified as an accident with temporary incapacity for work, in order to subsequently lead to disability, is correct and reveals a natural dynamic of the evolution of the victim's health, which the legislator has not adequately regulated.

It is justified to point out that Law No. 319/2006 and the methodological norms regulate in detail the initial investigation procedure, but do not provide explicit solutions for the hypothesis of a subsequent modification of the consequences of the accident. This legislative omission generates significant difficulties in practice, as there is no clear procedural framework to establish whether and how the investigation is resumed, who has the power to intervene and what are the legal effects of the new situation.

The direct consequence of this gap is also correctly highlighted, namely the emergence of non-unitary practices at the level of territorial labor inspectorates. In the absence of express legal provisions, each administrative structure may adopt different solutions: either completing the existing file, or resuming the investigation, or drawing up a new report. Although these solutions may be justified from the perspective of practical necessity, they do not have a clear legal basis, being the result of interpretation and administrative practice. This situation directly affects legal certainty, both for employers and for victims, who cannot anticipate with certainty how the case will be resolved.

The text also correctly captures the impact on social security rights. In the absence of a clear procedure for reclassifying the accident, delays or difficulties may arise in granting disability benefits, which runs counter to the purpose of social protection. In this sense, the legislative gap is not purely theoretical, but produces concrete effects on injured persons.

The invocation of fundamental principles – the security of legal relations, the predictability of the law and the effective protection of workers – is fully justified. Any legal norm must be clear, accessible and predictable, so that the recipients can adapt their conduct. In the case under consideration, the lack of explicit rules creates uncertainty and makes the position of the victim, who should benefit from increased protection, vulnerable.

The proposed legislative intervention is pertinent and necessary. The express regulation of the accident reclassification procedure would contribute to the standardization of practice and the elimination of uncertainties. It is rightly suggested to establish the competence of the bodies involved, the deadlines and the necessary documents, as well as to clarify the effects on the rights of the victim. The introduction of a separate article in the methodological norms would represent an appropriate solution, since these norms already detail the investigation procedure and can more easily integrate such an addition.

As for the proposed solution – resuming the investigation and issuing a new report – this is logical from a legal point of view, since the modification of the consequences of the accident may imply a change in the classification and, implicitly, the investigation competence. However, in order to avoid overlaps or contradictions, it would be necessary for the law to clearly specify the relationship between the initial and subsequent investigation, as well as the way to capitalize on the findings already made.

In conclusion, the text correctly highlights an important legislative gap in the field of occupational safety and health, demonstrating that, although the existing regulatory framework is generally coherent, it does not cover all practical situations. The need for legislative intervention is evident, in order to ensure a uniform, predictable and efficient application of the rules, as well as to guarantee the effective protection of workers affected by occupational accidents.

References

1. Law no. 319/2006 on occupational safety and health.

2. Government Decree no. 1425/2006 on the Methodological Rules for the Application of Law no. 319/2006 on Occupational Safety and Health.

THE SUSTAINABLE DEVELOPMENT OF THE EUROPEAN UNION TOWARDS 2030, THE ACCESSION PROCESS OF THE REPUBLIC OF MOLDOVA, AND ITS LEGISLATIVE IMPACT ON THE ECONOMIES OF ROMANIA AND UKRAINE

Mihai SUSANU,
Corneliu TUNI[1]

Abstract:

Legislative correlation and the direct and indirect economic impact on the SME sector in the Republic of Moldova, between the sustainable development of the European Union towards 2030 and the accession process of the Republic of Moldova, involves the analysis of complex and comprehensive mechanisms, as well as the correlation of legislative and economic leverages of great complexity, usable at both macroeconomic and microeconomic levels. The accession process must complement the current objectives of the European Union concurrently with the period in which the Republic of Moldova must prepare its legislation for the adoption of the Community Acquis. This negotiation process will offer the possibility of managing and implementing new economic mechanisms, implementation which will be carried out through the prism of legislative changes specific to accession, which together will generate new leverages for economic development at macro and microeconomic levels.

Currently, the Republic of Moldova is undergoing an extremely important national structural modification process, a process representing the most extensive socio-economic restructuring in the last 20 years. The accession process will pave the way for accessing European leverages for macroeconomic sustainable development that will impact the entire region.

Keywords*: European Union law; sustainable development; enlargement policy; Republic of Moldova; accession negotiations; acquis communautaire; Romania; Ukraine; DCFTA.*

1. Introduction

The European Union's enlargement policy has been reshaped after 2022 by a geopolitical urgency that did not exist in the preceding decade. The Russian aggression against Ukraine, the concomitant destabilisation of the Republic of Moldova, and the Union's own internal commitment to climate neutrality by 2050, with an intermediate, legally binding target of a fifty-five per cent reduction in greenhouse gas emissions by 2030 (European Union, 2021), have converged to place the sustainable development agenda and the enlargement agenda on the same institutional timetable. This convergence is not accidental. The European Commission has consistently framed enlargement as an instrument through which candidate states import the environmental, social, and economic governance standards that underpin the Union's own sustainability strategy (European Commission, n.d.). For the Republic of Moldova, granted candidate status in June 2022 and having

[1] University of European Political and Economic Studies "Constantin Stere", Republic of Moldova

opened formal accession negotiations in June 2024 (European Commission - Enlargement, 2024), this means that the legal process of accession is, in substance, a process of transposing the sustainable development acquis, from energy efficiency and renewable energy law to climate governance and environmental impact assessment, into domestic legislation on a compressed timeline oriented towards the year 2030.

This article addresses a research question that has received comparatively little sustained legal analysis: how does the legislative dimension of Moldova's accession process, undertaken in the shadow of the Union's 2030 sustainability targets, produce spillover effects on the economies of two neighbouring, non-identically situated states, Romania, a Member State bound by the acquis, and Ukraine, a candidate state negotiating in parallel? The article proceeds in five substantive parts. Section 2 outlines the legal architecture of the EU's sustainable development strategy towards 2030. Section 3 analyses the legal stages of Moldova's accession process and the mechanism of legislative approximation inherited from the Association Agreement and DCFTA. Section 4 examines the economic and regulatory impact on Romania, with particular attention to energy law and cross-border infrastructure. Section 5 examines the parallel and interdependent impact on Ukraine. Section 6 offers a comparative assessment of risks and opportunities, before the article concludes.

Methodologically, the article adopts a doctrinal and policy-analytical approach. It relies on primary sources, including the Treaty on European Union, the European Climate Law, the EU-Moldova Association Agreement, and official conclusions of the EU-Moldova Intergovernmental Conferences, supplemented by institutional reporting from the European Commission, the Council of the European Union, and specialised policy institutes. Given the pace of developments during 2025-2026, the article also draws on contemporaneous institutional press releases and expert commentary, which is treated with appropriate caution as to its provisional character.

2. The legal architecture of EU sustainable development towards 2030

The Union's sustainable development commitments derive their international legal foundation from the 2030 Agenda for Sustainable Development, adopted by the UN General Assembly in 2015, which the Union has repeatedly affirmed as a guiding framework for its internal and external policies (United Nations, 2015). Internally, this global commitment was operationalised through the European Green Deal, presented by the Commission in December 2019 as a cross-cutting growth strategy intended to transform the Union into a "modern, resource-efficient and competitive economy" while achieving climate neutrality by 2050 (European

Commission, n.d.; European Parliament, 2020). More than one hundred and fifty individual legislative and policy measures have since been adopted or proposed under this strategy, spanning energy, industry, transport, buildings, and food systems (European Parliament, 2020).

The decisive legal step converting political ambition into binding obligation was Regulation (EU) 2021/1119, the European Climate Law, adopted on 30 June 2021, which enshrines in primary legislative form both the 2050 climate-neutrality objective and the intermediate 2030 target of a net fifty-five per cent reduction in emissions relative to 1990 levels (European Union, 2021). To operationalise this target, the Union adopted the "Fit for 55" package in 2023, comprising thirteen revised legislative instruments and six new ones covering emissions trading, energy taxation, renewable energy, and the Carbon Border Adjustment Mechanism (CBAM), the latter scheduled to become fully operational in 2026 (European Parliament, 2020). By 2026, the Union has also embarked on a parallel project of regulatory simplification in response to slower economic growth, persistent inflation, and shifting political majorities in several Member States, without formally retreating from the substantive 2030 targets (Ashurst, 2026).

The significance of this framework for the present analysis lies in its external dimension. Article 49 TEU conditions accession on respect for the values referred to in Article 2 TEU and requires candidate states to adopt the Union acquis in its entirety, which today includes the substantial body of environmental and climate legislation generated by the Green Deal. Consequently, a state acceding after 2024 does not merely inherit an "average" EU environmental acquis; it inherits an acquis substantially densified by the sustainability legislation adopted since 2019. For Moldova, this means that chapters of the negotiating framework dealing with energy (Chapter 15), environment and climate change (Chapter 27), and transport (Chapter 14) now carry a materially heavier transposition burden than they would have a decade earlier. This structural fact is central to understanding why the 2030 horizon operates simultaneously as an EU-internal target and as an external benchmark against which candidate states, including Moldova, are implicitly measured. What is today EU internal target to be achieved will become automatically Moldova mandatry condition to comply durign the accesion period and fulfill in the negotiated time of the accssion agenda.

3. The accession process of the Republic of Moldova: legal stages and approximation mechanisms

Moldova's legal relationship with the Union predates its candidacy. The EU-Moldova Association Agreement, signed in June 2014 and in full effect since July 2016, established alongside political association a Deep and

Comprehensive Free Trade Area (DCFTA), whose distinguishing legal feature, compared with conventional free trade agreements, is its requirement of "far-reaching and progressive regulatory approximation to EU law in trade-related areas", pursuant to Annex IV of the Agreement (European Union, 2014; European Commission - Access2Markets, n.d.). An ex-post evaluation commissioned to assess a decade of implementation found that the DCFTA had been "efficient and effective", while identifying legislative approximation itself as an area with continued room for improvement (CEPS, n.d.). This finding is legally significant: it demonstrates that Moldova entered its formal candidacy in 2022 already possessing a decade of institutional experience in acquis transposition, a factor that plausibly explains the comparative speed of its subsequent accession track.

The Republic of Moldova was granted EU candidate status by the European Council in June 2022, in the immediate aftermath of Russia's invasion of Ukraine, and, following completion of the analytical screening process, the Council authorised the opening of accession negotiations in June 2024 (European Commission - Enlargement, 2024). Negotiations proceed, under the revised 2020 enlargement methodology, through six thematic clusters comprising thirty-three individual chapters (Consilium, 2026). The first cluster, "Fundamentals", covering the judiciary, anti-corruption, public administration reform, and economic governance, was formally opened on 15 June 2026 at the second EU-Moldova Intergovernmental Conference in Luxembourg. A month later, at the third Intergovernmental Conference of 14 July 2026, negotiations were opened on Cluster 6, "External Relations", specifically Chapter 30 (external relations) and Chapter 31 (foreign, security and defence policy) (Consilium, 2026). The European Parliament, in its annual report on Moldova adopted on 8 July 2026, called for the immediate opening of negotiations on all remaining chapters, with the Moldovan government's stated ambition being to open the entirety of the thirty-three chapters before the end of summer 2026 (Armenpress, 2026).

Two structural features of the current negotiating architecture merit legal comment. First, the "fundamentals-first" principle, whereby Cluster 1 must be opened before substantive progress on other clusters and must remain open throughout the negotiations, means that Moldova's rule-of-law and anti-corruption reforms function as a continuous conditionality mechanism rather than a discrete, closable chapter. This has direct sustainability relevance, since environmental and energy legislation of the kind embedded in Cluster 4 ("Green Agenda and Sustainable Connectivity") depends for its effective enforcement on the institutional capacities, judicial independence, administrative competence, being built under Cluster 1. Second, Moldova's accession track has been explicitly and repeatedly linked, at the political level,

to that of Ukraine through what several institutional and expert sources describe as a "package approach": both countries opened their respective first clusters within twenty-four hours of one another in June 2026 (eunews.it, 2026), and their subsequent trajectories, while formally distinct, are treated by the Council as politically interdependent. This linkage, discussed further in Section 5, is one of the principal transmission channels through which Moldova's legislative approximation acquires regional, rather than purely bilateral, economic significance.

4. Impact on the Romanian economy

Of the Union's Member States, Romania occupies a singular position in relation to Moldova's accession process: it is Moldova's only EU land border, its principal energy interconnector, and, by virtue of shared language and extensive historical, familial, and commercial ties, its most consistent political sponsor within the Council. The mutual economic agreements that have shaped the commrce from the lat years offer a sustainable bridge for SMEs and big companies to access the EU Single Market using Romania as an economic bridge. Institutional commentary describes Romania as Moldova's "closest and natural partner" and as the physical and political "bridge" through which Moldova's disconnection from the former Soviet-era energy grid and its integration into the continental European system has been achieved (Moldova Invest, 2026). This position generates concrete legal and economic consequences that are worth disaggregating.

The clearest and most quantifiable impact concerns the energy sector, itself a core component of the Green Deal's sustainability architecture. Following Moldova's synchronisation with the Continental European electricity grid, Romania has become the principal channel of Moldovan electricity imports and grid-balancing capacity; since 1 January 2025, the right bank of the Dniester has ceased purchasing electricity of Transnistrian origin, with domestic Moldovan production supplemented by imports "from Romania and Ukraine" covering the shortfall (Moldpres, 2025). At the infrastructural level, Transelectrica, Romania's transmission system operator, signed in March 2025 a contract worth approximately RON 133.4 million for the construction of the 400 kV Suceava-Bălți overhead power line, to be completed within fifty-two months, alongside parallel projects connecting Strășeni-Gutinaș (Energy Industry Review, 2025). The European Union contributed €15.4 million toward the related Vulcănești-Chișinău interconnector, while the United States government provided $130 million toward the Strășeni-Gutinaș line, illustrating that the financing of Moldova's energy-law approximation is itself a multilateral undertaking with direct implications for Romanian grid operators, engineering firms, and electricity exporters (Moldpres, 2025). For Romanian energy companies,

Moldova's obligation, as a matter of DCFTA and, prospectively, accession-chapter compliance, to align its electricity market rules with the EU's Third and Fourth Energy Packages creates a genuinely single regulatory space across the Prut river, reducing transaction costs for Romanian generators and traders and expanding the addressable market for Romanian renewable energy investment.

Beyond energy, Moldova's continuing legislative approximation under the DCFTA, now reinforced by the accession negotiating chapters on company law, public procurement, and free movement of goods, has a direct bearing on Romanian exporters and investors, for whom regulatory convergence lowers the compliance burden associated with trading across the border. Romanian firms are, in practice, frequently the first foreign investors to benefit from each incremental stage of Moldovan legal approximation, given proximity, linguistic commonality, and pre-existing commercial networks. The Reform and Growth Facility for the Western Balkans and, by extension, the analogous instruments now being designed for Moldova and Ukraine, comprising €1.5 billion in low-interest loans and €385 million in grants for Moldova over 2025-2027, are explicitly projected by the Commission to have the potential to double the size of the Moldovan economy over the following decade (GMFUS, 2026). Such growth, concentrated in a state whose principal transit and investment corridor runs through Romania, is reasonably expected to generate second-order demand for Romanian logistics, financial, construction, and energy services, even though rigorous ex-ante econometric quantification of this specific spillover remains, at the time of writing, largely absent from the public record and should be treated as a plausible, rather than definitively established, effect.

Not all identified effects are unambiguously positive. Commentary from several Brussels-based outlets has raised concerns that the eventual accession of both Moldova and Ukraine, absent transitional arrangements limiting free movement of workers, could increase outward labour migration from both states toward wealthier Member States, given that combined they would constitute the poorest accession cohort in the Union's history, with per-capita GDP figures cited in the range of approximately $22,000 or considerably below in market-exchange terms for Ukraine specifically (Brussels Signal, 2026). For Romania, which itself continues to experience net emigration pressures in several sectors, competition for regional labour, alongside the fiscal implications of a larger Union budget required to finance cohesion and agricultural transfers to two large new recipient states, represents a legitimate, and as yet legally unresolved, area of concern that will likely require negotiated transitional periods analogous to those applied in the 2004 and 2007 enlargement rounds.

5. Impact on the Ukrainian economy and the Moldova - Ukraine interdependence

Ukraine's own accession track has advanced, formally, in close chronological parallel with Moldova's. Ukraine achieved full technical readiness across all six negotiating clusters following an accelerated legislative screening process completed in 2025, and, like Moldova, opened its first cluster, "Fundamentals", on 15 June 2026 (eu-ua.kmu.gov.ua, 2026). This near-simultaneity is not coincidental but reflects the Council's explicit political decision to treat the two countries' accession bids as linked, a linkage that both reduces the risk that either state's progress may be blocked unilaterally for reasons extraneous to its own merits and creates a shared exposure whereby delay affecting one candidate risks delaying the other.

For Ukraine, the legislative dimension of accession intersects with the unprecedented economic disruption caused by the ongoing war. The upgraded DCFTA between the EU and Ukraine, extending the trade liberalisation measures first granted autonomously in 2022, is designed to deepen alignment between Ukrainian and EU production and technical standards while accounting for the sensitivity of specific EU agricultural sectors (eu-ua.kmu.gov.ua, 2026). The scale of the reconstruction task dwarfs that facing Moldova: the World Bank's Rapid Damage and Needs Assessment estimates Ukraine's ten-year reconstruction cost at approximately $588 billion, nearly three times the country's pre-war GDP (Statistics of the World, 2026). At the 2026 Ukraine Recovery Conference, the Commission announced the first disbursement of €3.2 billion in budgetary support under the €90 billion Ukraine Support Loan mechanism, alongside a €6 billion defence package, with total committed international financing for 2026-2027 exceeding €110 billion (European Commission - Enlargement, 2026). The scale of these figures means that, unlike Moldova's accession, Ukraine's is widely expected to require the Union's Member States to become net contributors to a substantially enlarged cohesion and agricultural budget, a fiscal transformation projected to require in excess of €500 billion over the medium term (ECFR, 2026).

For Romania and Moldova, Ukraine's parallel accession generates both complementary and competitive dynamics. Complementarity is evident in energy and transport infrastructure: the same interconnection logic that links Moldova to the Romanian grid also links Ukraine, with joint interconnection projects between Chișinău, Suceava, and western Ukrainian nodes explicitly described as part of a single regional strategy by Moldova's Energy Ministry (energie.gov.md, 2026). Reconstruction demand in Ukraine, concentrated in construction materials, engineering services, and logistics, is a plausible source of significant export growth for Romanian firms operating through Black Sea and Danube corridors, particularly the port of Constanța,

which has already absorbed a substantial share of Ukrainian grain exports displaced by the closure of Black Sea shipping lanes since 2022. Competition, conversely, arises chiefly in the allocation of EU structural and agricultural funding: Ukraine's vastly larger agricultural sector, should it accede on terms analogous to those applied to existing Member States, would materially alter the distribution of Common Agricultural Policy payments, a prospect that has already prompted defensive lobbying from Romanian and other Central European farming associations. The legislative dimension of this competition will likely be negotiated through transitional and safeguard clauses analogous to those developed during the 2004-2007 enlargement, rather than resolved definitively in the near term.

6. Comparative assessment: opportunities, risks, and the role of the 2030 horizon

The regulation so far suggest that the year 2030 functions less as a fixed accession deadline, since no Member State or Commission document formally commits to Moldovan or Ukrainian membership by that date, than more as a structural reference point that compresses the legislative timetable for both candidates and, derivatively, for the regulatory environment facing Romania. The Union's own climate and energy acquis is calibrated to 2030 targets; a candidate state seeking to demonstrate credible convergence must show, well before formal membership, that its domestic legislation is capable of meeting those same targets. This produces an accelerated approximation dynamic in Moldova, visible in the speed with which energy interconnection and market-design legislation has advanced since 2022, considerably faster than the corresponding processes undertaken by Central European candidates in the 1990s.

For Romania, the principal opportunity lies in consolidating its role as the primary gateway for EU-Moldova, and increasingly EU-Ukraine, trade, investment, and energy flows, a role that carries long-term strategic and commercial value extending well beyond the immediate transactions described in Section 4. The principal risk lies in the fiscal and labour-market consequences of enlargement to two comparatively poor candidate states, which will require careful, and currently unresolved, negotiation of transitional arrangements. For Ukraine, the opportunity lies in binding reconstruction financing to a credible legal and institutional trajectory that reduces investment risk; the risk lies in the sheer scale of adjustment required, both fiscal and agricultural, within a Union whose own budgetary framework was not designed with a state of Ukraine's size and post-war condition in view.

A further, cross-cutting legal risk concerns coordination capacity. Because Cluster 1 conditionality applies continuously throughout the negotiations, and because the "Green Agenda and Sustainable Connectivity"

cluster depends on functioning judicial and administrative institutions for effective enforcement, Moldova's and Ukraine's ability to meet 2030-oriented sustainability benchmarks is contingent on the pace of their broader rule-of-law reforms, a pace that neither Bucharest nor Brussels can unilaterally accelerate. Romanian and EU technical assistance, of the kind already channelled through structured policy dialogue mechanisms supporting the Association Agreement's implementation, therefore remains a necessary, though not individually sufficient, condition for translating legislative approximation into measurable regional economic gains (DAI, n.d.).

7. Conclusions

This analysis conclude that the European Union's sustainable development strategy towards 2030 and the accession process of the Republic of Moldova are analytically and practically inseparable. The Union's climate-neutrality and 2030 emissions-reduction targets, given binding legal form by the European Climate Law, have densified the acquis that Moldova must transpose as a condition of membership, particularly in energy, environment, and transport law, thereby compressing the timetable of legislative approximation inherited from the 2014 Association Agreement and DCFTA. This process is not confined to Moldova's own domestic legal order. Romania functions as the principal physical and institutional conduit through which Moldovan legislative and market integration is realised, generating measurable effects in cross-border energy infrastructure and plausible, if not yet fully quantified, effects in trade and investment. Ukraine's parallel and politically linked accession track, considerably larger in scale and complicated by wartime reconstruction needs estimated at $588 billion, generates both complementary regional infrastructure and logistics opportunities for Romania and Moldova, and competitive tension over the future allocation of EU structural and agricultural resources.

The evidence reviewed indicates that the region's medium-term legal and economic trajectory will depend on three factors: the pace at which Moldova and Ukraine can sustain rule-of-law reforms sufficient to make their sustainability legislation enforceable rather than merely transposed; the willingness of the Union and its existing Member States, including Romania, to negotiate workable transitional arrangements addressing labour mobility and agricultural policy; and the availability of financing instruments, of the kind already deployed through the Reform and Growth Facility and the Ukraine Support Loan, capable of bridging the gap between legislative alignment and real economic convergence. Further empirical research, particularly econometric modelling of trade and investment flows between Romania and Moldova disaggregated by DCFTA implementation stage,

would materially strengthen the currently qualitative account offered here and is recommended as a priority for future study.

References

Armenpress (2026) European Parliament calls for opening all remaining accession negotiation chapters with Moldova. Available at: https://armenpress.am/en/article/1255084 (Accessed: 24 July 2026).

Ashurst (2026) The European Green Deal at five: progress, fault lines, and the next chapter in EU sustainable finance. Available at: https://www.aoshearman.com/en/insights/sustainability-outlook-2026/the-european-green-deal-at-five-progress-fault-lines-and-the-next-chapter-in-eu-sustainable-finance (Accessed: 24 July 2026).

Brussels Signal (2026) Impact of Ukraine and Moldova joining EU on labor markets. Available at: https://brusselssignal.eu/2026/06/if-ukraine-and-moldova-enter-eu-their-citizens-will-flood-european-labour-markets/ (Accessed: 24 July 2026).

CEPS (n.d.) Ex-post evaluation of the implementation of the Deep and Comprehensive Free Trade Area between the EU and its Member States and Moldova. Available at: https://www.ceps.eu/ceps-publications/ex-post-evaluation-of-the-implementation-of-the-deep-and-comprehensive-free-trade-area-between-the-eu-and-its-member-states-and-moldova/ (Accessed: 24 July 2026).

Consilium (2026) Moldova. Available at: https://www.consilium.europa.eu/en/policies/moldova/ (Accessed: 24 July 2026).

Consilium (2026) Enlargement: EU and Moldova start negotiations on external relations policies. Press release, 14 July. Available at: https://www.consilium.europa.eu/en/press/press-releases/2026/07/14/enlargement-eu-and-moldova-start-negotiations-on-external-relations-policies/ (Accessed: 24 July 2026).

DAI (n.d.) Moldova - Support for Structured Policy Dialogue, Coordination of the Implementation of the Association Agreement, and Enhancement of the Legal Approximation Process. Available at: https://www.dai.com/our-work/projects/moldova-support-for-structured-policy-dialogue-coordination-of-the-implementation-of-the-association-agreement-and-enhancement-of-the-legal-approximation-process (Accessed: 24 July 2026).

energie.gov.md (2026) Dorin Junghietu: Moldova to develop new energy interconnection projects with Romania and Ukraine. Available at: https://www.energie.gov.md/en/content/dorin-junghietu-moldova-develop-new-energy-interconnection-projects-romania-and-ukraine (Accessed: 24 July 2026).

Energy Industry Review (2025) Transelectrica strengthens Romania's interconnection with the Republic of Moldova. Available at: https://energyindustryreview.com/power/transelectrica-strengthens-romanias-interconnection-with-the-republic-of-moldova/ (Accessed: 24 July 2026).

eu-ua.kmu.gov.ua (2026) Ukraine and the EU review progress on reforms and preparations for the opening of accession negotiation clusters. Available at: https://eu-ua.kmu.gov.ua/en/news/ukraine-and-the-eu-review-progress-on-reforms-and-preparations-for-the-opening-of-accession-negotiation-clusters/ (Accessed: 24 July 2026).

eunews.it (2026) The accession process for Ukraine and Moldova begins, first chapters of negotiations opened. Available at: https://www.eunews.it/en/2026/06/16/the-accession-process-for-ukraine-and-moldova-begins-first-negotiation-chapters-opened/ (Accessed: 24 July 2026).

European Commission (n.d.) The European Green Deal. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (Accessed: 24 July 2026).

European Commission - Access2Markets (n.d.) EU-Moldova Deep and Comprehensive Free Trade Area. Available at: https://trade.ec.europa.eu/access-to-markets/en/content/eu-moldova-deep-and-comprehensive-free-trade-area (Accessed: 24 July 2026).

European Commission - Enlargement (2024) EU opens accession negotiations with Moldova. Available at: https://enlargement.ec.europa.eu/news/eu-opens-accession-negotiations-moldova-2024-06-25_en (Accessed: 24 July 2026).

European Commission - Enlargement (2026) Ukraine. Available at: https://enlargement.ec.europa.eu/countries/ukraine_en (Accessed: 24 July 2026).

European Commission - Enlargement (2026) EU steps up support for Ukraine's defence, recovery and reconstruction at the Ukraine Recovery Conference 2026. Available at: https://enlargement.ec.europa.eu/news/eu-steps-support-ukraines-defence-recovery-and-reconstruction-ukraine-recovery-conference-2026-2026-06-25_en (Accessed: 24 July 2026).

European Council on Foreign Relations (2026) Accelerate the accessions: why faster is better in EU enlargement policy. Available at: https://ecfr.eu/publication/accelerate-the-accessions-why-faster-is-better-in-eu-enlargement-policy/ (Accessed: 24 July 2026).

European Parliament (2020) Green Deal: key to a climate-neutral and sustainable EU. Available at: https://www.europarl.europa.eu/topics/en/article/20200618STO81513/green-deal-key-to-a-climate-neutral-and-sustainable-eu (Accessed: 24 July 2026).

European Parliament (2025) Moldova: challenges and progress towards EU membership. Available at:

https://www.europarl.europa.eu/topics/en/article/20250606STO28765/moldova-challenges-and-progress-towards-eu-membership (Accessed: 24 July 2026).

European Union (2014) Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part. Official Journal of the European Union, L 260, 30 August. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0830(01) (Accessed: 24 July 2026).

European Union (2021) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality (European Climate Law). Official Journal of the European Union, L 243, 9 July, pp.1-17.

German Marshall Fund of the United States (2026) Moldova's window of opportunity for rapid EU membership. Available at: https://www.gmfus.org/news/moldovas-window-opportunity-rapid-eu-membership (Accessed: 24 July 2026).

Moldova Invest (2026) Romania - Republic of Moldova strengthen energy partnership: investments, interconnection and green transition at the core of the joint agenda. Available at: https://moldovainvest.eu/en/international-en/romania-republic-of-moldova-strengthen-energy-partnership-investments-interconnection-and-green-transition-at-the-core-of-the-joint-agenda/ (Accessed: 24 July 2026).

Moldpres (2025) Energy Minister: 2025 - turning point. Moldova decisively strengthened energy security. Available at: https://www.moldpres.md/eng/economy/energy-minister-2025-turning-point-moldova-has-decisively-strengthened-its-energy-security (Accessed: 24 July 2026).

Statistics of the World (2026) Ukraine economy 2026: four years of war, a $588 billion reconstruction bill, and the war economy that refuses to collapse. Available at: https://statisticsoftheworld.com/blog/ukraine-economy-2026-war-economy-reconstruction (Accessed: 24 July 2026).

United Nations (2015) Transforming our world: the 2030 Agenda for Sustainable Development. UN General Assembly Resolution A/RES/70/1, 25 September.

THE HISTORY AND ADVANTAGES OF MEDIATION AS AN ALTERNATIVE METHOD FOR RESOLVING PRIVATE-LAW DISPUTES

Corneliu TUNI,
Mihai SUSANU[1]

Abstract:
Mediation, understood as a consensual and confidential method of dispute resolution facilitated by a neutral third party, has accompanied human social organisation since its earliest forms. This paper traces the historical development of mediation, from tribal councils of elders and the practices of Ancient Greece and Rome to its institutionalisation in Romanian tradition through the roles of godparents, priests, schoolmasters and mayors. It then examines the concept of conflict as the substantive object of mediation, before presenting, in a systematic manner, the principal advantages of mediation over adjudication before the competent courts, namely reduced financial cost, shorter duration, procedural simplicity and flexibility, lower emotional cost, a mutually satisfactory (win-win) outcome, the binding legal force of the mediation agreement, confidentiality, the preservation of relationships between the parties, the prevention of further conflict, and the retention by the parties of exclusive control over the outcome. A comparative analysis of mediation regimes in Canada, Germany, France, the Czech Republic and Austria is undertaken, followed by an assessment of the Romanian legal framework established by Law No. 192/2006, with particular attention to the insufficient regulation of the mediation agreement. The paper concludes that a unitary, internationally harmonised practice of mediation in private-law matters, aligned with EU Directive 2008/52/EC, would contribute significantly to relieving the burden on the Romanian courts.

Keywords*: mediation; conflict resolution; alternative dispute resolution; private law; comparative law; Romanian legislation; Directive 2008/52/EC.*

1. Introduction: The Historical Origins of Mediation

The history of mediation is lost in the mists of time. What has reached us consists, in fact, of the earliest records, in various forms of writing, of procedures whose antiquity is, to a certain extent, contemporary with that of conflict itself. From the earliest forms of organisation of primitive human societies, and from the separation of tribal castes into so-called occupations (hunters, gatherers, and so forth), we witness the emergence of the first commercial exchanges and, at the same time, the development of the first inter- and intra-community social relations.

Intercommunity relations are those generated by the need for communication among members of different tribes, on the one hand, by the need for socialisation, on the other, and also by the natural need to assert

[1] University of European Political and Economic Studies "Constantin Stere", Republic of Moldova

oneself in various positions of influence within the community. At a certain level of development, intercommunity relations are the equivalent of today's international relations, bringing face to face individuals from different communities, with different principles and even different value systems.

Historical evolution shows that the earliest forms of conflict resolution were, in fact, mediations. This is, moreover, a natural feature of those times, in which social evolution could not yet speak of the existence of a legislative system. The mediation of conflicts was generally carried out within society itself, the mediator being either the leader of the whole community or, in later societies, the so-called council of elders or of wise men, who, having examined the matter submitted to their judgment and having heard both sides, would reach a decision — most often, probably, resolving the dispute by adopting a middle course.

Later written history situates the emergence of mediation in the period of Phoenician trade. The practices of Ancient Greece and Ancient Rome gave the term 'mediation' an appropriate meaning. The Romans used several names for the persons who carried out this process, such as medium, interpolator, conciliator, interlocutor and, ultimately, mediator. In the Middle Ages, the practice of mediation was forbidden in some countries, while in others it could be carried out only by the central authorities. In certain cultures, the mediator was regarded as a sacred person, deserving of particular respect.

In Romania, although mediation was never institutionalised in its own right through express regulation, the practice has been known since very ancient times. A first example is provided by the 'Council of Elders' (Sfatul Bătrânilor) of the ancient Romanian settlements, whom the community recognised as the wise men of the village and who held, among other powers, the authority to mediate the reconciliation of community members involved in disputes.

Another example, belonging to family law and likewise encountered since ancient times, is the fact that, in Romanian tradition, godchildren have always turned to their godparents to mediate the various disputes that arose within their families. Particular mention must be made of the activity of priests, who, in their parishes and since the most distant times, practised mediation not only through attempts to reconcile parishioners in dispute, but also through their involvement in efforts to extinguish or settle larger-scale conflicts, whether between groups of community members or between community members and the authorities. Indeed, it was not only the priest who assumed such responsibilities, but also the village schoolmaster and the mayor. It may be observed that those in dispute would thus turn to persons who enjoyed social prestige within the community, which offered the parties the guarantee that the mediator chosen by them, or recommended by the community, would demonstrate wisdom, neutrality and impartiality in

approaching and resolving their conflict. Also with regard to the tradition of mediation, it is worth recalling that disputes between merchants from the Greek colonies and those from the Venetian colonies on the Black Sea coast were settled, at the place where the dispute arose, through the mediation of the 'Syndic', a guild-leader position. In the second half of the nineteenth century, with the introduction of the Code of Civil Procedure of 9 September 1865, the resolution of disputes was institutionalised through the district courts (judecătoriile de plasă), which, for cases or damages of small value, could issue final decisions in certain matters. Through the Laws on Communal and District Justices of the Peace of 1879, 1894 and 1896, special judges were institutionalised — in practice, 'travelling judges' — for certain cases without value or of small value, as well as for minor offences, understood as those affecting the moral relations between two or more persons without producing a general material effect on social relations (Zecheru N., 2013, p. 45).

Mediation thus appears as an alternative form of dispute resolution between two or more parties who wish to reach an understanding with the assistance of a third party specialised as a mediator. Disputes may involve, from the point of view of the parties, states, organisations, communities, individuals, and commercial companies with various forms of organisation.

Mediation is based on the trust that the parties place in the mediator, as a person capable of facilitating negotiations between them and of supporting them in resolving the conflict through a mutually convenient, effective and lasting solution.

2. The Concept of Conflict

In order to understand mediation more fully, it is appropriate first to examine what conflict actually is. Conflict denotes opposition, disagreement or incompatibility between two or more parties. Although, in general human understanding, conflict is associated with violence — a definitional remnant of the conflictual periods in the evolution of states, when everything was reduced to armed confrontation — conflict, in fact, may or may not be violent. At the level of relations between individuals, natural or legal persons, or between various types of organisations, conflicts are generally disagreements of position with respect to particular situations. Such conflicts tend to have a moderate dynamic and a normal evolution, their resolution relying on the mechanisms devised by human beings for this purpose: either adjudication or mediation. With regard to inter-state relations, however, conflicts can often degenerate into war.

Dynamic conflict brings social dynamics into the discussion. Its principal characteristic is the instability arising from unforeseen change. For this reason, reliable predictions within social systems are difficult to achieve,

even though, in principle, the future state of the system can in theory be predicted with precision.

The basic elements of a conflict, or the vectors of conflict, are the parties. Within a conflict, a party may be defined as a behavioural unit, a group or an organisation capable of assuming a number of different positions over time and within certain limits. Thus, in its essence, conflict presents itself as a complex social phenomenon determined by the clash of opposing interests, concepts and needs of persons or groups when they come into contact and pursue different objectives or hold different value systems.

The methods of conflict resolution are clearly defined, namely: recourse to the competent courts of law, or mediation, as an alternative method of resolving conflicts (Tuni C., 2015, pp. 531–534).

In the present paper, we propose to highlight the advantages of the mechanisms for implementing mediation in the resolution of private-law disputes, as compared with recourse to adjudication before the competent courts, depending on the procedure applicable to the matter submitted for judgment.

3. Advantages of Mediation over Judicial Proceedings

3.1 Reduced Financial Cost

The financial cost of resolving a dispute through mediation is considerably lower than the expense involved in resolving it through the courts. The mediator charges only the fee agreed in advance with the parties, according to the complexity and nature of the case. In court proceedings, by contrast, stamp duty, lawyers' fees and the cost of expert reports accumulate into very substantial sums when compared with the cost of a mediation fee.

3.2 Shorter Duration

The time required to resolve a dispute is substantially reduced. During the mediation process, depending on the complexity of the case and the availability of the parties, the conflict may be resolved as early as the first session — that is, after a single meeting between the parties involved. In more complex cases, resolution may take place over several stages, but even then the process does not approach the duration of a court trial through its various levels of jurisdiction.

3.3 Procedural Simplicity and Flexibility

Mediation procedure is simple and flexible, adaptable to each individual conflict. The parties retain control over the process and over the solution, which they come to accept through dialogue and mutual concessions, assisted and facilitated by the mediator. By comparison, court procedure is cumbersome and arduous, requiring considerable tact and

patience and, most often, the assistance of a legal specialist, namely a lawyer. In court, the parties are frequently required to furnish evidence through expert reports or social investigations, which further burden the process, and numerous hearings are typically necessary before a judicial decision is reached. In mediation, by contrast, the parties agree the date, time and place of each session together with the mediator.

3.4 Lower Emotional Cost

Mediation avoids the emotional cost associated with litigation and its outcome. In court, the parties must wait for a decision over long periods of time, during which they cannot be certain that the outcome will be in their favour, even where they believe, and can substantiate, that they are right. This waiting period is marked by considerable emotional strain. In mediation, by contrast, each party is free to engage in dialogue, to propose a solution, and to consider both its own proposals and those offered by the other side, so that together the parties may arrive at the solution most beneficial to both.

3.5 A Mutually Satisfactory (Win–Win) Outcome

Mediation results in a win–win outcome, in which both parties emerge as winners. In litigation, one party loses the case while the other prevails. In mediation, each party wins, because the solution — being their own agreement — is accepted by, and satisfactory to, all parties.

3.6 The Binding Legal Force of the Mediation Agreement

The instrument concluded before the mediator carries the force of an agreement between the parties; more precisely, as between the parties, the agreement has the force of law and is valid and effective, producing legal effects from the moment of signature. The agreement may subsequently be submitted to a notary public or to a court of law in order to be vested with enforceability.

3.7 Confidentiality

Confidentiality of the process is a further advantage of mediation, and indeed a fundamental principle of it. The entire mediation procedure is conducted on the basis of the confidentiality of both information and process, which is an extraordinary advantage for the parties. All discussions before the mediator, at every stage of the process, are conducted under the aegis of confidentiality, and every session takes place in a neutral and confidential setting. This stands in marked contrast to the major disadvantage of judicial proceedings, where hearings are public and anyone — including representatives of the mass media — may see and hear a party and its claims. Confidentiality thus appears as a necessity for each party, and as an advantage that cannot be found in court proceedings.

3.8 Preservation and Reconsolidation of the Parties' Relationship

By its very definition, mediation is a dialogue of the parties — a dialogue between the parties themselves, and between each party and the mediator. It is a constructive dialogue in which the mediator assists and facilitates the parties in reaching a mutually advantageous resolution of the conflict. Once an agreement, even a partial one, has been reached, the parties tend to improve the relationship they had prior to the emergence of the conflict. A study of judicial practice demonstrates that, in court proceedings, resentment prevails throughout the process and, even after a final judgment, tends to deepen: relations break down permanently, and the parties come to view each other with lasting resentment, forgetting, in most cases, that before the conflict arose they were husband and wife, business partners, good neighbours, or in a sound employer–employee relationship.

3.9 Prevention of Further Conflict

A further, particularly important advantage of mediation lies in the prevention of future conflicts between the parties. In mediation, the parties not only resolve their present conflict advantageously but, through the reconsolidation of their relationship, also prevent the emergence of new disagreements through continued dialogue. Once diagnosed by the mediator and addressed jointly by the parties, the causes of the conflict become factors that help to avoid future disputes. In litigation, by contrast, one dispute may give rise to another, generating further claims and disagreements, so that the conflict escalates without finding an end. In mediation, the mediator and the parties pursue, together, the extinguishing of the conflict and its resolution by peaceful and amicable means; having voluntarily reached an agreement, the parties come to recognise that the conflict was merely an obstacle to a relationship that will continue into the future.

3.10 The Parties Retain Exclusive Control over the Outcome

The decision as to the solution belongs exclusively to the parties. Neither a judge, nor any external party, nor the mediator may compel the parties to reach a solution, still less impose a particular solution upon them. The parties alone decide which solution is most efficient and most advantageous, reciprocally, for each of them. It is precisely this defining volitional element that lies at the heart of the mediation process in private-law matters: the parties retain the option of resolving their conflict through mediation. Consequently, as also follows from the law, the mediator's authority in negotiating the conflict derives directly from the parties, who invest the mediator with the trust necessary for the process to continue. For this reason, we do not support proposed amendments to the Code of Civil Procedure that would make mediation a mandatory preliminary stage before

court proceedings (Source 6). We nonetheless find, in the legislation of other states, provisions that establish mediation as a mandatory preliminary stage before litigation. Moreover, an increasing number of opinions among Romanian mediators and judges converge towards the imposition of mediation as a procedure preliminary to court proceedings in certain civil-law mattersâ (Armasu M, 2016, p. 5).

4. Comparative Perspectives: Mediation in Foreign Legal Systems

4.1 Canada

Consider, for example, the pilot mediation project conducted in Canada between 1999 and 2000, in Ontario and Toronto, by Brock University. This project yielded a study of 3,000 conflicts in which the parties accepted mediation as a preliminary procedure and treated the resulting solution as binding. At the conclusion of the study, observers noted an appreciable decrease in the number of conflicts ultimately resolved in court, the majority instead being resolved through mediation; the parties also reported considerably lower costs than those incurred through litigation, together with a much shorter period for resolving the conflict.

The initiative of Brock University was carried forward in the new Canadian Code of Civil Procedure (2008), which, in subdivision 24.1.1, enshrines the concept of 'Mandatory Mediation', stating that mediation is intended to reduce the costs and duration of court proceedings, and establishing mediation commissions at the level of each administrative-territorial subunit. As a further observation, the Canadian civil code defines mediation simply as a method of resolving conflicts outside the courts, without assigning it other attributes such as 'optional' or 'mandatory'.

4.2 Germany

In German civil law, mandatory mediation has been regulated since 2000 in certain civil-law disputes, such as boundary disputes, defamation through the media, or any other conflict concerning sums of up to €750. Mandatory mediation may, however, be carried out only by mediators with specialised legal qualifications, such as lawyers or notaries, and applies only in certain Länder (for example, Bavaria), while retaining the same principles of neutrality, impartiality and confidentiality found in Romanian legislation. It is noteworthy that the German and Canadian legislators, operating within two different legal systems, have each opted for the mandatory character of mediation in civil matters and, in particular, for the promotion of mediation by the state through seminars and information sessions freely accessible to litigants, with the declared purpose of relieving the burden on the courts. This is precisely the aspect still missing from the Romanian legal landscape — whether owing to a lack of interest or a lack of

legislation — namely the promotion of mediation in civil matters, not primarily by the professional organisations that have increasingly emerged, but above all by the judicial apparatus itself.

4.3 France

Closer to the subject matter of conflict mediation in Romanian civil law are the regulations governing the mediation process in French civil law. Following a similar trajectory, the Romanian and French legal systems both historically maintained the institutions of justices of the peace and reconciliation commissions. France abandoned these methods of conflict resolution around the 1950s, and Romania somewhat later. Under current French regulation, however, Law No. 95-125 of 1995 allows a judge to delegate certain of his or her own functions to a third party (mediator), who pursues resolution of the conflict under the judge's supervision (Canada. Code of Civil Procedure. 2008). Although entirely optional, mediation procedure has been actively promoted by the Courts of Appeal of Grenoble and Paris, with immediate results in reducing the number of civil-law disputes brought before the courts; an increasing number of civil conflicts have accordingly been resolved through mediation, at substantially lower cost in both time and money.

French legislation presently also recognises mediation as a mandatory method of dispute resolution in labour-law matters (before the Conseils de Prud'hommes); likewise, in divorce matters, mediation is mandatory before the Family Court may be seized of the case (France. Law No. 95-125,1995).

4.4 Czech Republic

Present in Czech legislation for at least a decade, mediation differs according to whether the matter is criminal or non-criminal in nature, the training of mediators itself differing according to the field in which they are to practise. As a mandatory procedure in certain fields strictly regulated by law, the procedural rules are carefully designed so that the system, as organised, enables the parties to reach mutually advantageous solutions while avoiding the burdening of the courts with cases whose resolution is favourable to both parties within the mandatory procedure before the mediator.

4.5 Austria and Other European States

As the first country in which mediation was recognised through an Act of Parliament, Austria offers the clearest evidence of the advantages of mediation procedure. Other countries, such as Belgium, Hungary and Bulgaria, although they do not impose mediation as a mandatory procedure, show a growing tendency to direct a significant number of cases towards mediation, with the future aim of increasing the number of conflicts resolved through mediation agreements (European Parliament and Council, 2008).

Across these various regulatory regimes, both in the Americas and in Europe, it is possible to identify legal systems that have implemented, or are in the process of implementing, mediation as a method of resolving conflicts in private-law matters — encompassing civil law, family law, business (commercial) law, and labour and social-protection law, among others, this list not being exhaustive. It is submitted that the legislation of both the Republic of Moldova and Romania concerning mediation should be aligned with these other legal systems, through the adoption of a further amendment to the mediation law consistent with the provisions of EU Directive 2008/52/EC (European Parliament and Council, 2008), in support of relieving the burden on the courts and directing litigants towards alternative methods of dispute resolution.

5. Mediation in Romanian Law: Current Framework and Shortcomings

In Romania, although regulated by Law No. 192/2006 (Law No. 192/2006), mediation in civil-law matters has not yet achieved the level of application desired by the legislator, still less the level required to relieve the burden on the courts. Regrettably, litigants — whether owing to inadequate promotion or to a lack of legal education — do not yet resort sufficiently to alternative dispute resolution methods, remaining largely tied to the classical system of justice. Numerous initiatives exist to amend Law No. 192/2006, in whole or in part, the principal proponents being the professional organisations established by authorised mediators. It is necessary to harmonise current Romanian legislation with European legislation on mediation, in compliance with Directive 2008/52/EC, adapting the requirements of the European Union to the Romanian legal system. It is important to underline the provision of the Directive stating that a mediation agreement vested with enforceability in one Member State may be enforced in the territory of another Member State, in the case of cross-border disputes. It remains an open question how Romania will be able to satisfy such a requirement without amending its current legislation accordingly.

In civil-law matters, the institution of mediation continues to suffer from an absence of implementing norms. Mediation procedures are not comprehensively regulated, and existing practice is too limited and too varied to establish a single, settled method. It is submitted that, within the mediation procedure, the mediator relies on two important and distinct legal instruments that must be treated with particular care: the mediation contract and the mediation agreement.

Law No. 192/2006, through Article 45, regulates the mediation contract, requiring written form and conferring enforceability with regard to the fee owed by the parties to the mediator. The mediation contract suspends the limitation period applicable to the disputed right submitted to mediation.

The legislator, however, left the mediation agreement itself unregulated. Articles 56 and 57 of the Law refer only to the parties' understanding and to the drawing-up of minutes closing the mediation procedure — provisions that are, in our view, insufficient to confer the legal force required on the instrument issued by the mediator. This absence of regulation of the mediation agreement constitutes precisely the weak link in the current law, depriving the mediation process of the force it requires and diminishing litigants' interest in this alternative method of dispute resolution. By contrast, the mediation agreement is regulated in all the legal systems discussed above, carries the legal force necessary for enforcement, and provides the parties to mediation with the support needed to resolve their conflict. It is submitted that any future regulation should include a separate chapter dedicated to the mediation agreement, addressing its manner of preparation and its legal force as against both the parties and third parties

In light of the new Romanian Code of Civil Procedure, mediation is expected to enjoy greater visibility, an outcome that will need to be sustained through the efforts of the entire legal system. Judges will be required, in respect of certain civil conflicts, to direct the parties towards mediation, thereby relieving the courts of cases capable of resolution through alternative methods.

6. Conclusions

In conclusion, it is hoped that mediation in private-law matters will crystallise into a unitary and coherent practice, legally harmonised with European and international legislation, and sufficiently flexible to accommodate the legal dynamics of the present day.

Mediation, as an alternative method of dispute resolution conducted under conditions of neutrality, impartiality and confidentiality, permits the swift and low-cost resolution of disputes, whether or not those disputes are already before the courts. Where a dispute pending before a court is nonetheless to be resolved through mediation, the parties may request the suspension of proceedings for that purpose; the parties then appear before the mediator, sign a mediation contract, and either begin the mediation process immediately or schedule it for a later date. Should the parties reach an understanding, a mediation agreement and minutes closing the mediation are drawn up and jointly presented to the court, following which a consent judgment (hotărâre de expedient) of enforceable character is issued, recording the parties' agreement; upon request, the stamp duty paid to bring the matter before the court is refunded. The advantages of resolving private-law disputes through mediation consist principally in the fact that the resulting solution is swift, consistent with the will of the parties, obtained at low cost, and capable of compulsory enforcement without further formality.

References

Zecheru N., 2013, Medierea unor conflicte de natură penală, alternativă pentru modernizarea sistemului judiciar; Bucureşti, Editura Ministerului Afacerilor Interne, p.45.

Tuni C., 2015,Mecanisme teoretice și legale de implementare a medierii în practica soluționării litigiilor: în materialele conferinței științifice internaționale: Rolul științei și educației în implementarea acordului de asociere la Uniunea Europeană. Chișinău.Vasilina. p.531-534

Armașu Mihai Ionuț, 2016, Medierea conflictelor in dreptul civil. UAIC Iasi, p.1-4

Canada. Code of Civil Procedure 2008

France. Law No. 95-125 of 8 February 1995. [Official Journal reference required].

European Parliament and Council (2008) Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Official Journal of the European Union, L 136, pp. 3–8.

Romania. Law No. 192/2006 on mediation and the organisation of the mediator profession. Official Gazette of Romania, Part I.

INHERITANCE OF DIGITAL IDENTITY – LEGAL IMPLICATIONS ON PERSONALITY RIGHTS AFTER DEATH

Ana-Maria VASILE[1]

Abstract:

The accelerated development of technology and the expansion of the digital environment have led to the emergence of new legal challenges concerning the protection of personality rights after death. Social media accounts, electronic correspondence, digital archives, photographs, online content, and virtual assets contribute to shaping a digital identity that continues to exist even after the termination of the legal personality of the natural person. In this context, questions arise regarding the legal nature of these elements and the possibility of their transmission or administration by heirs.

In the absence of a unified and explicit regulation in Romanian law, legal practice highlights difficulties related to heirs' access to the deceased person's digital accounts, the protection of personal data, the right to privacy, and the limits of exercising non-patrimonial rights after death. At the same time, the relationship between succession law and the rules governing personal data protection generates numerous doctrinal and practical controversies.

The issue of inheriting digital identity reflects the necessity of adapting civil law to new technological and social realities in order to ensure a balance between the protection of the deceased person's memory, the interests of heirs, and the observance of fundamental rights within the digital environment.

Keywords: *digital identity; personality rights; digital inheritance; personal data; succession law; privacy.*

Introduction

The digitalization of society has profoundly transformed the manner in which individuals exercise their rights and engage in legal relationships, giving rise to legal issues that could not have been anticipated by traditional civil law regulations. The rapid development of information technologies and the widespread use of digital platforms have fundamentally changed the ways in which individuals communicate, conduct their professional activities, manage their assets, and establish their digital presence and identity. Today, every individual leaves behind a vast amount of digital data, accounts, and online content that collectively form their digital identity and may continue to produce legal effects even after the holder's death.

This reality raises a series of complex legal issues situated at the intersection of civil law, succession law, personal data protection, and the protection of fundamental rights. Although the rules governing the devolution of an estate are comprehensively regulated by the Romanian Civil Code, the legal regime applicable to digital assets remains insufficiently developed,

[1] PhD Lecturer, „Constantin Brâncoveanu" University of Pitești

both under Romanian law and in many other legal systems. In practice, heirs frequently encounter difficulties in accessing the deceased person's e-mail accounts, social media profiles, digital archives, and other virtual assets, while digital service providers often rely on obligations relating to privacy protection and the confidentiality of communications to restrict such access.

The complexity of the legal regime governing digital assets is further reinforced by the dual nature of digital identity. On the one hand, digital identity encompasses elements of economic value, such as digital assets, copyrighted works, monetized accounts, and cryptocurrencies, which may form part of the deceased's estate. On the other hand, it also comprises deeply personal elements—including an individual's image, online reputation, electronic correspondence, photographs, and records of online activity—that are intrinsically linked to the holder's personality and raise the question of whether the protection afforded to non-patrimonial rights survives the holder's death.

Under Romanian law, personality rights are expressly regulated by Articles 58–81 of the Civil Code, while the memory of the deceased benefits from specific legal protection. Nevertheless, the Civil Code contains no explicit provisions governing the legal status of digital identity after the death of its holder or the manner in which heirs may exercise rights over the deceased's digital elements. Furthermore, pursuant to Recital (27) of Regulation (EU) 2016/679 (General Data Protection Regulation – GDPR), the Regulation does not apply to the personal data of deceased persons, leaving Member States free to adopt national rules governing the processing of such data.

Against this background, it becomes necessary to clarify the legal nature of digital identity and to distinguish between those elements that may be transferred mortis causa and those that remain subject to the legal protection afforded to personality rights. Only such an approach can ensure an appropriate balance between the individual's autonomy of will, the protection of the deceased person's memory, the legitimate interests of heirs, and the requirements of privacy protection in the digital environment.

The Concept of Digital Identity and Its Legal Nature

The concept of digital identity has undergone significant development alongside the expansion of information and communication technologies, becoming one of the central concepts of the digital society.[1] Initially, digital identity was viewed exclusively from a technological perspective, being associated with user identification and authentication mechanisms in electronic environments. However, the evolution of legal relationships

[1] Clare Sullivan, *Digital Identity: An Emergent Legal Concept*, University of Adelaide Press, Adelaide, 2011, p. 4

conducted through digital platforms has established digital identity as a subject of legal analysis.[1] Consequently, the concept has transcended its purely technical dimension and is now examined in close connection with fundamental rights, personal data protection, privacy, and the exercise of proprietary rights in the digital environment.[2]

From a legal perspective, digital identity cannot be reduced to the mere existence of an account on an online platform or the use of an electronic identifier. Rather, it comprises the entirety of digital information, attributes, and elements that enable the direct or indirect identification of an individual and reflect that person's activities, relationships, and presence in the digital environment. This category includes not only identifying information, such as usernames and e-mail addresses, but also photographs, audio and video recordings, electronic correspondence, documents stored in cloud services, records of online activities, content published on social media platforms, and metadata generated through the use of digital services.

Legal scholarship emphasizes that digital identity constitutes a projection of an individual's personality in the virtual environment rather than a mere electronic reproduction of their identity in the physical world.[3] The digital environment enables the continuous accumulation of information that frequently exceeds what individuals knowingly disclose about themselves through the aggregation of browsing data, expressed preferences, transaction histories, and online interactions. From this perspective, digital identity acquires an autonomous character, resulting not only from the holder's voluntary actions but also from the automated processing of data carried out by digital platform operators.

This characteristic explains why digital identity cannot be classified exclusively either as a proprietary right or as a non-proprietary right. On the one hand, certain components of digital identity are intrinsically linked to the individual, including their image, online reputation, voice, private correspondence, and social relationships developed in the digital environment, all of which constitute expressions of personality rights. On the other hand, the same digital identity may encompass elements capable of economic valuation, such as copyrights in digital content, revenue generated through the monetization of digital platforms, cryptocurrencies, virtual assets,

---

[1] Clare Sullivan, *Digital Identity – The Legal Person?,* Computer Law & Security Review, Vol. 25, No. 3, 2009, p. 227

[2] Margarita Robles-Carrillo, *Digital Identity: An Approach to Its Nature, Concept, and Functionalities*, International Journal of Law and Information Technology, Vol. 32, 2024, pp. 1–6.

[3] Edina Harbinja, *Post-Mortem Privacy 2.0: Theory, Law and Technology*, Springer, Cham, 2022, pp. 15–25

internet domain names, and accounts used for commercial purposes. This hybrid structure justifies a differentiated legal approach, whereby each component is governed according to the legal nature of the right involved.

Although Romanian law does not expressly define digital identity, the existing legal framework allows certain components of digital identity to be integrated within the sphere of personality rights protected by the Romanian Civil Code. Pursuant to Article 58 of the Romanian Civil Code, every individual enjoys the right to life, health, physical and psychological integrity, dignity, one's own image, and respect for private life—legal values that are equally applicable in the digital environment. Likewise, the legal provisions protecting a person's name, image, reputation, and private life apply whenever these rights are infringed through electronic platforms or other digital services.

At the same time, digital identity must also be examined in relation to the concept of patrimony. Under the traditional understanding of civil law, patrimony comprises the totality of an individual's rights and obligations having economic value. However, the development of the digital economy demonstrates that a significant portion of patrimonial value may be embodied in intangible assets existing exclusively in digital form. Monetized accounts on content-sharing platforms, electronic wallets, virtual assets, and rights relating to digital works may therefore constitute assets capable of transmission by inheritance, notwithstanding their exclusively electronic form. By contrast, access to private correspondence, personal messages, and communication records raises distinct legal concerns, as these elements are primarily protected by the legal rules governing privacy and the confidentiality of communications.

Accordingly, digital identity cannot be regarded either as a mere asset or exclusively as an attribute of personality. Rather, it constitutes a complex legal reality situated at the intersection of civil law, succession law, personal data protection, and the protection of fundamental rights. It is precisely this hybrid legal nature that explains the difficulties encountered in determining the legal regime applicable after the holder's death and justifies the need for a differentiated approach based on the legal nature of the various components constituting an individual's digital patrimony.

Personality Rights after Death under Romanian Law

As a general rule, the death of a natural person results in the termination of legal capacity and renders the exercise of strictly personal subjective rights impossible. Nevertheless, the death of the right holder does not extinguish all legal effects arising from personality rights. Romanian law recognizes the need to protect certain non-proprietary values even after death, in consideration of the respect owed to the memory of the deceased and the

legitimate interest of family members or other close persons in seeking the cessation of infringements affecting that memory.[1]

Personality rights occupy a distinct place within the Romanian civil law system and are expressly regulated by Articles 58–81 of the Romanian Civil Code. These rights embody the fundamental values of the human person and protect interests such as life, health, physical and psychological integrity, dignity, honour, reputation, image, name, and private life. Their non-proprietary nature derives from the fact that they are inherent to the individual, inalienable, not subject to extinctive prescription, and, as a matter of principle, non-transferable.[2]

The non-transferable nature of personality rights does not, however, mean that they cease to produce any legal effects upon the death of their holder. On the contrary, Articles 78–81 of the Romanian Civil Code recognize the possibility of protecting the memory of the deceased, acknowledging that certain values intrinsically linked to the deceased's personality continue to benefit from legal protection even after the opening of the succession. Such protection is not intended to preserve the legal personality of the deceased but rather to safeguard an autonomous social value, namely the memory and dignity of the person who has passed away.[3]

Legal scholarship has emphasized that the post-mortem protection of personality rights represents a continuation of the general obligation to respect human dignity. Although the holder of these rights no longer exists from a legal perspective, the legal order cannot remain indifferent to acts capable of affecting the deceased's reputation, image, or memory. Consequently, the right to bring legal proceedings is vested, where appropriate, in those persons authorized by law, who do not become holders of the deceased's personality rights but merely enjoy procedural standing for the purpose of protecting the deceased's memory.[4]

The issue becomes considerably more complex in the context of the digital environment. Whereas, in the past, infringements upon the memory of a deceased person occurred primarily through printed or audiovisual

---

[1] Article 15 of the Romanian Civil Code – **Protection of Non-Proprietary Rights**; Articles 78–81 of the Romanian Civil Code (respect for the deceased and the protection of the deceased's memory).

[2] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (eds.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Article 58.

[3] O. Ungureanu, C. Munteanu, *Civil Law. Persons*, 4th ed., Hamangiu Publishing House, Bucharest, 2022, p. 55.

[4] I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introduction to Civil Law*, 2nd ed., Hamangiu Publishing House, Bucharest, 2013, section concerning personality rights.

publications, they may now result from the management of social media accounts, the modification of previously published content, the commercial use of the deceased's image, or the continued existence of digital profiles that generate automated interactions. Consequently, the memory of the deceased is no longer protected exclusively within the physical sphere but also within a virtual environment characterized by permanent accessibility, the rapid dissemination of information, and the practical difficulty of permanently removing published content.

This reality requires a reinterpretation of personality rights in light of the new forms through which digital identity is expressed. An individual's image is no longer represented solely by printed photographs or traditional audiovisual recordings, but also by social media profiles, digital avatars, multimedia content, records of online activities, and information generated through the use of electronic services. Likewise, a person's reputation may continue to be influenced after death by online comments, the unauthorized use of their name or image, or the dissemination of false information in the digital environment.

From the perspective of succession law, a clear distinction must be drawn between personality rights and assets capable of transmission mortis causa. Rights relating to dignity, honour, image, and private life do not form part of the deceased's estate, as they are inseparably linked to the individual. By contrast, certain proprietary rights arising from the commercial exploitation of one's image, intellectual creations, or other digital assets may be transferred by inheritance in accordance with the law. This distinction is particularly significant in the context of digital patrimony, where the same digital platform may contain both economically valuable assets and information belonging exclusively to the sphere of private life.

Legal scholars have observed that the difficulty in determining the legal classification of digital patrimony stems precisely from its hybrid nature. For example, a social media account may contain family photographs, private conversations, personal documents, copyrighted works, monetized content, and contracts concluded in electronic form. In such circumstances, the automatic application of succession rules risks infringing not only the personality rights of the deceased but also the rights of other individuals involved in electronic communications. Consequently, each category of information must be assessed separately according to its legal nature.

Another legal issue concerns the relationship between the heirs' right to administer the deceased's estate and the obligation to respect the deceased's wishes. It is entirely possible that, during their lifetime, an individual intended certain data, correspondence, or digital files to remain confidential even after death. In the absence of explicit legal provisions governing a digital will or

the appointment of a digital executor, resolving such conflicts requires reconciling the principles of succession law with the protection of personality rights and the safeguarding of private life.

It follows that the protection of personality rights does not cease upon the death of their holder but continues to influence the legal regime governing the elements constituting digital identity. In the absence of specific legislation governing post-mortem digital patrimony, the provisions of the Romanian Civil Code relating to personality rights constitute the principal legal framework for resolving disputes between heirs, digital service providers, and other interested parties, while at the same time highlighting the continuing need for explicit legislative intervention.

Inheritance of Digital Accounts and Digital Assets

The expansion of digital technologies has led to the emergence of a category of assets which, although lacking a tangible existence, may possess significant legal and economic value. Today, an individual's patrimony is no longer composed exclusively of tangible property or traditional proprietary rights but also encompasses a wide range of digital assets, including user accounts, documents stored in cloud services, electronic wallets, cryptocurrencies, internet domain names, works created and published in digital format, and content monetized through online platforms. Consequently, the opening of a succession raises the question of the legal nature of these assets and the extent to which they may be transferred to the heirs.[1]

Pursuant to the principle established by Article 953 of the Romanian Civil Code, succession consists in the transfer of the patrimony of a deceased natural person to one or more living persons. It follows from this definition that the object of succession is the deceased's patrimony, namely the totality of rights and obligations having economic value existing at the time the succession is opened.[2] However, applying this principle in the digital environment requires a distinction between those elements that possess a proprietary character and those that merely constitute manifestations of the holder's personality.

Legal scholarship has observed that the concept of digital patrimony refers to the entirety of proprietary rights, assets, and economic interests existing exclusively in electronic form or managed through digital services.[3] This category includes, for example, online bank accounts, cryptocurrency

[1] Edina Harbinja, *Post-Mortem Privacy 2.0: Theory, Law and Technology*, Springer, Cham, 2022, p. 55

[2] Article 953 of the Romanian Civil Code; Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, C.H. Beck Publishing House, Bucharest, 2021, commentary on Article 953.

[3] Naomi Cahn, *Digital Assets and Fiduciary Access*, ACTEC Law Journal, Vol. 42, 2017, p. 183

wallets, rights relating to internet domain names, transferable software licences, the economic rights associated with digital works protected by copyright, and revenue generated through the monetization of content published on digital platforms. By contrast, electronic correspondence, family photographs, private messages, and communication histories cannot be assessed solely in terms of their economic value, since they directly reflect the holder's private life and personal identity.

From this perspective, the mere existence of a digital account does not justify its automatic inclusion in the deceased's estate. Rather, a distinction must be drawn between the contractual relationship existing between the user and the digital service provider, on the one hand, and the content contained within that account, on the other. As a general rule, the user does not acquire ownership of the account itself but only a contractual right to use the service, governed by the terms and conditions accepted at the time the account is created.[1] Consequently, heirs cannot automatically claim the transfer of the contractual relationship itself but may exercise only those rights forming part of the deceased's patrimony, insofar as such rights are not excluded by their legal nature or by statutory or contractual provisions.

This distinction is particularly important in relation to social media platforms. User profiles contain information of different legal natures, including photographs, video recordings, private conversations, contact lists, public posts, copyright-protected content, and, in some cases, income generated through online commercial activities. Accordingly, no uniform legal classification can be applied. While proprietary rights arising from the economic exploitation of digital content may form part of the deceased's estate, access to private messages and other information belonging to the sphere of intimate life raises distinct legal issues concerning the protection of the confidentiality of communications and the right to privacy of both the deceased and the third parties who communicated with them.[2]

Similarly, cloud storage services may contain documents of widely differing legal nature, including legal documents, professional archives, personal photographs, manuscripts, databases, and intellectual works. Some of these possess evident economic value and may therefore be administered by the heirs, whereas others constitute purely manifestations of private life and require respect for the wishes expressed by the holder during their

[1] Edina Harbinja, *Legal Aspects of Transmission of Digital Assets on Death*, *Journal of Internet Law*, Vol. 18, No. 11, 2015.

[2] Lilian Edwards, Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased,* Cardozo Arts & Entertainment Law Journal, Vol. 32, 2014, p. 83

lifetime. In the absence of specific legal provisions governing heirs' access to such services, different solutions have emerged in practice, largely depending on the contractual policies adopted by digital service providers.

A separate category consists of digital assets possessing autonomous economic value. Cryptocurrencies, digital tokens, internet domain names, rights relating to electronic wallets, and revenue generated through digital platforms constitute intangible assets capable of economic valuation. Where the deceased held proprietary rights over such assets at the time of death, they form part of the estate pursuant to the general rules of civil law. The principal practical difficulties concern not the transfer of ownership itself, but the effective possibility of accessing such assets in the absence of passwords, cryptographic keys, or other authentication credentials known only to the deceased.

A distinct issue concerns content created by the deceased and protected under copyright law. In this respect, a distinction must be drawn between the author's moral rights and economic rights. While moral rights remain permanently linked to the creator's personality and are subject to a specific legal regime, economic rights are transferable by inheritance under the conditions established by the special legislation governing copyright.[1] Consequently, works published in digital form may continue to generate economic effects after the author's death, without this implying the transfer of the personality rights associated with the work.

In my view, digital patrimony cannot be regarded as a homogeneous legal category, since it comprises elements subject to different legal regimes, thereby excluding the uniform application of succession rules to all of its components. It includes both intangible assets possessing economic value, which are capable of transmission mortis causa, and deeply personal information, the protection of which continues to be governed by the legal rules applicable to personality rights and the right to privacy. In the absence of clear legislative criteria, each element must be classified individually according to the legal nature of the right exercised by the holder prior to death.

Such an approach is consistent with both the principles of succession law and the requirements arising from the protection of fundamental rights. I submit that digital patrimony cannot be transferred as a single, indivisible legal entity, but only insofar as its proprietary components are concerned, provided that they are not intrinsically linked to the holder's personality. By contrast, those elements reflecting the individual's private life, dignity, image,

[1] Romanian Copyright and Related Rights Act No. 8/1996 (republished), Articles 11, 12 and 44–46; L. Pop, A. Vidu, S. I. Vidu, *Elementary Treatise on Civil Law. Obligations*, Universul Juridic Publishing House, Bucharest, 2020 (section concerning the author's economic and non-economic rights).

reputation, or personal relationships remain subject to the legal regime governing personality rights, even where they are stored or accessible exclusively in the digital environment. Such a distinction makes it possible to reconcile the legitimate interests of heirs with respect for the memory of the deceased and lays the foundation for the development of a coherent legal framework governing digital patrimony under Romanian law.

The Need for Legislative Regulation under Romanian Law

The rapid development of digital technologies and the expansion of individuals' digital patrimony have exposed the limitations of the current legal framework governing succession and the protection of personality rights. Although the provisions of the Romanian Civil Code provide general rules concerning the devolution of estates and the protection of non-proprietary rights, they were drafted at a time when digital patrimony and digital identity had not yet emerged as legally significant realities. Consequently, the application of traditional legal principles to digital patrimony frequently gives rise to difficulties of interpretation and inconsistent legal solutions.[1]

One of the principal shortcomings of Romanian law lies in the absence of a legal definition of digital patrimony and digital assets. At present, national legislation does not specify which elements of digital identity may be transferred by succession, nor does it establish the criteria for distinguishing such elements from personality rights. Such a distinction is essential, since the indiscriminate application of succession rules to all components of digital identity could result in violations of the right to privacy, the confidentiality of communications, or the wishes expressed by the holder during their lifetime.

At the same time, the Romanian legal framework does not regulate the legal relationship between heirs and digital service providers. In practice, access to the online accounts of a deceased person depends primarily on the contractual policies of platform operators rather than on any legal entitlement expressly granted to heirs. This situation creates a legal imbalance, as the exercise of succession rights becomes subject to contractual clauses unilaterally drafted by digital service providers, without adequate legislative oversight.[2]

Another issue arises from the absence of legal provisions enabling individuals to express their wishes regarding their digital patrimony. Under Romanian law, a will produces legal effects with respect to the assets and

[1] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Article 953 et seq.

[2] Edina Harbinja, *Post-Mortem Privacy 2.0: Theory, Law and Technology*, Springer, Cham, 2022, pp. 129–170.

rights forming part of the testator's patrimony. However, there are no specific rules governing the administration of digital accounts, their deletion, their conversion into memorial accounts, or the appointment of a person responsible for managing an individual's digital identity after death. In the absence of such mechanisms, the deceased's intentions may remain unknown, leaving heirs to seek access to digital accounts without being able to demonstrate the holder's wishes.

The first direction for legislative reform should be the adoption of a legal definition of digital patrimony and the establishment of criteria distinguishing its proprietary components from its non-proprietary ones. Such regulation would make it possible to distinguish digital assets having economic value from those components of digital identity that merely constitute manifestations of personality and therefore continue to require legal protection after death. A statutory definition would promote greater consistency in judicial practice and facilitate the application of the general principles of succession law to these new forms of patrimony.

In my view, Romanian law should also expressly recognize the possibility for any individual to determine, during their lifetime and by means of a unilateral legal act, how their digital identity should be managed after death. Such an instrument, commonly referred to in legal scholarship as a digital will, would not constitute a distinct category of testamentary disposition within the meaning of succession law, but rather a complementary legal mechanism through which an individual could decide whether particular accounts should be deleted, archived, converted into memorial profiles, or managed by a specifically designated person. Such a solution would strengthen individual autonomy and reduce conflicts between heirs and digital service providers.

Furthermore, I consider it necessary to establish explicit statutory obligations for digital service providers in their dealings with the successors of a deceased person. At present, access to digital information is governed primarily by the platforms' terms and conditions, resulting in divergent outcomes in legally comparable situations. Legislative intervention could establish uniform procedures for verifying the status of heirs, providing access to relevant information, and distinguishing between data having proprietary value and information relating exclusively to the private life of the deceased or of third parties.

Finally, I submit that future legislation should ensure an appropriate balance between the interests of heirs and the protection of fundamental rights. The exercise of succession rights cannot justify unrestricted access to all digital information belonging to a deceased person, particularly where such information concerns private correspondence or contains personal data

relating to third parties. Accordingly, the legislature should establish clear criteria governing the limits of heirs' access and introduce procedural safeguards enabling courts or competent authorities to assess the proportionality of the measures requested.

In conclusion, the absence of explicit legislation governing digital patrimony is not merely a matter of legislative technique but a deficiency affecting both legal certainty and the effective operation of succession law. The evolution of the digital society demonstrates that an individual's patrimony can no longer be understood solely by reference to tangible property and traditional proprietary rights. I consider that the adoption of explicit legislation governing digital patrimony constitutes an inevitable stage in the evolution of Romanian succession law. Only through the establishment of clear legal rules distinguishing the proprietary components of digital patrimony from its non-proprietary elements can an appropriate balance be achieved between individual autonomy, the protection of personality rights, and the legitimate interests of heirs.

References

- *** Romanian Civil Code
- ***Romanian Copyright and Related Rights Act No. 8/1996 (republished)
- Baias, Fl. A., E. Chelaru, R. Constantinovici, I. Macovei (eds.), The New Civil Code. Article-by-Article Commentary, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021;
- Cahn Naomi, *Digital Assets and Fiduciary Access*, ACTEC Law Journal, Vol. 42, 2017;
- Edwards, Lilian Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased,* Cardozo Arts & Entertainment Law Journal, Vol. 32, 2014;
- Harbinja Edina, *Post-Mortem Privacy 2.0: Theory, Law and Technology*, Springer, Cham, 2022;
- Harbinja Edina, *Legal Aspects of Transmission of Digital Assets on Death*, *Journal of Internet Law*, Vol. 18, No. 11, 2015;
- Pop L., A. Vidu, S. I. Vidu, *Elementary Treatise on Civil Law. Obligations*, Universul Juridic Publishing House, Bucharest, 2020
- Reghini, I., Ș. Diaconescu, P. Vasilescu, *Introduction to Civil Law*, 2nd ed., Hamangiu Publishing House, Bucharest, 2013;
- Robles-Carrillo Margarita, *Digital Identity: An Approach to Its Nature, Concept, and Functionalities*, International Journal of Law and Information Technology, Vol. 32, 2024;

• Sullivan Clare, *Digital Identity: An Emergent Legal Concept*, University of Adelaide Press, Adelaide, 2011, p. 4

• Sullivan Clare, *Digital Identity – The Legal Person?,* Computer Law & Security Review, Vol. 25, No. 3, 2009, p. 227

• Ungureanu O., C. Munteanu, *Civil Law. Persons*, 4th ed., Hamangiu Publishing House, Bucharest, 2022, p. 55.

THE FORCED HEIRSHIP RESERVE BETWEEN FAMILY PROTECTION AND FREEDOM OF DISPOSITION – CURRENT CHALLENGES IN JUDICIAL PRACTICE

Ana-Maria Vasile[1]

Abstract:

The forced heirship reserve represents one of the most significant limitations on the freedom of disposition in civil law, reflecting the necessity of protecting family interests within succession transmission. This institution remains relevant in the context of contemporary social and economic transformations, characterized by the diversification of patrimonial relationships and the increasing emphasis on individual autonomy.

In judicial practice, the application of legal provisions regarding the forced heirship reserve raises difficulties related to the determination of the succession estate, the establishment of the disposable portion, the reduction of excessive liberalities, and the identification of indirect or disguised donations that may affect the rights of forced heirs. At the same time, the interpretation of the provisions of the Civil Code reveals the existence of inconsistent judicial solutions, especially in situations where the will of the deceased conflicts with the protection granted to forced heirs.

From a doctrinal perspective, the forced heirship reserve continues to be analyzed both as a mechanism for the protection of family solidarity and as a limitation on testamentary freedom and the exercise of property rights. Current debates highlight the necessity of maintaining a balance between an individual's patrimonial autonomy and the protection of forced heirs, in accordance with new social and legal realities.

Keywords: *forced heirship reserve; forced heirs; testamentary freedom; reduction of liberalities; disposable portion; succession law.*

Introduction

The institution of the reserved portion occupies a central position in Romanian succession law, representing the principal mechanism through which the legislature limits the freedom to dispose of one's estate in order to ensure the protection of forced heirs. Through this regulation, the law seeks to strike a balance between the individual's autonomy of will and the obligation to protect family relationships, as enshrined in the mandatory rules governing succession law.[2]

Although the current legal framework governing the reserved portion is relatively stable, the application of the provisions of the Romanian Civil Code continues to generate numerous practical difficulties, particularly with regard to determining the estate forming the basis for calculation, the reduction of excessive gratuitous transfers, and the legal classification of certain transactions as indirect or disguised gifts. In this context, judicial practice reveals divergent

[1] PhD Lecturer, „Constantin Brâncoveanu" University of Pitești

[2] Articles 1086–1099 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

solutions, resulting both from the particular circumstances of each case and from the complexity of reconciling the protection afforded to forced heirs with the deceased's freedom to arrange the transfer of his or her estate.[1]

This study aims to examine the legal foundations of the reserved portion and the principal difficulties encountered in the application of this institution, with reference to the provisions of the Romanian Civil Code, the views expressed in legal scholarship, and the relevant trends reflected in judicial practice.

1. Legal Foundations of the Reserved Portion

The reserved portion is the legal institution through which the law limits an individual's freedom to make gratuitous dispositions of his or her estate, guaranteeing certain heirs a minimum share of the inheritance regardless of the deceased's intention as expressed through inter vivos gifts or testamentary dispositions. Governed by Articles 1086–1099 of the Romanian Civil Code, the reserved portion constitutes one of the most significant limitations on the principle of testamentary freedom, serving to protect family interests and ensure a balanced transfer of wealth upon death.[2]

From a legal perspective, the reserved portion does not constitute an independent right of succession, nor does it confer an autonomous right over specific assets belonging to the deceased's estate. Rather, it defines the limits within which the deceased may validly dispose of his or her property through gifts or testamentary dispositions. Accordingly, the part of the estate over which the deceased remains free to dispose is referred to as the disposable portion, the two institutions being intrinsically interconnected.[3]

The legal basis of the reserved portion must be examined in light of two fundamental principles that require continuous reconciliation: the autonomy of individual will and the protection of the family. On the one hand, the right to property entitles its holder to dispose freely of his or her assets, including by means of gratuitous transfers. On the other hand, the legislature has considered that such freedom cannot be absolute, as it could result in the complete exclusion from succession of persons towards whom the deceased owed moral and family obligations. In this context, the reserved portion reflects the legislature's choice to give priority to the protection of certain categories of heirs without eliminating the deceased's freedom to dispose of the estate as a whole.[4]

---

[1] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Articles 1086–1099.

[2] Articles 1086–1099 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented

[3] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Articles 1086–1099.

[4] Fr. Deak, R. Popescu, *Treatise on Succession Law*, 5th revised and updated ed., Universul Juridic Publishing House, Bucharest, 2024, pp. 335–347.

The current legal framework establishes the mandatory nature of the rules governing the reserved portion, which are intended to safeguard family-related public policy interests. Consequently, gratuitous dispositions exceeding the disposable portion are not null and void but are subject to reduction upon the request of the forced heirs, under the conditions prescribed by law. This mechanism reconciles the deceased's testamentary intent with the statutory rights of forced heirs while avoiding the complete invalidation of excessive gratuitous transfers.[1]

Contemporary legal scholarship has emphasized that the institution of the reserved portion continues to justify its existence despite the increasing importance attached to individual patrimonial autonomy in modern society. The evolution of economic relations and the diversification of wealth-transfer mechanisms have created new ways of circumventing the mandatory rules governing the reserved portion, thereby reinforcing the importance of judicial scrutiny over excessive gratuitous transfers and legal transactions that conceal gifts subject to reduction. Consequently, the reserved portion remains one of the principal legal instruments through which a balance is maintained between testamentary freedom and the protection of family interests.

2. Forced Heirs and the Extent of the Reserved Portion

The reserved portion is granted exclusively to certain categories of statutory heirs, referred to by the Romanian legislature as forced heirs. Pursuant to Article 1087 of the Romanian Civil Code, these categories include the deceased's descendants, privileged ascendants, and the surviving spouse.[2] Limiting the beneficiaries of the reserved portion reflects the legislature's intention to protect only those persons who maintain particularly close family relationships with the deceased and whose interests justify restricting the deceased's freedom to dispose of his or her estate.[3]

Descendants enjoy the broadest protection under succession law. Whether they inherit in their own right or by representation, they cannot be deprived of their reserved portion through gifts or testamentary dispositions exceeding the disposable portion. This legislative approach is justified by the need to preserve the continuity of the family estate and by the reciprocal obligations existing between parents and children, obligations that do not cease upon the death of the deceased.

---

[1] D. Chirică, *Treatise on Civil Law. Succession and Gratuitous Transfers*, C.H. Beck Publishing House, Bucharest, 2014, pp. 385–402.

[2] Article 1087 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[3] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Articles 1087–1088.

Alongside descendants, the law also grants the status of forced heir to the surviving spouse. The protection afforded to the surviving spouse is justified not only by the solidarity inherent in family relationships but also by the contribution that spouses, in most cases, make to the acquisition and preservation of the family estate. Although the reserved portion is distinct from the rights arising under the matrimonial property regime, both institutions pursue the same objective, namely ensuring a minimum level of patrimonial protection for the surviving spouse.

With regard to privileged ascendants, they benefit from the reserved portion only insofar as they satisfy the legal requirements for inheriting from the deceased. Under the current legal framework, this category is limited to the deceased's parents. The legislature has considered that the family relationship between parents and children justifies maintaining succession protection, although to a lesser extent than that afforded to descendants.[1]

The extent of the reserved portion is determined by Article 1088 of the Romanian Civil Code, according to which it amounts to one-half of the share that the forced heir would have received under the rules of intestate succession.[2] Consequently, the reserved portion does not constitute a fixed fraction of the estate but varies depending on the number and category of heirs who are actually entitled to inherit. Its calculation requires the identification of the forced heirs, the determination of their statutory shares, and the establishment of the estate forming the basis for calculation. In practice, these operations represent the principal source of succession disputes and justify a separate analysis of the determination of the estate and the disposable portion.

3. Determining the Estate for Calculation and the Disposable Portion

Determining the estate forming the basis for calculation constitutes one of the most important stages in establishing both the reserved portion and the disposable portion, since only by reference to this estate can it be assessed whether the gratuitous transfers made by the deceased have infringed the rights of the forced heirs. Although the Romanian Civil Code expressly regulates the method of calculation, its practical application frequently gives rise to difficulties resulting both from the complexity of the estate and from legal transactions concluded by the deceased during his or her lifetime.[3]

---

[1] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Article 1087 of the Civil Code.

[2] Article 1088 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[3] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Article 1091 of the Civil Code.

Pursuant to Article 1091 of the Romanian Civil Code, the calculation of the reserved portion and the disposable portion begins with the determination of the gross estate, from which the liabilities of the succession and the succession charges are deducted, resulting in the net estate transferred upon death.[1] Only after this operation has been completed is the value of gifts subject to collation or reduction fictitiously added to the estate, without the donated assets actually being returned to the succession. This legal mechanism serves exclusively to establish an objective basis for calculating the reserved portion and the disposable portion.

The fictitious addition of gifts constitutes one of the distinctive features of the institution of the reserved portion. It does not produce any transfer of ownership nor does it affect the rights lawfully acquired by the donee; its sole purpose is to verify whether the deceased respected the legal limits governing gratuitous transfers. From this perspective, legal scholarship emphasizes that fictitious addition is an accounting and legal operation distinct from both the collation of gifts and the reduction of excessive gratuitous transfers, even though these institutions are functionally interconnected.

A recurrent issue in judicial practice concerns the valuation of donated assets. Although the Romanian Civil Code establishes clear rules governing their valuation, the practical application of these rules becomes particularly difficult where the donated assets have undergone substantial alterations, have been transferred to third parties, or have significantly increased or decreased in value as a result of market developments. In such situations, the courts are required to determine the value relevant for calculating the reserved portion, taking into account both the statutory criteria and the particular circumstances of each individual case.[2]

Judicial practice also reveals numerous disputes arising from indirect or disguised gifts. Although such transactions formally appear to be onerous contracts, they are, in reality, intended to confer a gratuitous benefit upon a particular person. Consequently, the legal classification of a transaction cannot depend solely on the title attributed to it by the parties. Instead, the courts must examine the parties' true intention, the existence of effective consideration, and the proportionality of the reciprocal obligations undertaken. It is precisely this substantive analysis that enables courts to distinguish genuine onerous contracts from disguised gifts that may subsequently be subject to reduction.[3]

---

[1] Article 1091 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[2] Article 1091(2) and (3) of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[3] Article 1091(4) of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented; Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021.

The determination of the disposable portion represents the outcome of all the operations described above and establishes the extent to which the deceased was legally entitled to dispose of his or her estate through gifts or testamentary dispositions. Any gratuitous transfer exceeding this limit may be challenged through an action for reduction brought by the forced heirs. Consequently, any error in determining the estate or in valuing donated assets has a direct impact on the extent of the reserved portion and on the validity of the gratuitous transfers made by the deceased.[1]

In our opinion, the difficulties encountered in judicial practice demonstrate that determining the estate forming the basis for calculation is not merely a mathematical exercise but rather a complex legal process in which the proper interpretation of legal transactions and the assessment of their effects on the succession estate are essential to maintaining the balance between testamentary freedom and the protection of forced heirs. For this reason, the rigorous application of Article 1091 of the Romanian Civil Code constitutes an indispensable prerequisite for the subsequent exercise of an action for the reduction of excessive gratuitous transfers.

4. Reduction of Excessive Gratuitous Transfers in Judicial Practice

The reduction of excessive gratuitous transfers constitutes the principal legal mechanism through which effective protection of the reserved portion is ensured. Although the reserved portion is governed by mandatory legal provisions, its infringement does not automatically render the gratuitous transfers made by the deceased ineffective. Instead, forced heirs are granted the right to seek their reduction to the extent necessary to restore their reserved portion.[2] This legislative approach reflects the legislature's intention to strike a balance between respecting the deceased's testamentary wishes and guaranteeing the minimum protection afforded by law to forced heirs.

Pursuant to Article 1092 of the Romanian Civil Code, reduction may operate only after the succession has been opened and exclusively upon the request of the persons entitled to bring such an action. Consequently, the court may not order the reduction ex officio, even where the evidence demonstrates that the gratuitous transfers exceed the disposable portion. Furthermore, Article 1093 of the Civil Code expressly provides that the action for reduction may be brought only by the forced heirs, their successors, and their unsecured creditors, under the conditions established by law.

---

[1] Articles 1092–1099 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[2] Article 1092 of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

Legal scholarship has consistently emphasized that the reduction of excessive gratuitous transfers does not constitute a sanction of nullity but rather a form of partial ineffectiveness operating solely to the extent necessary to restore the reserved portion. Accordingly, the gratuitous transfer remains valid, while its legal effects are limited only insofar as they exceed the disposable portion.[1] This solution preserves the deceased's intentions within the limits permitted by law while avoiding the complete invalidation of gratuitous dispositions.

The effects of reduction are governed by Article 1097 of the Romanian Civil Code, according to which the reserved portion must, as a rule, be restored in kind, whereas pecuniary compensation is allowed only in the situations expressly provided for by law. This legislative option seeks to restore the patrimonial situation that would have existed had the reserved portion not been infringed, thereby ensuring effective protection for forced heirs.

Judicial practice shows that actions for reduction are frequently accompanied by disputes concerning the determination of the estate forming the basis for calculation, the legal classification of certain transactions as disguised gifts, and the determination of the disposable portion. Courts have consistently held that reduction cannot be ordered before completing all the operations necessary to determine the estate and the extent of the reserved portion, since only after these preliminary assessments have been carried out can the excessive character of a gratuitous transfer be established.[2] Likewise, the mere existence of a will or a gift does not, in itself, justify the admission of an action for reduction; the claimant must prove that the reserved portion has been effectively infringed.

Another controversial issue concerns the distinction between the reduction of excessive gratuitous transfers and the collation of gifts. Although both institutions operate within the framework of succession law, they pursue different objectives. The collation of gifts aims to ensure equality among certain categories of statutory heirs, whereas reduction is intended exclusively to protect the reserved portion where it has been infringed by excessive gratuitous transfers. Confusing these two legal mechanisms may lead to unlawful judicial solutions and adversely affect the rights of forced heirs.

Recent legal scholarship has also emphasized the autonomous nature of the action for reduction, which may be brought independently of other claims arising in succession proceedings, provided that the court is able to determine all the elements necessary to establish whether the reserved portion has been

---

[1] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Articles 1092–1098.

[2] Ioana Nicolae, *Reduction of Excessive Gratuitous Transfers (Part I)*, *Universul Juridic Review*, 8 August 2022.

infringed. This approach strengthens the judicial protection afforded to forced heirs and contributes to clarifying the relationship between the action for reduction and the other procedural remedies available in succession matters.

In our opinion, although the current legal framework provides a coherent regulatory basis, judicial practice demonstrates that the difficulties encountered do not stem from the legal provisions themselves, but rather from the complexity of factual situations and the diversity of the legal mechanisms through which property is transferred during the lifetime of the deceased. In this context, the reduction of excessive gratuitous transfers continues to represent the essential legal instrument for maintaining the balance between testamentary freedom and the protection of forced heirs.

5. Contemporary Challenges in Judicial Practice

The application of the legal provisions governing the reserved portion continues to generate numerous challenges in judicial practice, despite the relatively comprehensive nature of the current legal framework. The complexity of succession disputes arises both from the diversity of factual situations and from the need to reconcile two fundamental legal principles that must coexist in equilibrium: the deceased's freedom to dispose of his or her estate and the statutory protection afforded to forced heirs. In many cases, courts are required not only to determine the extent of the reserved portion but also to establish the legal nature of transactions concluded by the deceased, assess their effects on the estate forming the basis for calculation, and determine the circumstances under which the reduction of excessive gratuitous transfers may be ordered.[1]

One of the most common difficulties concerns the determination of the estate forming the basis for calculation. Under the Romanian Civil Code, both the reserved portion and the disposable portion are calculated by reference to the net estate, to which the value of gifts made by the deceased is added under the conditions prescribed by law. In practice, however, identifying all gratuitous transfers made during the deceased's lifetime and determining their value frequently give rise to litigation, particularly where the donated assets have undergone substantial fluctuations in value or have subsequently been transferred to third parties.

Another significant issue concerns the legal classification of transactions that formally appear to be onerous but, in reality, conceal gratuitous transfers. Courts are often required to determine whether contracts of sale, maintenance agreements, or other legal transactions represent genuine

[1] Fl. A. Baias (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021, commentary on Articles 1086–1099 of the Civil Code.

onerous contracts or, instead, disguise indirect or simulated gifts that may be subject to reduction.[1] Such an assessment requires a careful examination of the parties' actual intention, the obligations assumed by each party, and the proportionality of the reciprocal performances. Consequently, courts are not bound solely by the title assigned to a legal transaction but must examine its substantive content and legal effects.[2]

Practical difficulties also arise in connection with the reduction of excessive gratuitous transfers. Although this legal mechanism is expressly regulated by the Romanian Civil Code, its application requires several successive operations, including the determination of the reserved portion, the calculation of the disposable portion, and the assessment of whether the gratuitous transfers exceed the statutory limits. In practice, judicial solutions often differ depending on the valuation of the assets involved, the existence of multiple successive gifts, and the order in which such gifts are subject to reduction, all of which directly affect the rights of the forced heirs.

Judicial practice further demonstrates the difficulty of distinguishing between the legitimate exercise of an individual's freedom to organize the transfer of his or her estate during lifetime and attempts to circumvent the mandatory rules governing the reserved portion. Not every reduction of the deceased's estate constitutes an infringement of the rights of forced heirs. However, where legal transactions are clearly intended to deprive them of the protection guaranteed by law, courts must give priority to the actual legal effects of those transactions rather than to their formal appearance.

Therefore, the difficulties encountered in judicial practice demonstrate that disputes concerning the reserved portion arise not primarily from deficiencies in the legal framework but rather from the complexity of factual situations and the diversity of legal mechanisms used in practice to transfer wealth. From this perspective, the role of the courts remains essential in maintaining an appropriate balance between respecting the deceased's intentions and ensuring the effective protection of forced heirs through the consistent interpretation of the Romanian Civil Code and the application of the fundamental principles of succession law.

Conclusions

The reserved portion remains one of the fundamental institutions of Romanian succession law, ensuring a balance between an individual's freedom to dispose of his or her estate and the protection afforded to forced

[1] Article 1091(4) of **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented.

[2] Dan Chirică, *Treatise on Civil Law. Succession and Gratuitous Transfers*, Hamangiu Publishing House, Bucharest, 2017, p. 561.

heirs. Although the current legal framework provides coherent regulation, judicial practice demonstrates that the principal challenges concern the determination of the estate forming the basis for calculation, the legal classification of indirect or disguised gifts, and the application of the mechanism for the reduction of excessive gratuitous transfers.

The present analysis shows that the effective resolution of such disputes requires not only the rigorous application of the provisions of the Romanian Civil Code but also a consistent judicial interpretation adapted to the realities of modern patrimonial relationships. In this context, the role of the courts remains essential in safeguarding both testamentary freedom and the legitimate interests of forced heirs, thereby contributing to legal certainty and predictability in succession law.

References

- *** **Law No. 287/2009 on the Civil Code**, republished, as subsequently amended and supplemented
- Baias Fl. A. (ed.), *The New Civil Code. Article-by-Article Commentary*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2021
- Chirică D., *Treatise on Civil Law. Succession and Gratuitous Transfers*, C.H. Beck Publishing House, Bucharest, 2014, pp. 385–402.
- Deak, Fr. And R. Popescu, *Treatise on Succession Law*, 5th revised and updated ed., Universul Juridic Publishing House, Bucharest, 2024, pp. 335–347.
- Nicolae Ioana, *Reduction of Excessive Gratuitous Transfers (Part I)*, *Universul Juridic Review*, 8 August 2022.