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CONSTITUTIONAL BOUNDARIES OF PRESIDENTIAL POWER AND GENERAL LEVEL OF POLITICAL CULTURE. THE CASE OF SERBIA[1]

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The general level of democratic, political culture in one country is the important determinant that should be taken into consideration both when analyzing its constitutional order as well as when considering its future shaping and direction. Countries that have had a substantial discontinuity in their historical-democratic development face special challenges when returning to the paths of liberal-democratic constitutionality, perhaps the biggest of which is raising the general level of political culture and (re)building a constitutional, democratic tradition. During this process particular systematic distortions may occur, among others, those regarding the mutual control and influence of the highest state authorities. In the Republic of Serbia, there is a noticeable inconsistency in what is generally perceived by the general public (as well as by the constitutional law scholars) as the level of powers and the authority of the President of the Republic. Constitutional framework is often being interpreted without taking the wider scope of the problem into consideration, which includes the immaturity of the democratic culture. This leads to (apparent) inconsistency between the presidential powers by the Constitution and how they really manifest themselves in reality. In this paper the author analyses Serbian constitutional omissions in this regard and offers possible solutions.

Keywords: *democracy, President of the Republic, Serbia, political culture, semi-presidentialism, Constitution, presidential power.*

LIMITELE CONSTITUȚIONALE ALE PUTERII PREZIDENȚIALE ȘI NIVELUL GENERAL AL CULTURII POLITICE. CAZUL SERBIEI

Nivelul general al culturii politice și democratice dintr-o anumită țară reprezintă un factor determinant important care trebuie luat în considerare atât la analizarea sistemului constituțional al acesteia, cât și la formarea direcției viitoare de dezvoltare. Țările care au avut un decalaj semnificativ în dezvoltarea lor democratică și istorică se confruntă cu provocări deosebite în revenirea pe calea constituționalității democratice liberale. Cea mai importantă problemă rămâne a fi ridicarea nivelului general al culturii politice și (re)crearea tradiției constituționale, democratice. În cursul acestui proces, pot apărea anumite distorsiuni sistematice, inclusiv în controlul reciproc și influența celor mai înalte organe ale puterii de stat. În Republica Serbia, există o disparitate marcată în ceea ce este perceput în mod obișnuit de publicul larg (precum și de cercetătorii constituționali) ca nivelul de autoritate și putere al Președintelui țării. Cadrul constituțional este adesea interpretat fără a ține cont de sfera mai largă a problemei, inclusiv de imaturitatea culturii democratice. Acest lucru duce la o discrepanță între atribuțiile prezidențiale, conform Constituției, și modul în care acestea se manifestă în realitate. În prezentul articol, autorul analizează lacunele constituționale ale Serbiei în acest sens și sugerează posibile soluții.

Cuvinte-cheie: *democrație, Președintele Republicii, Serbia, cultură politică, semiprezidențialism, Constituție, putere prezidențială.*

[1] The early version of this paper was presented at the ECPR *(European Consortium for Political Research -UK)* General Conference in 2021.

LIMITES CONSTITUTIONNELLES DU POUVOIR PRÉSIDENTIEL ET NIVEAU GÉNÉRAL DE CULTURE POLITIQUE. LE CAS DE LA SERBIE

Le niveau général de la culture démocratique et politique dans un pays donné est un déterminant important qui doit être pris en compte à la fois dans l'analyse de son ordre constitutionnel et dans l'examen de sa formation et de sa direction futures. Les pays qui avaient un écart important dans leur développement historique et démocratique se heurtent à des défis particuliers pour retrouver la constitutionnalité démocratique libérale, dont le plus important est peut-être l'amélioration du niveau général de la culture politique et la (ré)création d'une tradition constitutionnelle et démocratique. Au cours de ce processus, il peut y avoir certaines distorsions systématiques, y compris dans le contrôle mutuel et l'influence des plus hautes autorités de l'état. En République de Serbie, il y a une disparité notable dans ce qui est généralement perçu par le grand public (ainsi que par les spécialistes de la Constitution) comme le niveau d'autorité et d'autorité du Président de la République. Le cadre constitutionnel est souvent interprété sans tenir compte de l'ampleur du problème, y compris de l'immaturité de la culture démocratique. Cela conduit à une divergence (apparente) des pouvoirs du président par rapport à la Constitution, telle qu'elle se manifeste réellement dans la réalité. Dans cet article, l & apos; auteur analyse les omissions constitutionnelles de la Serbie à cet égard et propose des solutions possibles.

Mots-clés: *démocratie, Président de la République, Serbie, culture politique, semi-présidentialisme, Constitution, pouvoir présidentiel.*

КОНСТИТУЦИОННЫЕ ГРАНИЦЫ ПРЕЗИДЕНТСКОЙ ВЛАСТИ И ОБЩИЙ УРОВЕНЬ ПОЛИТИЧЕСКОЙ КУЛЬТУРЫ. ПРИМЕР СЕРБИИ

Общий уровень демократической, политической культуры в той или иной стране является важной детерминантой, которую следует учитывать как при анализе ее конституционного строя, так и при рассмотрении ее будущего формирования и направления развития. Страны, имевшие существенный разрыв в своем историко-демократическом развитии, сталкиваются с особыми проблемами при возвращении на путь либерально-демократической конституционности, возможно, самой большой из которых является повышение общего уровня политической культуры и (вос)создание конституционной, демократической традиции. В ходе этого процесса могут возникать определенные систематические перекосы, в том числе и во взаимном контроле и влиянии высших органов государственной власти. В Республике Сербия наблюдается заметное несоответствие в том, что обычно воспринимается широкой общественностью (а также учеными-конституционалистами) как уровень полномочий и власти Президента Республики. Конституционные рамки часто интерпретируются без учета более широкого масштаба проблемы, в том числе незрелости демократической культуры. Это приводит к (кажущемуся) несоответствию полномочий президента, согласно Конституции, тому как данные полномочия реально проявляются в реальности. В статье автор анализирует конституционные пробелы Сербии в этом отношении и предлагает возможные решения.

Ключевые слова: *демократия, Президент Республики, Сербия, политическая культура, полупрезидентство, Конституция, президентская власть.*

Introduction

The level of general political and democratic culture plays a major role in the way to approach normative activities in one country, in order to build up the constitutional order and develop democracy. These two terms are among those whose meaning anyone interested "simply knows and feels", but on whose definitions there is essentially no consensus on. One of the definitions of political culture (according to the Encyclopedia Britannica) is that: „Political culture, in political science, a set of shared views and normative judgments held by a population regarding its political system (...) the building blocks of political culture are the beliefs, opinions, and emotions of the citizens toward their form of government."[2] When it comes to democratic culture, it is of-

[2] https://www.britannica.com/topic/political-culture

ten explained that: “Democratic culture is defined as the desire and ability of individuals in a population to participate actively, individually and together, to the government of public affairs affecting them. The existence of a democratic culture within a population is characterized by the active contribution, effective and in duration, of members of civil society to development of: the common good, the terms of ‘living together’ and the construction of collective decisions.”[3] One could say that a high level of political and democratic culture in a modern society implies the perception of the state as a common good (*res publica*), awareness of the existence of a social contract, government as a public service to citizens and finally - awareness of the need to respect human rights and other democratic values.

In countries with the long tradition of democracy, the unwritten rules - constitutional customs (which political factors follow despite the apparent absence of their exact foundation in a written constitution and laws), have been formed over decades and even centuries in some cases. Certain things are not done simply “because the one doesn’t do it”. On the other hand, in countries where democracy is still developing the principle that “everything that is not explicitly forbidden is hence allowed” applies as a rule. This phenomenon is also present when it comes to the role and function of the president of the republic. While the developed countries of Western Europe have long since established the fundamental principles of the presidency, the countries of the former Eastern bloc have had to face many challenges after the establishment of a democratic order (which the former overcame decades ago). The legacy of the authoritarian system, the process of transition and the anachronism of (re)encountering the original accumulation of capital at the very end of the 20th century, have left their consequences when it comes to forming the physiognomy of the constitutional system, and thus the role of the president.

With the adoption of its Constitution in 1990, the Republic of Serbia re-traced its path in the direction of liberal-democratic constitutionality and the multi-party system was re-introduced. The legacy of the authoritarian communist regime, the civil war in the former Yugoslavia, isolation and the generally unfortunate historical circumstances in Serbia in the 1990s made the political and economic transition very slow, only to gain momentum after the fall of Slobodan Milošević in 2000. The 1990 Constitution, on the other hand, remained in force until Serbia’s independence in 2006 and the adoption of a new Constitution that remains in force up to this day. Both Serbian constitutions contain omissions (following the same constitutional model) that prevent the predictability of political life and create a completely legal possibility for the President of the Republic, if certain political conditions are met, to *de facto* concentrate far more power in his hands, than he or she seems to have at disposal, according to the text of the Constitution. There are clear indications that such omissions in the constitutional framework did not occur by accident in 1990. They seem to be made deliberately in order to create a “flexible” concept, able to adapt to the current political needs by means of interpreting the functions of the president. Especially worrying is the fact that the current Constitution from 2006 contains the same flaws as the previous one in this regard.

Democratic tradition and presidential powers

Building a constitutional tradition and raising the level of political and democratic culture are processes that require time and continuity, regardless of the specific features of the government system in a particular country.

In the presidential system of government, like the one in USA, the president incorporates

[3]http://fundfordemocraticculture.org/democratic-culture/

all the effective executive power in addition to a series of ceremonial functions, in accordance with the strict division of power in this country. He is the head of state, a symbol of the people and at the same time the head of the government. In the literature, this is described by the slogan "*He reigns, but he also rules*" - as a contrast to the maxim of English constitutionalism "*King reigns, but does not rule*".[4] Despite the fact that the powers of the American president are extremely numerous and heterogeneous in nature, their stronghold in the US Constitution is vague and shallow, constitutional regulation is mostly of a principled nature. The exact limits of the president's authority are determined by a series of conventions that came to existence during the centuries of development of this country. The literature hence emphasizes the need to consider the historical development and practice of the president's authority, in order to easily determine their limits in a particular case.[5]

Regarding the strength of presidential powers, at the very other end of the spectrum is the federal president in Germany (*Bundespräsident*). The constitutional regulation of presidential powers in this country is also vague and somewhat imprecise (the right of presidential veto, i.e. waiving the promulgation of a bill is, for example, derived from the Basic law entirely doctrinally[6]), and the literature points out that many constitutional lawyers have difficulties, even "contempt for this function", because the powers and duties of the president are "hard to grasp". "The fact that the constitutional regulation of this function is imprecise, as well as the strong influence of practice, contribute to the difficulties in trying to give answer to the question what is constitutional and what is simply part of the political code". Additionally, no federal president has ever tried to "test the limits of his powers" against the other constitutional bodies.[7] There is not even a consensus in the doctrine whether the federal president is a "head of state" or not. [8]

When it comes to the countries of the former Eastern bloc, returning to the ideas of liberal constitutionality meant problems. As a rule, the presidents of these states initially tried to appropriate as much *de facto* power as possible, but over time, sooner or later, depending on the specific state, the physiognomy of the constitutional order would become clearer.

For example, Árpád Göncz, the first president of Hungary after the collapse of socialism, examined the limits of his power in relation to the government with pronounced "presidential

[4] Clinton Rossiter, *The American Presidency*, New York 1956, 6.

[5] Curtis A. Bradley, Trevor W. Morrison, Presidential Power, Historical Practice and Legal Constraint, *Columbia Law Review*, 4/2011, 1103 – 1105.

[6] At the same time, there is a full consensus only about the presidential veto due to formal unconstitutionality, while there are doctrinal differences when it comes to material unconstitutionality. It is rightly pointed out that these two aspects are sometimes difficult to separate. See: Martin H. W. Möllers, „Staats- und verfassungsrechtliche Aufgaben und Kompetenzen", *Der Bundespräsident im politischen System*, Wiesbaden 2012, 85 – 87.

[7] Martin Nettesheim, „Amt und Stellung des Bundespräsidenten in der grundgesetzlichen Demokratie", *Handbuch des Staatsrechts der Bundesrepublik Deutschland III*, Heidelberg 2005, 1052.

[8] According to some authors (von Münch, Kunig, Nettesheim, Badura, etc.), the Federal President is the "head of state" (*Staatsoberhaupt*) of the Federal Republic of Germany and functionally represents part of the executive, although he or she is not a member of the Federal Government. According to others, he or she is not a "weaker part of the double-headed executive", because by the nature of his/her powers and the character of the Basic Law, it differs significantly from the domain of executive power, and there is no place for this function in the classical scheme of power division into three branches (Schleich). There are also authors who notice the difference between the qualification of the federal president as head of state when it comes to foreign affairs and internal affairs, recognizing the limited powers in the second case, but also noting that the situation is similar in constitutional parliamentary monarchies such as the United Kingdom or some Scandinavian countries, in which no one denies the monarch the epithet of head of state (Mangoldt, Klein, Starck). See: Ingo von Münch, Philip Kunig (Hrsg.), *Grundgesetz Kommentar*, München 2012, 2580-2581. ; Martin Nettesheim, 1040 – 1041. ; Peter Badura, *Staatsrecht – Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland*, München 2015, 617. ; Klaus Schlaich „Die Funktionen des Bundespräsidenten im Verfassungsgefüge", *Handbuch des Staatsrechts der Bundesrepublik Deutschland II*, Heidelberg 1987, 579 – 580. ; Herman Mangoldt, Fridrich Klein, Christian Starck, *Kommentar zum Grundgesetz,* München 2005, 1408.

activism” during his first term, but stopped having such aspirations during his second term, thus tracing the practice that will be continued by all future presidents of Hungary.[9]

After the adoption of the transitional, the so-called. “Small Constitution” in Poland, the first president of this country (*Prezydent Rzeczypospolitej Polskiej*) was Lech Wałęsa, former leader of the independent union “Solidarity” (*Solidarność*). At that time, he actually already held this position for two years, before the adoption of the Small Constitution. Though the characteristics of this Constitution were such that they provided for a balanced relationship between the powers, political circumstances (primarily highly fragmented parliament) were such that they favored aspirations to strengthen the function of president. The parliament in which as many as 29 political groups had representatives (out of which the strongest won only 14 percent of the votes), could not be an adequate counterweight to the president, so Lech Wałęsa “constantly sought to have a decisive say in the conduct of state policy.”[10]

Tensions between the president and the prime minister were notable especially in the sphere of international relations and defense (Wałęsa kept interfering when it came to the selection of ministers from these two departments).[11] The roots of the misunderstanding about the limits of the president’s power date back to before the adoption of the Small Constitution. The literature points out that the origin of the problem lies in the fact that in 1990, when Lech Wałęsa was elected president, the norms governing this function were deliberately left unclear so that they could be interpreted in accordance with political needs. As we will see, a very similar situation happened in Serbia in the same year.[12]

In addition to (mis)using rather vague regulations, the absence of constitutional customs and still undeveloped democratic culture in order to expand the scope of his political power, the Polish president also openly threatened with unconstitutional actions. For example, when he vetoed the proposal to amend the Polish Criminal Code (which provided for the decriminalization of abortion) in 1994, he publicly stated that he would refuse to sign such a law, even if it was re-voted in the parliament (what would be his obligation by the Constitution). However, the constitutionally required high majority of 2/3 of the deputies was not reached in re-vote, and the threat of unconstitutional actions of the president was no longer relevant.[13] It remains however as a testimony to the perception of the presidency at one point.

The phenomenon that (after the fall of authoritarian regimes) the new rulers examine the limits of their constitutional powers was widespread in the former communist states. The same thing was happening in Russia itself, with the difference that there the president openly insisted on broad and strong powers when writing the Constitution.[14] In other words, it was not necessary to use “back doors” and extensively interpret the reduced constitutional framework, because it was initially built for “superpresidentialism”, as described at the time by some Western authors, such as Steven Holmes. In his paper, he cites

[9] Philipp Köker, *Veto et peto: Patterns of Presidential Activism in Central and Eastern Europe*, (*doctoral dissertation - University College London*), London 2015, 227.

[10] Darko Simović, *Polupredsednički sistem*, Beograd 2008. 255.

[11] Piotr Sula, Agnieszka Szumigalska, „The Guardian of the Chandelier or a Powerful Statesman? The Historical, Cultural and Legislative Determinants of the Political Role of the President of Poland“, *Presidents above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power*, Brno 2013, 113. and Mirjana Kasapović, Parliamentarism and Presidentialism in Eastern Europe, *Politička misao*, 5/1996, 132.

[12] John Elster, Bargaining over the Presidency, *East European Constitutional Review*, 1/1994, 96.

[13] George Sanford, *Democratic Government in Poland – Constitutional Politics since 1989*, London 2002, 141.

[14] For more on the circumstances of the adoption of this Constitution, see: Lee Kendall Metcalf, Presidential Power in the Russian Constitution, *Journal of Transnational Law and Policy*, 1/1996, 126 – 134.

the president of Russian President Boris Yeltsin, who had a comment on this topic shortly before the adoption of the Constitution: „I will not deny that the powers of the president outlined in the draft are considerable. What do you expect? How can we rely on Parliament and Parliament alone in a country that is used to czars or 'leaders', in a country that does not have well defined interest groups, where normal parties are only now being formed, in a country with very low executive discipline and with wide-spread legal nihilism? In half a year, people will demand a dictator".[15]

Very similar views were shared in Serbia as well, even within moderate scholarly circles: „A weak president, subordinate to the Parliament, with radically limited authority, is a concept that seems to be in opposition to our constitutional tradition, to comparative experience of similar countries."[16]

The transition and the "returning" to the paths of liberal-democratic constitutionalism was a challenge for all countries of the former Eastern bloc, but not to the same extent, due to historical circumstances and the immanent characteristics of cultural heritage. The transition to a market economy, the inviolability of private property, political freedom - were only some of the challenges for the countries of the former Eastern bloc. In scholarly circles it is sometimes stated that the countries of Protestant and Catholic spiritual tradition such as the Czech Republic, Slovenia, Croatia or East Germany „have experienced relatively successful transitions from communism to market economies – and they were historically shaped by the Protestant or Roman Catholic religious traditions, rather than by Orthodox tradition".[17] This only somewhat correlates to the results of the research about the relation of traditional vs. secular-rational values.[18] Protestants find themselves in the first place, but Orthodox take the third place, right in front of predominantly Catholic cultural regions. Therefore, the wider historical scope is to be taken into consideration in order to determine the obstacles and means for their overcoming. Also, when it comes to the Republic of Serbia (and parts of the region as well), it is important not to ignore the fact that a whole decade after the fall of the Berlin Wall was marked by instability, war and economic crisis. Only after 2000, after the political changes and the onset of relative stability (primarily in the international context), the transition processes in Serbia began somewhat to speed up and gain traction. Because of these reasons as well, Serbia was behind many other countries of the former Eastern bloc. The progress of democratic culture required, above all, stability.

The level of general political and democratic culture significantly affects the scope and quality of the necessary constitutional and normative actions, in order to achieve the highest possible degree of democracy in society. In principle, the higher the level of political culture in one society that strives for democracy, the less the need for detailed normative regulation of political life. The long, unbroken tradition of aiming for democracy will, as a rule, generate constitutional customs and the socio-political climate in which the following of those customs is simply implied. In young democracies, especially those that have historically only recently emerged from some kind of authoritarian regime (and particularly if such a regime has been in force for a long time), it will generally be the opposite – "everything that is not explicitly forbidden" will be considered as allowed. The evolution of democratic culture therefore inevitably requires time, continuity of stability. Serbia still has a long way

[15] Steven Holmes, *Superpresidentialism and its Problems, East European Constitutional Review, 1/1994, 125.*

[16] Olivera Vučić, Position and Functions of State Sovereign (Head of State), *Facta Universitatis*, 2/2004, 44.

[17] Ronald Inglehart "East European value systems in global perspective", *Democracy and Political Culture in Eastern Europe* (ed. Hans-Dieter Klingemann, Dieter Fuchs and Jan Zielonka), New York, 2006, 73.

[18] *Ibid.* 74.

to go in this regard, which can be easily be noticed by observing its political life.

Constitutional and factual position of the President of the Republic of Serbia

When it comes to the position of the president in the Serbian constitutional order, the basic paradox and the key word is - constitutionalized unpredictability. This implies that in a completely identical constitutional and legal framework, depending on the existence of certain political circumstances, the role of the president can manifest itself almost as a mere ceremonial function, or as a central political position that *de facto* represents the center of political power and decision-making. In Serbian literature, within the analysis of the "development of the institution of the President of the Republic of Serbia" from 1990 onwards, Serbian presidents encounter contradictory qualifications where they are characterized as "passive" or "omnipotent" president, "constitutional president" or "very powerful president".[19] It is interesting that President Boris Tadić was considered "passive" in the first term, and "omnipotent" president of the Republic in the second, in one and the same constitutional framework. Does that mean that the Serbian constitutional framework is actually such that it foresees a weak president, and that all those "omnipotent" presidents actually violate it? The answer to that question is negative - it is not a question of violating the Constitution, but of two essential problems that in combination lead to such phenomena, quite legally. The first is the lack of a constitutional tradition and the immaturity of democratic culture, and the second is inadequate regulations whose creators (un)intentionally did not take into account the first two factors.

The leading relevant literature in Serbia most often points out that in Serbia "constitutional customs do not even exist in traces", and that "constitutional practice, if it can be talked about, is fragile".[20] It is emphasized that "the only constitutional custom could most likely have been established if the current president, Aleksandar Vučić, had done the same as his predecessor when he took office - Tomislav Nikolić resigned from the position of political party president in 2012, and Aleksandar Vučić did not do the same".[21] The current president did not do that because his predecessor paid a high political price for doing so, and he did not want to repeat the same mistake. The doctrine points out: "The political collapse of Tomislav Nikolić was an important message to every subsequent candidate for the presidency, because it became clear that there is no real political power without the support of the ruling political party. Hence, instead of improving the political culture and strengthening the principles of constitutionality, Serbia took a step back in 2017."[22] The attempt to establish the first constitutional custom came too early, when the political climate and the general level of achieved political culture are taken into account.

In the atmosphere of extensive political conflicts, after the adoption of the Constitution in 1990, wide-range criticism of the position of the President of the Republic immediately started within the scholarly and general public. The assessments ranged from the perception of the presidential function as "a weak one", up to the claims that the president has extremely strong powers established by the Constitution. „This criticism had commenced not only on the day of its coming into force, the day its solutions were brought to life, but rather as

[19] Đorđe Marković, „Način izbora predsednika Republike Srbije", *Predsednik Republike i Ustav*, Beograd 2018, 131.

[20] Vladan Petrov, „Predgovor – Ustav po meri predsednika i predsednik po meri ustava?", *Predsednik Republike i Ustav*, Beograd 2018, 8.

[21] Vladan Petrov, „O nekim opštim mestima i poimanju sistema vlasti uopšte i u Republici Srbiji", *Parlamentarizam u Srbiji*, Sarajevo 2018, 17.

[22] Darko Simović, „Kako do neutralne moderatorne vlasti predsednika Republike Srbije?", *Predsednik i Ustav*, Beograd 2018, 39.

of the day in which its writing started, which means the critique was not so much aimed at the solutions, but at the way in which its adoption was decided, and, foremost, at those adopting it. Therefore, the original criticism was much more political than legal in nature, and the purpose of such endeavors was much more political, than legal."[23] There were few objective assessments of the role of the president in that period. „The impression remains that the question of the President of the Republic has been that principal target of such attacks more for non-constitutional than for constitutional reasons, and more for supposed and possible than for realistic and actually conducted Constitutional actions."[24]

The Constitution of Serbia from 1990, as well as the Constitution from 2006 (in force), envisage a kind of semi-presidential system, in which the President of the Republic is elected directly by the people and in which there is no institute of counter signature for his acts. On the other hand, the scope of his constitutionally given powers is not too wide, and for the most part not even executive in nature. There are some differences between these constitutions when it comes to the function of the President of the Republic. In the current Constitution, the presidential powers are somewhat reduced compared to the previous one, but the President also got some powers that he did not have before, since the 1990 Constitution was not written for an independent state but a member of the federation (Serbia was part of Yugoslavia). According to the current constitutional framework, the President of Serbia "expresses the state unity of the Republic of Serbia"[25], represents the Republic in the country and abroad, proposes a candidate for Prime Minister, promulgates laws and has other classical powers of the President in the parliamentary system (presidential veto, the right to appoint and recall ambassadors, etc.).[26] The President also commands the Army and appoints, promotes and dismisses Army officers. He is elected directly for a term of 5 years and no one can be elected to this position more than twice.

It is clear, therefore, that this is a function of extremely high legitimacy, but not of particularly high political potency (if only that what the Constitution states as the powers of the president is taken into consideration). The constitutional formulations lead to the conclusion that the weight of political power in the Serbian constitutional order is in the position of prime minister. However, the "problem" arises not due to what is written in the Constitution, but due to the absence of what should be written (and is missing), and that is the issue of incompatibility of the incumbent President and retention of membership and leadership position in the political party from which he or she comes.

The ban on retaining membership and leadership in a political party is not prohibited by the Constitution for the president of the Republic (as is the case, for example, in neighboring Croatia - also a country with a semi-presidential system of government[27]). Such prohibition does not exist in the relevant laws either. The Constitution of the Republic of Serbia only states that "the President of the Republic may not perform another public function or professional activity." Is the position of the president of the political party a "public function" or a "professional activity"? Any dilemma on this issue was ceased to exist in 2004 with the adoption of the Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions. This law defines the term "public office", not including the president of the party or any other function in a political party. Four years later, the term "public office" was redefined with the adoption of the Law on

[23] Olivera Vučić, 42.
[24] *Ibid*.
[25] Ustav čl. 111.
[26] Ustav čl. 112 para. 1.
[27] Constitution of the Republic of Croatia, art. 96

the Anti-Corruption Agency[28] (came into force in 2010), but positions in a political party did not fall under this term again.[29] Therefore, the prevailing view in Serbian literature today is that "when you look at the concepts of public office, professional activity, it is clear that membership or a leading position in a political party is neither a public function nor a professional activity – hence there is no incompatibility with the function of the president of the Republic."[30]

After the adoption of the 1990 Constitution, opponents of Slobodan Milošević's regime (who was the first president of Serbia after the fall / transformation of the communist regime) pointed out that "in essence, constitutional decisions on the President of the Republic (according to the 1990 Constitution – M.Đ.), his powers and relations with the National Assembly, pave the way for the establishment of a personal government shrouded in a veil of a kind of parliamentary-presidential system."[31] The key part here is "paving the way", therefore, creating opportunities that may, but do not necessarily have to (depend on a number of factors) lead to the possibility for the concentration of power. In that sense, the Serbian doctrine points out the importance of "the personal authority of the head of state, the strength of the party apparatus under his control and plebiscite support."[32] In other words, if the President of the Republic is also the leader (president) of a party with broad and strong support in parliament, there is the possibility of concentration of power by essentially removing the decision-making process out of the institutions (using political party power-leavers). Decisions are reached elsewhere and then merely implemented through the institutions. However, if cohabitation is taking place, or if the President of the Republic is not also the leader of his party, this possibility does not exist. All of the Serbian presidents who had been in a position to legally *de facto* concentrate far more effective power than "constitutionally expected", seized the opportunity and did so.

A kind of confirmation that this "small door" mechanism for the concentration of power was not a matter of omission, but that it was made on purpose, is primarily a circumstance that it was not removed by the adoption of the current Constitution from 2006, because such potential obviously suited the elites. Also, a kind of recognition comes from the pen of one of the creators of the Constitution from 1990, prof. Dr. Ratko Marković, who wrote that the Serbian Constitution "was not built on the outlines of either the parliamentary or semi-presidential system, but on the unique, and already past historical circumstances in Serbia in the early 1990s. Back then, from self-governing socialism, we formally and institutionally entered the regime of parliamentary democracy with the newly formed economic and political institutes that follow it. After half a century of their non-existence, political parties were re-formed in Serbia. A pure parliamentary government in which the government is on a seesaw - standing up when it has a parliamentary majority, falling down when it is left without it - would mean a great danger to the stability of the newly introduced institutions and the new political system. The consciousness of the citizens, accustomed to the same center of power for almost half a century, also wanted to know where the seat of power is in the new order. That is why they resorted to one constitutional trick. The President of the Repu-

[28] Law on the Anti-Corruption Agency, *Official Gazette RS* 97/2008, 53/2010, 66/2011 – decision of the CC, 67/2013 – decision of the CC, 112/2013 – authentic interpretation, 8/2015 – decision of the CC 88/2019.

[29] Dejan Milić, „Da li su inkompatibilne funkcije šefa države i predsednika političke stranke? Ustavnopravni položaj predsednika Republike Srbije", *Parlamentarizam u Srbiji*, Sarajevo 2018, 240 – 243.

[30] Miloš Stanić, „Nespojivost funkcije predsednika države sa članstvom i vođstvom u političkoj stranci – primer Srbije", *Parlamentarizam u Srbiji*, Sarajevo 2018, 200.

[31] Pavle Nikolić, Institucija predsednika Republike i promašaji i nedorečenosti Ustava Republike Srbije od 1990., *Arhiv za pravne i društvene nauke*, 2-3/1991, 290 – 291.

[32] Dragan Stojanović, Ustavno pravo, Niš 2006, 323.

blic is foreseen to be almost untouchable (irrevocable) during his constitutional mandate, but with little executive power. The focus was on his direct election, because such a choice of an innocuous organ creates the illusion that he has the greatest power. There is no constitutional institution that cannot be abused in practice and thus betray its purpose, so it was the same with the institution of the President of the Republic."[33] The motives were therefore somewhat similar to those expressed by Boris Yeltsin in Russia at the time. The mode of realization, as we have seen, was however somewhat different.

The fact that leaving the position of leader of a political party after assuming the office of the President of the Republic is not illegal, but allowed, in combination with the lessons of political life in Serbia as the one that has been served to the former President Tomislav Nikolić mean that nothing will change, unless constitutional-normative intervention that would unequivocally prohibit the retention of party membership by the President of the Republic takes place. An alternative to this is to wait for a longer period of time in which the maturation of political and democratic culture would lead to this circumstance not anymore being decisive.

Finally, in the periods when the concentration of effective power in the hands of the president occurs, it has its consequences in terms of metamorphosis/distortion of particular presidential powers. For example, the classical presidential power of presidential veto (which in Serbia includes both political and constitutional veto) changes primarily in its political part. Since it no longer serves to control the expediency of the legislative activity of the parliament, the presidential veto sometimes becomes a kind of a "public opinion test" for certain policies. A particular solution is placed in the form of a proposal of the government, and then it is voted upon in the parliament. If there is a severe negative reaction from the general public, the president vetoes the bill and thus retains political points.[34]

Great expectations and harsh reality

In Serbia, when it comes to interpretation of constitutional regulations (even in scholarly circles), the comprehension of reality ("what is") and well-intentioned projections of "what we think it should be" are sometimes mixed and twisted. Constitutional interpretations, which often do not have a clear basis in the Constitution itself, are drawn on the basis of the concept of the constitutional identity and the spirit of the Serbian Constitution. In principle, it is true that "constitutional culture implies consistent respect for the constitution, not only its explicit written word, but also its spirit, and even the unwritten rules of modern constitutionalism."[35] However, due to the absence, or perhaps better said, the immaturity of political and constitutional culture, the expectations for the following of the "spirit and unwritten constitution" are unrealistic and in the field of practical application – totally arbitrary. "The spirit of the Constitution", in the conditions of the present level of democratic culture in Serbia, consists simply and only out of that what was written in the Constitution and (still) nothing more.

In the constitutional judiciary context, this is explained in the literature as follows: "The Constitutional Court finds, and then protects the objective meaning of constitutional norms, regardless of the will of its creator." Interpretation must be oriented towards determining the objective linguistic meaning of constitutional norms, but also taking into account

[33] Ratko Marković, Ka budućem Ustavu Srbije, *Srpska politička misao*, posebno izdanje (2017), 267.

[34] This happened several times, for example, during the term of President Slobodan Milošević, when he vetoed a law that was passed by the parliamentary majority, which was under his control. – Presidential veto on public company „Politika" from 1992.

[35] Darko Simović, „Uzroci prezidencijalizovanja parlamentarizma i dometi ustavnog inženjeringa u Republici Srbiji", *Parlamentarizam u Srbiji*, Sarajevo 2018, 74.

their goal and place in the entire constitutional system. Subjective interpretive methods have significance only to the extent that they confirm objective linguistic meaning. Attempts to reveal the meaning of the constitution only by establishing its 'spirit' (even when it is sought in the history of constitutional norms) are too uncertain, because they are based on subjective interpretation. The 'exact' meaning of the notion 'spirit of the constitution' cannot be reliably established, in order to achieve immediate constitutional judicial protection. This does not mean, however, that the constitutional court must necessarily recognize constitutional norms only as their narrowest verbal meaning."[36]

Unfortunately, Serbia does not have a clearly defined constitutional identity yet. On the contrary - unpredictability and "incompleteness" is an immanent characteristic of the order itself, in the way in which it is organized currently, as well as in the last 30 years. "For none of the previous presidents, the central problem was that he institutionally undertook an action for which he was not authorized. On the contrary, the mechanism is extremely simple - as a person of high legitimacy, who controls the parliamentary majority through a party leadership through a party position, it is enough to "recommend" or "suggest" a certain solution and it will be implemented. There is no constitutional mechanism that can stop him from expressing his opinion (nor should it exist), but that opinion in this case has a special weight due to the party function, which he or she is allowed to retain. This also does not violate the article of the Constitution which stipulates that 'political parties may not directly exercise power, nor subordinate it to themselves' (Art. 5 Para. 4), because there is no direct exercise of power - everything still goes through institutions, but the actual center of decision making is displaced (which is practically impossible to prove). From 1990 onwards, the constitutional order in Serbia is inconsistent and the function of the president is unpredictable in its real strength. That should definitely change in the future."[37]

One could raise the question – why is the accumulation of leadership position and specifically presidential function a decisive factor for the metamorphosis of the system of government in the Republic of Serbia. The reasons are complex, but can be reduced to several basic factors. First of all, Serbia is a country of authoritarian political heritage, and the president is a figure of high legitimacy due to the direct way of election. These two factors, just like in Russia, contribute to the visibility of the president and his strength in the eyes of the general public. Secondly, the electoral system in Serbia is such that elections are largely depersonalized. Important roles in political life, in the eyes of the citizens, are played either by parties as such or more often - their leaders. A depersonalized electoral system implies that when electing deputies, citizens are usually guided by the image and policy of party leaders, which then makes it easier for them to manage the use of party instruments. Finally, it should be pointed out that the global phenomenon of the crisis of parliamentarism as such is also present in Serbia and due to the previously listed factors - it is comparatively taking on greater proportions.

Finally, it must be noted that the expectations of both the general and professional public on all these issues may be too high due to the specifics of the age in which we live. Namely, the world has never been smaller, the simple trip to some far more democratically and constitutionally developed country of the West can be organized and undertaken with unprecedented simplicity when the wider his-

[36] Dragan Stojanović, „Premise ustavne kontrole prava i njihovo ostvarivanje u praksi Ustavnog suda Srbije“, *Uloga i značaj Ustavnog suda u očuvanju vladavine prava*, Beograd 2013, 116.

[37] Miroslav Đorđević, *Presidential Veto Power*, (*doctoral dissertation – Faculty of Law University of Belgrade*), Belgrade 2020, 173.

torical scope is taken into consideration. The means of modern communication also allow for much clearer insight into those societies, like never before. An individual in a country like Serbia, which is burdened with historical heritage, may wonder why such a type of constitutional and democratic organization cannot simply be established. The reasons lie in the fact that human consciousness does not develop or change at the speed at which the technological progress does. The development of political and democratic culture requires time. The new generations will eventually perceive some of the acquired freedoms as something that is "normal" and take them for granted. This however does not mean that the passage of time alone is sufficient. Careful measured baby steps in the direction of the desired goal are necessary. In this process, all the factors shaping the political life and culture in the country must play an active role - the voters themselves, as well as all active political and political factors in the broadest sense, which includes public office holders, political parties and their activists, NGOs, various other civil society organizations (which can also be informal politically profiled groups), media, etc.

Conclusions

Today, the Republic of Serbia is facing challenges on its path to developing democracy – the same or similar ones as those that were overcome decades or even centuries ago by the more developed countries of the West. The consequence of the historical legacy and decades of authoritarian constitutionalism is, among other things, that the level of democratic culture and the quality of political culture are still relatively low. Due to these circumstances, as well as inadequate constitutional regulation in Serbia, there is a distortion of constitutional solutions that successfully exist in countries with a longer democratic tradition. In parallel with the strengthening of the processes leading to the maturation of political, democratic and constitutional culture in the country, we should strive for constitutional and legal solutions that respect the reality of the current situation and pave the way for progress with their provisions. The regulation of the powers of the President of the Republic is one of those areas in which the discrepancy between the proclaimed and the real is highly visible and leads to the deformation of the principle of separation of powers, formally observed – in full accordance with the Constitution and relevant laws. As a temporary solution, which could speed things up in this sense, we should strive to ban the accumulation of membership in a political party and the function of the President of the Republic, as has been done, for example, in Croatia. Such a reform, perhaps paradoxically, can only be carried out by a strong government with a long-term vision, because in addition to changing the Constitution, it also requires a broad social consensus. After successful and *pro futuro* very important recent constitutional revision in domain of judiciary, politically speaking, it seems that the potential for such a key structural reform exists right now, and this opportunity should not be missed.

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CITIZENS' INVOLVEMENT IN THE EUROPEAN UNION COMMON COMMERCIAL POLICY

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The starting point of this contribution is, first, a factual observation and, second, a normative finding. Free trade agreements today often enjoys a high degree of public attention including controversial deliberations among and within political parties and have thus obviously turned into a politicized area of law. It is recognized that traditional concepts of democratic legitimacy developed under the conditions of the nation-state alone constitute an inadequate approach for legitimizing the respective transnational steering regimes. Rather, those scholars who are sympathetic towards a conceptual change of legitimacy favor more complex approaches comprising of 'input-oriented' as well as 'output-oriented' elements; legitimizing factors that are more appropriately qualified as alternatives to, or surrogates for, democratic legitimacy and find their overarching normative basis in the republican constitutional principle. Against this background, the contribution assesses the possibilities for the involvement of the general public as well as individual non-state actors in the two main phases of EU FTAs. This includes an evaluation of the direct and indirect participatory option during the negotiations of these agreements. Moreover, the contribution attempts to identify and assess the venues for participation by interested and affected non-state actors in the implementation and continued progressive development of EU FTAs.
Keywords: *European Union, economic relations, trade agreement, law, investment.*

IMPLICAREA CETĂȚENILOR ÎN POLITICA COMERCIALĂ COMUNĂ A UNIUNII EUROPENE

Punctul de plecare al acestei contribuții este, în primul rând, o observație faptică și, în al doilea rând, o constatare normativă. Acordurile de liber schimb de astăzi se bucură adesea de un grad ridicat de atenție publică, inclusiv deliberări controversate între și în cadrul partidelor politice și, prin urmare, s-au transformat în mod evident într-un domeniu politizat al dreptului. Este recunoscut faptul că conceptele tradiționale de legitimitate democratică dezvoltate numai în condițiile statului-națiune constituie o abordare inadecvată pentru legitimarea regimurilor de direcție transnațională respective. Mai degrabă, acei savanți care sunt simpatici față de o schimbare conceptuală a legitimității favorizează abordări mai complexe care cuprind elemente 'orientate spre intrare', precum și 'orientate spre ieșire'; legitimarea factorilor care sunt calificați mai adecvat ca alternative sau surogate pentru legitimitatea democratică și își găsesc baza normativă generală în principiul constituțional republican. În acest context, contribuția evaluează posibilitățile de implicare a publicului larg, precum și a actorilor nestatali individuali în cele două faze principale ale acordurilor de liber schimb ale UE. Aceasta include o evaluare a opțiunii participative directe și indirecte în timpul negocierilor acestor acorduri. În plus, contribuția încearcă să identifice și să evalueze locurile de participare a actorilor nestatali interesați și afectați la punerea în aplicare și dezvoltarea progresivă continuă a acordurilor de liber schimb ale UE.
Cuvinte-cheie: *Uniunea Europeană, relații economice, acord comercial, drept, investitie.*

IMPLICATION DES CITOYENS DANS LA POLITIQUE COMMERCIALE COMMUNE DE L'UNION EUROPÉENNE

Le point de départ de cette contribution est, d'une part, une observation factuelle et, d'autre part, une constatation normative. Les accords de libre-échange bénéficient aujourd'hui souvent d'une grande

attention du public, y compris des délibérations controversées entre et au sein des partis politiques, et sont donc manifestement devenus un domaine de droit politisé. Il est reconnu que les concepts traditionnels de légitimité démocratique développés dans les seules conditions de l'état-nation constituent une approche inadéquate pour légitimer les régimes de gouvernance transnationaux respectifs. Au contraire, les chercheurs qui sont favorables à un changement conceptuel de la légitimité favorisent des approches plus complexes comprenant des éléments "axés sur les intrants" ainsi que des éléments "axés sur les extrants"; facteurs de légitimation qui sont plus convenablement qualifiés d'alternatives ou de substituts à la légitimité démocratique et trouvent leur base normative globale dans le principe constitutionnel républicain. Dans ce contexte, la contribution évalue les possibilités d'implication du grand public ainsi que des acteurs non étatiques individuels dans les deux principales phases des ALE de l'UE. Cela comprend une évaluation de l'option participative directe et indirecte lors des négociations de ces accords. En outre, la contribution tente d'identifier et d'évaluer les lieux de participation des acteurs non étatiques intéressés et concernés à la mise en ьuvre et au développement progressif continu des ALE de l'UE.

Mots-clés: *Union européenne, relations économiques, accord commercial, droit, investissement.*

УЧАСТИЕ ГРАЖДАН В ОБЩЕЙ ТОРГОВОЙ ПОЛИТИКЕ ЕВРОПЕЙСКОГО СОЮЗА

Результатом представленного исследования является фактический мониторинг ситуации, а также анализ нормативного материала. Сегодня соглашения о свободной торговле часто привлекают к себе большое внимание общественности, включая спорные дискуссии между политическими партиями, тем самым превращаясь в политизированную область права. Признано, что традиционные концепции демократической легитимности, разработанные только в условиях национального государства, представляют собой неадекватный подход к легитимации соответствующих транснациональных режимов управления. Скорее всего, те ученые, которые отдают предпочтение концептуальному изменению легитимности, предполагают более сложные подходы, включающие «ориентированные на результат» элементы. Факторы, которые более уместно квалифицировать как альтернативы или суррогаты демократической легитимности, находят свою всеобъемлющую нормативную основу в республиканском конституционном принципе. На этом фоне оцениваются возможности участия широкой общественности, а также отдельных негосударственных субъектов в двух основных фазах соглашений о свободной торговле с Евросоюзом. Это включает в себя оценку вариантов прямого и косвенного участия во время переговоров по этим соглашениям. Помимо этого, в нашем исследовании, делается попытка определить и оценить возможности участия негосударственных субъектов в реализации и дальнейшем прогрессивном развитии соглашений о свободной торговле с Евросоюзом.

Ключевые слова: *Европейский союз, экономические отношения, торговое соглашение, право, инвестиции.*

Introduction

The starting point of this contribution is, first, a factual observation and, second, a normative finding; both being concerned with changing circumstances and equally shifting perceptions thereof as well as the consequences resulting from these developments. First, to start with a primarily factual observation, the negotiation and conclusion of regional economic integration agreements, in particular also the ones signed by the European Union (EU), today often enjoy a quite high degree of public attention, thereby indicating the more recently changing character of international economic law in general – and of trade and investment agreements in particular – as an increasingly political law.

While seen from a global perspective most certainly many areas of the international economic legal order admittedly always have been – and continue to be – contested among states, in particular those adhering to different ideologies, the normative contractual design of foreign economic relations has – viewed from the domestic perspective of most countries – for a long time primarily been the concern of a comparatively small circle of experts. In particular, international negotiations aimed at concluding multilateral, regional or bilateral treaties in the realm of international economic

law have in previous decades normally not attracted a substantial attention on the side of the politically interested broader public. This finding most certainly applied also to the member states of the EU. Consequently, the fact that these negotiations were traditionally largely conducted by governmental representatives – quasi or even literally – "behind closed doors" [1, p. 681-701] usually didn't give rise to critical discussions among the citizens of the political community concerned.

The main ideas of the research

As evidenced for example by the intensive and controversial public debates in a number of EU member states with regard to the negotiations leading to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which has been signed by the parties on 30 October 2016 and is provisionally applied since 21 September 2017, as well as first and foremost the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013 (with the negotiations being currently on hold), this situation has changed in an unprecedented way. Foreign trade and investment policy today often enjoys a high degree of public attention in many countries, among them also many EU member states, including controversial deliberations among and within political parties and has thus obviously turned into a politicised area of law in the true sense of the meaning. From a broader perspective, this finding has for example more recently quite vividly been expressed by *Michael J. Trebilcock* stating that "popular and scholarly debates over the virtues and vices of economic globalization ensure that international trade policy has forever forsaken the quiet and obscure corners of trade diplomacy that it once occupied, and become a matter of 'high politics'" [2, p. 7 et seq]. The transformation into a more politicised field of law, although occasionally viewed with suspicion and most certainly not without challenges, is in principle to be welcomed already because of the fact that it brings with it the possibility of realizing one of the central overarching objectives of – what might be characterized as – an emerging constitutionalized international economic law [3, p. 157-173], namely supporting the continued conversion of the normative framework dealing with international economic relations into a more human-oriented legal order [4, p. 37-85].

Why has this situation more recently changed in an unprecedented way, in particular also as far as the general public in many EU member states is concerned? The underlying reasons for this shift and comparative new trend are most certainly manifold. However, prominently among them is surely the in part considerably more comprehensive policy approach towards the regulatory content of free trade agreements negotiated also by the EU in recent years with its focus on, among others, the establishment of quite comprehensive and elaborate – albeit, viewed from the perspective of the international (economic) system as a whole, neither unprecedented nor at least uncommon [5, p. 1081-1096] – institutional steering structures ("treaty bodies") [6, p. 532-566], on normatively addressing the economic relevance of so-called behind-the-border issues [7, p. 671-677], as for example manifested in the concept of regulatory cooperation as well as on substantive and procedural investment protection, including the stipulation of international investor-state dispute settlement mechanisms [8, p. 247-300]. All of these features have in common that they result in a shrinking of domestic policy space and regulatory autonomy of the contracting parties that goes well beyond traditional free trade agreements that focus primarily on border measures and do not stipulate investment protection standards.

To mention but one example, the investment provisions protecting against indirect expropri-

ation [9, p. 959-1030] as well as the guarantee of fair and equitable treatment [10, p. 700-763] have, *inter alia*, by setting certain standards for domestic administrative procedures, in particular in light of the occasionally quite far-reaching understanding of these protection standards by some investment arbitration tribunals, developed a considerable potential to codetermine the design of certain segments of the domestic legal orders of the respective host states [11, p. 953-972]. Thereby, it hardly needs to be emphasized that stipulating restrictions on the “policy space” of states on the basis of international legal obligations and thus providing conditions of legal certainty for private economic operators are among the central – and in principle indispensible – purposes of international economic agreements. In light of the enhanced effectiveness and considerably expanded scope of application of regional economic integration agreements, the possibility of disputes increasingly arises which involve impairments of economic interests of private business actors such as foreign investors covered by respective protection standards of international investment agreements that are justified by the host state in question based on a recourse to (non-economic) public interest concerns like the protection of public health or the environment [12, p. 532-566]. Against the backround of these regulatory features and their potential normative consequences, modern and more comprehensive free trade agreements, most certainly including those negotiated and concluded by the EU, are perceived by an increasing number of politically interested persons and groups as a category of transnational regulatory design worth taking a closer (and not infrequently more critical) look at.

Second, and this leads us to a normative finding concerning these changing steering structures and perceptions thereof, it is precisely these more “intrusive” regulatory features of modern comprehensive free trade agreements – as well as, for example, the increasing prevalence and regulatory importance of transnational governance regimes in general – that have first and foremost also given rise to certain legitimacy challenges. And indeed, these legitimacy challenges that arise in connection with the normatively relevant steering activities of modern governance structures in the transnational realm have already been qualified as “emerging as one of the central questions – perhaps *the* central question – in contemporary world politics” [13, p. 212-239]. As already evidenced by an ever-growing literature dealing with this topic in general or at least with some of its aspects, this most certainly also applies to the regulatory features of recent EU free trade agreements [14, p. 29-43]. Thereby, taking into account the complexity of this issue, it hardly needs to be emphasized that it will neither be feasible to elaborate, nor is this comparatively short contribution aimed at elaborating, on all of the manifold implications of the possible “legitimacy deficits” in something even close to a comprehensive way.

Rather, and in order to make a long and complex story short, let it initially suffice here to recall that it is ever more recognized that traditional concepts of democratic legitimacy developed under the conditions of the nation-state – some of which finding their normative manifestations also for example in Article 10 (1) and (2) of the Treaty on European Union (TEU) – alone provide an increasingly inadequate and insufficient basis for legitimizing the respective transnational steering regimes, already because of the fact that the diversity and complexity of regulatory mechanisms in the international realm does in general not allow for the establishment of comparable allocative structures [15, p. 89-118]. There are obviously a number of different conclusions and consequences potentially to be drawn from this finding. However, in case one accepts, together with what probably amounts by now to a majority of legal scholars, as the most

appropriate consequence a resulting need for a conceptual modification of our understanding of legitimacy, it seems possible – by taking recourse to the distinction between "input-oriented" and "output-oriented" models of legitimacy as developed by *Fritz W. Scharpf* [16, p.705-741] and in order to reduce the existing (factual and scholarly) complexities by way of systemization [17] – to broadly distinguish between three main lines of argumentation in the literature.

Some scholars have developed – on the basis of exclusively "input-oriented" legitimizing strategies – transnational concepts of democracy such as for example the model of a "cosmopolitan democracy" by *David Held* [18, p. 240-267], even though the implementation of such an "enormously ambitious agenda for reconfigurating the constitution of global governance and world order" [19, p. 681-702] in practice appears for the time being rather unrealistic [20, p. 596-624]. On the other end of the spectrum are those academics that argue for entirely "output-oriented" models of transnational legitimacy [21].

However, the majority of those legal scholars who are currently sympathetic towards a conceptual change of the understanding of legitimacy, favor more complex approaches comprising of "input-oriented" as well as "output-oriented" elements. According to these pluralistic models, it is necessary to determine with regard to every individual regulatory regime whether a sufficient number of legitimizing factors exist that substitute or mutually reinforce each other. Although there is no *numerus clausus* with regard to the potential aspects to be taken into account, it is nevertheless possible to identify a number of factors to which particular importance is frequently attributed to in the legal literature. Among them is from an "output-oriented" perspective the effective realization of the common good, generally regarded as one of the most important legitimizing factors for the respective regulatory structures. In order to facilitate this optimal orientation towards the realization of the common good, a prominent position is – in the realm of "input-oriented" factors – occupied, *inter alia*, by the requirements of transparency in the decision- and rule-making processes as well as in particular also of opportunities for a more direct and more sustained participation by interested and affected societal actors [22]. Specifically with regard to the governance realm of the EU, some of these last-mentioned approaches and concepts indeed find their normative recognition for example in Article 10 (3) and Article 11 TEU as well as in Article 15 and Article 24 of the Treaty on the Functioning of the European Union (TFEU).

Republican Legitimacy in Disguise: On the Normative Foundations of Pluralistic Legitimation Strategies

Although the respective mechanisms and means as normatively enshrined in particular in Article 10 (3) and Article 11 TEU are stipulated in this EU treaty in its title II under the heading "provisions on democratic principles", it has already rightly been emphasized that a closer look at their quasi-constitutional foundations reveals that not all of the factors considered to be of relevance in these more complex and pluralistic legitimation approaches are in fact manifestations of democratic legitimacy in the narrower sense of the concept [23]. This applies in particular, to mention but one example, to the orientation towards an effective realization of the common good; considered to be one of the central elements in pluralistic legitimation models, but nevertheless not among the factors that are easily attributable to the ordering idea of democratic legitimacy.

Rather, some of these elements, among them first and foremost the orientation towards the common good, but also for example the idea of a sustained public participation by interested societal actors in the governance processes of

a political community, are more appropriately qualified as alternatives to, or surrogates for, democratic legitimacy that find their overarching normative basis in the principle of republicanism [24, p. 443-490]; a constitutional ordering concept whose relevance in the context of the transnational realm [25, p. 45-64], and especially also in the process of European integration in general as well as the EU legal order in particular [26, p. 913-941], has only more recently received increasing attention in the (legal) literature. Viewed through this quite useful and enlightening prism of republicanism, the more complex, pluralistic legitimation approaches comprising of "input-oriented" as well as "output-oriented" elements, intended also to provide a more solid level of legitimacy for comprehensive transnational regulatory regimes such as modern EU free trade agreements, thus actually have their normative foundation in the concept of democratic legitimacy as complemented by republican strands of legitimation.

Involvement of the General Public in the Negotiation of EU Regional Economic Integration Regimes

These republican supplements – among them especially the possibilities for the involvement of the general public as well as of individual non-state actors – have in particular more recently also been taken recourse to by EU institutions – and citizens – in the first phase of EU regional economic integration treaties, namely the negotiation of these agreements. Despite the challenges posed by what could be labelled the primarily executive approach to international (treaty) negotiations and the inherent limits to publicity and inclusiveness resulting from it [27, p. 61-87], the constitutional treaty framework of the EU provides now for in principle comparatively far-reaching stipulations in this regard; stipulations that have also inspired EU institutions to adopt in the present context a policy approach that is increasingly characterized by the fostering of transparency and the solicitation of stakeholders' input [28, p. 681-702].

Among these stipulations is the European citizens' initiative in accordance with Article 11 (4) TEU and Article 24 TFEU [29, p. 61-81]; an instrument allowing for the possibility of political standard-setting by EU citizens, whose given relevance in the context of the common commercial policy in general and of EU free trade agreements in particular has more recently been subject to an important clarification by the General Court in the case of *Efler et al. v. European Commission* [30, p. 61-81] dealing with the legality of a Commission's refusal to register the proposed European cititzens' intiative "Stop TTIP" [31]. In addition, we witness in recent years a number of notable measures by EU institutions aimed at fostering transparency in the present context; an indispensable prerequisite for public participation as for example enshrined in Article 1 (2) and Article 10 (3) TEU as well as Article 15 TFEU. They include the (subsequent) publication of negotiating mandates by the Council as well as the more recent practice of the Commission to publish certain documents related to ongoing treaty talks, among them in particular also original EU text proposals used in the respective negotiations [32]. Examples of the last-mentioned approach concern a number of EU text proposals related to, among others, the negotiations on a free trade agreement with Indonesia [33], the negotiations on a respective treaty with New Zealand [34], the negotiations of a free trade agreement with MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) [35], the negotiations of a free trade agreement with Australia [36], the negotiations of a modernized association agreement with Chile [37], the negotiations of a free trade agreement with the Philippines [38], as well as the negotiations of a Deep and Comprehensive Free Trade Area (DCFTA) with Tunisia [39].

Finally, in the realm of participation by means of dialogues and consultations as envisioned in the paragraphs one to three of Article 11 TEU, it seems worth recalling that in recent years the Commission has initiated an increasing number of public consultations in the present context of international trade and investment relations, in particular also in connection with, or in preparations of, negotiations on the conclusion of free trade agreement with third countries. The oldest important example in this regard was the online public consultation process, in the period from 27 March 2014 until 13 July 2014, on investment protection and investor-to-state dispute settlement in the envisioned Transatlantic Trade and Investment Partnership Agreement with the United States of America [40]. In this comparatively short period of time, the Commission received a total of nearly 150.000 replies [41]; a fact that clearly underlines again the changing character of international economic law as an increasingly political law. Subsequent topics of public consultations initiated by the Commission included the future of EU-Mexico trade and economic relations (2 July to 31 August 2015), the future of EU-Australia and EU-New Zealand trade and economic relations (11 March to 3 June 2016), a possible modernization of the trade part of the EU-Chile association agreement (9 June to 31 August 2016), the negotiations on a deep and comprehensive free trade agreement between the EU and Tunisia (21 November 2016 to 22 February 2017), the implementation of the EU-Korea free trade agreement (8 December 2016 to 3 March 2017) as well as a multilateral reform of investment dispute resolution (21 December 2016 to 15 March 2017) [42].

Public Participation in the Implementation Phase of EU Free Trade Agreements

Although occasionally overlooked or underestimated, the possibilities for public participation are currently not confined to the negotiation phase of regional economic integration agreements concluded by this supranational organization. Rather, more recent EU free trade agreements also increasingly foresee venues and mechanisms for the active involvement of interested and affected individuals and other private actors in the subsequent implementation as well as progressive development of these steering regimes; thereby also acknowledging the character of these trade and investment treaties as "living instruments" that benefit from continued, and again in particular also republican, means of legitimation.

In order to illustrate this more participatory and inclusive approach agreed upon by the contracting parties of modern EU free trade agreements, attention might be drawn here to three different regulatory concepts and frameworks that have more recently become increasingly common features of regional economic integration agreements concluded by this supranational organization and its member states. The first of these steering approaches concerns the possibilities for public participation in the field of trade and sustainable development as well as, quite closely related, with regard to covered trade-related labor and environmental issues [43, p. 493-511]. To mention initially but one example, Article 373 of the EU Association Agreement with Moldova, signed on 27 June 2014 and entering into force on 1 July 2016 [13], stipulates in this regard that each contracting party "hall ensure that any measure aimed at protecting the environment or labour conditions that may affect trade or investment is developed, introduced and implemented in a transparent manner, with due notice and public consultation, and with appropriate and timely communication to, and consultation of, non-state actors".

Furthermore, with regard to the institutional dimension of public participation, Article 376 (4) of the EU-Moldova Association Agreement requires the parties to "convene new or consult

existing domestic advisory group(s) on sustainable development with the task of advising on issues relating to this Chapter. Such group(s) may submit views or recommendations on the implementation of this Chapter, including on its (their) own initiative.” These domestic advisory groups “shall comprise independent representative organisations of civil society in a balanced representation of economic, social, and environmental stakeholders, including, among others, employers’ and workers’ organisations, non-governmental organisations, business groups, as well as other relevant stakeholders” (Article 376 (5) EU-Moldova Association Agreement). In addition, a joint civil society dialogue forum is created on the basis of Article 377 of this agreement that shall be convened once a year in order to conduct a dialogue between the contracting parties and relevant non-state actors on sustainability aspects including environmental concerns [44]. With regard to the composition of the forum, the parties have committed themselves to promote – in the words of Article 377 (1) – “a balanced representation of relevant interests” and stakeholders by inviting, inter alia, representative organizations of employers, workers, environmental interests and business groups to participate in the dialogue forum.

Moreover, Article 23.8 (5) of CETA even stipulates with regard to covered labor issues that each contracting party “shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns. Each Party shall inform its respective domestic labour or sustainable development advisory groups of those communications” [45]. Quite similar procedural and institutional frameworks aimed at facilitating the participation of citizens and of other non-state actors are stipulated, among others, in the Articles 13.9 *et seq.* of the free trade agreement between the EU and its member states, of the one part, and the Republic of Korea, of the other part, signed on 6 October 2010 and in force since 13 December 2015 [46], in Article 299 of the EU-Ukraine Association Agreement that entered into force on 1 September 2017 [47], in the Articles 12.13 *et seq.* of the free trade agreement between the EU and the Republic of Singapore as signed on 19 October 2018 and entered into force on 21 November 2019 [48], in the Articles 237 *et seq.* of the EU Association Agreement with Georgia, signed on 27 June 2014 and entering into force on 1 July 2016 [49], in the Articles 16.10 *et seq.* of the Economic Partnership Agreement signed by the EU and Japan on 17 July 2018 that entered into force on 1 February 2019 [50] as well as, albeit with certain modifications, in the Articles 13.12 *et seq.* of the free trade agreement between the EU and Vietnam, signed on 30 June 2019 and entering into force on 1 August 2020 [51].

A second steering approach of relevance in the present context concerns the possibilities for private actor participation in the field of regulatory cooperation. Article 21.8 of CETA stipulates in this regard that in order to “gain non-governmental perspectives on matters that relate to the implementation of this Chapter [on regulatory cooperation], each Party or the Parties may consult, as appropriate, with stakeholders and interested parties, including representatives from academia, think-tanks, non-governmental organisations, businesses, consumer and other organisations. These consultations may be conducted by any means the Party or Parties deem appropriate.” Implementing this stipulation, the European Commission initiated, among others, a public consultation on proposals for regulatory cooperation activities in the Regulatory Cooperation Forum under CETA in February 2018 [52]. Comparable participatory approaches are for example enshrined in the Articles 18.7 and 18.10 of the EU-Japan Economic Partnership Agreement.

Finally, a third participatory option worth at least briefly drawing attention to relates to the

involvement of representatives of the general public and other non-state actors in the dispute settlement mechanisms established under EU free trade agreements. Article 14.15 of the EU-Korea Free Trade Agreement together with Article 11 of Annex 14-B (Rules of Procedure for Arbitration) of this treaty foresees in principle, albeit subject to certain qualifications [53], the competence of the arbitration panel to receive "unsolicited written submissions from interested natural or legal persons of the Parties, provided that they are made within 10 days of the date of the establishment of the arbitration panel, that they are concise and in no case longer than 15 typed pages, including any annexes, and that they are directly relevant to the factual and legal issues under consideration by the arbitration panel" (Article 11 (1) of Annex 14-B). This possibility for non-state actors to submit *amicus curiae* briefs [54, p. 694-721] to the arbitration panel in dispute settlement proceedings between the contracting parties of the regional economic integration agreement at issue – an approach that has been already for a number of years time quite controversially debated in the realm of WTO dispute settlement [55, p. 496-510] as well as in the area of investor-state arbitration proceedings [56, p. 510-564] – is for example also enshrined in Article 400 in connection with Annex XXXIII, paras. 37 *et seq.* of the EU-Moldova Association Agreement, in Article 264 in connection with Annex XX, paras. 37 *et seq.* of the EU-Georgia Association Agreement, in Article 14.17 (2) in connection with Annex 14-A, paras. 42 *et seq.* EU-Singapore Free Trade Agreement, in Article 3.41 (2) in connection with Annex 9, paras. 42 *et seq.* of the Investment Protection Agreement between the EU and its member states, of the one part, and the Republic of Singapore, of the other part, signed on 19 October 2018 [57], in Annex 29-A, paras. 43 *et seq.* of CETA, in Article 319 in connection with Annex XXIV, paras. 37 *et seq.* EU-Ukraine Association Agreement as well as in Article 21.17 of the EU-Japan Economic Partnership Agreement.

Conclusions

In light of these in principle quite remarkable, possibilities for the involvement of the general public as well as individual non-state actors during the negotiation phase of regional economic integration agreements concluded by the EU as well as in particular also during the subsequent implementation phase of this new generation of treaties, we finally turn to what amounts probably to be the most challenging issue: Do these republican elements of legitimation, most certainly viewed together with the main pillars of democratic legitimacy of the EU common commercial policy provided by the European Parliament [58, p. 67-85], the governments of the EU member states acting in the Council as well as the parliaments at the national level, establish as a whole a sufficient level of legitimacy for the modern type of EU free trade agreements and the regulatory features stipulated therein? There seems to be no easy answer available, already in light of the incontrovertible finding that attributing and measuring legitimacy is very far from a mathematical operation. Much has already been – and much more could surely be – said about this issue. Nevertheless, for the purposes of this comparatively short contribution, I intend to confine myself here to two remarks.

First, there appears to be an increasing awareness among EU institutions and member states that the participatory opportunities for private actors, including the general public, specifically also during the implementation phases of regional economic integration agreements can be, and in fact should be, further enhanced. This is for example evidenced by the findings made in the non-paper "Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements"

published by the Commission services on 26 February 2018 [59-60]. Among the issues, identified and discussed in a respective consultation process involving, *inter alia*, the European Parliament, EU member states, the European Economic and Social Committee, civil society groups, businesses as well as academics, and being of relevance in the present context are the exchange of best practices between the domestic advisory groups established under the different free trade agreements as well as the creation of clear and transparent rules as well as procedures for respective civil society structures [61, p. 8].

Other innovations, intended to improve public participation in the enforcement of free trade agreements, include a considerable broadening of the material scope of competences of the domestic advisory groups as well as the joint civil society fora by covering not merely the issue of trade and sustainability but potentially the implementation of the whole free trade agreements [62, p. 6]; an approach envisioned by the EU to be put into treaty practice beginning with the EU-Mexico free trade treaty on which an agreement in principle has been announced by the parties in April 2018 [63]. Finally, to mention but one further example, the document foresees – aside from a more general commitment of the Commission to improved transparency and communications in trade policy and negotiations – a more efficient system to respond to submissions received from citizens and other stakeholders. In this regard, the non-paper states, *inter alia*, that the “Commission services are committed to responding to written submissions from citizens on TSD [trade and sustainable development] in a structured, transparent and time-bound way. In particular, the Commission will acknowledge receipt within 15 working days, indicating the responsible services, and presenting opportunities for submitting additional information. It will respond within two months from the date of receipt providing information about any follow up, and including justification of any action taken. Should an additional period of time for analysis be needed, because of the complexity of the matters raised, the Commission will inform the author as soon as possible and within the above mentioned time-limit, indicating the necessary extra time needed” [64, p. 12]. Viewed from an overarching perspective of legal theory, these ongoing attempts aimed at improving the participation of citizens and other non-state actors in the implementation of EU free trade agreements clearly correspond to the normative character of the republican legitimation factors as principles and thus as “optimization requirements relative to what is legally *and* factually possible” at a given time [65, p. 67; 66 p. 505 et seq.].

Second, and with regard to the respective allocation of decision-making competences in the present context, it seems worth recalling that the determination whether a sufficiently high level of legitimacy for the modern type of EU free trade agreements has been achieved is most certainly not made by (legal) scholars with any legitimate claim to ultimate authority but, first, by those political actors that have the competence and decide to sign as well as ratify the international agreements at issue and, second, by those supranational and domestic judicial bodies entrusted with the task of assessing these treaties in light of respective constitutional requirements, as well as, third and ultimately, by the peoples of Europe themselves by, among others, participating in elections at the regional, national and supranational level. This last-mentioned finding does not only hint at another very fundamental element of public participation in connection with EU regional economic integration agreements but also seems, and in fact should be perceived as being, quite reassuring from the perspective of democratic and republican self-government as a whole.

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DICHOTOMOUS THEORIES OF CULTURAL AND LEGAL SUPERSYSTEMS

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Among the modern theories of cultural systems and supersystems, dichotomous models occupy one of the most important places. Almost all recent theories of this kind represent variations and processing of the Marx-Engels division. The most important of these theories are those of A. Coste, Z. Weber, A. Weber, R. M. MacIver, W. Ogburn, F. S. Chopin, T. Veblen, M. Tugan-Baranovsky, and others. Even within the same culture, say sensitive, any of its main systems divides (sociologically) its own values into 'values-purposes' and 'values-means', into positive and negative, leading to a pyramid of values. In each class of sociocultural phenomena, not all its values are considered equal, but stratified in a hierarchical pyramid, starting with the negative and mediocre 'values-means' and ending with the final, supreme 'means-purposes'. These authors support the dichotomous division of the total sociocultural world into two different supersystems. The common feature of all dichotomous theories is that, without any explicit distinction between sociocultural and conglomerate systems, they divide the total culture of all societies into two different classes, and claim that all phenomena, within each class, are interdependent and change within the same pattern, given that the patterns of change in each class are fundamentally different. All these considerations and empirical evidence show the injustice of dichotomous theories of progress and lagging behind. At best, they fall into the well-known mistake of elevating a particular fact to the rank of a universal rule.

Keywords: *society, civilization, sociocultural phenomena, dichotomous theories, cultural system, legal system, supersystem.*

TEORII DIHOTOMICE ALE SUPERSISTEMELOR CULTURALE ŞI JURIDICE

Printre teoriile moderne ale sistemelor şi supersistemelor culturale, modelele dihotomice ocupă unul dintre cele mai importante locuri. Aproape toate teoriile recente de acest fel reprezintă variaţii şi prelucrări ale diviziei Marx-Engels. Cele mai importante dintre aceste teorii sunt cele ale lui A. Coste, Z. Weber, A. Weber, R. M. MacIver, W. Ogburn, F. S. Chopin, T. Veblen, M. Tugan-Baranovsky şi alţii. Chiar şi în cadrul aceleiaşi culturi, să zicem sensibile, oricare dintre sistemele sale principale îşi împarte (sociologic) propriile valori în "valori-scopuri" şi"valori-mijloace", în pozitive şi negative, ducând la o piramidă de valori. În fiecare clasă de fenomene socioculturale, nu toate valorile sale sunt considerate egale, ci stratificate într-o piramidă ierarhică, începând cu 'valorile-mijloace' negative şi mediocre şi terminând cu "mijloacele-scopuri"finale, supreme. Aceşti autori susţin diviziunea dihotomică a lumii socioculturale totale în două supersisteme diferite. Trăsătura comună a tuturor teoriilor dihotomice este

că, fără nicio distincție explicită între sistemele socioculturale și conglomerate, ele împart cultura totală a tuturor societăților în două clase diferite și susțin că toate fenomenele, în cadrul fiecărei clase, sunt interdependente și se schimbă în cadrul aceluiași model, având în vedere că modelele de schimbare din fiecare clasă sunt fundamental diferite. Toate aceste considerații și dovezi empirice arată nedreptatea teoriilor dihotomice ale progresului și rămânerea în urmă. În cel mai bun caz, ei se încadrează în binecunoscuta greșeală de a ridica un anumit fapt la rangul unei reguli universale.

Cuvinte-cheie: *societate, civilizație, fenomene socioculturale, teorii dihotomice, sistem cultural, sistem juridic, supersistem.*

THÉORIES DICHOTOMIQUES DES SUPERSYSTÈMES CULTURELS ET JURIDIQUES

Parmi les théories modernes des systèmes culturels et des supersystèmes, les modèles dichotomiques occupent l'une des places les plus importantes. Presque toutes les théories récentes de ce type représentent des variations et un traitement de la division Marx-Engels. Les plus importantes de ces théories ont celles de A. Coste, Z. Weber, A. Weber, R. M. MacIver, W. Ogburn, F. S. Chopin, T. Veblen, M. Tugan-Baranovsky et d'autres. Même au sein d'une même culture, disons sensible, l'un de ses principaux systèmes divise (sociologiquement) ses propres valeurs en "valeurs-buts" et "valeurs-moyens", en positif et négatif, conduisant à une pyramide de valeurs. Dans chaque classe de phénomènes socioculturels, toutes ses valeurs ne sont pas considérées comme égales, mais stratifiées en une pyramide hiérarchique, commençant par les "valeurs-moyens" négatifs et médiocres et se terminant par les "moyens-buts" finaux et suprêmes. Ces auteurs soutiennent la division dichotomique du monde socioculturel total en deux supersystèmes différents. Le trait commun de toutes ces théories est que, sans distinction explicite entre systèmes socioculturels et systèmes de conglomérats, elles divisent la culture totale de toutes les sociétés en deux classes différentes, et prétendent que tous les phénomènes, au sein de chaque classe, sont interdépendants et changent au sein du même modèle, étant donné que les modèles de changement dans chaque classe sont fondamentalement différents. Toutes ces considérations et preuves empiriques montrent l'injustice des théories dichotomiques du progrès et du retard. Au mieux, ils tombent dans l'erreur bien connue d'élever un fait particulier au rang de règle universelle.

Mots-clés: *société, civilisation, phénomènes socioculturels, théories dichotomiques, système culturel, système juridique, supersystème.*

ДИХОТОМИЧЕСКИЕ ТЕОРИИ КУЛЬТУРНЫХ И ПРАВОВЫХ СУПЕРСИСТЕМ

Среди современных теорий культурных систем и суперсистем дихотомические модели занимают одно из важнейших мест. Почти все новейшие такого рода теории представляют собой вариации и переработку Маркса-Энгельса. Важнейшие из этих теорий — теории А. Косте, З. Вебера, А. Вебера, Р. М. Макивера, У. Огберна, Ф. С. Шопена, Т. Веблена, М. Туган-Барановского и др. Даже в пределах одной и той же культуры, скажем сенситивной, любая из ее основных систем делит (социологически) собственные ценности на «ценности-цели» и «ценности-средства», на позитивы и негативы, образовывая пирамиду ценностей. В каждом классе социокультурных явлений не все его значения считаются равноценными, а стратифицированными в иерархической пирамиде, начиная с отрицательных и посредственных «средств-ценностей» и заканчивая высшими «средствами-целями». Эти авторы поддерживают дихотомическое разделение всего социокультурного мира на две разные суперсистемы. Общей чертой всех дихотомических теорий является то, что без какого-либо явного различия между социокультурными и конгломератными системами они делят общую культуру всех обществ на два разных класса и утверждают, что все явления внутри каждого класса взаимозависимы и изменяются в рамках одной и той же модели, учитывая, что закономерности изменений в каждом классе принципиально различны. Все эти соображения и эмпирические данные свидетельствуют о несправедливости дихотомических теорий прогресса и отставания. В лучшем случае, они впадают в знаменитую ошибку возведения известного факта в ранг всеобщего правила.

Ключевые слова: *общество, цивилизация, социокультурные явления, дихотомические теории, культурная система, правовая система, суперсистема.*

Introduction

Among the modern theories of cultural systems and supersystems, dichotomous models occupy one of the most important places. Almost all recent theories of this kind represent variations and processing of the Marx-Engels division. The most important of these theories are those of A. Coste, Z. Weber, A. Weber, R. M. MacIver, W. Ogburn, F. S. Chopin, T. Veblen, M. Tugan-Baranovsky, and others. Even within the same culture, say sensitive, any of its main systems divides (sociologically) its own values into ‘values-purposes’ and ‘values-means’, into positive and negative, leading to a pyramid of values. In each class of sociocultural phenomena, not all its values are considered equal, but stratified in a hierarchical pyramid, starting with the negative and mediocre ‘values-means’ and ending with the final, supreme ‘means-purposes’. These authors support the dichotomous division of the total sociocultural world into two different supersystems. The common feature of all dichotomous theories is that, without any explicit distinction between sociocultural and conglomerate systems, they divide the total culture of all societies into two different classes, and claim that all phenomena, within each class, are interdependent and change within the same pattern, given that the patterns of change in each class are fundamentally different. All these considerations and empirical evidence show the injustice of dichotomous theories of progress and lagging behind. At best, they fall into the well-known mistake of elevating a particular fact to the rank of a universal rule.

Variations in dichotomous theories

Dichotomous models occupy one of the most important places among the modern theories of cultural systems and supersystems,. Some of the ideas, before these theories appeared, are found in the doctrine of Confucius and Mencius, of Hindu and Buddhist thinkers, and in the works of Plato, Aristotle, Polybius, and other Greco-Roman thinkers. In a more developed form, it is found in the writings of various social thinkers of the seventeenth and eighteenth centuries, and in the first half of the nineteenth century. Karl Marx and Friederich Engels, by dividing sociocultural relations into two main classes, *the relations of production,* (which) constitute the economic structure of society, and *the ideological superstructure*, which consists of *legal, political, religious, artistic or philosophical forms and relations*, have given new life and full development to the economic variant of dichotomous theories[1]. Almost all recent theories of this kind represent variations and processing of the Marx-Engels division. The most important of these theories are those of A.Coste, Z.Weber, A.Weber, R.M.MacIver, W.Ogburn, F.S. Chopin, T. Veblen, M. Tugan-Baranovsky and others.

The common feature of all dichotomous theories is that, without any explicit distinction between sociocultural and conglomerate systems, they divide the total culture of all societies into two different classes, and claim that all phenomena, within each class, are interdependent and change within the same pattern, given that the patterns of change in each class are fundamentally different.

Coste divides all sociocultural phenomena into two systems and conglomerates. By social *facts*, Coste means the phenomena of government, the production and distribution of economic or useful products, beliefs and solidarity. By *ideological* facts, he means the phenomena of impractical or useless arts, such as poetry, philosophy, and various ideologies, including those of the theoretical and non-applied sciences, which are not useful or utilitarian. While the social phenomena of government, economy, faith and solidarity are closely linked and correlated with each other in their

[1] See a comparative analysis of the early sketch of Marx’s theory with its later version in G. Gurwitch, La vocation actuelle de la sociologie (Paris, 1963) pp. 220-332.

change, fluctuation and evolution, ideological phenomena do not show any close correlation with social phenomena. In other words, *sociality* and *ideological mentality* are independent of each other[2]. Changes in ideological phenomena take place sporadically, irregularly and without continuity, constant direction or accumulation. They also appear and fall down. The most socially powerful societies are often overshadowed in terms of ideological achievements and the people of genius ideology, while socially weak societies often have an abundance of great ideological creations - in art, in a system theological of religion, in literature and in theoretical science or philosophy. *The social system*, with its elements, on the contrary, shows continuity, regularity, accumulation, and a linear direction of progress. In this linear direction, *the social system* has passed, in all its compartments - economic, government, beliefs, solidarity - through five stages, from the town to the Federation of Metropolises. At each stage, each of these compartments or subsystems is integrated with the others and changes with them.

Similar to Coste's theory in the main aspects are the theories of L. Weber, A. Weber, W. Ogburn, R. MacIver and many others[3].

According to Louis Weber, a person and his/her spirit have a double nature: *homo faber*, the technical person and the worker, on the other hand, and *homo socius*, the social person, on the other[4]. In order to live and survive, a person had to and must be a *homo faber*, who manipulates and controls the external, material objects of nature. As a social animal, he/she had to develop his/her respective social instincts and inclinations of spirit. These two aspects of human nature and intelligence are manifested sometimes in his/her technical preoccupations and activities, sometimes in his/her social and speculative activities and preoccupations.

"*Between these two tendencies, the geometric-mechanical comprehension of the external world, and a speculative conception of this world that is formed in us when we become aware of it through the lens of social categories, there is no harmony or rational correspondence; rather there is a discord and almost an antinomy. It is said that when a person thinks (meditates) on his/her nature and conditions, he/she thinks with the brain of another age, and although h/she possesses the technical knowledge of the adult, he/she still philosophizes as a child*[5]."

In any society and culture, there are always these two different supersystems, each unifying a large number of subsystems. The technical supersystem includes technology, practical and applied sciences, economic processes of production and modification of material things, practical inventions, practical language, and other sectors of agriculture. Speculative and reflective systems consist of religion, magic, ethics, law, the arts, philosophy, and the theoretical sciences. At one point one of these supersystems predominates in a given society (reflective or speculative in the Middle Ages, for example), in another its rival (technical, in the modern era). Each of them, when it dominates, imprints its culture, with its specific note.

Of these, *the homo faber* technical system (and the corresponding thinking and activities) emerged earlier than the speculative, reflecti-

[2] Check A.Coste, *L'experience des peuples et les previsions qu'elle autorise* (Paris, 1900) unit I, II și *Les principes d'une sociologie objective* (Paris, 1899) unit II, III, IV, XXII.

[3] See A.G. Keller, *Societal Evolution* (New York, 1931) pp. 208, 218, 225-226, 246-250. Kroeber's theory of *reality* and *value culture* is a variant of dichotomous theories. See A. Kroeber, The Nature of Culture (pp. 152-166). Another variant of these theories is given by R. Merton in *Civilization and Culture*, *Sociology and Social Research*, XXI (1936), 105-113.

[4] Louis Weber, The Rhythm of Progress (Paris, 1913). See also Civilization et tehnique in Civilization: Le mot et l'idee (Paris 1930), pp.131-143.

[5] Louis Weber, *Le rythme du progres* (Paris, 1913), pg. XI-XIII.

ve, or social system. Changes in these systems and in all elements of each system take place in different ways.

The technical supersystem changes gradually, continuously and cumulatively. The change in the reflective supersystem is sporadic and non-cumulative. Because progress or technical change is cumulative and continuous, it influences the change of the speculative system in the total culture much more than the last over the first.

This is the essential framework of this theory. Not much different is the theory offered by A. Weber, R. Macver and T. Veblen. Alfred Weber rightly points out, that if sociology does not want to be sterile and pedantic, it must deal not only and not so much with the pure study of forms and the description of petty facts (however precise), but with the central problems of life and it should try to understand the historical processes, their meanings, and the way and cause, in their entirety[6].

In pursuit of this goal, he considers that the total sociocultural world of a given society or area (social system) and the total change in it (Gesellschaftsprozess) consists of two different systems - civilization and culture - and two different processes - the process of civilization (*Zivilizationsprozess*) and cultural change (*Kultur bewegung*). Through civilization, A. Weber means something similar to *the mechanical arts* of F. Bacon, with *the mechanical system* of L. Weber and, in a generic form (though not in the concrete content), with *the social category* of Coste. It is a world of scientific, technological, economic, material, utilitarian, sociocultural phenomena. By culture, it means reflective, spiritual, non-utilitarian values and phenomena - religious, philosophical, artistic and similar[7].

Total sociocultural change (*Gesellschoftsprozess*) is made up of these two main processes, *Zivilizationsprozess* and *Kulturbewegung*. The mode of change of each of these processes is different: *Zivilizationsprozess* is universal, always spreading in ever-widening sections of humanity, regularly, cumulatively, linearly in its expansion and perfection; it is a line of progress. *Kulturbewegung* is irregular, non-cumulative, without any linear direction, linked to a certain area of historical culture or society, beyond which it does not spread, despite cultural contact; it is not transferable to other cultures.

From these brief descriptions, we can easily recognize the essential resemblance of the schemes of Coste, Louis Weber, and Alfred Weber.

Very similar in the essential points is the scheme of R. MacIver. He attributes the inadequacy of the current haphazard description of historical change to the inability of scientists to recognize the fundamental unity of the phenomena they describe. Without a real unity, no real change takes place, because any real change presupposes continuity, and continuity exists only in a certain unity. He rightly remarks, “*Without this concept of unity, historical correction cuts only separate paths through the jungle of events*[8].” In short, he clearly understands the need to distinguish between a system unit and a conglomerate unit. Because conglomerates are infinite in number, no simple description of change or modification in conglomerates allows us to properly understand the nature and cause of general patterns of change. Hence MacIver’s search for major systems or units in the jungle of sociocultural phenomena. Its solution is reduced to the recognition in the total sociocultural world of two distinct classes or fundamental systems, namely, the system of civilization and the system of culture. The first is made up of

[6] Alfred Weber, *Ideen zur Staats- und Kultursoziologie* (Karlsruhe, 1927), pg.5-6. His last work, *Kulturgeschichte als Kultursoziologie* (Leyden, 1935), does not go far beyond the theory set out in the *Ideen*.

[7] A.Weber, *Ideen*, pg. 2.

[8] AR.MacIver, *The Historical Pattern of Social Change, in Journal of Social Philosophy*, October, 1936, pg.36.

non-utilitarian sociocultural elements that serve as means rather than as ends or values in themselves; these are the technological, scientific, economic and political systems. The culture system is composed of socio-cultural elements that are *values-goals*: "*Family, church, club, discussion group, circle of friends, sports organization, art and science association, alumni association, and certain forms of institutions educational, are typical embodiments of values-as-goals*[9].". The patterns of change in each of these systems are different: civilization or technological change is gradual, cumulative, linear, and progressive in the line of ever-improving means of civilization. Cultural change is intermittent, non-cumulative, nonlinear, progressing in undulating lines or in *cycles and rhythms*.

Civilization - the latest and most perfect cars, cars and planes - is universal by nature; it spreads to all peoples, with their different cultures. Culture, on the other hand, is something more intimate; it can only belong to a certain group. It has no universality; it does not penetrate beyond a certain group; it does not broadcast *urbi et orbi* and is restricted to a limited social area[10].

Both of these systems coexist in any society and influence each other. But because the progress of the civilizational system is incessant, cumulative, and unhindered, the technological system seems to condition the cultural system far more than the other way around[11].

The theories of W. Ogburn and F.S. Chopin are built on the same lines. According to Ogburn, sociocultural phenomena fall into two main classes: material culture and immaterial culture. Material culture is not clearly defined by the author[12]. From the context of his writings, it is obvious that material culture encompasses technological inventions, economic phenomena, and several other classes of sociocultural phenomena. Nonmaterial culture consists of immaterial sociocultural phenomena, such as art, philosophy, religion, partially social, political, and other forms of organization, and other sectors of the sociocultural world.

Ogburn's two culture systems are different, and so they are changing in different ways. Material culture changes in a linear direction, of a selective accumulation; over time, it develops progressively and becomes more perfect; its change is continuous (though not with the same speed and tempo); the tempo of change is faster than in immaterial culture. In the process of change, material culture usually takes precedence, while immaterial culture lags behind. This means that material culture is stronger than immaterial culture - again a thesis shared by almost all previous theories. Intangible culture changes sporadically; it is neither cumulative nor universal.

Finally, a number of other theories, such as those of Karl Marx and Thorstein Veblen[13], clearly emphasize the economic or technological

[9] See MacIver, Society (New York, 1937), chap. XII. These criteria have been used by many economists to separate economic activities from others. *"Economic activity is characterized by two specific features: objective - nature and not man is its immediate object; subjective - economic activity is always a means, not an end in itself"* in M.I. Tugan-Baranovsky, Foundations of Political Economy (6th ed., Riga, 1924) pg.9.

[10] In his work *Social Causation* (New York, 1942), MacIver changes his theory somewhat, *dividing the conscious form of total existence* into social, technological, and cultural systems, indicating roughly the major sectors of each system. However, the essential principles of the previous version of his theory are maintained in this latest version.

[11] In this respect, an ambiguity floats along both of MacIver's works. On the other hand, it strongly emphasizes the reciprocity of influence, and even the fact that the course of technology or civilization is controlled by culture, which determines what is used. See Society, pp. 462-464 and 470-473. This ambiguity, inevitable in such a setting, is present throughout MacIver's theory.

[12] In *Social Change* (New York, 1922), he introduces the term without any definition or specification; pg.60. See also *Recent Social Trends in the United* States (New York, 1933), p. XIII, where the whole theory is exposed again. The specific definitions given do not rule out vagueness.

[13] See K. Marx, A *Contribution to the Critique of Political Economy* (New York, 1904), pp. 11-13. For an exposition and analysis of Marxist sociology see G. Gurwitch, *Dialectique et sociologie* (Paris, 1962) chap. VIII; T. Veblen, The Institute of Workmanship (New York, 1914); *The Theory of The Seizure Class* (New York 1899); *The Place of Science in Modern Civilization* (New York, 1919) and *The Higher Lerning in America* (New York, 1918).

system of the total sociocultural world (*Marx's material power* and *material forces of production* and *Veblen's technological system*), but do not group the rest of the sociocultural traits in a defined system. They are left as a kind of residual category, in which such subsystems as Marx's *legal* and *political superstructure* and *ideology* are sometimes distinguished; but this is done *en passant*, so to speak. Another difference is that Marx and Veblen's theories implicitly assume that the whole sociocultural world is obviously integrated around their *economic-technological* system, in an integral system and, therefore, when the axis changes, the rest of the sectors of the sociocultural world change. But this difference - important at first sight - is not so important in reality because, after all, L. Weber, Ogburn and MacIver also claim that the technical-material system is constantly changing and is irresistible in its effects on the on the non-material cultural system, which means, in fact, that both of their systems are somewhat integrated into a causal system, dominated by the civilizational or material system. Marx's theory is, in fact, a prototype of all the other theories examined.

The main flaw of these theories is that none go beyond more or less general statements about the nature of the sociocultural system or unit. Is the system made up of causally united elements, or of logically united elements, or is it just a formal concept-category, a simple sum of similar conglomerates? If so, how does it differ from conglomerates? None of the authors, except MacIver, even try to define their system. Even less do we know whether a certain class of social phenomena, for example art or religion, in *all* its forms, always belongs to one of the two systems, or whether it belongs to it only in a certain form. For example, when art is visual or sensitive, or when religion is *scientific*, they belong to a class; they belong to the other system when art is ideational or when religion is supranational. Theories are really foggy.

To the extent that it is necessary to determine whether they mean something precise, it is found that the dichotomous divisions of these theories are fictitious, logically deficient, and factually erroneous. Let's look, from this perspective, one variant after another:

Material *versus* non-material culture

What is material culture? In one place we are told that the materiality of the *culture trait* "*lies not in the life (or physical properties) of a particular object, but in the perpetuation of the* ***knowledge*** *of being the object."*[14] Furthermore, we are always told that material culture *develops through inventions, through inventions, or through mental capacity*[15]. This means that material culture itself is a form of knowledge, because invention or mental capacity is neither a physical-chemical process as such nor a biological process as such (many organisms do not invent), but a mental process or idea. As such, it must be placed by Ogburn with immaterial culture, because science is considered by him as a form of immaterial culture. We thus have two statements: *knowledge is material culture* and *knowledge (science) is immaterial culture.*

As R. Merton rightly remarks: "The same cultural trait is sometimes classified (by Ogburn) as material, sometimes as immaterial. For example, the use of objects and substances is a part of material culture (*Social Change, 72*), while the ways of doing things and the rules involved in the handling of technical procedures are immaterial (*Ibid*, 28, 44, 271). Again, the methods of making objects are both material and immaterial (*Ibid*, 12, 105, 106), and so on.[16]"

All this means that the fundamental premise of Ogburn's theory is poorly defined, even contradictory in itself; precisely because of

[14] Obburn, *Social Change*, pg.74.
[15] *Ibid*, pg. 36, 103, 269 și urm.
[16] See R. K. Merton, Civilization and Culture in Sociology and Social Research, XXI (1936), 104.

this it cannot serve as a basis for subsequent theses based on it.

The same is true of Marxist theory and similar theories of *economic interpretation of history*. *Their means and instruments of production, the material force of production, the relations of production and the economic structure (or system) of society as* the real basis on which the legal and political superstructures (and other ideological superstructures) are based, are poorly defined. These theories completely neglect the fundamental fact of the composite and derived nature of any economic system, as clearly determined by scientifically valid knowledge and technology, and the nature of the prevailing ethical and legal norms in society, as well as the obvious influence of religious, philosophical, political factors, and even aesthetics. In its phases of production, distribution and even consumption, the economic system of a social group incorporates scientific (including technological) knowledge and the legal and moral norms prevailing in it. The Bronze Age economy was only as advanced as its knowledge, technology, and legal norms. Before the knowledge of the properties of fire, wind, wheel, or later steam, electricity, and atomic fission, and before the invention of tools for the use of these energies, the economy of the Stone Age, Copper, Bronze or Machine could not be established: the knowledge used has determined the kind of economy of each society in the past and determines it today. Also, the kind of legal norms prevailing in a given society precisely determines the main forms of economic relations in it - whether there will be communal or private property and what legal ways to acquire, use, administer, exchange and dispose of economic goods, there will be. This derivative nature of the economic system can be expressed by the equation:

$$SE = f (ST + LE)$$

(The economic system of any society is a function of its science and technology, plus its laws and ethics). Less important, but still significant, is the conditioning role of the religious, philosophical, political and aesthetic values and norms of society. A considerable power of the economic forces is due to the power of the scientific-technological and ethical-legal forces that the economic system incorporates. With the change in its scientific-technical knowledge and in the ethical-legal norms, the economic system of the society undergoes a corresponding change[17].

This compound-derived nature of the economic system does not mean that it should be seen as a kind of *prime mover* (initial cause of movement) in sociocultural change, or as *a real basis* for non-economic superstructure, as Marxist theory holds. If we subtracted its scientific-technological and ethical-legal components from any economic system, there would be nothing left, just as if we extracted hydrogen and oxygen from water, there would be nothing left.

The second fundamental error of both Marxist and Ogburnian theories is the consideration of material and immaterial as two separate entities or different classes of phenomena. It is a mistake because, as we have seen, any object, feature or element of culture always has two aspects: its internal, sociocultural significance, which is its immaterial aspect, and its external or material aspect, which consists of vehicles and agents composed of inorganic and organic phenomena, which embody, objectify, externalize or socialize the internal aspect or sociocultural significance. Deprived of their internal significance, a tool, a knife, an ax, a car, a fishing tackle, a radio and a national flag all cease to be objects of culture and become purely physical, chemical or biological objects. A scientific idea, when it becomes social and penetrates, from the mind of

[17] See a development of this thesis in R. Stammler, *Wirtschoft und Recht nach der materialist Geschichtsfassung* (Leipzig, 1896) and in L. Petrazycki, *Die Lehre vom Einkomenn* (Leipzig, 1893).

the person who conceived it, in social life, is always objectified in some *material* vehicles: in a speech (sound, air waves), in a book, in a tape recorder, in a film, manuscript, instrument, apparatus, laboratory, scientific reading, meeting, class, university, academy, institute, and in hundreds of other forms, perfectly material. A technical idea is externalized in the form of the invented machine or tools, and in the material possessions of the corporation exploiting the invention. Similarly, a religious belief, becoming sociocultural (i.e. accessible to others) is inevitably externalized in the vehicles of preaching, confession, manuscript, book, print media, music, ceremonies, religious statues, paintings, icons, in the construction of chapels, temples, cathedrals, and in the formation of religious organizations, with all their material properties and complexes. An aesthetic idea, becoming social, is embodied in paintings, statues, ornaments, constructions, musical scores and instruments, conservatories, performance halls, concert studios, museums and in many other forms, perfectly material.

The volumes of codes of laws and statutes, the police, the judges, the courts, the prisons, the electric seats, and other material instruments of punishment, are *the material* vehicles of legal and ethical ideas and values.

The same is true of political, economic or social ideas, values and norms. Each of them, if conceived by an individual, cannot become social - that is, accessible to others - without some form of externalization or materialization, because (excluding telepathy and clairvoyance) we cannot convey to anyone something of our inner experience - ideas, feelings, emotions, wills - without externalizing it. Externalization means materialization. It requires vehicles and physical agents. We know that any empirical sociocultural system has *the material* components of vehicles and agents. On the other hand, no object or phenomenon, whatever its physical or chemical properties, can become an object or phenomenon of culture without having the internal aspect of meanings. When this axiom is understood, all the absurdity of the contrast between material culture (vehicles) and immaterial culture (meanings) as separate entities and classes or objects becomes separate.

Technological versus socio-reflective culture

Is the dichotomy of Louis Weber and partly of Marx and Veblen better than the dichotomy of material and immaterial? No, and for similar reasons. These theories like to start with the old maxim *Primum vivere*, *deinde philosophare*, or as Goethe said, “*In the beginning was action*[18]” and as W.G.Sumner said, “*The first task of life is to live; people start with deeds, not thoughts* ”.[19] These theories claim that the person was first *homo faber*, not *homo socius* or *homo sapiens* thinker, and that action, practice, ways of doing things or techniques, preceded and precede any thought and are special phenomena of thought. Hence, the separation of technique, or technical class from sociocultural phenomena, from the non-technical class. Is this logically valid? No, it is not. First of all, there is no evidence of factual or logical evidence that *homo faber* preceded *homo sapiens* or *homo socius*. Logically, in order to be even the most primitive *homo faber*, the person must be, to a certain extent, a thinker - in a primitive way - *homo sapiens*; otherwise, he/she could not do or make anything (because he/she is not considered to be driven by instinct. If he/she were driven by instinct, then he/she would be just an animal, an organism of biology and not a carrier of culture). It took a lot of thinking on his/her part to make it the simplest stone weapon to throw at an animal, not to mention the more complex operations.

[18] See L. Weber, *La rythme du progres*, page 123.

[19] W.G.Sumner, *Folkways* (New York, 1906) pp. 1, 2, 25 ff .; and A. Keller, *Societal Evolution* (New York 1931) pg.208.

Leaving aside the priority of the emergence of *homo faber* and turning our attention to current and known human behavior, we can say with certainty that people do not always start with actions: in all their rational or semi-rational behavior, in all their conscious actions, whether they think before they act or they think simultaneously with the action. The proportion of these rational, semi-rational, conscious, premeditated actions is enormous in total human behavior.

In his/her claim to universality, the pragmatic argument discussed is obviously erroneous. He/she elevates a partial category to the rank of universal rule. Blind and unthinking action is not enough to become a real force for socio-cultural change, to be cumulative, and to influence by growing all other sectors of socio-cultural phenomena. A blind and erroneous action leads only to the loss of the actors, and not to the accumulation of culture, experience and knowledge. If the unthinking action, as an instinct, happens to be adequate, to fulfill a need, the result will be a development of the instinct, a stagnation of the instinctively correct answers, and the eventual stagnation of the whole sociocultural life. The result will not be an ever-changing culture, and no social technique other than the instinctive technique of animals. In short, the argument destroys itself through internal contradictions, and can be left there to rest in peace.

The dichotomous classification of sociocultural phenomena into technical (or technological) and non-technical (non-technological) phenomena is absolutely debatable. Any class of sociocultural phenomena, including the class of supposedly non-technical phenomena, has its technical and non-technical aspects, just as any class of sociocultural phenomena has its *material* vehicles and its *immaterial* meanings and aspects. Technique means how to do things, how to use tools and implements, and how to consciously and unconsciously achieve certain goals. Painting, sculpture, architecture, music, literature, drama, religion, science, law, ethics, economic, political and social organizations have their own technique and cannot but have it. In short, any class of sociocultural phenomena has its own technique, reaching the technology of *technology*. Every scientific system, be it physics or chemistry, history or biology, has its own technique of research, study, training, conservation and propagation. In most cases it is a very complex, difficult and complicated technique, which requires years of training. At the same time, science in general and the social sciences in particular are, according to the criticized theory, supposedly non-technical or non-technological phenomena. Every religion has a vast technical element: the techniques of its prayers, rituals, processions, its influence and its propagation. It also has a huge number of vehicles, tools, *material* tools and a very rigid and complex code of rules and hieratic rules, of technical procedure, to achieve its goals. And religion is supposed to be a non-technical phenomenon! Every art, be it music, painting, architecture, theater, literature, has its own technique. Each artist often has their own special method of creation, and it takes years and years of training to master even a small part of this technique. And it is claimed that art is also a non-technical phenomenon.

Contrasting technical phenomena with non-technical ones, as separate classes, is not much more justified than contrasting the face with the bridge of the palm, or one side of the garment with the other (the vehicle that aims with meaning). To say that one side of a garment progresses, that the other lags behind, or that one face appears earlier than the other, is also absurd. Put in such a form, the theory is, of course, wrong. It can be put, however, in a different form, namely that certain classes of sociocultural phenomena (with their technical and non-technical aspects) are united in

one system - for example, an economic and technological system - while other classes of sociocultural phenomena - for example, art, religion, science, ethics and law - are united in another system, and these systems change differently. This brings us to the third society of dichotomous theories: civilization *versus* culture.

Civilization versus culture. Society versus ideology

We are faced with an extremely vague character in terms of what is meant by each class and what *forces* - elements, components, subsystems - of sociocultural phenomena, each class is made up of. A. Weber does not give any clear *fundamentum divisionis*. A.Coste, M.Ingam-Baranovsky and R.MacIver say that it is *the principle of utility* or that of *values-as-means* and *as purposes*. Is the principle valid? Does it serve as a competent guide to distinguish which one? We're afraid not. First, because each of these authors puts the same category of phenomena sometimes in one, sometimes in the other of their dichotomous classes. For example, Coste puts his beliefs and religion in his class from time to time. So does MacIver. Science is put by him sometimes in civilization[20], sometimes in culture[21].

Then, according to the same utilitarian principle, Coste puts beliefs in the class of sociality (corresponding to MacIver's civilization); MacIver and A. Weber generally put religion in the class of culture, or what Coste calls ideology. Thus, although guided by the same principle, the authors use very different methods to *compartmentalize* sociocultural phenomena. Such inconsistencies and contradictions are numerous throughout their work. This shortcoming is not surprising, given the nature of their criteria. The principle of utility or use, by its very nature, cannot satisfactorily serve the purpose. If you are psychologically *unstable*, or what each person thinks is useful or not, we are stuck in a maze of oddities, differences and individual contradictions. Psychologically, an atheist considers religious functions absolutely useless; a believer, on the contrary, considers them the most useful and vital, even useful in his/her business.

Psychologically, Coste and MacIver consider the whole of theoretical science (natural, social, and humanistic)[22] and all the arts as useless or as *values-as-purposes*. There are thousands of people, scientists, artists, ordinary people who, psychologically, disagree with such a diagnosis; in their opinion, science and the arts are extremely useful, in the narrowest sense of the term. Coste, Weber, and MacIver consider technology useful and place it in the class of sociality or civilization, but there are many writers, philosophers, and ordinary people who deplore technical progress, find it harmful and poisonous, and believe that it deprives culture of beauty and health, undermines the true vigour and vital force of mankind, [23]etc.

Psychologically, there is no uniformity or assessment that determines which sociocultural phenomena are useful and which are not, which are *values-as-means* and which are *values-as-purposes*.

[20] See MacIver, *Society*, Farrar & Rinehart Inc., New York, 1937, pp.403-404.

[21] MacIver, *The Historical Pattern of Social Change*, Routledge, 1969, p.41

[22] MacIver sees the association of the arts and sciences as "the typical embodiment of values-as-goals". See "The Historical Pattern of Social Change" pg.41.

[23] See, for example, the views of Tolstoy, Ghandi, Ruskin, and Inge on him; or works such as those of G. Sombroso, *La rancon du machinisme* (The Price of Machinism) (Paris, 1931); RA Freeman, *Social Decay and Regeneration* (Boston, 1921); H.Adams, *The Degradation of the Democratic Dogma* (New York, 1919), J.L. Duplan, *La Majeste la machine* (Paris, 1930); D.Rops *Le monde sans ame* (*The world without a soul*) (Paris, 1932); H. Dubreuil, *Standards* (Paris, 1929); H.de Man, *An de la du Marxisme (Beyond Marxism*) (Paris, 1929); G. Duhamenl, *L'Umaniste et l'automate* (Paris, 1933); H. Bergson, *Le deux sources de la morale et de la religion* (Paris, 1932); O.Spengler, *Der Meurch und die Technik* (Munich, 1933); A.J.Toynbee, *A Study of History*, vol.III pp. 154-174; vol.IV pg ,. 39-56; L.Mumford, *Technics and Civilization* (New York, 1935) and *The Culture of the Cities* and P.M. Schull, *Machinisme et philosophie* (Paris, 1938).

That these statements are not mere assumptions is proved by a current study of the relationships between the manifest activities of individuals and groups and the motivation of these activities. A study on the actual motivation of 55 manifest activities of 103 people showed, first, that there is no close and specific relationship between a certain manifest activity and a certain motive, also considering whether the activity is considered as a means or as a purpose. Here are examples of the main reasons for the various activities: religious activity has as reasons (for different people and the same individual at different times): physical need, personal peace, tradition, custom, utilitarian and economic reasons, coercion, force of circumstance, curiosity, change, and so on. Dance is motivated by personal, social entertainment, habit, training, exercise, etc. The food is motivated by physical need, tradition, animosity, strength of circumstance and so on. These answers present a much more complex picture of motivation and its changing character than is usually presented. They also show that the same activity, even eating, seems to be sometimes a simple mean, sometimes a purpose in itself. For some, religious activity is a *value-goal*, for others a *value-means*. Even for the same individual it is sometimes the means, sometimes the goal[24].

There is no way to maintain the dichotomy criticized on a psychological basis. MacIver understands this, so he tries to move the problem from the subjective-psychological to the objective-sociological. He claims that such a dichotomy, with the compartments of culture mentioned in each dichotomous class, is sociologically given as an objective, supra-individual social reality.

Is the claim valid? We seriously question it, given that the author himself places science, for example, sometimes in one, sometimes in other groups. One may also wonder whether family, church, club, focus group, circle of friends, sports organization, arts and science associations, graduate associations, and certain forms of educational institutions are typical embodiments of *values-as-goals*, while technological, economic and political systems are typical *values-as-means*. We know that for most ordinary people and for some thinkers, from the sophists, Lextus Empiricus, Lucian, Marseilles of Padua, Machiavelli, Pierre du Bois, to a legion of skeptics, liberals and radicals, the only justification for religion and the church is that they are socially useful: they are good means for certain purposes. We know many people who marry (especially with a wealthy partner) and conceive of a family as a mere means for purposes completely foreign to the family. A large number of people view exercise and sports as a nuisance, but as a means of maintaining good health. On the other hand, for many technological inventors, and probably for most great inventors, the invention itself was the goal. Value in itself, not a means for something else.[25]

In terms of political systems, it would mean that we do not trust Plato, Aristotle, Hegel and a lot of great authors about the state and government, who considered the state and government as a *value-goal*, as a condition and at the same time the highest values, much higher and much more than *value-purpose,* than MacIver's conversation, sports, graduate and similar associations.

These facts cannot be questioned, but it can be argued that they present the situation from a psychological point of view, rather than a sociological one. If so, we may be wondering what

[24] See detailed data in P. Sorokin and C. Berger, *Time-Budgets of Human Behavior* (Harvard Sociological Studies, 1939) part III.

[25] See F. Tanssing, *Inventors and Money-Makers* (New York, 1915), where the real psychology of inventors and their passion for their work is excellently documented. J.Rossman, *The Psychology of the Inventor* (Washington, 1931) chap.X. Of the 710 inventors asked about the reasons for their invention, 193 indicated a love for the invention; 167, financial gain; 118 needs; 73 desire to reach; 27 prestige; 22 altruisms; 6 laziness and so on.

is wrong with MacIver's alleged sociological evidence. Unfortunately, he does not provide any evidence. The only way left for him is to show that an objective investigation of the classes listed by sociocultural phenomena proves that technological, economic, and political activities are always and everywhere utilitarian, while family, religion, arts, science, and philosophy are uniformly and perennially devoid of utilitarian character. It is hardly possible to prove such an assertion. First, if the so-called useless or non-utilitarian classes of sociocultural phenomena were like this, how would they have survived throughout all the great epochs of human history? Secondly, there are enough studies of even the most primitive religion and magic to prove their exceptional utility in various ways: Plato, Aristotle, Ibu-Khaldun, Vico, St. Thomas Aquinas, and other idealistic thinkers, as well as investigators, sceptics or scientists such as Marseilles of Padua, Machiavelli, E. Durkheim, J. Frazer, G. LeBen, B. Kidd, G. Sorel, V. Pareto, C. Illwood, Max Weber and F. de Coulanges have unquestionably demonstrated the functions utilities of religion[26]. The same can be said, with a slight change, about the arts and especially about science, ethics, law and any kind of cultural phenomena. And vice versa, not every form of technological, economic or political activity has always been useful everywhere. If that were the case, there would never have been a bad economy, no harmful politics, no harmful technology[27].

From the point of view of ideational ethics, all sensible utilities lead only to perdition; union with the Absolute and all that leads to it are the only real value. From the point of view of sensitive ethics, ethics and ideational values are nothing but superstition and obscurantism. In short, any objective examination will show that, sociologically, there are no classes of useful or useless sociocultural phenomena as such, or *values-means* and *values-goals* as such. Even less is it an objective sociological fact that economic, political, technological, and other classes are sociological *means*, while the circle of friends and the sports organization are *goals*.

Sociologically, there is no class of sociocultural objects that for all people, at all times, in all cultures, is always *value-purpose* or *value-means*. Even within the same culture, say sensitive, any of its main systems divides (sociologically) its own values into *values-purposes* and *values-means*, into positive and negative, leading to a pyramid of values. Religion has its value as a goal: God, union with him, salvation of the soul. It also has its *middle values*: obedience, godly living, donations to church and the poor, regular church attendance, church building, and so on. Likewise, science has its *value-purpose*: true and real knowledge, and its *middle values*: obtaining a good endowment for a university, good laboratories, libraries, tools and study techniques. Art has *its purpose value*: beauty, and *its middle values*: brushes, canvases, piano, etc. *The goal value* of the business is to achieve a successful enterprise, also on the line of social service; *its values-means* are advertising, sellers, organizers, workers, successful competition, etc. So, it is with politics and government.

In each class of sociocultural phenomena, not all its values are considered equal, but stratified in a hierarchical pyramid, starting with the negative and mediocre *means-values* and ending with the final, supreme *goal-value*. There is hardly any important sector of culture and society that considers all its values to be equal, either as mere means or as mere purposes, or to put them all on the same level.

[26] See especially works such as J.G. Frazer, *Psyche's Task* (London, 1913) and G. Sorel, *Reflection on Violence* (New York, 1912), p. 133, where he proves the usefulness of mythology.

[27] Toynbee clearly demonstrates that technological progress, if any, has been associated with a decline of civilization, not with its development and improvement. See *A Study of History*, vol.III, p.154; vol.IV, pp. 39-56.

This is the real sociological situation, not the imaginary one, assumed by the mentioned authors. These authors have no real basis on which to claim that their dichotomy is solidly grounded. The dichotomous division of the total sociocultural world into two different supersystems is erroneous. Therefore, it is no less erroneous to try to give each of these divisions a number of special features.

We have seen that all dichotomists claim a number of differences in the functions and mode of change of each of their two systems. They assure us that the technological, societal, material, civilizational system changes regularly, is cumulative, is linear in *its progressive growth and improvement* (*its progressive: biggernes and betterness),* spreads earlier, more easily, in all cultures, and takes it forward in the process of change; and that the other system, ideological, immaterial, cultural, is neither cumulative, nor linear in its development, nor universal in its diffusion; it is locally limited to a whole society or area, and lags behind in the process of change.

Are these statements valid? Logically, if the dichotomies are debatable, we should expect these conclusions to be questionable. In fact, they are also inappropriate. The claim that civilization or sociality, respectively material culture has a universal character, spreads more easily in all kinds of societies and cultures, and is adopted and accepted by all, while immaterial culture remains, and is destined to remain, a pure local phenomenon, unable to spread in different cultures, is also highly questionable. Indeed, since the end of the 19th century, a lot of new technological inventions have spread all over the planet: automobiles, airplanes, radios, and so on. But since World War I, such *masses* of intangible culture as communism, fascism, totalitarianism, jazz music, and certain forms of dance have also spread throughout the planet; and if we measure the spread and universality of diffusion, by the number of individuals and groups who have accepted them and who use the material and immaterial complexes mentioned, it is likely that fascism, communism and totalitarianism have spread more widely and in a shorter period than the car or the plane. In other words, the supposedly universal cultural traits are at least as universal as the supposedly universal civilizational traits. The Bible is obviously immaterial culture; and yet there is hardly any technological invention that can be broadcast *urbi et orbi* as much as the Bible. So are the works of Shakespeare and Beethoven; like the Confucian and Platonic philosophies; like using lipstick and hairstyle; as the monarchy and the republic; like socialism and progressivism; as monogamous and polygamous family life; as the style of fashion, art and parliamentarism; like evening wear and theosophy. The spread of Mohammedanism is another example of the widespread of intangible culture in the past. Dissemination of the Syrian alphabet from Syria to the Mongols and Manchurians in Asia; of Hellenic art forms from the Greco-Roman world to the Hindu world; the dissemination, adaptation, or independent invention of very similar moral codes to an enormous number of primitive and historical societies of the past and present[28]; the presence of an enormous number of similar political institutions, similar forms of marriage and family life, religious beliefs, forms of social organization, morals and manners, in a large number of societies of the past and present; often separated from each

[28] In relation to members of the same society, the main moral perceptions and the main crimes are similar, almost identical, in the codes of Judaism, Hinduism, buddhism, christianity, confussm, taoism, mahomedanism and almost all historical and primitive societies. As for the crime, see *Dynamics*, Vol. II, Chapter.15, especially pg. 576. See also the imilarity of moral codes, *Ibid*, Chapter 113 and 114. See also L.Hobhouse, *Morals in Evolution* (London, 1923) and E.Westermark, *The Origin and Development of Moral Ideas* (2 vol., London, 1906).

other by vast areas[29] - all these examples of the spread or independent invention of similar values of intangible culture, in hundreds and thousands of different tribes, societies and nations, are eloquent proof of the ability of intangible values to spread or spread root in the most diverse cultures and peoples. This fact alone makes the claims of dichotomous theories entirely invalid.

On the other hand, a lot of purely technical inventions do not spread beyond the society that invents them and needs them. Polynesians and Eskimos have invented ingenious methods of navigation, perfectly adapted to their conditions. Societies in a mountainous region did not adopt them and remained untouched by them. The Assyrians and Spartans invented (or adopted) an excellent technique of military organization. Many companies that did not need such a technique did not take an interest in it and did not adopt it. The technique of heating buildings with electricity, oil or gas, or building houses capable of retaining heat, has not spread to tropical and subtropical regions. Fishing techniques have not been adopted by societies living in regions without rivers or lakes, or fish waters. Material values in no way monopolize the privilege of being more necessary than intangible values. The facts are contrary to the theory that *all* material values are needed by *all* societies, while *all* intangible values are not needed by any other society except the society that created them. The real situation is that between both kinds of *tangible and intangible values* there are some that are needed by a large number of societies, so they are widely adopted (or created independently in different societies); and there are material and intangible values that meet only the local need of a given society, or of a few particular societies. As such, they remain *parochial* values and do not spread to different societies and areas.

The defenders of the criticized theories say that while non-material culture can spread as widely and quickly as material, its dissemination is much less real. Communism and Christianity of the Russians, the Chinese, the blacks, the Hindus, the Abisinians, the French and Americans are similar only by name, they show; by their real character, these ideologies represent something very different for each of these groups. True. But the same is true of the dissemination of material objects. Why? Because the character (or system), whether is material or immaterial, when it is disseminated from one group to another, undergoes a transformation in its use, meaning, value and character (when the groups are distinguished by their culture). The greater the difference, the greater the change that the character must suffer.[30] Only by changing between similar groups can the conglomerates or migration systems be maintained, without any change in their qualities, functions, use, etc. A car seems to be the same in New York as in an African wilderness. The most superfluous text, howe-

[29] For example, a cultural feature such as the *hereditary government* is located at 90 different primitive societies in the sample of Hobhouse-Wheler-Ginsberg; as *personal government*, at 80 societies; as a *matrix descendant* at 75; as a *patryl descendant* at 84 different tribes and societies; like *the killing of defeated prisoners* on 105 and so on. See L.T. Hobhouse, G. C.Wheeler and M. Grizberg, *The Material Culture and Social Institutions of the Simpler Peoples* (London, 1915). See many cases of similarity in the non-material features of the cultures of different peoples and societies in J. Mazzarella, *Les types sociaux et le droi*t (Paris, 1908) and in its volumes of *Studi ethnologia guiridica* (Catania, 1903). Examples of such widespread dissemination or invention of similar cultural systems or features are found in almost every competent text of cultural anthropology, ethnoology and sociology; they are also found in beliefs, myths, poetry; in the forms of family life and marriage; in the forms of political organization, war and peace; magic and rituals; forms of art and ceremony; ethical norms and morals; in almost every field of so-called immaterial culture. In view of this undeniable fact, we can only wonder that the dioctomist theorists are serious about their claim. See also M.Mauss, *Civilization: Elements et forms*, in: *Civilizations: Le mot et L'idee*, (Paris, 1910).

[30] It can be easily seen that the statement is a partial case of the general principle of the selectivity of a sociocultural system. If any system is selective, it accepts some and rejects other features. Those they accept must be changed if they are very heterogeneous in relation to the system; the greater the heterogeneity, the greater the change must be. When it is too large, the system does not ingest it at all.

ver, indicates that it is different: it acts differently (in some cases, forced to the maximum); it is used for different purposes; its values and meanings are different; its damage and repairs are different.

The dichotomous assertion of the advancement and lagging behind of material and immaterial cultures is also debatable. If the theory says that in the emergence or change of a cultural system its material and behavioural forms appear and change first, the theory is erroneous. Usually, the ideas, the concepts inside a system, including the technical invention, precede their material objectification and socialization. Similarly, a change in the meaning component of the system usually precedes the change in its other components.

If the theory means that the practical technical invention precedes in time the theoretical discoveries in the corresponding pure science, such as, for example, that physico-chemical technology precedes the development of mathematics, physics and chemistry, or that medicine and agronomy precede the discoveries and development of theoretical biology, then the theory is just as debatable.

Sometimes a technical inventor, in the process of his/her creation, discovers an essential theoretical principle, but even then, he/she can only be one of the many theoretical discoveries that had to be known before his/her invention was possible. Discoveries and inventions go hand in hand with their major transformations, albeit in minor fluctuations, when one, when the other seems to take precedence.

If theory is to say that in the life history of a given total culture, scientific, technological and economic discoveries appear, flourish and change first, while religious, artistic, socio-political, philosophical and ideological discoveries appear, they thrive and change later, the theory is again questionable, both logical and factual. In the years of history, people who have created important religious and political systems appeared many centuries before scientific, technological and economic discoveries, creators and inventors. This is true of all the countries studied.

If the theory is to say that natural-scientific disciplines and technologies occur, develop and change earlier than social, humanist, religious, artistic, philosophical, and ethical (in succession, mathematics and mathematical technology; astronomy, physics, chemistry and technologies; biology and its technologies) the theory is essentially similar to Comte's theory. Data on discoveries in natural sciences and humanities in Arabia, as well as in various natural sciences around the world, and data on creative historical personalities in specific fields, do not corroborate such a claim at all. Rather, they prove that the invention or creation of a new system in religion, politics, social science, humanities, philosophy, or the arts was produced either before or at the same time as the discoveries in the mathematics-physico-chemical and technological fields[31]. This is evidenced by paleolithic and Neolithic cuture data. In all primitive tribes, we meet not only relatives of physicochemical sciences and their technologies, but often more developed systems of religion and magic, arts[32], family and political organizations, and laws and morals.

In addition, until very recently, there were no clear divisions between science, philosophy, religion and technology. Almost all the eminent thinkers of Greece and Rome, and of medieval Europe, were at once scholars, philosophers, moralists, and political and social ideologues; many were also technical inven-

[31] See A.Kroeber, *Configurations of Culture Growth*, University of California press, 1947, pg.779. He does not find even a people in whose culture science comes first, followed by religion. The rule is that religion first reaches a high degree of integration, and then the science, the arts, etc. are developing.

[32] See especially F. Boas, *Primitive Art* (Oslo, 1927); H.Read, *Art and Society* (New York, 1937) and R.H.Lowie, *Primitive Religion (*New York, 1925).

tors, such as Thales of Miletus, Pythagoras, Architas, Anaximander, Anaximenes, and Democritus[33]. Many others, such as Hesiod, Homer, Pythagoras, Thales, Heraclitus, Empedocles, Zena, Anaxagoras, Socrates, Protagoras, Plato, Aristotle, St. Thomas Aquinas, Nicholas Cusamus, Roger Bacon, and others, were simultaneously philosophers, theologians, men of science, social, political, legal and ethical thinkers, as well as artists. We cannot expect the scholar of these people to change faster and sooner than the philosopher, theologian, legislator, or political thinker. If it is assumed that each of these individual thinkers is logical, his total ideology must have changed more or less consistently in unity. On the other hand, if everyone is assumed to be illogical, the very fact of illogicality excludes the possibility of any uniform change, which would give constant priority to the change of his scientific and technical ideas.

As for the seemingly convincing argument that the speed of change in material culture is faster than in the immaterial one, the argument fails, failing to bring any unit of speed of change. Without such unity, comparing the magnitude or speed of change between material and immaterial phenomena becomes impossible. Which change is greater or faster: from paganism and Judaism to Christianity, or from horse-drawn carriage to automobile? From polygamy to monogamy, or from the pastoral economy to the agricultural economy? From classical to Gothic architecture, or from a *natural* economy to a money economy? From capitalism to communism or from steam to electricity? From gunpowder to atomic fission, or from sovereign nation states to a world state? Which of these changes covers the longest sociocultural distance in the shortest amount of time? Without a unit to measure, the question cannot be answered. The dichotomous argument becomes completely useless. No less useless is their argument that while the material culture of the last few decades has changed enormously, the immaterial culture has lagged behind and is now hopelessly obsolete. The argument is purely subjective and arbitrary in choosing the criteria. The sublime norms of ethical conduct, The Golden Rule, the ethical norms of almost all major religions, and especially the Sermon on the Mount rules, have been discovered and formulated in ethical or immaterial culture thousands of years ago. The behavioural and material realization of these norms has remained irreparably back to the present time. Science and technology have not yet objectified, through them or through total material culture, these immaterial discoveries. Likewise, even known *economic* and political systems were formulated by religious, ethical, political, and social thinkers long before, by thinkers such as Moses, Confucius, Lao-tzi, Hesiod, and Plato, to name a few. And yet the economy and the material and technological political regimes have not been able, until now, to realize these ideological systems. Some of the greatest aesthetic values in literature and painting, sculpture and architecture, music and drama, were developed long before in ancient Egypt and China, India and Greece, Rome and Persia. The material, technological and economic culture contemporary with these creations was, in comparison, infinitely more primitive, imperfect and inefficient; even today’s material culture cannot boast of any comparable perfection in its own field. These intangible creations have been waiting for thousands of years for proper realization in material culture, and are still waiting. The immaterial *utopias* of beautiful garden cities, of carpets and flying machines, even of intraatomic fission, dissolution and recreation, appea-

[33] See P.M.Schuhl, *Machinisme et philosophie*, (Paris, 1908), chap.I; A.Diels, *Antike Technik* (Leipzig-Berlin, 1924), pg.98 ff; L. Robin, *Plato* (Paris, 1935); F.M.Feldhaus *Die Technik der Antike und des Mittelalters* (Potsdam, 1931) and A.Rey, *La science dans l’antiquite* (2 vols. Paris, 1930-1933).

red thousands of years ago. In fact, on every side, the argument is just as wrong, because it makes the two fundamental assumptions false, discussed before; first, that the ideologies and material vehicles of cultural systems can be separated, and second, that all material components and all intangible components can be combined into two pseudo-supersystems. We have already seen that such a process ignores the true unity of cultural systems and admits, on the other hand, an entirely false unity of artificial, material and immaterial cultural clusters.

Equally meaningless is the assertion that while the material culture of the last century has changed enormously, our family, artistic, political, ethical, and religious cultures, have remained unchanged and outdated. First of all, it is not true to say that in the last century, decades or even years, our immaterial culture has not changed; it has changed enormously in all compartments. Second, even if it hadn't changed, what would be the reason for calling it outdated or obsolete? Suppose the family remained strong, truly family-oriented, free from divorce, with healthy and solid relationships and conditions, which ensures a good education of the children and minimizes juvenile delinquency. Is there a need for such an institution to change in order to avoid obsolescence? If it did, and change would take the form of a huge increase in divorces, separations, love scandals, and juvenile delinquency, then could it be said that it keeps up with material change and becomes *modern*? Is the music of Bach, Mozart and Beethoven obsolete? Does jazz and rock-and-roll represent a breakthrough in music, corresponding to a change in material culture? Is Shakespeare obsolete, and is only the latest bestseller representative of modern literature? It is pointless to talk about the enormous change in material culture and the obsolescence of immaterial culture. The fact that people like Beethoven and Shakespeare appeared centuries ago is proof of the leading (progressive) role of the immaterial arts, and not of their lagging behind in comparison with material culture.

In their great lamentation of the supposed lagging behind of immaterial culture, dichotomous theorists never stop to reflect on what kind of immaterial culture would correspond to each stage of material development. What kind of institution of family, music, philosophy, law, painting or sociology would be proper to *atomic material culture*? What kind of music should accompany atomic fission? What religion, if any? What ethics?

These questions have never been answered, because technology itself has never been able to replace the criteria for assessing the level of intangible culture. The criteria of obsolescence in music, religion, family, law, and philosophy must be drawn from music, religion, family, law, and philosophy. No other assessment can be meaningful, because in the absence of any appropriate standard, it degenerates into vague generalizations.

If the theories claim that the technology itself, which changes, always causes a change in the immaterial culture, the statement is again largely erroneous. We know of a large number of cases in which an existing technology has fallen not because of technology, but under the influence of intangible culture. Toynbee shows how the splendid Roman roads, the magnificent irrigation systems of the Tigris and Euphrates Valleys, Ceylon, were shattered not because of a decline in technical skills, but because of the emergence of social, political and moral anarchy among those peoples. We have witnessed the gigantic destruction of technological culture on the surface of this planet, in the wars and revolutions of this century[34]. Contemporary historians have discovered that the economic and technological decline of the Greco-Roman world was "not the cause, but

[34] See Toynbee, *A Study of History*, vol.IV, p.40.

one aspect of the more general phenomenon of social disorganization.[35]” On the other hand, the development of modern technology, modern capitalism, and modern material culture did not occur earlier, but partly later, partly simultaneously with the development of the sensory arts and materialist and utilitarian philosophy, utilitarian and hedonistic ethics, and law, secularism, new forms of political and social thought, individualism, singularism, nominalism, the Renaissance, the Reformation and many other intangible cultural systems[36].

The error of the theory of the unilateral efficiency of material culture can also be demonstrated by examining primitive societies, where it is discovered that there are different forms of intangible culture, in peoples with material cultures and similar technologies. On the other hand, religion, arts, literature, marriage customs, family organization, and similar political and legal institutions are found in populations with similar technological and material cultures.

Finally, it is false to claim that material culture is cumulative, while immaterial culture is not. This statement is again so ambiguous and vague that several possible meanings of it must be considered. If it literally means what it says, then it is obviously wrong; with the passage of time, the immaterial culture that accumulates in all its forms. Today, we have a much greater mass and diversity of musical compositions, literary works, sculptures, paintings, constructions, philosophies, religions, ethical systems, codes of laws, and social and political theories than we had with 100, 500, or 5,000 years before. If the statement is that only in science and technology do new discoveries actually produce new things or inventions, it is also wrong. Important religious, aesthetic or philosophical innovations are no less new. Confucianism, Taoism, Judaism, Christianity and Mohammedanism are all as new as any petty technical invention compared to their predecessors.

The same is true of important philosophical, literary, architectural, musical, or legal creations. In fact, novelty is neither absolute nor immaterial. *The new* technological invention, or scientific discovery, is generally a combination of old elements or a variation of an old principle. Even the fundamental principles of atomic structure, fission, and destruction were very old, dating from Democritus and Lencip, and from the even older thinkers of ancient India. The principles of structure, fission and atomic destruction are very precisely formulated in several ancient Hindu sources, which involve a cycle of elementary dissolution of all material elements - space, smell, colour, shape, fragrance, sound, ether and matter, with all their properties - occurring periodically at 311,040,000,000,000 years[37].

Creation in intangible cultures similarly involves the combination and variation of older systems. Bach’s music, compared to its predecessor, is as new as a locomotive compared to the horse and cart; but both Bach’s music and the locomotive represent a happy blend of two or more ideas that existed before. Both have combined existing elements in a new way. There is no basis for claiming a distinction between material and immaterial culture systems in terms of the novelty of their creations. In both cases, accumulation means replacing the old with the new, which is itself composed of the old. Finally, if this thesis means that only in material culture is there a progressive change towards perfection, the statement is again very debatable. Is German beer a more perfect example of material culture than Roman

[35] M.L.Rostovtzeff, *The Social and Economic History of the Roman Empire* (New York, 1926) pp. 302

[36] See M. Weber, *Gesammelte Aufsatze zur Religionssoziologie* (3 vols., Tubingen, 1922-1923) although he exaggerates the role of Protestantism; A. Fanfani, *Catholicism, Protestantism and Capitalism* (New York, 1936).

[37] See, among the many Hindu sources, *The Vishm Puranma*, trans. of H.H. Wilson (5 vols., London, 1864-1877) vol. V, pp. 55, 162, 195; and vol. I, p. 114.

wine? The answer is simply a matter of personal taste - it cannot be decided objectively and scientifically. The same can be said about the latest fashion in clothing, food and fuel, compared to the old one. If we had the courage to believe, many of us would prefer the old-fashioned clothing, our mother's cooking and the wood fire, to the many modern forms of these material cultures.

This is true even of more complex inventions. Many of our contemporaries, including a number of scholars, would have liked the atomic bomb to have never been invented; many of us would rather get rid of the turbulent, threatening, and noisy planes and missiles if we could. If in an increasingly complex life they have become almost inevitable, it does not mean that we have to make a virtue out of necessity. Even a large number of the inhabitants of the city do not see any virtue in the need to live in the crowded houses of the big cities, with all their hustle and bustle, their dirt and shine, their fascination and their deadly monotony. Likewise, many people don't think they feel better in the extremely monotonous life of a modern factory than their grandparents on the farm felt.

Conclusions

All this shows that as soon as an investigator introduces the principle of *the best*, he/she abandons the field of scientific objectivity and begins to assess his/her personal preferences. From the point of view of a killer and perhaps an inventor, the atomic bomb is a better instrument of destruction than its predecessors; from the point of view of humanity, and especially of the victims, it is an infernal invention. The position of those who object is at least as justified as that of its followers. The same can be said of other inventions. Judging by the rapidly rising rate of suicides, mental disorders, and destructive wars of the twentieth century, it is clear that this century of great technological progress has not made humanity happier or more at peace with life.

On the other hand, on the basis of this subjective preference, a better case for *progress* could be made by the progress of intangible culture. There are few people who are inclined to reject the latest astrophysical cosmology and return to the Ptolemaic system. After the emergence of the great religious and ethical systems, few want to return to primitive animism, fetishism, and religious totemism. After the great philosophical systems, we no longer aspire to return to primitive philosophies. After Bach, Mozart and Beethoven, we can hardly return to the ordinary, uncultivated song. After the great historical works, we can no longer accept the primitive fantasy stories.

If such reversals occur to the more primitive, they occur in both material and immaterial cultures. The war destroyed many parts of Europe, Asia, and Africa, and returned them to a material culture even worse than that of many primitive tribes. Somewhat similar recurrences also occur from time to time in intangible culture.

All these considerations and empirical evidence show the injustice of dichotomous theories of progress and lagging behind. At best, they fall into the well-known mistake of elevating a particular fact to the rank of a universal rule.

As a general conclusion, we can say that dichotomous theories, with all this criticism, have contributed a lot, by analyzing some fundamental problems of sociocultural reality, to the knowledge of this reality, by their valid clarifications on some problems as well as by their *enlightened errors*.

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SMART SPECIALISATION AND INGOs IN IMPLEMENTING THE REGIONAL INNOVATION DEVELOPMENT POLICY: LEGAL AND ECONOMIC ASPECTS

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The development of states and regions based on innovation and knowledge is the main direction in the modern economy and law. The article discusses the main provisions of the European agenda for the strategy of «smart specialization», tools and experience of its implementation. The directions for the development of regional strategies for «smart specialization» in the EU and Moldova are determined. The important role of International Non-governmental organizations is in promoting sustainable development and regional economical development. They play an important role in the formation and implementation of democratic structures. They also play a serious role in economic development and promotion of innovations. The article concluded that the introduction of the smart specialization methodology in the regions of Moldova will have a positive effect on harmonizing the structure of the economy in accordance with the global challenge of accelerating technological development, if lessons from European practice are taken into account, such as the integration of regional innovation ecosystems into interregional and international context, strict consideration of local specifics and competitive advantages, which is achieved in close cooperation with the business community.

Keywords: *regional policy, international organizations, innovation policy, smart specialization, regional development strategy, European Union.*

SPECIALIZAREA INTELIGENTĂ ȘI ONGI-URILE ÎN IMPLEMENTAREA POLITICII REGIONALE DE DEZVOLTARE INOVAȚIONALĂ: ASPECTE JURIDICE ȘI ECONOMICE

Dezvoltarea statelor și a regiunilor bazate pe inovație și cunoaștere este direcția principală în economia și dreptul modern. Prezentul articol analizează principalele prevederi ale agendei europene pentru strategia de "specializare inteligentă", instrumentele și experiența implementării acesteia. Sunt determinate direcțiile de dezvoltare a strategiilor regionale de "specializare inteligentă" în UE și Moldova. Rolul important al organizațiilor neguvernamentale internaționale este în promovarea dezvoltării durabile și a dezvoltării economice regionale. Acestea ocupă un loc important în formarea și implementarea structurilor democratice. Ele joacă, de asemenea, un rol semnificativ în dezvoltarea economică și promovarea inovațiilor. Autorul a concluzionat că introducerea metodologiei de specializare inteligentă în regiunile Moldovei va avea un efect pozitiv asupra armonizării structurii economiei în conformitate cu provocarea globală de accelerare a dezvoltării tehnologice, dacă se iau în considerare lecțiile din practica europeană, cum ar fi integrarea ecosistemelor regionale de inovare în contextul interregional și internațional, specificul local și avantajele competitive, care se realizează în strânsă cooperare cu comunitatea de afaceri.

Cuvinte-cheie: *politică regională, organizații internaționale, politică de inovare, specializare inteligentă, strategie de dezvoltare regională, Uniunea Europeană.*

SPÉCIALISATION INTELLIGENTE ET ONGI DANS LA MISE EN ŒUVRE DE LA POLITIQUE RÉGIONALE DE DÉVELOPPEMENT DE L’INNOVATION: ASPECTS JURIDIQUES ET ÉCONOMIQUES

Le développement des états et des régions basé sur l’innovation et la connaissance est la direction principale de l’économie et du droit modernes. L’article traite des principales dispositions de l’agenda européen pour la stratégie de «spécialisation intelligente», des outils et de l’expérience de sa mise en њuvre. Les orientations pour le développement de stratégies régionales de «spécialisation intelligente» dans l’UE et la Moldova sont déterminées. Le rôle important des organisations non gouvernementales internationales est de promouvoir le développement durable et le développement économique régional. Ils jouent un rôle important dans la formation et la mise en њuvre des structures démocratiques. Ils jouent également un rôle important dans le développement économique et la promotion des innovations. L’article a conclu que l’introduction de la méthodologie de spécialisation intelligente dans les régions de Moldova aura un effet positif sur l’harmonisation de la structure de l’économie en fonction du défi mondial de l’accélération du développement technologique, si les leçons de la pratique européenne sont prises en compte, telles que l’intégration des écosystèmes d’innovation régionaux dans le contexte interrégional et international, la prise en compte stricte des spécificités locales et des avantages concurrentiels, ce qui est réalisé en étroite coopération avec le monde des affaires.

Mots-clés: *politique régionale, organisations internationales, politique d’innovation, spécialisation intelligente, stratégie de développement régional, Union européenne.*

КОНЦЕПЦИЯ «УМНОЙ СПЕЦИАЛИЗАЦИИ» И МНПО В РЕАЛИЗАЦИИ РЕГИОНАЛЬНОЙ ПОЛИТИКИ ИННОВАЦИОННОГО РАЗВИТИЯ: ЮРИДИЧЕСКИЕ И ЭКОНОМИЧЕСКИЕ АСПЕКТЫ

Развитие государств и регионов на основе инноваций и знаний является основным направлением в современной экономике и праве. В статье рассматриваются основные положения европейской стратегии «умной специализации», инструменты и опыт ее реализации. Определены направления развития региональных стратегий «умной специализации» в ЕС и Молдове. Отмечается важная роль международных неправительственных организаций, которая заключается в содействии устойчивому развитию и региональному экономическому развитию. МНПО играют важную роль в формировании и реализации демократических структур, а также в продвижении инноваций. Автором сделан вывод о том, что внедрение методологии умной специализации в регионах Молдовы положительно повлияет на гармонизацию структуры экономики в соответствии с глобальным вызовом ускорения технологического развития, если будут учтены уроки европейской практики, такие как как интеграция региональных инновационных экосистем в межрегиональный и международный контекст, четкий учет местной специфики и конкурентных преимуществ, что достигается в тесном взаимодействии с бизнес-сообществом.

Ключевые слова: *региональная политика, международные организации, инновационная политика, умная специализация, стратегия регионального развития, Европейский союз.*

Introduction

Modern priorities of the innovative development of the national economy actualize the development and implementation of regional innovative strategies aimed at increasing innovative activity, the level of scientific and technological development, deep modernization of industry and restructuring of the economies of states. In this regard, Moldova is particularly interested in the experience of the European policy of regional development, formed as part of the implementation of the strategy of «smart specialization», which has proven its effectiveness in the development of regional innovation systems in the countries of the European Union and has proven to be in demand in Australia, South Korea, and in a number of Latin American states. In the practice of the economic development of Moldova, the key areas of regional «smart specialization» are able to ensure the transition from an equalizing regional policy to the effective development of the regions of the country based on innovation and knowledge.

Despite the extensive discussion of the problems associated with innovative development based on the principles of «smart specialization», its effective introduction into the management practice is complicated by the insufficient study of European experience and the lack of developed mechanisms for its adaptation for use in regional strategies aimed at orienting the basic industries of the specialization of the region to the introduction of intelligent technologies into production and management processes [7, pp. 494-498].

The goal of the short study is to summarize the leading European experience of the development and implementation of «smart specialization» strategies and to develop directions for the innovative development of Moldova and its regions, taking into account the lessons of European countries.

Achieving this goal requires the following tasks to be set and addressed: study the essence of the «smart specialization» strategy, identify its goals and priorities; consider the algorithm for the implementation of this strategy in the countries of the European Union; identify important lessons for the regions of Moldova that need to be taken into account when transforming the structure of the economy based on the principles of the «smart specialization»; propose directions for the development of regional strategies for the «smart specialization» in Moldova, taking into account the generalization of European experience.

The object of the research is the "smart specialization strategy" as a progressive methodology for transforming the structure of the regional economy, based on the theory of strategic management, which includes specific principles, methods, implementation tools. Studies of regional development are of an interdisciplinary nature which are described with numerous definitions that might be formulated differently, depending on the context and the area of science they derive from.

Content of the «Smart specialization strategy»

The term «smart» in relation to growth and development was first used in the Europe 2020 strategy, which identified three key priorities for the development of the European Union in response to the serious structural problems of the continent [4]:

- smart growth based on knowledge and innovation;
- sustainable growth, promotion of a more resource efficient, green and competitive economy (sustainable growth);
- inclusive growth, stimulation of an economy with a high level of employment, ensuring economic, social and territorial cohesion (inclusive growth) [5].

Regional innovation strategies of smart specialization, which represent a reasonable choice and funding from public and private funds for spheres of activity, allowing the interaction of innovation and entrepreneurial activity to create competitive advantages, were announced as a tool for achieving the goals of smart and sustainable growth at the regional level in the European Union's Innovation Program.

In 2021, regional innovation policy was 31 years old and it was fully coordinated with other types of EU innovation-related policies. In order to implement the «Europe 2020» Strategy, the flagship initiative «Digital Agenda for Europe» [3] was developed, aimed at ensuring sustainable economic growth and social benefits from the use of information and communication technologies. Thus, the «Digital Agenda for Europe» initiative is relevant for all regions and cities, as it focuses on a key element of developing «smart specialization» strategies.

The importance of regional development based on the principles of «smart specialization» is highlighted in the Communication from the Commission to the European Parliament, the Council, the European Economic

and Social Committee and the Committee of the Regions.

The European Commission introduced the Smart Specialization strategy (S3) concept in the EU Cohesion Policy 2014-2020 as an “ex-ante conditionality” for European regions to obtain funding for research and innovation from the European Regional Development Fund (ERDF). Smart Specialization strategy is a place-based innovation policy concept to support regional prioritization in innovative sectors, fields or technologies through the “entrepreneurial discovery process (EDP)”, a bottom-up approach to reveal what a region does best in terms of its scientific and technological endowments [2].

The smart specialization strategy for regional innovation and innovation development focuses on promoting technologies in the fields of technology, economy and the civil society. The Smart specialization strategy aims to lead Europe to smarter, more inclusive and more sustainable growth. In particular, the S3 is an economic development strategy that aims at research and innovation and involves a gradual approach based on the development of a common vision.

In the context of the implementation of the Smart specialization strategy, the launch of regional changes is associated with the search for competitive advantages and structural changes, which can be described by the following processes [8, pp. 2125-2146]:

1. Formation of a knowledge base to move towards new opportunities. At this stage, it is important to understand the collective opportunities in research and development (R&D), engineering and production. Here it is possible to mention the experience of Austria, which had strong capabilities and competencies in mechanical engineering. However, entrepreneurs found out new opportunities by identifying pathways from fine mechanical and optical engineering to medical technologies.

2. Technological modernization of existing industries. This was the case in Finland, where the pulp and paper industry are traditionally strong. However, in response to new challenges, intensive modernization is underway here based on the introduction of elements of nano- and biotechnology, for which individual companies increase R&D costs and investments not only on the introduction of new technologies, but also on the study of the latest achievements.

3. Diversification. It is rather not about industry diversity, but about synergy achieved through the effect from the scale and positive externalities. Such synergy provides the benefits and attractiveness of the transition to new types of economic activity. An example is the French region of Toulouse, where the development of aeronautics in the Airbus valley contributed to the expansion of entrepreneurial activities in higher education and the emergence of research infrastructure in new areas such as satellites and GPS technologies.

4. Filling new market niches. In this case, we are talking about radical innovations (goods and technologies), the appearance of which makes it possible to fill new market niches. For example, close collaboration between researchers and entrepreneurs in the Italian region of Florence has led to the development of new IT applications for the management and maintenance of archaeological and historical heritage in Italy.

Thus, the analysis of the strategic documents of the European Union aimed at the development and implementation of regional strategies for the «smart specialization» allows us to highlight the following features:

- accumulation of critical mass and the selection of priorities on which limited resources are concentrated;
- competitive advantage by mobilizing researchers and businesses;
- development of world-class clusters and intersectoral cooperation in order to create original high-tech industries;

• joint leadership of business, universities, the state and the public in effective innovation systems.

Tools of the Smart Specialization Strategy (S3)

A key aspect of smart specialization, either on the regional or on the country level, is to promote technology, fields, population and businesses, and to create competitive advantages that would help these territories to foster their economic and social development using the principles of sustainable growth [12].

In order to put into practice, the «smart specialization» strategies by countries and regions, the European Commission has developed a special algorithm, which is a sequence of six steps on the path to transforming the regional economy towards the «smart sustainable development» [6] (see Table 1).

Table 1. Algorithm for the implementation of the Smart Specialization Strategy

Step	*Tools*	*Purpose*
Analysis of the regional context and potential for innovation	Analysis (compliance) of scientific and technological specialization: analysis of the specialization of investments in R&D, publications and citations, as well as patent applications	Identification of promising strategic directions of development, market «niches» or specific areas for competitive advantages (in the present day and in the future)
	Analysis of regional economic specialization, identification of clusters	
	SWOT-analysis	
	Interactive map of competitors	Identification of competitors and assessment of competitiveness
Setting up the environment and structure for inclusive management	Defining long-term and short-term goals	Formation of an effective structure for inclusive management of strategy implementation
	Analysis of the environment, debates, participatory actions, pilot projects, identification in Vision	
Formation of a common vision of the future of the region	Smart Typology of Growth	Combination of regional and international experience in order to identify the perspective with the broadest trends
Selection of a limited number of regional development priorities	Map Visualized Eye@RIS3 Priority	Positioning territory, finding potential partners for cooperation
Determination of implementation policy, roadmaps and action plan	ESIF-viewer	Visualization of planned investments using European structural and investment funds
Integration of monitoring and evaluation mechanisms	(ESIF) - Energy	Determination of funding potential, implementation of benchmarking, assessment of the level and dynamics of competitiveness in the European landscape
	(ESIF) - Digital	
	Regional benchmarking	
	Digital innovation hubs	
	Competitiveness scoreboard	

Source: [9]

To support the regions in the development and revision of national and regional strategies, the European Commission created the Smart Specialization Platform (S3 Platform), which is a set of interactive tools, among which are the following:

Eye@RIS3 is a map of priorities of all countries and regions of the European space. There is a detail breakdown by countries, regions, economic spheres, scientific areas and political goals, which allows to determine one's own place of the territory in the corresponding coordinate system, to identify potential partners for cooperation.

ESIF-viewer is a visualization tool for planned investments in the European Structural and Investment Funds (ESIF). It is intended for government bodies at the national and regional levels.

The search for potential funding within the framework of European priorities for interested parties is facilitated by such tools as (ESIF) - Energy, (ESIF) - Digital, and if the former is intended for searching within the operational programs of the European Structural and Investment Funds, then the latter allows you to assess the planned investments in information and communication technologies by country and region.

Digital innovation hubs are an interactive search tool for the European organizations whose activities are related to supporting the digital transformation of business and society. They help classify organizations by stage of development, technical competence (cyber-physical systems, the Internet of things, artificial intelligence and cognitive systems, location identification technologies, gamification, data mining, etc.), types of services provided (information, training, support of networks, scientific research, testing and validation, product consortia) [10].

The role of INGOs in innovation policy and Smart specialization

International Non-governmental organizations (INGOs) play an important role in the formation and implementation of democratic structures. They also play a serious role in economical development and promotion of innovations. Formal and informal organizations as well as grassroots movements must be recognized as partners in the implementation of Agenda 21 [2]. INGOs have recognized and diverse experience, expertise and capacity in areas that will be of particular importance for the implementation main UN common goals. Non-governmental organizations also need to develop cooperation and interaction among themselves and with state and business sector in order to increase their effectiveness as participants in sustainable development activities.

The development of information and communication technologies opens up new opportunities for citizens to participate in the processes of preparation and decision-making, communication, horizontal economic and social interactions, exchange and transfer of knowledge.

INGO work and public participation in the decision-making process is one of the priority areas of EU support for the development of INGOs in candidate countries, as well as a qualification requirement for EU membership. All levels of participation are encouraged, from the simple provision of information to consultations, dialogue and, finally, partnerships between non-governmental organizations and government bodies.

It is already possible to state the strengthening of the role of the public in political and economic processes. An important role of INGOs is in scientific, educational and innovation communities through the implementation of modern concepts of innovation policy in the innovation quadrangle model: government-science-education-business-civil society.

Innovation is critical for organizations wanting to meet the scale of current global challenges, increase their impact and stay relevant in a changing context. NGOs should consider the strategic objectives of their innovation efforts and how it can help improve their future-readiness [2].

Smart specialization in the regional development of the Republic of Moldova

According to Art. 107 of the Association Agreement between the European Union and the Republic of Moldova, the Parties will promote mutual understanding and bilateral cooperation in the sphere of regional policy, including methods for the development and implementation of regional policy, multi-level governance and partnership, with a particular emphasis on the development of disadvantaged areas and cooperation, aimed at creating channels of communication and improving the exchange of information and experience between national, regional and local authorities, socio-economic actors and civil society [1].

The *National Program of Moldova* in the sphere of research and innovation for 2020-2023 (adopted by the Government Decision No. 381/2019) aims to adopt and transfer the principles of intellectual specialization. Based on the desire to strengthen the impact of the results of innovation and research activities on the business environment and on society as a whole, the National Program also provides for the implementation of the principles of smart specialization. Smart specialization establishes priorities, determined on the basis of participation, to create competitive advantage by developing existing research and innovation strengths, aligning them with the needs of the business environment for a coherent approach to emerging opportunities and market development, while avoiding duplication or fragmentation of efforts [11].

Thus, the National Program includes identifying niches for smart specialization in the Republic of Moldova with the aim of promoting research based on best practices in strategic areas that are relevant and significant for the economy and society. The specific tasks approved by the strategy, in turn, provide for the following measures:

- Carrying out the process of entrepreneurial discovery.
- Approval of strategic priorities for activities in the sphere of research and innovation for 2023-2027 in accordance with the identified niches for specialization.
- Identifying areas for which new research centers need to be established.

As part of the pilot project for countries included in expansion and neighborhood partnerships, Moldova used the expertise of European experts to make a map of economic, scientific and innovation potential, and to initiate the process of developing a strategic framework in the sphere of intellectual specialization. The concept of smart specialization, smart cities and a number of its elements is extremely interesting and promising for cities and municipalities of the Republic of Moldova. Especially in terms of improving local governance and improving the quality of public services provided to local communities. In this sense, the Republic of Moldova is at the initial stage of studying, understanding and introducing some elements of this concept: introduction of the concept of e-government, widespread use of e-services and payments, e-procurement, introduction of the concept of a one-stop shop, domains, etc. At the moment, the first step has been completed – mapping in the Republic of Moldova, and the goals set for this process have been achieved.

The report «*Mapping the Economic, Innovation and Scientific Potential in the Republic of Moldova*» analyzes the potential sectors related to intellectual specialization at the level of 5 out of 6 development regions of the Republic of Moldova. The mapping of the economic, scientific and innovative potential of the Re-

public of Moldova is focused on five areas of statistics: in the development regions of North, South, Center, Chisinau municipality and the ATE of Gagauzia.

Thus, the city of Chisinau, which has the status of the capital, concentrates most of the economic activity of the Republic of Moldova. There are many priorities economic areas for Chisinau, of which the following sectors of particular interest can be considered: production of IT, electronic and optical products, telecommunications and programming, consulting and related activities, which clearly underlines the importance of the ICT sector for Chisinau. The ICT sector has been identified by Moldova Investment and Export Promotion Organization (MIEPO) as one of the main sectors of the economy that contributes to the economic development of the city of Chisinau and, obviously, the Republic of Moldova.

In the Northern Development Region, the following sectors with growth potential were identified: agriculture and food processing, identified by MIEPO as one of the main sectors of the economy, food and dairy products, as well as the production of electrical equipment, electrical devices, which can be together important as the elements of development.

For the Central Region, potentially significant economic sectors are: agriculture and food industry, identified by MIEPO as one of the main sectors of the economy, but animal farming, meat processing and canning and meat production are also of particular interest, which indicates the important role of the meat industry. In addition, in this region, the sector of textiles, clothing, footwear and leather is developed in comparison with other regions of Moldova, and the production of pharmaceuticals and the sphere of building materials are also strong economic areas.

The following potential sectors of the economy are identified for the Southern region: food industry, which includes the production of flour products, starch and starch products, the production of bakery and flour products, as well as the production of beverages, including wine.

Potentially relevant sectors of the economy for the Gagauzia are the following: food industry, with special emphasis on the production of flour-milling products, starch and starch products, as well as the production of beverages, including the production of wine.

The regional analysis shows somewhat distinctly the sectors of the economy with the potential for smart specialization. This confirms that Chisinau and the other four regions are different from each other and may have different but intercomplementary areas for intellectual specialization. For North, Centre, South and the ATE of Gagauzia, agriculture and food industry are common priority areas, but there are differences: the cultivation of annual crops is less relevant in the Northern region, which relies more on industry, meat production, including animal farming, processing and canning of meat and meat products. Forestry and timber industry are also developed in the Central region. There are various models of specialization in the production and processing of food products, and the production of beverages, including wine, is a priority in the Southern region and in Gagauzia.

Differentiation of development regions according to the resulting indicators in combination with their economic activity makes it possible to make a profile of each development region according to its economic activity.

- Chisinau municipality - (E) electricity and heat, gas and water, (O) other activities for the provision of collective, social and personal services;
- Northern development region - (C) mining and (A) agriculture, hunting and forestry, (F) construction;
- Central development region - (G) wholesale and retail trade, repair of motor vehicles,

motorcycles, household appliances and personal items, (M) education;

- Southern development region - (D) processing industry, (B) fishing and fish farming.

Conclusions

Smart specialization for Moldova is one of the prospective instruments of innovative development. It facilitates the financing issues solutions for new elaborations in terms of a lack of public investments in R&D and sufficient lobbying of domestic producers' interests, transformation of innovative achievements in region into commercially successful technologies, creating new areas of business activity with the help of targeted forms of interregional cooperation.

According to forecasts, smart specialization has potential in the Republic of Moldova and at the moment can be defined in several national documents and policies. The preliminary priority areas for innovative activities, identified for the Republic of Moldova, are the following: chemical industry, materials and nanotechnologies; agriculture and processing; energy; ICT; health, biomedicine and pharmaceuticals; electrical and electronic technologies; production of machinery and equipment; industries, services and environmental sciences.

An important element in this regard is the fact that almost the entire territory of the Republic of Moldova is covered with high-speed Internet access, which made it one of the world leaders. However, in order to accelerate and stimulate the implementation of the concept of smart specialization and/or some of its elements, as the experience of the Republic of Moldova shows, it is necessary to meet some fundamental elements:

1) The existence of an advanced and genuine administrative, economic and financial decentralization in the state is one of the main conditions for the effective implementation of the concept of smart specialization and/or some of its elements. Only a decentralized political and administrative system, in which local public administration bodies are endowed with all the necessary information, economic, financial, social instruments and can freely use them, can ensure the interest and effective implementation of such modern and complex concepts as smart cities.

2) Government strategies should include elements connected with regional development, such as: encouraging local business development with a focus on strong infrastructure investments and attracting investments focused on competitive advantages at the local level – smart specialization.

3) For the Republic of Moldova, a combination of these strategies is proposed through various components of public investment of the development program, which will implement such components as: support for entrepreneurship; development of economic services of common interest: information, entrepreneurship training, coaching, mentoring; increasing the value of territorial potential by equipping cities with technical and communal equipment; improving the accessibility –infrastructure of access; support of the existing infrastructure for business support (incubators, industrial parks, economic zones) for the development of new services; growth poles of network cities (connectivity).

4) Regions base their development on large urban centers. To determine the specialization of cities in certain areas, it is necessary to conduct business start-up processes within the framework of an intellectual specialization strategy. In particular, at the level of each city of the growth pole, such identification can occur within the broader economic areas of niche markets with promising dynamics, for which there are good starting prerequisites and an ecosystem of really interested participants.

5) Creation of databases with complex, complete, relevant and high-quality information necessary for urban development and

all spheres of local public administration: population, heritage, communications/roads, transport, networks, technical and municipal infrastructure, etc. Moreover, it is necessary to decentralize them and ensure direct access of local authorities to this data and their compatibility. There is still a lot of work to be done in the Republic of Moldova.

6) Implementation of the goal of regional development and the concept of smart specialization requires significant funds. Funds to which the cities and municipalities of the Republic of Moldova do not have access. Therefore, it is necessary and extremely important to have access to funds for cities and local communities in the Republic of Moldova through the cities and municipalities of Romania and other EU countries. Local communities in the Republic of Moldova need support and direct access to EU development funds, and Romania is the most suitable supporter of this goal.

The smart specialization implementation in the Moldovan economy can be enhanced by:

1. Establishing an effective dialogue between central and local authorities, national producers and academic institutions; development of new areas of activity through targeted forms of interregional cooperation – conferences, forums, advisory bodies, consulting divisions of regional authorities etc.

2. Business awareness campaigning about smart specialization for industrial enterprises held by regional authorities via web-portal creating. It will help to receive full information about smart specialization process, its opportunities and perspectives for certain industries.

3. Stimulation R&D in the smart specialization area that which be directed on domestic industrial enterprises' problems solution relying on international, and in particular, European experience.

4. The development of financial and administrative tools of S3 implementation support on a regional level of industrial sector.

The benefits derived from smart specialization in an industrial sector will have a multiplier effect on the whole economy.

Smart specialization of countries and regions is desirable since it might help them to better integrate into the global economic space that is market by the digitalization and interconnectedness in the universal information and communication systems. Moreover, it would help them to promote their social, economic, environmental and political development that would create favourable conditions for the life of their citizens.

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THE EDUCATION SYSTEM AND LEGAL VALUES

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The systemic perspective on the educational phenomenon reveals, among others, its complexity and interactions as a social process of formation, development and social integration of the human personality, of transmitting the social experience and of the culture of formation of the capacities and abilities of the individuals, of social innovation, of general systems theory have an important methodological role in the study, understanding and scientific design of education. The philosophy of education integrates the component of the systemic approach, but it is not limited to this, exploring the holistic and metatheoretical aspects. It reveals that, a structural dimension is also the axiological dimension, of integration in education of social values. The law, which includes: legal truth, freedom, justice, legal security, public good, evokes so many constitutive values of educational systems in democratic countries. The concentrated expression of this system, its paradigm could be the human dignity that represents a major educational objective. Therefore, the integration and promotion of legal values in the educational system, represents an educational purpose of the most important.
Keywords: *system, education, philosophy, axiology, value, legal values.*

SISTEMUL DE EDUCAȚIE ȘI VALORILE LEGALE

Perspectiva sistemică asupra fenomenului educational relevă, printre altele, complexitatea și interacțiunile acestuia ca proces social de formare, dezvoltare și integrare socială a personalității umane, de transmitere a experienței sociale și a culturii de formare a capacităților și abilităților indivizilor ,de inovare socială. Reperele cardinale ale teoriei generale a sistemelor au un rol metodologic important în studiul, înțelegerea și proiectarea științifică a educației. Filosofia educației integrează componenta abordării sistemice, dar nu se rezumă la aceasta, explorând și aspectele holistice și metateoretice. Ea relevă că, o dimensiune structurală este și dimensiunea axiologică, de integrare în educație a valorilor sociale.Un sistem valoric, minimal şi deschis care orientează dreptul şi care cuprinde: adevărul juridic, libertatea, justiția, securitatea juridică, binele public, evocă tot atâtea valori constitutive ale sistemelor educaționale din țările democratice. Expresia concentrată a acestui sistem, paradigma sa ar putea fi demnitatea umană care reprezintă un obiectiv educativ major. De aceea, integrarea și promovarea valorilor juridice în sistemul educațional,reprezintă o finalitate educațională dintre cele mai importante.
Cuvinte-cheie: *sistem, educație, filosofie, axiologie, valoare, valori juridice.*

LE SYSTÈME ÉDUCATIF ET LES VALEURS JURIDIQUES

La perspective systémique du phénomène éducatif révèle, entre autres, sa complexité et ses interactions en tant que processus social de formation, de développement et d'intégration sociale de la personnalité humaine, de transmission de l'expérience sociale et de la culture de formation des capacités et des capa-

cités des individus, d'innovation sociale. de la théorie des systèmes généraux ont un rôle méthodologique important dans l'étude, la compréhension et la conception scientifique de l'éducation. La philosophie de l'éducation intègre la composante de l'approche systémique, mais elle ne se limite pas à cela, en explorant les aspects holistiques et métathéoriques. Elle révèle qu'une dimension structurelle est aussi la dimension axiologique, de l'intégration dans l'éducation des valeurs sociales. la loi, qui comprend: vérité juridique, liberté, justice, sécurité juridique, bien public, évoque tant de valeurs constitutives des systèmes éducatifs dans les pays démocratiques. L'expression concentrée de ce système, son paradigme pourrait être la dignité humaine qui représente un objectif éducatif majeur. Par conséquent, l'intégration et la promotion des valeurs juridiques dans le système éducatif, représente un objectif éducatif des plus importants.

Mots-clés: *système, éducation, philosophie, axiologie, valeur, valeurs juridiques.*

СИСТЕМА ОБРАЗОВАНИЯ И ПРАВОВЫЕ ЦЕННОСТИ

Системный взгляд на образовательный феномен раскрывает, в частности, его сложность и взаимодействие как социальный процесс формирования, развития и социальной интеграции человеческой личности, передачи социального опыта и культуры формирования способностей личности, социальных инноваций. Кординальные устои общей теории систем играют важную методологическую роль в изучении, понимании и научном оформлении образования. Философия образования объединяет компоненты системного подхода, но не ограничивается этим, исследуя целостный и метатеоретический аспекты, и показывает, что структурное измерение также является аксиологическим условием интеграции в образовании социальных ценностей. Закон, который включает в себя правовую правду, свободу, справедливость, правовую безопасность, общественное благо, вызывает много основополагающих ценностей образовательных систем в демократических странах. Концентрированным выражением этой системы, ее парадигмой может быть человеческое достоинство, которое представляет главную образовательную цель, поэтому интеграция и продвижение правовых ценностей в системе образования представляет образовательную цель как наиболее важную.

Ключевые слова: *система, образование, философия, аксиология, ценность, правовые ценности.*

Introduction

The systemic perspective on the educational phenomenon reveals, among others, its complexity and interactions as a social process of formation, development and social integration of the human personality, transmission of social experience and culture of formation of capacities and abilities of individuals of social innovation.

The basic methodology used in this theoretical approach includes the acquisition of the systemic approach but also the historical, philosophical and integrative method. It promotes the type of disciplinary, multidisciplinary, interdisciplinary and transdisciplinary scientific approach [14, p. 209].

I. The system concept. The systemic approach in education

The study of ***organized complexity*** is the key issue of general systems theory. Undoubtedly, education as a social phenomenon, has a high degree of complexity. The cardinal landmarks of general systems theory have an important methodological role in the study, understanding and scientific design of education. Therefore, their evocation, even illustrative, cannot be ignored.

An undisputed priority in the consistent elaboration of the theory of systems belongs to Ludwig von Bertalanffy. [3] The initial point is to understand the system ***as a complex of interacting elements, these interactions having an organized (non-random) character.*** [4] Other properties used by Bertalanffy to characterize the systems:

- ***integrity*** - the change of any element influences all the other elements of the system and leads to the change of the whole system and vice versa, the change depends on all the other elements of the system;

- ***centralization*** - the process of increasing the coefficients of interaction of a part or an element of the system. As a result, no matter how insignificant changes in this part are (the dominant part of the system), they lead to significant changes in the whole system;
- ***hierarchical organization of the system*** - when certain elements of the system are in themselves systems of a lower order and (or) the system in question appears as an element of a system of a higher order; the open or closed nature of a system, etc.

According to Parson, the social system comprises ***four groups of structural elements***:

- roles (activities of the individual in society: mayor, judge, etc.)
- communities (family, political parties, etc.),
- rules and
- values.

In addition to structural interactions, Parsons also distinguishes between ***functional interactions***, a perspective in which function appears as an essential attribute (or complex of properties) of a system (or subsystem), which is exercised in terms of its relation to other systems (or elements thereof).

Parsons distinguishes ***4 functions at the system level*:**

1) of normative stability;

2) integration, which coordinates the elements of the system;

3) goal pursuit;

4) adaptation, which covers the set of means available to the system to achieve its objectives;

The cybernetic component of systemic analysis reveals the importance of the elements of control, reaction, self-control regarding the possible behaviors of the system, even if we do not know at all or part of its structure using concepts such as “input” “output”, “Black base” (black box), feed-beck (reverse connection) it is able to ensure the self-regulation of the system). [2, pages 58-306] It allows the perception and capitalization of the conceptual experience in educational matters, but also its historical becoming. We consider theses [14], such as:

- the idea of education is closely linked to the conception of man, culture, society;
- humanism put culture at the center of education through its literary components (l.Bruni);
- instrument of purification of the soul (M.Vegio); and the formation of a good citizen (M. Palmieri);
- the educational ideal of a person as a free and intelligent being who pursues his/her happiness according to reason and controlling his/her passions (J. Locke,);
- the center of education is given by the subject of education (R. Baden-Powell, J. Dewey, M. Montessori, etc.);
- education is a spiritual process that tends towards self-awareness (G. Gentile);
- education is a permanent process (J. Legrand, 1970);
- education is a function of economic and social processes (N. Luhmann);
- the role of extracurricular education, of educational experiences in social life, religious community, political life, forms of association and volunteering, etc.

The philosophy of education integrates the component of the systemic approach, but is not limited to it, also exploring the holistic and metatheoretical aspects. [6, pp.288-295] A paper [13] on the subject configures at least the following areas:

a) the ontology of education, refers to the phenomenology of education;

b) the praxiology of education in the theory of effective educational action;

c) the epistemology of education, evokes the horizon of common and scientific knowledge of education;

d) axiology of education, researches the impact of social values on education;

e) the normativeness of education, refers to the social normative system;

f) the dialectic of education reveals the continuities and leaps of the educational phenomenon in its historicity, the irreducible quality of education but also the interactions and syntheses with other social components.

II. Axiology, value pluralism and legal values

In the following, from this rich thematic field, we will try some analyzes that refer to the legal axiology in education. It capitalizes on philosophical reflection on the subject, such as:

➢ Value can be defined as a social relationship in which the value given to objects or facts (natural, social, psychological) is expressed, by virtue of a correspondence of their characteristics with the social needs of a human community and its ideals.

➢ Value, as a phenomenon, has a threefold determination:

a. the valorizing act takes place at the level of social consciousness;

b. human appreciation, although subjective, has objective premises;

c. the value is established on certain historically and socially conditioned criteria of praxis.

An "axiological frame of reference" [11] states:

– in order to grasp social facts in general, a person must have a teleological consciousness, that is, an awareness of purpose and value;

– the acquisition of existence by human consciousness is achieved through a discursive approach, the result of the act of rational knowledge, which is a cognitive attempt to reveal the structures of the world «as such» but also through a valuable attitude through which a person establishes meanings, gives things and shares a preferential status;

– a fact becomes valuable as soon as it enters the dynamic field of our interests and appreciations;

– value implies a relationship between "something" worth valuing and "someone" able to give appreciation, a relationship between the valued object and the valuing subject. This relation has a social character because the valorizing subject values those objects, activities or creations that, through their objective qualities, prove to be able to satisfy human needs, necessities, aspirations and these needs, necessities, aspirations are historically and socially conditioned by practice. There is an inalienable correspondence between the qualities of a valuable fact and human needs and ideals;

– the act of valorization, being constituted at the level of the social consciousness, has priority over the acts of preference, which take place at the level of the individual consciousness, although it is achieved only through them. In other words, the act of valorization is a preference validated by a human community;

– there is a system of values for each human community, the historical and social transformations entailing changes regarding the criteria of valorization as well as those of chaining and hierarchy of values and imprinting a certain dynamic of values;

– it can be noticed the existence of some general-human values, that respond to some universal needs (needs and aspirations) of all people, they valued (cherished and desired) them and capitalized them regardless of the historical time;

– each value has an intrinsic finality, which is equivalent to saying that values are irreducible and cannot be related to a broader category. In this sense, Kant shows that there are three manifestations of the human soul producing culture – truth, goodness, beauty – which result from three special energies of the human soul: truth – from what he calls pure reason; the good

- from practical reason and the beautiful - from feeling. The originality and irreducibility of the values, lead to the non-admission of the superiority of rank but at most of some temporary priorities according to the social-human needs to which they correspond. The axiological approach must reveal the irreducible specific function of each value in the social life and of the individual [17, p. 26,156].

– a person creates values and is created through values, which become coordinates of human action and the ontological determinants of the human condition. Values motivate, guide, provide assessment criteria, models and reference systems, evaluation principles, for human action. They propose to the individual a complex of coded solutions that “memorize” the collective experience of the group to which he/she belongs, anticipate and humanize his/her creations;

– values contribute to the cooperation of individuals, having an integrative function in society, being at the same time «firm» in the processes of anticipation and social creativity.

Contemporary attempts to capture different value configurations and possible hierarchies reveal the significance of philosophical, moral, scientific, political, legal, religious, economic, artistic values, on which we retain some notations [17, p. 156].

It argues the privileged position of philosophy, able to solve the «axiological confusion», to play a coordinating, ordering and guiding role, in the conditions of pluralism of ideas, through those conceptions of life that emerge victorious from a loyal confrontation carried by force of convincing arguments. In this sense, M. Heidegger emphasized: «Since the conceptions of life compete with each other and here it also depends on the argument which will be the most acceptable conception» [16, p. 113]. To achieve this noble desire, but full of risks and responsibilities, philosophy must be a court capable of «re-thinking» human problems and at the same time, able to offer a way to solve them [20, p. 235-248].

Within a complex conception that retains the human significance of values, which are at the same time knowledge, meaning, experience, satisfaction, desire, aspiration, human project, we can capture the role and place of values in relation to social and human becoming, the contribution of different types of values for the progressive development of society and the human individual, their social and human functionality [10, p. 149].

Determining the role and place of values in relation to social development and improving the human condition implies a concrete, real, historical approach. This is because throughout human history values have been constituted in distinct configurations, in hierarchical systems, in which they were ordered according to their significance for the person, to the importance given to them by human communities, to concrete and historically determined social formations.

In this way, the different types of values (economic, legal, political, moral, scientific, philosophical, artistic, religious) were given different importance and ranks according to the way and the extent to which the different species of values contributed to meeting certain needs, necessities, aspirations of a person from that historical moment.

The hierarchy of values, so placing them on a certain scale according to the importance given by society and the individual, should not be understood as a mechanical subordination of one value to another that nullifies the specificity of each value, its original and irreducible function. It ensures the functioning of the cultural system as a unitary whole, or, on the contrary, prevents this operation from being carried out by jeopardizing the human, multiple and at the same time unitary direction of the culture [10, p. 151].

In the conditions of cultural pluralism of contemporary society, there is an increasing need to reconsider the principle of human dignity – the person understood as a unitary system - problems that not only precede scientific assessments, but act underground or open to the core of science [15, p. 273]. «The novelty of the culture of the twentieth century is the openness to the global person, of all aspects of his/her life and history, as no other previous stage of it has done, which usually privileged some of his representations» [9, p. 179].

III. Values in law and their educational significance

The introduction of the notion of value at the center of legal theory is not a useless work, nor an orientation towards idealism, nor a launching into philosophical or moral speculations. On the contrary, it means appreciating exactly how the law protects individual and collective interests.

Author L.C. Tanugi finds that law is not an outer packaging for the authority decisions, but a language with structural effects, a result of the competition between interests and values [18]. The complex conception of law includes the axiological dimension, law, being the product of social facts and human will, a material phenomenon and a set of moral values and a normative order, a set of acts of will and acts of authority, freedom and coercion. The law, remarks Fr. Rigaux is inextricably linked to the supreme values of our society. Rehbinder proposes a three-dimensional theory of the knowledge of law as a science of values, a science of norms, a science of reality, on which the complex character of the conception of law was noted [6, p. 217]. These approaches have a great educational impact. They are as many theses for the legal education of students, and later of citizens, as constitutive dimensions of lifelong learning.

Values as "valued entities" are preferred par excellence to express what is desirable in law, what "should be". Their historical evocation also has important educational significance. It was commented that, as Radbruch remarks, law implies a hierarchy of values without which its consistency will be inexplicable, but as for finding the unique and ultimate value, but also the whole "value construction", philosophy and legal doctrine reveal a true kaleidoscope. In this regard, M.F. Puy presents an enumeration whose development is considered instructive: good (Plato), justice (Aristotle), order (Cicero), peace (St. Augustine), common good (St. Thomas), power (Machiavelli), certainty (Bacon), security (Hobbes), equality-democracy (Rousseau), freedom (Kant), general utility (Bentham), state (Hegel), foresight (Comte), solidarity (Duguit) [6, p. 367].

Truth as a value is involved in the moral world of the individual, in the rational foundation of action, in the contradictory continuity and discontinuity of social life, in the humanization of the individual and society [7].

The truth, desirable to be valued for legal conscience, is the one characterized by a high degree of assessment of correspondence, representative, as accurately as possible, certain, features validated by specific means, while requiring rules and legal institutions to provide satisfactory solutions to the situations raised by social life, the complexity of the issue of truth, with countless hypostases that include ignorance of the truth or error.

The complex and irreducible functionality of truth in the legal world is expressed, among other things, in establishing the connection between "must" and "is" (or has occurred), in "shaping" the legal norm, "inducing" legality, guidance and regulation, legal action, its appreciation of value, the selection of legal experience, in cultivating the legal dimension of the human being, in achieving sociality and historical progress. At the same time, the legal

truth has significant “relationship valences” in the value constellation of a historical time, being also a Truth for Freedom, Truth for Justice, Truth for Human Dignity.

The problem of maximum philosophical, social and political resonance, the permanence of human thought of all times, appreciated even today as “a bunch of confusions, misunderstandings” (K. Jaspers) freedom as one of the cardinal landmarks of the human condition, has naturally great implications in the legal world.

From a social-political perspective, in exact and penetrating terms, with very current meanings for contemporaneity, especially for the educational system, J. J. Rousseau, expressing his belief, argued: “When everyone does what they like, they often do what others don’t like. This does not mean freedom. Freedom means less doing what you want than not being submissive to someone else; it means, at the same time, not to submit the will of another to our will…, in common freedom, no one has the right to do what forbids the freedom of another, because true freedom never destroys itself. That is why freedom without justice is a real contradiction, because, whatever we do, everything is embarrassing in the action of a disordered will. Therefore, there is no freedom where there are no laws or where someone is above the law…; a free people submits but not as a servant; they have rulers, not masters… in a word, the fate of freedom is always linked to the fate of laws: it reigns or perishes with them” [19, p. 257]. “At first sight, it would indeed seem that by prohibiting certain actions, our freedom is limited. In reality, this is the miracle of the right through this apparent limitation the freedom of each of us is being strengthened. This is the characteristic phenomenon of law, as its foundation [19, p. 45].

Justice as the original value of law, as justice through law, culminates in the requirement that each subject be recognized among others according to its value and that each be assigned what he or she deserves. The ideal criterion of justice translates into a determined requirement that is not satisfied with any intersubjective relationship, based only on a partial, defective or wrong recognition and therefore subject to empirical and contingent limitations or deviations, but imposes equal and perfect recognition, according to pure reason, the quality of the person, in him/her -self as in all others, in all possible interferences between several subjects [19, p. 87].

Contemporary reflection on the idea of justice cannot ignore the experience of law, legal science and philosophy of law, human culture in general. At the same time, it reveals the consubstantiality of Law, Justice, Democracy. Fair law is the legitimately democratic right. The theme of legal justice can be included in the general issue of rationalization of human action, in particular legal norms. The rationalization of law is a component of social rationalization, the result of a complex and contradictory process, of the social struggle in which political societies integrate equal and free individuals, of some value options. It implies the possibility of giving expression to various interests, arguments and values, of confronting them, in the context of a social dialectic, which does not know an infallible method or an absolute argument, of imposing decisions in the name of the majority option.

Conclusions

A value system, minimal and open, which guides the law and which includes: legal truth, freedom, justice, legal security, the public good, evokes as many constitutive values of the educational systems of democratic countries. The concentrated expression of this system, its paradigm could be human dignity, in the broadest sense, as respect for the human condition in all its variety.

Indeed, legal truth is also a matter of human dignity; freedom allows the expression of human dignity, its plenary affirmation; justice is also the recognition and balance of human dignity found and recognized in others; legal security protects human dignity; the authentic public good can only be the good of human dignity on the scale of society. And history reveals this [8].

As an expression of consubstantiality, affinity, interdependencies between the proposed values, human dignity does not annihilate the irreducible character of these values. However, it is able to provide the guiding principle, the structural axis of the value system that guides the law: Law is for people, for the human person in the diversity of his/her needs and manifestations. This means that law must contribute through its specific normative climate to the conservation and development of people as bio-psycho-social beings; the normality of ensuring the satisfaction of physiological needs; to achieve civic security; in the establishment and development of the social framework, in which everyone is with others and freedoms must coexist; to provide legitimate benchmarks in the competition for the assertion of human personality; to ensure the legal climate necessary for everyone to achieve the creative ideal.

Therefore, the educational system must have as a constitutive axiological dimension, among others, the legal values. Their educational values are decisive for contemporary education.

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DOCTRINAL STUDIES OF THE QUALITY ASSESSMENT CRITERIA OF JUDICIAL DECISION GUARANTEEING THE SOCIAL PROTECTION OF ITS PARTICIPANTS

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In this article, the author examines the main criteria for assessing the quality of a court decision in the Republic of Moldova and foreign countries. In particular, the basic requirements for a court decision are revealed, such as validity and legality. Separately, the author investigated the features of assessing the quality of court decisions in the judicial practice of European states, CIS countries, Asian countries and international organizations of judges. As a result of the research carried out by the author, it was found that in all judicial systems the main criteria for the quality of a court decision are legality, validity and motivation. The theses presented by the authors can be used by scientific and practical workers for further, fundamental and theoretical, deeper researches. The most important result of the presented scientific article are the conclusions and proposals formulated by the authors, which could significantly improve the current legislation.

Keywords: *court decision, legality, validity, motivation, fairness, quality.*

STUDII DOCTRINARE A CRITERIILOR DE EVALUARE A CALITĂŢII HOTĂRÂRII JUDECĂTOREŞTI, CARE GARANTEAZĂ PROTECŢIA SOCIALĂ A PARTICIPANŢILOR

În prezentul articol autorii examinează principalele criterii de evaluare a calităţii unei hotărâri judecătoreşti în Republica Moldova şi în ţările străine. În special, sunt dezvăluite cerinţele de bază pentru o decizie judecătorească, precum validitatea şi legalitatea acesteia. În mod special, autorii au investigat caracteristicile evaluării calităţii deciziilor judecătoreşti în practica judiciară a statelor europene, a ţărilor CSI (Comunitatea Statelor Independente), a ţărilor asiatice şi a organizaţiilor internaţionale. Ca urmare a cercetărilor efectuate s-a constatat că în toate sistemele judiciare principalele criterii pentru calitatea unei hotărâri judecătoreşti sunt legalitatea, validitatea şi

motivaţia acesteia. Tezele prezentate de către autori pot fi utilizate de lucrători ştiinţifici şi practicieni pentru efectuarea unor studii ulterioare mai profunde, fundamentale şi teoretice. Cel mai important rezultat al articolului ştiinţific prezentat sunt concluziile şi propunerile formulate de către autori, care ar putea îmbunătăţi semnificativ legislaţia actuală.

Cuvinte-cheie: *hotărâre judecătorească, legalitate, valabilitate, motivaţie, corectitudine, calitate.*

ÉTUDES DOCTRINALES DES CRITÈRES D'ÉVALUATION DE LA QUALITÉ DE LA DÉCISION DE JUSTICE, QUI GARANTIT LA PROTECTION SOCIALE DES PARTICIPANTS

Dans cet article, l'auteur examine les principaux critères d'évaluation de la qualité d'une décision de justice en République de Moldova et à l'étranger. En particulier, les exigences de base d'une décision de justice sont divulguées, telles que sa validité et sa légalité. Par ailleurs, l'auteur a étudié les caractéristiques de l'évaluation de la qualité des décisions de justice dans la pratique judiciaire des États Européens, des pays de la CEI (Communauté d'États Indépendants), des pays asiatiques et des organisations internationales de juges. À la suite des recherches menées par les auteurs, il a été constaté que dans tous les systèmes judiciaires, les principaux critères de qualité d'une décision de justice sont la légalité, la validité et la motivation. Les thèses présentées par les auteurs peuvent être utilisés par les travailleurs scientifiques et pratiques pour d'autres recherches, fondamentales et théoriques, plus profondes. Le résultat le plus important de l'article scientifique présenté sont les conclusions et les propositions formulées par les auteurs, qui pourraient améliorer considérablement la législation actuelle.

Mots-clés: *décision de justice, légalité, validité, motivation, équité, qualité.*

ДОКТРИНАЛЬНЫЕ ИССЛЕДОВАНИЯ КРИТЕРИЕВ ОЦЕНКИ КАЧЕСТВА СУДЕБНОГО РЕШЕНИЯ, ГАРАНТИРУЮЩИХ СОЦИАЛЬНУЮ ЗАЩИТУ ЕГО УЧАСТНИКОВ

В данной статье авторами рассматриваются основные критерии оценки качества судебного решения в Республике Молдова и зарубежных странах. В частности, раскрываются основные требования, предъявляемые к судебному решению, такие как обоснованность и законность. Отдельно исследованы особенности оценки качества судебных решений в судебной практике европейских государств, государств СНГ, азиатских стран и международных организаций. В результате проведенного исследования было установлено, что во всех судебных системах главными критериями качества решения суда является законность, обоснованность и мотивированность. Изложенное авторами тезисы могут быть использованы научными и практическими работниками для дальнейших более глубоких фундаментальных и теоретических исследований. Самым важным результатом представленной научной статьи являются сформулированные авторами выводы и предложения, которые могут существенно улучшить действующее законодательство.

Ключевые слова: *решение суда, законность, обоснованность, мотивированность, справедливость, качество.*

Introduction

Judicial decisions will be able to carry out the tasks of civil proceedings only if they are lawful, which is entirely dependent on the court's compliance with all the requirements set forth in the Law [17, p. 311].

The establishment of requirements for judicial decisions is explained by several factors, in particular:

1) the presence of legal requirements for judicial decisions contributes to the authority of the judiciary, testifies to the perfection of the procedural form, forms a respectful attitude towards the court, the judiciary, and has an educational effect on citizens and organi-

zations. These requirements are publicly reflected in the procedural codes and are a disciplining principle for judges in the administration of justice. Reflection of the results of consideration and resolution of civil cases in court decisions that do not meet the requirements established by law is unacceptable and is the basis for canceling or changing a court decision;

2) the establishment in the law of uniform requirements that apply to court decisions allows the people participating in the case to evaluate the activities of the court when considering a specific civil case, comparing the court decisions made in a particular case with the requirements imposed by law. If the persons participating in the case come to the conclusion that the rendered judgment does not meet the requirements, they have the right to appeal it. Thus, the existence of legal requirements for judicial decisions is a guarantee of the right to a fair trial;

3) the presence in the law of uniform requirements for court decisions is the criteria for verification and review of court decisions by higher authorities. When appealing a court decision, the courts of review instances must have a clear idea of the requirements for compliance with which the court decisions are checked [7, p. 19].

Requirements for a judicial decision

In the science of civil procedural law, legality, validity, reasoning, expediency, fairness, certainty is singled out as requirements for a judicial decision [9, p. 230]. However, Article 239 of the Code of Civil Procedure of the Republic of Moldova reflects only the requirements of legality and validity [5].

The legality of a judicial decision is the first requirement imposed by civil procedural legislation on this type of first instance decision. A decision shall be lawful when it is taken with strict observance of the rules of procedural law and in full conformity with the rules of substantive law, which apply to this legal relationship or are based on the application, where appropriate, of analogies of law or analogies of law [6, p. 320].

The court decision must be made in accordance with substantive law. This means that the court must apply the law applicable in this particular case and correctly interpret this law.

The judgment must be made in accordance with the rules of procedural law, which means that the decision must comply with the provisions of the Code of Civil Procedure.

The legality of a court decision is a strict and unwavering compliance with the norms of substantive law to be applied in the case, with strict observance of the norms of procedural law in accordance with their content and purpose.

A court decision is legal if it was issued in full compliance with the norms of civil law that govern these legal relations, and civil procedural rules are observed. Based on the foregoing, the court is obliged to resolve civil cases on the basis of the Constitution of the Republic of Moldova, international treaties to which the Republic of Moldova is a party, constitutional, organic and ordinary laws, resolutions of the Parliament, normative acts of the President of the Republic of Moldova, orders and resolutions of the Government, normative acts of ministries, other central and local public authorities, as well as on the basis of regulations issued by the employer, and individual labor contracts.

In the cases provided for by law, the court applies customs, if they do not contradict the foundations of law and order and morality. Also, the court is obliged to resolve civil cases in accordance with national jurisprudence and the jurisprudence of the European Court of Human Rights (hereinafter - the ECtHR) [15, p. 28].

The requirement of legality consists of two components:

1) the decision must correctly apply substantive law. The decision will be considered lawful if the court correctly applied the existing substantive law norm, did not apply the substantive law norm that is not subject to application, gave the correct interpretation of the substantive law norm;

2) a court decision will be legal if the requirements of the procedural law were observed during its issuance. In particular, if: the decision was made by the legal composition of the court; the decision was made in a procedure that ensures the independence of judges; the rights to participate in the process of all persons participating in the case were ensured; when making the decision, the rule on the language of the proceedings was not violated; when making a court decision, the equality of all participants in the process was ensured; the court decision is made in accordance with the requirements (signed by the appropriate subjects); the case file contains the minutes of the court session, which allows you to reproduce the procedure for considering a civil case, compare the court decision with the evidence examined [3, p. 35].

Validity of a court decision means that the court bases its decision on the evidence that was examined in court sessions. The decision is justified when the facts relevant to the case are confirmed by evidence examined by the court that meets the requirements of the law on their relevance and admissibility, or by circumstances that do not need proof, and also when it contains exhaustive conclusions of the court arising from the established facts [8, p. 103-104].

The validity of a court decision is the correspondence between the conclusions of the court in the decision and the factual material examined by the court in full and comprehensively.

The decision of the court may be considered justified if:

1) the court will correctly determine the circumstances that are essential for the case, and the presence or absence of each of them individually will express its judgment;

2) circumstances established by the court that are relevant to the case will be based on the evidence examined in the court session;

3) the conclusions of the court on the presence or absence of legal facts essential for resolving the case, set out in the decision, will correspond to the circumstances of the case [22, p. 12].

The decision is justified when the facts relevant to the case are confirmed by evidence examined by the court that meets the requirements of the law on their relevance and admissibility, or by circumstances that do not need proof, and also when it contains exhaustive conclusions of the court from the established facts.

A complete and comprehensive study of legally significant circumstances is a necessary condition for making an informed decision. A study of cassation and supervisory practice shows that most decisions are canceled precisely because the court did not establish all the necessary facts, or did not take into account certain circumstances that are important.

Considering the requirement of the validity of the judgment, it should be borne in mind that the active role in proving belongs to the parties. In this regard, the court considers and resolves the case only taking into account the evidence presented by the parties. He/she may invite the persons participating in the case to substantiate their claims or objections with additional evidence, but in any case, this is the right, and not the obligation of the parties, due to which the court is forced to substantiate its decision only with the evidence available in the case [20, p. 17].

If legality, as a requirement for a court decision, refers to the legal side of the decision, then the validity of the court decision belongs to the factual side. We can say that the validity of the judgment covers three interrelated elements: 1) the circumstances of the case; 2) evidence; 3) the conclusions of the court from the analysis of the established circumstances, confirmed by the examined evidence [19, p. 4-7].

Motivation of a court decision is the obligatory presence in the court decision of exhaustively reasoned conclusions of the court on the results of the evaluation of evidence and the facts established on their basis [14, p. 6].

The motivation of a judicial act is connected with the issues of stating the motives on which the court came to a particular conclusion. These motives should concern both questions of law (substantive and procedural) and questions of fact.

As a legal requirement, motivation, on the one hand, reflects the relationship between the actual circumstances of the case, established by the court, and the conclusions; eliminates the disunity of evidentiary information; allows you to uncover contradictions in the evidence studied. On the other hand, the motivation of a judicial act reveals the judges' personal understanding of the applicable legal norm of substantive and procedural law [2, p. 25-26].

The expediency of a court decision is the requirement that a court decision must be made within the limits of legality, in particular, within the limits of the permissibility of interpreting the rules of law.

The validity of an expedient decision means that both the evidence and the circumstances and conclusions made by the court ensure the legality of such a decision. Expediency is connected with the evidence examined and evaluated by the court.

The fairness of a court decision is a requirement aimed at establishing the correct qualification of a legal dispute for the purpose of reasonable application of legal norms that meet their moral content and is conditioned by the requirements of a public assessment of a court decision as a fair act of the judiciary, decided in the name of the law. The decision-making procedure is considered fair if the following conditions are met:

1) uniformity: a procedure is fair if it can be used in the same way in different situations for different people;

2) neutralization of prejudices: the procedure is fair when the decision does not depend on the prejudices of a third party;

3) accuracy and completeness of information transfer: a procedure is fair if it makes it possible to collect accurate and complete information;

4) correctness (the possibility of appeal): the procedure is fair if it contains the possibility of correcting wrong decisions;

5) representativeness: the procedure is fair if it takes into account the values of the participants and the groups to which they belong;

6) ethical: a procedure is fair if it meets the ethical standards accepted in society [12, p. 30].

The certainty of a court decision is the requirement that the court decision must clearly state whether the claim is satisfied or denied; if the claim is satisfied, what exactly is awarded to the plaintiff, what right is recognized for him, what the defendant is obliged to do. This requirement means that the court decision must clearly resolve the issue of the content of the rights and obligations of the parties in connection with the contentious material legal relationship that is the subject of the court's consideration. The decision of the court must contain an answer, who owns the rights, who bears the duties, what is their

specific content. This requirement, being observed by the court, entails the reality of the execution of the judgment.

If one of the above requirements for a court decision is violated, the court decision cannot be considered legal, and the issued judicial act is subject to cancellation [4, p. 43].

Summing up the foregoing, we can draw the following conclusion, the court decision must meet the requirements of legality, validity, motivation, expediency, fairness and certainty.

The legality of a court decision is a strict and unwavering compliance with the norms of substantive law to be applied in the case, with strict observance of the norms of procedural law in accordance with their content and purpose.

The validity of a court decision is the correspondence between the conclusions of the court in the decision and the factual material examined by the court in full, comprehensively.

The motivation of a court decision is the obligatory presence in the court decision of exhaustively reasoned conclusions of the court about the results of the assessment of evidence and the facts established on their basis.

The expediency of a court decision is the requirement that the decision of the court must be made within the bounds of legality.

The fairness of a judgment is a requirement aimed at establishing the correct qualification of a legal dispute in order to reasonably apply legal norms.

Certainty of a court decision is a requirement according to which the decision of the court must be clearly formulated whether the claim is satisfied or denied; if the claim is satisfied, what exactly is awarded to the plaintiff, what right is recognized for him, what the defendant is obliged to do.

Examples of criteria for assessing the quality of a judgment in foreign countries

Finland. Of great interest is the project "Assessment of the quality of resolution of cases in courts. Principles and Proposed Quality Criteria", which was carried out in Finland in the District of the Rovaniemi Court of Appeal during 1999-2005 [23]. The project was highly appreciated by the world legal community.

One of the important sections of the project is the section on the court decision, and in particular on the choice of qualitative criteria related to the court decision. There are seven in total. Here are excerpts from the project.

Choice of quality criteria

1) The first qualitative criterion related to the decision of the court is that *the decision is fair and legal* (correctness of the decision); this is one of the most important purposes of the judiciary. This qualitative criterion means that the decision complies with the current legislation and is based only on established facts. Moreover, the correctness of the solution should be obvious at a glance.

2) In accordance with the second qualitative criterion*, the legal reasoning of the decision must convince the parties, lawyers and scientists of the fairness and legality of the decision.*

The achievement of this qualitative criterion depends on the impression that the parties have of the reasoning part of the decision. Even if the decision is both fair and legal, from the point of view of the stability of legal relations, a problem arises if the reasoning part of the decision is not able to convince the reader of this. Naturally, it is difficult, even impossible, to compose a motivational part in such a way that it convinces every one of the correctness of the decision. For this reason, for this qualitative criterion, the group of persons whose opinion should be taken into

account was limited to the parties, legal professionals (judges, prosecutors, lawyers) and legal scholars.

3) The third qualitative criterion related to a judgment is that *the reasons for the judgment must be transparent.* The existence of an open civil society requires that court decisions should also be open. In this regard, the transparency of motivation is especially important. Even if the reasoning behind a decision is formally in the public domain, openness will not be genuine until the reasoning for the decision explicitly states the real reasons for the decision.

4) The fourth criterion for the quality of a court decision is that *the reasoning part of the decision is set out in detail and systematically*. It should indicate which substantive issues are being contested and which are not. With this in mind, the motivational part should be problem-oriented. In detail, this means that the motivation part defines positions on all accepted evidence and on all controversial issues. A systematic approach, in turn, means that various legal issues are dealt with separately and in a logical order.

5) The reasoning part of the decision is where the judge informs the parties and the public about how the court took the issues raised by the parties and what their significance was for the resolution of the case. To fulfill this role, *the motivational part of the decision must be understandable*; this is the fifth criterion for the quality of a judgment.

6) According to the sixth quality criterion, *the solution must have a clear structure and be linguistically and grammatically correct*. A decision is more understandable when a distinction is made in its structure between the circumstances of the case, the evidence presented, the reasoning and the conclusion. In addition, the solution should not contain linguistic or spelling errors, and should be well written stylistically. You also need to pay attention to the design of the solution.

7) The seventh and final quality criterion relating to a judgment relates to the announcement of the judgment, that is, the oral communication of the judgment to the parties and the public in the case where the judgment is issued immediately after the trial. According to the qualitative criterion, *the decision must first of all be declared in such a way that it can be and will be understood.*

Sweden. A broad discussion of the quality of court work began in Sweden as early as 1997. The Swedish Central Judicial Administration (Domstolsverket) organized two one-day workshops on the importance of quality in a judicial context. In the report, the main aspects of the quality of judicial activity were divided into four categories: 1) qualitative aspects of the judicial decision; (2) qualitative aspects related to the timing of cases; (3) qualitative aspects of dealing with clients; and (4) qualitative aspects related to the competence and training of judges and other court staff.

The first characteristic of a good decision is its correctness in terms of compliance with the law. In addition, the decision must contain a full and understandable justification, a logical and clear statement of the facts. The report also draws attention to the appearance of the judgment as a quality criterion: a quality judgment must be pleasing to the eye. Moreover, in addition to being legal, the solution must also be flawless in terms of language and spelling.

International organizations of judges

There is no single approach to evaluating the work of judges: such an evaluation can be considered a prerequisite for judicial independence in some countries, and absolutely incompatible with the independence of judges in others. As follows from the Conclusion of the Consultative Council of European Judges (hereinafter referred to as the CCJE) “On the

evaluation of the work of judges, the quality of justice and the observance of the principle of independence of judges" (Conclusion of the CCJE No. 17), in those countries where the work of judges is evaluated, various evaluation methods are used, which depend on the peculiarities of the formation of the judicial system in a given country. "Evaluation" may include formal and structural systems of evaluation using well-defined criteria, or more informal systems for collecting data on the quality of a judge's performance. Formal evaluation implies a clearly defined purpose, evaluation criteria, the structure of the evaluation body and its procedures, as well as legal and/or practical implications. Informal assessment does not have these features and does not always have immediate consequences for the judge whose performance is being assessed. Informal collection of information about the work of a judge in order to promote him in his position can also be considered as one of the types of evaluation.

Another important principle is that the life tenure of judges cannot be called into question as a result of an unfavorable evaluation. According to the recommendation of the Committee of Ministers of the Council of Europe, "indefinite tenure may only be terminated in cases of serious violations of disciplinary or criminal law, or if a judge is no longer able to perform his functions." Thus, the results of the consideration of the case under no circumstances can be the basis for punishing the judge. Similarly, the Kiev Conference Recommendations stipulate that "the work of judges should not be evaluated by the content of their decisions or verdicts (either directly or on the basis of statistics on the annulment of decisions)" [16]. In any case, the evaluation should focus on the methodology used by the judge in his work, and not on the legal merits of individual decisions [11].

Among Council of Europe member states, 24 countries use relatively formal judge evaluation systems (Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Moldova, Monaco, Netherlands, Poland, Romania, Slovenia, Spain, Macedonia, Turkey, Ukraine). In these countries, evaluation is carried out on a regular basis.

7 countries do not use formal assessment (Czech Republic, Denmark, Finland, Iceland, Luxembourg, Norway, Sweden, Switzerland, UK). However, Sweden uses certain assessment tools to differentiate the remuneration of judges, while Finland and Sweden use them when discussing professional development programs. In the UK, informal assessment is used in relation to the issue under consideration of the promotion of judges [18].

The quality of a court decision fundamentally depends on the quality of its motivation [11]. At the same time, the decision will be motivated only if the judge has enough time to prepare it. When issuing a court decision, under no circumstances should proper motivation be neglected in order to expedite proceedings; on the contrary, proper motivation should be considered an "absolute necessity". Sequential, clear, unambiguous and consistent arguments of the court should allow the reader to trace the chain of inferences on the basis of which the decision was made.

The motivation should reflect the judge's compliance with the principles enshrined in the ECtHR, in particular the right to a fair trial. In order to comply with the principle of a fair trial, the reasoning must indicate that all the main issues put before the judge were actually investigated. The judgment must examine the issues of fact and law that underlie the dispute, as well as the objections of the opponent. Particularly close and careful consideration requires complaints of viola-

tion of the rights guaranteed by international legal treaties in the field of human rights. At the same time, “although Article 6 and 1 of the Convention provides for the obligation of courts to substantiate their decisions, this should not be understood as a requirement to respond in detail to each argument”. The scope of this obligation may vary depending on the nature of the decision. However, if a party’s argument is decisive for the outcome of the case, the judgment must contain a separate, specific response to that argument.

It is important to note that when examining legal issues, the court must apply the provisions of national and international law, including national constitutions and the practice of international bodies and courts of other countries, as well as rely on legal literature. This presupposes that, judges have an adequate knowledge of international and European law and case law “so as to exercise their judicial functions in accordance with the principle of legality which all democratic countries adhere to”. In interpreting the law, judges should take into account the principle of legal certainty. In general, judges must consistently apply the law, and any discrepancy with established jurisprudence must be clearly identified in the decision, with appropriate justification.

The Magna Carta of the Judges stipulates that, judicial documents and decisions must be written in “plain, simple and clear language. Based on the results of a fair and public hearing, judges must make reasoned decisions, with public announcement within a reasonable time [10].

Conclusion No. 11 of the Consultative Council of European Judges on the Quality of Court Decisions.”

On December 18, 2008, the Consultative Council of European Judges (CCJE) for the Committee of Ministers of the Council of Europe adopted Conclusion No. 11 “On the quality of judicial decisions” in Strasbourg. (CCJE (2008 Op. No. 5) [21].

According to the CCJE, the quality of judicial decisions is the main factor determining the quality of justice (p. 2).

A judgment of high quality is one that achieves the correct result to the extent that the tools at the judge’s disposal allow - and this process occurs fairly, promptly, clearly and definitely (paragraph 3).

The judicial decision is aimed not only at resolving the dispute between the parties and determining their legal status, but often also at the formation of judicial practice that can prevent the occurrence of such disputes in the future and ensure the preservation of social balance (paragraph 7).

The quality of a judicial decision depends not only on a particular judge, but also on a number of various conditions external to justice, such as the quality of legislation, the material support provided to the judiciary, and the quality of legal education (paragraph 10).

The quality of judicial decisions also depends on internal factors such as the professionalism of judges, procedures, case management, hearings and integral elements of the decision itself (paragraph 20).

Transparency and openness of hearings, as well as adherence to the principle of adversarial and equal rights of the parties, are a necessary prerequisite for the parties and the general public to correctly perceive the court decision (paragraph 30).

Mandatory elements of a ruling

All judicial decisions must be understandable, written in clear and simple language - this is a prerequisite for their correct understanding by the parties and society as a whole. To do this, it must be properly structured, and the motivational part must be clear and understandable to everyone (paragraph 32).

Court decisions must be justified. The quality of a court decision fundamentally depends on the quality of its motivation. Proper justification is a mandatory requirement that should not be neglected in the interest of speeding up the process. Proper reasoning requires the judge to devote some time to preparing the judgment.

The obligation of the courts to formulate a reasoning part does not mean an obligation to respond to every argument put forward by the parties in support of their position. The level of detail should vary depending on the nature of the decision. In accordance with the practice of the ECtHR, the scope of the arguments presented depends on the various arguments put forward by the parties, as well as on different legal norms, customs, doctrinal principles and judicial practice regarding the presentation and drafting of judgments in different countries (paragraph 41).

The study of legal issues involves the application of the legal norms of national, European and international law. In your arguments, you should refer to the relevant provisions of the constitution and applicable national, European and international law. Where appropriate and likely to be useful, and in common law countries essential, references may be made to national, European and international jurisprudence, as well as to the legal literature (paragraph 44).

Judgment quality assessment

The Advisory Council emphasizes that any way of assessing the quality of judicial decisions should not affect the independence of the judiciary in a general and individual sense (paragraph 59).

Any assessment of the quality of the judiciary should be aimed solely at improving the quality of judicial decisions, and not serve only as a bureaucratic tool and not be limited to it. It is not an instrument of external control over the judiciary (paragraph 61).

The Advisory Council recalls that the assessment of the quality of justice, that is, the quality of the work of the judiciary as a whole and of an individual court or group of courts, should not be confused with an assessment of the professional abilities of a particular judge, which serves other purposes (paragraph 62).

The Advisory Board emphasizes (especially when using quantitative and qualitative statistical indicators) that it is desirable to combine different methods of assessment associated with different qualitative indicators and data sources. No method should take precedence over others. Assessment methods may be acceptable provided they are scientifically sound, literate, carefully prepared, and presented in an accessible manner. In addition, the evaluation system should not call into question the legitimacy of judicial decisions (paragraph 68).

The Advisory Board welcomes the consideration and evaluation of judicial decisions by the judges themselves. The Advisory Council also encourages the participation of "outside" persons (e.g., lawyers, prosecutors, law professors, citizens, state and non-state public organizations) in the evaluation, provided that the independence of the judiciary is fully ensured. Such external evaluation should not be used as a method of limiting judicial independence or the integrity of the judicial process. The first point in assessing court decisions should be the assessment of the availability of a timely and effective appeal procedure (paragraph 70).

In addition, the limited number of appeals and successful appeals can become objectively measurable and relatively reliable indicators of quality. However, the Advisory Board emphasizes that neither the number of appeals nor the number of successful appeals can directly reflect the level of quality of the judgments being challenged. A successful appeal may be nothing more than a way for the appellate judge to

evaluate difficult issues, whose decision could be reviewed if the case were referred to an even higher-level court (paragraph 74).

The proper conduct of the procedure, the correct application of legal principles and assessment of the facts of the case, as well as enforceability, are key elements to ensure a high-quality judgment.

The decision must be clear, written in clear and simple language, but each judge must be free to choose his/her own style or use standard patterns.

The Advisory Board recommends that the judiciary prepare collections of samples and examples to facilitate the process of writing judgments.

Court decisions must be fundamentally justified. Their quality fundamentally depends on the quality of their justification. The reasoning part may include an interpretation of legal principles while providing legal certainty and consistency. However, if the court decides to depart from previous jurisprudence, this should be clearly stated in the judgment.

The Advisory Board recommends the development of a mechanism, acceptable to the legal traditions of each country, to ensure access to higher courts.

It is permissible for judges to express dissenting opinions that may affect the quality of the content of a court decision, and may also contribute to a better understanding of the decision, the development of law as such. These opinions must be properly substantiated and published.

Any order contained in or following a judgment must be set out in clear and ambiguous language so that it can be carried out immediately or, in the case of an order for action or payment, was made immediately.

The Advisory Board stresses that the content of an individual judgment is examined by means of an appeal or review procedure provided by the national courts or by the right of access to the European Court of Human Rights.

The judiciary as a whole should be subject to scrutiny to assess the quality of judicial decisions. Attention should be paid to the duration, transparency and proper conduct of the procedure.

The evaluation must be carried out in accordance with the fundamental principles of the Convention and cannot be carried out solely in the light of economic and managerial considerations.

Any method of assessing the quality of a judgment should not limit the independence of the judiciary as a whole or its individual elements, should not serve as a bureaucratic means or consist only in it, and should not be confused with an assessment of the professional abilities of an individual judge, which is carried out for other purposes. Moreover, evaluation systems should not call into question the legitimacy of judicial decisions.

The evaluation procedure should be primarily aimed at determining the need, if any, for changing the law, changing and improving the judicial procedure and / or further training of judges and judicial personnel.

The Advisory Board emphasizes that it is desirable to combine different evaluation methods. Assessment methods should be applied under the condition of their deep scientific development, literacy and thorough preparation, and the way they are selected should be transparent.

The Advisory Council encourages the study and evaluation of judgments by the judges themselves. The Advisory Council also approves the participation in the assessment of “external” persons, provided that judicial independence is fully ensured.

Through their jurisprudence, their appraisal of judicial activities and their annual reviews, superior courts can influence the qual-

ity of court decisions and their evaluation, and in this regard, it is essential that their jurisprudence be clear and consistent.

Assessing the quality of decisions should be one of the powers of the Council for the judiciary, if one exists, or another independent body, with the same guarantees for the independence of judges as for the Council for the judiciary.

Features of judicial proceedings in the countries of Central Asia

The Judgment Writing Methodology for the countries of Central Asia [1] was prepared within the framework of the EU Supremacy Platform - Central Asia project funded by the European Union.

Section 2.2. of the report is devoted to indicators of the quality of court decisions. The following quality criteria are called:

2.2.1. Legality. There are three legitimacy criteria:

1) Legitimacy is often defined as the compliance of a judicial act with current regulations. It really is. But there is a problem that a judge may make a decision that is not in accordance with the law, but it has not been overturned and, therefore, is legal in the sense that the law prescribes that the decision be respected and enforced. Therefore, the first criterion for the legality of a judicial act will be its compliance with the general practice of application and interpretation of the law applied or to be applied in such a case.

2) The competence of the judge or the judicial acts issued by him/her (violations: non-compliance with the rules of jurisdiction, dressing in a form not provided for by law, circumstances of personal interest, etc.). The second criterion of legality will be the absence of circumstances that testify to the illegality of the judicial act.

3) The third criterion of legality will be the presence in it of the details required by law (the name of the act, an indication of the body that adopted the act, the date of the decision, the signature of the judge, etc.).

2.2.2. The legal validity of a decision is often confused with its legality. At the same time, although these are close, but different aspects from each other. If legality is measured by the compliance of the decision in form and content with the current legislation, then validity has a slightly different dimension. This measurement lies in the extent to which a court decision can be perceived as correct, reasonable, fair, logical both by the participants in the process, higher-ranking judges, and by society as a whole. In other words, validity indicates the presence in the decision of arguments that can be considered as convincing grounds for issuing just such a judgment within the framework of this legal order.

At the same time, the decision of the court must indicate the motives on which the judge made this decision. In practice, legal, but unmotivated decisions often come across. This indicates that the courts do not fully fulfill their main public function of restoring the disturbed social peace, strengthening the rule of law and maintaining law and order.

If the judge clearly and reasonably states why he/she considers this or that punishment fair, why he/she chooses this or that legal qualification of the dispute, why he rejects some evidence and accepts others, then this will undoubtedly serve to strengthen the authority of the judiciary, and will indirectly contribute to the development of legal awareness in society. Even if the losing party does not agree with the arguments given by the court, it will have to admit that the decision was not made arbitrarily, but is the result of a balanced and reasonable reasoning of the judge, and that the losing party had the opportunity to effectively exercise its right to be heard by the court. These reasonings of the judge can become the subject of verification

when appealing the decision in a higher instance, which will create additional guarantees for the losing party of the fairness and validity of the decision made in its case (Article 427 of the Code of Civil Procedure of the Republic of Kazakhstan, Article 339 of the Code of Civil Procedure of the Kyrgyz Republic, Article 353 of the Code of Civil Procedure of the Republic of Tajikistan , Article 314 of the Code of Civil Procedure of the Republic of Uzbekistan, Article 353 of the Code of Civil Procedure of the Republic of Turkmenistan).

2.2.3. Logic. The text of a legal document should be drawn up taking into account the laws of logic (exclusion of the third, double negation, etc.), as well as the methods of logical thinking (deduction and induction, analysis and synthesis, etc.). When making decisions, judges may draw up truth tables or otherwise check the sequence of the arguments underlying the decision. For example, when establishing the invalidity of a contract, the judge must logically deduce the nullity of all provisions of this contract and refuse to satisfy claims based on such provisions. So, if, along with the recognition of the loan agreement as invalid, a demand is made to pay interest on the loan amount provided for by this agreement, satisfaction of the claim regarding the invalidity of the agreement logically entails a refusal to collect interest under this agreement. Also, in the event of a conflict of norms of law, the judge must choose one norm applicable to the disputed legal relations in accordance with the conflict rules (lex specialis, lex posterior, lex superior) and refuse to apply other norms that conflict with it (for example, choose the highest legal norm). Sometimes a judge may need to analyze the priority of these conflict rules if they diverge in relation to specific rules of law (for example, a rule of a special law clashes with a later rule of a general law). This analysis should be carried out taking into account applicable legal provisions and uniform jurisprudence.

2.2.4. Reliability. This criterion in practice entails the greatest number of difficulties.

Reliability should be understood as the compliance of the decision, on the one hand, with the actual circumstances in connection with which the disputed legal relations have developed, and the compliance of the judge’s interpretation of the norms of law and the provisions of legal documents with the will of the persons who created these norms and documents, on the other.

In fact, the credibility of a judgment thus presupposes that the court has established with certainty all the facts in the case and has distinguished between significant and insignificant facts, between facts of primary and secondary importance. This puts before the court the task of verifying the truth of the statements of the parties about the facts and the task of making a judgment on the legal significance of the facts proved by the parties. Therefore, in fact, the court's decision will be reliable not only if the court establishes the circumstances of the case, but also on the condition that the court correctly determines the significance of these circumstances, as well as the relevance and admissibility of the evidence presented by the parties.

2.2.5. Correctness. This indicator of quality can be understood as both linguistic and terminological correctness of a judicial act. These indicators may not seem central to the work of drafting judges, but they should also be given special attention.

Erroneous or ambiguous wording in court decisions can lead to these decisions being perceived as bad, which in turn will not strengthen the authority of the judiciary and the rule of law. Even if the distortion of the meaning of certain phrases in the decision does not affect how the

judge decided the case on the merits, such a decision will not fully fulfill the functions of restoring social peace and strengthening the rule of law, which were discussed above. Moreover, such mistakes will give the public a reason to doubt the professionalism of judges, which can indirectly cast a shadow on the entire judiciary of a given state. Of course, grammatical and spelling errors can also create obstacles to ensuring the motivation and consistency of a court decision, since the wrong linguistic form of decisions will in no way accompany their better understanding. Therefore, these errors should be avoided at all costs.

Let's analyze the example of Kazakhstan. The protocol decision of the Commission on the Quality of Justice under the Supreme Court of the Republic of Kazakhstan dated September 16, 2019 No. 7-3-1 / 1136a (as amended on October 21, 2019, November 18, 2019) approved the Methodological Guide for Assessing the Professional Activities of a Judge . In accordance with clause 8 of the Methodological Guide:

«8. The professional activity of a judge is assessed according to the following groups of criteria: 1) professional knowledge and ability to apply it in the administration of justice; 2) results of judicial activities; 3) business qualities; 4) moral qualities for compliance with the requirements of the Code of Judicial Ethics".

According to paragraph 9 of the Methodological Guide:

9. Professional knowledge and the ability to apply it in the administration of justice are evaluated on the basis of the following criteria: 1) The quality of judicial acts. 2) The quality of trials.

The reasons for cancellations and changes are assessed by the Commission, based on the grounds established by the procedural legislation and the degree of their materiality.

19. Analysis of the quality of drawing up judicial acts is carried out by studying by the members of the Commission three or more decisions, sentences and final decisions of the assessed judge, with the exception of judges participating in the competition for the position of a judge of a higher instance, the chairman of the court and the chairman of the judicial board.

23. In the course of studying judicial acts, members of the Commission evaluate:

1) compliance of the judicial act with the requirements of the law, as well as the requirements of the normative decisions of the Supreme Court;

2) referee skills:

– determine and evaluate the circumstances that are important for making a decision on the case;

– determine and apply the rules of law governing legal relations in a particular case;

– formulate a legal position for the relevant category of cases;

– clearly express thoughts, logically reason and analyze;

– state the text of the procedural document clearly and competently, in an official business style;

3) compliance with the rules of spelling and style (paragraph 23 of the Methodological Guide).

The specifics of judicial proceedings in the Russian Federation

In the Russian Federation, according to the Institute for the Rule of Law, part of the European University at St. Petersburg, counting the number of revoked judicial acts is the main method for assessing professionalism and is cited as a central argument in assessing the performance of courts. This is directly stated in the generalizations of the work of arbitration courts and courts of general jurisdiction. There is no alternative to this method today. Any other situation, when anything

other than an actual appeal is used to assess the quality of a judge's work, will raise suspicions of violating the principle of judicial independence. This does not exclude the conduct of internal monitoring and extra-procedural audit of the work of a judge.

Extra-procedural checks of the quality of judges' work do not correspond to the essence of modern justice, where a judge has already gone through a complex selection procedure and has a special status. In 2001, when there was an active search for solutions to improve the work of judges, the Council of Judges spoke out against the introduction of special positions of judge-auditors.

Under these conditions, reliance on the results of the appeal represents the ideal and only solution for public evaluation of the quality of work. In part, this issue was disclosed in the legal position of the Constitutional Court, set out in the Resolution of October 18, 2011 No. 23-P, according to which it is not allowed to raise the question of the presence in the actions of a judge of the corpus delicti under Article 305 of the Criminal Code of the Russian Federation "Issuance of a knowingly unjust sentence, decision or other judicial act", when the relevant judicial act issued by this judge has entered into force and has not been canceled in the manner prescribed by the procedural law. Following the position of the Constitutional Court, the High Qualification Board of Judges (hereinafter referred to as BKKC - the High Qualification Board of Judges) noted that the powers of the qualification boards do not include verification of the legality and validity of judicial acts, it can only be carried out in special procedures established by the procedural law (through consideration of the case by higher courts), and another procedure for the revision of judicial acts is fundamentally unacceptable.

If the annulment and amendment of judicial acts is the central criterion for the professionalism of a judge, then the methodology for calculating these indicators is important. The most common practice is to calculate the share of cancellations and changes from all appealed judicial acts. In some courts, they concentrate only on cancellations, and ignore changes. There are options when they are limited to counting the cancellations of only judicial acts issued on the merits of the case, without taking into account "service" decisions. There are situations when decisions that are not on the merits of the case form an additional indicator. In some regions, the number of cancellations is taken into account in relation to the same indicator of the previous year, and somewhere the share is estimated in comparison with other courts / judges. It happens that when evaluating the quality of work of a particular judge, the reasons for cancellations are filtered. Both cases and persons or judicial decisions can be taken into account. In some cases, it is not spelled out which calculation method was used. Only a general indicator of quality/stability is indicated. There are cases when, in addition to canceled and amended judicial acts, they take into account as a negative indicator cases in which the proceedings were terminated, or complaints that were left without consideration.

In other words, in Russia there is no single rule for assessing the quality of the work of judges, which creates great opportunities for manipulating the practice of disciplinary responsibility. The rules for taking into account the quality of the work of a judge do not have a single criterion, they are diverse and represented by many practices, and at the same time they are not legitimized, that is, they were developed informally on the ground.

The popularity of assessing the quality of a judge's work through the number of cancellations and changes is combined with the uncertainty of the methodology used. In

each specific case, the mechanisms of individual sorting of indicators are activated. If you wish, you can count all the cancellations, plus mention changes in judicial acts, or you can focus only on the cancellations of judicial acts that consider the case on the merits. You can choose the reasons why some cancellations should not be regarded as negatively characterizing the judge, but you can, on the contrary, follow the path of a formal approach and count each cancellation and even change as evidence of the judge's unprofessionalism.

In practice, the biased nature of the approach is realized, in which each cancellation is considered as a minus in the work of a judge. With high rates of cancellation of judicial acts, the automatic onset of adverse consequences for both the judge and the whole court is possible. Therefore, in practice, a mechanism was developed to reset too strict accounting rules - this is expressed in the desire of a higher authority to avoid cancellations and changes in judicial acts as far as possible. There is a special terminology for this, "strengthening". This means that in some situations the arguments of the complaint may be valid, but they will not be satisfied. Although the violation indicated by the applicant in the complaint is really present, the decision is made not to cancel or change the judgment. After consideration in the court of second instance, the decision enters into force. Hence the term "strengthening". This has a negative impact on the image of the courts, as citizens do not receive full judicial protection. At the same time, there is a paralysis of the activity of a higher instance, which voluntarily refuses to perform its main function of managing judicial practice. This leads to negative assessments of the work of the courts of the verification instance.

The struggle to maintain indicators causes criticism, reduces the authority of the courts.

The unpredictability of the use of quantitative indicators of cancellations leads to the self-tuning of the judicial system in order to minimize negative costs and dilute the essence of the appeal procedure. The way out is to revise the methods for assessing the quality of judges' work. This requires a reassessment of the essence of procedural activity and a deep differentiation of the reasons for the annulment and amendment of judicial acts.

Thus, to date, neither society nor the judiciary has a clear understanding of the criteria for assessing the quality of a judge's work used in the framework of disciplinary responsibility [13].

Conclusions

The criteria for assessing the quality of a court decision, which we managed to identify when studying foreign experience, are largely repeated, sometimes overly verbose, but on the whole reflect the necessary requirements that must be made to a court decision. We come to the conclusion that these criteria can be used to develop more reasonable and reasoned criteria that can be used as the basis for evaluating the work of judges.

As an option, the following criteria can be proposed: 1. Legality; 2. Validity; 3. Certainty of the decision; 4. Unconditional decision; 5. Completeness of the solution; 6. Logic; 7. Reliability; 8. Correctness; 9. Persuasiveness; 10. Transparency; 11. Clarity and understandability; 12. Clear structure and form of the decision; 13. Clear and distinct announcement of the decision.

Perhaps this is an incomplete enumeration of all the criteria for assessing the quality of a judgment, but it seems to us that if we ignore the verbose and overly abstract enumeration of all criteria, which is typical for European judges, then the bottom line will be exactly those criteria that we have listed.

The most common is the assessment of the quality of a court decision by a quantitative criterion: the number of canceled decisions. Moreover, in Russia, many researchers recognize it as the only possible one. With this we cannot agree.

The study of foreign experience shows that the quantitative criterion cannot be the only criterion for assessing the quality of judicial decisions. The Advisory Council of European Judges emphasizes that it is desirable to combine different methods of evaluation linked by different qualitative indicators and data sources. The Advisory Board stresses that neither the number of appeals nor the number of successful appeals can directly reflect the level of quality of the judgments being challenged.

It should be taken into account that the assessment of the quality of a judgment cannot in any way affect the independence of judges. An important principle is that the life tenure of judges cannot be called into question as a result of an unfavorable assessment. Foreign experience shows that one should not get carried away, as in the doctrine of Russia, only by quantitative criteria for assessing the quality of judicial decisions.

In connection with the above, the following conclusions and recommendations are offered:

1. It should be recognized that the quality of court decisions cannot be properly assessed if only the purely legal significance of a court decision is taken into account. The entire legal system should be assessed as a whole, since both external and internal factors influence the quality of court decisions.

2. Any way of assessing the quality of judicial decisions should not affect either the independence of the judiciary or individual judges.

3. It is recommended to apply various methods of quality assessment: evaluation of the activities of judges, statistical evaluation, evaluation of judges by local public authorities.

4. Judges can evaluate their colleagues and evaluate their own performance.

5. Participation in the evaluation of «external» persons (e.g. lawyers, prosecutors, law professors, citizens, national or international non-governmental organizations) is also allowed, provided that the independence of judges is fully ensured.

6. The first point in assessing the quality of judicial decisions should be to assess whether there is a speedy and effective appeals process.

7. Through their jurisprudence, their appraisal of judicial activities and annual reviews, higher courts can influence the quality of judicial decisions and their evaluation. In such cases, it is most important that the jurisprudence be presented clearly, consistently and sustainably. In their reports and clarifications, higher courts may develop guidelines for lower courts that draw attention to the principles applicable in their case law.

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ORGANIZATIONAL AND LEGAL ISSUES IN STREAMLINING THE HORIZONTAL STRUCTURAL CONNECTION BETWEEN CENTRAL AND LOCAL PUBLIC BODIES

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The article reveals the reasons for the lack of coordination functions and horizontal links in the apparatus of public authorities in the Republic of Moldova. The object of the research is a complex of legal and non-legal relations, multiparty, which arise in the initial stages of the formation of unstable organizational structures, linear-functional, of the central public administration bodies. The aim of this paper is to develop methods for streamlining the relationships and structures of the functional matrix at all levels of governance and self-government. Ways to weaken the multiparty factor are proposed by developing self-regulatory organizations of entrepreneurs and delegating them to state functions. The relevance of the topic is due to the fact that the lack of flexible links and coordination structures between the governing bodies, in the conditions of constant conflicts between party leaders, can lead to problems that call into question the very existence of the state. The author also argues that concrete measures need to be taken in order to combat imperfect legal rules in the form of tightening control over departmental regulation and establishing a permanent review of legislation. Based on the author's experience in using the various questionnaires and surveys in his monographs, it is proposed, in drafting each new bill, to conduct a content analysis of current regulatory acts in the relevant field or industry and, from a scientific point of view, reach a final decision on whether such a regulatory act can be adopted. It is proposed to formulate at the state level and include in the legislation the various strategic objectives of promoting cooperation in the field of scientific and technological progress and small business.

Keywords*: coordination, organizational structure, legal norms, reationalization, delegation of functions.*

PROBLEME ORGANIZAȚIONALE ȘI JURIDICE ALE RAȚIONALIZĂRII CONEXIUNII STRUCTURALE ORIZONTALE ÎNTRE ORGANELE PUBLICE CENTRALE ȘI LOCALE

Articolul dezvăluie motivele lipsei funcțiilor de coordonare și a legăturilor orizontale în aparatul autorităților publice din Republica Moldova. Obiectul cercetării îl constituie un complex de relații juridice și non juridice, pluripartite, care iau naștere în stadiile inițiale ale formării structurilor organizatorice instabile, liniar-funcționale, ale organelor administrației publice centrale. Scopul prezentei lucrări este de a dezvolta metode de raționalizare a relațiilor și structurilor matricei funcționale la toate nivelurile de guvernare și autoguvernare. Sunt propuse modalitățile de slăbire a factorului multipartit prin dezvoltarea organizațiilor de autoreglementare ale antreprenorilor și delegarea acestora a unor funcții ale statului. Relevanța temei se datorează faptului că lipsa unor legături și structuri flexibile de coordonare între organele de conducere, în condițiile unor conflicte constante între liderii de partid, poate duce la apariția unor probleme care pun în discuție însăși existența statului. De asemenea, autorul susține că este necesar să se întreprindă măsuri concrete în vederea combaterii normelor juridice imperfecte sub forma înăspririi controlului asupra reglementării departamentale și instituirea unei expertize permanente a legislației. Pe baza experienței autorului de utilizare a diverselor chestionare și sondaje în monografiile sale, se propune, la elaborarea fiecărui nou proiect de lege, să se efectueze o analiză de conținut a actelor de reglementare actuale în domeniul sau industria relevantă și, din punct de vedere științific, ajunge la o decizie finală dacă

poate fi adoptat un astfel de act de reglementare. Se propune formularea la nivel de stat și includerea în legislație a diverselor obiective strategice de promovare a cooperării în domeniul progresului științific și tehnologic și al micului business.

Cuvinte-cheie: *coordonare, structură organizatorică, norme juridice, raționalizare, delegarea funcțiilor.*

PROBLÈMES ORGANISATIONNELS ET JURIDIQUES LIÉS À LA RATIONALISATION DE LA CONNEXION STRUCTUREL HORIZONTAL ENTRE LES ORGANISMES PUBLICS CENTRAUX ET LOCAUX

L'article révèle les raisons du manque de fonctions de coordination et de liens horizontaux dans l'appareil des autorités publiques de la République de Moldova. L'objet de la recherche est un complexe de relations juridiques et non juridiques multipartites, qui se posent aux stades initiaux de la formation de structures organisationnelles instables, linéaires et fonctionnelles des organes centraux de l'administration publique. Le but de ce travail est de développer des méthodes de rationalisation des relations et des structures de la matrice fonctionnelle à tous les niveaux de gouvernement et d'autonomie gouvernementale. Des moyens d'affaiblir le facteur multipartite par le développement d'organisations d'autoréglementation des entrepreneurs et leur délégation de certaines fonctions de l'État sont proposés. La pertinence du sujet est due au fait que l'absence de liens et de structures de coordination flexibles entre les organes directeurs, dans des conditions de conflits constants entre chefs de parti, peut conduire à l'émergence de problèmes qui remettent en cause l'existence même de l'État. En outre, l'auteur soutient qu'il est nécessaire de prendre des mesures concrètes pour lutter contre les normes juridiques imparfaites sous la forme d'un contrôle renforcé de la réglementation départementale et d'un examen permanent de la législation. Sur la base de l'expérience de l'auteur de l'utilisation de divers questionnaires et enquêtes dans ses monographies, il est proposé, lors de l'élaboration de chaque nouveau projet de loi, de procéder à une analyse du contenu des actes réglementaires en vigueur dans le domaine ou l'industrie concerné et, d'un point de vue scientifique, de prendre une décision finale sur la possibilité d'adopter un tel acte réglementaire. Il est proposé de formuler au niveau de l'État et d'inclure dans la législation divers objectifs stratégiques pour promouvoir la coopération dans le domaine du progrès scientifique et technologique et des petites entreprises.

Mots-clés: *coordination, structure organisationnelle, normes juridiques, rationalisation, délégation de fonctions.*

ОРГАНИЗАЦИОННО-ПРАВОВЫЕ ПРОБЛЕМЫ РАЦИОНАЛИЗАЦИИ ГОРИЗОНТАЛЬНЫХ СТРУКТУРНЫХ СВЯЗЕЙ МЕЖДУ ЦЕНТРАЛЬНЫМИ И МЕСТНЫМИ ОРГАНАМИ ПУБЛИЧНОГО УПРАВЛЕНИЯ

В статье раскрываются причины отсутствия координационных функций и горизонтальных связей в аппарате публичных органов Республики Молдова. Объект исследования – комплекс правовых и неправовых, многопартийных отношений, возникающих на начальных стадиях формирования неустойчивых, линейно-функциональных организационных структур центральных органов публичного управления. Целью данной работы является разработка методов рационализации функционально-матричных связей и структур на всех уровнях государственного управления и самоуправления. Предлагаются пути ослабления фактора многопартийности за счет развития организаций саморегулирования предпринимателей и делегирования им некоторых функций государства. Актуальность темы обусловлена тем, что отсутствие гибких координационных связей и структур между органами управления, в условиях постоянных конфликтов между лидерами партий может привести к появлению проблем, ставящих под сомнение само существование государства. Автор также придерживается мнения о необходимости реализации конкретных практических шагов в преодолении несовершенных норм права в виде ужесточения контроля над ведомственным нормотворчеством и учреждения постоянно действующей экспертизы законодательства. На основе накопленного автором опыта использования различных опросных листов и анкет, описанного в своих монографиях, предлагается при разработке каждого нового законопроекта проводить контент-анализ действующих нормативных актов в соответствующей сфере или отрасли и, с научной точки зрения, приходить к окончательному решению, нужно

ли принимать к рассмотрению такой нормативный акт. Предлагается сформулировать на государственном уровне и закрепить в законодательстве различные стратегические цели содействия кооперации в области НТП и малого бизнеса.

***Ключевые слова**: координация, организационная структура, правовые нормы, рационализация, делегирование функций.*

Introduction

The subject of this article is the development of organizational and legal measures to rationalize the organizational structure of central and local public authorities through the introduction of applied methods for analyzing structural functional-matrix relationships. The object of research is a complex of legal and non-legal, multi-party relations that arise at the initial stages of the formation of unstable, linear-functional organizational structures of central public administration bodies.

Purpose of the article. The main goal of the work is the research and development of methods for rationalizing functional-matrix relationships and structures at all levels of government and self-government.

Research methods. In preparing the article, the following theoretical and applied research methods were used: dialectical, system-structural, comparative legal, content analysis of existing regulations and theoretical and prognostic.

Presentation of the main ideas

The organizational structure of the management of the national economy of the Republic of Moldova has constantly changed and will continue to change. We have accumulated a lot of experience in analyzing and improving this structure since Soviet times. We came to the conclusion that “in addition to analyzing the formal organizational structures of ministries, state committees and departments, their divisions, it is possible to identify the real, actual management structure” [1, p. 63]. For this purpose, a special questionnaire was developed for the head of a subdivision (ministry, department) [1, p. 116-118], which can be used at the present time to analyze the existing organizational structures of ministries and departments of the Republic of Moldova. The methodology is not outdated, only the functions of ministries and departments have changed, which must be taken into account when applying the above questionnaire.

“The links of the organizational structure of the management of the national economy (OSUNKh) of the republic are complex economic, structural and administrative-legal and social phenomena. Their close relationship in terms of resources and managers not only does not exclude, but also implies the presence of features of functioning in a particular territory, and therefore the need to study each separately and in conjunction with other elements of the economic mechanism, the state apparatus and the rules of law, including - determining the legal status, legal relations, economic activity, independence in the formation of higher management structures” [2, p. 4].

In the central public administration bodies of the Republic of Moldova, a linear or linear-functional management structure is mainly used. Linear structure is the most logical in terms of structuring, precise but not as flexible as we would like it to be. Each leader has an expanded package of opportunities, while he/she must be more often highly specialized, to be able to implement special knowledge.

In order to strengthen horizontal coordination between ministries and departments, it would be advisable to introduce, where necessary, a matrix type of structure.

It consists of two parts, the first is a linear structure, the second is a program-targeted one. In the program-target structure, special attention is paid to the successful fulfillment of the set goal, in the solution of which all departments participate. All works performed on a given topic must not only be completed quickly, but created with precision in each specific block. For this, favorable conditions must be provided, a normalized working day and a certain amount of work to be done. That is why all managers must clearly monitor the effectiveness and success of the process, making their own adjustments. The creation of a matrix structure is used only when necessary. In the presence of short terms for implementation, as well as a certain complexity of the work performed.

In some cases, a program-target structure should be introduced. It consists of elements of a functional and divisional structure. There is double subordination, to two leaders from different structures. Such a structure is being created for temporary work. She fully focuses on the development of a new project and makes every effort for its successful implementation. This is especially important for the digitalization of the economy, public administration and the rule of law.

We propose to consider the process of digitalization as a new function of management and interpret the definition of "digitalization" as a process of changing (state) management (as well as various industries and sectors of the economy and the social sphere) by qualitatively changing the approach to the processes of organizing, planning, forecasting, managing and controlling the use of digital technologies and modern approaches to effective management. The practical part of digitalization lies in the application of basic management functions in the interaction system for both government bodies and business entities (points of contact in the process of digitalization of the economy and management).

A multi-party system is a political system in which there can be many political parties that theoretically have an equal chance of winning a majority of seats in a country's parliament.

Advantages:

- real competition;
- a wide range of representatives of public opinion;
- the ability to vote for the party that suits your interests (or against all if there is such a column).

Disadvantages:

- a multi-party system performs the function of aggregation (generalization) of interests worse;
- the voter, voting for such a party, often does not know what exactly he/she is voting for in the end;
- most often, with such a party system, one party is not able to win the parliamentary elections and therefore is forced to compromise with other political parties.

In the Republic of Moldova, even under the conditions of a multi-party system, one party could win, which does not contribute much to the formation of an optimal management structure of the central public administration bodies, the freedom of entrepreneurship.

Even in the principalities and kingdoms of the European Union, freedom of enterprise is guaranteed. So, according to Article 38 of the Constitution of the Kingdom of Spain on February 27, 1978 "recognizes the freedom of enterprise within the framework of a market economy." At the same time, "public authorities guarantee and protect its implementation in accordance with general economic requirements and ensure its productivity, and, if necessary, in accordance with planning requirements" [3]. Article 28 of the Constitution of the Principality of Andorra of March 14, 1993 also states that "free enterprise is recognized within the framework of a mar-

ket economy and is carried out in compliance with the law” [4]. Article 32 of the same Constitution states that “the state may intervene in the organization of economic, commercial, financial and labor life in order to ensure, within the framework of a market economy, the balanced development of society, as well as general welfare” [5].

Article 16 of the Charter of Fundamental Rights of the European Union, which is called “Freedom of entrepreneurial activity”, states that “Freedom of entrepreneurial activity is recognized in accordance with communitarian law and with national legislation and national practice” [6]. Taking into account the prospects for the accession of the Republic of Moldova to the EU, it would be advisable in Chapter II “Fundamental Rights and Freedoms” of the Constitution of the Republic of Moldova, after Article 33, to provide for Article 33* “Freedom of entrepreneurial activity and self-regulation” with the following content:

(1) The freedom of entrepreneurial activity is recognized and guaranteed within the framework of a market economy and is carried out in compliance with the law, including various forms of commerce, intermediation and small business.

(2) The State may intervene in the organization of economic, commercial, financial and working life in order to ensure the balanced development of society within the framework of a market economy and to prevent illegal speculative transactions in order to establish fair social relations.

(3) Self-regulation is an independent form of association of entrepreneurs and entrepreneurial communities, in which a voluntarily created self-regulation organization independently sets goals, objectives, functions, powers, rights, obligations and a mechanism of mutual responsibility between small businesses within this organization and streamlines its relations with the state by submitting a self-regulation act (code of conduct, rule for settling disputes in its own court) to the relevant body, and the state authorizes it (agrees, legitimizes) and can delegate to it part of its powers to regulate the market in the relevant industry on a contract basis.

In this regard, it is also necessary to adopt the Law of the Republic of Moldova “On Self-Regulatory Organizations”. This will give impetus to the transfer of some functions of the central public authorities to these organizations in such sectors as, for example: construction, audit, insurance, in the financial market, etc.

In Article 126 of the Constitution of the Republic of Moldova, which is called “Economy”, in part (2) it is stated that “The state must [7] ensure: ... b) freedom of trade and entrepreneurial activity, protection of fair competition, creation of favorable conditions *for the use of production factors*” (underlined by us - В.*И. V.I.*). Thus, the freedom of trade and entrepreneurial activity is considered by the legislator as an institution of a market economy or even as a production factor, but not as a human and citizen’s right, and not even as an obligation of the state to ensure such freedom, but its duty. What causes bewilderment not only among entrepreneurs, officials, but also among legal scholars, for example, specialists in constitutional and civil law, including experts of the Higher Attestation Commission, since disputes arise over whether the right of a person and a citizen to entrepreneurial activity and its various forms is a subject of constitutional the rights. After all, for this there are such branches of law as civil and business law.

But, as our numerous studies show, any form of entrepreneurship, including commerce, mediation and small business, must initially be provided with constitutional norms and guarantees, which will allow stabilizing

the relevant legislation. Only with such a formulation of the question is it possible to build a rule of law state in which the engagement in these types of activities will become legal, honest, socially oriented towards the development of the general welfare of society and *the establishment of fair social relations based on the constancy of the operation of the norms enshrined in organic laws*. Indeed, over the past 15 years, the texts of many laws have been changed, repealed or completely replaced three, four or more times.

It seems that democratic and civilized relations between subjects of any form of small business and the state depend primarily on the availability of a sufficient number of legal norms of high quality, on how stable both the relevant rights and obligations of small businesses and the powers of public administration are regulated in the legislation., as well as guarantees aimed at ensuring, observing and protecting the interests of small businesses. The modern regulation of the administrative and legal regulation of small businesses in various areas of socio-economic life, on the one hand, is distinguished by a significant number of regulations, which ultimately determines a complex and diverse set of administrative and legal relations. On the other hand, this legislation is characterized by scattered, unsystematic, duplication, insufficient legal justification for a particular normative act, lack of clarity and clarity of presentation. And without this, it is impossible to strengthen small business - the most important component of sustainable political stability in the Republic of Moldova.

The implementation of entrepreneurial activity at any stage of its development took place within the framework of state regulation. The development of entrepreneurship is inextricably linked with the development of statehood, the strengthening of state power, and the existence of entrepreneurship outside the state, and, consequently, of administrative and legal regulation, is impossible.

Our government should use the Japanese model of state regulation and planning and the system of contracts and subcontracts we propose, described in paragraph 4 of Chapter II of our monograph, which is called "The nature, essence and development of contractual and subcontracting relations in the system of correlation of civil and administrative law" [8, p. 121-135].

At present, the so-called "Japanese model" of interaction between small and large businesses has been formed in Japan, which has been adopted by many developed countries of the world. In all areas, small and large businesses coexist. Small businesses are engaged in the construction of mass housing, and large businesses are involved in the construction of roads, factories, multi-storey residential and office buildings and shopping malls. It is the same in transport: there are small enterprises engaged in transportation, and large taxi fleets, bus corporations. That is, big business gives work to small ones. As for mechanical engineering, wherever there are labor-intensive processes, large companies determine what is more profitable for them - to create their own production facilities or to load a network of small subcontractors with orders. About 55% of small enterprises in industry operate in this way [10, p. 32].

We propose to transform the Ministry of Economy and Infrastructure into the Ministry of Economy and State Planning. At the same time, the functions of state planning in relation to a market economy and its digitalization should be carried out jointly with the Ministry of Finance. In this regard, approximately half of the functions of the Ministry of Finance listed in articles 1-19, 27-33 of the Law on the audit of financial statements dated December 15, 2017 No. 271 should have been delegated to the relevant self-regulatory or-

ganizations, but after the adoption of the Law of the Republic of Moldova on self-regulatory organizations. Similar laws have been adopted in Belarus, Kazakhstan, the Russian Federation and other states.

Since many normative acts have accumulated during the structural transformations (the composition of the Parliament and the Government and various courts have changed), some of which were developed and adopted while lobbying the disparate interests of party leaders, it would be necessary to conduct a content analysis of all normative acts of the Republic of Moldova.

Content analysis is a method that is a systematic numerical processing, evaluation and interpretation of the form and content of an information source. Content analysis is a method that can be used to generalize certain material manifestations of the behavior and relations of various types of subjects. The ability to study a large number of cases is one of the main attractive features of content analysis as a research method.

Since any law is a significant text that determines the state policy and norms of behavior of society in a particular area of socio-economic relations and has a number of special characteristics that are important for conducting content analysis, it is necessary to establish whether the material verified from all points of view, on the creation which specialists from various fields and representatives of various parties worked, whether there are random spontaneous words and meanings in the law that do not reflect a known situation, qualitative content.

Ideally, the text of the law is a well-defined semantic structure, where each of the elements has a meaningful and logical justification. At the same time, the law covers a large semantic field, subject to several dominants (tasks), what is called the main content. This is what is visible to the naked eye and what is primarily subjected to intuitive analysis. But there is also a second and third semantic series, which can be revealed only by special methods, in particular with the help of content analysis.

Conclusions and recommendations

1. In order to improve the legislation on entrepreneurship, it would be advisable to conduct a ***second survey*** of officials at all levels (central and local, including the PMR) and the entrepreneurs themselves, which we conducted in 2004 using our “Questionnaire on Entrepreneurial Legislation” [8, p. 327-331], “Questionnaire for determining the quality of the law” [8, p. 331-332] and “Questionnaires (local level)” [8, p. 342-344].

2. In addition, for the successful development of small business it is necessary:1) to create a department of entrepreneurship, contracts and protection of small business interests in the Government of the Republic of Moldova, 2) to establish mandatory goals in normative acts, that a certain percentage of all public procurement contracts will be generally awarded to small businesses.

3. All republican departments that develop and implement fiscal, legislative and regulatory policies must publish information about the “economic impact” of all their new decisions on small business” [9, p. 77].

4. To achieve all the goals outlined in this article, it is necessary to form an interdepartmental group (program-target structure) of the following specialists: in the field of artificial intelligence (there is such a laboratory at the Institute of Mathematics of the Academy of Sciences of the Republic of Moldova), economists, lawyers, programmers, etc.

5. Before the development of each new draft law, it is necessary to conduct a content analysis of existing regulations in the relevant area or industry and, from a scientific point of

view, justify whether such a regulation should be accepted for consideration.

6. It is necessary to formulate at the state level and fix in the legislation the following strategic goals of promoting cooperation in the field of scientific and technical progress and small business:

Establish on the basis of universities, institutes of the Academy of Sciences of Moldova small firms, commercial laboratories as objects for attracting investments, integrating science and small business;

Stimulate the investment activity of the corporate sector by attracting talented scientists and engineers also from other countries (especially those who left Moldova) in the implementation of national and joint investment scientific and technical programs;

Create small scientific, scientific-technical, scientific-production firms, organizations, laboratories, associations, centers in the form of scientific and technological parks, technopolises near large scientific and industrial centers;

Liberalize legislation in order to stimulate investment in innovation, combine the joint efforts of large corporations in conducting joint promising (pre-competitive) R&D of a strategic nature.

To this end, it is necessary to develop a draft Law of the Republic of Moldova "On Technological Innovations", which will fix the status of the National Science Foundation and cooperative research centers and entities (for example, NSF, universities, institutes of the Academy of Sciences of Moldova, etc.), which should be allowed to create such centers to develop industrial technologies together with these organizations and in cooperation with small businesses and non-profit organizations [8, p. 251 and others].

7. The draft Law of the Republic of Moldova "On the Transfer of Technologies to Small Businesses" proposed by us could also serve as a legislative basis for the development of small businesses, on the basis of which certain sectoral structures (for example, technology management under the relevant ministry) would act as an intermediary between large and small businesses in Transnistria and Moldova in general, would establish real interaction between the government, local public authorities in large cities) and small businesses, and would also encourage cooperation within the small business sector and between small enterprises and universities.

This would significantly contribute to the final settlement of the Transnistrian conflict and the revival of all sectors of the national economy on both banks of the Dniester.

8. In this regard, it is also necessary to fix the terms of the technical contract, which should be determined by the parties: 1) the name of the subject of the contract; 2) the content, scope and requirements of the objectives of the work; 3) plan, pace, deadline, place and method of implementation; 4) keeping technical information and materials secret; 5) responsibility for risk; 6) ownership of the technical result and its distribution; 7) criteria and methods of practical verification; 8) price or remuneration, as well as methods of payment; 9) a penalty or the procedure for calculating the amount of compensation for losses; 10) the procedure for settling disputes; 11) explanation of names and technical terms.

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VIOLATION OF THE PROCEDURE FOR OBTAINING RELIABLE EVIDENCE, WHICH HINDERS THE WORK OF THE TEMPORARY INVESTIGATIVE COMMISSIONS OF THE VERKHOVNA RADA OF UKRAINE

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The published article is determined for studying such a question as the crimes against the procedure for obtaining reliable evidence, which interferes with the activities of the temporary investigative commissions of the Verkhovna Rada of Ukraine. The suggested article includes observing such a question as realization an investigation by temporary investigative commissions of the Verkhovna Rada of Ukraine is one of the leading forms of parliamentary control in Ukraine. The article produces such notions as the temporary investigative commission, the lawful procedure for obtaining reliable evidence, crimes against justice, witness's testimonies, obligation of a witness to testify to the temporary investigative commission. The main attention is given to the methods of obstruction of the investigation of the temporary investigative commission, which are used by the witnesses. The key note concerns such issues as qualification of a witness's refusal to testify by a temporary investigative commission of the Verkhovna Rada of Ukraine as disrespect for the Verkhovna Rada of Ukraine. This study is an original proposal to solve the current problem of criminal law protection of the legal procedure for conducting an investigation by a temporary investigative commission of the Verkhovna Rada of Ukraine.

Keywords: *temporary investigative commission, parliamentary control, crimes against justice, witness's testimonies, emergency, parliamentary investigation.*

ÎNCĂLCAREA PROCEDURII DE OBȚINERE A PROBELOR VERIDICE, CE IMPIEDICĂ ACTIVITATEA COMISIILOR TEMPORARE DE ANCHETĂ ALE RADEI SUPREME A UCRAINEI

Prezentul articol este dedicat studiului problemei privind infracțiunile penale ce încălcă procedura obținerii dovezilor certe împiedicând activitățile Comisiilor temporare de anchetă din cadrul Radei Supreme din Ucraina. Studiul include examinarea problemei anchetării de Comisiile temporare pentru investigație în cadrul Radei Supreme a Ucrainei ca una dintre principalele forme de control parlamentar. Autorul utilizează concepte precum: comisie temporară de anchetă, procedură legală pentru obținerea probelor certe, infracțiuni contra justiției, probe testimoniale, obligația martorului de a face declarații (mărturii) în fața Comisiei temporare de anchetă. O atenție deosebită se acordă modalităților de obstrucționare a cercetării Comisiei temporare de anchetă, care sunt utilizate de martori. Ideea principală a articoluluil se referă la problema calificării refuzului unui martor de a răspunde în Comisia temporară de anchetă a Radei Supreme a Ucrainei drept lipsă de respect față de organul legislativ suprem a Ucrainei. În articol este prezentată soluția autorului privind problema protecției dreptului penal în proceduri legale pentru desfășurarea investigațiilor de către Comisia temporară de anchetă a Radei Supreme din Ucraina.

Cuvinte-cheie: *comisie temporară de anchetă, control parlamentar, infracțiuni contra justiției, probe testimoniale, urgență, anchetă parlamentară.*

VIOLATION DE LA PROCÉDURE D’OBTENTION DE PREUVES FIABLES, QUI ENTRAVENT L’ACTIVITÉ DES COMMISSIONS TEMPORAIRE D’ENQUÊTE DU VERKHOVNA RADA D’UKRAINE

L’article publié est consacré à l’étude de la question telle que les infractions pénales contre la procédure d’obtention de preuves fiables entravant les activités des commissions temporaires d’enquête de la Verkhovna Rada de l’Ukraine. Cet article inclut l’examen de la question telle que l’enquête sur les commissions temporaires d’enquête de la Verkhovna Rada de l’Ukraine comme l’une des principales formes de contrôle parlementaire en Ukraine. L’article prévoit des concepts tels que la commission temporaire d’enquête, la procédure légale pour l’obtention des preuves fiables, les infractions pénales contre la justice, la déposition de témoins, le devoir d’un témoin de témoigner à la commission temporaire d’enquête. L’attention principale est portée sur les méthodes d’entrave à l’enquête de la commission intérimaire d’enquête, utilisées par les témoins. L’idée principale de cet article concerne la question telle que la qualification du refus du témoin de témoigner par la commission temporaire d’enquête de la Verkhovna Rada de l’Ukraine comme le manque de respect pour la Verkhovna Rada de l’Ukraine. Cet article présente la solution de l’auteur au problème moderne de la protection par le droit pénal de la procédure légale pour mener l’enquête par la commission temporaire d’enquête de la Verkhovna Rada de l’Ukraine.

Mots-clés: *commission temporaire d’enquête, contrôle parlementaire, infractions pénales contre la justice, témoignage, urgence, enquête parlementaire.*

НАРУШЕНИЕ ПОРЯДКА ПОЛУЧЕНИЯ ДОСТОВЕРНЫХ ДОКАЗАТЕЛЬСТВ, ПРЕПЯТСТВУЮЩИХ ДЕЯТЕЛЬНОСТИ ВРЕМЕННЫХ СЛЕДСТВЕННЫХ КОМИССИЙ ВЕРХОВНОЙ РАДЫ УКРАИНЫ

Данная статья посвящена исследованию вопроса криминальных правонарушений против порядка получения достоверных доказательств, которые препятствуют деятельности временных следственных комиссий Верховной Рады Украины. Анализ охватывает рассмотрение такого вопроса как расследования временных следственных комиссий Верховной Рады Украины как одна из главных форм парламентского контроля. В статье приводятся такие понятия как временная следственная комиссия, законный порядок получения достоверных доказательств, криминальные правонарушения против правосудия, свидетельские показания, обязанности свидетеля дать показания временной следственной комиссии. Главное внимание уделяется способам препятствования расследованию временной следственной комиссии, которые используют свидетели. Основная идея статьи касается вопроса квалификации отказа свидетеля от дачи показаний временной следственной комиссии Верховной Рады Украины как неуважение к Высшему законодательному органу страны. Статья представляет также авторское решение современной проблемы уголовно-правовой охраны законного порядка проведения расследования временной следственной комиссией Верховной Рады.

Ключевые слова: *временная следственная комиссия, парламентский контроль, криминальные правонарушения против правосудия, свидетельские показания, чрезвычайная ситуация, парламентское расследование.*

Introduction

The protection of the administration of justice is one of the most important and priority tasks of the criminal legislation of most countries. After all, it is justice that ensures in the state the principle of equality of all citizens before the law and suppresses violations of the law, regardless of the social status of the offender in society. Therefore, one of the most important tasks of criminal law is the protection of justice from unlawful encroachments, both on the part of officials and persons who do not belong to them, but at the same time are participants in the process. Responsibility for crimes (criminal offenses) against justice is provided in both the Criminal Code of Ukraine [1] and in the Criminal

Code of the Republic of Moldova [2]. The norms that provide for punishment for crimes (criminal offenses) against justice determine punishments for encroachments on the normal activities of not only the judiciary, but also bodies that contribute to the procedural activities of the court in the performance of the function of justice (prosecuting authorities, inquiry), as well as bodies that execute sentences, decisions and other court decisions handed down by the courts [3, p. 145].

Due to the complexity and magnitude of the concept of "justice", the rules providing for liability for crimes against justice can be divided into several groups. One of these groups includes articles establishing criminal liability for crimes against justice, which are expressed in violation of the procedure for obtaining reliable evidence and establishing objective truth in a case. In the Ukrainian Criminal Code (hereinafter referred to as the Criminal Code of Ukraine), this group includes accidents: a knowingly unreliable evidence, a knowingly unreliable conclusion of an expert, a knowingly unreliable translation of a translator, qualifies as a criminal offense, which is provided for in Article 384; refusal of the witness to give reveals or the refusal of the expert or translator to fulfill the obligations assigned to him/her, qualifies as a criminal offense, which is provided for in Article 385; obstructing the appearance of a witness, victim, expert, forcing them to give findings or a conclusion that qualifies as a criminal offense, which is provided for in Article 386 [1].

Dispositions of criminal offenses, which are provided for in Articles 384, 385, 386 of the Criminal Code of Ukraine [1] are formulated in such a way that they cover criminal acts that violate the lawful procedure for the administration of justice in all cases of pre-trial investigation. The list of entities that conduct pre-trial investigations given in these dispositions includes the bodies that conduct pre-trial investigations, as well as, since 2019, temporary investigative commissions and special temporary commissions of the Verkhovna Rada of Ukraine (hereinafter referred to as the VRU).

In democratic countries, parliamentary investigations are a mechanism for monitoring and preventing abuses and errors in the implementation of public policy, and identifying other problematic issues in public life. In European countries (Belgium, Great Britain, the Netherlands, France, etc.), the functioning of the institution of parliamentary investigations takes place in the form of activities of temporary investigative commissions, less often investigative committees [4, pages 4-5]. A common reason for the formation of temporary commissions of inquiry is the desire to separate the process of investigation necessary in a particular situation and the implementation of a particular policy. An analysis of the practice of democratic countries allows us to state the importance of the institution of temporary investigation commissions in the system of public administration. Temporary investigative commissions are created at the moment of actualization of certain problems of public importance and / or aggravation of problems that cause public concern. Often the task of these commissions is to establish the causes of a certain critical and / or threatening situation and develop a set of recommendations (including legislative ones) for its immediate elimination. One of the main reasons for the introduction of the institution of temporary investigative commissions in the political systems of democratic countries is the problem of corruption and the specific features of the investigation of corruption cases due to its nature (backroom agreements, the secret nature of making public decisions, the inaccessibili-

ty of the perpetrators for punishment). Often the perpetrators of illegal acts may have political and economic influence that will allow them to avoid negative consequences from the investigation conducted by law enforcement agencies. In this case, one of the most effective ways to collect the necessary information is to assign this task to a temporary commission of inquiry. Thus, the institution of temporary investigation commissions is an effective and tested in European practice tool for investigating and developing options for solving the most pressing problems of public importance [4, p. 11].

In Ukraine, the institution of temporary investigative commissions is embodied in the so-called temporary investigative commissions of the Verkhovna Rada, special temporary commissions of the Verkhovna Rada, special temporary investigative commissions of the Verkhovna Rada. All of them are collegiate provisional bodies of the Verkhovna Rada, which are created by decree of the Verkhovna Rada, people's deputies of Ukraine are recruited into their main structure, they operate within 6-12 months from the date of their creation. The commission differs in its purpose: the task of the Temporary Investigative Commissions of the VRU - the exercise of parliamentary control through the investigation of issues of public interest; the task of the Special Temporary Commissions of the VRU - preparation, Preliminary consideration and finalization of draft laws and other acts of the Supreme Court, if the subject matter of the legal regulation of such drafts does not belong to the subjects under the competence of the committees of the Supreme Court; except when the VRU establishes a special commission as the main committee to work on the draft law on amendments to the Constitution of Ukraine [5]; task of special temporary commissions of inquiry of the VRU - preparation for impeachment of the President of Ukraine [6]. The activity of these commissions for a long time was regulated by vague instructions in the Regulation of the VRU [7] and actually was in the grey zone" of enforcement. On Decembre 19, 2019, Law of Ukraine No. 400-IX "On Temporary Investigative Commissions and Special Temporary Commissions of the Verkhovna Rada of Ukraine» [5] was adopted, which clearly regulated the powers and procedures for the work of these commissions. Since then, the VRU has dramatically stepped up its efforts to establish and make use of temporary commissions of inquiry, and consequently, the question of the criminal-legal protection of the legal working procedures of the temporary commissions of inquiry of the Investigative Commission of the VRU has been on the agenda.

In accordance with paragraphs 4, 5 part 1 article 12, part 1, article 19 of the aforementioned law, the commissions of inquiry have the right to invite persons as witnesses to give evidence or explanations, as well as experts or translators, while these persons are warned in writing about criminal liability for: knowingly false testimony, knowingly untruthful conclusion of an expert, knowingly wrong translator's translation; refusal of a witness to testify; the refusal of an expert or an interpreter to fulfill the obligations assigned to him/her without good reason [5], therefore, these acts are considered by the aforementioned law to be the most dangerous violations of the lawful procedure for the work of temporary investigation commissions.

The vigorous activity of temporary investigation commissions in Ukraine currently determines the relevance of the review of violations of the procedure for obtaining reliable evidence, which hinders the activities of temporary investigation commissions of the Verkhovna Rada.

This article does not study the activities of the special temporary investigative commission of the VRU, due to the lack of creation and activities of such a commission in the history of Ukraine.

In this review, the author used the logical method, the method of semantic analysis, as well as the comparative legal method.

Violation of the procedure for obtaining reliable evidence, which hinders the activities of the temporary investigation commissions of the VRU, is currently a little-studied problem that has not managed to attract the attention of scientists in 2020-2021. In 2021, Doctor of Law O. Zozulya studied the temporary investigative commissions of the VRU without affecting the protection of their activities [8]. As a result of the review of modern legal literature, the author is forced to state that the problem of criminal law protection of the activities of temporary investigation commissions of the VRU is still waiting for its researcher.

International experience in the work of parliamentary investigative bodies (investigative commissions and/or investigative committees)

The principles generally accepted in the democratic world for the functioning of temporary investigative commissions are as follows: 1) the commission must adhere to the deadlines for its activities prescribed by law; 2) the commission must conduct the investigation in the most efficient and cost-effective way; 3) the commission must adhere to the principles of objectivity; 4) the commission must adhere to the requirements of secrecy until the official decision on the publication of the results of the commission's investigation; 5) the commission must draw rational and justified conclusions based on its own investigation; 6) the commission must avoid legal errors; 7) the report prepared by the commission should be comprehensive and cover all aspects of the studied problem [4, p. 5-8].

The European Parliament has the authority to create an investigative committee to investigate controversial issues or incorrect implementation of Commonwealth law in accordance with Article 193 of the Treaty on the European Union [9]. In the Kingdom of the Netherlands, since 2002, the Lower House of the State Parliament has its own investigative unit - the Investigative Office [4, p. 2]. In the Republic of Moldova, according to Part 1 of article 35 of the Rules of Procedure of the Parliament, at the request of a parliamentary faction or a group of deputies comprising at least 5% of the elected deputies, the Parliament may adopt a resolution on the establishment of an investigative commission by a majority of votes of the present deputies [10]. In accordance with article 36 of the Rules of Parliament [10] the commission of inquiry calls as a witness any person who has information about any fact or circumstance who can assist in the investigation of the case and any person who has any evidence or has any means of evidence, is obliged to present them to the commission at its request. Institutions and organizations are required by law to assist the commission of inquiry. But the investigative commission cannot summon representatives of the judiciary, the prosecutor's office and the criminal prosecution authorities to present information that could harm the correctness of the consideration of cases in court and / or the secrecy of criminal prosecution.

Crimes against the procedure for obtaining reliable evidence and establishing objective truth in a case in the Criminal Code of the Republic of Moldova

In the Criminal Code of the Republic of Moldova, criminal law protection of the pro-

cedure for obtaining reliable evidence and establishing objective truth in the case is devoted to: Article 312 “False testimony, conclusion or incorrect translation”, it provides criminal liability for knowingly false testimony of a witness or victim, or specialist or expert opinion, knowingly incorrect translation of an interpreter in a civil case, criminal proceedings, proceedings on offenses or consideration of a case in an international court; article 313 “Refusal or evasion of a witness or a victim from giving evidence”, it provides criminal liability for refusal or evasion of a witness or a victim from giving evidence in the course of a criminal prosecution or during a trial; article 314 “Inducement to give false testimony, false conclusion, improper translation”, it provides for criminal liability for causing a witness, a victim to give false testimony, an expert to give false conclusion, translator to perform incorrect translation [2]. Unfortunately, the investigation of the commission of inquiry is not mentioned among the processes protected by these articles.

Legislated procedure for the work of temporary investigative commissions of the VRU

In accordance with article 12 of the Law of Ukraine “On temporary investigative commissions and special temporary commissions of the Verkhovna Rada of Ukraine”, the temporary investigative commission has the right to: receive all information, documents, materials necessary for its activities from state authorities and / or local governments, their officials and employees, enterprises, institutions, organizations, regardless of their form of ownership, to get acquainted with the documents that relate to the subject of the investigation, receive copies of them, if necessary, seize them, and in the case when these documents are needed by the bodies that conduct a criminal investigation - seize their copies, invite persons for give evidence and/ or explanations on issues that are being investigated by the investigative commission, listen to them at meetings of the investigative commission, put questions to them, receive testimony and/or explanations from them about the circumstances that are being investigated, except as otherwise provided by law, to decide on the involvement of experts and specialists in the work of the commission of inquiry, invite them to meetings of the commission of inquiry, appoint examinations, seek assistance from state authorities and / or local self-government, other state bodies, their officials, heads of enterprises, institutions, organizations, public associations that are obliged to assist the investigative commission in its investigation, to involve in the investigation employees of the prosecutor’s office of Ukraine, the SSU, the Ministry of Internal Affairs of Ukraine with the consent of their leaders [5]. In accordance with Article 17 of the Law of Ukraine “On Temporary Investigation Commissions and Special Temporary Commissions of the Verkhovna Rada of Ukraine”, a member of the temporary investigative commission takes part in the meetings of this commission, visits without hindrance upon presentation of a certificate of a People’s Deputy of Ukraine and instructions from the investigating commission to clarify issues related to investigation, any enterprises, institutions, organizations on the territory of Ukraine, receives, on behalf of this commission, written or oral explanations from officials of state authorities and / or local authorities, heads of enterprises, institutions, organizations, regardless of their form of ownership, public organizations and individual citizens, receives, on behalf of the commission of inquiry, originals or copies of

documents, including those containing state secrets, from these persons [5].

In accordance with Article 13 of the Law of Ukraine "About Temporary Investigative Commissions and Special Temporary Commissions of the Verkhovna Rada of Ukraine" Temporary Investigative Commission is obliged to: conduct punctures and transcripts of its sittings, collect information, evidence, explanations, documents, materials, to study them, to keep in accordance with the established procedure the entry and exit documents of the commission of inquiry, on the basis of a comprehensive analysis of the circumstances studied, to prepare conclusions and proposals for submission to the Constitutional Court for consideration and proposals for draft acts of the VRU on the basis of their consideration; to report to the VRU on the progress and results of the investigation in accordance with the deadlines and tasks assigned to it by the VRU, and, upon completion of its work, to transmit all minutes and transcripts of meetings to the relevant units of the Office of the VRU; other materials of the Commission of Inquiry, its conclusions and proposals, if the materials of the Commission of Inquiry are transmitted to the General Prosecutor's Office of Ukraine, the corresponding structural units of the apparatus of the VRU receive their copies [5].

According to article 19 of the Law of Ukraine "On temporary investigative commissions and special temporary commissions of the Verkhovna Rada of Ukraine" officials and officers of public authorities and / or local authorities, heads of enterprises, institutions, organizations, regardless of their form of ownership, public organizations and individuals are required to appear at the invitation of the Commission of Inquiry and give truthful testimony and / or explanations about the circumstances known to them, on issues related to the subject of the investigation, in the manner prescribed by law. A person who gives evidence and/or explanations as a witness is warned in writing about criminal liability for knowingly untruthful testimony or refusal to testify, and this person is also obliged to answer questions that relate to the subject of the investigation, and, if necessary, state his/her testimony in writing and/ or explanations and they will be added to the minutes of the meeting of the commission of inquiry. If the invited person did not come to the meeting of the investigative commission without valid reasons, then the investigative commission may decide on the application of the procedure for forced bringing to such a person by the forces of the National Police [5]. In accordance with article 20 of the Law of Ukraine "On temporary investigation commissions and special temporary commissions of the Verkhovna Rada of Ukraine", members of the temporary investigation commission conduct an investigation by checking the facts and circumstances both directly at the places of their occurrence, and by requesting documents, obtaining testimony and / or explanations [5].

It must be pointed out that, in accordance with paragraph 2 of part 4 of article 4 of the Law of Ukraine "On temporary investigative commissions and special temporary commissions of the Verkhovna Rada of Ukraine", the temporary investigative commission cannot establish the presence or absence of guilt in the commission of a criminal offense [5]. If the temporary investigative commission discovers clear signs of a criminal offense, the temporary investigative commission, when drawing up for the VRU a report on the investigation done with a reasoned conclusion and proposals, includes a proposal to send the report to the Ministry of Internal Affairs of Ukraine, the National Police of Ukraine,

the SSU, the State Bureau of Investigation to verify the stated information and taking measures to respond to violations of the law, then the VRU, after processing the report of the temporary investigative commission, adopts a resolution in which it confirms the above proposal.

From a brief review of the procedure for the work of temporary investigation commissions of the VRU, it follows that obtaining testimony and / or explanations from officials and officials of state authorities and / or local authorities, heads of enterprises, institutions, organizations, regardless of their form of ownership, public organizations and individual citizens on the subject of the investigation is one of the key tools of the work of the temporary investigative commission, the success of the investigation depends on its unhindered and maximum active use. Witnesses knowingly giving false testimonies and/or refusing to testify can create significant difficulties in conducting an investigation by a temporary commission of inquiry. Therefore, the legal procedure for obtaining testimony by the temporary investigative commission during the work of the temporary investigative commission needs criminal legal protection, which is provided by article 384, 385, 386 of the Criminal Code of Ukraine [1] according to their dispositions. It is worth paying attention to the easiest way to violate the legal procedure for obtaining testimony by a temporary commission of inquiry during the work of a temporary commission of inquiry - the refusal of a witness to testify without good reason, which qualifies under part 1 of article 385 of the Criminal Code of Ukraine [1]. This act is characterized by two signs - the action in the form of a witness refusing to testify without good reason and the time the act was committed - during the investigation of the temporary investigative commission. Also, such an act is characterized by the direct intent of the witness, who understands that he/she evades testifying, but does so for his/her own personal reasons. This tactic of obstructing the investigation of the interim Commission of Inquiry can be resorted to by high-ranking officials, on whose testimony the progress of the investigation depends. The above conclusions are confirmed by the practice of Temporary Investigative Commissions, which will be discussed below.

Violation of the procedure for obtaining reliable evidence in the practice of the temporary investigative commission

In 2020, an emergency situation developed on the territory of Ukraine in the Luhansk region in the form of two waves of large-scale fires that occurred in July and September-October 2020. In July 2020, 1,500 hectares of forest burned out in the Severodonetsk forestry, which is 4% of all forests in the Luhansk region, the State Forest Agency estimated the losses from the fire at 4-5 billion UAH. [11]. In September-October 2020, forest fires in the Severodonetsky district of the Luhansk region burned 12,000 hectares of forest [12], while the fire spread to settlements: the villages of Kapitanovo, Sirotino, the village of Voronovo almost completely burned down, more than 100 houses were destroyed by fire [12], 17 people died in the fire [13, p.9]. Luhansk region received 185 million UAH from the budget to help the victims alone, not counting other expenses for the liquidation of the natural disaster [12]. A natural disaster of this magnitude caused a wide public outcry and the VRU had to apply the mechanisms of parliamentary control to find out the reasons for the current situation.

In accordance with the Decree of the VRU No. 1047-IX dated December 2, 2020, a temporary investigative commission of the VRU

(hereinafter referred to as the commission) was created, consisting of 8 People's Deputies of Ukraine to investigate the causes of large-scale fires in 2020 in the Luhansk region and the actions / inaction of the Luhansk regional Department of the State Service of Ukraine for Emergency Situations and the Luhansk Regional State Administration - Luhansk Regional Civil-Military Administration regarding the timely regulation of the occurrence and prevention of occurrence of emergency incidents for a period of 6 months from the date of the commission's creation [14].

People's Deputy of Ukraine Gorbenko R.A. was elected as the head of the commission. In accordance with the Resolution of the VRU of December 2, 2020 No. 1047-IX the Commission was entrusted with the following tasks: 1) finding out the real reasons for the outbreak of mass fires in 2020 on the territory of the Luhansk region, controlled by the Ukrainian authorities; 2) studying the effectiveness of managerial decisions of the Luhansk Regional Department of the State Emergency Service of Ukraine and the Luhansk Regional State Administration - the Luhansk Regional Civil-Military Administration in organizing the process of localization and firefighting, evacuation of citizens; 3) investigation of the facts of abuses, actions/inaction of the leadership of the Luhansk Regional Department of the State Emergency Service of Ukraine, the leadership of the Luhansk Regional State Administration - the Luhansk Regional Military-Civilian Administration to implement precautionary measures after the fire in July 2020, which would make it impossible to spread to large territories of not only forests but also settlements; 4) establishing circumstances, collecting information and obtaining explanations from citizens, enterprises, institutions, organizations, central and local state authorities and local self-government and their officials involved in activities that are related to the subject of the commission's investigation; 5) initiating the issue of bringing the perpetrators to justice in accordance with the legislation of Ukraine [14].

During the period of the commission's work, 12 meetings were held, in particular 2 field meetings in the Luhansk region (in Severodonetsk on December 21, 2020 and in the settlement of Sirotino on March 11, 2021) [13, p. 7].

It is expected that the main method of collecting information for the commission was to obtain testimony from persons involved in the subject of the investigation, mainly officials. With this, the commission immediately began to have serious difficulties. On December 21, 2020, at an off-site meeting of the commission in the city of Severodonetsk, the head of the Luhansk Regional State Administration, the Luhansk Regional Military-Civilian Administration Gaidai S.V., who was invited to testify on the subject of the investigation, refused to answer the questions of the members of the commission and arbitrarily left the meeting, which was regarded by the commission as a failure to fulfill its legal requirements [13, p. 7]. It is obvious that the commission regarded the actions of Gaidai S.V. as a violation of the provisions of part 2 of article 19 of the Law of Ukraine "On temporary investigation commissions and special temporary commissions of the Verkhovna Rada of Ukraine" [5]. If we evaluate these actions from the point of view of criminal law, then there is a refusal of the witness to testify without good reason, since such reasons would have been noted by the commission in its report. The absence of evidence from Gaidai S.V. prevented the further work of the commission, and the commission made a second attempt to obtain evidence - on December 24, Gaidai S.V. was summoned by an agenda for

a meeting of the commission, which was held in Kyiv on December 30, 2020 from 13-00 to 15- 30. However, Gaidai S.V. did not come to the meeting, referring to the letter he received dated December 28, 2020 No. 5271 / 0 / -20 about holding meetings on December 29-30 in the government house under the leadership of the Vice Prime Minister of Ukraine Reznikov O.Y. At the same time, Gaidai S. V. did not propose to the commission to consider the possibility of his arrival at this meeting not at 13-00, as he was called, but at another time during the meeting. Therefore, at the meeting of the commission, it was unanimously decided to re-summon Gaidai S.V. to hear and receive written and oral evidence and explanations on issues within the competence of the commission and about his absence at the meeting of the commission on December 30, 2020 [13, p. 7]. Let us pay attention to the fact that the official reason for summoning Gaidai S.V. was the hearing and receipt of his written and oral testimony on issues within the competence of the commission, therefore, this decision confirmed that Gaidai S.V. had the status of a witness in the investigation of the commission. On January 15, 2021, Gaidai S.V. announced in a letter No. 01. 01-09-172 that he would take part in the meeting on January 28, 2021 at 16-00 via videoconference [13, p. 7]. Since, according to the law and in practice, commission meetings are never held via videoconference, from the point of view of Ukrainian criminal law, this is a refusal of a witness to testify without good reason. Only after the direct appeal of the commission to the Prime Minister of Ukraine regarding the behavior of Gaidai S.V., was Gaidai S.V.’s appearance ensured to attend the meeting of the commission on January 25, 2021 [13, p. 7]. Thus, there is an obstacle to the work of the commission in the form of the repeated refusal of the witness to testify, which delayed the work of the commission for about a month and which the commission could not bypass by simply refusing to receive the testimony of the witness because of the importance of the testimony. It should be noted that from the point of view of Ukrainian Criminal Law, the refusal of a witness to testify without good reason is qualified as a criminal offense, which is provided for by part 1 of article 385 of the Criminal Code [1].

In the course of further investigation, the Commission found that in violation of the requirements of article 4 of the Law of Ukraine “On Military-Civil Administrations” [15] and article 71, 75, 76 of the Civil Defense Code of Ukraine [16] Head of the Luhansk Regional State Administration - Luhansk Regional Military-Civil Administration Gaidai S. V. in the periods from August 6, 2020 to July 14, 2020 and from September 30, 2020 to October 5, 2020 (i.e. at the immediate time of the disaster) did not appoint a disaster manager to establish a regional disaster management headquarters for emergency response [13, p. 9]. In accordance with Ukrainian legislation, due to his official status, Gaidai S.V. also holds the post of head of the regional commission for technological and environmental safety and emergency situations. The commission of inquiry found that, in violation of the norms of Ukrainian legislation, the head of the aforementioned regional commission did not ensure the organization of measures to eliminate the consequences of the emergency. In violation of the requirements of paragraphs 11, 12, 17, 22 of the Procedure for evacuation in case of a threat of occurrence or an emergency situation, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 841 dated October 30, 2013 [17], part 6 of article 33 of the Code of Civil Defense of Ukraine [16], the head of the Luhansk Regio-

nal State Administration - the Luhansk Regional Military-Civilian Administration Gaidai S. V. did not organize the evacuation of the population during an emergency. As a result, on September 30, 2020 in the town Sirotino and the village of Voronovo during the fire burned 11 people who could not evacuate on their own [13, page 9].

The commission's investigation could not have been successful without establishing the facts described above. These facts could not be established by the commission without obtaining evidence from Gaidai S.V., and their importance explains the reasons for the repeated refusal of witness S.V. Gaidai to testify.

The Provisional Commission of Inquiry, in its report on the investigation for the VRU, proposed to consider the resignation of Gaidai S. V. from the post of Head of the Luhansk Regional State Administration - Luhansk Regional Military and Civil Administration on the basis of paragraph 1. 1 article 9 of the Law of Ukraine "On Local Administrations" taking into account the features of paragraph 1.4 article 6 Law of Ukraine "On Military-Civil Administrations" in connection with its violation of the laws of Ukraine [13, p. 11]. Since the Provisional Commission of Inquiry does not have the power to establish whether or not there is a criminal offence, it requested the Head of the Commission of Inquiry to send the report of the Interim Commission of Inquiry to the Office of the Attorney General, The SBU, the National Police, the State Bureau of Investigation to verify the information contained therein and to respond to violations of the law [13, p. 11]. After processing the report of the Interim Investigation Commission, the VRU adopted Resolution 1529-IX of June 3, 2021 [18], in which it supported the above-mentioned proposals of the Commission. Currently, Ukrainian law enforcement agencies are engaged in a pre-trial investigation of the activities of Gaidai S. V. during emergencies in July and September-October 2020.

Conclusions

Due to the incomplete pre-trial investigation, the author does not make a final determination as to the qualification of Gaidai S. V. However, the example of the investigation of the Provisional Commission of Inquiry described above demonstrates the importance of respecting the legal procedure for obtaining testimony during the work of the Interim Commission of Inquiry, as well as the difficulty for the Provisional Commission of Inquiry to overcome such artificial obstacles to its investigation. This is partly due to the high-ranking status of the persons speaking as witnesses, their deep knowledge of the procedure for conducting an investigation, a brief, limited resolution of the VRU on the establishment of a temporary commission of inquiry for the duration of the investigation by this commission. If the "dangerous" time of the work of the temporary investigative commission is kept "silent", then this will allow avoiding responsibility for miscalculations and violations of laws in their official activities. From the point of view of international institutions of parliamentarism, such behavior of a witness is unequivocally assessed as disrespect for the parliament and should be punished not just as an obstacle to the investigation, but as a demonstration of disrespect for the legislature of their country. Therefore, in the event that a witness or an expert or translator commits what is described in the disposition of article 385 of the Criminal Code of Ukraine [1] of a criminal act during the investigation of the temporary investigative commission, this act should be considered directed against the authority

of the state power of Ukraine. Therefore, it would be logical to toughen the punishment for this act. Since the disposition of part 1 of article 385 of the Criminal Code of Ukraine [1] does not separately single out the criminal act of a witness, expert, translator during the investigation of the temporary investigative commission and it will be necessary to create a new part of this article of the Criminal Code of Ukraine in order to save time and effort when creating a new edition of Article 385 of the Criminal Code of Ukraine [1], we propose to supplement the sanction of Part 1 of Art. 385 of the Criminal Code of Ukraine [1] with a new alternative type of punishment that will be applied in the event of a criminal act committed by a witness, expert, translator during the investigation of the temporary commission of inquiry, as the most severe version of this act. According to the sanction of Part 1 of Art. 385 of the Criminal Code of Ukraine, all described in the disposition of Part 1 of Art. 385 of the Criminal Code of Ukraine, criminal acts are punishable by a fine of 50 to 300 non-taxable minimum incomes of citizens or arrest for up to 6 months [1]. When tightening the sanction, a more severe type of punishment should be chosen than arrest, and in accordance with Art. 50 of the Criminal Code of Ukraine [1] such type of punishment, which is next in severity after arrest, is restriction of freedom.

The proposed wording of the sanction, Part 1, Art. 385 of the Criminal Code of Ukraine [1] will be as follows: “punishable by a fine of 50 to 300 non-taxable minimum incomes of citizens or arrest for up to 6 months or restriction of liberty for 1 year.”

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USE OF SPECIAL KNOWLEDGE IN THE PROCEDURE OF CRIMINAL CASES

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In the process of examining the case at the trial stage, the judge, in some cases, requests that methodical research be carried out with the application of special knowledge in order to clarify circumstances that are important for the fair settlement of the case. The disposition and performance of the judicial expertise in the trial phase takes place under the conditions of observing the principle of orality, directness, publicity and adversariality. These principles, which underlie the trial of the case, differentiate the procedure for disposing of judicial expertise in the trial phase from the procedure for disposing of expertise in the criminal investigation phase. In essence, the judicial function consists in administering the evidence, the evaluation of the evidence administered in order to pronounce a decision on the merits of the criminal accusation made by the prosecutor against the defendant, as well as the pronouncing of a court decision resolving the criminal law conflict being guaranteed. to the parties and to the procedural subjects the fullness of the rights provided by art. 6 European Convention on Human Rights. In the process of examining the case in the trial phase, the judge in some cases at the request of the parties requests a methodical investigation with the application of special knowledge in order to clarify some circumstances that are important for the fair settlement of the case.

Keywords: *judicial expertise, judicial expert, disposition, conclusion, request of the parties, judicial investigation, court.*

UTILIZAREA CUNOȘTINȚELOR SPECIALE ÎN PROCESUL DE JUDECARE A CAUZELOR PENALE

Probatoriul penal reprezintă totalitatea acțiunilor întreprinse de organele competente ale statului în vederea stabilirii circumstanțelor cauzei. În procesul examinării cauzei în faza de judecată, judecătorul, în unele cazuri, solicită efectuarea unor cercetări metodice cu aplicarea cunoștințelor speciale în scopul clarificării unor circumstanțe care au importanță pentru soluționarea justă a cauzei. Dispunerea și efectuarea expertizei judiciare în faza de judecată are loc în condițiile respectării principiului oralității, nemijlocirii, publicității și contradictorialității. Aceste principii care stau la baza judecării cauzei, diferențiază procedura de dispunere expertizei judiciare în faza de judecată de procedura dispunerii expertizei în faza de urmărire penală. În esenţă, funcţia de judecată constă în administrarea probatoriului, evaluarea probatoriului administrat în vederea pronunţării unei hotărâri cu privire la temeinicia acuzaţiei penale formulate de procuror împotriva inculpatului, precum şi pronunţarea unei hotărâri judecătoreşti prin care să fie rezolvat conflictul de drept penal dedus judecăţii fiind garantate părţilor şi subiecţilor procesuali plenitudinea drepturilor prevăzute de art. 6 a Convenţiei europene a Drepturilor Omului.

Cuvinte-cheie*: expertiză judiciară, expert judiciar, dispunere, încheiere, cererea părților, cercetare judecătorească, instanță de judecată.*

UTILISATION DE CONNAISSANCES SPÉCIALES DANS LA PROCÉDURE DES AFFAIRES PÉNALES

Dans le processus d'examen de l'affaire au stade du procès, le juge demande, dans certains cas, que des recherches méthodiques soient effectuées avec l'application de connaissances spéciales afin de clarifier les circonstances importantes pour le règlement équitable de l'affaire. La disposition et l'exécution de l'expertise judiciaire en phase de jugement s'effectuent dans les conditions du respect du principe d'oralité, de franchise, de publicité et de contradictoire. Ces principes, qui sous-tendent le jugement de l'affaire, différencient la procédure de disposition d'expertise judiciaire en phase de jugement de la procédure de disposition d'expertise en phase d'instruction pénale. En substance, la fonction judiciaire consiste à administrer les preuves, à évaluer les preuves administrées en vue de prononcer une décision sur le bien-fondé de l'accusation pénale portée par le procureur contre le prévenu, ainsi que le prononcé d'une décision de justice résolvant le conflit de droit pénal étant garanti aux parties et aux sujets de procédure la plénitude des droits prévus par l'art. 6 Convention européenne des droits de l'homme. Lors de l'examen de l'affaire au stade du procès, le juge dans certains cas, à la demande des parties, demande une enquête méthodique avec l'application de connaissances spéciales afin de clarifier certaines circonstances importantes pour le règlement équitable de l'affaire.

Mots-clés: *expertise judiciaire, expert judiciaire, décision, conclusion, demande des parties, instruction judiciaire, tribunal.*

ИСПОЛЬЗОВАНИЕ СПЕЦИАЛЬНЫХ ЗНАНИЙ ПРИ РАССМОТРЕНИИ УГОЛОВНЫХ ДЕЛ

Доказательства представляют собой совокупность действий, предпринятых компетентными государственными органами для установления обстоятельств уголовного дела. В процессе рассмотрения дела на стадии судебного разбирательства, судья в некоторых случаях просит провести методическое исследование с применением специальных знаний для выяснения обстоятельств, важных для справедливого и объективного разрешения дела. Размещение и проведение судебной экспертизы на этапе судебного разбирательства происходит при соблюдении принципа устности, прямоты, гласности и состязательности. Эти принципы, лежащие в основе судебного разбирательства по делу, отличают процедуру предоставления судебной экспертизы на этапе судебного разбирательства от процедуры предоставления экспертной информации на этапе уголовного расследования. По сути, функции судебных инстанций заключаются в использовании доказательств, оценке представленных доказательств для вынесения решения по существу уголовного обвинения, выдвинутого прокурором против подсудимого, а также в вынесении судебного решения, разрешающего Уголовно-правовой конфликт, гарантируя сторонам и процессуальным субъектам полноту прав, предусмотренных ст. 6 Европейской Конвенции о Правах Человека.

Ключевые слова*: судебная экспертиза, судебный эксперт, диспозиция, заключение, ходатайство сторон, судебное следствие, суд.*

Introduction

Solving certain circumstances is not possible without the application of special knowledge in various fields, which can be obtained and applied through special training and professional experience, being used for the purpose of researching facts, circumstances, objects, phenomena, etc., which can serve as evidence. in criminal proceedings.

The criminal evidence represents the totality of the actions undertaken by the competent state bodies in order to establish the circumstances of the case. Judicial expertise, within the criminal evidence, is an evidentiary procedure in which the forensic expert conducts research and formulates conclusions regarding certain circumstances, facts, objects, etc. The results of this activity are materialized by the forensic expert in a forensic report, which is a means of proof in criminal proceedings.

Materials and methods applied

A number of research methods have been applied in this paper, including: the logical method (based on inductive and deductive analysis, interpretation of legal norms governing forensic activity, etc.), the comparative method, the systemic method (applicable for the purpose of investigating documents national and international legal rules containing regulations on the institution of judicial expertise in criminal proceedings), the empirical method (in the process of drafting the paper by the author was examined the practice of the ECtHR, the Constitutional Court, the Criminal College of the CSJ and criminal cases were consulted).

Main research ideas

The special importance of the trial phase in the conduct of the criminal trial was noted by several specialized authors who, unequivocally, acknowledged to the court the central role it plays in the conduct of criminal justice. This does not undermine the importance of criminal prosecution, but emphasizes that resolving the conflict of criminal law arising from the commission of a criminal act, establishing the guilt or innocence of the person brought to justice remains the exclusive prerogative of the court [8, p. 641].

During the trial, the court verifies the legality and validity of the criminal accusation formulated by the prosecutor, as well as of the civil claim formulated by the civil party, adopting a decision by which the criminal and civil side of the case is solved; the court's decision may be subject to judicial review by the public prosecutor, the injured party or the parties [18, p. 236].

The disposition and performance of the judicial expertise in the trial phase takes place under the conditions of respecting the principle of orality, directness, publicity and adversariality. These principles, which underlie the trial of the case, differentiate the procedure for disposing of judicial expertise in the trial phase from the procedure for disposing of expertise in the criminal investigation phase.

Matters concerning the disposition of the forensic examination or the hearing of the forensic expert are examined and resolved in order to ensure an objective examination of the circumstances of the case, the complete and detailed investigation of the forensic report, the observance of the legal provisions, as well as the correct and objective assessment of the forensic report in conjunction with the other means of proof.

The purpose of this evidentiary procedure in the trial phase is to resolve by the expert some ambiguities found by the judge, the solution of which requires the application of special knowledge in various fields of science, art, technology or craft, which arose in the examination of the criminal case.

The legislator gives the parties the opportunity to submit requests for the hearing of the judicial expert or the ordering of judicial expertise, at the preliminary hearing, but from a tactical point of view we consider it appropriate to submit requests for the hearing of the judicial expert or the ordering of judicial expertise in the course of the judicial investigation.

On the one hand, non-giving of decisions to administer evidence could potentially affect the fairness of the process, and on the other hand the arbitrary admission of such requests could affect the reasonable timeframe of the process. This balance must be ensured not only in the case of first instance but also in the case of the appellate court.

The Constitutional Court notes that the appellate court, although not obliged to order the readministration of evidence or the administration of new ones, is nevertheless obliged to give a reasoned opinion on such requests. Therefore, the refusal to administer new evi-

dence requested by the parties must be sufficiently substantiated [15].

The CSJ agreed with the position of the lower hierarchical courts when it rejected the request for an additional hearing of an expert, which had previously already been heard in the same process. *The additional hearing of the expert Cozlovschi Gh., was also rejected by the appeal and ordinary appeal court, since he was heard in the appeal court following the order of the Supreme Court to rejudge the case, it confirmed the conclusions set out in the self-technical expert report carried out on a case-by-case basis* [6].

The CSJ criticized the decision of the Court of Appeal because, ... *it did not resolve in anyway the appeal on the conclusion of the court of first instance of December 21, 2016 (f.d. 98 v. 6), which ruled: "the request of Donos T. is rejected regarding the disposition of a complex psychiatric-psychological-medical expertise regarding the injured party Rusu V., as being unfounded", challenged by the defense in the declared appeals (points 3. - 4. of the decision)* [9].

In some cases, the experts heard deviate significantly from the opinion expressed in the expert report, although their hearing is done in order to elucidate the unclear aspects of the expert report. In such cases, the prosecuting authority or the courts must verify the reasons which led to discrepancies between those indicated in the expert report and the statements of the expert heard [13]. In order to admit or reject the request of the parties for the disposition of judicial expertise, it is necessary for the court to examine all admissible evidence, but in the preliminary hearing, the court cannot rule on the admissibility of certain evidence, the Constitutional Court notes that the examination of evidence in contradictory conditions is reserved for the stage of judicial investigation. At this stage, the parties may request, *inter alia*, the examination of the criminal bodies of the documents and the minutes of the proceedings. In this regard, if at the preliminary hearing stage, the court decides which of the evidence presented to the court to resolve the case is relevant, at the stage of the judicial investigation the judge must examine in substance each piece of evidence that he/she considered relevant [11].

Therefore, based on the decision of the Constitutional Court, the evidence presented by the parties is examined in the judicial investigation, and following the investigation which establishes the factual basis for the disposition of the judicial expertise, following which a request for the disposition of the judicial expertise is submitted, in the same way the court is able to examine the requests submitted by the parties regarding the disposition of the judicial expertise only after the examination of some evidence presented by the parties.

The legislator obliges the parties to the trial to provide the list of evidence which it intends to investigate in the course of the trial, including those which have not been examined in the context of criminal proceedings. The parties will thus indicate the list of evidence they intend to examine in the course of the judicial investigation: minutes of the hearing of the judicial expert, report of the judicial expertise, etc.

Failure to present the list of evidence will make it impossible to investigate the evidence in the judicial examination. However, if the party who invokes the fact of the discovery after the stage of filing the criminal case, there will be no impediment to examine the evidence given [12].

In the preparatory part of the hearing, the chairman of the hearing establishes the identity and competence of the judicial expert, explains his/her rights and obligations, and warns the judicial expert of the criminal liability he/she bears for intentionally making false statements. In accordance with article 363

Criminal Procedure Code, the president of the court hearing establishes only the identity and competence of the judicial expert, but in the preparatory part of the court hearing the president of the court hearing will explain the right of recusal of the judicial expert, but to exercise this right it is necessary to be informed other information regarding the activity of the expert.

In this regard, we support the position of the author A.I. Paliasvili who states that it is not enough for the parties to be informed only of the identity and competence of the forensic expert, but also the information about his/her work (*the case of Sara Lind Eggertsdottir v. Iceland* [2]), his/her function, special degree, scientific title, studies, etc. [19, p. 73].

In the case of Mirilashvili vs. The Russian Federation, the European Court of Human Rights found that during the criminal investigation phase it was ordered to carry out the forensic examination in the phonoscope commission. The group, consisting of three forensic experts, was provided with samples of the applicant's voice in Russian. The experts searched the audio recordings, in which discussions were recorded in Georgian. Two of the three experts included in the committee who did not speak Georgian found that the applicant's voice belonged to the applicant, and the Georgian-speaking forensic expert included in the committee of experts concluded that the voice did not belong to the applicant.

In order to contradict the conclusions of the forensic report indicating that the voice belonged to the applicant, the defense requested the court to summon the citizens Rosinskaia E. R. and Galeasina E. I as specialists, on January 29, 2003, these persons were heard and stated that the methods by which it had been established that the applicant's voice belonged to the applicant were uncertain and that their conclusions were uncertain. Rosinskaia E. R. and Galeasina E. I., presented their conclusions to the court [1], the presented conclusions contributed to the disposition of a repeated expertise on this case.

We contend that the court was required to inform the parties that two of the three judicial experts included in the panel of experts did not know the language in which the person was identified.

Likewise, we maintain the opinion that when explaining to the expert his/her rights and obligations, the reason for the summons must be explained to him/her as well as at the initiative of which the judicial expert was summoned.

The local legislator did not regulate the procedure for removing or releasing the judicial expert from the courtroom, but, from a practical point of view, a legal regulation of releasing or removing the expert from the courtroom would contribute to a good conduct of the trial.

On this question the authors M.A. Celitov and N.V. Celitova, according to which in the preparatory part of the court hearing, the president of the court hearing will solve the question regarding the removal of the judicial expert from the courtroom until he/she is heard [20, p. 207].

Therefore, we support the view that the judicial expert may be released from the courtroom at the request of the parties or on his/her own initiative. In both cases, the court will examine the arguments of the participants in the trial and will make a reasoned decision as to when the judicial expert will be released or removed from the courtroom.

The effectiveness of the judicial expertise ordered in the trial phase is directly proportional to the ability of the president of the court hearing to perceive not only the purpose of this evidentiary procedure, but also to understand the specificity of this means of proof, compared to other means of evidence examined in the investigation courts.

In the course of the investigation, the court will investigate all the evidence presented by the parties to the trial. However, due to its passive role, the court is not ex officio entitled to order the performance of the forensic examination, or to comment in advance on the admissibility of the forensic report carried out in the criminal investigation phase.

In this regard, we will refer to the conclusion issued by the Chisinau Court, based in Buiucani district, regarding the request for recusal of the judge who, after withdrawing to the deliberation chamber in order to pronounce the sentence, resumed the judicial investigation, exposing himself to the violation of the disposition procedure of the judicial expertise, which was ordered and carried out until the beginning of the criminal investigation. In this case, the judge questioned ex officio the opportunity to perform the repeated expertise on the grounds of procedural defects that affected the primary expertise report, commenting in advance on the admissibility of this evidence, calling it devoid of probative value [14].

In the course of the judicial investigation, each party to the proceedings is entitled to submit the request to require the performance of the forensic examination. Such a request shall be made in writing, indicating the facts and circumstances subject to the finding and the objects, materials to be investigated by the expert [4].

Requests will be substantiated, and if new evidence is requested, the facts and circumstances to be proved will be indicated, the means by which such evidence may be administered, the location of such evidence, and the identity of the experts will be indicated and their address if the party cannot ensure their presence in court [4].

Requests shall be resolved by the court after hearing the views of the other parties to the proceedings on the application.

In *the Mantovanelli judgment against France (Hot.18.03.1997)* CtEDO reiterated that respect for the right to a fair trial presupposes the right of the parties to be able to express their views before the expert report was drawn up, since the mere possibility granted to discuss the conclusions of the expert study was not sufficient to meet the requirements of Article 6 ECHR [3]. In the trial phase, no procedural act can be performed except with the approval and control of the court. This provision is applicable to any means of proof whose administration has been previously admitted by the instant [8, p. 686].

The author Igor Dolea reiterates that when examining the case on the merits or on appeal, the court may order the performance of the expertise, if, following a request or application of the parties, it will be found that certain circumstances have not been established in criminal proceedings and without finding them, it is impossible to solve the case in a fair manner [12, p. 1015].

Therefore, if there are any circumstances in the trial of the case, the settlement of which requires the application of special knowledge, each party to the trial, both the prosecution and the defense will file a request for the disposition of the forensic examination. The request for the performance of the forensic examination shall be made in writing, indicating the facts and circumstances subject to the finding and the objects, materials to be investigated by the expert [4].

Following the submission of the request for the disposition of the judicial expertise, the judge listens to the opinion of the parties regarding the need to carry out the judicial expertise. The opposing party shall be required to be aware of the request for the ordering and conduct of the forensic examination, and shall state its merits.

When ordering the forensic examination, it is important to pay attention to how the expert

will answer the questions. One of the main causes of reaching erroneous or scientifically unfounded conclusions is the superficiality in setting the objectives of the expertise, not to mention the situations in which these objectives are left to the discretion of the expert [17, p. 116].

In order to resolve any requests submitted by the parties in the trial, the judge or, as the case may be, the full court shall deliberate on the spot, without withdrawing to the deliberation chamber. However, following the consultation of the parties, regarding the request for the disposition and performance of the judicial expertise, the judge, as the case may be, the full court, as the case may be, will withdraw for deliberation.

The need to withdraw to the deliberation chamber results from the need to establish the factual grounds for disposing of the forensic examination as well as to exclude the intention of the party requesting the forensic examination to delay the trial.

Our legislator has provided for these procedural documents to be issued as separate documents, issued only after the formation of the Court has been withdrawn in the Chamber of the council and attached to the minutes of the hearing. Based on the provisions of Article 144 (1) CPP RM (on the disposition of expert opinions by the court), we understand that the express and exhaustive termination provided for in Article 342 (2) the Code of Criminal Procedure of the Republic of Moldova must be justified, and a statement of the factual and legal reasons for the suitability of specialist knowledge in the proper resolution of the case without deliberation is practically difficult.

Beyond the difference established by the legislator between the separate conclusions and the conclusions that are included in the minutes of the hearing, the Court notes that Article 20 of the Constitution establishes a basic requirement for respecting the guarantees of the right to a fair trial - that of justifying any judicial act resolving the issues that arose during the trial of the case [7].

The author Mihail Udroiu, mentions that the deliberation is the activity carried out by the court panel in order to establish the solution to be pronounced in the criminal case; a deliberative activity also takes place when the court rules on various requests made by the prosecutor, the injured person or the parties (for example, the deliberation on the evidence requested to be administered in the judicial investigation) [18, p. 278].

Professor Igor Dolea reiterates that during the deliberation the probative material and other procedural material are verified and evaluated in order to assess it and determine the next solution. The deliberation procedure is not public, as is natural, in order to ensure the independence of judges in the materialization of their own conviction on the examined case [12, p. 944].

The deliberation must take place in the council chamber, where access to other persons is prohibited. In the event that the criminal case has been tried by a panel, the deliberation takes place under the chairmanship of the president of the court hearing [12, p. 944].

Following the deliberation, the court will comment on the requests submitted by the parties by a decision.

The author Igor Dolea classifies the conclusions issued by the courts into two categories: the conclusions issued as a separate document and the conclusions included in the minutes of the court hearing [12, p. 946].

Following the deliberation, the judge or the president of the panel will announce if the request is admitted or rejected. Regardless of whether it was admitted or rejected, the judge will argue the decision. In case of admitting the request, the judge, after informing the parties, will send the conclusion of the disposition of the expertise and the objects to be sub-

mitted to the investigation to the institution of expertise.

The Constitutional Court of the Republic of Moldova commented on the reasoning of the court decisions. The Constitutional Court noted in paragraph 15 that beyond the difference established by the legislature between the separate conclusions and the conclusions included in the minutes of the hearing, the Court notes that Article 20 of the Constitution [5] establishes a basic requirement for compliance, guarantees of the right to a fair trial - the one regarding the motivation of any judicial act by which the issues arising during the trial of the case are resolved [10]. Therefore, the provisions of Article 20 of the Constitution do not release them from the obligation to present sufficient reasons in case of rejection of the request for conducting the forensic examination.

The time and place when the forensic report will be made public and in what order it will be read in conjunction with the other means of proof is determined by the court. The forensic report shall be made public to the parties, which may be read in whole or in part.

As a rule, the court reads only the conclusions of the expert report, but the parties to the trial may request the court to acquaint the other parties with the expert report.

In this context, we mention that the European Convention on Human Rights in art. 6 par. 3 let. b, provides for the possibility of a person having sufficient time to become acquainted with evidence in order to ensure his/her defense.

Therefore, the request of the parties to provide the necessary time to get acquainted with the report of judicial expertise is a binding one for the court. Regarding the right to get acquainted with the materials of the case, the author M. Poalelungi, I. Dolea, C. Gurschi, T. Vizdoaga and others were exposed, who reiterated that this right of the accused is presented as a counterbalance regarding the prerogatives of the investigative bodies empowered in organizing the investigation and conducting criminal proceedings. The right to dispose of the time and facilities necessary for the defense is aimed at gathering the multitude of evidence, which would allow the organization of a defense, as far as possible in the circumstances of the case, effective and efficient in order to challenge the accusation.

The provisions of art. 142 (2) The Code of Criminal Procedure of The Republic of Moldova grants the right of the parties, on their own initiative and on their own account, are entitled, through the criminal investigation body, the prosecutor or the court, to submit to the public institution of judicial expertise / office of judicial expertise conducting forensic examination to ascertain the circumstances which, in their opinion, may be used in the defense of their interests.

These regulations are most often interpreted arbitrarily in judicial practice, or the national courts reject the requests based on law based on art. 142 (2) CCP, and the requests of the party do not reach the institution of judicial expertise. A solution that also requires the intervention of the legislature, would be to submit the application directly to the institution of expertise or to an independent expert, with the information of the court.

Conclusions

The disposition of the judicial expertise in the trial phase can take place only on the basis of the request of the parties. The court, in turn, examining the application and hearing the opinion of the other parties will issue a decision admitting or rejecting the application. Based on ECtHR practice, the conclusion is to be reasoned, even if the request of one of the parties has been rejected. The overall observance of the legal requirements regarding the disposition of the judicial expertise, will contribute essentially to the observance of the procedural guarantees of the parties to the trial.

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15. Mai mult, eventualul refuz al instanței de apel poate fi contestat odată cu fondul cauzei. Toate acestea au ca scop, pe de o parte, asigurarea dreptului la un proces echitabil, iar, pe de altă parte, soluționarea cu celeritate a cauzei, întrucât, în caz contrar, s-ar permite prelungirea nejustificată a soluționării acesteia printr-o cerere de readministrare/administrare a probelor, cu toate că dispunerea lor nu este pertinentă cauzei. Pct.50 Decizia Curții Constituționale a Republicii Moldova nr. 74 din 02.07.2020 de inadmisibilitate a sesizării nr. 1g/2020 privind excepția de neconstituționalitate a unor prevederi din articolele 251 alin. (2) ș alin. (4), 325 alin. (2), 413 alin. (3) ș 414 alin. (2) din Codul de procedură penală.

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PECULIARITIES IN EXAMINATION OF COMPLAINTS IN THE ORDER OF THE PROVISIONS OF THE ARTICLE 313 OF CRIMINAL PROCEDURE CODE

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Free access to justice is guaranteed at all procedural stages, namely the protection of human interests, rights and freedoms in criminal proceedings, including the observance by the judge of the person's right to examine the complaint about the actions and illegal acts of a criminal investigative body or of the body performing operative investigative activities in a fair manner. The complaint about the actions and illegal acts of a criminal investigative body or of the body performing operative investigative activities, is examined by the investigating judge, respectively the task of the investigating judge is to prohibit any alleged abuse of the criminal investigation bodies and of the bodies performing operative investigative activities, in which the legitimate rights and interests have been violated by these bodies, in case if the person disagrees with the result of an examination of his/her complaint by the prosecutor or did not get a response to his/her complaint from the prosecutor within the timeframe provided by law. In the same context, it should be mentioned that the regulations of art.313 CPC, aim to ensure free access to justice and the right of any person to a fair trial.

Keywords: *complaint, investigating judge, court, criminal investigative body, body performing operative investigative activities, constitutional rights and freedoms.*

PARTICULARITĂȚILE EXAMINĂRII PLÂNGERILOR ÎN ORDINEA ART. 313 AL CODULUI DE PROCEDURE PENALĂ

Accesul liber la justiție este garantat în toate fazele procedurale, respectiv apărarea intereselor, drepturilor și libertăților omului în cadrul procesului penal, presupune inclusiv și respectarea de către judecător a dreptului persoanei de a examina plângerea împotriva acţiunilor şi actelor ilegale ale organului de urmărire penală şi ale organelor care exercită activitate specială de investigaţii în mod echitabil. Plângerea împotriva acțiunilor și actelor ilegale ale organului de urmărire penală şi ale organelor care exercită activitate specială de investigaţii, se examinează de către judecătorul de instrucție, respectiv sarcina judecătorului de instrucție este de a interzice orice pretins abuz ale organelor de urmărire penală și organelor care exercită activitate specială de investigații, în care drepturile şi interesele legitime au fost încălcate de aceste organe, în cazul în care persoana nu este de acord cu rezultatul examinării plângerii sale de către procuror sau nu a primit răspuns la plângerea sa de la procuror în termenul prevăzut de lege. În aceiași ordine de idei, este de menționat, că reglementările art. 313 CPP, au drept scop de a asigura accesul liber la justiție și dreptul oricărei persoane la un proces echitabil.

Cuvinte-cheie: *plângere, judecător de instrucție, instanță de judecată, organ de urmărire penală, organ care exercită activitate specială de investigație, drepturi și libertăți constituționale*.

PARTICULARITÉS DE L'EXAMEN DES PLAINTES DANS L'ORDRE DE L'ART. 313 DU CODE DE PROCÉDURE PÉNALE

Le libre accès à la justice est garanti à tous les stades de la procédure, respectivement la défense des intérêts, des droits et des libertésde l'homme dans le cadre de la procédure pénale, suppose, y compris,

le respect par le juge du droit de la personne d’examiner la plainte contre les actions et les actes illégaux de l’organe de poursuite pénale et des organes exerçant une activité d’enquête spéciale de manière équitable. La plainte contre les actions et les actes illégaux de l’organe de poursuite pénale et des organes exerçant une activité spéciale d’enquête, est examinée par le juge d’instruction, respectivement la tâche du juge d’instruction est d’interdire tout abus allégué des organes de poursuite pénale et des organes exerçant une activité spéciale d’enquête, dans laquelle les droits et intérêts légitimes ont été violés par ces organes, si la personne n’est pas d’accord avec le résultat de l’examen de sa plainte par le procureur ou n’a pas reçu de réponse à sa plainte de la part du procureur dans les le délai prévu par la loi. Dans le même ordre d’idées, il convient de mentionner que le règlement de l’art.313 du CPC vise à garantir le libre accès à la justice et le droit de toute personne à un procès équitable.

***Mots-clés**: plainte, juge d’instruction, cour, organe de poursuite, organe exerçant l’activité spéciale d’enquête, droits et libertés constitutionnels*.

ОСОБЕННОСТИ РАССМОТРЕНИЯ ЖАЛОБ В ПОРЯДКЕ, ПРЕДУСМОТРЕННОМ СТАТЬЕЙ 313 УГОЛОВНО-ПРОЦЕССУАЛЬНОГО КОДЕКСА

Свободный доступ к правосудию гарантируется на всех этапах судопроизводства, а именно защита интересов, прав и свобод человека в ходе производства по уголовному делу, а также предполагает соблюдение судьей прав человека на объективное рассмотрение жалобы в отношении действий и незаконных актов органов уголовного преследования и органов, осуществляющих специальную розыскную деятельность на справедливой основе. Жалоба в отношении действий и незаконных актов органов уголовного преследования и органов, осуществляющих специальную розыскную деятельность рассматривается судьей по уголовному преследованию, соответственно, задача судьи заключается в том, чтобы запретить любые предполагаемые злоупотребления органами уголовного преследования и органами, осуществляющими специальную розыскную деятельность, в которых законные права и интересы были нарушены этими органами, в случае несогласия лица с результатами рассмотрения жалобы прокурором или неполучения от прокурора ответа на жалобу в предусмотренный законом срок. В этом же ключе, следует отметить, что положения статьи 313 УПК направлены на обеспечение свободного доступа к правосудию и права любого человека на справедливое судебное разбирательство.

***Ключевые слова**: жалоба, судья по уголовному преследованию, суд, орган уголовного преследования, орган осуществляющий специальную розыскную деятельность, конституционные права и свободы.*

Introduction

According to the provisions of article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) states that any person whose rights and freedoms recognized by this Convention have been violated has the right to an effective remedy by a national court, even then, when the infringement is due to persons who have acted in the exercise of their official duties [1].

Respectively, in this regard falls the examination by the investigating judge of the complaints against the illegal acts of the prosecutor, of the criminal investigation bodies and of the bodies exercising special investigative activity if the person does not agree with the result of the examination of his/her complaint by the prosecutor or has not received a response to his/her complaint from the prosecutor within the time limit provided by law.

Article 10 of the Universal Declaration of Human Rights of December 10, 1948 provides for: “Everyone has the right to equal treatment to be heard fairly and publicly by an independent and impartial tribunal, which will decide either on his/her rights and obligations or on the merits of any criminal charge brought against him/her” [2].

The topicality of this subject is justified by the fact that the investigating judge is responsible for prohibiting any alleged abuse of criminal prosecution bodies and bodies carrying

out special investigative activities, in which the rights and legitimate interests have been violated by these bodies, in case that the person does not agree with the result of the examination of his / her complaint by the prosecutor or did not receive an answer to his / her complaint from the prosecutor within the term provided by law.

General aspects regarding the examination of complaints in the provisions of art. 313 of Criminal Procedure Code

Article 6 of the Convention guarantees the right to a fair trial, the relevant party to whom it states that: "*Everyone has the right to a fair trial of his/her case, publicly… by a court … which will decide … on … the merits of any criminal charge directed against him/her"* [3] In the same order of ideas, it is to refer also to article 20 of the Constitution of the Republic of Moldova, according to which everyone has the right to effective satisfaction of the competent courts against acts infringing his or her legitimate rights, freedoms and interests [4].

According to the provisions of art. 313 paragraph (1) of the Code of Criminal Procedure, complaints against illegal actions and acts of the criminal investigation body and of the bodies exercising special investigative activity may be submitted to the investigating judge by the suspect, accused, defender, injured party, other participants in the trial or by other persons whose rights and legitimate interests have been violated by these bodies, if the person does not agree with the result of the examination of his/her complaint by the prosecutor or has not received a response to his/her complaint from the prosecutor within the term provided by law [5].

As a result, the provisions of paragraph 1 state that the holders have the right to lodge complaints against the illegal actions and acts of the criminal investigation body and of the bodies carrying out special investigative activity, the suspect, the accused, the defense counsel, the injured party, and other participants in the trial or by other persons whose rights and legitimate interests have been violated by these bodies.

In the light of the above, the provisions of paragraph (2) of the same article indicate that the following may be challenged before the investigating judge:

1) refusal of the criminal investigation body:

a) to receive the complaint or denunciation regarding the preparation or commission of the crime;

b) to satisfy the steps in the cases provided by law;

c) to initiate criminal proceedings;

d) to release the detained person for violating the provisions of art. 165 and 166 of this Code;

e) to release the detainee in violation of the period of detention or the period for which the arrest was authorized.

2) the orders regarding the cessation of the criminal investigation, the filing of the criminal case or the removal of the person from the criminal investigation;

3) other actions that affect the constitutional rights and freedoms of the person.

We must therefore draw attention to the fact that not every action of the criminal investigation body or of the body carrying out special investigative activity can be challenged before the investigating judge, but only that which has affected a legal right governed by substantive or procedural law, that is, *the constitutional rights and freedoms* of the person.

Art. 6 pt. 44) Code of Criminal Procedure, stipulates that the fundamental defect in the previous procedure, which affected the pronounced decision is the essential violation of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, by other international treaties, the Constitution of the Republic of Moldova and other national laws.

Moreover, in spite of these legal provisions, concrete circumstances, considered to be a fundamental defect, are to be invoked in the complaint to the investigating judge, with an indication of the legal rules which lay down the rights and freedoms claimed to be essentially infringed, the essence of those infringements in relation to procedural criminal rules and other national laws, international conventions and treaties, how and to what extent the alleged infringements would have affected the contested decisions, omitting the argument of the illegality of the contested decisions in this respect and the indication of concrete errors of law in the given chapter.

The complaint against illegal acts and acts of the prosecuting body and bodies exercising special investigative activity shall be submitted to the investigating judge provided that the prior appeal has been respected, that is to say, the fulfillment by the petitioner or applicant of the provisions laid down in Article 298, 299[1] Code of Criminal Procedure.

On the basis of the above, we would like to mention that if the petitioner has filed a complaint against the acts and illegal acts of the prosecuting body and the bodies exercising special investigation activity directly to the investigating judge without having complied with the prior appeal procedure, to this end, a termination shall be issued stating that the complaint lodged, with an explanation of the order of appeal of the document or proceedings, is inadmissible, in the manner provided for in article 298-299[2] Code of Criminal Procedure.

It should be noted that in examining these complaints, the prosecutor is the one who is obliged to present the relevant materials in court, i.e., the burden of proof is on the prosecutor. But taking into account the principle of adversarial proceedings and equality of arms in the process, both parties are on an equal footing and are entitled to argue their position, to present evidence that would confirm or refute what is disputed. It is pertinent to note that all the evidence relied on by the parties is to be assessed by the investigating judge and from the point of view of the source of such evidence, in order to be based on a decision on the complaint.

During the examination of the complaint, the investigating judge must not exceed certain limits. The investigating judge is not entitled to assume the obligations of the criminal investigation body, only to rule on the arguments invoked in the complaint, having the obligation to find and remove violations of the rights and legitimate interests of persons with the obligation of the criminal investigation body to liquidate detected violations that have affected fundamental rights. Last but not least, the investigating judge should not comment on the evidence administered, which would confirm or not the guilt of the persons concerned in the criminal case.

At the same time, the investigating judge must not rule in advance on issues that may subsequently be the subject of a judicial investigation in the trial on the merits (point 5.10 of the Decision of the Plenum of the Supreme Court of Justice No. 7 of July 4, 2005) [6, p. 14].

As a result, it is pertinent to mention that on the examination of the complaints in the provision of article 313 Code of Criminal Procedure, the general conditions for judging a case on the merits are not extended, these categories of complaints are examined within certain limits.

The investigating judge is competent to verify the compliance of the procedural documents issued by the criminal investigation body and the prosecutor with the legal provisions and procedural norms and that they should not be adopted with fundamental violations that invalidate them.

At the same time, the investigating judge may not subrogate the role of the prosecutor or the court of first instance to assessing the evidence and the legal qualification of the person’s actions, assessing the degree of guilt or innocence of the perpetrator, lack or insufficiency

of evidence, this role belongs exclusively to the prosecutor in the criminal investigation or the court of first instance in the trial of the case, but it cannot be blamed on the investigating judge in the judicial procedure of the judicial control. Finally, the intended role of the investigating judge in examining the complaint in the provision of art. 313 Code of Criminal Procedure, is to verify whether or not the rights and legitimate interests of the person were violated as a result of the issuance of the decision by the criminal investigation body, if the person did not receive a response to the complaint or received an answer but was exceeded the term provided by law, if the rights and legitimate freedoms of the suspect, the accused, the defender, the injured party, other participants or persons interested in the criminal proceedings have been affected or restricted.

Paragraph (5) in Article 313 of the Code of Criminal Procedure stipulates that, the investigating judge, taking the complaint into account, shall adopt an end obliging the prosecutor to liquidate the detected infringements of the rights and freedoms of the human or legal person and, where appropriate, declare the act or procedural action under appeal null and void.

Finding that the contested acts or actions were carried out in accordance with the law and that the rights or freedoms of the person or legal person were not violated, the investigating judge ruled on the rejection of the complaint. The copy of the conclusion is sent to the person who filed the complaint and to the prosecutor.

In the light of the above, it should be pointed out that the court is not the criminal prosecution body, it should not be in favor or against the prosecutor or the petitioner, but it should only be in the interests of the law.

Thus, the investigating judge, after examining the complaint in collaboration with the arguments of the participants in the trial, of the evidence presented, will verify the legality and validity of the contested decisions, whether or not the constitutional rights were violated, given that the criminal prosecution body has the obligation to take all necessary steps to establish the objective truth in order to conduct an effective investigation.

Moreover, the ECtHR has stated that the authorities must always make a serious effort to find out what has happened and must not rely on hasty or unfounded conclusions to stop the investigation or put them in their decisions and take all necessary steps, reasonable and available by law to provide evidence of the incident.

Obviously, the investigating judge is to state all the arguments put forward in the complaint as a consequence of failing to comply with these matters, thereby affecting the person's right to access justice.

Finally, the court must find with certainty whether or not the solution adopted by the prosecutor in the case is contrary to the factual and legal situation, whether or not it has fully examined the circumstances of the case or not.

In other words, the legal purpose of any official investigation of the facts alleged on reasonable grounds to be prejudicial is to take measures, to exhaust all possible means of administering evidence to establish the circumstances of the case, and in the event that compliance is raised, a regulation aimed at protecting the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they require the organization of an effective judicial investigation system at the end of which there is no appearance of arbitrary assessment of the circumstances giving rise to the crime or investigation.

In view of the above, the court is to find out what circumstances constitute or not the violation of the right to a fair trial, guaranteed by art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which gives the right to a reasoned decision, the national courts being obliged to motivate

their solutions and conclusions, to provide answers to all questions that are relevant to the outcome of the process.

At the same time, the court, following the examination of the complaint, is to ascertain whether or not the criminal investigation body has fulfilled all possible procedural actions, in compliance with the rigors of art. 252 of the Code of Criminal Procedure, which states that *the purpose of the criminal investigation is to collect the necessary evidence regarding the existence of the crime, to identify the perpetrator, to determine whether or not it is appropriate to prosecute under the law and to establish its liability, and according to the provision of art. 254 (1) of the Code of Criminal Procedure, the criminal investigation body is obliged to take all the measures provided by law for the investigation in all aspects, complete and objective of the circumstances of the case to establish the truth.*

According to the provision of art. 19 (3) of the Code of Criminal Procedure*, the criminal investigation body has the obligation to take all measures provided by law for the investigation in all aspects, complete and objective, of the circumstances of the case, to highlight both the circumstances proving the guilt of the suspect, accused, defendant, as well as those who exonerate him/her, as well as the circumstances that mitigate or aggravate his/her liability.*

It should also be noted that the European Court of Human Rights has reiterated in its practice that the extent of the State's obligations regarding the thorough and resultant investigation of any act alleged to be criminal, depends on the nature of the petitioner's complaint.

The fulfillment of these obligations does not imply the right to initiate a criminal investigation against a third party or to be sentenced to criminal sanctions, nor any obligation of result which would imply that any criminal prosecution must end with a conviction. In particular, in the event of compliance with a regulation aimed at protecting the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, they require the organization of an effective judicial inquiry system at the end of which there is no appearance of appreciation, arbitrary of the circumstances that gave rise to the deed. The form of the investigation may vary depending on the circumstances without the need to initiate criminal proceedings in all cases.

Paragraph (6) of Article 313 of the Code of Criminal Procedure provides that the conclusion of the investigating judge shall be irrevocable, with the exception of the termination of the refusal to prosecute, the removal of the person from prosecution, the cessation of the prosecution, the classification of the criminal case and the resumption of the prosecution, which may be appealed to the court of appeal within 15 days of the date of delivery.

Moreover, the remedy against the conclusion of refusal to prosecute, removal of the person from prosecution, bringing the criminal proceedings to an end, classifying the criminal case and resumption of prosecution ensures not only the right to double degree of jurisdiction but also compliance with the provisions of Article 13 of the Convention, governing the right to effective redress. Respectively, the decisions of the investigating judge regarding the refusal to initiate criminal proceedings, the removal of the person from criminal prosecution, the cessation of criminal proceedings, the filing of the criminal case and the resumption of criminal proceedings are likely to be appealed to the court of appeal within 15 days from the date of pronouncement. In its turn, the court of appeal, being invested with the role of ensuring the judicial control of the contested decisions, will examine the appeal submitted in accordance with the provisions of art. 437-451 Code of Criminal Procedure.

However, with regard to this chapter, several problems of interpretation are provided.

Thus, according to recommendation No. 71 regarding the judgment of the appeal against the decisions adopted in the order provided by art. 313 of the Code of Criminal Procedure, mentions that according to the judicial practice adopted by the courts of appeal, in case there are sufficient grounds to admit the declared appeal, according to art. 449 (1) pt. 2) let. c) Code of Criminal Procedure, the courts order the annulment of the conclusion of the investigating judge, with the sending of the case for retrial in the court of first instance, because it is necessary to administer new evidence [7, p. 2].

In this regard, we should also draw attention to the fact that if the courts order the annulment of the conclusion of the investigating judge, with the referral of the case to the court of first instance, because it is necessary to administer new evidence, the reasonable time is violated, conducting the criminal investigation.

Or, para. (3) in art. 313 of the Code of Criminal Procedure, provides that the complaint is examined by the investigating judge within 10 days. As a result, the term of 10 days is a narrower term, namely aiming to comply with the provisions of art. 20 of the CPP. Consequently, the Supreme Court of Justice concludes that the ground provided by the legislator in art. 449 para. (1) pt. 2) let. c) Code of Criminal Procedure, namely, when the case is sent to a new retrial, because it is necessary to administer additional evidence, does not refer to the examination of the appeal against the conclusion of the investigative judge provided by art. 437 para. (1) point 31) Code of Criminal Procedure, but it is a solution regulated by the legislator for cases when the merits are judged, i.e., when challenging the sentence handed down by judges on minor offenses for which the law provides exclusively non-custodial sentences, sentences pronounced by the Supreme Court of Justice. (art. 437 para. (1) pt. 1), 3)) [8, p. 3].

By acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Republic of Moldova has undertaken to guarantee the protection of the rights and freedoms proclaimed by the Convention of all persons under its jurisdiction.

From the provisions of the Constitution of the Republic of Moldova (art. 4 paragraph 2), as well as from the decision of the Constitutional Court no. 55 of October 14, 1999 "Regarding the interpretation of some provisions of art. 4 of the Constitution of the Republic of Moldova, it follows that the Convention is an integral part of the domestic legal system and, respectively, is to be applied directly like any other law of the Republic of Moldova, except that the provisions of the Convention take precedence over other domestic laws. [9, p. 14].

Conclusions

In conclusion, we will mention that, according to the provisions of the criminal procedural legislation, the criminal process aims to protect the person, society and the state from crimes, as well as to protect the person and society from illegal acts of persons with positions of responsibility in their activity related to investigating alleged crimes, committed, so that any person who has committed a crime is punished according to his/her guilt and no innocent person is held criminally liable and convicted.

In this respect, the task of the investigating judge is to prohibit any alleged abuse of the prosecuting authorities and the bodies carrying out special investigative activities.

The purpose of examining the complaints in the order of art. 313 of the Code of Criminal Procedure, is for the court to find the circumstances that constitute the non-observance of the right to a fair trial, guaranteed by art. 6 of the Convention, moreover, according to the legal provisions and the judicial practice, the investigating judge in the process of criminal prosecution, examining the complaint

submitted according to the provisions of art. 313 of the Code of Criminal Procedure, is not entitled to assume the obligations of the criminal investigation body, only to rule on the arguments invoked in the complaint.

In conclusion, we draw attention to the fact that the rules of international and national law regulate and guarantee the right of every participant in the proceedings to participate in the examination of complaints against illegal acts of the prosecutor, of the criminal investigation bodies and special investigative bodies.

Respectively, the right of the person to examine complaints against illegal acts of the prosecutor, criminal prosecution bodies and special investigative bodies presupposes that the prosecutor, the petitioner and other persons interested in the trial are entitled to hear the material of the case, to present evidence which would confirm or refute the arguments put forward in the complaint. It is important to mention that the regulations of art. 313 of the Code of Criminal Procedure, aims to ensure free access to justice and the right of any person to a fair trial.

Last but not least, it is necessary to outline that the conduct of the criminal trial takes place by the criminal investigation body, and as a judicial body with its own attributions in the conduct of the criminal trial, the investigating judge, in the criminal investigation phase, is not entitled to assume the obligations of the criminal investigation body, having only to rule on all the arguments invoked in the complaint and, respectively, to verify whether the contested acts or actions were carried out in accordance with the law and whether the human or legal person’s rights or freedoms were not violated, by the criminal investigation body. The investigating judge shall not be entitled to prejudge on matters which may subsequently be the subject of judicial investigation in the proceedings as a matter of substance, nor shall the investigating judge require the prosecutor to take a decision or other decision in the outcome of the review or, where appropriate, to appreciate the evidence administered in a certain way, especially at the discretion of the petitioner or prosecutor, and thus to check only respect for human rights and freedoms when adopting the decision, i.e., to exclude any abuse by the prosecuting bodies and bodies exercising special investigative activity.

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IMPLEMENTATION OF INTERNATIONAL CYBER SECURITY STANDARDS IN THE NATIONAL LEGISLATION OF UKRAINE

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The article is dedicated to the study of the implementation of international norms in the field of cyber security in the national legislation of Ukraine. The information society creates the need to form a new type of intelligence capable of embracing the latest reality of information technology. Technological changes in the 21st century require a change in the unilateral technocratic paradigm. In this context, the topic of the study - the implementation of international standards in the field of cyber security - is relevant. The problems of cyber-attacks are urgent problems for every country in the world through the global digitization of information. These attacks are becoming more frequent. Cybercriminals do not stand still, creating more and more ways to attack and damage cyberspace, improving their viruses and malware. This is especially true for cyber-attacks on the Internet, the consequences of such attacks are unpredictable. Often these consequences are a malfunction of the cyberspace system (internet connection is lost). In the face of external aggression, Ukraine has clear intentions to join Euro-Atlantic and European structures. The multiple threats and dangers are aimed at destabilizing Ukraine. In various countries around the world, the fight against cyber terrorism is the functional responsibility of the intelligence unit and military forces, in order to carry out offensive and defensive actions on the Internet. Cybersecurity issues in the context of global threats lead to the emergence (creation) of new problem-solving mechanisms associated with the invasion of cyberspace on a global scale. The results of the research can be used to further conceptualize the definition of cybersecurity and its impact on Ukrainian law.

Keywords: *cyber security, digitization, cybercrime, cyber sphere, cyber defense, cyber-attack, Internet resource.*

IMPLEMENTAREA NORMELOR INTERNAȚIONALE DE SECURITATE CIBERNETICĂ ÎN LEGISLAȚIA NAȚIONALĂ A UCRAINEI

Articolul este dedicat analizei implementării normelor internaționale în domeniul securității cibernetice în legislația națională a Ucrainei. Societatea informațională creează necesitatea formării unui nou tip de inteligență capabilă să îmbrățișeze cea mai recentă realitate a tehnologiei informației. Schimbările tehnologice din secolul XXI necesită o schimbare a paradigmei tehnocratice unilaterale. În acest context, tema studiului, - implementarea normelor internaționale în domeniul securității cibernetice, - este relevantă. Problemele atacurilor cibernetice sunt actuale pentru fiecare țară din lume prin digitalizarea globală a informațiilor. Aceste atacuri devin din ce în ce mai frecvente. Infractorii cibernetici nu stau pe loc, creând din ce în ce mai multe modalități de a ataca și dăuna spațiul cibernetic, îmbunătățindu-și virușii și programele malware. Acest lucru este valabil mai ales pentru atacurile cibernetice pe Internet. Consecințele unor astfel de atacuri sunt imprevizibile. De cele mai multe ori, aceste consecințe reprezintă o defecțiune a sistemului cyberspațial (conexiunea cu Internetul este pierdută). În condițiile unei agresiuni externe, Ucraina are intenții clare de a se alătura structurilor euroatlantice și europene. Multiplele amenințări și pericole vizează destabilizarea Ucrainei. În diferite țări ale lumii, lupta împotriva terorismului cibernetic este responsabilitatea funcțională a unității de informații și a forțelor militare, cu scopul de a desfășura acțiuni ofensive și defensive pe Internet. Problemele de asigurare a securității cibernetice în contextul amenințărilor globale determină apariția (crearea) de noi mecanisme de soluționare a problemelor asociate cu invazia spațiului cibernetic la scară globală. Rezultatele cercetării pot fi utilizate pentru a conceptualiza în continuare definiția securității cibernetice și impactul acesteia asupra legislației ucrainene.

Cuvinte-cheie: *securitate cibernetică, digitalizare, criminalitate cibernetică, sferă cibernetică, apărare cibernetică, atac cibernetic, resursă Internet.*

MISE EN ŒUVRE DES NORMES INTERNATIONALES DE CYBERSÉCURITÉ DANS LA LÉGISLATION NATIONALE DE L’UKRAINE

L’article est consacré à l’étude de la mise en œuvre des normes internationales dans le domaine de la cybersécurité dans la législation nationale de l’Ukraine. La société de l’information crée le besoin de formation d’un nouveau type d’intelligence capable d’embrasser la dernière réalité des technologies de l’information. Le changement technologique au 21e siècle nécessite un changement de paradigme technocratique unilatéral. Dans ce contexte, le sujet de l’étude, - la mise en œuvre des normes internationales dans le domaine de la cybersécurité, - est pertinent. Les problèmes des cyberattaques sont des problèmes urgents pour tous les pays du monde grâce à la numérisation mondiale de l’information. Ces attaques sont de plus en plus fréquentes. Les cybercriminels ne s’arrêtent pas, créant de plus en plus de moyens d’attaquer et de nuire au cyberespace, améliorant ainsi leurs virus et logiciels malveillants. Cela est particulièrement vrai pour les cyberattaques sur Internet. les conséquences de telles attaques sont imprévisibles. Le plus souvent, ces conséquences sont un dysfonctionnement du système du cyberespace (la connexion à Internet est perdue). Dans des conditions d’agression extérieure, l’Ukraine a clairement l’intention de rejoindre les structures euro-atlantiques et européennes. De multiples menaces et dangers visent à déstabiliser l’Ukraine. Dans différents pays du monde, la lutte contre le cyber-terrorisme relève de la responsabilité fonctionnelle de l’Unité de renseignement et des forces militaires dans le but de mener des actions offensives et défensives sur Internet. Les problèmes de cybersécurité dans le contexte des menaces mondiales déterminent l’émergence (création) de nouveaux mécanismes pour résoudre les problèmes liés à l’invasion du cyberespace à l’échelle mondiale. Les résultats de la recherche peuvent être utilisés pour conceptualiser davantage la définition de la cybersécurité et son impact sur la législation ukrainienne.

Mots-clés: *cybersécurité, digitalisation, cybercriminalité, cyber sphère, cyber défense, cyber attaque, ressource Internet.*

ИМПЛЕМЕНТАЦИЯ МЕЖДУНАРОДНЫХ НОРМ В СФЕРЕ КИБЕРБЕЗОПАСНОСТИ В НАЦИОНАЛЬНОЕ ЗАКОНОДАТЕЛЬСТВО УКРАИНЫ

Статья посвящена исследованию имплементации международных норм в сфере кибербезопасности в национальное законодательство Украины. Информационное общество создает необходимость формирования нового типа интеллекта, способного охватить новейшую информационно-техническую действительность. Технологические сдвиги XXI века обуславливают необходимость смены односторонней технократической парадигмы. В этом контексте, тема исследования имплементации международных норм в сфере кибербезопасности актуальна. Проблемы кибератак и кибернападений – неотложные вопросы для каждой страны мира через глобальную цифровизацию информации. Количество подобных атак со временем увеличивается. Киберпреступники не стоят на месте, создавая все новые и новые способы совершения нападения и нанесения вреда киберпространству, совершенствуя свои вирусы и вредоносные ПО. Особенно это касается кибердаров по сети Интернет. Результаты таких нападений непредсказуемы. Чаще всего, последствиями нападений становится сбой в системе киберпространства (теряется связь с сетью Интернет). В условиях противостояния внешней агрессии, Украина имеет четкие намерения вступить в евроатлантические и европейские структуры. Количество и качество угроз и опасностей направлены на дестабилизацию Украины. В разных странах мира борьба с кибертерроризмом – функциональные обязанности подразделений информационно-военных сил, имеющих целью проведение наступательных и оборонительных действий в сети Интернет. Проблемы обеспечения кибербезопасности в контексте глобальных угроз обуславливают появление (создание) новых механизмов решения проблем глобального масштаба, связанных с вторжением в киберпространство. Результаты исследования могут быть использованы в дальнейшей концептуализации определения кибербезопасности и ее влияния на законодательство Украины.

Ключевые слова: *кибербезопасность, цифровизация, киберпреступления, киберсфера, кибербезопасность, кибератака, Интернет-ресурс.*

Introduction

The legislation of Ukraine in the field of cybersecurity is developing, first of all, through the European integration aspirations of Ukraine, the development of legal regulation of e-commerce within the WTO.

Technological progress does not stand still, so cyberspace is now a new and no less important territory, for leadership in which states around the world are trying to take measures to ensure their own interests, national benefits. At the same time, cyberspace attracts international terrorist groups, transnational organized criminals who want to benefit from stealing information and interfering with the functioning of national systems.

Unfortunately, there is a narrow list of international legal acts that could regulate the relations of subjects of international law in cyberspace.

The principles of cooperation between states within the framework of cyberspace were laid down in 1998 by the Resolution of the UN General Assembly UNGA 53/70. The rapid development of technologies that can be applied in the civil and military fields, allows them to be used for incompatible processes between different countries. It should be noted that now it is necessary to take more and more effective modern measures for safe and stable work in the digital space. Only such a policy on the part of different countries of the world can have a positive impact on the sustainable development of the economy.

The UNGA resolution helps member states to cooperate in considering possible threats to information security, hacker threats. It defines the main concepts that affect the sphere of information security. Each country, in order to increase the level of cybersecurity at

the global level, should inform the Secretary General of the advisability of developing and implementing international principles. Such measures will contribute to the fight against information terrorism and crime [12]. Such actions entail a trend towards the annual presentation of proposals from different states, the preparation by the General Assembly of resolutions on the achievements of digitalization, the telecommunications sector, taking into account international security trends.

The UN General Assembly during 2000-2001 prepared two Resolutions numbered 55/63 and 56/121. They directly relate to the issues of combating the criminal use of information technology. These Resolutions allow states to exchange information, resources of professionals capable of implementing norms that affect the effective fight against the criminal use of information technologies. They help to achieve cooperation on equal terms between the investigating authorities of different states [13].

Resolution 57/239 of 2003 “Creating a global culture of cybersecurity” the UN General Assembly notes the importance of using modern digitalization opportunities (information telecommunication systems) for social development in different countries. It emphasizes that national governments, business activities, the functioning of public organizations and individual users of the Internet must have a clear understanding of the possible risks. Awareness of possible cybercrimes and hacker attacks allows you to take all measures that increase the overall level of electronic information security. Therefore, the Assembly proposes elements that would influence the creation of a global culture of cybersecurity [14].

Research methodology. The article used a comparative historical method, as well as methods developed within the framework of legal phenomenology and hermeneutics. The basic method was a comprehensive systematic approach to the analysis of the problems of the internal legislation of Ukraine. Descriptive, logical, systematic, historical methods are used as the most suitable for studying the problem in time and its connection with related scientific and practical issues.

Review of scientific literature in the direction of research. The theoretical basis of the article was the works of G.M. Danilenko, G.V. Ignatenko, I.I. Lukashuka, S.Yu. Marochkina, T.N. Neshataeva, A.N. Talalaeva, O.I. Tiunova, G.I. Tunkina, E.T. Usenko and other lawyers, who analyze the implementation of international norms in the field of cybersecurity in the national legislation of Ukraine. When studying this problem, the works of such foreign scientists as Martijn van Empel, Marianne de Jong, Sean Murphy, Frederic Kirgis, César Landa, Julio Ramón Garcia Vilchez, Adam Banaszkiewicz and others were used.

Main ideas of the research

The Council of Europe has adopted the main instrument for ensuring cybersecurity - the 2001 Cybercrime Convention, which has been ratified by 49 countries of the world. This document is also known as the Budapest Convention on Cybercrime [13]. In Ukraine, it entered into force on July 1, 2006 [108]. This international treaty guides the public (Internet users) and the international community to protect themselves in the field of cybercrime.

This document defines a list of terms related to cybercrime, questions of actions that are violations of digital technologies. The Cybercrime Convention defines the procedural aspects that force countries that have ratified the document to take on the following obligations:

– creation of domestic legislation, the purpose of which is to strengthen the procedures contained in the Treaty (search for information, capture and interception of data in electronic form);

– cooperation by providing mutual assistance, even without special agreements (on extradition, access to computer data, etc.);

– investigation and prosecution of cybercrime committed in the territory of a ratifying State.

The Convention has an additional protocol that appeared in 2003. In Ukraine, it entered into force on April 1, 2007. It contains a list of extended cybercrimes: distribution of racist material or xenophobic views on the Internet, threats and insults of xenophobic and racist motives distributed through a computer network [8]. The first document among the EU countries regulating cyberspace is Directive 95/46, adopted by the European Parliament and Council on October 24, 1995. The Directive points out the importance of protecting individuals from criminal theft and processing of personal data, on the free movement of personal information. Member States, based on the Directive, must take measures to protect the fundamental rights and freedoms of individuals (their right to privacy, the processing of personal data) [6].

The European Parliament and the European Union are trying to ensure the maximum level of cybersecurity in the territories of EU member states. For this purpose, the European Agency for Network and Information Security was established in 2004. Article 2 of Regulation No. 460/2004 provides, in a number of other objectives, for the following point - the expansion of the European Union's ability to quickly and effectively respond to modern challenges of cyberspace (to solve information security problems). Also, this agency can perform other important functions:

– providing assistance and advice to the Commission and Member States on issues related to network security, confidentiality of information;

– providing assistance to the Commission in the technical preparatory work to update and develop European Union regulations in the field of network and information security [10]. In 2016, an important document among European states for organizing cooperation in the cyber sphere was signed - the EU Network and Information Security (NIS) Directive [5].

Its goal is to achieve a high overall level of security of network and information systems within the Union. The Directive aims to ensure that Member States cooperate in matters of cyber security in a coordinated manner: adopt appropriate national strategies, create interaction groups to support and facilitate cooperation on strategic issues such as cybersecurity, monitor the exchange of information between Member States. An equally important task set before the EU countries by the Directive is the creation of a rapid response team for computer incidents to develop a level of trust between Member States and ensure the effectiveness of cooperation; establishing security requirements for operators providing digital services, etc.

In 2007, Estonia faced such a serious threat as attacks on the cyberspace of the state. Therefore, in 2008, NATO took important steps to overcome the consequences and prevent such incidents - the decision to establish a Center for Advanced Studies in General Cyber Defense CCD COE (*Cooperative Cyber Defense Center of Excellence*). The activities of the center are focused on coordinating actions to ensure cyber defense and creating policies to assist allies in attacks [15, p. 110].

In particular, Estonia is one of the European leaders in cybersecurity. It is in Tallinn

that the NATO Cyber Defense Center is located. Estonia began to actively develop in the field of cybersecurity, attracting as many resources as possible. In June 2011, the Center for the Development of State Information Systems was modified and became the Department of the State Information System, which is engaged in the development of the state information system, considering it as a single entity. In 2018, the Department examined 9,135 cases of Estonian computer networks, of which 348 had a direct impact on the operation of an important administrative service or page [39].

The EU has a unique opportunity to invest in enhancing cooperation, ensuring coordination among EU member states, key EU stakeholders in the field of cybersecurity. In 2016, the European Commission signed a private partnership agreement with the European Cyber Security Organization (ECSO). This move resulted in the structuring and coordination of industrial digital security resources in Europe.

The partnership includes a wide range of participants, including: manufacturers of equipment, components; operators of basic services, research institutes united under the auspices of ECSO. The European Union has committed to invest about 450 million euros in this partnership [39].

Today, the EU has a problem with the lack of qualified specialists (information and communication technology workers, especially experts in the field of cybersecurity). European Union budget proposals for the period 2021-2027 contain an emphasis on the development of digital skills in the field of cybersecurity.

The European Commission has invested more than 63.5 million euros in four pilot projects: Four pilots: CONCORDIA; ECHO; SPARTA; Cybersec4 Europe.

They laid the foundation for the creation of a European Network of Cybersecurity Centers of Excellence (helping to strengthen cybersecurity research and coordination in the EU).

The pilot projects aim to contribute to the common post-2020 European Cybersecurity and Innovation Roadmap and the European Cybersecurity Strategy for Industry. They were intended to provide EU assistance in defining and testing management models for the European network of specialists in the field of centers of excellence in the field of cybersecurity [39].

The role of cyberspace is constantly growing due to the introduction of global digitalization in the world. Due to the presence of risks of criminal hacker attacks, many countries create personal national legislative norms and introduce new cybersecurity strategies in order to be able to protect themselves from offenses in cybersecurity.

In 2016, by Decrees of the President of Ukraine No. 96/2016 “On the decision of the National Security and Defense Council of Ukraine” dated January 27, 2016, “On the Cyber Security Strategy of Ukraine”, a national cyber security strategy was approved [1]. In 2009, NATO Headquarters adopted a strategically important document, the Framework for Cooperation on Cyber Defense between NATO and Partner Countries. This act laid the foundation for establishing cooperation in the field of cybersecurity between the participating countries (including with the participation of Ukraine) [2]. Article 3 of Annex XVII (Regulatory Approach to Achieving a Full Internal Market Regime in a Specific Sector) states: “Relying on Articles 114, 124, 133 and 139 contained in Chapter 6 “Establishing a Business, Trade in Services and Electronic Commerce”, Chapters 7 “Current payments and capital flows” of Section

IV of this Agreement and Article 2 (1) of this Annex Ukraine implements and implements on a permanent basis in its national legal system (in accordance with Article 2 (2)) of this Annex the provision of the current EU legislation contained in the Additions" [19].

A fairly common practice in the context of cybercrime is the infliction of damage by computer technologies to military and civilian infrastructure, the provision of negative effects on production processes, and the organization of failures in the functioning of national Internet resources. Therefore, cybersecurity issues are becoming more relevant and acute, becoming urgent for many countries, which they consider to be a problem at the national level.

As a result, security in the world requires the expansion of international legal cooperation between the subjects of international law in order to maintain peace, to prevent the resolution of cyber wars that can run in parallel with kinetic ones (may be accompanied by real military conflicts).

In January 2012, the EU reformed legislation (amending personal data protection issues in order to bring legislation in line with the requirements of the "digital age"), wanting to implement the European Digital Single Market Strategy. As a result, 2 documents were adopted: Directive 2016/680 of the European Parliament and of the Council of the EU of April 27, 2016 "On the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of preventing, investigating, detecting or prosecuting criminal offenses or executing criminal penalties" and " On the free movement of such data, as well as repealing Council Framework Decision 2008/977, repealing Directive 95/46/EC (General Data Protection Regulation (GDPR)" [20].

The Strategy and Agenda were published in the spring of 2015. Already in July 2016, the European Commission presented "Additional measures to promote the development of the cyber defense industry". On July 6, 2016, the EU Directive on measures to ensure a high overall level of security of network and information systems throughout the European Union (DIRECTIVE (EU) 2016/1148 - NISDirective) was adopted. The Directive contains uniform rules that allow each EU member state to exercise the right to independently take its own measures to implement the norms of this Directive into national legislation [21]. The purpose of the Directive is to ensure a high level of network and information security in the EU. To achieve this goal, it is necessary to take measures immediately in 3 directions:

– *increasing by each member country at the national level the capacity of the cybersecurity system;*

– *increasing the level of cooperation between the EU countries;*

– *introduction of a risk management system, the obligation of member governments to notify basic web service operators (digital service providers) of all cyber incidents.*

For further success in the development of regulation in the field of cybersecurity at the legislative level, there is Council Directive 2008/114 / EC of December 8, 2008, which identifies and defines critical infrastructures in Europe, conducts an assessment analysis to develop the necessary measures to improve their protection and protection. It is important to understand the need to take into account the provisions of this document when developing a national regulatory act, as well as local acts of business entities.

Of particular note are the Cross-Cutting Criteria for EQI Evaluation defined in Directive 2008/114/EC (refer to paragraph 1). They consist of the following criteria:

– *accident criterion - an assessment of the potential number of deaths or injuries received by employees;*

– *criterion of economic results - analysis of the significance of economic costs and / or deterioration of products, services provided, including potential consequences for the environment;*

– *criterion of public consequences - assessment of the impact on public confidence, physical suffering, disruption of everyday life (including the failure to provide citizens with basic services).*

Cross-cutting criteria have limiting values, the establishment of which is directly influenced by consideration of the severity of the consequences caused by damage or destruction of a particular infrastructure. Member States are responsible for the accuracy of the endpoints of the cross-cutting criteria (they differ for certain critical infrastructures). Each case is considered separately.

Each EU Member State informs the Commission annually of the number of infrastructures in each sector for which the discussion and determination of the limit values of the cross-cutting criteria took place. Sectoral criteria should take into account other indicators - the characteristics of individual sectors of a single critical infrastructure (hereinafter - ECI).

In doing so, each Member State should verify the existence of an Operator Security Plan (OSP) or similar instruments that are intended to address issues in each specific ECI located on its territory.

In Ukraine, the initial stage of creating a legislative regulation of cyber defense is currently underway. However, the most difficult stage has already been passed, and Ukraine is moving according to the planned strategy of the state policy to ensure cyber defense.

Of course, ahead in Ukraine is the need to overcome many challenges, to consider and solve problems of cyber defense. Currently, the organization of public-private interaction remains an urgent unresolved issue; it is also necessary to form a list of critical infrastructure facilities, as well as develop approaches to cyber defense. For the functioning of the legal regulation in the field of cybersecurity in Ukraine, it is necessary to perform a large amount of work.

Today, an information war is taking place between Russia and Ukraine, which implies not only a real military conflict with losses in the form of casualties, but also the conduct of information and psychological operations to destabilize the civilian population and conduct cyber-attacks. Therefore, an urgent issue for Ukraine is the creation of a clear, understandable and logical Strategy (the formation of a regulatory framework for ensuring cybersecurity).

Conclusions

The legal framework for cybersecurity in Ukraine contains international obligations and elements of national legislation. With regard to international experience, the Budapest Convention and the Directive on Network and Information Security (NIS) should be highlighted.

National legislation should contain the following:

– *obligations that Ukraine must fulfill after signing international agreements and conventions;*

– *especially that Ukraine will have to make commitments if it continues to demonstrate its desire to join the European Union.*

In Ukrainian legislation, problems also arise due to the uncertainty of the issues of distribution of powers between various pu-

blic and private institutions in the field of cyber defense, as well as the lack of legally regulated and financial security of the strategy of public and private partnership, the unresolved large number of procedural issues of the actions of control bodies and law enforcement officers; insufficient attention when considering the problems of general cybersecurity education, awareness raising and capacity building. All these moments significantly increase Ukraine's vulnerability to cyber incidents and cyber-attacks.

Ukraine cannot do without the need for a legislative settlement of the listed problematic issues that negatively affect the transparency of the legislative process, the fruitfulness of cooperation between Ukrainian and international stakeholders, and the promotion of increased trust between them.

In conclusion, we note that cybercrimes are cross-border in nature, using servers and technical platforms from different countries. Currently, there is a need to develop cooperation at the interstate level. While there are attempts to explain their own political hardships, accusations are heard from the Euro-Atlantic side about "Russian interference" with the help of information and communication processes, which will in no way contribute to resolving mature contradictions in the field of cybersecurity. Ukraine, in the case of UN membership, has every chance to become one of the initiators of a large-scale international treaty on the issues of "non-proliferation" of digital information weapons, the fight against cyberterrorism and during espionage by hackers.

In order to improve cybersecurity measures aimed at counteracting cyber terror and cybercrime, it is necessary to study in detail the experience of foreign countries and implement it in Ukraine.

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REMOTE WORK AS A METHOD OF LABOR PROTECTION IN PERIODS OF PUBLIC HAZARD

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The study made it possible to consider distance work as a event within the labor protection institute. The results of the study make it possible to make clarifications and additions to the existing scientific ideas about the genesis of this institution of labor law and labor legislation. The prerequisites for the modernization of the legal regulation of distance work are revealed: the actual and widespread emergence of the corresponding economic relations; development of technological conditions for widespread use of remote work; adoption and approbation of legislation allowing remote registration of the emergence, change and termination of labor relations. The improvement of legislation took place in the conditions of self-isolation caused by the coronavirus pandemic, in the conditions of the forced digitalization of public relations, in the conditions of the constitution of social partnership in the world of work and the intensification of the application of its principles and mechanism in the practice of rule-making. Prospects for the legal regulation of distance work as an institution are associated with its extension to all categories of the precariat, as well as to all cases of the use of dependent labor. As a part of the labor protection institute, remote work has every chance of first spreading to new forms of dependent labor that have arisen and are emerging in a changing society in the process of preparing for the transition to the sixth technological order (platform employment, labor of economically dependent self-employed contractors, etc.). To do this, this institution should introduce the maximum possibility of differentiating the legal regulation of the relevant relations.

Keywords: *remote work, labor protection, employer, employee, social partnership, social dialogue, electronic document.*

MUNCA DE LA DISTANȚĂ CA METODĂ DE PROTECȚIE A MUNCII ÎN PERIOADE DE RISC PUBLIC

Prezentul studiu ne-a permis să constatăm că munca la distanță este un eveniment sistematic în cadrul institutului de protecție a muncii. Rezultatele studiului permit să efectuăm unele clarificări și completări la ideile științifice existente despre geneza acestei instituții a dreptului la muncă și a legislației muncii. Sunt relevate premisele pentru modernizarea reglementării legale a muncii la distanță: apariția efectivă și pe scară largă a relațiilor economice corespunzătoare; dezvoltarea condițiilor tehnologice pentru utilizarea muncii la distanță; adoptarea și aprobarea legislației care să permită înregistrarea de la distanță a apariției, modificării și încetării raporturilor de muncă. Îmbunătățirea legislației a avut loc în contextul regimului de autoizolare cauzat de pandemia de coronavirus, în condițiile digitalizării forțate a relațiilor publice, constituirii parteneriatului social în lumea muncii și intensificarea aplicării principiilor și mecanismului acestuia în practica de stabilire a regulilor. Perspectivele reglementării legale a muncii la distanță ca instituție sunt asociate cu extinderea acesteia la toate categoriile de precariat, precum și la toate cazurile de utilizare a muncii dependente. Ca parte a institutului pentru protecția muncii, munca la distanță are toate șansele să se răspândească mai întâi prin noi forme de muncă dependentă care au apărut și apar într-o societate aflată în schimbare, în procesul de pregătire pentru tranziția la cea de-a șasea ordine tehnologică (angajare pe platformă, forța de muncă a antreprenorilor dependenți din punct de vedere economic

etc.). Această instituție ar trebui să introducă posibilitatea maximă de diferențiere a reglementării juridice a relațiilor relevante.

***Cuvinte-cheie**: muncă la distanță, protecția muncii, angajator, angajat, parteneriat social, dialog social, document electronic.*

LE TRAVAIL À DISTANCE COMME MÉTHODE DE PROTECTION DU TRAVAIL EN PÉRIODE DE DANGER PUBLIC

L’étude a permis de considérer le travail à distance comme un événement systématique au sein de l’Institut de protection du travail. Les résultats de l’étude permettent d’apporter des éclaircissements et des compléments aux idées scientifiques existantes sur la genèse de cette institution du droit du travail et de la législation du travail. Les préalables à la modernisation de la régulation juridique du travail à distance sont révélés : l’émergence effective et généralisée des relations économiques correspondantes ; développement de conditions technologiques pour une utilisation généralisée du travail à distance; adoption et approbation d’une législation permettant l’enregistrement à distance de l’apparition, de la modification et de la cessation des relations de travail. L’amélioration de la législation a eu lieu dans le contexte du régime d’auto-isolement provoqué par la pandémie de coronavirus, dans les conditions de la numérisation forcée des relations publiques, dans les conditions de la constitution du partenariat social dans le monde du travail et de l’intensification des l’application de ses principes et de son mécanisme dans la pratique de l’élaboration des règles. Les perspectives d’une régulation légale du travail à distance en tant qu’institution sont associées à son extension à toutes les catégories de précariat, ainsi qu’à tous les cas de recours au travail salarié. Intégré à l’Institut de protection du travail, le travail à distance a toutes les chances de s’étendre d’abord à de nouvelles formes de travail salarié apparues et émergentes dans une société en mutation et en train de préparer le passage au sixième ordre technologique (emploi de plate-forme, travail d’entrepreneurs indépendants économiquement dépendants, etc.). Pour ce faire, cette institution devrait introduire la possibilité maximale de différencier la réglementation juridique des relations pertinentes.

***Mots-clés:** travail à distance, protection du travail, employeur, employé, partenariat social, dialogue social, document électronique.*

ДИСТАНЦИОННАЯ (УДАЛЕННАЯ) РАБОТА КАК СПОСОБ ОХРАНЫ ТРУДА В ПЕРИОДЫ ОБЩЕСТВЕННОЙ ОПАСНОСТИ

Проведённое исследование позволило рассмотреть дистанционный труд как системное мероприятие в составе института охраны труда, что само по себе позволяет внести уточнения и дополнения в имеющиеся научные представления о генезисе этого института трудового права и законодательства о труде. Выявлены предпосылки модернизации правового регулирования дистанционного труда - фактическое и повсеместное возникновение соответствующих экономических отношений, развитие технологических условий для широкого применения дистанционного труда, принятие и апробация законодательства, позволяющего дистанционное оформление возникновения, изменения и прекращения трудовых отношений. Совершенствование законодательства проходило в условиях режима самоизоляции, вызванной пандемией короновируса, форсированной цифровизации общественных отношений, конституирования социального партнёрства в сфере труда и активизации применения его принципов и механизма в практике нормотворчества. Перспективы правового регулирования дистанционного труда как института связаны с его распространением на все категории прекариата, а также на все случаи применения несамостоятельного труда. Как часть института охраны труда удаленный труд имеет все шансы первоочередного распространения на новые формы несамостоятельного труда, возникшие и возникающие в меняющемся обществе (платформенную, экономически зависимых самозанятых подрядчиков и др.), организации производства и труда в ходе перехода к шестому технологическому укладу. В этой связи, данный институт следует внедрить максимальную возможность дифференциации правового регулирования соответствующих отношений.

***Ключевые слова**: удаленная (дистанционная) работа, охрана труда, работодатель, работник, социальное партнерство, социальный диалог, электронный документ.*

Introduction

It is difficult to ensure the quality of life necessary in modern society and the level of social justice required by citizens, neglecting modern trends that are characteristic of the period of a global change in the technological order, evading or lagging behind in the legal regulation of actually emerging economic and social relations, especially relations that tend to become more widespread, such as remote labour. A study by the McKinsey Institute of more than 2,000 activities across more than 800 occupations conducted in nine countries (China, France, Germany, India, Japan, Mexico, Spain, the UK and the US) found that hybrid teleworking models will continue post-pandemic, in mainly for the highly educated, well-paid minority of the labor force [1, 2]. Therefore, in 2020, the institution of remote (remote) work, chapter 49.1 on the features of regulation of which was introduced into the Labor Code of the Russian Federation in 2013, reasonably underwent reform.

Legal regulation of remote labor in its various forms [3, pp. 49-58] was paid attention both in the Soviet science of labor law [4, pp. 98-101] and in modern Russian labor law science [5, pp. 51-59]. This applies to homework [6, pp. 248-261], and business trips [7, pp. 37-49], and remote work [8, pp. 91-106]. Separate aspects of remote work are considered in the works of representatives of non-legal humanities - sociologists [9, p. 40-46], economists [10, p. 9-17], psychologists [11, p. 118-122]. In recent years, there has been an increased interest in comparative legal research on the regulation of remote labour in various countries of the world, whose legal scholars also pay attention to remote work in their publications [12, p. 27].

The study of the latest legal regulation of remote work is an extremely popular direction in modern laborious science [13; 14, pp. 59-65; 15]. But all research, following the legislation, is aimed primarily at the study of remote work as a way of work organization. In this article we will try to pay attention to the other side of remote work (it is better to say - remote work - as used not only in labor relations, but also in any use of human labor - independent or dependent). We will consider remote work as an integral part of the institute of labor protection, as a complex, intricate action on labor protection.

Comprehensive theoretical studies of the legal regulation of the modernization of the legal regulation of remote work as an integral part of the institute of labor protection in domestic legal science have not been carried out. It seems necessary to identify and designate the individual basic elements that could form the basis of such a study.

Research methodology. In the course of the study, general scientific methods of cognition and special scientific methods were used: historical, system-structural, formal-legal, and others. Among the methods of research, the author used the general foundations of formal logic (analysis, synthesis, comparison, etc.) and scientific research (study and analysis of sociological data on the use of remote work). The formulated proposals and decisions are substantiated, reasoned and evaluated taking into account the provisions and results achieved by the science of labor law. Conclusions and recommendations are based on a comprehensive study of doctrinal sources, normative legal acts, law enforcement practice, and empirical data.

Research highlights

The prerequisites for updating the institution of remote work as a form of labor organization were, first of all, the factors of economic development - the actual and widespread emergence of relations that make it possible

to more effectively carry out entrepreneurial activities with the involvement of workers who perform their labor function outside the location of the employer. This global trend has fully affected the domestic economy and was supported by the Russian legislator.

The second prerequisite for updating the institution of remote work was the development of technological conditions for its wide distribution - the deep digitalization of society, the deployment of an extensive network of modern telecommunications and the provision of a real possibility of its use by the final users of a digital product. The fact is that the institute of home work was generally aimed at servicing labor relations within the framework of the third and fourth technological modes, involving the production of certain material goods. The modern institution of remote work has become the response of society and the legislator to the challenges of the new fifth technological order, in which the emphasis has shifted to the production of intangible goods and services. The development of legislation on remote work in the conditions of its economic need, however, without the technological support of society, would only be an imitation of the legal regulation of the corresponding group of social relations that are not capable of spreading any widely.

It should be noted one more prerequisite for the renewal of the institution, related to the previous two - the adoption and wide approbation of legislation that allows remote registration of the emergence, change and termination of labor relations, maintenance of work books, registration of periods of temporary disability and entering information on pension experience to the bodies of the Pension Fund of Russia and etc. Not only was the introduction of the new norms preceded by a long experiment covering a wide range of employers, including the largest, which is becoming the norm for the Russian Ministry of Labor and can only be welcomed, the practice of applying the existing norms on remote work has already become the subject of generalization and analysis.

Among the conditions under which the current legislation on remote work was updated, the following should be indicated.

First. The establishment of social partnership in the sphere of labor and the intensification of the application of its principles and mechanism in the practice of rule-making, the increasingly careful consideration of the opinions of representatives of workers and employers in the Russian tripartite commission for the regulation of social and labor relations when adopting regulations affecting labor relations by the Government of the Russian Federation. The constitutional reform for the first time in Russian history led to the consolidation of the concept of social partnership at the level of the Basic Law. It is applied in two articles of the amended Constitution: in Article 75.1, according to which “The Russian Federation ... ensures the balance of the rights and obligations of a citizen, social partnership, economic, political and social solidarity” and in subparagraph e 4, paragraph 1, article 114, which gives the Government of the Russian Federation the authority to ensure the implementation of “the principles of social partnership in the field of regulation of labor and other relations directly related to them.” In the context of a combination of the impact of the pandemic, digitalization and constitutional reform, the Government of the Russian Federation and the Ministry of Labor acted in the spirit of social and labor partnership as bipartisanship. But the domestic system of social partnership in the sphere of labor is based on the principle of tripartism, where the interests of the state and society as a whole are given an independent role, the same as the role of traditional social partners, which allows for a policy that

reflects the independent interests of society as a whole, and not just traditional ones, social partners and even contrary to the position of the latter, if there is a pressing public interest in this. Therefore, the objections of social partners are not always an insurmountable obstacle for the Government to adopt some socially significant rules, even if they directly affect the interests of employees or employers, and in the absence of the consent of the latter, if there really is an emergency public need for such rules under certain conditions. On the contrary, if the new rules concerned only traditional social partners, then the Government, having not found a compromise, justifiably refrained from introducing new legal regulation. In both cases, the actions of the government in themselves cannot be considered as a violation of the principles of social partnership, the leadership of which is prescribed by the Constitution of the Russian Federation [16, p. 249-261].

Second. Forced digitalization of public relations caused by the urgent transfer of labor and educational relations to a remote format and an experiment in Moscow to create artificial intelligence [17, p. 144-148]. The expansion of the use of remote work in particular and electronic services for obtaining public services in general has become a trend in legal regulation in a pandemic. Its most striking manifestation is the adoption of the Federal Law of June 8, 2020 No. 168-FZ "On the unified federal information register containing information about the population of the Russian Federation."

The third and most important circumstance, which led to a change in the Labor Code, allows us to talk about the dual nature of remote work and about remote work as part of the legal institution of labor protection in a narrow sense. The regime of self-isolation in the context of a pandemic, which at once expanded the range of social relations with the use of remote work and significantly accelerated the correction of their legal regulation, as well as the practice of imposing restrictions at the federal, regional and municipal levels. The self-isolation regime has shown the ability to do without millions of workers and employees, in any case, directly in offices, often remote work completely replaces classical labor relations. Opportunity to study remotely - both at school and at an institute or college. The ability to do without the consumption of show content "live" - and musical, and theatrical, and sports. The admissibility of going less often or not going at all to shops and catering establishments, limiting yourself to a remote order for the delivery of relevant goods to your home, but it is better and less likely to leave your home, limiting communication to social networks and instant messengers. The self-isolation regime has shown the uselessness in the very near future of a number of professions and positions. In Russia, at the peak of the pandemic, 11 percent of the total number of workers activated remotely. Moreover, the most demanded was the combined type of employment, when the employee works at home and in the office for periods [18, p. 3-8].

The pandemic has shown the urgent need to implement new labor protection measures that correspond to the level of danger that has arisen.

National Security Strategy of the Russian Federation, approved the Decree of the President of the Russian Federation of July 2, 2021 No. 400, the preservation of the people of Russia and the development of human potential are named paramount national interests and strategic national priorities (subparagraph 1 paragraph 25, subparagraph 1 paragraph 26, section 3 of the Strategy). Among the goals of state policy in the social sphere (paragrapsh 33 of section 4), guarantees of the sanitary and epidemiological well-being

of the population are highlighted. The stated goals of the state policy can be achieved by ensuring the sustainability of the health care system, ready for new threats associated with the spread of infectious diseases, etc. (subparagraph 6 and paragraph 33 of section 4 of the Strategy), increasing real life expectancy, reducing mortality and the level of disability of the population, prevention of occupational diseases (subparagraph 4), sanitary and biological well-being of the population (subparagraph 9).

To solve these problems, organizational and financial efforts of the state are required, aimed at the development and implementation of infrastructure projects in the field of sports, education, upbringing, medicine, energy and public infrastructure, transport, constant monitoring of the situation in critical areas and an immediate response to detected negative factors and trends. etc. Such measures of the state, of course, will have an indirect impact on the labor and social rights of citizens - through the creation of additional jobs, the growth of incomes of all segments of the population, the release of parents' time from caring for children with the opportunity to devote it to productive work, etc. At the same time, they cannot be dispensed with, since they must create a material and organizational base, a foundation that will only allow to fully solve problems directly related to labor and social protection, with funding and organizational measures that are and will be very quickly and directly noticed and appreciated by citizens. The solution of these tasks will be regulated by legislation on the budget, energy, utilities, construction, traffic management, medicine, education, culture, sports, etc., but not labor and social welfare.

As for the tasks of labor legislation directly in preserving the health of the population employed in socially useful labor and countering biological threats, first of all, this is the creation of methods, and standards of labor protection that meet modern challenges. The operational response of labor law was the addition of the labor protection institute with a set of rules for remote work as a way to ensure safe working conditions.

Article 312.7 of the Labor Code of the Russian Federation regulates the features of labor protection for remote workers. These features relate to remote work as a way of organizing work that, in the opinion of the employer, corresponds to the needs of production and is voluntarily used by the employer and employees.

Remote work as an institution of labor protection is applied in different ways from the point of view of the will of the parties to the employment contract.

In accordance with Art. 312.9 of the Labor Code of the Russian Federation, temporary transfer of an employee to remote work is possible in two exceptional cases:

1) in the event of a natural or man-made disaster, industrial accident, industrial accident, fire, flood, earthquake, epidemic or epizootic, and in any exceptional cases that endanger the life or normal living conditions of the entire population or part of it. In this case, the will of the employer is formed independently, on the basis of its own assessment of the exceptional cases listed in the law in terms of their threat to life or normal living conditions of the population or part of it, i.e., any group of people, including the collective of employees of this organization. This is the employer's right. Such a transfer is limited by the duration of the circumstances or cases that served as its basis;

2) when an appropriate decision is made by a state or local government body, the transfer of employees to remote work becomes no longer a right, but an obligation of the employer. This obligation arises for the

employer both in the event that he/she sees the above cases and circumstances that endanger the life or normal living conditions of the entire population or part of it, and when he/she does not see them. Disposition part 1, article 312.9 of the Labor Code of the Russian Federation is structured in such a way that a public authority or local government can base its decision on the above cases and circumstances, base the decision on a different wording, or completely refuse to explain the decision in its text. In itself, the decision of a public authority or local government gives rise to the obligation of the employer to temporarily transfer employees or part of them (depending only on the decision of the public authority or local government) to remote work. The decision of a public authority or local self-government may retain elements of optionality when making a decision by the employer, for example, when determining categories or specific employees, if the public authority orders to transfer part of the employees to remote work with or without selection criteria The term of the transfer can be indicated in the decision of the state authority or local self-government when special measures are introduced (including by indicating the event) or in a separate decision on their completion, and then the employer must be guided by this decision in his/her actions to organize production and labor. Undesirable is the adoption of decisions by a state authority or local self-government that does not contain a deadline for the completion of the actions prescribed by them. Allowed by such acts, the dispositive behavior of the heads of organizations based on different interpretations of those named in part of the article 312.9 of the Labor Code of the Russian Federation of circumstances and cases and the assessment of the termination or continuation of their action, may become an obstacle to achieving the goals that guided the state or municipal authority when making a decision.

In case of temporary transfer to remote work at the initiative of the employer on these grounds, amendments to the employment contract with the employee are not required. At the end of the term for such a transfer (but not later than the end of the period of existence of the circumstance (case) that served as the basis for the employer to make a decision on the temporary transfer of employees to remote work), the employer is obliged to provide the employee with the previous job provided for in the employment contract, and the employee is obliged to start performing it (part 5 article 312.9 of the Labor Code of the Russian Federation).

At the same time, in both cases, the employer's behavior retains an element of optionality. If the specifics of the work do not allow the temporary transfer of the employee at the initiative of the employer, or the employer cannot provide the employee with the equipment, software and hardware, information security tools and other means necessary for the performance of his/her labor function remotely, the time during which the specified employee does not perform his work function, is considered downtime for reasons beyond the control of the employer and employee, with payment for this downtime in accordance with part 2 of artocle 157 of the Labor Code of the Russian Federation (if a larger amount of payment is not provided for by collective agreements, agreements, local regulations) (part 7 of article 312.9 of the Labor Code of the Russian Federation).

In both the first and second cases, the consent of the employee for such a transfer is not required (part 2 of article 312.9 of the Labor Code of the Russian Federation). Accordingly, the refusal of the employee can most negatively affect the continuation of labor relations with him/her and not on his/her initiative.

At the same time, the employee has the right to require the employer to provide remote work in accordance with the requirements of the law, agreements and local regulations.

As we have already noted, transferring to remote work is a complex set of measures taken by the labor protection institute. Therefore, the legislator imposes numerous requirements for its implementation. The employer provides the employee with the equipment, software and hardware, information security tools and other means necessary for the employee to perform his/her job function remotely, or pays compensation to the remote worker for the use of equipment, software and hardware, information security tools and other means owned or rented by him/her, reimburses the costs associated with their use, and also reimburses the remote worker for other expenses related to the performance of the labor function remotely. If necessary, the employer trains the employee in the use of equipment, software and hardware, information security tools and other means recommended or provided by the employer. For the period of temporary transfer to remote work at the initiative of the employer, the employee is subject to the guarantees provided for in chapter 49.1 of the Labor Code of the Russian Federation for a remote worker (parts 2, 6 of article 312.9 of the Labor Code of the Russian Federation).

We have already noted the growing influence of social partnership on labor relations. In this sense, remote work was no exception. According to part 3 of article 219 of the Labor Code of the Russian Federation, the employer, taking into account the opinion of the elected body of the primary trade union organization, adopts a local regulatory act on the temporary transfer to remote work, which he/she introduces to each employee. This local act should indicate:

– the circumstance that served as the basis for the employer’s decision to temporarily transfer employees to remote work;

– list of temporarily transferred workers;

– the period for which employees are temporarily transferred to remote work, not exceeding the period of existence of the circumstances that served as the basis for the employer to make a decision on a temporary transfer;

– the procedure for providing temporarily transferred employees at the expense of the employer with the equipment, software and hardware and other means necessary for them to perform their labor function remotely, payment of compensation for the use of equipment belonging to employees or rented by them and other means, reimbursement to employees of other expenses related to the performance of the labor function remotely;

– the procedure for organizing the work of employees temporarily transferred to remote work, including the working hours, periods of interaction between the employee and the employer within its limits, subject to the restrictions established by the internal labor regulations or the employment contract; the procedure and method of interaction between the employee and the employer, ensuring the identification of the parties to communication, the procedure and deadlines for the submission by employees to the employer of reports on the work performed, etc.

We see the prospects for national legal regulation of relations related to remote work in:

– further improvement of the legislation on remote work and, in particular, the electronic personnel document management that ensures it and the storage of information on labor relations in electronic form, a wide experiment aimed at approbation of which is currently being conducted by the Ministry of Labor of Russia;

– finalization and inclusion in the labor legislation of the norm on the "quiet regime" in labor relations, when outside working hours, the employer is not entitled to disturb employees excluded from the bill under consideration during the third reading. The assertion that the exemption from the bill of the right to off-line protects the rights of the teleworker, since such communication with the employer can be compensated by overtime pay [19], does not stand up to criticism. It would be interesting to look at the amount of compensation when the employer called the employee five times in the middle of the night, set tasks, listened to the report and kept within ten minutes in total;

– expanding the implementation of the principles and mechanism of social partnership in the practice of rule-making, in particular, in the event of termination of regulation of the specifics of labor relations in certain industries, activities and professions;

– extending the legal regulation of remote work to all categories of the precariat, as well as to all cases of the use of independent labor not under an employment contract (self-employed, working under a contract with platforms and aggregators, individual entrepreneurs who do not use hired labor, etc.). That is why in our article we actively used the concept of "remote work" as a broader, intersectoral and interdisciplinary concept in comparison with the concept of "distance work" enshrined in the Labor Code of the Russian Federation.

Conclusions

As part of the institution of labor protection, remote work has every chance of priority (along with social partnership, possibly resolving labor disputes with proper differentiation of the institution) distribution to new forms of dependent (conditionally dependent) labor that have arisen and are emerging in a changing society (platform, economically dependent self-employed contractors, etc.), organization of production and labor during the transition to the sixth technological order. To do this, it is in these institutions that the maximum possibility of differentiating the legal regulation of the relevant relations should be introduced, as was done, for example, by the legislator, who proposed an extremely wide range of types of jurisdictional bodies and procedures for resolving individual labor disputes in professional sports [20]. A differentiated approach is also possible to other new or future forms of non-independent (conditionally non-independent) labor through the extension of labor legislation to individual legal relations and their blocks, including the norms regulating labor protection, social partnership and resolution of labor disputes, with fixing the features of legal regulation.

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LEGAL REGULATION OF THE MINIMUM INCOME SYSTEMS WITHIN THE EUROPEAN UNION

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The basic aim of the European institutions in the social field is to standardize the rights of European citizens to social assistance, but the forms, amounts and conditions for the granting of social benefits are based on the particular reality of each Member State. This article contains a thorough analysis of the European legal instruments that guarantee the right of citizens in financial difficulty to a minimum income. This addresses the key elements on which to assess the level of effectiveness and efficiency of the minimum income schemes provided by Member States. And finally, we identified the components of a decent minimum income: financial support, access to the labor market and access to quality social services . In this context, the author notes that in recent years, the European institutions have paid particular attention to issues related to ensuring a minimum subsistence income for all persons in a situation of financial vulnerability. Based on the research carried out, the author concludes that the European institutions attach particular importance to the minimum income schemes provided by the Member States. Therefore, in order to increase the effectiveness and efficiency of the fight against poverty and social exclusion, several legislative measures have been adopted in recent years aimed at modernizing income schemes to ensure a dignified life for those in need in accordance with European principles and values.

Keywords: *social assistance, minimum income, social services, labor market, European Union.*

REGLEMENTAREA JURIDICĂ A SISTEMELOR DE VENIT MINIM DIN CADRUL UNIUNII EUROPENE

Scopul de bază ale instituțiilor europene în domeniul social este uniformizarea drepturilor cetățenilor europeni în materie de asistenta socială, însă formele, cuantumurile şi condițiile de acordare a alocațiilor sociale, au punct de plecare realitatea particulară a fiecărui stat membru. Prezentul articol conține o analiză minuțioasă a instrumentelor juridice europene care garantează dreptul cetățenilor aflați în dificultate financiară la un venit minim. Astfel, sunt abordate elementele cheie în baza cărora se evaluează nivelul de eficacitate și eficiență a schemelor de venit minim furnizate de statele membre. Iar în final, am identificat componentele unui venit minim decent: suportul financiar, accesul la piața muncii și la servicii sociale de calitate. În acest context, autorul notează, că în ultimii ani, instituțiile europene acordă o deosebită atenție aspectelor ce țin de asigurarea unui venit minim de existență tuturor persoanelor aflate în situație de vulnerabilitate financiară. În baza cercetării efectuate, autorul concluzionează, că instituțiile europene acordă o atenție sporită schemelor de venit minim furnizate de statele membre. De aceea, în vederea sporirii eficacității și eficienței în lupta cu sărăcia și excluziunea socială, în ultimii ani au fost adoptate mai multe măsuri legislative care au drept scop modernizarea schemelor de venit pentru a asigura persoanelor nevoiașe un trai demn în conformitate cu principiile și valorile europene.

Cuvinte-cheie: *asistență socială, venit minim, servicii sociale, piața muncii, Uniunea Europeană.*

RÉGLEMENTATION JURIDIQUE DES SYSTÈMES DE REVENU MINIMUM AU SEIN DE L'UNION EUROPÉENNE

L'objectif fondamental des institutions européennes dans le domaine social est d'uniformiser les droits des citoyens européens dans le domaine de l'assistance sociale, mais les formes, les montants et les conditions d'octroi des allocations sociales ont un point de départ pour la réalité particulière de chaque état membre. Cet article contient une analyse approfondie des instruments juridiques européens garantissant le droit des citoyens en difficulté financière à un revenu minimum. Il aborde les éléments clés sur la base desquels le niveau d'efficacité et d'efficience des régimes de revenu minimum mis en place par les états membres est évalué. Enfin, nous avons identifié les composantes d'un revenu minimum décent: soutien financier, accès au marché du travail et accès à des services sociaux de qualité. Dans ce contexte, l'auteur note que ces dernières années, les institutions européennes ont accordé une attention particulière à la garantie d'un revenu minimum vital pour toutes les personnes en situation de vulnérabilité financière. Sur la base des recherches menées, l'auteur conclut que les institutions européennes attachent une importance particulière aux régimes de revenu minimum prévus par les états membres. Par conséquent, afin d'accroître l'efficacité et l'efficience de la lutte contre la pauvreté et l'exclusion sociale, plusieurs mesures législatives ont été adoptées ces dernières années visant à moderniser les régimes de revenu afin de garantir aux personnes dans le besoin une vie digne conformément aux principes et valeurs européens.

Mots-clés: *aide sociale, revenu minimum, services sociaux, marché du travail, Union européenne.*

ПРАВОВОЕ РЕГУЛИРОВАНИЕ СИСТЕМ МИНИМАЛЬНОГО ДОХОДА В ЕВРОПЕЙСКОМ СОЮЗЕ

Основная цель европейских социальных институтов - стандартизация прав европейских граждан в отношении социальной помощи, но формы, размеры и условия предоставления социальных пособий основаны на конкретной реальности каждого государства-члена. В статье содержится детальный анализ европейских правовых инструментов, гарантирующих право граждан, находящихся в затруднительном финансовом положении, на минимальный доход. Рассматриваются также ключевые элементы, по которым оценивается уровень действенности и эффективности схем минимального дохода, предоставляемых государствами-членами. И, наконец, определены составляющие достойного минимального дохода: финансовая поддержка, доступ к рынку труда и к качественным социальным услугам. В данном контексте, автор отмечает, что в последние годы европейские институты уделяли особое внимание вопросам, связанным с обеспечением прожиточного минимума для всех уязвимых в финансовом отношении лиц. На основании проведенного исследования, автор приходит к выводу, что европейские учреждения придают особое значение схемам минимального дохода, предоставляемым государствами-членами. Таким образом, чтобы повысить эффективность и действенность борьбы с бедностью и социальной изоляцией, в последние годы был принят ряд законодательных мер для модернизации схем доходов, чтобы обеспечить достойную жизнь нуждающимся, в соответствии с европейскими принципами и ценностями.

Ключевые слова: *социальная помощь, минимальный доход, социальные услуги, рынок труда, Евросоюз.*

Introduction

The basic aim of the European institutions in the social field is to standardize the rights of European citizens to social assistance, but the forms, amounts and conditions for the granting of social benefits are based on the particular reality of each Member State.

This article contains a thorough analysis of the European legal instruments that guarantee the right of citizens in financial difficulty to a minimum income. This addresses the key elements on which to assess the level of effectiveness and efficiency of the minimum income schemes provided by Member States. And finally, we identified the components

of a decent minimum income: financial support, access to the labor market and access to quality social services. In this context, the author notes that in recent years, the European institutions have paid particular attention to issues related to ensuring a minimum subsistence income for all persons in a situation of financial vulnerability. Based on the research carried out, the author concludes that the European institutions attach particular importance to the minimum income schemes provided by the Member States. Therefore, in order to increase the effectiveness and efficiency of the fight against poverty and social exclusion, several legislative measures have been adopted in recent years with the aim of modernizing income schemes to ensure a dignified life for those in need in accordance with European principles and values.

Ideas and discussions

Most of the social benefits provided by the Member States of the European Union are determined by the specific nature of each region, but certain rights are universal, such as *guaranteeing a minimum income.* Minimum income schemes are aimed at people who have incomes below the guaranteed minimum. Thus, the minimum income is provided in the form of social assistance, the value of which is the difference between the minimum income adopted at national level and the income available to the applicant. All citizens who are in financial difficulty have the right to benefit from this monetary support, and they prove that they are looking for a job and want to work. Usually, the aid is granted for an unlimited period, until the person finds the necessary resources to ensure a minimum subsistence, but there are states, such as France, Italy and Spain, where social assistance is granted on a limited time period. At first sight, we can see that the Member States are entitled, independently, to set the minimum level at national level, and the European Commission has no powers to set it. However, analyzing the European Social Charter (1961), the Community Charter of the Social Rights of Workers (1989), the Charter of Fundamental Rights (2000), the European Pillar of Social Rights (2017), we find that one of the most important objectives of the European institutions is to harmonize social assistance measures to ensure a dignified life. Because poverty and social exclusion are violations of human dignity and fundamental human rights, and the central goal of income support systems must be to lift people out of poverty and enable them to lead a life compatible with human dignity. Moreover, the real goal is not only to provide assistance, but, above all, to accompany the beneficiaries to enable them to move from a situation of exclusion to active life [10].

Due to the fact that the states do not register notable results in order to ensure a dignified living for the people in need, it was necessary to establish at European level, a mandatory directive on the establishment of a minimum income within the European space. Thus, improving national policies and their coordination would be a relevant response to fighting and combating serious social problems such as poverty and social exclusion, which hinder the harmonious development of Europe's social dimension. European officials believe that decent minimum income systems benefit both those in need and society as a whole. Such systems ensure that those in need are kept active in society, help them reconnect with the labor market, and enable them to live a dignified life. Decent minimum incomes are essential for the creation of a more egalitarian society, are the real basis of social protection and ensure social cohesion, which is favorable to the whole community. For these reasons, several EU directives and recommendations have been adopted in re-

cent years to support Member States in identifying the most effective practices and tools through which progress will be made.

As early as 1992, through Recommendation no. 92 on the common criteria for sufficient resources and social assistance in social protection systems, the European Council established that the social policies of the Member States need to be improved with regard to a minimum income sufficient for a dignified life, at least at a level above of the one of the risks of poverty and to lift people out of poverty, and the level of benefits should be improved. Moreover, there is an obligation at European level to establish adequate, transparent, sustainable and accessible social assistance.

In the field of social assistance, the main objective of the European Union and the Member States is no longer simply to help those who do not have sufficient financial resources, but a reintegration of citizens who for certain financial, psychological reasons, etc. are excluded from a normal social life, characterized by the opportunities of contemporary societies. In this sense, several strategies are being adopted in the European space, which provide for various forms of support, which aim not only to provide monetary aid, but also to provide a set of measures to recover people pushed to the margins of society. Thus, the Council of the European Union notes that innovative solutions and approaches to active inclusion are needed, combining adequate income support, access to quality services and inclusive labor markets, while ensuring equal employment opportunities for both women and men to effectively fight poverty and social exclusion, especially in the context of fiscal sustainability constraints [3].

Since 2008, the condition that social assistance has been linked to active measures has been established in order to achieve the central objective of social assistance in the European Union *to help people to help themselves*. In our opinion, this motto must be the basis for the adoption of social policies aimed at providing various types of support to people who, for some reason, cannot independently ensure an adequate level of well-being. If the aid is limited to financial support from the state, a large part of the beneficiaries of social assistance cannot be included in society, in the field of work and remain dependent on the social assistance system. However, if the forms of social assistance provide for occupational counseling, training / qualification / retraining or other active measures, the beneficiaries of social assistance can reintegrate more easily into the labor market, gaining self-confidence and regaining independence from the social assistance system. In this regard, the strengthening of adequate minimum income systems in all Member States, with adequate budgetary, human and material resources, together with *active employment policies* for the able-bodied, is an important and effective measure to combat poverty and inequalities, helping to ensure economic and territorial cohesion, protecting the fundamental rights of the people, ensuring a balance between economic and social objectives and supporting social integration and access to the labor market [9, p. 152]. However, according to the latest information provided by the Member States on the social situation and the progress made in this regard, the European institutions find that the National Poverty Reduction Plans do not always take into account the recommendation on combining income systems with social inclusion measures, and states focus only on providing a minimum living wage.

Income systems are essential to ensure that no one is excluded. Although established in all Member States, income systems vary significantly in terms of adequacy, coverage, use

and complementarity with labor market activation measures and facilitation goods and services, including social services. In many cases, eligibility criteria and benefit levels should be modernized [4, p. 12].

The last countries to introduce minimum income systems are Italy and Greece. In other countries, it was established earlier - in 1933 in Denmark and in 1948 in the United Kingdom. It appeared quite early in Germany (1961) and the Netherlands (1963), then in Belgium (1974) and Ireland (1977), and relatively recently in Luxembourg (1986) and France (1988), as well as in Portugal (1996). [2, p. 96]. However, we cannot consider that all the minimum income systems provided in the European area are adequate and meet the needs of the beneficiaries. In recent years, there have been positive developments in many countries to increase the accessibility and adequacy of income schemes according to the needs of beneficiaries, but in other countries, the minimum income situation has been negative and has shown total ineffectiveness in fighting combating poverty among the needy. For these reasons, minimum income systems must be accompanied by a coordinated strategy at national and European level, focusing on broad actions and specific measures, such as active labor market policies for the outermost groups of the population, education and training for people with low qualifications, minimum wages, social housing policies and the provision of affordable, accessible and high-quality public services [10].

In this context, we can note that in recent years, the European institutions have paid special attention to issues related to ensuring a minimum subsistence income for all persons in a situation of financial vulnerability. In this regard, the European Parliament, in line with the concept of some doctrines, regarding the notion of material deprivation, expressed the option that "*the main objective of national minimum income guarantee systems is to combat poverty and promote inclusive companies across Europe, the corresponding level of minimum income should be equivalent to at least 60% of the average income per economy* [11]". Thus, more and more authors have highlighted the importance of correlating the minimum amount of guaranteed income on social bases with the minimum standards in the budget, so to speak with the monetary equivalent of goods and services that make up the minimum consumption basket [12, p. 10]. This resolution standardizes at the level of the European Union, the minimum income provided on social bases, which would guarantee the maintenance of the citizen at the level of the subsistence threshold. This fact-based recommendation is found in most Member States, namely that the minimum guaranteed social income is between 20% and 40% of the average gross income of the economy, taking into account the existing impediments in the states that limit the possibilities for adoption of universal social assistance practices and benefits [8, p. 152]. Thus, in the case of Ireland, for example, the threshold for material deprivation is above the threshold communicated by the Europe 2020 Strategy, while in other countries with a higher level of economic development (Netherlands, Austria), this threshold is set at a value that represents between 40-50% of the average gross income per economy. We find an identical situation in the former socialist countries, such as Bulgaria, Estonia, Slovakia where the level barely reaches the threshold of 40%. Thus, in the highly developed countries, the minimum income has a high value, but the Member States with a modest level of development, the value of the minimum income is low, because low public funds are allocated, thus trying to provide financial support to as

many people as possible in situations of vulnerability.

Another aspect that needs to be taken into account and determines the amount of guaranteed minimum income is the reference budget, according to which the amount of social assistance is assessed, which would meet the social needs of citizens living in different EU countries. Thus, there are countries where a standard indexation mechanism is not substantiated, and income is granted in the form of a lump sum, the amount of which depends on the choice of the political factor; similarly, in other states, the adjustment is arranged according to the variation of one of the basic economic indicators, such as the consumer price index or the value of the daily basket of goods and services [7, p. 75]. To this end, at European level, the Commission, in its Communication on the Social Investment Package, urges Member States to set reference budgets to help design efficient and adequate income support that takes into account the social needs identified at local, regional and national level in order to improve territorial cohesion; moreover, to use the reference budgets as a tool for assessing the adequacy of the minimum income systems provided by the Member States.

According to statistics, in most EU countries, the adjustment of the minimum social support is made in accordance with a certain reference element, which is different in each state, so in some cases it is adjusted to the value of the daily basket or salary, or is adjusted to the price index, the basic aim in each case is to respond as well as possible to the social needs of the social categories that are in various situations of difficulty. A minimum income must be set in a global approach to different human needs, which is not limited to a level of survival or simply to the level of the poverty rate calculated on the basis of median income, which in reality does not meet essential needs in some countries. Therefore, all living, housing, education, health and cultural needs need to be integrated in order to provide the best conditions for integration / reintegration to those excluded from the labor market and living in poverty [1].

The European institutions recommend that states pay attention to the key issues in setting the minimum income: the permanent revision of the amount in order to increase it periodically, improving the use and coverage of segments of the population affected by social risks and, of course, strengthening the links between different elements of active inclusion. An eloquent example is the Swedish State, where the minimum income is provided to fill financial gaps, and each year the Swedish government sets a national standard (*riksnorm*) for food, clothing, footwear, hygiene, health, leisure, consumer goods, hobbies, newspapers, telephone costs, etc. the norm also covers the costs for housing, electricity, union taxes, expenses for medicines. Thus, the national rule is the basis for the minimum amount of social assistance benefits. In addition to this, the national norm also takes into account family members, children, their ages, occupational status of parents, etc. the social assistance council may request that the beneficiaries of social benefits participate in employment activities, or in activities for the improvement of professional skills. These measures are undertaken on the basis of the individual capacity and wishes of the beneficiaries, and are aimed at developing the capacity of individuals to independently ensure an adequate level of well-being.

Even if there are recommendations at European level, in the end, the amount of the minimum living allowance starts from the reality of each country, so, for example in Bulgaria the amount of aid is 22 euros, and in Denmark 1433 euros, and the examples can continue. And the situation mentioned indi-

cates the presence of a considerable inequality in the European Community. According to statistics, the highest levels of income inequality are recorded in Romania, Lithuania, Bulgaria, Latvia, Cyprus, Estonia and Italy. There is also income inequality between the regions of the Member States.

However, we can note that in many European countries the minimum income is not enough and does not meet the essential needs of people in vulnerable situations. According to data presented by the European institutions, the dynamics of the number of people who are deep in poverty is constantly growing.

According to the approach of the European institutions, minimum income schemes need to be seen in the perspective of an active inclusion approach, which involves a combination of measures aimed at: integrated support in the form of adequate monetary benefits, access to quality social services and the inclusion of an activating component for beneficiaries. Based on the evaluation of the European Minimum Income Network, three key elements have been identified which are the most relevant [5, pp. 8-9]:

1. Adequacy of benefits to combat poverty: the aim of minimum income systems must be to ensure that beneficiaries can live a dignified life. Establishing adequate minimum income levels must ensure a decent standard of living. In this regard, it is necessary for states to set appropriate amounts of social benefits so that they are sufficient to have a dignified life. European experts say that the minimum income must cover the cost of fuel to enable poor households affected by energy poverty to pay their energy bills. The minimum income should be calculated on the basis of realistic estimates of the costs of heating a household, depending on its specific needs - for example, a family with children, the elderly and people with disabilities [10]. Moreover, they should not only cover the minimum maintenance costs, but should provide the possibility for the needy people to have access to quality medical and social services, etc. Poverty is a multidimensional phenomenon and it does not refer only to the lack of financial resources, here we can also notice the education and medical and social services of poor quality etc. The adequacy of minimum income benefits can be measured by comparing the income of the beneficiaries with the national poverty line and the income of the beneficiaries with the income of a low-wage worker. According to statistics, in 2016, in the case of single-person households, the adequacy was highest in the Netherlands, Ireland, Denmark and Luxembourg. In these countries, the level of benefits has exceeded 80% of the national poverty line. Especially in the case of the Netherlands, the level of benefits was 106% of the poverty line, effectively lifting the beneficiaries out of poverty. At the lower end, the adequacy of the minimum income in Bulgaria, Romania, Hungary, Slovakia and Lithuania is below 40% of the poverty line or one third of the income of a person with a low salary in 2016 [6, p. 152].

2. Eligibility and use rules: The main eligibility requirements applied in national schemes nclude nationality / citizenship and / or residence, age, lack of financial resources, lack of assets above a certain limit and exhausted entitlement to any other (social) allowances. The strictness of these criteria determines the extent to which a system provides universal access. Thus, stricter eligibility requirements involve less coverage and vice versa. Checking resources is the most commonly used way to target people living in poverty. Resource checking conditions generally assess the resources of all household members, not just direct applicants. In most Member States, the threshold used in the verification of resources is the maximum level of benefits provided,

while several Member States also do not take into account part of the income of individuals, which has a positive effect on the coverage of systems and helps to reduce poverty among the employed [6, p. 152]. European officials recommend that Member States take the following circumstances into account when setting the minimum income: the link between the minimum income and the condition of access; the impact of the composition of the household, given the importance of the factor of children in poverty; consideration of other resources such as inheritances; components of the minimum cash and in-kind income, for example, through access to healthcare, housing, mobility, family support and utilities.

Many Member States face challenges with low usage rates. The complexity of many national minimum income systems and the administrative requirements for accessing them can be a problem and can hinder their efficient and targeted implementation. Non-use is a serious issue that needs to be taken into account, as it is between 20% and 75% among EU Member States. It is caused by a lack of awareness of rights, administrative burden and the stigma associated with claiming rights (costs, conditionality, controls). In order to increase utilization, formal and informal barriers should be reduced.

3. Activation and access to services: Economic support should be accompanied by activation measures and non-monetary incentives, including the provision of additional services. Activation approaches should take into account significant differences between beneficiaries due to different personal factors. This requires a mix of personalized assistance to accompany the beneficiaries (those able to work) on the way to finding a job, as well as the sequencing of interventions / activation measures from the least demanding. The three pillars of active inclusion - adequate minimum incomes, inclusive labor markets and access to quality services - are not always developed in a coherent way, mainly due to difficulties in coordinating employment and social services.

Conclusions

Finally, we note that the European institutions establish [1]:

- Decent minimum income can only make sense in a comprehensive approach to integration and active inclusion, which combines access to inclusive labor markets - with quality jobs and continuing education - with access to quality public services, especially in regarding education and health;
- The right to work must remain a fundamental right, as a central element of emancipation and economic independence;
- Decent minimum income is, in essence, a temporary but indispensable element, the aim of which is the integration / reintegration of people into the labor market through active measures - it is an emblematic measure for the social credibility of the European Union;
- Areas of adequacy, coverage and access to minimum income remain key issues for Member States in developing their own systems. These systems need to be supported and, where appropriate, completed at European level.

Thus, based on our research, we conclude that the European institutions attach particular importance to the minimum income schemes provided by the Member States. Therefore, in order to increase the effectiveness and efficiency of the fight against poverty and social exclusion, several legislative measures have recently been adopted aimed at modernizing income schemes to ensure a dignified life for those in need in accordance with European principles and values.

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EUROPEAN LAW AND PROTECTION OF WOMEN AGAINST VIOLENCE: HISTORY AND PROMOTION OF THE ISTANBUL CONVENTION

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Among gender issues, the issue of protecting women from all types and forms of violence, including domestic (family) violence, occupies a special place. At the international legal level, the most comprehensive definition of – domestic violence‖ which includes not only physical violence, but also psychological, moral, economic coercion, the creation of various discriminatory conditions, as well as pressure, given the fact that the subject is female is enshrined in the fundamental documents, International law is actively developing tools aimed at comprehensively protecting women from all forms of discrimination and violence. However, there are many obstacles to the successful implementation of such norms in the national legislation of states. In this regard, the purpose of this article is to highlight the worldwide distribution of the most important international treaty in this area – the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (Istanbul Convention), as well as the unfinished process of ratification of this convention in Ukraine.

Keywords: *women's rights, international law, domestic violence, protection of women's rights, discrimination, gender equality, Istanbul Convention.*

DREPTUL EUROPEAN ȘI PROTEJAREA FEMEILOR CONTRA VIOLENȚEI: ISTORIA ȘI PROMOVAREA CONVENȚIEI DE LA ISTANBUL

Printre problemele de gen, cea a protejării femeilor de toate genurile și formele de violență, inclusiv violența domestică (în familie) ocupă un loc important. La nivel de drept internațional, în actele fondatoare este fixată definiția cea mai largă a conceptului „violență domestică", în care sunt incluse nu doar formele de violență fizică, dar și psihologică, morală, economică, crearea diferitelor condiții discriminatorii, și de asemenea constrângerea din motivul, că subiectul acestora este femeia. Dreptul internațional elaborează activ instrumentele, care sunt direcționate spre protejarea complexă a femeii împotriva tuturor genurilor de discriminare și violență. Dar pe calea implementării cu succes a asemenea norme apar o mulțime de obstacole. În legătură cu aceasta, scopul prezentului articol este iluminarea răspândirii mondiale a celui mai important acord internațional în acest domeniu – Convenția Consiliului Europei din anul 2011 privind prevenirea şi combaterea violenţei împotriva femeilor şi a violenţei domestice (Convenția de la Istanbul), și, de asemenea, nefinalizarea procesului de ratificare a acestui document în Ucraina.

Cuvinte-cheie: *drepturile femeii, drept internațional, violență domestică, protejarea drepturilor femeii, discriminare, egalitate de gen, Convenția de la Istanbul.*

LA LOI EUROPÉENNE ET LA PROTÉCTION DES FEMMES CONTRE LA VIOLENCE: HISTOIRE ET PROMOTION DE LA CONVENTION D'ISTANBUL

Parmi les questions de genre, la place particulière est occupée par la question de la protection des femmes contre tous les types et formes de violence, y compris la violence domestique (familiale). Au niveau juridique international, les documents fondamentaux consacrent la définition la plus large de la

notion de «violence domestique», comprenant non seulement les formes de violence physique, mais aussi la coercition psychologique, morale, économique, la création de diverses conditions discriminatoires, ainsi que les pression due au fait que le sujet est une femme. Le droit international développe vite des outils visant à une protection complète des femmes contre tous les types de discrimination et de violence. Donc, il existe de nombreux obstacles à la mise en œuvre réussie de ces normes dans la législation nationale. Alors, le but de cet article est de souligner la diffusion mondiale du traité international le plus important dans ce domaine – la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique 2011 (Convention d'Istanbul), ainsi que la processus inachevé de ratification de cette convention en Ukraine.

Mots-clés: *droits des femmes, droit international, violence domestique, protection des droits des femmes, discrimination, égalité des genres, Convention d'Istanbul.*

ЕВРОПЕЙСКОЕ ПРАВО И ЗАЩИТА ЖЕНЩИН ОТ НАСИЛИЯ: ИСТОРИЯ И ПРОДВИЖЕНИЕ СТАМБУЛЬСКОЙ КОНВЕНЦИИ

В гендерной проблематике особое место занимает вопрос защиты женщин от всех видов и форм насилия, включая домашнее (семейное) насилие. В основополагающих документах на международно-правовом уровне закрепляется наиболее широкий состав определения понятия «домашнее насилие», в которое входят формы не только физического насилия, но и психологического, морального, экономического принуждения, создание различных дискриминационных условий, а также давление по причине того, что субъектом насилия является женщина. Международное право активно разрабатывает инструментарий, направленный на комплексную защиту женщин от всех видов дискриминации и насилия. Однако, на пути успешной имплементации таких норм в национальные законодательства существует немало препятствий. В связи с этим, цель представленной статьи – осветить мировое распространение важнейшего международного договора в этой области – Конвенции Совета Европы по предотвращению и борьбе с насилием в отношении женщин и насилием в семье 2011 г. (Стамбульская Конвенция), а также незавершенный процесс ратификации данного документа в Украине.

Ключевые слова: *права женщин, международное право, домашнее насилие, защита прав женщин, дискриминация, гендерное равенство, Стамбульская Конвенция.*

Introduction

Violence against women and domestic violence continues to be one of the most pervasive human rights violations worldwide. This phenomenon affects women from all walks of life in all parts of the world, regardless of cultural, religious, economic, social or geographical characteristics. According to global estimates by the World Health Organization, every third woman in the world has experienced gender-based violence at least once in her life [1]. Gender-based violence against women is violence that is directed at a woman because she is a woman, or that clearly affects women [2, p. 4], has devastating consequences, both for the victims and for society as a whole. All over the world, women are daily subjected to psychological and physical abuse, harassment, rape, mutilation, forced marriage or forced sterilization by their families. Recognition of the scale and impact of this scourge is essential if the fight to prevent violence against women and domestic violence is to be effective. Violence against women is clearly a violation of human rights and no tradition can justify this violation. The inability and/or refusal of political leaders to take a clear position on this issue contributes to the transfer of violence into the sphere of private life, as well as its perpetuation and even justification of acts of violence against women and domestic violence. Therefore, the elimination of gender-based violence should be a task and a priority for the executive, legislature and judiciary, public and human

rights organizations, women's rights groups and other NGOs, professional organizations and trade unions, the media and the private sector, educational institutions and community groups, regional and international structures and the general public.

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter referred to as the Istanbul Convention) [3] is an innovative and legally binding international treaty aimed at eliminating violence against women and domestic violence. The Convention [3] is the legal basis for the development and adoption of advanced strategies and measures aimed at preventing and combating violence against women and domestic violence in states that have ratified it. The Convention [3] was developed in Europe, but its scope is global. Any state can accede to the Convention [3] or use it as a model for the development of national or regional legislation and policies.

The Istanbul Convention of the Council of Europe [3] is the most progressive and ambitious international human rights treaty aimed at eliminating violence against women. In 2012, the Spanish Observatory on Combating Domestic Violence and Gender-based Violence awarded the Council of Europe with the most prestigious award for its work on the elimination of gender-based violence in connection with the development of the Istanbul Convention [2, p. 13]. In 2015, the Convention received the prestigious Vision Award from the World Future Council, the Inter-Parliamentary Union and UN Women in recognition of its contribution to the fight against violence against women [2, p. 13]. The Istanbul Convention is called the "gold standard" [4] in the fight against gender-based violence.

Since the adoption of the Istanbul Convention [3] in April 2011, it has had a major positive impact on the status of women across Europe. It has contributed to the awareness of the European public of the urgent need to take action to combat violence against women and domestic violence. The Convention has served as the starting point for important progressive changes in national laws regarding gender-based violence.

However, all the standards laid down in the Istanbul Convention [3] can lead to long-term positive changes in the world only if the largest possible number of European and non-European countries sign, ratify and fully implement the convention.

The Istanbul Convention entered into force on August 1, 2014. Since then, it has been ratified by 35 countries - Turkey, Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, Estonia, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Romania, Portugal, San Marino, Serbia, Slovenia, Spain, Sweden, Switzerland [5]. The Council of Europe is the continent's leading human rights organization and actively promotes the protection of women and girls from gender-based violence. The adoption of the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) has made the Council of Europe the leading organization for promoting gender equality, protecting women's rights and preventing gender-based violence [2, p 11]. At present, the signing of the Istanbul Convention [3] and the introduction of its basic principles into national legislation is a legally optional, but civilizational integral part of the integration of Eastern European countries into the EU.

The Istanbul Convention was signed by Ukraine back in 2011, but has not yet been ratified due to protests from churches and conservative politicians against the term

"gender" used in it. The EU and a number of international organizations have repeatedly called on Ukraine to ratify the Istanbul Convention. The last such statement was made jointly by the EU, the UK, Norway, Switzerland and a number of international organizations on their resources on the International Day to End Violence against Women in 2021 [6]. The urgent and overdue for Ukraine problem of ratification of the Istanbul Convention [3] determines the relevance of the review of the Istanbul Convention [3] as the most important tool for protecting women's rights, its history and promotion in the world.

In this review, the author used the logical method, the method of semantic analysis, as well as the comparative legal method.

Currently, domestic violence is a constant topic in international law studies, illustrating the many ways in which this right interacts with the domestic norms of national laws. The Istanbul Convention as an instrument of EU law for the protection of women's rights has been deeply studied by a large constellation of European and English-speaking scholars, including J. Gardam [7], Klugman [8], S. Friedman and B. Goldblatt [9] and many others. However, their view characterizes the position of the EU and the British Commonwealth, while the review presented here is a view from Ukraine.

The essence and principles of the Istanbul Convention of the Council of Europe

The Istanbul Convention [3] is Europe's first legally binding instrument specifically addressing violence against women and marks an important step towards greater gender equality. The Istanbul Convention [3] sets high standards for the protection of women in Europe. Therefore, member states are obliged to form a national legal framework to combat all forms of violence against women, to prevent and prosecute them. In addition, the Convention [3] highlights the relationship between women's empowerment, i.e., gender equality, and the elimination of all forms of violence against women. The objectives of the Istanbul Convention in accordance with Part 1 of article 1 of this Convention are as follows: protect women from all forms of violence and prevent, prosecute and eradicate violence against women and domestic violence; contribute to the elimination of all forms of discrimination against women and promote genuine equality between women and men, including through the empowerment of women; develop a comprehensive framework, policies and measures to protect and assist all victims of violence against women and domestic violence; promote international cooperation to eliminate violence against women and domestic violence; provide support and assistance to organizations and law enforcement agencies in implementing effective cooperation for the adoption of a comprehensive approach to the elimination of violence against women and domestic violence [3]. To achieve these goals, the Istanbul Convention [3] draws on other international legal instruments, such as the Convention for the Protection of Human Rights and Fundamental Freedoms [10], as well as the case law of the European Court of Human Rights. In addition, it develops and refines the standards enshrined in the Convention on the Elimination of all forms of discrimination against women [11]. The scope of the Istanbul Convention [3] covers all forms of violence against women, including domestic violence, which affects women the most. The cornerstones of the Istanbul Convention [3] are the prevention of violence, the protection of victims and the prosecution of perpetrators. The Istanbul Convention [3] recognizes that the fight against gender-based violence can only be effective if states

pursue a comprehensive and coordinated policy.

The main beneficiaries of the Istanbul Convention [3] are women. This follows logically from its focus on combating forms of violence that only women suffer because of their female sex (such as female genital mutilation or forced abortions), or that women experience disproportionately more than men (domestic violence, forced marriage, forced sterilization, rape and other forms of sexual abuse, sexual harassment or stalking).

At the same time, the parties to the Istanbul Convention [3] are encouraged to extend its application to all who are at risk of or suffer from domestic violence, including men, children and the elderly. Thus, it is recognized that men are also subjected to some of the forms of violence covered by the Istanbul Convention, albeit less frequently and generally in less severe forms.

The Istanbul Convention consists of 81 articles, which are grouped into 12 chapters [3].

Article 3 of the Istanbul Convention defines the main terms used in the Istanbul Convention: “violence against women” is understood as a violation of human rights and a form of discrimination against women and means all acts of gender-based violence that lead or may lead to physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or private life; “domestic violence” means all acts of physical, sexual, psychological or economic violence that take place within the family or at home or between former or current spouses or partners, whether or not the perpetrator lives in the same place that and the victim; “gender” means the socially fixed roles, behaviors, activities and characteristics that a particular society considers to be appropriate for women and men; “gender-based violence against women” means violence that is directed at a woman because she is a woman or that affects women disproportionately; “victim” means any individual who is subjected to violence against women or domestic violence; “women” includes girls and teen girls under the age of 18 [3]. A detailed analysis of the definitions of these key concepts for the meaning of the convention proves that the convention is aimed at protecting women on the basis of gender, i.e., their belonging to women and recognizes as a woman a person who was born a woman; in the case of domestic violence, the circle of protected persons expands and includes children both sexes, sometimes disabled. Part 2 of the article 4 of the Istanbul Convention focuses on the need to prevent discrimination against women in the form of: enshrining in their national constitutions or other relevant legislation the principle of equality between women and men and ensuring the practical observance of this principle; prohibition of discrimination against women, including the use of sanctions where appropriate; repeal of laws and practices that discriminate against women [3]. Part 3 of the article 4 of the Istanbul Convention clarifies that compliance with the provisions of the Istanbul Convention by the Parties, in particular by taking measures to protect the rights of victims, must be ensured without any discrimination on the basis of sex, race, color, language, religion, political or other opinions, national or social origin, belonging to national minorities, property status, birth, sexual orientation, gender identity, age, health status, disability, marital status, migrant or refugee status, or other grounds [3]. This part is often the subject of speculation and is interpreted by opponents of this Convention as a desire to spread the ideas of sexual minorities, although in fact these provisions actually duplicate article 14 of the Convention for the Protection of Human Ri-

ghts and Fundamental Freedoms [10], as well as paragraph "a" of article 5 of the Convention on the elimination of all forms of discrimination against women, according to which States Parties must take all measures to change the social and cultural patterns of behavior of men and women in order to achieve the eradication of prejudices and the abolition of customs and all other practices that are based on the idea inferiority or superiority of one of the sexes or stereotypical roles of men and women [11]. The desire for equality between men and women is confirmed by Art. 6 of the Istanbul Convention, which requires the use of a gender approach to achieve equality between men and women [3]. Article 12 of the Istanbul Convention obliges its participants to take all necessary measures to introduce changes in the social and cultural patterns of behavior of women and men in order to eradicate prejudices, customs, traditions and any other practice that are based on the idea of inferiority of women or stereotyped ideas about the role of women and men, and encourages the active contribution of men and boys to the prevention of all forms of violence falling within the scope of this Convention [3].

The four fundamental principles of the Istanbul Convention [3] are: prevention; protection; prosecution; comprehensive policy. They are embodied in the concrete practical guidelines of the Istanbul Convention [3] on qualifying and combating forms of gender-based violence and domestic violence.

Chapter V of the Istanbul Convention describes those forms of violence against women that this Convention aims to combat and which must be criminalized in national legislation in order to fulfill obligations under the Istanbul Convention: psychological violence is intentional behavior that leads to serious damage to the psychological integrity of a person as a result of coercion or threats; stalking - intentional behavior in the form of repeated threatening behavior directed at another person that causes her or him to fear for their safety; physical violence is intentional behavior, in the form of committing acts of physical violence against another person; sexual assault is the commission, without consent, of vaginal, anal or oral penetration of a sexual nature into the body of another person using any part of the body or object, or the commission of other acts of a sexual nature with a person without consent, or forcing another person to perform an act of a sexual nature, without consent, with a third party, forced marriage is the intentional conduct of forcing an adult or child into marriage; female genital mutilation; forced abortion; forced sterilization [3]. All of the above forms of violence must be criminalized and prosecuted, which does not exclude the protection of all victims from any further acts of violence in parallel with the criminal prosecution of the aggressors. Article 43 of the Istanbul Convention emphasizes that liability for offenses established in accordance with this Convention must occur regardless of the nature of the relationship between the victim and the person who committed the relevant acts of violence [3].

Chapter IV of the Istanbul Convention describes the necessary legislative or other measures to protect all victims from any further acts of violence, which consist in the establishment of general support services, specialized support services for any victims who are subjected to any form of violence falling within the scope of this Convention, the creation of appropriate, easily accessible enough shelters to provide safe accommodation for victims, especially women; the establishment of public, toll-free, 24-hour telephone hotlines to provide advice to applicants, confidentially or with due respect for their anonymity, in relation to all forms of violence falling within the scope of this Convention; setting

up adequate, easily accessible centers for victims of rape or sexual violence in sufficient numbers to provide medical and forensic examination, trauma support and counseling for victims; psychosocial counseling for children witnessing all forms of violence; providing victims with appropriate means of civil legal protection in relation to the person committing violent acts [3].

Article 49 of this Convention emphasizes that in investigations and trials in relation to all forms of violence falling under the scope of the Istanbul Convention, the rights of the victim should be a priority at all stages of criminal proceedings [3]. Article 50 of this Convention obliges the Parties to take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence falling within the scope of this Convention promptly and properly, by providing adequate and prompt protection to victims, and that responsible law enforcement agencies shall, promptly and appropriately, carry out prevention and protection against all forms of violence falling within the scope of this Convention, including the application of preventive operational measures and the collection of evidence [3].

Article 60 of the Istanbul Convention gives women the right to refugee status within the meaning of article 1, A (2) of the 1951 Refugee Convention in the event of gender-based violence against women [3].

Chapter IX of the Istanbul Convention establishes a mechanism for monitoring the implementation of the Convention by the Parties, which is carried out by an expert group on action against violence against women and domestic violence (hereinafter referred to as “GREVIO”) [3]. GREVIO is composed of a minimum of 10 members and a maximum of 15 members, taking into account gender and geographical balance, as well as multidisciplinary expertise. Its members are elected by the Committee of the Parties from candidates nominated by the Parties for a term of 4 years, renewable once, and are selected from among the citizens of the Parties [3]. GREVIO determines the appropriate means to carry out this monitoring procedure by approving a questionnaire for each assessment cycle, which will serve as the basis for the procedure for assessing the implementation of the Convention by the Parties. This questionnaire is sent to all Parties and they respond to it and to any other requests for information from GREVIO. The Parties shall submit to the Secretary General of the Council of Europe a report, based on a questionnaire, on legislative and other measures to give effect to the provisions of this Convention, for consideration by GREVIO. GREVIO considers the above-mentioned report and, based on all the information received and comments of the Parties, approves its report and conclusions on the measures taken by the Party concerned to implement the provisions of the Istanbul Convention, sends them to the Party concerned and the Committee of the Parties. The report and conclusions of GREVIO are published from the moment they are adopted, together with possible comments from the Party concerned [12]. The Parties submit GREVIO reports to their national parliaments. The Parliamentary Assembly of the Council of Europe regularly sums up the implementation of the Istanbul Convention [3].

The history of the adoption and dissemination of the Istanbul Convention in the world

In 2002, the recommendations of the Committee of Ministers of the Council of Europe on the protection of women from violence were adopted [13]. In 2006, a group of parliamentarians created the Women Without Violence Parliamentary Network with the aim

of actively engaging parliamentarians at all levels across Europe and beyond in raising awareness of this serious violation of human rights, as well as initiating, encouraging and advancing legislative and political changes to end gender-based violence. In 2006-2008 a pan-European campaign to combat violence against women, including domestic violence [14]. During its implementation, the need for harmonized legal standards to ensure that victims enjoy the same level of protection across Europe became apparent. In December 2008, the Committee of Ministers established a group of experts mandated to prepare a draft convention. For just over two years, this group, called CAHVIO (Committee for preventing and combating violence against women and domestic violence), has been developing a draft text. The Assembly of the Council of Europe actively participated in the discussion and development of the Istanbul Convention [15]. The final draft of the convention was prepared in December 2010. On April 7, 2011, the Istanbul Convention was adopted by the Committee of Ministers of the Council of Europe. On May 11, 2011, the Istanbul Convention was opened for signature on the occasion of the 121st session of the Committee of Ministers in Istanbul. On August 1, 2014, the Istanbul Convention entered into force after ratifications by 10 countries, eight of which were supposed to be members of the Council of Europe [5]. During the period from 2012 to 2021, 46 countries and the EU as a whole signed the Istanbul Convention, it was ratified by 34 of them, the first of them was Turkey in 2012, the last ratification by the Republic of Moldova on 10/14/2021 [16]. In 2018 alone, this convention entered into force in nine countries (Croatia, Cyprus, Germany, Estonia, Greece, Iceland, Luxembourg, North Macedonia and Switzerland), and in 2019 Ireland ratified the treaty [5]. To the great regret of the world community, in March 2021, Turkey announced its withdrawal from the Istanbul Convention [5], which, most likely, was the result of another EU refusal to admit Turkey to the EU. Although opponents of the Istanbul Convention accuse it of destroying "traditional values", part 5 of article 12 of this Convention reveals to us the true reason for all forms and types of opposition to the adoption and dissemination of this Convention - this is the requirement to reject the use of culture, customs, religion, traditions and so-called "reasons of honor" as a justification for any act of violence falling within the scope of this Convention [3].

Of particular interest is the impact of the standards of the Istanbul Convention [3] on the national legislation of the countries that have ratified it. In essence, the Istanbul Convention [3] imposes detailed obligations on states to introduce legislative responses to violence against women, in contrast to the much more general obligations placed on states by the European Court of Human Rights. The process of implementing the standards of the Istanbul Convention on the Protection of Women from Gender-Based Violence and Domestic Violence in national legislation is carried out under periodic monitoring by GREVIO and is guided by GREVIO recommendations in accordance with Art. Art. 66, 67, 68, 70 of the Istanbul Convention [3].

To provide information on legislative and other measures to implement all the standards of the Istanbul Convention in legislation and law enforcement practice, the participating States use the list of questions compiled by GREVIO [17]. Based on information received from the State, as well as informal reports from NGOs or national human rights institutions, GREVIO conducts a comprehensive assessment of the implementation of the Convention. The control process is based on a dialogue between the oversight body and

a wide range of national partners, including national parliaments [2, p. 25].

The Istanbul Convention also provides for an urgent investigation procedure that allows urgent action to be taken “to prevent serious, massive or persistent acts of violence covered by the Convention” [18]. If GREVIO decides that the situation requires immediate attention, it may initiate an investigation procedure and require the State concerned to urgently submit a special report. In addition, GREVIO can adopt recommendations that are not specific to any particular country, but are related to issues of interest to all participating States [3]. This procedure allows GREVIO to explain the key themes and concepts of the Istanbul Convention [3] for the effective implementation of its provisions in practice.

GREVIO evaluations have shown that many governments have failed to provide the necessary funding to fulfill their commitments to combat gender-based violence. In some countries, cutbacks in police funding have led to a reduction in the number of specialized units to deal with domestic violence or sexual crimes. In other countries, public funding for shelters and services needed for women and children to recover from abuse remains insufficient. Significant reductions in government funding for women’s rights organizations and other human rights NGOs limit their ability to provide assistance to victims. This entails not only disastrous consequences for the victims, who literally die, but is also a short-sighted policy. Studies have shown that gender-based violence has a long-term negative impact on the economy (in terms of health care costs, missed work days and other very tangible costs) and, therefore, on society as a whole [2, p. 45].

In 2017, GREVIO submitted to Austria its report on Austria’s implementation of the provisions of the Istanbul Convention. GREVIO called on the Austrian authorities to ensure that the long-term needs of all female victims and their children are met by ensuring an adequate level and stability of funding (proposal 28, paragraph 111 of the GREVIO report on Austria’s implementation of the provisions of the Istanbul Convention) [19]. In April 2019, a proposal was submitted to the legal committee of the Austrian National Council to develop a long-term strategy to combat all forms of violence against women, following the recommendation of GREVIO to develop a long-term plan or strategy that would give the necessary attention to all forms of violence defined by the Istanbul Convention, and which would provide for permanent long-term financing of sustainable and comprehensive measures in this direction [2, p. 33].

Between 2016 and 2019, Danish parliamentarians made about 200 inquiries on issues related to violence against women, eleven of which related specifically to the Istanbul Convention. Some of the requests related to the Government’s follow-up to the GREVIO Assessment Report on Denmark, including one to the Minister for Children and Social Affairs, who was asked to clarify the government’s position in response to the criticism expressed by GREVIO that the procedures necessary for making decisions on guardianship, Denmark does not provide adequate protection for women and children who have been subjected to domestic violence by a spouse or father [2, p. 34].

The role of the legislature in the implementation of the Istanbul Convention is also important. Parliamentarians, along with the executive branch, are responsible for bringing national norms in line with the norms of international treaties, including the Istanbul Convention [3]. For example, not all of the states that ratified the Istanbul Convention have brought their laws into line with

the standards of the Istanbul Convention [3] regarding rape - in some countries, the legislative definition of rape is based not on the absence of voluntary consent, but on the presence of coercion and the use of force, and this despite that psychologists have long known that a traumatic event can plunge a person into a state of shock, in which the victim will not resist out of fear that the perpetrator might kill her. Obviously, the outdated definition of rape is contrary to Art. 36 of the Istanbul Convention [3]. In other countries, there is an urgent need to end impunity and to abolish lenient sentences on the grounds that the perpetrator acted out of respect for their culture, traditions, religion or customs, or defended their "honor". It is important to remember that instead of mitigating punishment, the Convention actually requires judges to increase the punishment if the crime is committed by a family member or by two or more persons acting in concert [2, p. 35].

The need for a legal definition of rape based on lack of consent is a recognized international human rights standard in Article 36 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and an obligation for parties to that Convention [20].

One of the most important achievements of this Convention was that many signatory states, including Germany, Sweden, Denmark, Croatia and Greece, eventually changed the interpretation of the term "rape" enshrined in national legislation. In 2018, the Swedish Parliament, in accordance with the provisions of the Istanbul Convention, passed a law recognizing that sex without consent is rape. This means that sex must be consensual, otherwise it is against the law. According to the new law, rape victims are no longer required to prove that the perpetrator used violence, threatened or took advantage of the vulnerable position of the victim [2, p. 37].

In general, the dissemination of the Istanbul Convention [3] in the world, its adoption and ratification by an increasing number of states should lead to legal "diffusion", i.e. the spread of gender standards of non-discrimination and protection of women from all clearly defined, and possibly permissible, forms of violence, their transition from the international legal and constitutional levels to the level of the law enforcer represented not only by state authorities, but also by addressees in various social strata, including the family. This is the main goal-setting of the Istanbul Convention [3] as a new regulator specialized in women's rights in comparison with the existing international legal regulators in this area.

Current Status and Prospects of the Istanbul Convention in Ukraine

The Istanbul Convention [3] was signed by Ukraine back in 2011, but has not yet been ratified due to a combination of various reasons, from protests of churches and conservative politicians against the term "gender" used in it to statements by more moderate politicians that in Ukrainian legislation has enough tools to protect women from domestic violence.

Since the emergence of the Istanbul Convention, Ukraine has been opposed to its ratification by the All-Ukrainian Council of Churches. In 2016, an attempt at the initiative of P. Poroshenko to ratify the Istanbul Convention ended in failure. In May 2020, a petition was created on the website of the President of Ukraine calling for the ratification of the Istanbul Convention, which received more than 25,000 votes [21]. President of Ukraine Volodymyr Zelensky, in response to this petition, said that he would submit a draft law on the ratification of the Istanbul Convention to the Verkhovna Rada after the Ministry of Foreign Affairs submits a corres-

ponding proposal [22]. In July 2020, the government of Ukraine announced that it was ready to submit a bill on the ratification of the Istanbul Convention to the Parliament. In March 2021, women's marches will be held in Kyiv, Kherson, Kharkiv, Zaporozhye, Poltava, Kramatorsk, Lviv, Ivano-Frankivsk, one of the main demands of the participants in the marches is the ratification of the Istanbul Convention. In June 2021, the head of the Ukrainian delegation to PACE, People's Deputy of Ukraine Maria Mezentseva announced that she expects the ratification of the Istanbul Convention by the Ukrainian parliament after the summer holidays in 2021 [21]. However, the situation with the ratification of the Istanbul Convention [3] by the Ukrainian parliament has frozen in one place and is far from over. It is necessary to analyze the reasons for the delay of the Ukrainian parliament with ratification.

The misconceptions caused by the misinterpretation of the terminology used in the Istanbul Convention [3] by conservative politicians were analyzed and dispelled by the author in the previous sections of this article. Obviously, the Istanbul Convention [3] is not among the European legal acts that protect the rights of LGBT people and focuses on the rights of women, although there are special acts that protect the rights of LGBT people. The fears of conservative politicians in this regard are nothing more than populism.

Much more interesting is the objection that Ukraine does not need the Istanbul Convention [3], because Ukrainian legislation has enough tools to protect women from domestic violence. Such a tool means the Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in order to implement the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence" dated 06.12.2017. No. 2227-VIII [23]. This law came into force on January 11, 2019, and in accordance with it, domestic violence is criminalized under Art. 126-1 of the Criminal Code of Ukraine, special programs for domestic rapists were introduced for domestic rapists and special services were created for people who suffered from domestic violence [23].

But so far, the practical result of these actions is more than modest: according to the statistics of the Ministry of Internal Affairs of Ukraine for 2019, 141,814 complaints about domestic violence were received, for 8 months of 2020 - 138,984 complaints about domestic violence, for 8 months of 2021 - 203,724 complaints about domestic violence, i.e., the growth dynamics of domestic violence +47% over the three years of the above-mentioned law [24]. Ukrainian law enforcers explain this by the difficult situation of isolation of individual families from society due to quarantine and the extremely scarce funding of programs to combat domestic violence by the Ukrainian government [24]. It is obvious that Ukraine in the fight against violence against women and domestic violence lacks European experience and practical developments of the main world expert on this issue - GREVIO. To receive GREVIO consultations, Ukraine must have the status of a country that has ratified the Istanbul Convention [3].

Conclusions

Obviously, having our own laws to combat gender-based violence against women and domestic violence is a good start, but clearly not enough to combat this evil. Firstly, the Istanbul Convention [3] covers those areas of Ukrainian legislation that need to be improved, for example, the organization of shelters, the socialization of victims, the

collection of statistics, etc. Secondly, by ratifying the Istanbul Convention [3], Ukraine will join those countries the situation in which is assessed by external experts who monitor the implementation of the Istanbul Convention [3] and can provide recommendations and practical developments for solving problems. Thirdly, by ratifying the Istanbul Convention [3], Ukraine will confirm its adherence to European values.

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PROCEDURAL-CRIMINAL CHARACTERISTICS OF JUVENILE CRIME

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Juvenile delinquency has always aroused some interest among researchers, as young people are a growing new generation, a generation in which many hope, and immoral and antisocial actions by young people suggest that parents, guardians, employees of educational institutions and other people who may be involved in the formation of a personality in one way or another pay little attention to the educational process. This article is dedicated to the problems of juvenile delinquency, the characteristics of criminal behavior being determined. In pursuit of this purpose and objectives, the author used the method of analyzing the subject of the article through the legislation of the Republic of Moldova, as well as examining the scientific opinions offered to the general public by publishing on web pages or in printed form various guides, articles, explanatory notes. A theoretical and legal analysis of the concepts of legal regulation of juvenile delinquency prevention in the implementation of the modern criminal policy of the Republic of Moldova is carried out in detail. The author highlights one of the factors of juvenile delinquency - family problems. Possible law enforcement issues are being considered, ways of resolving them are proposed in order to prevent crime. The objective factors for the fight against juvenile delinquency are indicated, - among them are the rapid increase in crime and delinquency among adolescents and the low efficiency of court decisions.

Keywords: *adolescent, juvenile delinquency, criminal policy, family relations, deviant behavior.*

CARACTERISTICI PROCESUAL-PENALE A DELINCVENȚEI JUVENILE

Delincvența juvenilă a provocat întotdeauna un anumit interes în rândul cercetătorilor, deoarece tineretul reprezintă o nouă generație în creștere, generație în care mulți își pun speranțele, iar comiterea unor acțiuni imorale și antisociale de către tineri sugerează că părinții, tutorii, angajații instituțiilor de învățământ și alte persoane care ar putea fi într-un fel sau altul implicate în formarea unei personalități, acordă puțină atenție procesului educațional. Prezentul articol este dedicat problemelor delincvenței juvenile, sunt determinate caracteristicile comportamentului infracțional. Urmărind acest scop și obiective, autorul a folosit metoda de analiză a subiectului articolului prin prisma legislației Republicii Moldova, precum și examinarea opiniilor științifice oferite publicului larg prin publicarea pe pagini web sau în formă tipărite a diverse ghiduri, articole, note explicative. Este efectuată în detaliu o analiză teoretică și juridică a conceptelor de reglementare juridică a prevenirii delincvenței juvenile în implementarea politicii penale moderne a Republicii Moldova. Autorul evidențiază unul dintre factorii delincvenței juvenile - problemele familiale. Sunt luate în considerare posibile probleme de aplicare a legii, sunt propuse modalități de soluționare a acestora în scopul prevenirii infracțiunilor. Sunt indicați factorii obiectivi pentru lupta împotriva delincvenței juvenile, - printre aceștia fiind creșterea rapidă a criminalității și delincvenței în rândul adolescenților și eficiența scăzută a activității instanțelor judecătorești.

Cuvinte-cheie: *adolescent, delincvență juvenilă, politică penală, relații familiale, comportament deviant.*

CARACTÉRISTIQUES PROCÉDURALES-PÉNALES DE LA DÉLINQUANCE JUVÉNILE

La délinquance juvénile a toujours suscité l’intérêt des chercheurs en raison de la jeunesse de la génération montante dans laquelle beaucoup de gens placent leurs espoirs, et la commission d’actes immoraux et le comportement des jeunes ont suggéré que les parents, les tuteurs, le personnel des établissements d’enseignement et toute autre personne qui pourrait être d’une manière ou d’une autre impliquée dans la formation d’un homme politique accorde peu d’attention au processus d’éducation. Cet article est consacré aux questions de la délinquance juvénile, les caractéristiques du comportement criminel sont déterminées. Poursuivant ce but et objectifs, l’auteur a utilisé la méthode d’analyse du sujet de l’article à travers la loi de la République de Moldova, ainsi que l’examen des opinions scientifiques offertes au grand public par la publication sur des pages Web ou sous forme imprimée de divers guides, articles, notes explicatives. Une analyse théorique et juridique des concepts de réglementation juridique de la prévention de la délinquance juvénile dans la mise en њuvre de la politique pénale moderne de la République de Moldova est réalisée en détail. L’auteur met en évidence l’un des facteurs de la délinquance juvénile - les problèmes familiaux. Les problèmes possibles d’application de la loi sont examinés, des moyens de les résoudre sont proposés dans le but de prévenir les crimes. Des facteurs objectifs de lutte contre la délinquance juvénile sont indiqués, parmi lesquels l’augmentation rapide de la criminalité et de la délinquance chez les adolescents et la faible efficacité des décisions de justice.

Mots-clés: *adolescent, délinquance juvénile, politique pénale, relations familiales, comportement déviant.*

УГОЛОВНО-ПРОЦЕССУАЛЬНАЯ ХАРАКТЕРИСТИКА ПРЕСТУПНОСТИ НЕСОВЕРШЕННОЛЕТНИХ

Преступность несовершеннолетних всегда вызывала определенный интерес у исследователей, ведь молодежь – это новое подрастающее поколение, на которое многие возлагают надежды, а совершение молодыми людьми безнравственных и антисоциальных действий свидетельствует о том, что родители, опекуны, работники образовательных учреждений, другие лица, которые причастны к формированию человека как личности, уделяют мало внимания воспитанию. Данная статья посвящена проблемам преступности несовершеннолетних, определены особенности преступного поведения. Для достижения поставленной цели и задач автор использовал метод исследования предмета статьи сквозь призму законодательства Республики Молдова, а также анализ научных мнений, предлагаемых широкой общественности, путем публикации на веб-страницах или напечатанных материалов в виде руководств, статей, пояснительных записок. Подробно проводится теоретико-правовой анализ концепций правового регулирования профилактики преступности несовершеннолетних при реализации современной уголовной политики Республики Молдова. Особо выделяется один из факторов преступности несовершеннолетних – семейное неблагополучие. Рассмотрены возможные правоприменительные проблемы, предложены пути их решения в целях профилактики преступности. Указываются объективные факторы для борьбы с преступностью несовершеннолетних лиц – быстрый рост преступлений и правонарушений среди подростков и низкая эффективность деятельности судов по делам несовершеннолетних.

Ключевые слова: *подросток, преступность несовершеннолетних, уголовная политика, семейные отношения, девиантное поведение.*

Introduction

The relevance of the topic lies in the fact that juvenile delinquency has always aroused the interest of many scientists, both theorists and practitioners. The reason is that the younger generation is a natural reserve for the socio-economic development of any country, and the commission of crimes by minors indi-

cates the existing shortcomings in education, the unformed conditions for their socialization, which makes it difficult to fully include a certain part of the younger generation in the life of society.

The practical importance of this article lies in the fact that the ideas and conclusions formulated in it can be used with the correct interpretation of the norms of criminal and criminal procedure legislation in the investigation and consideration of crimes among minors, and which can eliminate some ambiguities in the application of criminal rules in practice. and help effective understanding of specialized scientific literature, etc.

Approach methodology. To achieve the set goal and objectives, we will use the method of researching the subject of the article through the legislation of the Republic of Moldova, as well as the analysis of scientific opinions offered to the general public through publication. on web pages or on paper in the form of manuals, articles, explanatory notes.

Main ideas of the research

Speaking about juvenile delinquency, from the point of view of society, it should be noted that the crime of such persons should be considered from the point of view of an indicator of social well-being or disadvantage of society. Therefore, the global community considers the prevention of crimes among minors as an important factor in the prevention of crime in general [1].

Juvenile delinquency has always aroused a certain interest among researchers, because young people are the new rising generation, on which many place their hopes, but the commission of immoral and antisocial actions by young people suggests that parents, guardians, employees of educational institutions, and other persons who can somehow be involved in the formation of a human being as a person, pay little attention to their education.

As Zainetdinova A. rightly points out "juvenile delinquency should be perceived as a social-legal, relatively massive phenomenon, including a set of socially dangerous actions, carried out during a specific period of time in a specific territory, which are not limited by criminal legislation." The concept of juvenile delinquency is an aggregation of offences committed by juveniles aged 14 to 18 [2]. Andronake A. states that "juvenile delinquency is a phenomenon that includes a multiplicity of violations of generally recognized social norms committed by persons under the age of 18 criminal violations" [3]. According to. Pashkin K, "juvenile delinquency deforms the personal formation of the juvenile delinquent himself, thereby contributing to the continuation of his/her criminal activity" [4].

Sharing these scientific views and based on the available scientific developments related to the subject of study, it is possible to conclude that despite the scientific research of the issue, the difficulties and problems of juvenile delinquency have not lost their relevance and significance, therefore, they urgently require further development and reflection in the criteria for the renewal of the legislation of the Republic of Moldova and the formation of society.

In addition, with a view to eliminating one of the grounds contributing to the commission of crimes by minors, the legislation of the Republic of Moldova establishes a certain obligation of persons whose circumstances include the performance of maintenance duties, education and training of minors.

Thus, parents, guardians or persons replacing them have every chance of being held accountable for committing violations of the law related to failure to fulfill the direct duties of maintaining, bringing up and educating a minor.

The norm of the article 60 part (2) of the Code of the Republic of Moldova "on

the offense”, specifically indicates that the failure or improper fulfillment by parents, guardians or persons replacing them of the obligation to support, bring up and educate the child, which entailed the commission of a socially dangerous act by him/her, entails the imposition of a fine in the amount of 9 to 18 conventional units or the imposition of punishment in the form of unpaid work in favor of society for a period of 40 to 60 hours [5].

As Prozumentov L. notes, “the study of the crime of persons who have not reached the age of majority as an independent section in the scientific literature should be called transitional. This is due to the fact that the age from 14 to 18 years is considered the transition from adolescence to adulthood, maturation, both physical and moral, the acquisition of a certain amount of knowledge and abilities that are important for inclusion in adult life and readiness to perform “adult” functions” [6].

However, with regard to juvenile delinquency, it should be pointed out that the legal system of the Republic of Moldova allocates two subgroups to the general group of minors, which are distinguished from the content of the legislation in force.

The first group includes persons under 14 years of age who are not criminally responsible because they cannot be considered sane, they are not considered to have the full capacity to distinguish between good and evil or to be aware of the gravity of the act.

This may be the main reason for considering minors from the group represented as persons in a difficult situation for whom public and social assistance can be applied exclusively.

The second subgroup includes persons from 14 to 16 years old who are brought to criminal responsibility in a differentiated manner.

A person who has not reached the age of majority and who has reached the age of 14-16 has the opportunity to be prosecuted for committing crimes provided for by the Criminal Code of the Republic of Moldova, in particular: part (2) of Art. 21; Art. 145, 147, 151; part (2) Art. 152; Art. 164; Parts (2) and (3) Art. 166; Art. 171, 172, 175, 186-188; part (2) - (6) art. 189; part (2) - (5) Art. 190; part (2) - (4) art. 192; Parts (2) and (3) Art. 192^1; part (4) art. 196; part (2) Art. 197; part (3) Art. 212; s. b) para. (4) art. 217; para. (3) let. b) and d), para. (4) Art. 217^1; let. a) and b) part (3) Art. 217^3; Art. 217^4; part (2), art. 217^6; Art. 260, 268, 270, 271; Art. 275, 280, 281, 283 - 286; parts (2) and (3) Art. 287; part (2) Art. 288; part (2) Art. 290; part (2) Art. 292; part (2) Art. 317; Art. 342 [3].

When compiling the list of crimes specified in part (2) article 21 of the Criminal Code of the Republic of Moldova, the legislator took into account the high degree of public danger, the obviousness or accessibility of awareness by minors at an early age, the intentional nature of guilt in the commission of crimes (for example, theft, deliberate destruction or damage to property, hooliganism) [7].

These crimes in their overwhelming majority are associated with an encroachment on life or well-being, on the freedom and sexual freedom of the individual, on property and other possessions.

A minor between the ages of 14 and 16 is criminally liable for the commission of those listed in part (2) of article 21 of the Criminal Code of the Republic of Moldova, crimes not only as their perpetrator, but also as an accomplice, and not only for committing a completed crime (or complicity in such a crime), but for attempting an extremely serious, especially serious, serious and medium-gravity crime, as well as for preparation for an extremely grave, especially grave, grave crime [8].

Minors who have reached the age of 14-18 are held criminally liable if it is confirmed that they were sane at the time of the crime. If it is established that a minor suffers from mental retardation, which is not associated with a psychological illness, it is also necessary to establish whether he/she was aware of the gravity of the act committed. Responsibility consists in the ability of a person during the commission of a crime to think over and realize his/her actions (inaction) and manage them [3].

The Criminal Code of the Republic of Moldova, establishing the criminal responsibility of minors, tries to ignore arbitrariness, as a result of which it takes into account many factors.

For this, it should be noted that only those minors who have legal personality are subject to criminal liability. And criminal legal personality appears with the achievement of such a value of the formation of the personality, in which the minor understands the legal and moral demands of the country and society for their own actions and manage their own actions.

Based on the indicated judgments, the concept of juvenile delinquency should be understood as a social and legal, relatively mass phenomenon, including a set of acts not placed by criminal law, committed during a specific period of time in a certain territory by persons aged 14 to 18 years. Due to the fact that the qualitative characteristics of juvenile delinquency are distinguished from the characteristics of "adult" delinquency by age characteristics, its essence, the grounds for its occurrence, measures for its prevention and its variability depending on time.

That is, juvenile delinquency is considered the result of the behavior of a specific group of persons under the age of 14 to 18 years, who, by their own illegal behavior, do not comply with the legal norms and social values of society, thereby harming it.

The criminal law nature of juvenile delinquency is determined by the Criminal Code of the Republic of Moldova.

The criminal law nature of crime is an objective phenomenon, since the criminal law prohibition arises from the need of society to combat those behaviors of offenders that harm it.

Also, it should be noted that juvenile delinquency is a global phenomenon. This suggests that this type of crime is not reduced to a single fact of committing a criminally punishable act, but is represented by a number of criminals aged 14 to 18 years. Individual excesses cannot be declared criminal by the legislator, because the criminal law norm is designed for multiple use and affects human behavior, which is in the nature of a fact, that is, the likelihood of repetition in the future. This is a symptom of juvenile delinquency, characteristic of all crimes, including those that are committed by minors occasionally, but pose an overestimated threat to society.

Juvenile delinquency is relatively widespread, as it is considered a social pathology, that is, a deviation from generally accepted behavior in society [9].

It is appropriate to ask the question, and what, in fact, causes juvenile delinquency? The reasons for the emergence of this type of crime are many, among them stands out: the complexity of family education, modern children are accelerating, developing at an accelerated rate, which complicates the process of their upbringing, parents and guardians do not have time to keep up with their level of development; young people's underemployment: when talking about rural areas, where young people have nowhere to put themselves into practice, there is no place for additional education, as opposed to urban areas, which are likely to do so, but because of their disinterest or lack of access to funds from parents, guardians to pay for such classes remain without

additional education and with a large amount of free time; reduced educational influence of adults, on the grounds of living a large number of out-of-town in rented apartments; unfavourable situation in the family, difficult life situation, negative example from adults often “push” young people to a criminally punishable act, the use of alcoholic beverages, easy access to narcotic and psychotropic drugs are also prerequisites for the commission of criminal acts by minors.

The list of grounds on which criminal acts are committed by minors is many, but each young person has their own.

In addition to the above features and grounds for juvenile delinquency, it should be noted such a feature as the method of committing a crime by minors. As a rule, the method of committing a crime is primitive. When choosing a method of committing a crime, juveniles operate with skills, habits, imitation of movie characters, and psychological characteristics.

Often, juveniles commit crimes in a group, which gives them more conviction in the act and confidence in actions. A teenager feels even more confident when committing a crime in complicity with an adult [9].

Another distinctive element of the commission of a crime by minors is the choice of the instrument of crime. Due to their inexperience, juvenile offenders use simple tools for committing a crime - legs, hands when inflicting bodily harm, kitchen knives, sticks, improvised materials, etc.

The next distinguishing feature of juvenile delinquency is the concealment of traces of the committed crime from parents, guardians or persons replacing them.

Analyzing this issue, Kanevsky L., rightly notes, “juvenile offenders, as a rule, try to hide the committed crime by destroying the means and instruments of crime, hiding, donating or selling stolen goods” [9].

Juveniles get rid of stolen property quickly, offering it for sale near the committed crime at reduced rates. As a rule, they commit theft in groups, together with their peers [3].

Practice shows that the most common crimes committed by minors are thefts, which differ in the variety of methods of their commission, the number of participants, the amount of harm, etc. The bulk of thefts are committed against private property. As a rule, small items, easily sold and used (sweets, drinks, cigarettes) and, of course, money are stolen.

In their own deeds (methods of committing), juvenile offenders show a large amount of imagination and ingenuity, penetrate places that are hard to reach for “adult” criminals, less often use tools and devices specific to professional burglars, improvise and use means and methods found by chance (at the crime scene), do not show much concern to hide the traces of the crime, which allows faster disclosure of such crimes. If they are found at the crime scene, they usually run away.

Ignoring the use of simple methods of committing crimes and the use of primitive tools, there is an increased unsolved crime committed by minors.

In order to combat and reduce the number of crimes committed by minors, it is necessary to take responsibility for taking appropriate measures to prevent juvenile delinquency at an early age, just at an early age a young person is most susceptible to both positive and negative impacts. First of all, this responsibility should fall on the shoulders of parents, guardians, and also on educational and medical institutions, public associations and law enforcement agencies [2].

Thus, it should be noted that juvenile delinquency is a structural element of general crime.

In the presented context, the opinion of the author Prozumentov L. is preferred: "juvenile delinquency contains the characteristics inherent in crime in general: a bad impact on society, relative prevalence and prohibition by criminal law, historical variability and social conditioning. Any of the listed characteristics is refracted through age-related features" [6].

An important point in the formation of a minor as a person, as an individual, interest in their upbringing is the specificity of proceedings in juvenile cases.

Thus, the proceedings in the category of cases under consideration have specifics, due to the characteristics of the subject – his/her physical, intellectual and mental development. In this regard, the Criminal Procedure Code of the Republic of Moldova, along with general requirements, imposes additional requirements on this form of legal proceedings.

In juvenile proceedings, a comprehensive study of interrelated problems is taken into account: the prerequisites for the commission of a crime, the process of formation of criminal behavior, the effectiveness of coercive and preventive measures. The difference from other forms of court proceedings in this model of court administration is due to the special status of the defendant, the widening of the range of subjects of the process, procedural complexity, and the strengthening of the procedural rights of the defendant and his legal representatives.

According to article 290, part 2 of the Code of Criminal Procedure of the Republic of Moldova, in cases in which there are arrested persons or minors, shall be considered as a matter of urgency and priority, and in accordance with article 345, part 1 of the Code of Criminal Procedure of the Republic of Moldova, the preliminary sitting on cases in which juvenile defendants or arrested persons are charged shall be held in an urgent and priority order.

Participation in the trial of a lawyer in cases of a minor is mandatory (article 69 of the Code of Criminal Procedure of the Republic of Moldova). Consequently, the failure to appear in court of the defense counsel requires either his/her replacement (with the consent of the defendant and his/her legal representatives), or the adjournment of the case [10].

The participation of a legal representative of a minor suspect, accused, defendant in criminal proceedings is mandatory, except for the case provided by law (article 480 of the Code of Criminal Procedure of the Republic of Moldova).

According to article 484 of the Code of Criminal Procedure of the Republic of Moldova, at the request of the defense counsel and the legal representative of the minor defendant, the court, after hearing the opinions of the parties, has the right to remove the minor defendant from the courtroom by its decision during the investigation of circumstances that can negatively affect the minor.

In accordance with article 485 of the Code of Criminal Procedure of the Republic of Moldova, when passing a sentence in a case against a minor, the court, along with the issues specified in article 385 of the Code of Criminal Procedure of the Republic of Moldova, should consider the possibility of releasing the minor from criminal punishment in accordance with article 93 of the Criminal Code of the Republic of Moldova or his probation in accordance with article 90 of the Criminal Code of the Republic of Moldova [11].

In the case of the release of a minor from criminal punishment with his/her placement in a special educational institution or to a medical and educational institution as well as with the use of compulsory measures of an educational nature, provided for in article 104 of the Criminal Code of the Republic of

Moldova, the court notifies the relevant specialized state body and entrusts it with monitoring the juvenile offender's behaviour.

An important defect of the new model of juvenile criminal justice is the weakening of support services that support the court in their social rehabilitation. We are talking about social educators (institutions similar to the American probation service) [12].

It is important to note that the laws of various states contain a set of special rules providing for the need to protect minors from the fact that the judicial procedure does not create circumstances for them that worsen their situation compared to adults. Precisely because of their age non-adaptation to extreme life situations. Therefore, the model of legal proceedings when considering cases of juvenile crimes should be humanized as much as possible.

In recent years, projects for the reorganization of juvenile courts have begun to appear in a number of European states. Thus, in the UK, several projects appeared, one of which proposed to eliminate the juvenile courts and instead create a system of family courts with broad jurisdiction, including civil law issues related to guardianship, custody, sanctions against parents, etc. In another project, it was proposed that the system of Scandinavian Committees for the Welfare of Adolescents to be used as a model for the reorganization of juvenile courts.

In Belgium, a recent youth protection law takes into account the creation of local youth protection committees, which largely encroach on the jurisdiction of juvenile courts.

This situation is not accidental. Here, apparently, two objective factors are at work: the rapid growth of crimes and offenses among adolescents and the low efficiency of the work of juvenile courts. This forces us to find more effective and flexible means in the fight against the growing youth crime. The choice is not accidental - a family court or a welfare committee, which means, first of all, a departure from judicial forms of regulating the behavior of adolescents, which do not give a serious educational effect. In addition, new organizations provide for the possibility of considering a much wider range of issues related to the life and upbringing of adolescents than juvenile courts [13].

In this regard, it is essential to outline the need to create a specialized juvenile court in the Republic of Moldova.

Juvenile courts could differ in the following features: consideration of juvenile cases by a single judge; the requirement that the judge has knowledge of child psychology; the inadmissibility of a formal trial and a formal accusation of a crime; a simplified judicial procedure, which basically boiled down to a conversation between a judge and a teenager with the participation of a trustee; predominant use as a measure of influence of guardian supervision. Currently, the legislation on the judiciary of the Republic of Moldova does not have the corresponding norms defining the judicial system in juvenile cases.

Conclusions

While acknowledging the results of the study, it is potentially possible to state that, after the declaration of independence, the Republic of Moldova has adopted a number of laws and ratified a number of international instruments that improve the situation of minors in conflict with the law.

Thus, the criminal legislation of the Republic of Moldova, adhering to the above-mentioned principle, provided for the general age of criminal responsibility from 16 years and only for certain crimes specified in article part 2, article 21 of the Criminal Code of the Republic of Moldova, criminal responsibility begins from the age of 14.

Despite the special approach of the legislator to persons under the age of 18, juvenile

delinquency continues to be widespread, and is considered a social pathology with specific features characteristic of this particular type of crime. To eliminate the objective consequences of the fight against juvenile delinquency, it is necessary that the work of the law enforcement system, parents, guardians and civil society be aimed at protecting, socializing minors who are prone to committing crimes or who have committed crimes, but to this day in the Republic of Moldova such a task is a problem for her permission.

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CONSIDERATIONS REGARDING ETHICS AND INTEGRITY IN THE PREVENTION AND FIGHT AGAINST DOPING IN ROMANIAN SPORT

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The reason that led to this paper to be written is to explain the new meanings of the notions of ethics, integrity, responsibility and accountability - in order to hold accountable those involved, directly or indirectly, in sports. Ethics management, "as one of the disciplines of management", deals with the development of those leadership tools that contribute to the ethical development of an organization, as well as the methods that can be used to determine in which direction organizations should develop. Sport, already considered a notable social phenomenon, requires a real "legalization" able to frame it harmoniously and consciously in the context and rigors of a civilized conduct, of the highest morality, but also of strict legality and responsibility. The author argues that ethical management seeks to improve decision-making processes, procedures and organizational structures, so that the activities of the organization are as closely related to ethical principles.

Keywords: *ethics, legal ethics, legal responsibility, professional responsibility, integrity, doping in sports, sports business.*

CONSIDERAȚII PRIVIND ETICA ȘI INTEGRITATEA ÎN PREVENIREA ȘI COMBATEREA DOPAJULUI ÎN SPORTUL ROMÂNESC

Motivul care m-a determinat ca să elaborez această lucrare este acela de a explicita noile accepțiuni ale noțiunilor de etică, integritate, răspundere și responsabilitate – în vederea responsabilizării a celor implicați direct, sau indirect, în activitatea sportivă. Managementul eticii, „ca una dintre disciplinele managementului", se ocupă de elaborarea acelor instrumente de conducere care contribuie la dezvoltarea etică a unei organizații precum şi a acelor metode care pot fi utilizate spre a determina în ce direcție ar trebui să se dezvolte organizaţiile. Sportul, considerat deja un fenomen social notabil, necesită o reală „juridicizare" capabilă de al încadra armonios și conștient în contextul și în rigorile unei conduite civilizate, de cea mai înaltă moralitate, dar și de strictă legalitate și responsabilitate. Autorul susține opinia că managementul etic urmăreşte îmbunătăţirea proceselor decizionale, a procedurilor şi structurilor organizaţionale, în aşa fel încât, activităţile organizaţiei să fie cât mai mult legate de principiile etice.

Cuvinte-cheie: *etică, etică juridică, răspundere juridică, răspundere profesională, integritate, dopaj în sport, afacere sportivă.*

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CONSIDÉRATIONS SUR L'ÉTHIQUE ET L'INTÉGRITÉ DANS LA PRÉVENTION ET LA LUTTE CONTRE LE DOPAGE DANS LE SPORT ROUMAIN

La raison qui m'a amené à élaborer ce travail est d'expliquer les nouvelles significations des notions d'éthique, d'intégrité, de responsabilité et de responsabilité – afin de responsabiliser les personnes impliquées, directement ou indirectement, dans l'activité sportive. La gestion de l'éthique, "comme l'une des disciplines de la gestion", traite du développement des outils de leadership qui contribuent au développement éthique d'une organisation, ainsi que des méthodes pouvant être utilisées pour déterminer dans quelle direction les organisations devraient se développer. Le sport, déjà considéré comme un phénomène social notable, nécessite une véritable "juridicisation" capable de l'encadrer harmonieusement et consciemment dans le contexte et les rigueurs d'une conduite civilisée, de la plus haute moralité, mais aussi de la légalité et de la responsabilité strictes. L'auteur soutient l'opinion selon laquelle la gestion éthique cherche à améliorer les processus de prise de décision, les procédures et les structures organisationnelles, de manière à ce que les activités de l'organisation soient autant que possible liées aux principes éthiques.

Mots-clés: *éthique, éthique juridique, responsabilité juridique, responsabilité professionnelle, intégrité, dopage dans le sport, sport business.*

РАЗМЫШЛЕНИЯ ОБ ЭТИКЕ И ЧЕСТНОСТИ В ОБЛАСТИ ПОЛИТИКИ ПРЕДОТВРАЩЕНИЯ И БОРЬБЫ С ДОПИНГОМ В РУМЫНСКОМ СПОРТЕ

Причина, по которой я написал данную статью, заключается в том, чтобы объяснить новое значение понятий этики, честности, ответственности и подотчетности - для привлечения к ответственности тех, кто прямо или косвенно занимается спортом. Управление этикой, «как одна из дисциплин менеджмента», занимается разработкой тех инструментов лидерства, которые способствуют этическому развитию организации, а также тех методов, которые можно использовать для определения того, в каком направлении организации должны развиваться. Спорт, который уже считается заметным социальным явлением, требует настоящей «легализации», способной гармонично и сознательно оформить его в контексте и строгости цивилизованного поведения, высочайшей морали, но также строгой законности и ответственности. Автор утверждает, что этическое управление направлено на улучшение процессов принятия решений, процедур и организационных структур с тем, чтобы деятельность организации максимально была бы тесно связана с этическими принципами.

Ключевые слова: *этика, юридическая этика, юридическая ответственность, профессиональная ответственность, честность, допинг в спорте, спортивный бизнес.*

Introduction

We can say that "ethics and moral responsibility were not very much of interest in Romanian society…"[2], although the intentions and efforts of many of us, somewhat dispersed, also focused on the field of sports ethics. This condition can be remedied by a clear, not at all abstract and, as all studies show, effective solution - called "ethics management"[3], which consists of the application of the laws, concepts, methods and techniques provided by management science in social practice"[4].

Ethics management, "as one of the disciplines of management", deals with the development of those leadership tools that contribute to the ethical development of an organization as well as those methods that can be used to determine in which direction organizations should develop. "Ethical management involves the description and analysis of the current ethical situation, the determination of the desirable situation and the decision on the

[2] Prof. Valentin MUREȘAN, director al Centrului de Cercetare în Etică Aplicată: „Dacă le vorbești oamenilor despre coduri etice, își fac cruce" | adevarul.ro" - Articol-interviu de Laurențiu Ungureanu din 18 octombrie 2013

[3] Idem

[4] BURDUȘ, E. „Tratat de management", Ediția a III-a, Editura Pro Universitaria, București, 2017, p. 44.

measures to be taken to achieve it, in perfect agreement with other forms of management.[5] "Ethical management is the result of the increasingly visible impregnation of responsible organizations, but seen not as an element of decoration, but as an "indispensable condition of their existence." An organization, in whose category we also include sports structures, demonstrates moral responsibility when it subordinates its interests to the interest of society[6]. Ethical management aims to improve decision-making processes, procedures and organizational structures, so that the activities of the organization are as close as possible to ethical principles. The tools used are codes of ethics, ethical auditing and other "strategies" to lead the organization on the path of respect for morality.[7] An express commitment to ethical values is also needed in sports organizations. This can be achieved by building an infrastructure and implementing its own self-regulatory systems. Under the normative pressure of international and national institutions and organizations, but also as a result of their own interests, "businesses", including sports, have developed or adapted different types of codes: codes of ethics, codes of conduct, good practices.

"The duty of the management team, in order to avoid failures, to lose the credibility of the codes and the reason for which they were developed, to strengthen the solidarity and trust between the members within the organization and between the organization and its environment, is, on the one hand, to prevent and maintain the strategies and actions of the codes through permanent reinforcement actions (education, training, recognition, disclosure, transparency and any other forms that help for this purpose). On the other hand, to accept the reality that there are always differences between the rules, provisions and the real capabilities of the organization and its members. The feeling of community and moral reciprocity implies and comes from a commitment sustained by mutually guaranteed commitments and obligations, which has its origin in a common business horizon with other social actors, the sustainability of the world".[8]

"Ethical management does not consist in controlling and penalizing staff behavior or in reflecting on work ethic. Rather, it is the set of actions taken by managers to stimulate an ethical awareness and sensitivity that permeates all aspects of the organization's work."[9] Ethical management can promote and maintain an ethical culture within organizations engaged in physical education and sports, both public and private law.

According to the new Romanian Civil Code, all those who operate an enterprise, i.e., the systematic exercise by one or more persons of an organized activity consisting of the following activities: the production, administration or disposal of goods or in the provision of services ***whether or not the (undertaking) is of a profit-making nature [article3, paragraph (3) Civil Code].*** Thus, we can say that the new paradigm of sport in Romania must emphasize that sport is not only non-profit, but also the economic one, that has long been present in sport. Sport can no longer be defended by financial interference. Sport must be understood as belonging to a market economy society. Sport is being sold; sport is becoming a commodity. Sport, according to the European Commission's White Paper on Sport, "is

[5] SANDU, Antonio, „Etică și deontologie profesională", Editura Lumen, Iași, 2012, p. 125.

[6] Idem, cu trimitere la Kaptein, M., (1998) Ethics Management, Auditing and Developing the Ethical content of Organizations, *Issues in Business Ethics,* vol. 10, pp: 31-45.

[7] Idem, cu trimitere la Jeurissen, R., (2005) Moral complexity in organizations, in Korthals, M., Rogers, R., (eds.), *Ethics for Life Scientist,* vol. 5, pp:11-20

[8] BRIȘCARIU, Aurica, „GLOBALIZARE ETICĂ. Responsabilitate socială corporativă", Institutul European, Iași, 2012, p. 84.

[9] SANDU, Antonio, op. cit., p. 126, cu trimitere la MENZEL, D., (2007), Ethics Management for Public Administrators: Building Organizations for Integrity, New York.

a growing social and economic phenomenon, which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity… The Commission recognizes the key role of sport in European society, especially at the moment, when it is necessary to get closer to citizens and to deal with issues that they are directly interested in. However, sport faces new dangers and challenges in European society, such as commercial pressure, the exploitation of young sportsmen, doping, racism, violence, corruption and money laundering" (White Paper on Sport, introduction, paragraphs 1 to 3).

Sports professionals, faced directly with countless problems in terms of moral judgment, responsibility and irresponsibility of sports bodies and their members and those carrying out related activities, seem increasingly interested in forming a concrete and coherent vision in this area. It is stated that sports have become over-professionalized and over-traded - in this sense we can answer that professional sports activities understood in terms of the New Civil Code must be subject to legal regulations. Perhaps, if the scope of this paper allows us, it would be necessary to develop the issue of morality in general, and morality in sport in particular - and to refer to the hypostases of its manifestation of: morality, immorality and amorality - the last two equally dangerous, given that legal norms are based on moral ones. And where morality decays - as a natural consequence - the power of law also decays. Only in this way will we probably be able to understand the need to direct sport to the values of pure sport. Thus, we will be able to combat the possible effects of ***a spiral of induced silence*** in order to achieve a certain perspective in relation to the valorization of sports activities.

Sports activities and sports business

In the spirit of the above, we can conclude that "*sports affairs*" can be regulated, as the case may be, by both *the rules of sports law* and *the rules of business law* - defined as *interdisciplinary (multidisciplinary) matter comprising the set of legal rules governing the social relations of the enterprise for profit, or without profit, from the moment of its establishment until the moment of its dissolution (liquidation), respectively the relations that are established between the state on the one hand and professional, on the other hand (administrative, fiscal, criminal law) , but also the relations of private law, which means the application of provisions of civil law, labor law and, last but not least, commercial law.* This proposed definition is the result of characterizing as a "business" the object of activity of sports structures - public and private law organizations, specialized public administration structures, as well as the Romanian Olympic and Sports Committee.

The relationship between organizational culture and ethics

Of course, sport, as a notable social phenomenon, both belonging to the cultural and economic areas, is also subject to globalization. But in order to understand what is happening now with the various subsystems of globalization and their consequences in terms of sports ethics, we must admit that: "One of the main features of the current process of globalization is that the traditional boundaries between politics, culture, technology, finance, ecology disappears and none of these dimensions can be approached and explained without the others. So is the phenomenon of globalization as a whole. Each aspect must be addressed separately. Cultural globalization (which also refers to sports activity – author's note Voicu A. V.), the oldest form of global dissemination of information, knowledge and paradigms of explicit world, is less attractive and less analyzed by theorists. The phenomenon is perceived more as a substitute for economic globalizati-

on. This type of ideologization of globalization, economic monocausal, projects cultural or civil-social globalization subordinated to the world market[10]" "… since the early decades of the twentieth century, the world has begun to look for common moral values for common problems of the globe. International institutions and organizations, commissions, universities, churches and individuals or associates have realized that ethics, philosophical discipline, is too universal and, as a result, should, on the one hand, be customized to the action of the human being in the form of *applied ethics*, and on the other hand, to meta-synthesize ideas and values, so that they are acceptable to all societies and cultures and become genuinely relevant for the survival and development of the human being. The first goal seems to have been achieved. There are so many ethics that one can philosophize today in the polyphonic register of *financial ethics, human resources ethics, marketing ethics, production ethics, intellectual property ethics, economic system ethics, legislative system ethics, business and international business ethics, bioethics,* etc. The overabundance of ethics is explicable: there is no field or human activity that can be independent of ethics and its caudal forks. Without downplaying postmodernist doctrines and theorists, the second goal, however, of building an *integrative ethic*, has remained at the forefront (although a good reason for the rhetoric of many international gatherings and the establishment of new institutions)"[11]. Thus, we will refer, with special regard, ***to sports ethics*** - in direct connection with cultural ethics and business ethics. "*As an applied form of ethics, business ethics is the set of requirements, attitudes, moral habits, rules that guide human behavior in work processes in organizations*"[12] - "*Business (sports) ethics is a syncretism between the ethics of individuals who make up the organization and cultural values and economic in which it operates*"[13]. Business ethics encompasses the set of rules, rules of conduct, and judgments of moral value regarding the organizations and individuals that make up these entities. As an applied form of ethics, sports ethics is the set of requirements, attitudes, moral habits, rules that guide human behavior in work processes in organizations. For these reasons, sports ethics, like business ethics, has a normative content but at the same time, as an academic discipline or philosophical theory, it also has a descriptive content. Business ethics is dependent on organizational culture.

Organizational culture represents the totality of symbols, beliefs, attitudes and patterns of learned, produced and recreated behavior by organizational members and which are objectively reflected in the goods and in the relationship with the outside. The organizational culture has some fundamental characteristics, including: philosophy/vision of the organization, rules of behavior, norms and values. These attributes could mean that sports ethics and organizational culture are one and the same thing. "In reality, not only do they differ in the sphere of attributes, but there is a gap between them as from abstract to concrete. In the sense that sports ethics, like business ethics, is a body of moral principles that can only be operationalized through organizational culture. It brings the attitudes and values of society within the consumer purchasing field and faster and unrestricted access to resources. Of course, these goals have not only proved to be competitive between companies, but have often exceeded the permissible moral limits by their very serious side effects. The weakening of state power and the lack of a non-negotiable system of legal constraints reminded society that the issue of the moral traits of commercial as well as

[10] BRIȘCARIU, Aurica. Op. cit., p. 57 și urm.
[11] Ibidem, p. 63 și urm.
[12] Ibidem, p. 65.
[13] Ibidem, p. 67.

sporting activities concerned everyone. Thus, the theory of ethical business has become the philosophical paradigm of the reflective world society ", as our time is called[14]. In society and in the work process, it is people who create moral frameworks and landmarks. It is not the organization itself that has ethical principles, but the people who activate this virtuality. Business ethics is a syncretism between the ethics of the individuals who make up the organization and the cultural and economic values in which it operates. For individuals, business ethics is not a summation of their moral principles. Moreover, individual principles, beliefs, and moral values do not have the same weight in formulating organizational ethical values, reflected - formally and informally - in organizational culture. Shareholders, managers and leaders have more power to influence the regulation and regulation of organizational behavior. For this reason, the group that holds the authority in the organization has already been assigned a special status in the field of ethics: "*managerial ethics*".

Thus, as it was stated in the introduction to this paper - ethical management aims to improve decision-making processes, procedures and organizational structures, so that the activities of the organization are related to ethical principles as much as possible. The tools used are codes of ethics, ethical auditing and other "strategies" to lead the organization on the path of respect for morality.

About the necessary moral diagnosis

The construction of an ethical infrastructure in organizations must be preceded by a moral diagnosis (highlighting typical immoral behaviors, including those related to the practice of doping in sport) and a moral hazard study (highlighting their negative effects). Ethical audit is the process by which we measure the "ethical climate," in other words, the internal and external coherence of an organization's core moral values. Ethical audit establishes the moral profile of an organization, the factors that affect its reputation and image in society - seeks to determine what moral values and standards are in operation, whether they are pursued or not, whether the ethical goals of the organization are achieved (internal control) and, on the other hand, whether the organization behaves responsibly and transparently with its partners, taking into account, where appropriate, cultural and value differences, and why not? - the psychological profile of the people we belong to.

Thus, for a good reception of the message of this paper / presentation we think, we will have to refer to the need to know the current *psychological profile* of our compatriots - which mirrors and generates the civic spirit regarding ethics, morality / integrity of our deeds - and attitudes (ir)responsible individuals and society for non-compliance with social, ethical, moral and deontological behavioral requirements.

We consider it necessary, before building an ethical infrastructure in sports organizations which have as their object sports activities, or their control and guidance, to make a diagnosis of their receptivity to the cultural and legal values of the European Union which, according to some "they are starting to haunt us too" - given that, unfortunately, neither of us have fully joined the current of the 1960s, in which "society, activists from all ideological spheres, non-governmental organizations and associations, especially from economically developed countries, initiated the *Normative Revolution*, as Donaldson calls it. It was the counter-reaction (incipient in fact – author's note Voicu, A.V.) of the civil society, in the form of all its courts, to the need for ideals and moral values…"[15]- in fact, at that time, Romania was restricted by different geopolitics than

[14] Ibidem, p. 67 și urm.

[15] BRIȘCARIU, Aurica. Op. cit., p. 70.

the one we are in - European and the North Atlantic Alliance.

Thus, I propose to transfer such a diagnosis to specialists in the field. In such a situation I recommend the psychologist Daniel David[16] who set out to develop in a modern paradigm of contemporary psychology the works of “academician, philosopher and psychologist Constantin Radulescu-Motru” dedicated to the psychology of the Romanian people… the purpose of the monograph being constructive and progressive, highlighting the strengths and correcting such a psychological profile, generated from the perspective of intercultural psychology, is very informative if you want to design public policies and country projects ....[17]

“A people who know themselves psychologically is more emancipative and harder to manipulate…such a type of approach such as the *Sapere aude* (Latin phrase means *Daring to know*, sometimes translated and *Dare to think*) can only help us all! ... people are not “obscure”/“retrograded”, but can at most be surprised by the emergence of an ethical, not emical[18] approach, as they were used to, connected to a sensitive theme and/or cultural voice, beyond the own domain of modern Romanian psychology, especially in an avoiding culture like ours, where change and the new/ innovation scare!”[19]

Daniel David states that “the paper is addressed not only to psychologists, but also to specialists in other fields of science, people of culture, the general public and those who make national policies ... Daniel David summarized the whole approach, and presented the implications (for example, what we need to do to evolve) and its limits and developments for the future ... so I urge you to hold this book in your hands and read it ...

… the development of this psychological component can be part of a country project, through which Romania is not only a state that has joined the European space, but a perfectly integrated one in this space… Daniel David’s prediction is that, adopting an educational, sociocultural policy and economically wise policy Romania will achieve this integration. What will be left of the current psychocultural profile? We believe that little, because, in essence, Romanians are integrated into European culture, only that they have been blocked in their way by the obstacles of history, the last being the communist period.

Indeed, with certain well-thought-out public policies, the positive psychological potential can be turned into reality ... These programs must, however, be designed by people with a professional profile that is congruent to the target of the programs and also implemented by people of this kind, otherwise some forms remain - imposed by the European institutions - without substance, designed only to consume the money allocated to them. On national cultural programs (as well as those concerning sport author’s note Voicu, A. V.): they must bring a new air, a paradigm shift, along the lines of the ideal psychocultural model, including in the polyphonic component of

[16] Prof. univ. dr. Daniel David, „Psihologia poporului român. Profilul psihologic al românilor într-o monografie cognitiv experimentală”, Editura Polirom, Iași, 2015.

[17] Daniel David, 2015, p. 20-24

[18] More precisely, this monograph approaches in a dominant ethical framework (with emic elements), from a cognitive perspective (with a psychometric and sometimes clinical content), the discrepancy between “how are” and “how are believed” Romanians in terms of psychological attributes, on an experimental / empirical background (with the methodology of intercultural psychology), in a framework of complexity theory and multilevel analysis. This approach is complementary to other previous approaches to Romanian psychology conceived from the perspective of other psychological specialties (for example, ethnopsychology, social psychology, intercultural and cultural psychology), often in a dominant emic approach (with ethical elements). The terms ethical and emic have different nuances in different authors - in the context of this monograph, if the emic approach refers to understanding and studying the phenomenon within the analyzed culture, the ethical approach involves understanding the phenomenon with an international methodology that systematically relates to other countries / cultures.”

[19] Ibidem, p. 24.

Romanian culture and the component of scientifically validated knowledge (*evidence-based knowledge),* i.e., a knowledge-based culture, which is absolutely mandatory in a globalized world driven by knowledge *(knowledge-based society) ...*[20]

About the legal normative framework of anti-doping policies

Organizational culture internalizes the norms and values of the sports organization - defining its specificity in terms of relations with the internal and external environment. The rules of organizational ethics, which aim at anti-doping regulations, can be imposed on participants in sports activities in the form of codes of ethics, internal regulations, regulations of disciplinary commissions, medical regulations, etc.

The Constitutional Court of Romania, by its Decision, no. 560 of May 29, 2012 regarding the exception of unconstitutionality of the provisions of art. 61 of Law no. 227/2006 on preventing and combating doping in sports, published in the Official Gazette of Romania, Part I, no. 537 of August 1, 2012, found that in the field of doping in sport, the Lausanne Court of Arbitration for Sport functions as a disciplinary court, especially after the adoption of the World Anti-Doping Code, which in this case confers direct jurisdiction on that court. Thus, the Constitutional Court, in the name of the law, decided "Rejects, as unfounded, the exception of unconstitutionality of the provisions of art. 61 of Law no. 227/2006 on the prevention and combating of doping in sports, exception raised, ex officio, by the Cluj Court of Appeal… Definitive and generally mandatory ...

In Part I of the World Anti-Doping Code 2021, under the title of Doping Control, paragraph 2 stipulates: "All provisions of the Code are substantially binding and must be followed as applicable by each anti-doping organization and by any athlete or other person.

When we refer to the issue of practical ethics - we cannot fail to refer to the issues concerning the moral profile of all participants in sports activities, which concern their rights and obligations under the World Anti-Doping Code, hereinafter referred to as the Code, entered into force on January 1, 2021, which also stipulates the sanctions that will be taken in case of violation of its provisions. Apart from the institutional system made up of all the signatories of the Code, we refer to: ***Athlete Assistant Staff***, which according to the document prepared by the World Anti-Doping Agency (WADA) entitled "Guide to Athlete Assistant Staff for Significant Amendments to the 2021 Anti-Doping Code" as: "*any coach, trainer, manager, agent, team staff, official, medical or paramedical staff, parent or any other person who works, treats or assists an athlete who participates in, or is preparing for, sports competitions*", It states: "The code applies to both you and your athletes. You have a personal responsibility to always operate in the spirit of sport and anti-doping rules. You also have an influence on the athletes you support. All sports assistants should create a clean sports environment that allows athletes to train and compete in accordance with anti-doping regulations. Education plays a vital role in making sure that both you and the athletes you work with know everything that is important about anti-doping and clean sports"; ***Athletes*** - the "Athlete's Guide to Significant Amendments to the 2021 Code" states that the World Anti-Doping Code "defines several different levels or types of athletes: *National; International level; Minors; Protected persons; Recreational*. It is important to always know which category you are in. The National Anti-Doping Organization and the International Federation will have specific definitions for each of these groups of athletes."

[20] Ibidem, p. 329 și urm.

The goals of the World Anti-Doping Code and the World Anti-Doping Program that support it are: to protect the fundamental right of athletes to compete in a clean, doping-free sport and thus to promote the health, fairness and equality of athletes worldwide, and ensure the implementation of effective, coordinated and harmonized international and national anti-doping programs to prevent doping, including: ***Education*** - to raise awareness, inform, communicate, instill values, develop skills and decision-making abilities to prevent intentional or unintentional violations of anti-doping regulations; ***Discouragement*** - to discourage potential users of doping substances by implementing strict and well-known regulations and sanctions by all partners; ***Detection*** - an effective testing and investigation system not only reinforces a deterrent effect but is also effective in protecting clean athletes and the spirit of sport, by detecting those who violate anti-doping regulations, while contributing to the deterrence of anyone involved in doping behavior; ***Enforcement*** - to prosecute and punish those found guilty of violating anti-doping rules. ***Rule of law*** - to ensure that all partners have agreed to abide by the Code and International Standards and that all measures taken to implement their anti-doping programs are in accordance with the Code, International Standards and the principles of proportionality and rights.

Being in full agreement with the “***Fundamental Arguments for the World Anti-Doping Code***” as follows: “**1.** Anti-doping programs are based on what is intrinsically valuable in sports. This intrinsic value is often referred to as the “spirit of sport”; it is the ethical aspiration towards human excellence by dedicating the natural aptitudes of each Athlete; **2**. Anti-doping programs aim to protect the health of sportspeople and provide them with the opportunity to aspire to human excellence without the use of prohibited substances or methods; **3.** Anti-doping programs aim to protect the ***integrity of sport*** in the sense of respect for the rules, for other competitors, for fair competition, a competitive environment with equal opportunities, and the value of clean sport in relation to the world. **4.** The spirit of sport is a celebration of the human spirit, body and mind. It is the essence of Olympism and is reflected in the values we find in and through sport, including: health, ethics, *fair play* and honesty, the rights of athletes as set out in the Code, excellence in performance, character and education, pleasure and joy, team work, devotion and commitment, respect for rules and laws, respect for self and other participants, courage, community and solidarity”, we cannot fail to refer to some considerations regarding the content and quality of educational work in sports organizations / structures.

However, the Code does not replace or eliminate the need for comprehensive anti-doping regulations adopted by each anti-doping organization. While some provisions of the Code must be included without substantial changes by each anti-doping organization in its own regulations, other provisions of the Code set out binding principles that allow flexibility in the formulation of regulations by each anti-doping organization or set requirements to be met, by each anti-doping organization, without the need to be reiterated in its anti-doping regulations.

Thus, until resolving the issue of law regarding the competent court exclusively with disputes generated by anti-doping rules in sports, discussed even at the level of the International Union of Lawyers, in which we recommended the need to be involved in sports doping disputes (with reference to when using drugs / doping substances) and national courts of common law[21], developing, following the

[21] VOICU, A. V., AVORNIC, Gh., *Critical considerations regarding the realization of the law in an anti-doping rules in the sporting activities*, in the organization of the International Union of Lawyers (The International Union of Lawyers - http://www.unionlawyers.ru/ international / eng / tasks. html) and the University of Krasnoyarsk, Russia, as a guest speaker, May 25, 2018; See also: VOICU, A. V., “Some con-

publication of this paper, the normative framework of anti-doping policies, contained in the new ***Law on preventing and combating doping in sports***[22]**,** which repealed, for good reasons[23], Law no. 227 of June 7, 2006, republished, on preventing and combating doping in sport - all these regulations prohibiting do-

siderations on child protection in connection with drug use / doping and doping practices", NATIONAL ANTI-DRUG CONFERENCE - with international participation, 3rd Edition "The impact of Romania's integration into the European Union from the perspective of reducing the demand and supply of illicit drugs. Treatment of adductions. Challenges and opportunities" Cluj-Napoca, October 25 - 27, 2007, organized by the National Anti-Drug Agency - Cluj regional service Center for Drug Prevention, Evaluation and Counseling of Cluj County and the University of Medicine and Pharmacy" Iuliu Hatieganu "Cluj-Napoca, in The CD of the conference (made by SC EJUPRESS SRL Cluj-Napoca, str. Campului no. 40/101, Tel.: 264-422002, 0747-221106, e-mail: ejupress@gmail.com);

[22] The President of Romania signed on Thursday, December 23, 2021, the Decree for the promulgation of the Law on preventing and combating doping in sports (PL-x 514 / 25.10.2021); Reason - Section 2 Reason for issuing the normative act: Description of the current situation: Given the fundamental right of athletes to practice clean, doping-free sport and thus to protect health and promote fairness and equality for athletes throughout the world It is necessary to implement effective, coordinated and harmonized anti-doping programs at the national level to detect, deter and prevent doping in sport. The National Anti-Doping Agency (ANAD) is a public institution with legal personality and decision-making autonomy in the anti-doping activity and operates under Law no. 227/2006 on preventing and combating doping in sports. The entire activity of ANAD is in line with international regulations in the field, respecting the principles and standards formulated by the World Anti-Doping Agency (WADA), the Council of Europe and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Accession to the International Convention against Doping in Sport, adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris on 19 October 2005 by Law No. 367/2006 and ratification of the Anti-Doping Convention by the Council of Europe Law no. 171/1998, as well as by signing the Copenhagen Memorandum in 2003, obliges Romania to comply with and implement at national level the World Anti-Doping Code (Code) developed by WADA. Council of Europe member states have agreed, under the auspices of the Council of Europe Anti-Doping Convention, in the Monitoring Group of the Convention and the Ad Hoc Committee on the World Anti-Doping Agency, to lay the groundwork for uniform legislation on preventing and combating doping. in sports. In order to achieve a high degree of international standardization of legislation on the prevention and combating of doping in sport, a series of legislative changes in the field are required, which should be materialized by drafting a new normative act on preventing and combating doping in sport. This bill is a legislative emergency because the amendments to the Code, following the revision process approved by the WADA Executive Committee in Katowice (Poland) in November 2019 and during 2020, respectively, had as a deadline to be taken over in full in Romanian law. dated 01.01.2021. Non-compliance with national legislation with the provisions of the Code will lead to the establishment of the National Anti-Doping Agency's non-compliance measure ordered by WADA, in accordance with the Code and the International Standard for Code Compliance of the Signatories. Specifically, the state of non-compliance translates into a series of possible sanctions that would affect the sports movement as a whole, such as the impossibility for Romania to organize more sporting events and the ban on the participation of Romanian athletes in major international competitions. Olympics, Paralympic Games, World or European Championships, etc.)…

[23] Reason - Section 2 Reason for issuing the normative act: Description of the current situation: Given the fundamental right of athletes to practice clean, doping-free sport and thus to protect health and promote fairness and equality for athletes throughout the world It is necessary to implement effective, coordinated and harmonized anti-doping programs at the national level to detect, deter and prevent doping in sport. The National Anti-Doping Agency (ANAD) is a public institution with legal personality and decision-making autonomy in the anti-doping activity and operates under Law no. 227/2006 on preventing and combating doping in sports. The entire activity of ANAD is in line with international regulations in the field, respecting the principles and standards formulated by the World Anti-Doping Agency (WADA), the Council of Europe and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Accession to the International Convention against Doping in Sport, adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris on 19 October 2005 by Law No. 367/2006 and ratification of the Anti-Doping Convention by the Council of Europe Law no. 171/1998, as well as by signing the Copenhagen Memorandum in 2003, obliges Romania to comply with and implement at national level the World Anti-Doping Code (Code) developed by WADA. Council of Europe member states have agreed, under the auspices of the Council of Europe's Anti-Doping Convention, in the Monitoring Group of the Convention and the Ad Hoc Committee on the World Anti-Doping Agency, to lay the groundwork for uniform legislation on preventing and combating doping. in sports. In order to achieve a high degree of international standardization of legislation on the prevention and combating of doping in sport, a series of legislative changes in the field are required, which should be materialized by drafting a new normative act on preventing and combating doping in sport. This bill is a legislative emergency because the amendments to the Code, following the revision process approved by the WADA Executive Committee in Katowice (Poland) in November 2019 and during 2020, respectively, had as a deadline to be taken over in full in Romanian law. dated 01.01.2021. Non-compliance of national legislation with the provisions of the Code will entail the establishment of the measure of non-compliance of the National Anti-Doping Agency ordered by WADA, in accordance with the Code and the International Standard for Code Compliance of the Signatories. Specifically, the state of non-compliance translates into a series of possible sanctions that would affect the sports movement as a whole, such as the impossibility for Romania to organize more sporting events and the ban on the participation of Romanian athletes in major international competitions (Games Olympics, Paralympic Games, World or European Championships, etc.) …

ping in sport for ethical and medical reasons. See also Law no. 104 of May 9, 2008, republished, on preventing and combating the illicit production and trafficking of doping substances, published in Official Gazette of Romania, Part I, no. 451 of June 28, 2011; Law no. 205 of May 26, 2004 on animal protection, republished and updated, with special reference to art. 6 let. g and art. 18; Government Decision no. 806/2021 for the modification of the Methodological Norms for the application of the provisions of Law no. 339/2005 on the legal regime of narcotic and psychotropic plants, substances and preparations, approved by Government Decision no. 1,915 / 2006, published in the Official Gazette, Part I, no. 750 of August 2, 2021. This, among others, according to the new regulation, art. 53 para. (1), refers to the Commission for the Destruction of Narcotic and Psychotropic Plants, Substances and Preparations Used in Human Medicine or Veterinary Medicine, which also has a representative of the Territorial Formation to Combat Illicit Trafficking and Drug Use (let. c)". All this, of course, excluding the contrary provisions of ***the Law on preventing and combating doping in sport***. Of course, we will join these normative acts with the special law on physical education in Romania, Law no. 69/2000, which includes references to doping in sports provided in Art. 18, letter ț, Art. 20, let. f), Art. 86, Title XIII Prevention and violence in sport and the fight against doping, Title XIV, entitled Sanctions.

About moral education - the foundation of civic education

To understand the acceptance of contemporary behavioral imperatives of *ethics*, *morality* - a concept used more recently under the dome of the notion of *integrity* - due to the fear of the ordinary man of the restrictions and sanctions[24] stipulated in violation of ethics, legal norms and other social norms, within the scope of the much broader notion of *deontology*, set out in the ethical or deontological codes of certain professions, it is necessary, at the outset, where appropriate, to supplement the common moral education - that is, the basic moral structures of an individual raised in a particular environment that varies from individual to individual and cannot be a standard[25]". "Only in this way will we be able to contribute to the awareness of all active or passive participants in the sports phenomenon, as well as of the political decision-makers in the field, regarding the "acute need to frame this phenomenon in the context of a civilized conduct, of the highest morality, but also of strict legality and responsibility[26]". Because in sports structures - and in those of decision makers, a lot of individuals with different moral (integrity) structures work. And because we will develop the legal meaning of the term *integrity*, I will present the two Mottos attached to a valuable work by Professor Mihai Adrian Hotca: "*Motto 1: In serious, long-term business, a component of the strategy must be integrity, ensured by codes of ethics and compliance procedures; otherwise, success is illusory and failure is certainty. Motto 2: Just as the heart is essential for the body to stay alive, so is integrity for business."*[27]

About legality - social behavioral imperative

Theoretically, in Romania, there is no question of the existence and importance of legal-legislative factors, environmental factors of the external environment (internal and internatio-

[24] Interview article, by Laurențiu Ungureanu from October 18, 2013, with reference to Prof. Valentin Mureșan, read work

[25] Idem.

[26] Afterword signed by Prof. univ. dr. Mircea MUREȘAN, at VOICU, A.V., „Delinquent civil liability with special regard to sports activity ", Ed. Lumina Lex, Bucharest, 1999

[27] Mihai Adrian HOTCA, *Business Integrity and Law,* Premium Magazine, Universul Juridic, Bucharest, June 8, 2021, article published and taken from Revista Iustitia no. 1-2 (17-18) / 2019 of the Dolj Bar.

nal), of the sports organization and coexisting with economic, technical and technological, socio-cultural, managerial, demographic, ecological, socio-cultural, political (internal state policy, foreign state policy, European Union policy).

At the very least, the group of legal and legislative factors and the group of political factors must (should) include factors that are in line with what the European Commission values in its White Paper on Sport: "it is a constantly evolving social and economic phenomenon, with an important contribution to the European Union's strategic objectives of solidarity and prosperity. The Olympic ideal for the development of sport in order to promote peace and understanding between nations and cultures, as well as the education of young people, was born in Europe and was supported by the International Olympic Committee and the European Olympic Forum. Sport attracts citizens, most of whom regularly participate in sports activities. It generates important values such as: team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfillment. Sport also promotes and actively supports the active contribution of EU citizens to society. The Commission recognizes the key role of sport in European society, especially at a time when it is necessary to approach citizens and deal with issues of direct concern to them. However, sport faces new dangers and challenges in European society, such as trade pressure, exploitation of young athletes, ***doping***, racism, violence, corruption and money laundering" (White Paper on Sport, Introduction, paragraphs 1-3).

Legality must emanate from both the international structures of sport and the positive law of a country. Only in this way will human values, the legitimate interests of the participants in sports activities, be guaranteed by the state's coercive force. And last but not least, the guarantee that the meaning of the development of the sport will not deviate from the respect of the principles that enshrined it. Organized sports activity, subordinated to public or private law organizations established for this purpose, is required to comply with both the provisions of internal regulations and international structures of sport, and the state legal order (which includes the provisions of international agreements to which Romania is party or joined). Observance of the legal norms belonging to a certain legal system is an obligation to which all nationals are bound, it is a fact that no longer involves discussions.

The same problem arises, of course, with regard to the legality of sports. It is a recognized fact that legal relations, in the field of sports, always combine within them, both the sports order and the state order, whose balance varies depending on the state and political regimes. The legality of sport is identified within three areas: 1. The area of state order; 2. The area of the sports field; 3. The area of international sports structures (extending to countries whose sports organizations and structures have acceded to international structures and include in their statutes and regulations their express regulations). The extraordinary development of contemporary sports, on large geographical areas, has determined the increase of the number of participants and the establishment of new sports organizations. The establishment of these new sports organizations has had and has as a consequence, the burden of international sports structures. This raises a lot of questions. One of these would be: what place have and can the international structures of sport occupy in the legal and economic organization of the world in which they operate? The answer to this question cannot be given only insofar as the institutional identity of these structures relates to the attributes of *legitimacy and legality* that can generate the *efficient and effective* management framework.

In order for the management of an organization to be considered *efficient*, it is necessary that the legal factors (of the environment of the sports organization) be valued not only in the sense of exploiting the opportunities offered by positive law but also in respect of state order and sports order. Sanctions received as a result of violating legal norms, including those belonging to what we call *lex sportiva*, can create major dysfunctions in the management of sports organizations and activities. Therefore, if in management science the content of the imperative of *legality* is not expressly included in the concepts of *efficiency and effectiveness*, it is our duty to propose it as a concept proper to the science of management.

About value

In social psychology - and even in sociology - the concept of value has been largely diluted in those of *norm* and *attitude*[28]. Indeed, the latter seem more operational, but in this way a specific and relevant psychosocial content is lost or neglected in the explanation and prediction of individual and group mentalities and behaviors. From the multitude of definitions and interpretations given to value, in socio-human disciplines, we distinguish the following: *general and abstract principles about what is important and valuable in life, about how people should behave and appreciate (in terms of good / bad, right / wrong, ugly / beautiful, etc.) situations, events, people, as well as social and natural objects* - we refer here both to social values (as main elements of the sociocultural context) and to their internalized personality.

The fundamental notes of the concept of value are: generality and centrality in the spiritual-symbolic universe of society and in the structure of human personality, standards (evaluative criteria) of human actions, motivational vectors that determine and guide action, their accentuated conscious, deliberate character, in the sense of adherence “to what is desirable”.[29] Two remarkable analysts of the issue of values, reveal five more important aspects of them:

1) Values are ideas (beliefs), but not cold ones, but infused with feelings;

2) They refer to desirable goals (for example, equality), and to the ways in which those goals are promoted (fairness, help, etc.);

3) Values transcend specific actions and situations (submission, for example, is practiced at school, at work, in the family, with friends or strangers);

4) Values serve as standards for selecting and evaluating people's behaviors and events;

5) They are ordered both at the societal level and individually, according to the importance of each other, forming value systems[30]. Values are collectively shared principles that guide judgments about what is right and good. Examples of values: fairness, obligation, equidistance, integrity, honesty, impartiality, transparency and openness, efficiency, justice, accountability, etc.- “Values are considered the essence of organizational culture. They come both from the social environment, in the form of attitudes and beliefs promoted by the national culture, and from the own experience of the employees. The value system allows the classification of situations, people, acts and ideas, from those considered moral to those unethical. Based on the system of values promoted at the level of the organization, the culture creates norms considered standards for the values of a group or categories of individuals”.[31]

[28] Petru ILUȚ. *Social values, attitudes and behaviors. Current topics in psychosociology.* Polirom Publishing House, Iași, 2004, p. 11.

[29] Idem, p. 12

[30] Idem, p. 12. Referring to SMITH, P. B., SCHWARTZ, S., (1997), Values, in W. BERRY. M. H., SEGAL and C., KAGITCIBASI (eds.), *Handbook of Cross-Cultural Psychology*, vol. 3. Allyn & Bacan, Boston, p. 80.

[31] BRIȘCARU, Aurica, read work., p. 68.

Compared to the social norms (religious, ethical, moral) which are also standards of conduct, values are more general prescriptions of the mode of behavior, being, at the same time, goals, ultimate states of attainment of our existence (end States of existence), social norms tell us how to behave in given circumstances, without being the motives of organizing the life with a long-term struggle.

About professional ethics

In some cases, where the professional conscience of the members of the assisting staff of the athletes is not in accordance with the imperatives of professional responsibility - part of the social responsibility, a state of conflict may be reached between the professional performance and the norm of legal conscience. Education is achieved not only in schools and families, but also wherever two or more members of society live, work together or meet - so we also refer to the field of sports activities in which the assistant staff of athletes must, here too, wear the role of a positive behavioral model. In the field of education, the reality proves that it is not enough that the deviations of teachers, or those assimilated to them, be punished only morally and ethically - violation of the subjective rights of participants in sports activities through illegal behavior requires legal liability.

Information is also required (and) on the legal consequences of conduct that is inconsistent with professional ethics. "Educators" must serve the interests of the fortress - they must be good citizens. We believe that the meaning of the phrase "good citizen" includes the quality of a valid interlocutor in the material and spiritual life of the city, of a subject capable of exercising his/her rights, respectively of assuming and respecting his/her obligations, in accordance with the existing social order. Deontology has emerged as a science of the rights and duties that regulate human activity in a given professional field.

The term d***eontology*** (deontos = duty, obligation, and logos = word, science) was first used by the English jurist and philosopher Jeremy Bentham (1742-1832) in his work *Deontology or the Science of Morality*, published in 1834. "The science of what to do in any circumstance." In the doctrines of English moralists, the term ***deontology*** is used, which means the principle of action in accordance with duty. The three ways of relating the person to morality are: a. ***morality***, the one in which the person knows the moral requirements and respects them; b. ***immorality***, in which the person knows the moral requirements, but does not respect them; c. ***amorality***, in which the person does not know the requirements of morality and as a result does not respect them.

The issue of this profession, of the educator, is the object of study for pedagogical deontology (Romeo Poenaru calling it *didactic deontology* [32]- the name of *pedagogical deontology* is motivated by the fact that the issue of education goes beyond the strictly didactic sphere). The deontology of the didactic (pedagogical) profession, as of any educator, must be based on a system of norms, rules, requirements, professional moral obligations, as well as on legal, administrative and technical-professional regulations that orient their activity towards correctness and efficiency - in fact, *in the current sense*, ***deontology*** includes, in addition to professional moral duties and various technical norms, basic professional requirements, administrative rules, legal norms, which, in structures specific to each profession will determine ***the professional deontological***

[32] VOICU, A. V., ROMAN, Gh., "The deontology of the sports profession between coercion and freedom", at the 8th Congress of the Colleges of Sports Science, Institute of Sport Science, University of Salzburg, July 9-12, 2003 - long abstract published in the congress CD and in "ECSS Salzburb 2003, 8th Annual Congress European College of Sport Science, July 9-12, 2003; Abstract Book, p. 284, ISBN 3-901709-11-8 - Institute of Sport Science University of Salzburg, with reference to POENARU, R., "Didactic Deontology", Timişoara, Poligrafia Universitatii Timişoara, 1989.

conduct (or deontological approach professional) - defined as “a set of attitudes and actions required by the professional and technical-professional norms, without which it is not possible to exercise the profession at the level of society’s requirements”.[33] The deontological norms establish a “minimum of specific morality regarding the exercise of a profession”.[34]

Components of the deontological approach

In any approach regarding deontology, one operates with the own terms of morality and ethics.[35]

1. Morality is, on the one hand, a form of social consciousness, and on the other hand, it consists of all the norms, rules, requirements, precepts, duties, ideas, etc. which regulates the relations between people - morality regulates the conduct of people in all social fields - intense interpersonal relations we identify, mainly in the area of professional activities, in work. *Work morality* regulates people’s behavior during work as well as everyone’s behavior in relation to their own professional activity. *The morality of the profession* considers the relations between professionals and between them and the object of the profession;

2. Ethics is the science of morality - it developed within philosophy - later asserted itself as a science in its own right. *Metaethics* has already been outlined and asserted - the science of the science of morality. *Work ethic* deals with the issue of work morality and *work ethics* the issue of profession morality. *The ethics of the profession* deals with the moral relations involved in practicing a profession - along with it, *the deontology of the profession* adds other imperatives: *legal norms, administrative norms, technical-professional norms* specific to that profession and whose observance, together with the moral norms of the profession, is strictly necessary for the correct achievement of the objectives of professional work. The scope of the notion of ***professional ethics*** is included in the scope of the notion of ***professional deontology***.

About legal liability and liability

Liability is perceived as a reprehensible social fact, which is summarized in the reaction aroused by an action that the company at the place and time of its commission considers reprehensible. For the consequences that the individual suffers as a result of a conduct, valued (evaluated) as not in accordance with the social norms, two terms are used in particular: the one of *liability* and the one of *responsibility*. Dictionaries and literature do not always distinguish between these terms - they are usually given the meaning of obligation of an individual or community, arising from the rules established in society at a given time, or in a certain community, to perform certain actions or to refrain from committing others, as well as their obligation to repair the damage caused by his/her (their) conduct. In this way, the terms *responsibility and liability* refer to actions or inactions that are imposed on the individual or the community through coercion, from the outside and do not concern their own attitudes.

The main element that distinguishes between the terms legal *liability and responsibility* is their social function - while liability is primarily about preserving a social system, responsibility is about improving the social system and developing it. Responsibility within the law is manifested only in the form of acceptance of a social relationship and not in the form of effective implementation of an action. Responsibility does not exclude liability,

[33] Idem, with reference to LĂSCUȘ, V. *Deontology of the social pedagogue*. Gewalt Publishing House, Cluj-Napoca, 2002, and at DUȚESCU, B. *Ethics of the medical profession*. Didactic and Pedagogical Publishing House, Bucharest, 1980.

[34] CRAIOVAN, I. *Treatise on the General Theory of Law.* Second edition. revised and added, Ed. S.C. Universul Juridic S.R.L., Bucharest, 2009, p. 189.

[35] Ibidem, p. 6-8.

but it is not limited to it, just as liability does not exclude responsibility, nor does it necessarily imply liability[36]. The society tends for its members to exceed the condition of liability and to reach the more mature and efficient condition of responsibility.[37]

Legal liability is "the complex of related rights and obligations, which - according to the law - is born as a result of committing an illegal act and which constitutes the framework for carrying out the state coercion by applying legal sanctions in order to ensure the stability of social relations and guidance of society in the spirit of respecting the rule of law".[38] The source of the rule of law is in authority - it is the only one that can achieve a scale of legal values, even if the legal value is not identical to the legal reality.[39] Petre Andrei, evoking Kant, notices that law wants to establish a moral principle, wants to be an ethical minimum and, for this reason, legal value tends towards moral value.[40] Georgio Del Vechio stated that where there is no coercion, there is no law - "the two concepts, coercibility and law, are, in real and logical terms, inseparable."[41] For a long time, from archaic to modern communities, the distinction between morality and law became difficult - differentiation is beginning to be more of a concern in modern times - now, when we talk about the values of law, it is about coercion by sanction - rules and laws which obligatorily provide for the sanction in case they are violated.[42]

The application of legal sanctions is only the final consequence of incurring legal liability - for the existence of liability, it is only required that there be some mandatory rules that have been violated by the perpetrator. The sanction will intervene only when a well-defined and determined obligation towards a person or other persons is violated, or when there is a precise damage or a risk of causing damage to another individual or to the collective[43]. Legal coercion is the "idea that generates the notion of justice."[44] The value of justice cannot become operational if the authority issuing the rule does not have the possibility to punish the one who violates the law - a balance must be struck between the declaration (materialized by the existence of the law) and the effectiveness of the legal system.

In the conditions of globalization, "lawyers can no longer afford the luxury of approaches made only from strictly local perspectives".[45]

About integrity

Integrity (probity, conformity, fairness, honesty) is an important social value, on the axiological podium, because it is among the first positions in most social spheres (art, economics, politics, etc.)"[46]. Thus, in terms of social

[36] BOBOŞ, Gh., VLĂDICA RAŢIU, G. *Responsibility, responsibility and coercion in the field of law.* Argonaut Publishing House, Cluj-Napoca, 1996, pp. 6-15 - with reference to: FLOREA, M., Responsabilitatea acţiunii sociale, Editura Ştiinţifică şi Enciclopedică, Bucureşti, 1976.

[37] FLOREA, M. *Determining and motivating social action*. Bucharest, Academy Publishing House, 1981.

[38] COSTIN, N. M. *Legal liability in the law of the Republic of Romania.* Dacia Publishing House, Cluj-Napoca, 1974, p. 20.

[39] ANDREI, Petre. *Filosofia valorii.* Editura Polirom, Iaşi, 1997, p. 131.

[40] CIUCĂ, M. V. *Lecţii de sociologia dreptului.* Editura Polirom, Iaşi, 1998, p. 295

[41] GEORGIO DEL VECHIO. *Lecţii de filosofie juridică.* După ediţia a IV-a a textului italian, Editura Europa Nova, 1997, p. 224.

[42] BIRIŞ, I., op. cit., p. 118 şi urm.

[43] MILL, John Stuart. *Despre libertate.* Editura Humanitas, Bucureşti, 1994, p. 102-103.

[44] BIRIS, I., op. cit. p. 149 with reference to John Stuart Mill, *Utilitarianism,* Alternative Publishing House, Bucharest, 1995.

[45] POPA, N. *The general theory of law.* 3rd edition. CH-Beck Publishing House, Bucharest, 2008, p. 11, with reference to Twining, W., "Globalization and Comparative Law" (quoted after MF Popa, The English Legal System. Current Evolution Trends, Doctoral Thesis, 2008, p. 60 .

[46] HOTCA, Mihai Adrian. *Business Integrity and Law,* Premium Magazine (online), Universul Juridic, Bucharest, June 8, 2021, article published and taken from Revista Iustitia no. 1-2 (17-18) / 2019 of the Dolj Bar. For developments regarding the protection of integrity in the private environment, see, the same author M. A. Hotca, *Protection of integrity in the private environment by means of criminal and extra-criminal law,* RRDPA no. 2/2019, p. 11 et seq.

relations, we now speak, or at least are, beautiful desideratum: the integrity of civil servants, the integrity of politicians, the integrity of scientists, the integrity of artists, the integrity of athletes,[47] etc. "The question of integrity" makes important positions in areas where it was a *rara avis*[48] and is now, or rather, relatively recently, trying to enter the "privacy of sport." And when it comes to business integrity, most organizations "adopt clear ethical principles in their mission statements, and some become even more explicit, for example: the *General Motors logo is "Victory with integrity*. *(Winning with Integrity*). *Integrity always means respecting the letter and spirit of the law. But it's not just about laws, it's about the foundation of every relationship we have*. "[49]

We have already stated that point 3 of ***the Fundamental Rights of the World Anti-Doping Code*** states:" *Anti-doping programs aim to protect the* ***integrity of the sport*** *in terms of respect for the rules, for other competitors, for an honest race, a competitive environment with equal opportunities, and the value of clean sport in relation to the world."*. But what can we mean by *integrity in sport*? It is not difficult to explain, especially in situations where colleagues with special interests in the field, such as Professor Hotca, have addressed this issue. – Thus, to the question: "what is meant by business integrity? "- let us ask ourselves another question, sufficiently justified, namely: "what is meant by the integrity of sports activities?". From an institutional perspective, integrity in sports (business) activities is the set of rules that ensure the fairness of those who participate in sports (economic) activities. From the point of view of the participants in sports (economic) relations, integrity in activities (business) represents the observance (compliance) by sports (economic) actors of the legal rules and those that ensure their professional probity. In another formulation, integrity in sports (business) consists in the obedient behavior of participants in the economic (sports) field towards the rules of fairness in intra- and extracorporeal relations.[50] The formal existence of an integrity system with fair rules, which does not apply, has a negative rather than a positive impact. Therefore, based on the premises set out above, we can conclude that integrity in sports (business) is an indispensable element of economic and ***sports*** success.

Serious illicit acts can be found in both public and private organizations, such as corruption, harassment, blackmail, threats, breaches of trust by disregarding trust, computer fraud or fraudulent transactions with electronic payment instruments, and fraud. tax fraud, money laundering, acts against consumers or unfair competition, facts against the integrity and confidentiality of computer systems or data, counterfeits, facts concerning employment re-

[47] LAWAL, Yazid Ibrahim, in IOSR Journal of Sports and Physical Education (IOSR-JSPE) e-ISSN: 2347-6737, p-ISSN: 2347-6745, Volume 3, Issue 4 (Jul. - Aug. 2016), PP 00 -00, www.iosrjournals.org - „Sport is increasingly big business and, crucially, associated with big business, thus providing opportunity and motivation for corrupt practices. Integrity is a complex term that takes on different meanings in different sporting environments: amateur, elite or professional sport, sporting levels, age groups: and according to different (Sipes, 1976). Integrity is generally viewed as critical area in today's world, and the sport environment is really no different and reasons for integrity behavior in sport and its allied support mechanisms are attributed to many factors, some of these factors are match fixing, corruption and doping, others reasons are overemphasis on winning, seeking prestige or financial rewards, bending the rules, cheating, coach aggression, disrespect, and player aggression; Lack of practical understanding of sportsmanship and difference between gamesmanship and sportsmanship, Winning at all costs; verbal abuse, negative coaching behaviors and practices, athletes being pushed too hard by coaches or parents, negative administrative behaviors and practices and negative officiating behaviors and practices; Negative coaching behaviors and practices are perhaps some main reasons for many instances of misconduct by individuals (Howman, 2013). Integrity in sport is largely addressed in research through concepts of fair play, respect for the game, sportsmanship, positive personal values of responsibility, compassion for the other, and honesty in adhering to rules (Lumpkin, Stoll, & Beller, 2003; Keating 2007 ; Gould and Carson 2008; Bolter 2010; Festini 2011;) ".

[48] HOTCA, M. A. *Integritatea afacerilor și dreptul,* op. cit.

[49] BRIȘCARU, Aurica, op. cit., p. 68.

[50] HOTCA, M. A. *Integritatea afacerilor și dreptul,* op. cit.

lationships, security and protection in the field of employment, facts against the legal regime concerning companies, facts concerning the customs regime, fraud against the financial interests of the EU, etc. to which we add those specified in the White Paper on Sport, "such as trade pressure, exploitation of young athletes, ***doping***, racism, violence, corruption and money laundering."

The means of criminal and extra-criminal law, sanctioning means other than those specified by the World Anti-Doping Code 2001, operational against doping in sport, are at the disposal of the factors involved in the prevention, detection and sanctioning of persons who commit acts affecting the integrity of sports activities. criminal law (Criminal Code, Code of Criminal Procedure, etc.). Instruments of a criminal and extra-criminal nature, although having a substantial contribution, must be complemented by other means mainly related to the policy of all organizations interested in knowing, preventing, investigating and combating the illicit phenomenon (criminal, civil, misdemeanor, etc.) in the field of sports activities.

Integrity and Compliance Officer

There are economic areas, and we are talking about banking and insurance where there are regulations designed to oblige organizations to adopt internal policies on the integrity of employees and members of management or supervisory bodies. Who stops us from adopting such measures in sports organizations? An essential condition for the implementation and, implicitly, for the effectiveness of the integrity and compliance system of an organization is *the integrity or compliance* department (office, service, etc.) in which it is necessary for the integrity and compliance officer (official, person in charge, etc.), also known as the ethics officer, to work.

"***The integrity and compliance officer*** is the person designated within the organization - its own employee or professional third party - for the purpose of investigating, ascertaining and drawing up proposals for measures relating to breaches of the rules of conduct. The integrity or compliance officer is, in many cases, a person with legal training (lawyer or legal adviser) either an employee of the organization or an outsider. In order to ensure the independence of the integrity officer, it is recommended that he be part of a department of the organization chart that ensures his autonomy from the members of the management or supervisory bodies, or that they are outside the company's staff."[51]

In the public system (public institutions, public authorities or national companies, autonomous utilities of national and local interest, as well as national companies with state capital), Law no. 571/2004 on the protection of personnel from public authorities, public institutions and other units that report violations of the law. According to art. 1 of Law no. 571/2004, this normative act regulates some measures regarding the protection of persons who have complained or reported violations of the law within public authorities, public institutions and other units, committed by persons with management or executive functions in public authorities, institutions and from the other budgetary units provided in art. 2… According to art. 3 of Law no. 571/2004 the following terms and expressions have the following meanings:

a) warning in the public interest means the notification in good faith of any act involving a breach of the law, of professional ethics or of the principles of good administration, efficiency, effectiveness, economy and transparency;

b) warning means the person who makes a notification according to letter a) and which is included in one of the public authorities, public

[51] Idem.

institutions or in the other units provided in art. 2;

c) disciplinary commission means any body in charge of disciplinary research duties, provided by law or by the regulations of organization and functioning of public authorities, public institutions or other units provided in art. 2”.

In the private sector, the institution of the whistleblower is not regulated at the legislative level, but is found, as we have seen, in certain areas (banking, for example), as well as in codes of conduct or other internal regulations of private companies. The integrity and compliance systems encountered in the private sector were inspired by the regulation contained in Law no. 571/2004 or the integrity and compliance policies adopted by multinational companies or by other private organizations[52], facts that urge us to set up our integrity compartments in sports organizations under private law, especially those that are of public utility. In integrity systems encountered in the private sector, the whistleblower is the person who reports a breach of the law or internal integrity regulations (whistleblowers) and is protected. Thus, the provisions of art. 5 of Law no. 571/2004 can be a source of inspiration for those who adopt internal regulations regarding the institution of the integrity warning, in terms of the scope of the facts concerned.[53]

The institution of whistleblowers had and has as its model the operational activity of those “*ethics officers*” or “*compliance officers*” or “*business conduct officers*”, and more recently, “*risk assessment officers*” included in the organization charts of large companies. They have a responsibility to ensure that the ethical values of the organization are *de jure* and *de facto* maintained in all its processes. The scope of their tasks is very diverse, from seeking to avoid corruption and discrimination, to monitoring the impact of company decision makers on shareholder investments, abuse of any kind, and so on. Although organized, at least in the United States and the United Kingdom, in professional associations (***Ethics & Compliance Officer Association),*** although they have stipulated regulated models and standards (***Defense Industry Initiatives***), the efficiency of their activity, at least at the moment, is not yet confirmed.

This is not necessarily due to a lack of professionalism, but to the multiple variables that influence their work results. There are countless examples: the competitive market environment, cultural values and different policies from one organization to another, the cultural values of the company in which the company or its subsidiary operates, insufficient support from those who run the company, etc. However, the reduction of companies’ anti-immoral acts cannot be solved by an officer, regardless of the name given to an employee, but it is a combined and permanent effort, in which the business partners must be the government and civil society.[54]

About the protection of integrity warnings

As of December 2019, the Member States of the European Union are in the midst of significant legislative changes on the protection of whistleblowers, with the adoption of Directive (EU) 2019/1937. The new legislation places more importance on whistleblower status and the role they play in highlighting unethical behavior and criminal activity, both in the private and public spheres. It is up to the EU Member States, by 17 December 2021, to transpose the Directive on the protection of whistleblowers into their own legislation, from which date the requirements become mandatory for companies with more than 250 employees. In other words, people who expose legislative violations will be protected by law and will not have to fear “consequences”.

[52] Idem.
[53] Idem.
[54] BRIȘCARU, Aurica, op. cit., p. 82 și urm

In this regard, companies will have to implement internal procedures for handling reports submitted by whistleblowers. Through this legislation, the European Union joins the United States, which has been providing protection to whistleblowers for two decades. Integrity advocates are important for ensuring a transparent and ethical society, as they expose violations or violations of EU law, from combating money laundering, data protection, protection of financial interests, food and product safety, public health, environmental protection and nuclear safety.[55]

What do companies need to know?

The new directive requires the following:

– Private companies with more than 50 employees must establish internal channels and procedures for reporting infringements and for taking subsequent action commensurate with their size and the level of risk that their activities pose to the public interest.

– Public sector entities should establish internal channels and procedures for reporting violations and taking subsequent action. Municipalities with less than 10,000 inhabitants or less than 50 workers may be exempted from this obligation.

With regard to private sector legal entities with between 50 and 249 employees, Member States must ensure, by 17 December 2023, the entry into force of the laws, regulations and administrative provisions necessary to comply with the Directive.

The directive provides a 3-step reporting template for alerts:

– *Internal reporting channels* within the internal structures of a particular private or public sector organization;

– *External reporting channels* as part of the public administration authorities designated for this purpose;

– *Public disclosure* by making information on infringements available to the public domain. (…)

The full material can be found in the Whistleblowing-EU-Directive.[56]

About professional responsibility and malpractice in sports[57]

Sharpening professional liability by legalizing it

In a state governed by the rule of law, *no one can be above the law* - neither the natural person, nor the legal person, nor any particular field of activity - in our case we refer to the field of physical education and sports.

We have made it clear that, it is recognized, those involved in sports must also respect: It is the ***state order*** that relates to the administration of the economic resources of sports services and services, to the issue of the taking of legal responsibility in its various forms: Criminal, administrative, civil, labor law (Coaches and teachers are required to comply with the provisions of the Labor Code, the professional status and the national and international codes concerning sporting and educational activities, which Romania has ratified), thereby conferring on the right subjects, part of the sports relations established in legal relations, guarantee of the protection of subjective rights

[55] Full article, signed by Silvia HARAM, Anca Maria VOICILĂ, *EU Directive on Integrity Warners. What should companies know*?, Premium Magazine (online), Universul Juridic, Bucharest, May 20, 2021.

[56] See also H.G. no. 1,269 / 2021 on the approval of the National Anti-Corruption Strategy 2021-2025 and its related documents (Official Gazette no. 1218 of December 22, 2021).

[57] From: 1. VOICU, A. V., VOICU, B. I. „Qualification of professional liability as a form of legal liability as a basis for an approach to the problem of malpractice in physical education and sports - The Qualification of Professional Liability as a Form of Legal Liability as Basis for an Approach to the Problem of Malpractice in Physical Education and Sport ", published in the Arena Magazine - Journal of Physical Activities, (7) 2018, INDEX COPERNICUS, EBSO host etc., pp. 7-20 (" Aurel Vlaicu "University of Arad) ; 2. Voicu A. V., Stănescu, R. Voicu, B. I., - Professional responsibility of coaches - Professional responsibility of coaches, in Discobolul Magazine of the National University of Physical Education and Sports in Bucharest - Discobolul 2021 (Volume 60, Issue 3), p. 307-3273 - https://discobolulunefs.ro/media/Cover%20Page%20&%20Contents_September2021.pdf

by the coercive force of the state. The state order also includes the norms belonging to the international agreements to which Romania has acceded and have as object the sports activity. Knowledge of the legal system is necessary for all participants in physical education and sports activities. In physical education and sports activities, values such as life, health, bodily integrity, dignity, justice, fairness, freedom, etc. must be protected and promoted. Sanctions received as a result of violating legal rules can create major dysfunctions in the management of physical education and sports organizations; ***The area of the sports field*** where the sports regulations govern (and the rules of the game); as well as ***the Area of International Sports Structures.***

In the traditional doctrine, the Civil Code subjected civil liability, at least technically, to different regimes, as civil liability was *tortious or contractual*. Thus, only these two forms of liability belonged to civil law.

Today, the New Romanian Civil Code, and the EU regulations on the institution of civil legal liability signal the birth of ***the third form of civil liability***, namely that of ***professional liability***. Thus, we will be in a position to address the issue of civil liability, while seeing the quality of common law of tortious civil liability, referring to the new form of civil liability, professional liability.

By identifying the facts of malpractice in the activity of physical education and sports - which can also be related to doping in sports, we will achieve not only an image of the birth of obligations by creating harm caused to athletes or third parties, but also a particularization of professional responsibility of *athletes* and *sports staff* - categories defined by the World Anti-Doping Code 2021 - we will have the support of effective attempts to harmonize Romanian sports legislation with those of European and Euro-Atlantic structures in which we have integrated.

The new concept of legal ethics (Legal ethics of the sports profession). Professional malpractice

We now refer to the concept of “legal ethics”[58] - a command that must be imposed on all professionals involved in sports activities. Thus, “the concept of ethics, and even more so that of legal ethics, is polysemantic. This situation is favored by the intertwining of morality (ethics), law and professional practices. The study of legal ethics, as part of applied ethics, is an imperative not only for the science of law, but also for moral philosophy. For these reasons, “moral philosophy has been marked, in recent years, by the singular development of its subdomain known as “applied ethics.”[59]

Research on legal ethics as part of professional ethics is in its infancy in Romania. This explains the very low interest, perhaps also for reasons of immorality or immorality of professionals, the media, and politicians - to outlaw sports activities. It is true that we are still in the presence of possible interpretations that would not make it possible to blame the malpractices of professionals, because it is invoked, in the interest of delaying the employment of the institution of legal liability, the existence of codes of ethics of certain professions.

Under these conditions, we will be able to “define” (absolutely theoretically) ***legal ethics*** *through the effort of understanding and interpreting legal norms, followed by their application in good faith.*[60]

The ethical-legal principle underlying the employment of civil liability was introduced in the regulations of the Civil Code, in art.

[58] SIBANA, Alexandra. *On the legal ethics of legal practitioners,* in Ion Copoeru, Nicoleta Szabo - Coordinators, “Ethics and professional culture”, Casa Cărţii de Ştiinţă, Cluj-Napoca, 2008, pp. 192-197.

[59] SIBANA, Alexandra, op. cit., p. 192, with reference to Ion Copoeru, Nicoleta Szabo, “Moral dilemmas and autonomy in the context of democratization and European integration”, Casa Cărţii de Ştiinţă, 2004, p. 8.

[60] Idem.

1,349, thus: the violation of the general obligation to observe the legal provisions or the rules established by the local custom, if it had as a consequence the violation of the subjective rights and legitimate interests of other persons, obliges the guilty party to full reparation. In contractual matters, this principle is enshrined in the provisions of art. 1,350 of the Civil Code The universalism of this rule makes it applicable in all cases, establishing the legal framework in which the victim can claim and obtain the payment of compensation.

This principle has deep moral significance, being equitable the restoration of the social balance destroyed by an illicit deed, which ensures the reparation of the damage suffered by the victim, by the one who is guilty of the created situation. This dimension of civil liability results from the fact that, by exercising his freedom, man builds his own personality, but, at the same time, he must also assume responsibility for his actions. Thus, the man who acts consciously is responsible for his own actions and their consequences, being forced to restore the distorted social balance. True responsibility is always associated with the order of commutative justice, which tends to establish a legal reaction designed to remove the consequences of the harmful event. *The relationship between ethics, morality and law* thus focuses on the idea of guilt of the perpetrator. Freedom and responsibility are two complementary and indispensable concepts that characterize human dignity.

The ethical and legal significance of civil liability for professional malpractice[61]

The legal relationship between the professional (sports profession / sports structure) and the beneficiary of the service (client, student, performance athlete, spectator, etc.) cannot be entirely subordinated to the rules established by a civil contract, nor to the rules of essentially tort liability. This is the reason why the debates, on the conditions and the foundation of the professional's responsibility, aim to detect on its specific elements, in order to argue the need to harmonize the legal norm with the realities of the contemporary society. All this due to the increasing danger of harm, here we are referring to the harm caused in the activity of physical education and sports.

Given the diversity and complexity of the hypotheses of professional civil liability, in the legal plan it is necessary to establish some abstract rules, applicable in all cases of malpractice, in order to ensure more effective protection of the victim, by supporting her in obtaining compensation.

The regulation of tortious and contractual civil liability in the current Romanian Civil Code aims to establish the rules of principle which, in the matter of ***professional malpractice***[62], are meant to govern the conditions of initiation and success of the action in incurring liability, respectively to lead to restoring the social balance destroyed by facts which have resulted in the injury of another person. In order to ensure a full protection of the victim of the act of malpractice, it tends to objectify the civil liability of the professional, who is engaged in most situations regardless of any fault. Thus, the analysis is transposed into a causal plan, the simple occurrence of the damage triggering the civil liability mechanism. *As a special hypothesis of legal liability, the civil liability for professional malpractice is that legal relationship that arises from the violation by certain categories of persons, generi-*

[61] LUNTRARU, Lacrima Bianca. *Civil liability for professional malpractice,* Universul Juridic Publishing House, Bucharest, 2018.

[62] For example, in the international acts to which Romania has acceded, such as the Magglingen / Macolin Convention, November 18, 2014 "Council of Europe Convention on the Manipulation of Sports Competitions", its Preamble talks about malpractice in sports: consistent application of the principles of good governance and ethics in sport is a significant factor in helping to eradicate corruption, the manipulation of sports competitions and other kinds of malpractice in sport".

cally called professionals, the rules of conduct established by law or the professional body to which they belong, causing damage to another person, in respect of which the obligation to repair it arises[63].

Analyzed as a legal institution, *malpractice brings together the rules governing this obligation to compensate the victim, related to the contractual or extracontractual act of the professional, the person involved, in our case, in sports and / or related activities*[64].

According to the definitions set out above, the structure of the legal relationship of liability for professional malpractice includes the four classic elements of civil liability in general: *the damage, the wrongful act of malpractice, the causal link between them and the fault of the person responsible.* In this context, the coach can be engaged in various forms of legal liability - criminal, civil, administrative, labor law (including those concerning occupational safety and health) - depending on the nature of the violated legal regulations. We are also in the situation where the person harmed by the act of the coach by a crime (criminal act) to become a civil party. Increased attention must be paid to the protection of children in sports, respecting both Law no. 272/2004, republished, on the protection and promotion of children's rights, as well as Government Decision 75/2015 on the regulation of the provision of paid activities by children in the cultural, artistic, sports, advertising and modeling fields.

We are also in a situation where the coach, as we have shown, can be given special forms of liability - for example, those contained in anti-doping regulations.

Conclusions

If measures to prevent illegal behavior in a sports organization have not proved effective, it is necessary to manage the problem, i.e., to take appropriate measures to manage the crisis in order to eliminate non-compliant behavior - and last but not least, where appropriate, to engage in legal liability - it is well known that the institution of legal liability is the most important legal institution of any legal system.

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[63] CIMPOERU D, Malpraxisul, Ed. C.H. Beck, București, 2013, p. 5.

[64] LUNTRARU, Lacrima Bianca, op. cit., p. 17.

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