INTERNATIONAL SCIENTIFIC JOURNAL

"SUPREMACY OF LAW"

REVISTĂ ȘTIINȚIFICĂ INTERNAȚIONALĂ

"SUPREMAȚIA DREPTULUI"

МІЖНАРОДНИЙ НАУКОВИЙ ЖУРНАЛ

«ВЕРХОВЕНСТВО ПРАВА»

JOURNAL SCIENTIFIQUE INTERNATIONAL

"SUPRÉMATIE DE DROIT"

МЕЖДУНАРОДНЫЙ НАУЧНЫЙ ЖУРНАЛ

«ВЕРХОВЕНСТВО ПРАВА»

№ 1, 2022

Спеціалізоване видавництво

Specialized publishing house

SUPREMACY OF LAW

INTERNATIONAL SCIENTIFIC JOURNAL

No. 1, year 7 (2022)

The journal is registered by the Ministry of Justice of the Republic of Moldova, Decision No. 311 of July 12, 2016

Field of research: **Legal sciences**

Electronic version: *http://uspee.md/supremdrept/; http://americanuniversity.md/supremdrept/.* Web: *www.supremdrept.revistestiintifice.md*

All articles are double-blind peer reviewed

SUPREMAȚIA DREPTULUI

REVISTĂ ȘTIINȚIFICĂ INTERNAȚIONALĂ

Nr. 1, anul 7 (2022)

Revista este înregistrată de către Ministerul Justiției al Republicii Moldova, Decizia nr. 311 din 12 iulie 2016

Domeniu de cercetare: **Științe juridice**

Versiunea electronică: *http://uspee.md/supremdrept/; http://americanuniversity.md/supremdrept/.* Pagina web: *www.supremdrept.revistestiintifice.md*

Toate articolele sunt recenzate în sistem „double-blind peer review"

Responsabilitatea pentru conținutul textelor aparține, în exclusivitate, autorilor

SUPRÉMATIE DE DROIT

JOURNAL SCIENTIFIQUE INTERNATIONAL

Nº 1, année 7 (2022)

Le journal est enregistré par le Ministère de la Justice de la République de Moldova, Décision n° 311 du 12 juillet 2016

Domeniu de cercetare: **Ştiinţe juridice**

Version électronique: *http://uspee.md/supremdrept/; http://americanuniversity.md/supremdrept/*.Web: *www.supremdrept.revistestiintifice.md*

Tous les articles sont évalués en système „double-blind peer review"

La responsabilité du contenu des textes incombe uniquement aux auteurs

ВЕРХОВЕНСТВО ПРАВА

МЕЖДУНАРОДНЫЙ НАУЧНЫЙ ЖУРНАЛ

№. 1, год 7 (2022)

Журнал зарегистрирован Министерством юстиции Республики Молдова,
Решение № 311 от 12 июля 2016 г.

Область исследования: **Юридические науки**

Электронная версия: *http://uspee.md/supremdrept/; http://americanuniversity.md/supremdrept/.* Сайт: *www.supremdrept.revistestiintifice.md*

Все статьи рецензируются по системе „double-blind peer review"

Ответственность за содержание текстов несут исключительно авторы

CONTENT

CUPRINS

TABLE DE MATIÈRES

ОГЛАВЛЕНИЕ

CZU 342.9(478)
DOI https://doi.org/10.52388/2345-1971.2022.e1.01

REFLECTIONS ON DEFICIENCIES IN CONTRAVENTIAL REGULATIONS IN THE FIELD OF PUBLIC PROCUREMENT IN THE REPUBLIC OF MOLDOVA

Gheorghe AVORNIC
Habilitated doctor in law, university professor,
University of European Political and Economic Studies "Constantin Stere",
Chisinau, Republic of Moldova
e-mail: *avornic@yahoo.fr*
https://orcid.org/0000-0002-2673-4331

Dorina GALAMAGA
PhD student, University of European Political and Economic Studies "Constantin Stere",
Chișinau, Republic of Moldova
e-mail: *dorina.galamaga@gmail.com*
https://orcid.org/0000-0002-9207-6277

This publication focuses on the analysis of national legislation on contravention liability in the field of public procurement in order to identify regulatory deficiencies, as well as the necessary interventions to improve legal provisions in the field of public procurement, in particular contravention liability in this area. Currently, the mechanism of contravention liability related to the public procurement system in the Republic of Moldova is non-functional, which determines the carrying out of a research in terms of insuring the legality and integrity. It is noted that the regulatory deficiencies and the lack of the mechanism of ensuring contravention liability in the public procurement process, are risk factors that lead to the non-application of coercive measures in public procurement and to the generation of fraudand corruption risks. This article presents a theoretical analysis of the notions and defective regulations aimed at contravention liability in public procurement, as well as their impact affecting both the national public procurement system, including integrity and public interest.

Keywords: *contravention liability, public procurement, contravention, risk factors, risk of fraud and corruption.*

REFLECȚII PRIVIND DEFICIENȚELE NORMATIVE CONTRAVENȚIONALE ÎN DOMENIUL ACHIZIȚIILOR PUBLICE DIN REPUBLICA MOLDOVA

Publicaţia de faţă, se axează pe analiza legislației naţionale privind răspunderea contravenţională în domeniul achizițiilor publice în vederea identificării deficienţelor normative, precum şi intervențiile necesare de îmbunătățire a reglementărilor din domeniul achizițiilor publice, în special răspunderea contravenţională în acest domeniu. În prezent, mecanismul răspunderii contravenționale aferent sistemului achizițiilor publice în Republica Moldova este nefuncțional, fapt ce determină efectuarea unei cercetări prin prisma asigurării legalității și integrității. Se remarcă faptul că deficiențele normative și lipsa mecanismului de atragere la răspundere contravenţională în procesul de achiziție publică, reprezintă factori de risc ce duc la neaplicarea măsurilor de constrângere contravenţională în achiziții publice și la generarea riscurilor de fraudă și corupție. Prezentul articol prezintă o analiză teoretică a noțiunilor și reglementărilor defectuoase ce vizează răspunderea contravenţională în achiziții publice, precum și impactul acestora ce afectează sistemul achizițiilor publice național, inclusiv integritatea și interesul public.

Cuvinte-cheie: *răspundere contravenţională, achiziții publice, contravenție, factori de risc, risc de fraudă și corupție.*

RÉFLEXIONS SUR LES LACUNES NORMATIVES EN MATIÈRE DE CONTRAVENTION DANS LE DOMAINE DES MARCHÉS PUBLICS EN RÉPUBLIQUE DE MOLDOVA

La présente publication se concentre sur l'analyse de la législation nationale sur la responsabilité en matière de contravention dans le domaine des marchés publics afin d'identifier les lacunes normatives, ainsi que les interventions nécessaires pour améliorer la réglementation dans le domaine des marchés publics, en particulier la responsabilité en matière de contravention dans ce domaine. Actuellement, le mécanisme de responsabilité en cas de contravention lié au système de passation des marchés publics en République de Moldova est inopérant, ce qui détermine la conduite d'une recherche afin d'assurer la légalité et l'intégrité. Il est à noter que les lacunes normatives et l'absence de mécanisme de responsabilité en cas de contravention dans le processus de passation des marchés publics représentent des facteurs de risque qui conduisent à la non-application des mesures de coercition en matière de contravention dans les marchés publics et à générer des risques de fraude et de corruption. Cet article présente une analyse théorique des notions et des conceptions erronées concernant la responsabilité en cas de contravention dans les marchés publics, ainsi que leur impact sur le système national de passation des marchés publics, y compris l'intégrité et l'intérêt public.

Mots-clés: *responsabilité en cas de contravention, marchés publics, contravention, facteurs de risque, risque de fraude et de corruption.*

РАЗМЫШЛЕНИЯ О НОРМАТИВНЫХ НЕДОСТАТКАХ В СФЕРЕ ГОСУДАРСТВЕННЫХ ЗАКУПОК В РЕСПУБЛИКЕ МОЛДОВА

Данная публикация посвящена анализу национального законодательства об ответственности за нарушения в сфере государственных закупок с целью выявления нормативных недостатков, а также необходимым мероприятиям по совершенствованию правил в сфере государственных закупок, в частности, ответственности за правонарушения в этой области. В настоящее время механизм ответственности за нарушение, связанное с системой государственных закупок в Республике Молдова, является нефункциональным, что определяет проведение исследования с точки зрения обеспечения законности и целостности. Отмечается, что нормативные недостатки и отсутствие механизма привлечения к ответственности за нарушения в процессе государственных закупок, представляют собой факторы риска, которые приводят к неприменению мер за правонарушения в государственных закупках и к мошенничеству и коррупции. В данной статье представлен теоретический анализ нормативных актов, касающихся ответственности за нарушения при государственных закупках, а также их влияния, как на национальную систему государственных закупок, так и на общественные интересы.

Ключевые слова: *ответственность за нарушение, государственные закупки, правонарушение, факторы риска, риск мошенничества и коррупции*

Introduction

Understanding and counteracting the particularities and legislative deficiencies of contraventional liability in the field of public procurement in order to strengthen integrity in public procurement, constitutes an important and current objective in preventing and combating corruption in this field.

As a result of the changes in the Criminal Code, through the Law for the amendment and completion of some legislative acts, No. 295 of December 21, 2017, *Official Gazette, 2018, no. 7-17 art. 58; No. 295 of December 21, 2017*, omitted (*intentionally or not*) the public entity empowered to ascertain contraventions, conclude minutes and apply sanctions for violations admitted in the public procurement process. During the last years, this legislative deficiency is intensively discussed by several public institutions, such as: the Court of Accounts, the National Anticorruption Center and by representatives of civil society, but even today it has not been remedied, a fact that generates suspicions regarding the integrity representatives who regulate and promote policies in the field of public procurement, as well as their will to improve legislation in this field [24].

Research Methodology

In order to carry out a detailed research of the subject covered in this analysis, a number of methods were used, among which we mention: *the historical method* - applied to understand the evolution of the content of the legislative norms on public procurement and the Criminal Code, in order to identify the irregularities that appeared in the field of procurement public; *the logical method* – used as a method of rational knowledge of legal norms when studying the problems of contraventional liability in public procurement; *the analytical method* – used for the detailed evaluation of the rules and information related to the non-application of contraventional coercive measures in the field of public procurement, in order to find the main reasons generating the malfunctions of the public procurement system; *the method of drafting normative acts* - came up with proposals to complete and modify the rules of the Criminal Code; *the deductive method* – analyzed each rule and paragraph of the Code of Criminal Procedure, in order to deduce the reasons for the non-functioning of the mechanism for applying criminal sanctions. A series of textbooks and monographs, normative acts in force and articles in periodicals were consulted for the preparation of this study.

Research Content

According to the Development Strategy of the public procurement system for the years 2016-2020, approved by Government Decision no. 1332/2016, obtaining an efficient and credible public procurement system is one of the fundamental elements of the country's development process, at the same time ensuring the proper implementation of legal provisions in practice by reducing waste, fraud and corruption, thus strengthening the trust of citizens and the business environment.

Also, this normative act comes to contribute to the fulfillment of the objective established in the Government Strategy regarding public administration reform, to contribute, including the implementation of other reforms related to the development of the private market, businesses and *the rule of law*, etc., which, in the end must include a functional, competitive, accountable and transparent procurement system.

The public procurement system is an instrument of the state and represents an important element of the national economy. The purpose of this instrument is the legal, transparent, fair, non-discriminatory and efficient use of public money.

In the Republic of Moldova, the volume of public procurement is directly related to the GDP and, as a component of it, is constantly dynamic. According to statistical data, the share of public procurement in the GDP volume is about 4.25 - 4.38% (year 2019-2020). In 2020, the share of public procurement in the GDP volume registered a slight increase compared to the level of 2019 [19].

Moreover, it is also highlighted that purchases play an important role in the economy of the member states, holding an important percentage (approximately 16%) of the EU GDP [17, p. 61].

Referring initially to the term "public procurement" we reveal several doctrinal opinions. So, according to the author Nica Elvira "the process of obtaining products, services or works by an entity, hereinafter referred to as the contracting authority, in accordance with the legislation in force is called public procurement". The same author believes that "public procurement includes any activity that has a purpose and is meant to respond to a need, a requirement in the public sector and that involves spending public money from the state budget" [17, p. 61].

According to other authors, "the field of activity of public procurement is the supply of goods, works and services by the entities that offer sums of money from national, European or national and European public funds in return"[8, p. 11].

Law on public procurement No. 131 of July 3, 2015 (hereinafter - Law no. 131/2015), defines "*public procurement*" as "the procurement, through a public procurement contract, of goods, works or services by one or more contracting authorities from the economic operators selected by them, regardless of whether the goods, works or services are intended for a public purpose or not" [13].

In our opinion, a general definition of public procurement is the purchase of products, works or services from public money according to legal requirements, by a legal person defined as a contracting authority, by awarding a public acquisition contract. The process of organizing and carrying out public procurement procedures is a complex process, consisting of several phases/stages with the involvement of several actors and is characterized as one of the most vulnerable areas to the risks of fraud and corruption.

In that field, at the current stage, the national legislative framework in the field of public procurement is often brought back into discussion, a fact that represents an opportunity to regulate the deficiencies found over the last years, either in terms of the basic rules that operate in this field, either in terms of the institutional framework in order to improve the regulations. The field of public procurement has undergone a series of changes aimed at perfecting legal relations in public procurement.

Thus, starting from May 1, 2016, with the entry into force of Law no. 131/2015, Law no. 96-XVI of April 13, 2007 on public procurement, with subsequent additions and amendments. With the adoption of the current law, the public procurement system in the Republic of Moldova entered a new stage of development, harmonizing the primary national normative framework with *the community acquis*, in accordance with the commitments assumed by the Republic of Moldova towards the European Union with the ratification of Association Agreement between the Republic of Moldova, on the one hand, and the European Union and the European Atomic Energy Community and their member states, on the other hand, by Law no. 112 of July 2, 2014 [10].

In 2018, through Law no. 169 of July 26, 2018, essential changes and additions were made to Public Procurement Law no. 131/2015, adjusting the regulatory framework to the new European Directives in force (Directive 2014/24/EU and Directive 89 /665/ CCE) [14].

Regarding this project to amend Law no. 131/2015, the National Anti-corruption Center through the anti-corruption expert report no. ELO18/5107 of June 11, 2018 revealed that "some provisions of the project do not come with viable solutions that would ensure a uniform and transparent interpretation and application of the regulations transposed from the directive, there is a need to reformulate them, to take additional measures in order to fit them into the area of social relations characteristic of our country, so that their content is explicitly rendered, respecting the national legislative technique and to incorporate this draft law into the national legal system. Other norms, also transposed from the directive, have a general-declarative and unachievable character because the legislation related to this field is not developed (labelling, sustainable purchases)" [20].

We are of the opinion that, on the one hand, the implementation of the new legal framework requires a period of adaptation on the part of public institutions, so as to facilitate the access of economic operators to public procurement procedures.

On the other hand, in the case of non-implementation of the secondary normative acts on time, the public procurement process, itself, offers a series of opportunities for the development of inappropriate behaviors of

the subjects involved in the process, some of which are likely to be considered acts of corruption, acts related to corruption or acts of corrupt behavior. Moreover, it is necessary for the subjects involved in the public procurement process to own, to know the normative framework and to be aware of the risks to which they may be exposed, in certain situations, how they can avoid violating the rules and what are the consequences in case of non-compliance. For these reasons, it is imperative to adopt legislative and normative acts in such a way, that it is possible to expressly identify those situations that can generate risks, as well as to adopt the instruments and the concrete mechanism by which they could be avoided.

Thus, we mention that the legislative and normative deficiencies related to public procurement persist at the moment, a fact that catalogues this field as still sensitive and vulnerable to fraud and corruption. A primary role in the development of the public procurement system is played by the legal framework, which should meet the most important principles of legislation, namely: appropriateness, coherence, consistency and *balance between competing regulations*.

Taking into account the provisions of the Public Procurement System Development Strategy for the years 2016-2020, approved by Government Decision no. 1332/2016, which highlights the most important characteristics of *Good Governance*, we note two characteristics, such as: **the supremacy of the law and liability**. Through the lens of these characteristics, certain aspects are to be analyzed in this article.

“***The rule of law*** includes *the development of clear and unitary legislation*, but, more than that, also a fair application of procurement rules. Two elements could affect the proper application of the rules, namely: the lack of knowledge and skills at the level of the contracting authorities, and/or the lack of integrity” [21].

Regarding the balance between the competing regulations and the development of a clear and unified legislation, we find that the contraventional normative framework in the field of public procurement is laconic, defective and outdated, a fact that distorts the application of contraventional coercion measures in the field of public procurement.

We mention that when drafting Law no. 295 of December 21, 2017, by which art. 402 of the Criminal Code was presented in a new wording, the principles of the legislative activity provided for in art. 3 letter c) and letter d) were not respected of the Law on normative acts no. 100/2017, namely: legality and balance between competing regulations, as well as the opportunity, coherence, consecutiveness, stability and predictability of legal norms [12], [4], [11].

According to some authors, the Criminal Code establishes for the investigating agent the possibility not only of establishing the fact that there is a reasonable suspicion that a criminal offense has been committed, but also of examining, but more importantly, applying the sanction to the criminal case [23, p. 217].

In this sense, evaluating the provisions of art. 402 paragraph (1) and paragraph (2) of the Contravention Code (in force), which stipulates the administrative authorities under the Ministry of Finance responsible and the contraventions entitled to examine them, a legislative inconsistency was detected namely the lack of express stipulation of “art. 327^1” both in paragraph (1) of art. 402 and another article of the Criminal Code in order to establish another authority responsible for examining/sanctioning public procurement violations (the ascertaining agent).

Thus, we attest to the lack of predictability in the application of contraventions in the field of public procurement, i.e., there is a lack of the ascertaining agent responsible for the examination, ascertainment of the

contraventions stipulated in art. 327[1] "Breach of the rules of initiation and conduct of public procurement procedures" of the Contraventional Code, as well as the application of sanctions.

We reiterate that the field of public procurement is one of the most complex fields, and the efficient use of public money, the transparency of processes and the elimination of corruption are benchmarks that would lead to the provision of quality public services and to the development not only of the infrastructure, but even of the rule of law, based on principles and values.

Or, the Supreme Law in art. 1 paragraph (3) proclaims "The Republic of Moldova is *a state of law* and democracy [...]" [3]. A fundamental principle of the state of law, represents the legality of any administrative process that can be ensured when both rules, responsibilities and clear mechanisms for its implementation are established, as well as appropriate **legal liability** measures for violating the established regulations.

The specialized doctrine approaches the term responsibility and liability for the violation of regulations differently. Thus, according to Professor Gh. Avornic, "Although the dominant term is **liability**, in legal literature the term **responsibility** is used, with the same value and meaning" [2, p. 273]. In the opinion of Professor B. Negru, "Legal responsibility is an integral part of social responsibility. Social responsibility consists in the obligation to bear the consequences of non-compliance with certain rules of conduct, an obligation that is imposed on the author of the deed contrary to these rules and which always bears the stamp of social disapproval of such conduct. The specificity of legal liability consists in the fact that it refers to the obligation to answer for the violation of the rule of law" [16, p.292].

However, "legal responsibility is a coercive measure applied by the state for the commission of an illegal act and expressed through the application of material, organizational or personal sanctions" [2, p. 279].

There are several forms of legal liability (constitutional, administrative, contraventional, disciplinary, criminal, civil, commercial, family, etc.).

In the following we will analyze the contraventional legal liability, which according to the author V. Gutuleac, "arises from the commission of the illegal act, which gives rise to the right of the state to apply the sanction provided for by the violated legal norm and the obligation of the violator to bear the consequences of the coercive measures applied to him/her.

Every violation of legal norms endangers or damages a certain social value, affects social relations or interests protected by them. Depending on the social danger of these violations and the nature of the relationships and interests damaged, illegal acts are classified into: crimes, misdemeanors, administrative violations and disciplinary violations" [7, p. 96].

The author I. Spinu considers that, "looking at the material content of the concrete deed, the contravention differs from the crime, as well as from any other act of violation of some legal norms that prescribe a certain way of individual and social behavior and with which it cannot and must not be confused" [22, p. 63].

Contraventional liability is carried out through the measures to sanction contraventional acts established by law. The sanction is a measure of responsibility that is applied for the purpose of educating the person who committed a contravention, in the spirit of compliance with the laws, as well as for the purpose of preventing the commission of contraventions both by the violator him/herself and by other persons [15, p. 671].

Professor Gh. Avornic concludes that "the sanction is the part or element of the legal norm that foresees the occurrence of consequences

as a result of compliance or non-compliance with the provisions of the disposition and hypothesis” [1, p. 107].

Other authors are of the opinion that “the following acts constitute contraventions, if they were not committed under such conditions as to be considered, according to the criminal law, crimes” [9, p. 257].

Therefore, examining each contravention of art. 237[1], in correlation with Law no. 131/2015, we find a lack of balance between the respective regulations. In this sense, we establish that the provisions of paragraph (2) and paragraph (8) of art. 237[1] do not correspond to the powers of the Public Procurement Agency, because it no longer examines appeals and does not issue decisions regarding public procurement procedures. These powers rest with the National Agency for the Resolution of Appeals.

In this connection, we note that the violation of the rules for organizing public procurement procedures and the non-execution of the (revision) decisions of the National Agency for the Resolution of Appeals by offenders, as well as the awareness that these actions are not subject to criminal liability, generate the perpetuation of committing abuses in the field of public procurement, because there is no coercive measure.

As a result of the audit, the Court of Accounts found that no sanctions were applied during 2020. The non-application of sanctions is due to the legislative changes made in 2018, according to which it is no longer specified that the AAP is the specialized body competent to resolve the contravention cases provided for in art. 327[1] of the Contravention Code. Those mentioned denote the difficult activity carried out by the AAP, which is not in accordance with the legal framework [18].

We are also of the opinion that it is necessary to revise art. 327[1] of the Contraventional Code and the improvement of the rules establishing the contraventional facts in the field of public procurement, because with the development of social relations, including the regulations in the field of public procurement, some contraventional facts are obsolete, and others are missing. In this last sense, we highlight that it is necessary to regulate other contraventional acts, which are frequently violated in the public procurement process, such as: non-publication of the award notice; non-publication of procurement plan and changes; incorrect application, throughout the entire public procurement process, of the award criteria or evaluation factors; canceling an award procedure in cases other than those provided by law or creating situations arranged to cancel the award procedure; violation of the provisions regarding the full and timely information about the decisions taken by the contracting authority regarding the results of the application of the public procurement procedure.

Moreover, the lack of regulation of contraventional liability is established for all categories of subjects involved in the public procurement process, namely: the certified specialist and procurement service providers.

Therefore, the lack of clear stipulations regarding the entity authorized to apply sanctions for illegal actions to subjects involved in the initiation and conduct of public procurement procedures may result in the further commission of illegal violations and abuses in the field.

Returning to the observance of the principles of legislation, we draw attention to the fact that their observance leads to the guarantee of the quality of the legal norms developed. In this context, in the Decision of the Constitutional Court no. 26 of September 27, 2016, the Court emphasizes that, “in order to provide legal security to the recipients of the law, any law must meet certain quality conditions. The requirement of the quality of the law is outlined through the lens of the principle of legal security in the composition of the conditions of predictability and clarity

of the law. In this sense, the Court mentions that the right of every person to know his/her rights and duties, enshrined in art. 23 para. (2) of the Constitution, implies the adoption by the legislator of accessible, predictable and clear laws" [8].

Thus, the lack of coherent stipulation of contraventional liability leads to the non-application of contraventional sanctions, and currently the provisions of art. 327^1 of the Contraventional Code are declarative and inapplicable.

Based on the judicial practice regarding the contraventions examined during the years 2020-2022 on the national portal of the courts of the Republic of Moldova (https://instante.justice.md/), court decisions regarding the contraventions in public procurement were identified [25-34]. From the content of these decisions, the following are established:

– Violations in the public procurement process that are ascertained through the competence of the National Anticorruption Center and the court. Thus, the cases are submitted to the court for examination by the ascertaining agent - the National Anticorruption Center. In this sense, we highlight that according to the provisions of article 401 paragraph (1^1) of the Criminal Code of the Republic of Moldova, the contraventions provided for in articles 264, 312, 313, 315 and 315^1 are ascertained by the National Anticorruption Center. Paragraph (3) of the same article, establishes that - Minutes regarding the contraventions provided for in paragraph (1^1) shall be submitted for substantive examination to the competent court.

– We note that the examination of illegal facts in the public procurement process by the National Anticorruption Center was initiated as a result of the notifications of the Intelligence and Security Service and the National Agency for solving complaints;

– The subjects of the contravention are the decision-makers within the public authorities (contracting authority) who participated directly or indirectly in the decision-making process of initiating, organizing and conducting public procurement procedures, including the award of the public procurement contract. It is found that the members of the working group through their actions have violated the powers stipulated in item 20 of the Government Decision no.667 of May 27, 2016 on the activity of the working group for public procurement and in the disposition/order of the head of the public authority on the establishment and activity of the working group for public procurement. At the moment, the provisions of the Government Decision no.667/2016 were repealed (February 05, 2021), by approving the Government Decision no.10 of January 20, 2021 for the approval of the Regulation on the activity of the working group for acquisitions.

– Furthermore, subjects who participated in the decision-making were identified, not being members of the working group and not signing the declaration of impartiality and confidentiality. In this context, we mention that each member of the working group has the obligation to sign, on his/her own responsibility, a statement of confidentiality and impartiality, by which he/she undertakes to unconditionally comply with the provisions of the Law no.131 of July 3, 2015 on public procurement. Thus, taking into account the opinions of some subjects, who have not formalized their status in the public procurement process, constitutes a violation according to the legal provisions.

– The ascertaining agent established that the members of the working group did not properly fulfill their obligations according to normative acts, committed the contraventions provided for in Article 312 "Abuse of power or abuse of office" and Article 313 "Excess of power or exceeding of office duties" of the contravention Code of the Republic of Moldova.

Following the examination of the disposition of the court decisions [25-34], we establish that

no subject was sanctioned contraventionally, namely: five subjects were found guilty for the imputed contraventional acts, but the contraventional process was terminated on the basis of the expiration of the prescription of prosecution contravention; in five other cases, the termination of the process was ordered, for the reason that there is no fact of the criminal offense.

It is concluded that, currently, violations in the field of public procurement are also ascertained through the lens of the powers of the National Anticorruption Center, which is subsequently referred to the court for substantive examination. At the same time, considering that half of the subjects were found guilty by the court, but the contraventional sanction was not applied to them due to the expiration of the statute of limitations for the contraventional liability, there is still a deficiency in the implementation of the contraventional rules, including in public procurement. In this sense, we propose the revision of the limitation period for contraventional liability provided for in article 30 of the Contravention Code.

Thus, liability for violating the provisions is a priority element in disciplining the subjects responsible for applying the rules.

The danger of risk factors (normative deficiencies) resides in the too wide discretion of the subjects involved in public procurement, discretion that can be used being liable to be held accountable to understand that they could interpret the norm ambiguously and non-exhaustively, either in their own interest or in the interest of a group of people, which may be detrimental to the public interest. In these circumstances, the person will look for ways to bribe the public agent to interpret the norm favorably in order to evade the contraventional liability.

The impact of these risk factors and corruption risks is serious and affects not only good governance by diminishing the efficiency, effectiveness and economy of public procurement, but clearly affects fundamental human rights and freedoms.

Conclusions

In conclusion to the above, we highlight that the rule of law requires ensuring legality and legal certainty. These principles enshrined in Article 1 paragraph (3) of the Constitution are essential for guaranteeing confidence in the rule of law. Therefore, ensuring and respecting these principles obliges the state to enact in a clear and predictable manner the adopted norms, including in the field of contraventional liability in public procurement.

In this context, it is imperative to make changes and additions to the Criminal Code of the Republic of Moldova, as follows:

1. The provisions of art.327^1 regarding the violation of the rules for initiating and conducting public procurement procedures are insufficient, ambiguous and obsolete. In order to discourage the admission of violations in the field of public procurement, it is proposed to revise and supplement this article with more violations subject to criminal liability. We consider it appropriate to modify the following paragraphs of this article, for example:

– the provisions of paragraph (2) and paragraph (8) do not correspond to the powers of the Public Procurement Agency, because according to the legal powers the Agency no longer examines appeals and does not issue decisions regarding public procurement procedures. These powers rest with the National Agency for the Resolution of Appeals. In this sense, it is proposed to modify these paragraphs by replacing the phrase “Public Procurement Agency” with the phrase “National Agency for the Resolution of Appeals”;

– regarding paragraph (7), it is proposed to add the phrase “Public Procurement Agency” with the phrase “and the National Agency for the Resolution of Appeals”, because these public institutions specialized in public procurement in order to fulfill

their functions and attributions need to have complete information when examining and issuing decisions, monitoring reports and other information;

– revising and completing the subjects liable to contravention liability in the field of public procurement, by including the certified specialist and public procurement service providers;

– completion of the article, with several facts/violations subject to criminal liability, such as: non-publication of the purchase contract award announcement; non-publication of procurement plan and changes; incorrect application, throughout the entire public procurement process, of the award criteria or evaluation factors; canceling an award procedure in cases other than those provided by law or creating situations arranged to cancel the award procedure; violation of the provisions regarding the full and timely information about the decisions taken by the contracting authority regarding the results of the application of the public procurement procedure;

– reviewing the amount of fines in order to increase them, a fact that would discourage the commission of contraventions in the field of public procurement;

2. With regard to article 402, we consider it necessary to complete paragraph (1) with the phrase "article 327[1]" and the exact establishment of the competent authority to resolve contravention cases. For example: it should be expressly established that the Public Procurement Agency is responsible for examining contraventions from article 327[1].

3. Moreover, it is considered relevant to ensure a balance between the normative acts related to the field of public procurement and to make simultaneous changes to article 10 of the Law on public procurement, no. 131/2015 in order to stipulate the exact attribution of the Public Procurement Agency "to examine, ascertain contraventions and apply contravention sanctions".

– Establishing a functional internal mechanism for enforcement of contraventions in this area. The need for a broad and uniform regulation, regarding the liability that derives from the principle of precision and consistency of the normative text.

Bibliography

1. AVORNIC, Gh. *Tratat de teorie generală a statului și dreptului (în două volume).* Ch.: S.n.,2010 (F.E.-P. „Tipogr.Centrală)., Vol.1 – 440 p, ISBN 9975-70-370-4.

2. AVORNIC, Gh. *Tratat de teorie generală a statului și dreptului (în două volume).* Ch.: S.n., 2010 (F.E.-P. „Tipogr.Centrală)., Vol. 2 – 580 p., ISBN 978-9975 78-864-9.

3. Constituția Republicii Moldova din 29.07.1994. În: *Monitorul Oficial nr.1 din 18.08.1994; Republicată în Monitorul Oficial,* 2016, nr. 78 art. 140.

4. Codul contravențional al Republicii Moldova nr.218-XVI din 24.10.2008, Republicat în *Monitorul Oficial, 2017,* nr. 78-84 art. 100.

5. FLORESCU, D. A. Petru, COMAN, L.. *Achiziții Publice. Reglementare, atribuire, audit financiar, jurisprudență,* București, Editura S.C. Universul Juridic SRL, 2013, ISBN 978-606-673-017-4.

6. GUȚULEAC, V., COMARNIȚCAIA, E. *Drept contravențional: note de curs;* Inst. De științe penale și Criminologie Aplicată, criminologie Aplicată. – Ed.a 2-a, rev. Și actualizată. – Chișinău: S.N., 2016 (Tipogr. „Baștina Radog"). – 208 p. ISBN 978-9975-3101-4-7.

7. GUȚULEAC, V. *Tratat de drept contravențional* – Chișinău: S.n., 2009 (E.F.-P. „Tipogr. Centrală"). – 320 p. ISBN 978-9975-78-739-0.

8. Hotărârea Curții Constituționale nr.26 din 27 septembrie 2016privind excepţia de neconstituţionalitate a unor prevederi din Legea nr.142-XVI din 26 iunie 2008 cu privire la ipotecă (notificarea debitorului ipotecar) (Sesizarea nr.83g/2016), În: *Monitorul Oficial al R. Moldova,* 416-422/101, 02.12.2016.

9. LĂZĂROIU, P., COCHINȚU, I., POPESCU, M. Ag., CÂRLAN, M. V. *Curs de achiziții publice: aspecte teoretice și aplicații practice*, București: Editura Hamangiu, 2018 – 265 p., ISBN 978-606-27-1070-5.

10. Legea pentru ratificarea Acordului de Asociere între Republic of Moldova, pe de o parte, și Uniunea Europeană și Comunitatea Europeană a Energiei Atomice și statele membre ale acestora, pe de altă

parte, nr. 112 din 02-07-2014, În: *Monitorul Oficial, 2014,* nr. 185-199 art. 442.

11. Legii cu privire la actele normative nr.100 din 22.12.2017. În*: Monitorul Oficial al R. Moldova* nr. 7-17 art. 34 din 12.01.2018.

12. Legea pentru modificarea și completarea unor acte legislative nr. 295 din 21.12.2017, În: *Monitorul Oficial, 2018,* nr. 7-17 art. 58.

13. Legea privind achizițiile publice nr. 131 din 03-07-2015, În: *Monitorul Oficial, 2015,* nr. 197-205 art. 402.

14. Legea pentru modificarea Legii nr. 131/2015 privind achizițiile publice nr. 169 din 26.07.2018, În: *Monitorul Oficial,* 2018, nr. 321-332 art. 527.

15. MĂRGINEANU, G., MĂRGINEANU, L. *Dreptul afacerilor* – Ch.: S.n., 2004 (Tipogr. „Elena-V.I.”). – 721 p. ISBN 9975-9750-2-X.

16. NEGRU, B. *Teoria general a dreptului şi statului,*secţia editare a Academiei de Administrare Publică pe lângă Guvernul Republicii Moldova, Chișinău, 1999.

17. NICA, E. *Managementul achizițiilor publice*, București, Editura Economică, 2012, ISBN 978-973-709-642-5.

18. Raportul auditului conformității asupra achizițiilor publice în cadrul sistemului Ministerului Finanțelor în anii 2019-2020, aprobat prin Hotărârea Curții de Conturi nr.48 din 30 iulie 2021. În: *Monitorul Oficial al R. Moldova* nr. 212-218 art. 64 din 10.09.2021.

19. Raport privind activitatea în domeniul achizițiilor publice desfășurată în perioada anului 2020, elaborat și publica de Agenția Achiziții Publice. Disponibil:*https://tender.gov.md/sites/default/files/document/attachments/raport_aap_2020_0.pd.*

20. Raportul de expertiză anticorupție Nr. ELO18/5107 din 11.06.2018 la proiectul de lege pentru modificarea și completarea Legii nr.131 din 03 iulie 2015 privind achizițiile publice al Centrului Național Anticorupție. Disponibil: https://cna.md/report_view.php?l=ro&id=5355.

21. Strategia de dezvoltare a sistemului de achiziții publice pentru anii 2016-2020 și a Planului de acțiuni privind implementarea acesteia, aprobată prin Hotărârea Guvernului nr. 1332 din 14.12.2016. În: Monitorul Oficial, 2016, nr. 459-471 art. 1442.

22. SPÎNU, I. *Note de curs drept contravențional și procedura contravențională* , S.n. 2018, f.E.-P. „Tipografia centrală” – 182 p. ISBN 978-9975-53-973-9.

23. TROFIMOV, I., CREȚU, A. *Drept procesual contravențional* / Acad. „Ștefan cel Mare” a Ministerului Afacerilor Interne. – Chișinău: cartea Militară, 2017 (Tipografia Academiei „Ștefan cel Mare” a MAI.). – 245 p. ISBN 978-9975-3163-1-6.

24. https://ager.md/2020/07/13/apel-deschis-al-societatii-civile-catre-autoritati-privind-ajustarea-cadrului-legal-privind-lista-de-interdictie-a-agentiei-achizitii-publice/ (vizitat la data de 10.10.2021).

25. Hotărârea instanței de judecată (dosar contravențional nr.4-2185/2020), disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/0ccb2c53-6241-4f8c-a20c-82534b030006 (vizitat la data de 19.09.2022).

26. Hotărârea instanței de judecată (dosar contravențional nr. 4-2169/2020), disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/9aa38eca-f092-48d7-94b9-794716d6109a (vizitat la data de 19.09.2022).

27. Hotărârea instanței de judecată (dosar contravențional nr. 4 – 2184/2020, disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/196f0d39-361f-4da4-94d3-31838bd86387 (vizitat la data de 19.09.2022).

28. Hotărârea instanței de judecată (dosar contravențional nr. 4-2399/2020),disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/0f8a60c1-aae6-4895-bd7c-0f906c76c86a (vizitat la data de 19.09.2022).

29. Hotărârea instanței de judecată (dosar contravențional nr. 4-2177/20), disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/03364793-0639-4412-8e90-1055365b69e2 (vizitat la data de 19.09.2022).

30. Hotărârea instanței de judecată (dosar contravențional nr. 4-174/2021), disponibil on-line: https://jch.instante.justice.md/ro/pigd_integration/pdf/4c8153cd-b93f-4075-86e0-004d03d942fc (vizitat la data de 19.09.2022).

31. Hotărârea instanței de judecată (dosar contravențional nr. 4-139/2021),disponibil on-line: https://jch.instante.justice.md/ro/pigd_integration/pdf/dc7a5d3e-c4dd-4ef5-89ec-eb9dab9f79f3 (vizitat la data de 19.09.2022).

32. Hotărârea instanței de judecată (dosar contravențional nr. 4-63/2021),disponibil on-line:https://jch.instante.justice.md/ro/pigd_integration/pdf/45c76ba8-3153-4d5a-897e-4760c8d2cc0b (vizitat la data de 19.09.2022).

33. Hotărârea instanței de judecată (dosar contravențional nr. 4-60/2021), disponibil on-line: https://jch.instante.justice.md/ro/pigd_integration/pdf/4722b9a7-8e76-4c82-a14d-3d25e5b3cf23 (vizitat la data de 19.09.2022).

34. Hotărârea instanței de judecată (dosar contravenționalnr. 4-2025/2020),disponibil on-line: https://jc.instante.justice.md/ro/pigd_integration/pdf/0f4bf45f-debd-4206-908b-44b5622e97f2 (vizitat la data de 19.09.2022).

CZU 343.351
DOI https://doi.org/10.52388/2345-1971.2022.e1.02

SOME THEORETICAL AND JUDICIAL PRACTICE ISSUES ON THE OFFENCE OF EMBEZZLEMENT

Ion IFRIM
Habilitated doctor, university professor, scientific researcher II,
"Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy,
Bucharest, Romania
e-mail: *ionut_ifrim24@yahoo.com*
https://orcid.org/0000-0001-5624-917X

Embezzlement is one of the most controversial issues in Romanian doctrine and jurisprudence. Gathering the results of research and criminal practice on the subject, this article is a synthesis intended to open the way to new research for our criminals. As such, we reproduce some of the controversial aspects and we expose our position with critical nuances towards the court that pronounced one solution or another. The importance of this is apparent not only from the novel elements that the legislator has inserted into the Criminal Code but also from comparative criminal law. Moreover, the importance of the issue also stems from the fact that the legal treatment of offenders differs according to the view taken.
Keywords: *embezzlement offence, theoretical and practical problems, connections, kinship.*

UNELE PROBLEME TEORETICE ȘI DE PRACTICĂ JUDICIARĂ PRIVIND INFRACȚIUNEA DE DELAPIDARE

Delapidarea se înscrie printre cele mai controversate problematici din doctrină și jurisprudență română. Adunând rezultatele cercetărilor şi a practicii penale în materia tratată, articolul de față reprezintă o sinteză destinată să deschidă drumul unor noi cercetări pentru penaliștii noştri. Ca atare, redăm unele aspectele controversate și expunem argumentat propria noastră poziție cu nuanțe critice la adresa instanței care a pronunțat o soluție sau alta. Importanța reiese nu numai din elementele de noutate ce au fost inserate de către legiuitor în Codul penal cât şi în legislația penală comparată. Mai mult, importanţa problemei reiese şi din faptul că tratamentul juridic al infractorilor este diferit, după cum se adoptă un punct sau altul de vedere.
Cuvinte-cheie: *infractiune, delapidare, probleme teoretice si practice, conexiuni, înrudiri.*

QUELQUES PROBLÈMES THÉORIQUES ET PRATIQUES JUDICIAIRES SUR LE CRIME DE DÉTOURNEMENT DE FONDS

Le détournement de fonds est l'une des questions les plus controversées de la doctrine et de la jurisprudence roumaines. Rassemblant les résultats de la recherche et de la pratique criminelle en la matière traitée, cet article est une synthèse destinée à ouvrir la voie à de nouvelles recherches pour nos pénalistes. En tant que tel, nous minimisons certains des aspects controversés et présentons notre propre position avec des nuances critiques par rapport au tribunal qui a prononcé une solution ou une autre. L'importance émerge non seulement des éléments de nouveauté qui ont été insérés par le législateur dans le Code pénal, mais aussi dans la législation pénale comparée. De plus, l'importance du problème découle également du fait que le traitement juridique des délinquants est différent, selon qu'un point de vue ou un autre est adopté.
Mots-clés: *crime, détournement de fonds, problèmes théoriques et pratiques, liens, parenté.*

НЕКОТОРЫЕ ПРОБЛЕМЫ ТЕОРЕТИЧЕСКОЙ И СУДЕБНОЙ ПРАКТИКИ ОТНОСИТЕЛЬНО ПРЕСТУПЛЕНИЯ О ХИЩЕНИЯХ

Хищение является одним из самых спорных вопросов в румынской доктрине и юриспруденции. Собрав результаты исследований и криминальной практики по рассматриваемому вопросу,

данная статья представляет собой синтез, призванный открыть путь к новым исследованиям для наших криминалистов. Таким образом, мы воспроизводим некоторые спорные моменты и аргументированно излагаем собственную позицию с критическими нюансами в адрес суда, вынесшего то или иное решение. значимость вытекает не только из новых элементов, внесенных законодателем в Уголовный кодекс, но и в сравнительное уголовное законодательство. Более того, значимость проблемы вытекает из того, что правовое обращение с преступниками различно в зависимости от той или иной точки зрения.

Ключевые слова: *преступление о хищениях, теоретические и практические проблемы, связи, родственники.*

Introduction

1. In this article we propose to present some of the solutions given by the court in relation to the objective and subjective conditions necessary for the existence of the crime of embezzlement, in its various forms and, after that, we deal with some aspects related to the sanctioning of this criminal act. We believe that a systematization of the material and some published examples from judicial practice can constitute a practical guide and a way to achieve that unity of views so important for the formation and consolidation of criminal science. Also, the importance and actuality of the researched theme results from the new elements that were inserted by the legislator both in the content of the new Penal Code, and which come to modify in a substantial way the legal text, as well as in the comparative criminal legislation.

2. In the criminal doctrine, it was said that the crime of embezzlement[1], due to its features, presents, within the first group of service crimes, the *highest degree of generic social danger*. In order to characterize the crime of embezzlement, it is necessary that, in addition to the *two* determining elements in establishing social dangerousness, namely, the *complex* legal object and *the quality of the subject* (that is, its legal position in relation to the stolen property), some adjacent elements should also be taken into account[2].

Key research insights

The text of this article, in the editorial which it received in Article 295 paragraph 1 of the Criminal Code, has the following content, in its first part: the use, appropriation or trafficking by an official, in his or her interest or for another, of money, values or other property which he or she manages or administers. Then, paragraph 1 of Article 272, letters b) and c) of Law no. 31/1990, republished, provides for *a special form of embezzlement*, but with subsidiary applicability to the main rule provided by the Criminal Code, consisting in the act of the founder, administrator, general director, director, member of the supervisory board or director or legal representative of the company: b) uses, in bad faith, the goods or credit enjoyed by society for a purpose contrary to his/her own interests or for his/her own benefit or to favor another society in which he/she has interests directly or indirectly: c) it is borrowed, in any form, directly or through an interposed person, from the company he/she manages, from a company controlled by him/her or from a company controlling the company he/she manages, the amount borrowed being above the limit set out in article 144^4 paragraph (3) letter(a), or make one of these companies give any guarantee for their own debts[3].

At the same time, according to article 295 of the Penal Code related to art. 308 Penal Code, constitutes *an attenuated variant* of the offense of embezzlement the commission of the act by the persons who exercise, permanently or temporarily, with or without

[1] Vintilă Dongoroz, *Drept penal,* 1939, p.194; Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Petrovici Simona, *Infracțiuni contra avutului obștesc*, Ed. Academiei Române, 1963, p.117.

[2] Vintilă Dongoroz, *Explicații teoretice ale codului penal român,* Partea specială, vol. III, Ed. Academiei Române, 1971, p. 176.

[3] Mihail Udroiu, *Sinteze de drept penal,* Editura, C.H.Beck, București, 2020, p. 750.

remuneration, an assignment of any nature in the service of a natural person among those provided for in article 175 paragraph (2) Penal Code or within any legal entity. It can be seen that embezzlement is *an aggravated variant* that has produced particularly serious consequences.

At the same time, unlike the previous criminal code (1969), which regulated the crime of embezzlement in Title VI, dedicated to crimes against patrimony[4], thus suggesting that the criminalization had in mind *the protection of the patrimony* of the person *first*, who gave in the management or administration to the author of the embezzlement of the assets, object of the execution act, and in *the subsidiary*, protected the service relations, the Criminal Code in force *included* the embezzlement within *the service crimes* considering its main legal object. We find the justification in the statement of reasons. Thus: "in the project, this deed was brought where it belonged, namely in the group of service crimes, because, by committing it, the social relationship at work is first harmed and, secondarily, the patrimony of a legal person is affected. The solution of including the crime of embezzlement in this category is traditional in our law, it being consecrated by the legislator of the Criminal Code from 1936 (art. 236). The situation is the same in other legislations, such as art. 432 Spanish Penal Code, art. 314 Italian Penal Code, art. 432-15 French Penal Code".

Moreover, in some textbooks[5] it has been mentioned that the text's movement *does not* only produce effects on a formal level, but it also brings more clarity regarding the conditions of typicality of the text. Thus, in the current normative framework, it is even more clear what is the ranking of social values protected by the norm: The first place is the protection of a fair and honest performance of the office by the public official or the private official (person from art. 308 of the Penal Code), in the second is the protection of the patrimony of the person who gave the property object of embezzlement into the administration or management of the author.[6] Therefore, in order to set up the act, it is no longer necessary to determine with maximum rigor the existence of damage to the victim's patrimony, especially concerning the abusive conduct of the public official proper or assimilated, from the perspective of its obligation to perform according to its function.

However, we notice that, in judicial practice, most of the time, the damage caused by the action of embezzlement is not so well outlined, especially when we discuss this type of crime.

Under this aspect, it was argued, in a certain view, that, in order for the facts that have been established by the court to be punished, for them to constitute the analyzed crime, it is required that they *perfectly* match all the conditions in the text of the law that punishes this crime[7]. This perfect match between the appearance of the material fact and the conditions in the text of the law must be observed with great care, because if this match does not exist *completely*, then it cannot be said that the given fact constitutes the crime of embezzlement[8]. The argument is found in the principle of legality of criminalization and sanctions of criminal law[9], that is, strict observance and application of the law, requires that when applying a certain text of law, the situations that the text provides,

[4] Tudorel Toader, *Drept penal roman*, Partea specială, vol. I, Ed.Universul Juridic, București, 2019, p. 255.

[5] Sergiu Bogdan, *Drept penal*. Partea specială, Ed. Universul juridic, 2020, p. 234; Vasile Dobrinoiu, Norel Neagu, *Drept penal,* Partea specială. *Teorie și practică judiciară*, Ed. Universul Juridic, 2011, p. 475.

[6] Ion Ristea, *Drept penal*, Partea specială, vol. II, București, 2020, p.48.

[7] Vintilă Dongoroz, *Tratat, Drept penal,* 1939, op. cit p.197.

[8] Petre Dungan,Tiberiu Medeanu, Viorel Pașca, *Drept penal,* Partea specială, vol. II, Ed. Universul Juridic, 2012, op.cit.p. 7.

[9] George Antoniu, *Noua legislație penală. Reflecții preliminare*, în Noua legislație penală tradiție, recodificare, reformă, progres juridic, vol.I Bucureşti, Ed. Universul Juridic, p. 24.

to fit (typicality) exactly with the situations contained in the material fact to which the text has been applied. It must be respected by both the citizens and the courts, and therefore *no* haste or ease is permitted when it comes to investigating whether or not an act constitutes a criminal offense. On the other hand, in order to find this match between text and fact, *every condition in the text must be examined*, and after it has been clearly understood what meaning that *condition* has, it must be verified whether it finds in the facts of the case a situation which is perfectly suited to it. This exam should be done for each condition, *thoroughly, seriously, carefully*.

3. Then, by knowing *the causes and conditions that determine or favor* the commission of the analyzed crime, it gives us the opportunity to understand more precisely and clearly the role that the means of criminal law can have in the fight against this service crime and in protecting service relationships[10]. However, there are still cases when some civil servants violate their duties and by their behavior create dissatisfaction within the institution. For example, by abusing their position or the actual possibilities offered by this position, they violate their main duty, to ensure the respect of service relations, and by disturbing the good running of the units, they harm the legal interests of citizens or damage the patrimony, as a consequence of the committed acts. They cunningly use any weaknesses and mistakes in the work, they seek whenever lack of vigilance gives them the opportunity to push for abuse or misrepresentation to strike in the relationships of service. The persistence of these dispositions, habits, conceptions, attitudes, mentalities, characteristic of our society, is explained by the lagging behind of consciousness in relation to social reality, they constitute the cause of several crimes at work. A similar conclusion was drawn by French authors regarding the causes and conditions that favor the commission of the crime of embezzlement[11]. In this sense, they should be educated to cultivate respect and care for people's needs, to fulfill their duties conscientiously and with a sense of responsibility, to respect service discipline.

But in the present article, the causes of the crime of embezzlement, we must also consider conditions that often contribute to the Commission of this crime, making it possible to commit it. Among these conditions, we mention the lack of vigilance, the superficiality or the ease of choosing officials, the disregard of the duty of fidelity, especially those who administer or manage. This largely explains the consistent fight against service crimes in general and *embezzlemen*t in particular[12].

4. Under these conditions, our criminal law, through its rules, permanently fulfills *a double action*[13]. First, an action to prevent crimes, action resulting from the criminal law's determination of dangerous acts considered crimes and from the threat of punishment to those who will commit crimes. The preventive action carried out by the criminal law is of particular importance in the field of protecting work relationships.

The norms of criminal law that serve to protect employment relationships, like all other norms of criminal law (as well as in the theory of comparative criminal law[14]), carry

[10] Valerian Cioclei, *Manual de criminologie*, Ed. All Beck, 1998, p. 6.

[11] Michel Véron, *Droit pénal spécial,* Ed. Colin, Paris, 1999, p. 110.. Patrice Gattego, Droit pénal spécial, Dalloz, Paris, 1995, p. 185.

[12] George Antoniu, Tudorel Toader (coordonatori), Versavia Brutaru, Ștefan Daneș, Constantin Duvac, Ioan Griga, Ion Ifrim, Gheorghe Ivan, Gavril Paraschiv, Ilie Pascu, Ion Rusu, Marieta Safta, Iancu Tănăsescu, Tudorel Toader, Ioana Vasiu, Ed. Universul Juridic, București, 2016, p. 298.

[13] Vintilă Dongoroz, în I. Tanoviceanu, V. Dongoroz, *Tratat de drept şi procedură penală*, vol. I, Bucureşti, p. 30–32; vol. III, p. 197–220; Traian Pop, Drept penal, vol. I, 1921, p. 60–81; Eugenio Florian, Trattato di diritto penale, vol. I, 1921, p. 47–80 etc.

[14] Thorsten Sellin, *L'effet intimidant de la peine*, în Revue de science criminelle et de droit pénal comparé, nr. 4/1960, p. 579–596; Jean Pinatel, *La prévention générale d'ordre pénal,* în Revue de sciences criminelle et de droit pénal comparé, nr. 3/1955, p. 554–561 şi urm.

out their preventive action in *two directions*[15]: in the direction of *general prevention* and in that of *special prevention*, so that in the field of preventing the commission of the act incriminated as embezzlement crimes, we encounter a general prevention action and a special prevention action[16].

By the function of *general prevention* is meant the anti-criminal inhibitory influence that the fact that the criminal law prohibits, under penalty of punishment, certain acts of conduct and that, through the coercive force of the state, the punishments established by the courts will be brought to bear on the members of society upon fulfillment.

The function of *special prevention* consists in the influence exerted on the criminal through criminal reaction measures, such as to exclude the commission of a new crime by him/her.

The *general prevention* function of the criminal law manifests itself, in our opinion, under a threefold aspect: 1) through the general warning about the socially dangerous and criminally illegal character of the incriminated acts of conduct; 2) by strengthening the legal awareness[17] of the recipients of the criminal law and by mobilizing public opinion against the criminal acts and those who commit them; 3) by curbing the tendencies of the returned elements to commit embezzlement crimes, using for this purpose the threat of punishment provided for committing the criminal act.

In relation to the preventive effectiveness of the criminal law through intimidation with the help of punishment, it should also be mentioned its *double conditioning* on the one hand by the justice of the punishment, i.e., its *proportionality* in relation to the generic social danger of the act for which it is provided, and on the other hand, by the *inevitability* of the punishment in the case of committing the crime, for which it is provided, in other words, by the *certainty* of the punishment.

It is necessary to mention that the general preventive action of the criminal law concerns the criminal sanction established in relation to the degree of generic social danger, so that the preventive efficiency of the law actually depends on the individualization of the sanctions in relation to the criminal act. But when it comes to general prevention as an effect of the application of punishment, it finds its effectiveness in the punishment applied to the criminal in relation to the committed act. The preventive action of the criminal law is therefore carried out under different conditions in the two situations.

In another aspect, we note that the norms of our criminal law devoted to the protection of work relationships and the punishments provided by these norms also exercise a special prevention action, an action that results from the effective application of the punishment to the persons who have committed any crime that has caused harm service relations.

5. In the Criminal Code, the crime of embezzlement is included in Chapter II, Title V, entitled "*Malfeasance in office"*. It seems to us that the name of Title V is objectionable. Each of these groups of crimes has a distinct legal object. It could coexist under a common name (as a common group legal object) such as "*crimes against public interests*", which systematizes under this title both corruption and service crimes, as well as other crimes that subscribe to this common legal object. The name of the title cannot consist of a simple association of the name of the component crimes, but must express the common features of the groups of component crimes.

Then, the inclusion of the crime of embezzlement in the Criminal Code among service crimes has the following justification,

[15] Vintilă Dongoroz, *Principalele transformări ale dreptului penal* în „Studii juridice", Edititura Academiei Române, 1960, p. 399 şi urm.

[16] Vintilă Dongoroz, *Sinteza asupra noului Cod penal al României*, în S.C.J., nr. 1/1969, p. 4–35.

[17] Anita M. Naschitz, *Conştiinţa juridică,* Ed. Ştiinţifică, Bucureşti, 1964, p. 217; „…dreptul , odată format, constituie, la rândul lui, un puternic factor de dezvoltare a conştiinţei juridice şi de asigurare, pe această cale, a propriei sale realizări".

the crime of embezzlement is organically linked to the group of service crimes in that the *active subject* (the actual public official or assimilated[18]) of embezzlement crimes is active within state units, so that committing the crime of embezzlement implicitly seriously affects the normal development of work relationships. These considerations, in addition to the stated reasons, determined the maintenance of this crime among the service crimes (following primarily the defense of the state apparatus and secondarily as a crime against patrimony[19]).

In the light of these considerations, bringing the crime of embezzlement into the group of service crimes appears completely justified[20].

Let us now see how to proceed in order to clarify whether or not a certain fact constitutes the crime of embezzlement[21]. It is advisable that before applying a text, and therefore the one concerning embezzlement, the judges should read it carefully, deepen its meaning, seek to grasp its entire application and understand what was meant to be punished by that text.

In relation to the legal description of the crime, the judicial body seeks to identify in the concrete situation the specific features of the content of the crime regarding the premise, object, objective side, subjective side and its subject (the Dongorozian structure).

The generic legal object of the crime of embezzlement, as with all other service crimes, is formed by the social relations of a service nature, therefore, with the conscientiousness, correctness and honor that civil servants and other employed persons must show, in the management and in the administration of money, values or other assets that they manage[22].

The special legal object of this offense is specified by its very notion; it consists in the social relations related to the smooth development of service relations. Due to the socio-political value represented by patrimonial social relations, their protection, by criminalizing the crime of embezzlement, constitutes the secondary special legal object, adjacent to this crime, the protection of social relations related to the smooth running of the service constituting the main special legal object. It does not always provide us with a sufficient criterion to distinguish this crime from other crimes with a similar content. We showed, when we characterized the crime of embezzlement, that it is seen as a service crime, but at the same time as a crime against patrimony. So, the object of the crime must be analyzed from this point of view. Therefore, in order to give a just qualification to the facts, the other elements of the content of the offense provided for by art. 295 Penal Code must also be used.

The establishment of the main special legal object of the crime of embezzlement is also determined by the material side of the criminal activity, which gives the deed the character of a crime against service relations, the criminalized action (in the ways of committing the embezzlement) being that of embezzlement of “goods, money, values...”

Establishing the order *of priority* regarding the two special legal objects of the crime of embezzlement serves to accurately determine and evaluate the social dangerousness of embezzlement and to fix the place of this crime in the system of the special part of the Criminal Code, as well as to differentiate the crime of embezzlement from other crimes, either crimes against patrimony or service crimes.

[18] Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/, 12 august 2022.

[19] Philippe Conte, *Droit penal special*, Ed.Litec, 2003, p. 295.

[20] Giovani Fiandaca, Enzo Musco, *Diritto penale*, *parte speciale,. I delitti contro il patrimonio.* Ed. Zanichelli, Bologna, 1996, p.14. Ferrando Mantovani, *Diritto penale, parte speciale,* Cedam, Padova, 1989, p.1

[21] Under this aspect, we reproduce from Doru Pavel, *Delapidarea*, 1959.

[22] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 306.

The material, direct object of the crime is the money, valuables or other tangible movable property with an economic value, which the perpetrator effectively manages or administers (even if they were not actually recorded in the accounting of the injured person).

Also, money, valuables or other goods which, although they are not part of the injured person's patrimony, are in fact administered or managed by the perpetrator, or fraudulently created extras in management, can constitute a material object of embezzlement.

According to the provision of art. 295 Penal Code, for the existence of the material object of the crime, *two* conditions must be met, namely: a) the asset must belong to or interest the public unit, as a rule, and b) the asset must be in the administration or management of the subject (*intraneus*).

These conditions regarding the material object are *essential requirements* for the existence of the dilapidation offense.

In determining the material object of the crime of embezzlement subject to the action of appropriation, use or trafficking, the text of art. 295 Penal Code uses *three* terms: "*money, securities, or some other good*".

The essential condition of the *material object* is that it has a *patrimonial value* embedded in the asset of the passive subject, the legal entity.

Money has a permanent and undeniable patrimonial value, therefore, it can always be the material object of the crime of embezzlement[23].

By values are understood the documents that include receivables to the bearer, i.e., receivables that can be realized by the holder of the document. Thus, it is the state bonds that participate in the draws, the C.E.C. to bearer, etc. The manager of such values, if he/she appropriates them, commits the crime of embezzlement, because they have a patrimonial value, being always convertible into money.

The notion of "any other asset" includes all assets with economic value that constitute property or, as we have shown, are only temporarily and provisionally in the possession of a public or private entity.

In addition to these, the question arose whether waste can be considered goods and whether, therefore, they can constitute a material object of the crime of embezzlement. The answer to this question depends on the destination of the respective waste. If, in the permanent process of production or through a special provision, the respective waste was intended either for use within the unit, or for some form of recovery, in this case they may constitute a material object of the crime of embezzlement. If it is established that the waste is devoid of any value and that it was to be thrown away with no further use, in this case, it is obvious that their appropriation cannot constitute a crime.

Analyzing the amount of the value of the material object, the question arose whether the crime of embezzlement exists, in the hypothesis when this value is completely insignificant[24].

In specialized literature, the notion of money means: banknotes, paper currency, regardless of whether it is found in cash or at the disposal of the unit, as well as the metallic currency.

Values are the documents that carry the receivables that can be realized in money (bonds, checks, bank transfer).

By other asset is meant any material thing that belongs to or interests the state (industrial and agricultural products, machines, furniture, etc.).

The goods that constitute the direct object of the crime of embezzlement must represent an *economic value*[25]. When determining the

[23] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal*, op.cit.p. 307.

[24] Vintilă Dongoroz și colaboratorii, op.cit.p. vol. III, 596; Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială, Teorie și practică judiciară,* Ed. Wolter Kluwer, București, 2008, p. 339.

[25] Ilie Pascu, în Vasile Dobrinoiu, și colaboratorii, *Noul*

value of the object, it is not the subjective assessment that the criminal has of the stolen property, but the objective value of the property that must be taken into account. The existence and size of the economic value of the asset is assessed in relation to objective data (nature, destination, etc.).

In principle, only movable goods can be the material object of the crime[26]. What can form the direct object of the crime of embezzlement in the case of immovable property is only the equivalent of the use of an immovable property or, in general, the fruits acquired from the immovable property, which are therefore in reality movable property. An exception to some extent is immovable property by destination on the date of the crime, which can form the material object of embezzlement and which by their nature are also movable property, which the law fictitiously considers immovable, based on their connection with the immovable property which are attached, constituting an accessory thereof.

Finally, the material object of the crime can only be physical goods that are or can be in the possession of the person. Even if the evasion is carried out on an asset belonging to the "values" category, we are still in the situation of a tangible movable asset, since, in order to be relevant from the point of view of criminal law, the right of claim must be incorporated into a title that offers the offender the opportunity to realize the claim.

In addition to the aspects regarding the material object of the crime, it is necessary to make some clarifications regarding the legal situation of the asset and the position of the subject of the crime in relation to it.

The goods on which the action of evasion is carried out must, as already shown, administer or manage them.

It can happen that goods belonging to other people end up in the scope of goods in the possession of the unit, without there being any legal relationship between those to whom they belong and the respective unit (for example goods stolen and placed in the warehouse of a public unit to be sheltered or sums of money belonging to the cashier kept in the unit's house). These goods do not belong to and are not of interest, so in case of their theft, the civil liability of the unit is not engaged. The theft of these goods *does not* constitute embezzlement, but another crime, qualified in relation to the data provided by the objective reality.

The formation of extras in management, due to error or incorrect manipulations, according to the normative acts in force, belong to the public or private person. The person who steals from these assets if he/she manages or administers them, commits the crime of embezzlement[27].

The property that constitutes the material object of the crime must be under the management or administration of the subject based on the duties arising from the service report. The subject must therefore have the position of manager or administrator in relation to the stolen asset.

If the criminal activity carries on a good of the unit that at the time of theft was not part of the mass of goods managed or administered by the subject, the crime committed constitutes theft and not dilapidation[28].

The establishment of the legal situation of the asset must, therefore, be done in relation to the *moment of the act*, verifying whether or not at that moment the asset was in the possession of a unit, the fair qualification of the criminal activity committed on the respective asset depends on this finding. Establishing the legal situation of the asset therefore involves knowing the dates when the asset entered or left the unit's patrimony.

cod penal, comentat, vol. II, Ed. Universul Juridic, București, 2012, p. 571.

[26] Victor Nicolcescu, *Delapidarea și gestiunea frauduloasă. Asemănări și deosebiri,* R.D.P. nr.4/2000, p. 98. București, Ed." Monitorul Oficial" .

[27] The present paragraph takes up the text published by Doru Pavel, Delapidarea, 1959.

[28] Mihail Udroiu, *Sinteze de drept penal,* op.cit, p. 751

The cumulative fulfillment of the two conditions bearing on the situation of the asset and the position of the active subject in relation to this asset being an essential requirement for the existence of the crime of embezzlement, the achievement of this requirement must be checked carefully, in relation to the particularities of each concrete case.

In the legal literature[29], the discussions are limited only to the controversy whether the assets in the cases shown above belong to or interest the state, or, on the contrary, do not belong to or interest the public unit, in the affirmative case the crime is embezzlement, the subject having the management of the assets, in the negative case the crime is an abuse of trust. For example, the embezzlement by the employee, through a service contract, of the money received from the employer for the purchase of goods constitutes the crime of breach of trust, and not that of embezzlement, the perpetrator not having the capacity of an official. Also, the defendant, a postal factor, by falsifying some documents, appropriated sums of money which, temporarily under the management of some officials from the county postal departments, such as postal factors, belong to the state budget. From here, it should be noted that the defendant's misappropriation of the money he/she had under his/her control constitutes the crime of embezzlement, and not of fraudulent management, as the court wrongly held[30].

In the criminal doctrine[31], it was emphasized that, in the case of so-called crimes with a *qualified subject*, i.e., those that can only be committed by a person who has the special capacity required by the law, the issue of the correct legal classification of the respective act as a crime is conditioned, on among others, and the existence of the quality required by law for the subject of the crime. In these cases, that quality of the person constitutes *an essential specific feature* of the content of the crime.

Embezzlement is one of the most well-known crimes with *a qualified subject*, which, apart from the problems it poses in relation to the other specific features of its content, calls for a careful examination and raises interesting issues regarding the delimitation of the subject of the crime. Therefore, the crime of embezzlement is the crime with a qualified active subject (*intraneus*).

If we carefully read the text that punishes the crime of embezzlement, we find first of all that the person who committed the crime must be *a civil servant*. The one who committed the crime, is called *the subject* of the crime, in the science of law[32].

So, for the crime of embezzlement, the subject of the crime, i.e., the person who commits the crime, must fulfill a special condition: *to be a public servant[33].* This is a characteristic feature of this side of the crime, a feature without which the content of the crime is not realized.

In the text of art. 295 Penal Code this feature of the offense finds its expression in the words: "*by a public official*". If he/she is not a civil servant, he/she *cannot* be charged with the crime of embezzlement. But what does civil servant mean? The law explains what we must understand by civil servant.

The concept of civil servant is defined from the point of view of the criminal law in art. 175 and whose content is as follows[34]:

"Civil servant, in the sense of the criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:

[29] *C.S.J., secţia penală, decizia nr. 3502/2002, www. legalis.ro.*

[30] *C.S.J., secţia penală, decizia nr. 2762/2000, www. legalis.ro.*

[31] Vintilă Dongoroz, *Tratat*, 1939, op.cit.p. 204.

[32] Idem, op.cit.p. 215.

[33] Teodor Vasiliu și colab., *Codul penal, Comentat și adnotat,* Partea specială, vol. I, Ed. Științifică și Enciclopedică, București, 1975, p. 364.

[34] The present section reproduces the text published by the undersigned: Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/12 August, 2022.

a) exercise duties and responsibilities, established under the law, in order to realize the prerogatives of the legislative, executive or judicial power;

b) exercise a position of public dignity or a public position of any nature;

c) exercises, alone or together with other persons, within an autonomous government, another economic operator or a legal person with full or majority state capital, duties related to the achievement of its object of activity.

(2) Likewise, a public servant, within the meaning of the criminal law, is considered a person who performs a service of public interest for which he/she was vested by the public authorities or who is subject to their control or supervision regarding the performance of that public service”.

Therefore, what characterizes the quality of civil servant from a criminal point of view, is primarily the fact of exercising *a function* or *a task* in the service of public interest.

This function or task can be of any kind. It does not matter if it is for a shorter or longer time, if it is permanent or random, it does not matter if the official was appointed with legal forms or without such legal forms. It is enough that he/she has fulfilled a task in the service of public interest, in order to be considered a public servant, that is, so that the article of the law regarding the crime of embezzlement can be applied to him/her, this of course if the other conditions of this text are fulfilled.

We have shown above that the civil servant must exercise a public function or public dignity or in the service of public interest.

In the specialized literature[35], the problem arises of knowing what is the meaning and extent of the notion of public servant from the point of view of criminal law, in order to be able to delimit the sphere of persons who have this quality required by art. 175 Penal Code.

The issue is of particular interest, both theoretically and practically, because the requirements of criminal law determined by the necessity of criminal charges call for the establishment of a wider scope, the attribution of a more extensive meaning to the notion of “public official” than the one recognized, in principle, in the administrative law [36].

The difficulty of defining the concept of *public official* comes from the lack of coverage or, on the contrary, from the widening of the scope of the concept of *public official* and, as such, the variations of definitions given to this term can create great difficulties of interpretation in judicial practice.

We note that, art. 175 of the criminal law in force defines the notion of “public official”, limiting itself to defining the notion of “public official” in a broad sense [art. 175 para. (1)], as well as the concept of *civil servant* “de facto” or “by assimilation” [art. 175 para. (2)].

In addition to these, we also specify the fact that, within the scope of the notion of civil servant[37], this name also includes the person who *performs a service of public interest* for which he/she was vested by the public authorities or who is subject to their control or supervision with regard to the fulfillment of that public service, even if it is not paid from public funds, but privately.

In defining the public function and outlining the scope of the persons who have the capacity of civil servant, the provisions of Law no. 188/1999 regarding the Statute of civil servants[38]. According to this law, the public

[35] Gheorghe Voinea, The active subject of the crime of embezzlement, RDP no. 4/2000, Bucharest, Ed. R.A. “Monitorul Oficial”, p, 120-121.

[36] The present section reproduces the text published by the undersigned: Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/12 August, 2022.

[37] Vintilă Dongoroz, Gheorghe Dărângă, Siegfried Kahane, Dumitru Lucinescu, Aurel Nemeş, Mihai Popovici, Petre Sîrbulescu; Vasile Stoican, *Noul Cod penal şi Codul penal anterior. Prezentare comparativă*. Ed. Politică, Bucureşti, 1969, p. 92. In the opinion of the cited authors, the restriction of this term was determined by the difficulties encountered in judicial practice, because the term official had too broad a meaning.

[38] Republished in the Official Gazette. nr. 365 din 29 mai 2007.

function represents the set of attributions and responsibilities established under the law, in order to realize the prerogatives of public power by the central public administration, the local public administration and the autonomous administrative authorities.

The civil servant is the person appointed, according to the law, to a public position. The person who was released from public office and is in the reserve corps of public servants retains his/her status as a public servant. The totality of civil servants within the autonomous administrative authorities and within the public authorities and institutions of the central and local public administration constitutes the body of civil servants.

In this context, it should be emphasized that the exact determination of the scope of the notion of a public official is of particular importance, today more than ever, for the effective combating of this category of criminals. The criminalization and sanctioning of these offenses constitute the means of criminal law to ensure compliance and fulfillment of service duties by all those who perform a job in the mechanism of our state. However, the state and its entire mechanism are currently of special importance due to their increasingly comprehensive economic-organizational and cultural-educational functions, and the fulfillment of the tasks corresponding to these functions also requires criminal law means.

The problem is, we think, generated by the care not to give *too much expansion* to the notion of a public official, due to the wide scope of framing offered by the incriminating texts - no matter how limited these incriminations are, possibilities that are also related to the scope wide range of persons whom art. 175 Penal Code includes them under the name of civil servants.

We consider that this is the main problem, because, first of all, it is the most common in practice, and secondly, the solution to be reached is related to the most radical legal effects, to the existence or not of a criminal liability for some offenses by certain categories of persons.

Schematically, we are looking for theoretical solutions for the following aspects of the notion of a public official, what content does this concept have from the point of view of criminal law and under what conditions does a person acquire this quality, becoming an *intraneus* active subject of a certain category of crimes?

Under this aspect, the provisions contained in art. 175 Penal Code, although they do not refer to the Statute of Civil Servants, they nevertheless mention the phrase "the person who (...) exercises (...) a public function of *any nature*". In other words, public officials, within the meaning of the criminal law, will also be persons who exercise a public function in the service of a public authority, public institutions, or other legal entities under public law, which makes *the scope of the notion of "public official"* not be circumscribed only to persons who exercise public power prerogatives, because the notion of "public official" regulated by our Criminal Code has *a larger scope than that provided by the Statute of public officials*[39].

Art. 175 of the criminal code shows that whenever the criminal law uses the expressions of public dignity, public institution, public unit, or others that contain the term "*public*", it refers to everything that interests the central or local bodies of power or the state administration, institutions, enterprises or economic organizations of the state, companies in which the state has participation in any form, cooperative organizations of any kind, mass organizations or associations or institutions of

[39] Constantin Duvac, Funcţionarii publici bancari cu atribuţii de control şi obligaţiile care le incumbă potrivit noilor coduri: penal şi de procedură penală, communication held at the international conference with the theme "Current affairs in banking legal activity", organized by the Association of legal advisors in the banking financial system at Piatra Neamţ, in 2010.

a social or professional nature and in general everything that interests society, in totally or in part and the promotion of its interests within the legal order, regulated by the state.

The content of this article of the law clarifies the meaning of the expressions function of public dignity or a public function of any nature[40].

If the official is in the service of such a public unit, then the crime of embezzlement can be charged, of course, if the other conditions are also met, conditions that we examine below.

We have examined above the condition that must be fulfilled by the one who commits the crime - the subject of the crime - in order to be charged with the crime of embezzlement. We showed that he/she must be *a civil servant* and we explained what is meant by *civil servant*[41].

According to the provisions of art. 295 Penal Code, the active subject, in the author's sense, of the crime of embezzlement can only be the civil servant who administers or manages the assets on which the embezzlement action is carried out[42]. Therefore, the author of the crime of embezzlement can only be the civil servant who, based on the obligations arising from the employment relationship, has the authority to manage or administer the respective assets[43].

By management is understood the activity carried out in order to preserve (keep and making available) and the material circulation (inputs and outputs) of the goods that belong to or interest the unit. This activity is carried out through a complex of operations that find their reflection on the material level in the documents of receipt, storage and delivery (by counting, weighing, measuring), as well as in the preparation and keeping of the record documents of these goods. Thus, the material contact with certain goods, also exercised as a result of the service relationship, but for the purpose of using the entrusted goods, does not constitute management. The theft of these goods must be classified as theft or abuse of trust and not embezzlement (for example, employees who are entrusted with tools, raw materials, protective clothing, sports materials, etc.). The use by the civil servant of the assets entrusted to him/her for this purpose constitutes a purpose other than that of administration or management. The use of the asset entrusted to the employee can be carried out in his/her personal interest (clothes, gloves, protective glasses, etc.) or in the work process submitted by him/her for the production, transformation or repair of goods (raw materials, tools, fuel, fuels, etc.).

On the contrary, the manager does not have tasks that involve the performance of an action for the use of the good, his/her task being, as shown above, to preserve the good and to bring about the fulfillment of provisions regarding its circulation (receiving and handing over the good). These attributions fix the profile of the management activity and determine the specific obligation from the content of the work report in the case when the official is a manager[44].

As is known, the regularity or validity, from a formal point of view, of the employment relationship does not influence the existence of the quality of civil servant, being the actual exercise of the duties by a person within the unit in which he works is sufficient.

Against this wide acceptance of the notion of civil servant, the question arises whether a person who *actually, (de facto)* therefore

[40] George Antoniu (coord.), *Noul Cod penal. Comentariu pe articole,* Vol. II (art. 57 171), Ed. C.H. Beck, Bucureşti, 2008, pp. 566 567; Gianina Cudriţescu Pilă, *Noţiunea de funcţionar,* în RDP nr. 3 din 2001, pp. 90 92.

[41] Fr. Strauss, *Noţiunea de funcţionar în dreptul nostru penal*, în „Justiţia", 1956, nr. 3, p. 454; O. Stoica, *Despre subiectul infracţiunii de delapidare,* în „Legalitatea", 1959, nr. 9, p. 25.

[42] Participants in the crime of embezzlement who do not have the powers of administration or management of the assets required to be the author of the crime, even if they have directly committed acts of evasion, are considered accomplices. Decision of the Supreme Court no. 1 207 of June 11, 1959, in „Legalitatea", 1959, nr. 12, p. 72.

[43] Vintilă Dongoroz și colab., vol. III, 1971, p. 597.

[44] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară*, op.cit., p. 478.

without a legal investiture, *performs* acts belonging to the management activity can have this quality and implicitly can be held accountable according to art. 295 Penal Code. The answer is affirmative, in our opinion, in the sense that the de facto manager can be subject to the crime of embezzlement, but not every actual exercise of an attribution that is indirectly contingent on the management of the unit constitutes de facto management[45].

The actual exercise of the management activity is considered to be a de facto management when the person without qualification performs acts specific to the performance of the management activity, regardless of whether this person is a civil servant of the respective unit or a private individual (for example an official who, exceeding the attributions, interfere in the management of the unit or a private individual who temporarily or permanently replaces the real manager (the case of relatives or friends of the manager who replace him/her and work for him/her[46]).

Therefore, the performance of the management activity attracts by itself the responsibility of management on those who, without having this quality, in fact performed acts of the management activity. For example, it was decided that the act of the defendant, a tax inspector within a financial administration, to appropriate sums of money from the receipts made in this capacity, constitutes the crime of embezzlement, and not the crime of fraudulent management. This, because the defendant has the capacity of a civil servant, and as part of his/her duties, he/she also had the obligation to manage the collected sums, while the fraudulent management is committed by any person who has assets under preservation or administration, not being required to have the capacity of office clerk[47].

Also, the court decided that the defendant had, at the time of committing the act, the capacity of an official who manages goods, in the sense of art. 295 para. (1) in conjunction with art. 308 para. (1) Penal Code. She was employed at the cashier of Theater E as a cashier and performed management duties, consisting of selling tickets for the performances held in the theater, collecting their value and depositing this money at the theater cashier. Therefore, the amount of money stolen was in her management. Regarding the lack of formalities for the employment of the defendant with an employment contract, the court considers that the apprehension of the crime of embezzlement is not conditioned by the existence of a valid employment contract at the time of the commission of the crime, because only the existing factual situation is relevant, as it is necessary that the person in question to fulfill an assignment in the service of the legal entity. This condition is fulfilled in the case, the accused carrying out his/her activity, during the trial period, with the consent and at the disposal of the management of Theater E[48].

By administration is understood the activity that is carried out in order to ensure the role that the patrimony of a unit must fulfill in relation to the purpose and tasks of that unit[49]. This activity is carried out through a complex of operations that find their concretization in the acts by which provisions are issued or taken regarding the economic and legal situation and the circulation of goods (for example, the conclusion of economic contracts for, supply,

[45] Gheorghe Voinea, *Subiectul activ al infracțiunii de delapidare*, op.cit..p. 120.

[46] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit. 308; S.Proca, *Încadrarea juridical a faptei gestionarului de a folosi fără știrea conducerii unității personae pentru a-l ajuta în muncă și care prejudiciază avutul obștesc,* R.R.D. nr.6/1977, p.32.

[47] *C.S.J., secția penală, decizia nr. 1005/1998, în CP. Ad, p. 793.*

[48] Andrei Viorel Iugan, *Codul penal, Parte specială. Include jurisprudența națională 2014-2020,* Ed. Universul Juridic, București, 2020, p.359-364.

[49] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,*

distribution or sale of goods, payment order, etc.).

The activity of administration is, therefore, an activity of disposition, while the activity of management is an activity of execution, of fulfilling acts of disposition.

The administrative activity is carried out by those who, according to the service report, have the authority to dispose of the patrimony of the respective unit: administrators, heads of units, accountants[50], etc.

Administrators have virtual contact with the assets they manage, unlike managers, who have physical contact; therefore, the action of evasion, in the case of the managers, is carried out directly, through the material act of taking the asset, while in the case of the administrators, through an act of disposition, which has the effect of removing the asset from the unit's patrimony.

From the point of view of the situation of the subject in relation to the stolen asset, as shown above, both in the case of management and administration, the unit's representatives always come, materially or virtually, in contact with the assets managed or administered by virtue of the attributions that they matched their employment relationship. Therefore, the search for an explanation along the lines of civil law of the difference between the position of the subject in relation to the asset in the case of management and the same position in the case of the administration of the asset is not necessary, especially since it only leads to confusion and questionable solutions (for example, the manager would have, and the administrator would have a legal possession, or the manager has material possession, and the administrator a legal possession, etc.).

The administrator is the official who, among his/her duties, also has those regarding the conclusion of disposition documents regarding the goods of the injured person or to administer these goods (for example, the director of a legal entity)[51].

Also, the administrator within the meaning of the criminal law is also the judicial administrator or the liquidator of the insolvent debtor's assets, as well as any of their representatives or subordinates. The administrator of the association of owners or tenants is also a direct active subject of the crime of embezzlement. For example, the administrator of the owners' or tenants' association has the capacity of an official. His act of appropriation, use or trafficking, in his own interest or for another, of money, valuables or other assets that he manages or administers constitutes the crime of embezzlement[52].

Criminal participation is possible in all forms: coauthor, instigation, complicity; however, all co-authors must have the special capacity required by law, otherwise complicity in the commission of the crime of embezzlement will be held for unqualified active subjects who directly contribute to it.

In the case of co-authorship, the special quality required by law for the author is required. For example, the perpetrators are two managers of the same warehouse or a manager and an administrator at the same store[53].

The duties of manager or administrator are not necessarily required for *instigators* or *accomplices*. They can even be from outside the unit to which the goods belong. An accomplice, for example, is the accountant who agrees to enter the names of fictitious persons in the payroll in order to help the paying cashier of the unit to evade the amounts that would have been due to these persons[54], or the auditor who, finding, during the inventory, an addition in management, does not register it, accepting to

[50] Gr. Rîpeanu, *Unele probleme privind conținutul infractiunii de delapidare*, în „Analele Universității ”C. I. Parhon”, 1956, nr. 6, p. 164.

[51] Ilie Pascu, Mirela Gorunescu, *Drept penal, Partea specială*, ediția a 2-a, Ed. Hamangiu, 2009, p. 301.

[52] Decizia nr. 3/2002, publicată în M. Of. din 24 februarie 2003, www.*legalis.ro.*

[53] Trib. Suprem, Secţia penală, decision nr. 1207/1959, în L.P. nr. 12/1959, p. 72.

[54] Trib. Suprem, Secţia penală, decision nr. 6311/1970, în CD. 1970, p. 361.

be appropriated by the manager[55]. Acts specific to the material element of the deed committed by a person who does not meet the conditions for the active subject of the crime, but together with it, are acts of complicity, and not of co-authorship.

The immediate *passive subject* of the crime of embezzlement is the institution/unit where the civil servant works or another employee who also has the quality of manager or administrator damaged[56].

For the crime of embezzlement to exist, the following conditions (elements) must be met: a) the goods that form the material object of the crime must have been in the administration or management of the perpetrator, b) an act of embezzlement must be carried out on those goods, c) to produce a harmful consequence that causes or could cause damage to the public or private unit, d) the perpetrator has worked with intention.

These conditions on which the existence of the crime of embezzlement depends are accompanied by *certain requirements* that give a specific note to this crime. In particular, the requirement regarding *the subject of the crime* (the quality of a public official in charge of management or administration) is especially typical of embezzlement.

This requirement, like the condition regarding the belonging of the good that accompanies it, refers to realities that exist before the commission of the crime and is outside the material activity carried out by the perpetrator and his mental attitude and, as such, together form a situation premise in the content of the crime[57].

Therefore, the content of the crime of embezzlement can be divided into: *the situation-premise*; *the objective side and the subjective side, these parts depicting the structure of the content*.

The starting point in examining the content of the crime of embezzlement must be *the premise-situation*, i.e., the investigation of the conditions that make up this situation, namely the condition that the assets that form the material object of the crime belong to the state unit (public person/public institution) or the natural person (private person) and the condition that the perpetrator has the capacity of a civil servant with management or administration duties.

These conditions regarding the pre-existing situations constitute, therefore, the basic basis, the premise that must be established in order to be able to proceed to the analysis of the other conditions from the content of the crime. We remind you that what is included in the content of the crime are not the pre-existing realities themselves, but the condition that they pre-existed.

Examining the *objective side* of the crime of embezzlement, like any other crime, involves the analysis of the constituent parts of this side: a) *the material element* and b) *the immediate follow-up*. However, since there must be a *causal link* between the criminal activity committed and the result produced, this will be analyzed as a requirement belonging to the objective side of the crime[58].

The material element of the crime of embezzlement consists in the act of stealing the asset managed or administered by the active subject, committed in one of the ways provided by art. 295 Penal Code: appropriation, use, trafficking.

As it was also shown, the characteristic feature of the crime of embezzlement and,

[55] Tribe. Supreme Court, Criminal Division, decision no. 3082/1972, in RRD no. 1/1977, p. 166. Regarding complicity, see also Trib. Supreme Court, Criminal Division, decision no. 294/1981, in RRD no. 10/1981, p. 72.

[56] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal*, op.cit.p. 309.

[57] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 310.

[58] Constantin Mitrache, Cristian Mitrache, *Drept penal român, Partea generală,* Ed.Universul Juridic, ediția a III-a, revăzută și adăugită, Ed.Universul Juridic, București, 2019, p.164.

therefore, of each of the ways of achieving its objective element is *the act of evasion*, an action that is involved in each of these ways[59].

Appropriation consists in the act of effectively appropriating the stolen asset, which represents the final moment of the criminal activity of theft.

The literal meaning of the word is: *to make one's own*. So, the term "*appropriation*" from the content of the crime of embezzlement translates the idea of making one's owned an asset belonging to the unit's assets.

Appropriation does not carry out a transmission of the right of ownership. Like any illegal activity, it gives rise to a precarious detention, with an illegal character, but which, by the will of the criminal, creates for him/her or another person, for the benefit of whom the crime was committed, all the benefits that a real owner of the good would have.

Appropriation implies *a material* activity of taking possession of the good for oneself.

So, the simple possession of the good is not always relevant to characterize the crime, because the possession of the good can be the result of the subject's functional attributions. Having the goods in his administration or management, the subject has, or may have, the possession of those goods. However, this holding is not in his own name and for himself, but for the unit to which the respective assets belong.

The conversion of this detention for the unit into a detention in its interest or for another characterizes the objective side of embezzlement - in the form of appropriation - and it must be externalized in an *unequivocal* activity of taking personal possession of the asset.

Therefore, in the case of embezzlement carried out in the form of appropriation, the development of the criminal activity begins with the operation of taking and removing the asset from its previous position and ends with the transfer of the asset into the possession of the perpetrator in bad faith, a transfer that is also part of the action of evasion. Therefore, the reference to the appropriation of the property was used by the legislator to determine and express, *through its final moment, the criminalization of the act of evasion*.

What is necessary for the consummation of the criminal activity of misappropriation is that the subject has the power to behave towards the stolen good as towards his own good, being able to exercise acts of disposition on the good. Thus, the deed of a manager who appropriates an asset from those he/she manages, by consuming or disposing of it, constitutes appropriation.

We specify that the consummation of the crime *does not require* the modality of appropriation, that the subject dispose of the stolen property, but only that the act of appropriating the property is carried out in such a way as to have created the possibility for the perpetrator to dispose of the property, of course without the right, as a good of his own.

The problem more often encountered in practice in relation to this feature of the objective side - appropriation - is that of the ratio between *lack and appropriation*.

The ascertained lack of a quantity of the goods under the administration or management of the subject was often equated with the subject's appropriation of these goods.

In reality, these two notions: *lack* and *appropriation* are not in a relation of equivalence, but can be found in the relation from cause to effect. In this report, *appropriation* is characterized as a *cause*, and *lack* appears as an *effect*. If any appropriation produces a lack, not every lack is necessarily the effect of an appropriation by the subject who administers or manages the goods.

The lack can also come from other causes: fortuitous event, losses from handling, losses

[59] Vintilă Dongoroz, și colab., *Explicații teoretice ale Codului penal, Partea specială*, vol. III, op.cit.p.466.

due to storage conditions, mistakes in the administration or preservation of the goods, scriptural mistakes in the accounting of the respective operations or in the inventory (in this case the lack is only apparent), evasions committed by third parties and so on.

All these causes and others of the same kind can be at the origin of the lack, hypotheses in which appropriation is *excluded*. From here, we must draw the conclusion that *lack* is not equivalent to *appropriation*, which is otherwise a point of view consistently accepted in judicial practice.

The relationships between lack and appropriation have created in judicial practice problems of proof and problems of qualification. Although distinct from each other, judicial practice has often intertwined these issues, drawing conclusions regarding the qualification from the way of interpreting the *lack* as an evidential element.

The premise from which the discussions and the adopted solutions started was that if the lack is not equivalent to appropriation and therefore does not enter as a constitutive feature in the content of the crime of embezzlement, it can still constitute *evidence* of appropriation, not direct evidence, but an indirect proof, a presumption.

The use consists in the perpetrator's act of using the stolen good, use that completes the criminal activity of theft[60].

One of the problems raised by this form of the objective side is that of knowing if one can speak of embezzlement through use, when *no harm* has occurred to the person in question.

Therefore, in the case of embezzlement carried out in the form of use, the carrying out of the criminal activity also begins by taking and removing the asset from its previous position and ends with the use of that asset, use which is equivalent to the appropriation of its economic (monetary) equivalent and which thus completes the action of evasion. Therefore, also in the case of use, the legislator referred to one of its moments to criminalize the act of evasion. This method of embezzlement is therefore characterized by the facts that taking possession of the asset, which completes the act of theft, is not done for the appropriation of the asset itself, but for the appropriation of its use, of the equivalent that this use represented, the appropriation of the asset is only temporary, how long does the use last.

In order for the use of the stolen good to complete the objective side of the crime, it must have produced a harmful consequence for the unit (public person (state) or private unit), either by reducing the use value (wear and tear), or by not carrying out or delaying operations due to the absence at the necessary time of the respective good, so that a material damage has been caused.

The use represents a temporary manifestation[61], carried out either in the own interest of the subject of the crime, or in the interest of another. It thus constitutes a crime of embezzlement, the method of use, the act of a manager who steals garments from the store to be worn by himself or another person, and after use, returns them to the store.

The goods that are the object of the activity of use must be non-consumable goods, otherwise the use implies consumption, equals appropriation and therefore the act committed will constitute an appropriation, as it represents an action of effective possession of the good (has disposed of it) and not only simple appropriation of the equivalent of its use.

Trafficking consists in the speculation of the stolen good and the appropriation of the profit obtained, acts that represent moments of the criminal activity of theft. A characteristic example of committing the crime of embezzlement through trafficking is the act of a manager of materials and auto parts to give

[60] Mihail Udroiu, *Sinteze de drept penal*, op.cit, p. 751.

[61] The duration of the subject's use of an value that manages is devoid of consequence regarding the existence of the crime.

these goods for temporary use to other people, in exchange for benefits.

In the case of this modality of the crime of embezzlement, the operation of taking and removing the asset from its previous position is therefore followed by the performance of some speculative operations with a view to the appropriation by the perpetrator or by another person of the resulting profit.

Embezzlement through trafficking is not done, therefore, with a view to appropriating the asset, but *only for the purpose of appropriating the profit* derived from the speculation of that asset. The appropriation of the property is therefore only temporary for the duration of the trafficking operations, after their completion the property is returned to the property of the injured person. It turns out that even in the case of trafficking, taking possession of the property is temporary. As a result, the scope of specula operations of the stolen asset must be limited only to acts of using the asset as a means to obtain a profit.

What distinguishes the action of “trafficking” from the “use” is to obtain a profit in the first case and to satisfy one’s needs in the second case, both of which are achieved by using the good and its subsequent restoration in the unit’s patrimony, as opposed to by the action of “appropriation”, to which there is no reintegration in the previous position of the good[62].

In other words, the trafficking activity involves: 1) a temporary use (and not an effective appropriation of the asset, as in the case of appropriation), 2) the appropriation of the profit arising from the speculation operation (and not a simple use of the asset as in the case of the use).

Therefore, the sale of an asset under the management or administration of the perpetrator and the appropriation of the price constitutes embezzlement by appropriation, and not by trafficking, because in this case the sale implies the theft of the asset and its disposal.

In the same way, the sale of the stolen goods and the return to the management of the injured person of their value or other goods of the same kind constitute embezzlement committed by appropriation, followed by the covering of the damage caused[63], and not embezzlement committed by trafficking.

If the manager did not appropriate the price of the sold good, but made the sale in irregular conditions or obtained a profit on the occasion of the sale, the act does not constitute embezzlement[64], lacking the action of stealing the good, but it will constitute, as the case may be, another crime, as, for example, an abuse of office. For example, the court held that on February 19, 2011, being a driver in the S.C. T S.R.L., while making a race in the European area, the defendant appropriated the amount of 2,200 liters from the tank of the received Volvo brand truck, unjustifiably using the fuel card; he replaced the truck’s tires with older ones, appropriated his work mobile phone and the car GPS system, after which he abandoned the truck in Belgium, facts that caused damage in the amount of 40,750 lei. It was assessed that the defendant culpably committed the crime of embezzlement[65]. With regard to the misappropriation of the work mobile phone, we believe that the crime of breach of trust would have been imposed.

[62] The present section takes up the text published by Doru Pavel, Delapidarea.

[63] In the same sense, see the decision of the Supreme Court, col. pen no. 1456 of May 16, 1958, published in C.D., 1958, p. 350; on the contrary, the decision of the Supreme Court no. 1166/1955, published in “Popular Legality”, 1,955, no. 7, p. 759, which considers the act embezzlement through trafficking; decision of the Trib. Capital, II criminal college no. 1910/1955, published in “Legalitatea populara” 1956, no. 7, p. 832, which considers the act embezzlement through trafficking, and the annotator of the case abuse of office.

[64] In the opposite sense, judicial practice was pronounced; see criminal decision no. 2047 of May 3, 1956 of the Suceava Regional Court, published in “Justiţia nouva”, 1956, no. 5, p. 884 and 885, in which it is claimed that it constitutes trafficking within the meaning of art. 236 the giving of goods on credit by the managing seller, if it was sought by this to obtain a profit.

[65] C. Ap. Bucureşti, s. I pen., dec. nr. 1350/22.09.2016.

In judicial practice, it was decided that the facts of defendant I who, as a sales manager within S.C. A S.R.L., in the period January 01, 2007-January 15, 2010, trafficked in his interest (as a shareholder of S.C. K S.R.L.) and his associate, T (co-shareholder and administrator of S.C. K S.R.L. and, respectively, sole shareholder and administrator of S.C. C S.R.L.), electronic products from warehouse no. 1 belonging to S.C. A S.R.L. (intact products, both new and from returns), a fact achieved by establishing by defendant I for various electronic products belonging to the injured party S.C. A S.R.L. (intact - coming from the company's warehouse no. 1) of preferential sales prices for S.C. K S.R.L. and S.C. C S.R.L., below the average selling price of the same categories of products to other customers, causing this company a loss in the amount of 714,139.97 lei, established by the accounting expertise report, meeting the constitutive elements of the crime of embezzlement in continuous form[66].

We appreciate that the normative variant of the acquisition is incidence. In the case of trafficking the good is temporarily removed from the patrimony of the legal person, being subjected to speculative operations, the author acquiring his profit in this way[67].

The carrying out of the embezzlement action, which constitutes the material element of the crime of embezzlement in any of its forms, determines, as it was shown, a change in the previous situation of the stolen goods by taking possession of these goods permanently or temporarily by the perpetrator[68].

The harmful consequence caused by carrying out the act of evasion, which is the material expression of the impact brought to the relationships that form the legal object of protection in the criminalization of art. 295 Penal Code, consists in creating a factual situation contrary to the one that should result from respecting the factual position that the injured person had, in the sense that he can no longer in fact dispose of the asset that forms the material object of the theft. This factual situation causes or exposes the person against whom the evasion was committed to material damage.

In the production of this material damage that results from the immediate follow-up, the impact that the evasion action has brought to the protected social value, i.e., the possession that the injured person has over the asset that forms the material object of the crime, is materialized.

In the case of official crimes, therefore also the crime of embezzlement, the occurrence of the prosecution against which the criminal law acts also means the occurrence or the possibility of occurrence of the damage, the harm, the civil injury brought to the injured person. This organic connection between the criminal injury and the civil injury in the crime of embezzlement, the legislator took into account both when establishing the criminalization in art. 295 Penal Code, as well as the legal individualization of the sanction.

In order to consider the objective side of the crime to be realized, it is necessary that between the action of absconding and the consequence produced – the change in the factual situation of the good from which the damage results, *there must already be a cause to effect link*[69]. It is not sufficient, therefore, to observe only that any of the actions which constitute the material element of the offense of embezzlement have been committed and that damage has occurred to the private or public person, that there is therefore a civil consequence, but that, as we have shown above, there is a need for it. it should also be established that the evading action has caused

[66] C. Ap. Bucureşti, s. I pen., dec. nr. 363/05.03.2015.
[67] V. Dorinoiu, op.cit.p. 481.
[68] Constantin Mitrache, Cristian Mitrache, *Drept penal român,* Partea generală, Ed.Universul Juridic, ediția a III-a, op.cit, p.167.
[69] George Antoniu, *Raportul de cauzalitate în dreptul penal*, Ed. Științifică, București, 1968, p.94.

the change in the factual situation (immediate consequence) and that the damage caused is the consequence of the change in the factual situation of the good. Practically, any evading causes a damage, but not all damage is the result of an evading.

In order to establish the concrete existence of the content of the crime of embezzlement, the absence of one or some assets from the injured person's patrimony must be established and its reality must be verified.

The formal finding of a lack of writing is not sufficient, as it can sometimes come from errors in record keeping, just as the finding that there is no lack of writing does not necessarily imply the non-existence of a material lack, the regularity of the writings can often come from skillful manipulations of the criminals in in order to mislead the control and supervision bodies[70].

As we have shown above, if the act of embezzlement, in any of its forms, always causes a lack, on the other hand, not every lack within a patrimony is the result of an embezzlement. It can also come from other causes, such as, for example, another crime (negligence, theft, etc.), from losses, wastage[71], etc.

Lack of management can come from various causes; it is always necessary to establish its *real cause*.

The careful research of the cause that determined the lack is required even more, since often the discovery of the crime starts from the finding of a lack in the management of money or materials of the injured person.

The lack is indirect evidence that can sometimes create a strong presumption of a person's guilt, but which must be corroborated with other concrete circumstances in order to convince the court of the truth in question. By virtue of its active role, the court will have to investigate, with the help of the administered evidence, the concrete circumstances of the case and establish whether the observed absence is the result of an act of evasion committed by the accused.

The investigative and judicial bodies must, therefore, pay special attention to establishing the real cause that determined the occurrence of the consequences.

In order to establish the objective side of embezzlement, it is necessary to unequivocally establish the performance of the action, which constitutes the material element (the activity of, appropriation, use or trafficking)[72], and that this is definitely the cause of the lack in the patrimony of the public or private person.

In conclusion, therefore, since the causal link between the material element of the crime and the immediate consequence is an objective link, it requires the ascertainment of the objective reality of the cause and *not the simple* assumption of its existence, the establishment of the reality of the consequence and the objective causal link between the cause and the result, i.e., between the committed deed and the change in the external world.

The criminal activity of embezzlement is carried out *only with intention*. In the characterization of intention, generally, two elements are designated that are combined with each other, each of them representing a mental act: an act of knowledge or foresight, and an act of will.

Regarding the act of foresight or knowledge, it is generally stated that the criminal must realize the socially dangerous consequences of his/her act, in other words he/she must have the representation in advance of the entire

[70] On the contrary, a case in which this problem arose was wrongly resolved by the Huedin Court by sentence no. 829/1956, published in "Legalitatea", 1957, no. 2, p. 193.

[71] In this regard, see the decision of the Supreme Court no. 16/1955, published in the C.D., 1955, vol. III, p. 59, which shows that the court must establish all the factual elements in relation to the real causes that determined the deficiencies in management and, in relation to these causes, to determine whether the shortages are not due to other circumstances that would exclude evasion.

[72] The finding of the crime of embezzlement can take place at any time during the management period and not only when the management is handed over. Decision of the Supreme Court, criminal college, no. 594 of March 17, 1959, published in "Legalitatea", 1959, no. 9, p. 72.

chain of his/her acts, with all the objective attributes of these facts and the consequences they must produce[73].

In the criminal representation - characteristic of the subjective side of the crime - the facts must appear with all their attributes and the consequences of these facts in their objective materiality. In other words, the criminal must realize that by performing a certain material activity, designed by him, this activity will give rise to a certain result. If this result is the one that we find in the content of the crime with the socially dangerous attribute, we can conclude that the feature of the provision from the subjective side is achieved.

As such, we will only make some clarifications regarding the mental attitude that accompanies the material activity of embezzlement.

The mental process under which the embezzlement activity is carried out consists in the fact that the perpetrator, taking the decision to carry out the act of embezzlement, realized the nature and consequences of this action and accepted the realization of those consequences.

Regarding the act of will, it is stated in the criminal law manuals that the criminal must *want* - that is to say, follow - the production of the socially dangerous result of his/her actions, which assumes that he/she acted *with the aim* of this result being produced (*the direct intention*) or, although he did not want - so he did not follow - the occurrence of the socially dangerous result, he foresaw it and accepted it anyway (*indirect intention*[74]).

In the crime of embezzlement, the authors agree that *direct intent* is required[75].

The immediate consequences of the embezzlement action and the socially dangerous character of these consequences *do not vary* in the case of the methods of committing the crime of embezzlement. What differs from one modality to another is *the target (goal)* towards which the subject tends by committing the evasion action.

In principle, in the crime of embezzlement, this *target (purpose)* is to obtain a profit, to satisfy an interest by committing the act of embezzlement. This common goal, however, varies in content from one modality to another, as follows: in the case of appropriation, the goal is to dispose of the stolen property; in the case of use, the goal is to appropriate the equivalent of the use of the good, and in trafficking, the goal is to appropriate the profit derived from the speculation of the good.

Achieving the purpose for which the subject committed the crime is not necessary for the consummation of the crime of embezzlement.

As we have already shown, the crime is considered consummated from the moment when the subject created the *effective possibility to dispose of*, use or speculate on the stolen good, in other words, he had the possibility of achieving the intended goal.

Determining the purpose, however, is necessary for the fair characterization of the committed act and for establishing the legal treatment of the criminal.

Also, in order to specify the concrete degree of social danger of the committed deed and to individualize the criminal's punishment, an important role is played by *establishing the motive* that led the perpetrator to commit the crime.

According to article 295 of the Penal Code in force in relation to article 308 Penal Code the commission of the offense by an *administrator or a manager* who exercises, permanently or temporarily, with or without remuneration, is a *mitigated variant* of the offense of embezzlement, this capacity in the service of a natural person of those referred to in article 175 paragraph (2) of the Penal

[73] Constantin Mitrache, Cristian Mitrache, *Drept penal român, Partea generală,* ediția a III-a, op.cit, p.172.

[74] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 313.

[75] Alexandru Boroi, *Drept penal, partea specială,* ediția 4, op.cit.p. 493.

Code (the natural person who exercises a service of public interest for which he/she has been invested by public authorities or who is subject to their control or supervision in relation to the performance of that public service) or within any legal entity.

The aggravated version, according to art. 295 Penal Code related to art. 309 Penal Code it is retained if the act caused material damage greater than 2,000,000 lei. This aggravated variant will be retained including in the hypothesis of committing the act by direct active subjects provided for by art. 308 Penal Code in force.

The cause of aggravation of the crime of embezzlement as provided for consists in the particular social dangerousness of the act, due to the existence of two objective circumstances: the frequency of acts of the same nature or the seriousness of the consequences caused.

The social significance of a deed results not only from the circumstances relating exclusively to that deed, but also from those circumstances external to the deed, which reflect on it and influence its concrete degree of social danger.

The frequent commission of acts of embezzlement is a circumstance likely to create, for the act that is included in the series of such crimes, a more accentuated social danger. The application of this circumstance, however, requires that the criminal has known the increased gravity of the committed deed arising from the frequent commission of the crime of embezzlement. The social climate in which a deed is committed is always an objective circumstance that enters as a component in determining and evaluating the degree of social danger of that deed. Then the aggravation of responsibility is not applied for the deeds of others, but because the deed of the accused is inserted in the chain of crimes of the same nature, which increases the guilt of the perpetrator and, implicitly, also increases the social resonance of his deed. Regarding the nature of this circumstance, it constitutes a special legal aggravating circumstance.

If the frequent acts were committed by the same author, the application of competition or recidivism will not remove the application of art. 295 Penal Code (in this case there *will be a contest).*

The second aggravating circumstance that makes the deed present a particular social danger is the seriousness of the consequences caused, greater than 2,000,000 lei. These consequences are different from the damage created by the crime and whose value constitutes the criterion for establishing the ordinary punishment.[76]

As the text of the provision emphasizes, the serious consequences must be of a nature to particularly increase the social dangerousness of the deed.

In the provisions of art. 295 paragraph 2 Penal Code the sanctioning regime for attempted embezzlement is provided[77]. In order for the crime of embezzlement to be *consummated*[78], it is necessary to carry out the act of taking possession of the asset, that is, establishing the possession in bad faith in the criminal's profit, and through this, at the same time, the immediate follow-up takes place, the change in the factual situation of the asset, which causes material damage to the injured party. It is sufficient for the consummation of the deed that, through the position in which the asset was placed by committing the act of evasion, the possibility of achieving the goal pursued by him/her is created for the subject of the crime.

Any cause, independent of the will of the subject, which intervenes and terminates the execution or prevents the prosecution from occurring constitutes the upper limit

[76] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 313.

[77] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară,* op.cit., p. 482.

[78] Gheorghe Ivan, Mari-Claudia Ivan, *Drept penal. Partea specială conform noului Cod penal,* Editia 4, Editura C.H. Beck, București 2019, p. 408.

of attempted embezzlement (for example, catching the criminal at the moment when he separates the goods he/she wanted to steal, the start of rain that makes it impossible to remove the bale of goods; however, it does not constitute an attempt, but a consummated fact, the act of a manager hiding some things in a warehouse that he/she was going to remove later from the premises of the unit, or the act of putting money or other goods in a briefcase in order to achieve a personal interest, etc.

Another issue worth emphasizing concerns the nature of repeated material acts committed in the case of the crime of embezzlement. In order to retain the character of a *continued crime* of embezzlement, it is not necessary that the repeated material acts committed in the implementation of the same resolution be of the same nature[79]. That is, a material act can take the form of appropriation, another under that of use or trafficking. The requirement of the law is satisfied since each separate act constitutes a way of committing one and the same crime, respectively, the crime of embezzlement[80]. For example, in judicial practice it was decided that the defendant was convicted for committing the crime of embezzlement in a continuous form consisting in the fact that, as a parish priest, in the period August 1, 1999-December 17, 2005, at Parish A, he appropriated at different time intervals the total amount of 93,926 lei, to the detriment of parish A and Protoyery A CC[81].

In art. 295 paragraph 1 Penal Code it is stipulated that the punishment consists of imprisonment from 2 to 7 years and the prohibition of exercising the right to hold a public office. The limits of the prescribed punishments are not rigid, since, by applying mitigating circumstances or aggravating circumstances, the limits of each group can be changed from case to case. In the operations of individualizing the punishment, all the criteria for individualizing the punishment will be taken into account.

The main criterion for establishing and individualizing the punishment is the value of the damage caused by the crime.

The amount of the damage must be determined in relation to the amount of stolen goods (amounts or things) and not to the difference remaining after the restitution of some of them.

If the crime of embezzlement took the form of a continued crime[82], the value of the damage caused is given by summing up the damages caused by the repeated acts, and the establishment of the sanctioning treatment of the participants in this crime takes place according to the ordinary rules in this matter.

For the mitigated variant: the special penalty limits for the base form are reduced by one third[83]. For *the aggravated version*: the special limits of the punishment provided by the law (including in the case of committing the act by direct active subjects provided for by art. 308 of the Penal Code) are increased by half[84].

5. The crime of embezzlement is *related* to the other crimes in the group of crimes committed by evasion, due to the similarity between them regarding the content of the special legal object, the nature of the material object, the material element whose characteristic feature - in the case of all crimes in this subgroup.

The crime of embezzlement is, however, *different* from other service crimes. The first difference is given by the situation-premise, which in the case of the crime of embezzlement consists in the fact that the active subject manages or administers the

[79] Florin Steteanu, D.Nițu, Drept penal. Partea generală, vol. II, Ed. Universul Juridic, București, 2018, p. 31.

[80] Decizia nr.798/1970 a Tribunalului Suprem, secția penală, în Revista Română de Drept, nr.9/1970, p.166.

[81] C.Ap. Constanţa, s. pen., dec. nr. 1076/27.10.2016, www.rolii.ro.

[82] Decision of the Supreme Court, criminal college, no. 2433/1955, published in "Justiţia nouva", 1956, no. 5, p. 883, considers successive misappropriations of money from the same management as continuous embezzlement.

[83] Mihail Udroiu, *Sinteze de drept penal,* op.cit, p. 760.

[84] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară,* op.cit., p. 478.

asset in the possession of the public or private person, while in the case of the other crimes the situation-premise is limited, among others, to the position the active subject to perform or not an act of service.

A second difference is given by the way in which the evasion action is carried out, in the realization of the objective side of the crimes in this category. The different forms in which this action is carried out mark the *difference* both in terms of the content of the objective element and the establishment of the consummatory moment of these crimes.

In relation to the other crimes, which are also carried out through an act of evasion, the crime of embezzlement differs from them (theft, robbery, etc.) by the quality and special position of the *active subject of the crime*, which, according to the law, must *have the capacity of an official* and to be in charge of the administration or management of the assets of an institution, assets of which the material object of the embezzlement is a part[85]. This particularity affects the legal object of this crime in the sense that it gives this object a complex content, the act constituting not only an official crime but also a crime against patrimony.

Between the offense of misappropriation and the offense of hijacking funds there are similarities regarding the special legal object, the nature of the material object and the premised situation (these being identical to the incriminations in art. 295 and 307 Penal Code).

The essential difference between these two offenses is given by the content of their material element. Although, in the case of both crimes, the incriminated action consists in the illegal movement of the asset from the position it had in the possession of the unit, in the case of embezzlement, this action is carried out by taking possession of the asset, i.e., by removing it from its place, and in embezzlement it is carried out it is achieved by illegally changing the predetermined destination of the asset, thus by evading its destination. The movement of the asset in the case of embezzlement is usually carried out within the same patrimonial sphere, while in dilapidation the asset passes from one patrimonial sphere (injured person) to another.

In practice, there may be cases where the crime of misappropriation of funds is committed in order to facilitate the commission of an embezzlement. In this case, the two criminal activities will constitute *a series of crimes*.

The crime of embezzlement differs from crimes against patrimony (committed by abuse of trust or deception), both by their characteristic feature (evasion in the case of embezzlement), and by the different content of the premise-situation, which marks a substantial difference between the mentioned crimes[86] (in the case of embezzlement, the

[85] Vintilă Dongoroz, I*ntroducere la explicaţiile teoretice ale Părţii speciale, în Explicaţii teoretice ale Codului penal roman*, vol. III de Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, Editura Academiei Române, Bucureşti, 1971, p. 7.

[86] Thus, a just solution is given when it is shown that the appropriation of a cart that the defendant, a member of the G.A.C., had obtained from the G.A.C. with the title of loan constitutes an abuse of trust and not embezzlement. In this case, there is no relationship between the defendant and G.A.C. a prior report of a patrimonial nature, but a legal work report that attributed to him the management of the property he appropriated (criminal sentence of the Braşov City Court no. 443/1952, published in “Justiţia”, 1952, no. 5, p. 785); by decisions no. 554/1955 (published in C.D., vol. III, p. 67, and no. 1 140/1955, published in C.D., vol. III, p. 70, the Supreme Court justly changes the classification of the facts of appropriation of the sums entrusted to a salaried employee to hire workers for breach of trust to the detriment of the state’s property (first case) and fraud (second case) in embezzlement, as he appreciates that the defendants had the management of these amounts. Or, in the case of the crimes of breach of trust and fraud, the subject, active, as is known, can be an employee of the respective public unit, but he must not be a manager or administrator of the assets he appropriates. person who had the management of these amounts and was obliged to make the payments on behalf of the reception base, the Supreme Court established that the act constitutes embezzlement and not a fraud against the private patrimony and that compensation civil rights are not granted to the producer, but to the state, which remains obligated to them. Decision no. 1 079/1955, published in “Legalitatea”, 1955, no. 6, p. 622. In the same way, the Timişoara Court judged that the appropriation of the sums resulting from the difference between the purchase price for some products and the lower price with which the defendant bought those products constitutes embezzlement and not fraud to the detriment of the producers, the appropriated amount belonging to the state’s assets, and the defendant having the management of this amount. The decision. Timisoara Court

pre-existing condition consists in the pre-existence of the legal service relationship under which the active subject has management or administration duties, which will constitute the direct object of the crime).

The crime of embezzlement can be found in a *correlation report* or in a report of *connection* with other crimes, according to the nature and intensity of the link that unites these other crimes with the crime of embezzlement.

When the prior commission of the crime of embezzlement (preceding crime) *conditions the existence* of another crime (subsequent crime), there is a correlation between them, and the crimes are correlative. For example, the crimes of *favoritism, concealment, omission of reporting* are subsequent crimes to the crime of embezzlement and conditioned by its commission. Without the existence of the crime of embezzlement, these crimes cannot exist.

If there is only a link between the crime of embezzlement and other crimes that derives from *the way the crime was committed* or from the circumstances of time, place, etc., the existence of one crime not depending on the existence of the other, these crimes are related and the relationship between they are a relationship of connection, and if the acts are committed by the same perpetrator, there is competition with connection[87]. For example, the crime of embezzlement is committed for the purpose of committing another crime; crimes of bribery[88], etc., or a crime of forgery in documents or destruction of documents or documents is committed in order to facilitate the commission of an embezzlement, or a crime (arson, destruction) is committed to hide the commission of an embezzlement.

The cases shown often appear in the form of the contest with connection; the same criminal, alone or in partnership, commits the crime of embezzlement through the mediation of another crime, or to conceal the crime of embezzlement; commits another crime.

A problem that has given rise to countless discussions in specialized legal literature, and varied and contradictory solutions in legal practice, was that of establishing whether embezzlement committed by forgery constitutes a unit or a plurality of crimes. The importance of the problem emerges not only from the need for theoretical clarification, but also from the fact that the legal treatment of criminals is different, according to one point of view or another.

In support of the thesis that embezzlement committed by forgery constitutes a unique complex crime[89], it was argued that the act of forgery "is devoid of its own meaning in relation to the social danger and any other; socially dangerous pursuits" and therefore, in conclusion, that we cannot speak of a criminal autonomy of the forgery activity, but only of "a material act of committing the crime of embezzlement". Supporters of this thesis also invoke the argument based on the unity of purpose in the execution of the criminal act and the unity of the criminal resolution of the criminal.

Embezzlement by forgery is also considered a complex crime by lawyers who believe that

no. 3 663 of July 22, 1958, published in "Legalitatea", 1959, no. 1, p. 76). In the opposite sense, the Arad Court wrongly qualifies as fraud that brings damage to the unit's assets and not embezzlement by false appropriation of a part of the minium collected from citizens by registering smaller quantities of grain than those that actually resulted in threshing. Decision of the Arad Court no. 352 of September 9, 1958, published in "Legalitatea", 1959, no. 4, p. 75.

[87] See, decision of the Supreme Court, criminal college, no. 1889, published in "Legalitatea populară", 1957, no.5, p. 563, regarding the situation when the defendant has two distinct separate and independent businesses and committed embezzlement in each of them separately. The act is not embezzlement in a continuous form, but two related embezzlement offenses in competition.

[88] Braşov Court, by sentence no. 852 of March 29, 1958 (published in "Legalitatea", 1959, no. 9, p. 73), wrongly settled a case regarding embezzlement and speculation, deciding that only one crime, the crime of embezzlement, had been committed, and not two crimes in competition embezzlement and speculation.

[89] See also Gr. Rîpeanu, *Câteva observaţii pe mărginea unor hotărâri judecătoreşti în legătură cu problema pluralităţii şi unităţii de infracţiune*, publicată în „Legalitatea populară", 1956, nr: 1, p.25; I. Tarhon, adnotare publicată în „Legalitatea", 1958; nr. 1, p. 70.

the activity of embezzlement (crime-purpose) absorbs the activity of forgery (crime-means), recognizing the court's right to assess that this activity constitutes a complex crime.

It was also argued that embezzlement by forgery constitutes an ideal[90] contest of crimes, there being only one fact (embezzlement by means of forgery), unit of criminal resolution and prosecution, and the defeat of two legal provisions.

The crime of embezzlement accompanied by forgery represents in reality, as the supreme court[91] also points out, *a real contest*, the two facts each constituting a crime. These activities have a different legal object, distinct content and social danger of their own, and by committing them special legal provisions are defeated. This autonomy in fact must correspond to a juridical autonomy.

Conclusions

As it follows from the previous developments, the need to analyze the crime of embezzlement is imposed as a topic not only of topicality compared to the frequency with which it appears in judicial practice, but also because it raises a complex issue likely to influence the regulation of criminal repression, a regulation whose improvement concern all the criminal laws of the world. Of course, we cannot consider that we have exhausted the entire problematic of the analyzed subject. On the contrary, the cases, notes and studies, published open new perspectives and highlight the importance and scope of the researched matter.

Bibliography

1. IUGAN, A. V. *Codul penal, Parte specială. Include jurisprudența națională 2014-2020*, Ed. Universul Juridic, București, 2020.

2. NASCHITZ, A. M. *Conştiinţa juridică*, Ed. Ştiinţifică, Bucureşti, 1964.

3. C. Ap. Bucureşti, s. I pen., dec. nr. 1350/22.09.2016.

4. C. Ap. Bucureşti, s. I pen., dec. nr. 363/05.03.2015.

5. C. Ap. Constanţa, s. pen., dec. nr. 1076/27.10.2016, www.rolii.ro.

6. C.S.J., secţia penală, decizia nr. 1005/1998.

7. C.S.J., secţia penală, decizia nr. 2762/2000, www.legalis.ro.

8. C.S.J., secţia penală, decizia nr. 3502/2002, www.legalis.ro.

9. DUVAC, C. Funcţionarii publici bancari cu atribuţii de control şi obligaţiile care le incumbă potrivit noilor coduri: penal şi de procedură penală, comunicare susţinută la Conferinţa internaţională cu tema „*Actualitatea în activitatea juridică bancară*”, organizată de Asociaţia consilierilor juridici din sistemul financiar bancar la Piatra Neamţ, în anul 2010.

10. MITRACHE, C., MITRACHE, C. *Drept penal român, Partea generală*, Ed.Universul Juridic, ediția a III-a, revăzută și adăugită, Ed.Universul Juridic, București, 2019.

11. Decizia de îndrumare a plenului Tribunalului Suprem nr. 1 din 30 ianuarie 1960, publicată în „Legalitatea”, 1960, nr. 2.

12. Decizia nr. 294/1981, în RRD nr. 10/1981.

13. Decizia nr. 3/2002, publicată în M. Of. din 24 februarie 2003, www.legalis.ro.

14. Decizia nr.798/1970 a Tribunalului Suprem, secția penală, în Revista Română de Drept, nr.9/1970.

15. Decizia penală nr. 2047 din 3 mai 1956 a Tribunalului regional Suceava, publicată în „Justiţia nouă”, 1956, nr. 5.

16. Decizia Tribunalului Suprem, col. pen. nr. 1456 din 16 mai 1958, publicată în *C.D.,* 1958.

17. Decizia Tribunalului Suprem, colegiul penal, nr. 1889, publicată în „Legalitatea populară”, 1957, nr.5.

18. Decizia Tribunalului Suprem, colegiul penal, nr. 2433/1955, publicată în „Justiţia nouă”, 1956, nr. 5.

19. DORU, P. D*elapidarea*, Ed. Științifică, 1959.

20. STETEANU, Fl., NIȚU, D. *Drept penal.Partea generală*, vol. II, Ed. Universul Juridic, București, 2018.

21. STRAUSS, Fr. *Noțiunea de funcționar în dreptul nostru penal,* în „Justiţia”, 1956, nr. 3.

22. ANTONIU, G. (coord.), *Noul Cod penal. Comentariu pe articole, Vol. II (art. 57171)*, Ed. C.H. Beck, București, 2008.

23. ANTONIU, G. *Noua legislaţie penală. Reflecţii preliminare*, în Noua legislaţie penală tradiţie, recodificare, reformă, progres juridic, vol.I Bucureşti, Ed. Universul Juridic.

24. ANTONIU, G. *Raportul de cauzalitate în dreptul penal*, Ed. Științifică, București, 1968;

25. ANTONIU, G. Tudorel Toader (coordonatori), Versavia Brutaru, Ștefan Daneș, Constantin Duvac, Ioan Griga,

[90] In this sense, see the solution from decision no. 12/1954. a Tribunalului, regional Suceava, publicată în „Justiţia nouă”, 1955, nr. 5, p. 734.

[91] The guidance decision of the plenary session of the Supreme Court no. 1 of January 30, 1960, published in “Legalitatea”, 1960, no. 2, p. 63.

26. IFRIM, I., GHEORGHE, I., PARASCHIV, G., PASCU, I., RUSU, I., SAFTA, M., TĂNĂSESCU, IA., TOADER, T., VASIU, Ia. Ed. Universul Juridic, București, 2016;

27. IVAN, Gh., IVAN, M.-Cl. *Drept penal. Partea specială conform noului Cod penal*, Editia 4, Editura C.H. Beck, București 2019;

28. VOINEA, Gh. *Subiectul activ al infracțiunii de delapidare*, RDP nr. 4/2000, București, Ed. R.A. „Monitorul Oficial".

29. PILĂ, G. C.. *Noţiunea de funcţionar*, în RDP nr. 3 din 2001.

30. FIANDACA, G., MUSCO, E. *Diritto penale, parte speciale,. I delitti contro il patrimonio.* Ed. Zanichelli, Bologna, 1996.

31. MANTOVANI, F. *Diritto penale, parte speciale,* Cedam, Padova, 1989.

32. RÎPEANU, Gr. *Câteva observaţii pe mărginea unor hotărâri judecătoreşti în legătură cu problema pluralităţii şi unităţii de infracţiune,* publicată în „Legalitatea populară", 1956, nr: 1.

33. RÎPEANU, Gr. *Unele probleme privind conținutul infractiunii de delapidare*, în „Analele Universității "C. I. Parhon", 1956, nr.5.

34. TARHON, I. adnotare publicată în „Legalitatea", 1958; nr. 1.

35. PASCU, I., în Vasile Dobrinoiu, și colaboratorii*, Noul cod penal, comentat*, vol. II, Ed. Universul Juridic București, 2012.

36. PASCU, I., GORUNESCU, M. *Drept penal, Partea specială*, ediția a 2-a, Ed. Hamangiu, 2009, p. 301.

37. IFRIM, I. https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de- notiunea-de-functionar-public/, 12 august 2022.

38. RISTEA, I. *Drept penal, Partea specială*, vol. II, București, 2020.

39. VÉRON, M. *Droit pénal spécial*, Ed. Colin, Paris, 1999.

40. GATTEGO, P. *Droit pénal spécial,* Dalloz, Paris, 1995.

41. UDROIU, M. *Sinteze de drept penal*, Editura, C.H.Beck, București, 2020.

42. STOICA, O. *Despre subiectul infracţiunii de delapidare,* în „Legalitatea", 1959, nr. 9.

43. DUNGAN, P., MEDEANU, T., PAȘCA, V. *Drept penal, Partea specială*, vol. II, Ed. Universul Juridic, 2012.

44. CONTE, Ph. *Droit penal special*, Ed.Litec, 2003.

45. PROCA, S. *Încadrarea juridical a faptei gestionarului de a folosi fără știrea conducerii unității personae pentru a-l ajuta în muncă și care prejudiciază avutul obștesc*, R.R.D. nr.6/1977.

46. BOGDAN, S. *Drept penal. Partea specială*, Ed. Universul juridic, 2020.

47. DOBRINOIU, V., NEAGU, N. *Drept penal, Partea specială. Teorie și practică judiciară*, Ed. Universul Juridic, 2011.

48. VASILIU, T. și colab.*, Codul penal, Comentat și adnotat, Partea specială,* vol. I, Ed. Științifică și Enciclopedică, București, 1975.

49. SELLIN, T. *L'effet intimidant de la peine*, în Revue de science criminelle et de droit pénal comparé, nr. 4/1960.

50. PINATEL, J. *La prévention générale d'ordre pén*al, în Revue de sciences criminelle et de droit pénal comparé, nr. 3/1955.

51. Trib. Suprem, Secţia penală, decizia nr. 1207/1959, în L.P. nr. 12/1959.

52. Trib. Suprem, Secţia penală, decizia nr. 3082/1972, în RRD nr. 1/1977.

53. Trib. Suprem, Secţia penală, decizia nr. 6311/1970, în CD. 1970.

54. TOADER, T. *Drept penal roman, Partea specială,* vol. I, Ed.Universul Juridic, București, 2019.

55. CIOCLEI, V. *Manual de criminologie*, Ed. All Beck, 1998.

56. DOBRINOIU, V., NEAGU, N. *Drept penal, Partea specială, Teorie şi practică judiciară*, Ed. Wolter Kluwer, București, 2008.

57. NICOLCESCU, V. *Delapidarea şi gestiunea frauduloasă. Asemănări şi deosebiri*, R.D.P. nr.4/2000, București, Ed." Monitorul Oficial".

58. DONGOROZ, V. *Drept penal*, 1939.

59. DONGOROZ, V. *Explicaţii teoretice ale codului penal român*, *Partea specială,* vol. III, Ed. Academiei Române, 1971.

60. DONGOROZ, V., DĂRÂNGĂ, Gh., KAHANE, S., LUCINESCU, D., NEMEŞ, A., POPOVICI, M., SÎRBULESCU, P., STOICAN, V. *Noul Cod penal şi Codul penal anterior. Prezentare comparativă*. Ed. Politică, București, 1969.

61. DONGOROZ, V. *Introducere la explicaţiile teoretice ale Părţii speciale*, în *Explicaţii teoretice ale Codului penal roman*, vol. III de Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, Editura Academiei Române, București, 1971.

62. DONGOROZ, V. în TANOVICEANU, I., DONGOROZ, V. *Tratat de drept şi procedură penală*, vol. I, București, p. 30–32; vol. III.

63. POP, T. *Drept penal*, vol. I, 1921.

64. FLORIAN, Eu. *Trattato di diritto penale*, vol. I, 1921.

65. DONGOROZ, V. *Principalele transformări ale dreptului penal* în Studii juridice, Ed. Academiei Române, 1960.

66. DONGOROZ, V., KAHANE, S., OANCEA, I., FODOR, I., SIMONA, P. *Infracţiuni contra avutului obştesc*, Ed. Academiei Române, 1963.

67. DONGOROZ, V. *Sinteza asupra noului Cod penal al României*, în S.C.J., nr. 1/1969.

CZU 340.1
DOI https://doi.org/10.52388/2345-1971.2022.e1.03

THE LEGAL CONFIGURATION OF THE CONCEPT OF COERCION

Oleg TĂNASE
PhD student, International Free University of Moldova,
Chisinau, Republica of Moldova
e-mail: *o.tanase@tanase-law.md*
https://orcid.org/0000-0002-9789-069X

The problem of the order of law in general, and of coercion in particular, we believe is relatively well developed in general legal theory. More comprehensive and complex studies can be found in the branch sciences. In addition to this, the concept of coercion and a series of problems related to this subject are the subject of multiple discussions, in the process of which a series of insufficiently examined problems were detected both in the general theory of law and in the branch sciences. Despite these drawbacks, jurists, philosophers and sociologists all over the world have over the years been concerned with researching various aspects of the phenomenon of coercion. Valuable works have been consecrated, which have not lost their value as sources of information to this day. But some issues were examined in these works, taking into account the political-ideological representations that dominated those times, which led to vague interpretations of the facts, sometimes even distorting their understanding.

Keywords: *law, legal coercion, state coercion, coercive measures, rule of law, rights and freedoms.*

CONFIGURAȚIA JURIDICĂ A CONCEPTULUI DE CONSTRÂNGERE

Problema ordinii de drept, în general, și a constrângerii în mod special considerăm că este relativ dezvoltată în teoria generală a dreptului. Studii mai ample și mai complexe găsim în științele de ramură. Necătând la aceasta, conceptul constrângerii și o serie de probleme legate de acest subiect constituie obiectul discuțiilor multiple, în cadrul cărora s-au depistat o serie de probleme examinate insuficient atât în teoria generală a dreptului, cât și în științele de ramură. Cu toate aceste inconveniente, juriștii, filosofii, sociologii din toată lumea s-au preocupat de-a lungul timpului de cercetarea mai multor aspecte ale fenomenului constrângerii. Au fost consacrate lucrări prețioase, care nu și-au pierdut nici până azi valoarea ca surse de informații. Însă unele probleme erau examinate în aceste lucrări, ținând cont de reprezentările politico-ideologice care au dominat acele timpuri, fapt care a condus la interpretări vagi ale faptelor, uneori chiar denaturând înțelegerea lor.

Cuvinte-cheie: *drept, constrângere juridică, constrângere statală, măsuri de constrângere, stat de drept, drepturi și libertăți.*

CONFIGURATION JURIDIQUE DE LA NOTION DE CONTRAINTE

Le problème de l'ordre du droit en général, et de la contrainte en particulier, est relativement développé dans la théorie générale du droit. Des études plus approfondies et complexes que nous trouvons dans les sciences de la branche. Malgré cela, le concept de contrainte et un certain nombre de problèmes liés à ce sujet font l'objet de multiples discussions, au cours desquelles un certain nombre de problèmes insuffisamment examinés ont été trouvés à la fois dans la théorie générale du droit et dans les sciences de la branche. Avec tous ces inconvénients, des juristes, des philosophes, des sociologues du monde entier se sont préoccupés au fil du temps de rechercher plusieurs aspects du phénomène de la contrainte. Des œuvres précieuses ont été consacrées, qui n'ont pas perdu de leur valeur en tant que sources d'information à ce jour. Mais certains problèmes ont été examinés dans ces travaux, en tenant compte des représentations politico-idéologiques qui dominaient cette époque, ce qui a conduit à de vagues interprétations des faits, parfois même à déformer leur compréhension.

Mots-clés: *droit, coercition légale, coercition de l'État, mesures de coercition, État de droit, droits et libertés.*

ЮРИДИЧЕСКАЯ КОНФИГУРАЦИЯ КОНЦЕПЦИИ ПРИНУЖДЕНИЯ

Вопрос о порядке права в целом и принуждения в частности, на наш взгляд, относительно хорошо разработан в общей теории права. Более обширные и сложные исследования можно найти в отраслевых науках. Помимо этого, понятие принуждения и ряд проблем, связанных с этой тематикой, являются предметом многочисленных дискуссий, в рамках которых был выявлен ряд малоизученных проблем как в общей теории права, так и в отраслевых науках. Невзирая на эти недочеты, правоведы, философы и социологи со всего мира на протяжении многих лет занимались исследованием различных аспектов феномена принуждения. Были освещены ценные работы, которые и по сей день не утратили своей актуальности как источники информации. Тем не менее, некоторые вопросы рассматривались в этих работах с учетом господствовавших в те времена политико-идеологических представлений, которые приводили к нечеткому толкованию фактов, иногда даже искажая их понимание.

Ключевые слова: *право, правовое принуждение, государственное принуждение, меры принуждения, верховенство права, права и свободы*.

Introduction

In legal science, there is still no unified theory of coercion that combines both legal and state principles of this phenomenon in society, and the term "*state legal coercion*" has not yet been widely recognized.

In the general theory of the state and law and in legal disciplines, there was a widespread tradition of "*considering coercion in relation to the state, only one of the methods of state management of society, combined with persuasion, encouragement, stimulation* [1]".

The study methodology includes traditional research methods: logical, grammatical, analysis and synthesis, deduction and induction, observation and comparison.

Results and discussions

The subject of research by legal scholars has always been state coercion (and to a large extent this tradition persists to this day), while legal coercion has been considered at best as the form in which state coercion manifests itself; frequently, the terms "*state coercion*" and "*legal coercion*" were used as synonyms [2, p. 18]. For example, D. G. Nohrin believes that "... In a state of law, any action of an authority must have a legal form" [3, p. 20].

These studies did not take into account the fact that legal coercion and state coercion, like law and the state itself, cannot be assimilated, although in essence they are interrelated phenomena.

State constraint is a type of constraint that is distinguished by the subject of its implementation. Such coercion is exercised by the state, represented by its organs and officials, and an indication of this characteristic of state coercion, in one form or another, is to be found in most of its definitions. For example, V. N. Protasov suggests that state coercion is "*an external influence on behavior based on the organized power of the state and aimed at the unconditional affirmation of the will of the state*" [4, p. 157].

A. I. Kaplunov defines state coercion as "*a method of influence that consists in the application by state bodies and their officials of measures established by law, which constitute a system of legal restrictions, deprivations, burdens or other actions that allow obliged persons to carry out his/her instructions and to comply with the prohibitions established by law, as well as to ensure public order and the security of individuals, society and the state against potential and actual threats*" [5, p. 17].

According to A. I. Dvoryak, "*state coercion is the impact of the state (through its organs and officials) on the behavior of people to achieve a set goal - the will of the*

state, expressed in legal norms. This impact on people's behavior is achieved by exerting mental, physical or other pressure, established by law and exerted on a specific person, which consists in limiting or depriving the specified person of certain benefits, interests, as well as imposing certain additional obligations to him/her” [6, p. 26].

It seems that legal coercion, as a type of general social coercion, can be distinguished by such a criterion as the nature of its impact: legal coercion always acts as a coercion mediated by legal norms, at the same time, the objectification of general social coercion through legal framework is designed to minimize the possible negative effects of coercion in human society and acts as a guarantee that its implementation will generally have socially favorable consequences. Considering legal coercion as a type of state coercion is possible only if it is proven that only the coercion, the subject of which is the state, is capable of having a legal character. For example, V. S. Egorov believes that “*legal coercion is established and implemented by the state*” [7, p. 38].

However, it is obvioua that there is clear and convincing evidence to the contrary. The fact that “*coercion based on legal norms can be exercised by persons unrelated to the state apparatus and, moreover, who do not have the personal authority to exercise state coercion*” and that therefore “*there is a legal coercion which is not state coercion*”, rightly notes P. V. Demidov [8, p. 8].

N. Ovsyannikov, which, depending on the subject authorized to apply coercive measures in the sphere of entrepreneurial activity, distinguishes between state coercion and public law coercion, naming citizens, individual entrepreneurs and organizations authorized to apply legal coercive measures in accordance with the law or the contract as subjects of the latter [9].

The most eloquent example of legal mediation of non-state coercion is the existence in criminal law of institutions of legitimate defense, of extreme necessity and of apprehension of the offender. Examples of legal coercion exercised not by the state and not under the authority of the state are also the application by the employer of one of the disciplinary sanctions provided for in article 206 of the Labor Code of the Republic of Moldova. In the given case, the coercion is of a legal nature, because the possibility of its use is expressly provided by the legal norms, but it cannot in any case be recognized as state coercion, because it is exercised by non-state actors and not under the authority of the state. State coercion and legal coercion can also be distinguished by the object against which they are applied. The object of legal coercion is always the activity and will of the criminal, and state coercion applies to a person whose interests are in conflict with the will of the state, regardless of the form in which it is expressed. Of course, most of the time, the object of legal coercion is also the object of state coercion. However, situations where the objects of state and legal coercion do not coincide cannot be ignored. Thus, for example, if the state itself is the offender, under conditions where the state is legal, it can be compelled to behave appropriately through legal mechanisms, either by the international community or by civil society.

Legal coercion and state coercion also differ in the purpose of their application. If the purpose of legal coercion is to ensure the well-being of society as a whole and of each individual member of it by resolving conflicts that arise in society and by harmonizing various social interests, the purpose of state coercion is to subdue the will and activity of an individual or a social group to the tasks of ensuring the welfare of the state. Of course, any activity of the state can also be described

as aiming to ensure social stability by regulating the most important social relations, but not because the "*common good*" is the real purpose of its existence. Maintaining social peace and harmony by regulating social relations is a guarantee of the durability of the entire state system, because any state that is not able to reconcile social interests is doomed to destruction.

In our view, the relationship between the state and legal coercion is dualistic in nature. On the one hand, at all stages of its historical development, the state acted and continues to act as the main subject of legal coercion. In a state of law, the law is the most effective means of implementing the state's strategy and tactics, the most effective tool for implementing its policies. A state that does not refer its activities to the rule of law is not considered legitimate by society and therefore cannot expect a stable and sustainable existence.

If we look at the relationship between legal and state coercion from another perspective, we see that the state is the primary law enforcement force. Because, at the present stage of social development, it is the state that holds such a powerful power, to which other subjects must submit, it is the one that most effectively exercises legal coercion. It is the state that gives power to the law [10, p. 322].

Thus, the dual nature of the relationship between state and legal coercion determines the introduction into scientific circulation of the term "*state-legal coercion*", which, however, is usually used as a synonym of the concepts "*state coercion*" or "*legal coercion*", without being defined independently. Numerous definitions of state-legal coercion logically and simultaneously indicate the signs of both state and legal coercion. For example, N. V. Lugoveț believes that by "*the legal coercion of the state must be understood the impact on people's behavior based on the rule of law to subordinate them to the will of the state*" [11, p. 26].

A. V. Korkin defines state-legal coercion as "*a type of social coercion exercised on a strictly legal basis, a special type of activity of specially authorized subjects, as a rule, of state bodies of executive power, and in the cases directly specified in the law , and of public formations, consisting in the direct physical, mental, material or organizational impact on the subjects of legal relations (both individual and collective), through the application of specific measures, which have a negative content for the person against whom they are used, applied in the case of the commission of crimes, as well as by the emergence of special conditions for the prevention, repression of crimes and the avoidance of undesirable consequences for society and the state* of a natural, social and anthropic order" [12, p. 34].

It seems that, given the question of coercion in a rule of law, it is the legal coercion of the state that should be the object of such study. We find that legal coercion has some specific meaning in a rule of law, unlike state coercion, which is inappropriate to consider in isolation from its legal form of application. It also makes no sense to consider other manifestations of social coercion, because they do not have specific forms of expression in the legal-state sphere and are implemented through mechanisms based on morality, religious norms, customs and other elements of the social mechanism for regulating social relations.

It seems that the specificity of the state legal coercion as an independent type of social coercion is manifested primarily by the specificity of its goals.

The ability to use coercion to impose its will is one of the most important attributes of the state, and the content of the state's will can be determined both by the needs of

society and its members, and by the state's own interests. Depending on whether the will of the state expresses the interests of society or a narrow social group, its objectives change and, consequently, so does the use of coercion. The specific nature of legal coercion by the state is determined by the fact that the state has the power to use legal coercion only to the extent that its activities are aimed at the fulfillment by the state of its general social functions. In this sense, the main purpose of the legal coercion of the state is to bring the behavior of the subjects under its control in accordance with the general social will expressed in the law. It seems obvious that no other subject of legal coercion is able to fully undertake the implementation of the coercive conformity of the actual behavior of the participants in social relations with the models established in the norms of law, because no other subject has sufficient power and authority for it, and therefore we cannot consider this objective to be an objective of any other type of legal coercion except that of the state. Another specific feature of state legal coercion is the presence of special requirements for its implementation. Since coercive state-legal influence acts as a private activity of state bodies and its officials, it is subject to the same requirements as any other activity of state bodies: legality, expediency, publicity, professionalism, etc.

The qualitative specificity of the legal coercion of the state is also predetermined by the special legal position of the state as the subject of the coercion. The specificity of its position lies in the fact that, for the state, the exercise of legal coercion is both a right and an obligation, while for all other participants in social relations, the possibility of exercising a coercive influence is only a right, because it represents an opportunity to satisfy their own interests and is implemented or not according to the choice of the subject. While other subjects apply legal coercion when there are two factors - objective (the occurrence of circumstances that are considered grounds for legal coercive action in the legal norms in force) and subjective (the will to act coercively), the state applies legal coercion in all cases in which it is impossible to secure the interests recognized by law through other means of action. Of course, in the vast majority of cases, the question of the need to act coercively is decided directly by the authorities or state officials, but the state will is related to the legal will, and the choice is determined not by the subjective desire of the direct subject of coercion, but by the requirements of opportunity, opportunity being seen exclusively as the ability to obtain the result considered useful from a social point of view by the legal norm through the application of a certain coercive measure.

This circumstance, at first glance, indicates that the exercise of legal coercion is exclusively an obligation of the state, so that a special clarification is required as to why we believe that it also acts as a right of the state. The need to consider coercion not only as a duty of the state, but also as a right, results from the fact that the state voluntarily assumes general social functions, for the exercise of which it uses coercion. In addition, it is characteristic of legal coercion that "*coercive measures are applied in accordance with the part of the right that has been objectified in the law*". It is known that legislative activity is the prerogative of the state, which means that it decides which coercive measures will be objectified. In this sense, the application of legal coercion - at least the creation of the potential for its application - should be considered a right rather than an obligation of the state.

Speaking about the form of expression of state legal coercive measures, it should be noted that in the legal literature it is

traditionally emphasized that state legal coercive measures are related to the sanction of the legal norm. Thus, for example, S. S. Alekseev notes that "*from the point of view of the content of legal coercion and the relations formed in connection with it, sanctions are the real "carriers" of the coercive influence of the state*" [13, p. 76].

V. K. Babaev says that a sanction can provide for measures of responsibility, preventive measures, protective measures, as well as "*the negative consequences resulting from the behavior of the entity itself*" [14, p. 128].

C. B. Evdokimov, examining reparative measures as an independent type of state legal coercive measures, emphasizes that reparative sanctions act as a normative basis for reparative forms of coercion, in which, in his opinion, reparative measures represent the implementation of the sanction of a legal norm [15, p. 22].

H. H. Rybushkin, considering prohibitive legal norms, emphasizes that the implementation of their sanctions takes place "*in the form of application at the level of individual legal regulation*" [16, p. 263].

Although we agree that the measures state coercive and legal norms sanctions are clearly related, we consider it necessary to note, however, that such a connection exists only when the basis for the application of state coercive measures it is illegal behavior, especially the violation of legal rules. In this situation, the application of a state legal coercion measure can be identified with the application of the external form of its expression - the sanction of a legal norm.

Although we agree that the measures of state coercive and sanctions of the legal norms are clearly related, we consider it necessary to note, however, that such a connection exists only when the basis for the application of state coercive measures is unlawful conduct, especially the violation of legal rules. In this situation, the application of a state legal coercion measure can be identified with the application of the external form of its expression - the sanction of a legal norm. However, in addition to illegal behavior, the need for coercive measures may be triggered by the emergence of special circumstances (related or not to the activity of social actors), which indicate the possibility of substantial harm to the legitimate interests of the individual, society and the state. Obviously, legal-state coercive measures aimed at preventing such harm or eliminating it cannot be expressed by the sanction of the legal norm, because, by definition, the sanction is only able to include the coercive measures applied in case of a deviation of the participants' behavior in legal relations from the model established by the provision. D. Baltag mentions that the sanction represents the component of the legal norm, which states the unfavorable consequences borne by those who violate the provision. The legal sanction represents the reaction of the regulatory authority to the addressees of its provisions: *punitive*, in certain situations, stimulatory, in other situations, a fact arising from the legal responsibility of the addressee and may concern his/her person (for example – prison), his/her patrimony (damage repair), or legal documents drawn up without complying with the law and affected by nullity (a pledge contract that violates an imperative rule) [17. p. 237].

The above circumstances oblige us to recognize that the provision of a legal rule may also act as a form of external expression of a measure of legal-state constraint in addition to the sanction, and the provision acts as a form of external expression of those measures of legal-state constraint, which are initially not related to the violation of the rule of conduct established by the rule

of law, but act as a means of responding to the existing danger of causing harm to the interests protected by law. The fact that both the sanction and the provision are external forms of expression of the state legal coercion measure predetermines two main ways of formulating the state legal coercion measure, of stating its content. If a coercive measure is expressed in the sanction of a legal norm, it is actually formulated as an unfavorable consequence of a certain behavior of a person (non-compliance or non-fulfillment of the provision of the legal norm). Because not only the implementation of coercion, but also the threat of it, contained in the sanctions of legal norms, has a real impact on the behavior of correlative subjects. Because, from the moment the legal norm enters into force and throughout its operation, the coercive potentiality contained in it has an impact on the will and consciousness and, consequently, on the behavior of an indefinite number of subjects acting in the legal space. We believe that this fact predetermines the need to understand state legal coercion as something broader than the simple application by the state of coercive measures contained in legal norms.

We believe that it is possible to agree with E. S. Popkova, who proposes to consider the stage of legislative activity as the moment of emergence of juridical-state coercion. At this stage, she writes, "*coercion is psychologically present, which is implied by the imperative nature of legal prescriptions and the possibility of state coercion behind each of the legal norms. From the moment the legal act is officially published, coercion begins to psychologically affect the conscience of each individual, formulating a reason for subsequent behavior*" [18].

Recognizing the fact that state legal coercion does not begin simultaneously with the implementation of coercive measures, but with the establishment of the potential possibility of their application, seems to us quite reasonable also because from the moment of establishing a legal obligation (ban) and sanctioning its non-execution (noncompliance), subjects' freedom to choose the behavioral option is significantly restricted. From that moment, participants in social relations are forced to act according to the instructions received; choosing another course of action implies a high probability or even inevitability of negative consequences in the form of restrictions on their ability to satisfy an interest that is important to them. The view that any legal duties in the good faith and proper performance of which the public authorities have an interest, as well as any legal prohibitions the violation of which is undesirable to them, have been and always will be a specific form of coercion, and traditionally had opponents. For example, F.M. Kudin writes: "*Without denying the importance of the preventive value of a legal norm, it must be emphasized that its impact on a person, his/her perception and awareness of a legal requirement cannot be considered as coercion, since the choice of behavior depends entirely on the subject himself/herself. There is no imposition of the will of the state contained in the rule of law, no forced or coercive implementation*" [19, p. 108].

This view of the content of legal state coercion cannot be accepted by us, nor can we accept the statement that "...*every legal instigation and every restriction must be considered as acts of mental coercion*". Recognizing that state legal coercion must be understood in a very narrow sense, that "... *the potentiality, the possibility of coercion contained in law enforcement norms is not yet coercion itself*", this is only possible if it is established that the existence of a prohibitive or binding legal rule does not in

itself restrict the freedom of the subject to choose his or her behavior or compel him or her to act in a certain way. However, if such a norm does not also have a coercive effect, then its observance can only be the result of a complete coincidence between the will of the power contained in it and the will of the participants in social relations. Of course, the assumption that such a coincidence is possible in all cases without exception is absurd in itself, because if a certain requirement is voluntarily fulfilled by all, there is no need for it to be enshrined by law.

Considering any legal impact as legal coercion of the state, in our opinion, is not exactly acceptable either. In our view, to support this point of view is to ignore the existence, in the legal sphere of the state, of methods other than coercion to influence behavior. This calculation does not take into account the fact that the purpose of law is to satisfy the needs of people in life. Therefore, in most cases, the patterns of behavior provided by the law coincide with the intentions of the participants in social relations, to the extent that they represent a way to realize their own claims.

D. Baltag draws attention to some points of view in this matter, returning and developing some aspects that have particularly interested legal research, giving a special look at some representatives of legal philosophy and doctrine. According to Aristotle, the constitution of the city, i.e., law, aims at the virtue, good and happiness of the citizens. For Kant, law is a rational expression, a categorical imperative and an end in itself like the moral law itself, like the absolute and like God. Hegel deifies the state, which he considers the holder of all spiritual values, and law is for him the way or "*walk*" of God between people in the world. According to I. Bentham, law is based on the general interest, its purpose being utility. The historical school (Savigny, Puchta) considers law a work of nature, a product of time, an emanation of the spirit of the people "*that is making itself*" like the language we speak. Ihering argues that law is an intentional product and pursues goals, distancing itself. The goal is the creator of all law, and law, states Ihering, is the form in which the state organizes, through coercion, the provision of society's living conditions [17, p. 106].

I. Craiovan, quoting Stammler, mentioned that law is a means by which a goal is achieved: the goal of all sops. Of course, law involves will, and like all will, it pursues ends. Right is a will, but not just any will, but an inviolable, autonomous, cohesive one. Among these attributes, inviolability refers to the imperative and coercive nature of law. According to Stammler, the right is justified to the extent that the goals pursued are just. Just law must always agree with social aspirations [20, p. 196].

According to G. Roubier, quoted by D. Baltag, the purpose of law as a "*science of means*" is constituted outside itself, politics establishing the goals of social governance, and law choosing the means [17, p. 107].

N. Popa notes that in this vision, law has a position of subordination, a vegetative existence, while in a democratic and free society, law must subject to its own censorship the aims and values of society, contributing to the definition of the horizon of ideality that transcends immediate practical needs and considerations of opportunity [21, p. 87].

An overly broad understanding of the legal constraint of the state should be avoided, as this leads to the "*paradoxical assumption that the definition and legislative extension of citizens' rights limits their freedom",* even if only such rights are enshrined and no other rights can be exercised. In addition, the possibilities and nature of exercising the rights are specified. In fact, there is no reason

to believe that a constitutional enshrinement of the right to life or personal dignity, for example, can in any way restrict the freedom of the individual possessing these rights.

The dynamic aspect of state legal coercion is expressed through the implementation of state legal coercive measures. The implementation of such measures is an active and intentional activity of the subjects authorized by the state for the effective implementation of the legal restrictions that constitute the content of these measures. In this case, considering that state legal coercion measures are only those legal coercive measures that are objectified in the written law, the implementation of state legal coercion does not cover the application of those measures that are not directly provided for by law.

The dynamic component of state legal coercion is specific both in terms of its form and content: the external form of expression of the implementation of state legal coercive measures is law enforcement: in its form of law enforcement, its content is the legal behavior of the subject of law enforcement activity. When we talk about the external form of the dynamic aspect of state legal coercion, we consider it necessary to emphasize two circumstances. First of all, legal-state coercive measures can be implemented only in the form of applying the law, and not in the form of using the law, as assumed, for example, by A. I. Kaplunov [22, p. 42].

Justifying his point of view, the mentioned author, as the implementation of measures of legal coercion of the state in the form of the use of law, names: the use of physical force, special means and firearms. It is clear that in these cases the application of the law rather than the use of the law takes place, because, firstly, the subject is not acting in his/her own interest, but in the interest of other subjects (including the state he/she represents) and, secondly, the use of coercion in this case does not represent the exercise of a subjective right, but a way of implementing the obligation to ensure public security, protect public order and protect the rights and legitimate interests of other legal subjects. It is also not without importance that the statement that state legal coercion is implemented only through law enforcement needs to be developed, because law enforcement has a heterogeneous content and is characteristic not only of law enforcement, but also of positive legal regulation. The mentioned circumstance determines that not the application of the law in general, but only the form of application of the law should be considered as an external form of expression of the legal coercive measures of the state.

Also, it cannot be fully accepted, without reservations, that state coercion is achieved only through the application of the law. Realization of the right is a special form of law enforcement and therefore occurs only when laws and regulations are implemented through actions taken by the state, represented by its organs, officials and public organizations authorized by the state. However, considering that not all state coercive actions are carried out on the basis of valid legal prescriptions and with a view to their implementation, it cannot be said that they constitute an act of law enforcement in all cases. Thus, for example, an invasion of the territory of one state by another state without a declaration of war cannot be recognized as law enforcement.

Speaking about legal-state coercion as a legal coercion, the subject of which is the state, it should be noted that its value as a method of influencing the behavior of participants in social relations lies primarily in its effectiveness: through coercion, law is able to achieve such results in the regulation of social relations, which cannot be obtained either by persuasion or encouragement.

Legal coercion does not always prove to be capable of ensuring that the coerced one obeys the legal requirements. Law, though authoritative, is by no means authoritative, so that if a party to a legal relation resolutely refuses to submit to a requirement imposed by law, the result will never be attained, unless the compulsion is exercised by a subject possessing superior force compared to the object of the compulsion. This circumstance clearly demonstrates that the effectiveness of state legal coercion is determined by its state nature rather than its legal nature, and the fact that state coercion is the most irresistible explains why it is the state to which the law primarily delegates the power to exercise coercive influence.

Conclusions

The analysis of the manifestations of general social coercion in the legal-state sphere, as it seems to us, allows us to draw some conclusions:

– State coercion and legal coercion are not identical concepts, because the criteria for distinguishing between these types of social coercion are different. These phenomena also differ in the object and purpose of the influence;

– In the rule of law, the only appropriate coercion is legal coercion of the state, which is not to be regarded as state coercion exercised by means of rights, but exclusively as the exercise of legal coercion by the state, vested with the powers of a subject of legal coercion, while maintaining the rule of law in all relations related to the exercise of such coercion;

– State-juridical coercion is a distinct form of coercion that absorbs the advantages of state and legal coercion, neutralizing their negative manifestations, among which the main ones are openness to arbitrariness and ineffectiveness.

Bibliography

1. МАКАРЕЙКО, Н. В. *Государственное принуждение как средство обеспечения общественного порядка*: Дис. ... канд. юрид. наук. - Н. Новгород, 1996.

2. ЦИХОЦКИЙ,, А. В. Г*осударственное принуждение в механизме обеспечения эффективности гражданского судопроизводства*. În: Журнал российского права. 2000. № 8. С. 18, 20.

3. НОХРИН Д. Г. *Государственное принуждение в гражданском судопроизводстве*. М.: Волтерс Клувер, 2009.

4. ПРОТАСОВ, В. Н. *Теория права и государства. Проблемы теории права и государства*. 2-е изд-е, перераб. и доп. М., 2001. С. 224.

5. КАПЛУНОВ, А. И. *Об основных чертах и понятии государственного принуждения*. În: Государство и право. 2004. № 12. С. 17.

6. ДВОРЯК, А. И. *Современные взгляды на проблемы государственного принуждения*. În: Октябрьская революция в России: проблемы государства и права. Материалы научной конференции. М., 1998. С. 48.

7. ЕГОРОВ, В. С. *Институт государственного принуждения в уголовном праве России*. Пермь, 2009. С. 38.

8. ДЕМИДОВ, П. В. *Частное правовое принуждение в сфере регулирования уголовного права.* În: Российская юстиция. 2005. №5. С.8.

9. ОВСЯННИКОВ, Ю. Н. *Применение мер правового принуждения в сфере предпринимательской деятельности*. În: Актуальные проблемы экономики и современного промышленного менеджмента. Материалы научно-практической конференции. 29 апреля 2004 года. Санкт-Петербург. [citat: 12 aprilie 2020]. Disponibil: http:/www.ibci.ru/konferencia/APEMPM/stO 17.htm).

10. БАРАНОВ, П. П., ШПАК. А. В. *Сила права: политико-институциональный анализ*. Ростов-на-Дону: 2004. 477 p.

11. ЛУГОВЕЦ, Н. В. *Меры уголовно-процессуального принуждения, их понятие и значение*. În: Следователь. 2003. № 7. p.24-34.

12. КОРКИН, А. В. *Институт административно-правового принуждения: меры, применяемые сотрудниками милиции.* Автореф. дис. ... канд. юрид. наук. Челябинск, 2004. 47 p.

13. АЛЕКСЕЕВ, С. С. *Теория права*. М., 1994. 150 p.

14. *Общая теория права. Курс лекций* /Под общей ред. В.К. Бабаева. Н.Новгород, 1993. 302 p.

15. ЕВДОКИМОВ, С. В. *Правовосстановительные меры* ... Автореф. диссертации канд. юрид. наук. Н.Новгород, 1999. 37 p.

16. РЫБУШКИН, Н. Н. *Запрещающие нормы в советском праве*. Казань: 1990. 487 p.

17. BALTAG, D. *Teoria generală a dreptului*. Chișinău: ULIM, 2010. 237 p. (536) ISBN 987-9975-101-38-7

18. ПОПКОВА. Е. С. Ю*ридическая ответственность и ее соотношение с иными правовыми формами государственного принуждения*: Дис. канд. юрид. наук. - М., 2001.

19. КУДИН, Ф. М. *Теория права и государства. Проблемы теории права и государства*. 2-е изд-е, перераб. и доп. М., 2001. С.203âКУДИН, Ф.М. *Теория права и государства. Проблемы теории права и государства*. 2-е изд-е, перераб. и доп. М., 2001. С.203

20. CRAIOVAN, I. *Teoria generală a drep*tului. București: Militară, 1997. 362 p. ISBN 973-32-0506-0.

21. POPA, N. *Teoria generală a dreptului*. București: Actami, 1996. 334 p. ISBN 973-97016-9-8

22. КАПЛУНОВ, А. И. *Административное принуждение применяемое органами внутренних дел (системно-правовой анализ)*. Дис.... докт. юрид. наук. М., 2005. С.52.

CZU 343.8
DOI https://doi.org/10.52388/2345-1971.2022.e1.04

THE NOTION AND STATISTICAL PARAMETERS OF PRISON CRIMINALITY IN THE REPUBLIC OF MOLDOVA

Cornel OSADCII
Doctor of law, associate professor,"Stefan cel Mare" Academy of the Ministry of Internal Affairs of the Republic of Moldova, Chișinau, Republic of Moldova
e-mail: *osadchy_cornel@mail.ru*
https://orcid.org/0000-0002-8872-0509

Valentin CHIRIȚA
Doctor of law, associate professor,"Stefan cel Mare" Academy of the Ministry of Internal Affairs of the Republic of Moldova, Chișinau, Republic of Moldova
e-mail: *valentin-chirita@yandex.ru*
https://orcid.org/0000-0002-7711-022X

Preventing and fighting crime is a priority for any rule of law. The essential guidelines are also the preservation of the state's role as guarantor of personal security, prevention of recidivism of previously convicted persons, etc. Not only the administration of penitentiary institutions plays a special role in this process, but also the complex of preventive measures aimed at excluding tension in conditions of increased conflict between individuals. Therefore, the crimes committed while serving the sentence negatively influence the state of order established in the penitentiary institutions, a fact that makes it difficult to carry out the basic tasks of the penitentiary system. All this creates a difficult situation in the interpersonal relations of the people serving the criminal sentence, also leads to the decrease of the trust of the convicts in the employees of the penitentiary institutions.This article is focused on some doctrinal approaches regarding prison crime, as well as on revealing the statistical parameters of prison crime in the Republic of Moldova for the period of 2016-2021.

Keywords: *penitentiary criminology, penitentiary crime, convicts, recidivism, prison sentence, penitentiary, penitentiary system.*

NOȚIUNEA ŞI PARAMETRII STATISTICI AI CRIMINALITĂȚII PENITENCIARE ÎN REPUBLICA MOLDOVA

Prevenirea şi combaterea criminalității constituie o prioritate pentru orice stat de drept. Orientările esențiale sunt, de asemenea, păstrarea rolului statului ca garant al securității personale, prevenirea criminalității recidive a persoanelor anterior condamnate etc. Nu doar administrarea instituțiilor penitenciare joacă un rol special în acest proces, ci şi complexul de măsuri preventive orientate spre excluderea tensiunii în condiții de conflict sporit între indivizi. Prin urmare, infracțiunile săvârşite în perioada ispăşirii pedepsei influențează negativ starea de ordine stabilită în instituțiile penitenciare, fapt care face dificilă realizarea sarcinilor de bază a sistemului penitenciar. Toate acestea, creează o situaţie dificilă în relaţiile interpersonale a persoanelor care ispăşesc pedeapsa penală, de asemenea, duc la diminuarea încrederii condamnaților în angajații instituțiilor penitenciare. Prezentul articol este axat pe unele abordări doctrinare privind criminalitatea penitenciară, precum şi pe relevarea parametrilor statistici ai acestui tip de criminalitate în Republica Moldova pentru perioada anilor 2016-2021.

Cuvinte-cheie: *criminologie penitenciară, criminalitate penitenciara, condamnați, recidivă, pedeapsa cu închisoare, penitenciar, sistem penitenciar.*

LA NOTION ET LES PARAMÈTRES STATISTIQUES DE LA CRIMINALITÉ PRISONNIÈRE EN RÉPUBLIQUE DE MOLDOVA

La prévention et la lutte contre la criminalité sont une priorité pour tout État de droit. Les lignes directrices essentielles sont également la préservation du rôle de l'État en tant que garant de la sécurité personnelle, la prévention de la récidive des personnes précédemment condamnées, etc. Non seulement l'administration des établissements pénitentiaires joue un rôle particulier dans ce processus, mais aussi l'ensemble des mesures préventives visant à exclure les tensions dans des conditions de conflit accru entre les individus. Par conséquent, les crimes commis pendant l'exécution de la peine influencent négativement l'état d'ordre établi dans les établissements pénitentiaires, ce qui rend difficile l'accomplissement des tâches fondamentales du système pénitentiaire. Tout cela crée une situation difficile dans les relations interpersonnelles des personnes purgeant une peine pénale, conduit également à la diminution de la confiance des condamnés dans les employés des établissements pénitentiaires. Cet article se concentre sur certaines approches doctrinales concernant la criminalité carcérale, ainsi que sur la révélation des paramètres statistiques de la criminalité carcérale en République de Moldova pour la période 2016-2021.

Mots-clés: *criminologie pénitentiaire, crime pénitentiaire, condamnés, récidive, peine de prison, pénitencier, système pénitentiaire.*

ПОНЯТИЕ И СТАТИСТИЧЕСКИЕ ПАРАМЕТРЫ ПЕНИТЕНЦИАРНОЙ ПРЕСТУПНОСТИ В РЕСПУБЛИКЕ МОЛДОВА

Предупреждение и борьба с преступностью является приоритетом для любого правового государства. Существенными ориентирами остаются также сохранение роли государства как гаранта личной безопасности, недопущение рецидива в отношении ранее судимых и др. Особую роль в этом процессе играет не только администрация пенитенциарных учреждений, но и комплекс профилактических мероприятий, направленных на исключение напряженности в условиях повышенной конфликтности между людьми. Таким образом, преступления, совершенные в период отбывания наказания, негативно сказываются на состоянии порядка, установленного в учреждениях исполнения наказаний, что затрудняет выполнение основных задач уголовно-исполнительной системы. Все это создает сложную ситуацию в межличностных отношениях лиц, отбывающих уголовное наказание, а также ведет к снижению доверия осужденных к работникам пенитенциарных учреждений. Данная статья посвящена доктринальным подходам к пенитенциарной преступности, а также выявлению статистических параметров данного вида преступности в Республике Молдова за период 2016-2021 гг.

Ключевые слова: *пенитенциарная криминология, пенитенциарная преступность, осужденные, рецидивизм, наказание в виде лишения свободы, пенитенциарное учреждение, пенитенциарная система.*

Introduction

Crime in places of detention throughout existence has attracted the increased attention of scientists. Criminality in places of confinement is the direct consequence of the contradictions that exist in society and in the penitentiary system, refracted through the conditions of isolation of convicts from society. At the same time, most criminologists claim that penitentiary crime retains all the characteristics inherent to crime of a general criminal nature [20, p. 84].

Criminality, as a social phenomenon, presents several sides and aspects that criminological science must follow and investigate. A first aspect is that of general crime, that is, the state of crime, its existence and volume [8, p. 27]. All this must be captured and described in the space and limits where they happen, where they take place.

In the legal literature, crime in penitentiary institutions is also called penitentiary crime [14, p. 647].

In light of the above, we draw attention to the fact that a specific segment of this phenomenon is criminality in penitentiary

institutions - structures designed to achieve the resocialization of delinquents. Criminality in penitentiary institutions represents in itself a diversity of criminal recidivism and is therefore dangerous in character and cruelty [22, p. 136].

The penitentiary environment is characterized by criminal "traditions" and "customs", as well as contempt for personality, even life, and for a good part of the prisoners, total moral degradation and the rejection of "official" values (from their point of view) are characteristic [22, p. 136].

Research methods used. In order to achieve the stated goal, a series of methods were applied in the present scientific approach, among which: the logical, systemic, comparative method.

Research content

From the point of view of criminology, penitentiary crime represents a set of crimes committed in penitentiary institutions by persons serving their criminal law sanction. It is a component of the criminal phenomenon, which differs from general crime according to the specifics of the place of commission (penitentiary institutions) and of the subjects (persons serving their criminal sentence) and which, in general, is reduced to the recidivism of criminal behavior on the part of people towards which has already been pronounced the sentence of conviction.

Analyzing criminality, the main element of the object of criminology, we distinguish the specifics of prison crime. This is manifested both by trends and legalities, as well as by the crimes included in this type of crime.

In this sense, the behavior of people who are serving their criminal sentence (regardless of the modality), researched behavior and by criminology, can be divided into two groups: acts provided by the criminal law as crimes and acts without the signs of a crime (regime violations) [3, p.20].

Penitentiary crime represents a negative socio-legal phenomenon, historically variable, which is made up of a totality of crimes committed by prisoners or prison staff in a determined period of time [3, p.23].

During the Soviet period, scholars called criminality in prison institutions - prison recidivism [9, p. 31].

At the current stage in criminology there are two visions regarding the definition of prison crime.

Some authors attribute to penitentiary crime the offenses committed by the convicts during the period of serving the custodial sentence [17, p. 39].

Thus, Parfinenko I. assigns only convicts to the subjects of penitentiary crime, however, he emphasizes that the notion of "prison crime" seems correct to be attributed to the crimes committed by those who have been prevented and convicted, who are detained in the penal isolation cells or are serving their sentence in penitentiaries [15, p. 41].

The author Dolgova A. defines penitentiary crime as the persistent crime in penitentiary institutions, in the places of execution of criminal sanctions [13, p. 647].

Another author, Filipova O., researching penitentiary crime, finds that its frequent manifestation is penitentiary recidivism, which represents a negative social-legal phenomenon, expressed by all the acts prohibited by the criminal law committed by convicts serving a custodial sentence for previous commission of a crime [19, p. 256].

Researchers who have a different vision regarding the definition of prison crime suggest to attribute it together with crimes committed by convicts in prisons and crimes committed by prison officials [18, p. 261].

Thus, some scholars reiterate that the criminality of convicts and officials in the penitentiary administration system should be referred to as penitentiary, and those guilty of committing crimes related to the activity

of penitentiary institutions – penitentiary criminals [16, p. 234].

Therefore, it seems to us that the subjects of prison crime can be attributed:

– close relatives and relatives of convicts who are legally on the territory of the penitentiary;

– the representatives of law and state bodies that carry out their work in penitentiaries;

– lawyers, representatives of civil society, religious cults, national and international organizations that ensure the protection of fundamental human rights and freedoms, the mass media and other persons who are legally on the territory of the penitentiary;

– persons who are illegally in the territory of the penitentiary.

The author Ghirko S. attributes to penitentiary crime “the criminal manifestations of convicts against other inmates, prison administration officials in the case of exceeding their duties or the manifestation of improper behavior towards persons deprived of their freedom, which contravenes the legislation, or towards other persons” [12, p 17].

In the view of the scientist Hohrin S., “penitentiary criminality is a way of criminal recidivism”, however it is important to take into account “its high social danger because the prejudicial act is committed directly in the process of executing the punishment for the previous crime under the conditions of taking the measures of preventing crimes and other crimes, demonstrates the unwillingness to correct himself/herself, actively opposing the norms and values unanimously accepted by society” [21, p. 212].

Professor Antonean Iu. insists on the idea that penitentiary crime is divided into crimes committed by convicts (prevented) and crimes committed by civil servants with special status within the penitentiary administration system [10, p. 101].

Analyzing the above definitions of prison crime, it should be noted that the characterization of prison crime would be incomplete without taking into account the crimes committed by the employees of the prison administration system. As the statistics show, more and more crimes committed by prison administration personnel are recorded every year [4].

Thus, we consider that prison crime should be understood as all the crimes committed by those sentenced to a custodial sentence or prevented both on the territory of the penitentiary (penitentiary, criminal prosecution isolation cell, provisional detention cell, detention center) [5] and outside the place of detention, as well as crimes committed by employees of the penitentiary administration system or other persons in a certain period.

Being a component of the criminal phenomenon, penitentiary crime is distinguished by the same features characteristic of crime in general: level, structure and dynamics [1, p.11].

At the same time, in addition to the existence and volume of the phenomenon, the structure of penitentiary crime must be analyzed and highlighted depending on the endangered social values, i.e., the component parts, groups and types of crimes that make up penitentiary crime. These aspects of the criminal phenomenon in penitentiary institutions are expressed numerically, through certain data (absolute or relative).

Penitentiary crime, like any other phenomenon of the objective world, can be attributed a quantitative and qualitative characteristic. The qualitative and quantitative part in turn characterizes the state of criminality [11, p. 47].

For the quantitative characteristic of crime, the combination of two notions is used: “*condition and level of crime”.*

Regarding the level of prison crime in the Republic of Moldova, we can reflect the criminogenic situation in prisons for the last five years as follows: 2016 - 184 crimes, 2017

- 146, 2018 - 281, 2019 - 354, 2020 - 125, 2021 - 198 [4].

In the analysis of the criminal system, it is necessary to highlight the indicators that characterize penitentiary crime, namely: *a) the general structure of penitentiary crime; b) the structure of some crime groups (property, violent, etc.); c) the structure of some types of crimes (murders, thefts, robberies, robberies, escapes, etc.).* The share of penitentiary crime in the structure of general crime is determined by the number of crimes committed in penitentiary institutions, compared to all registered crimes.

According to the official statistical data of the National Penitentiary Administration (ANP) of the Ministry of Justice of the Republic of Moldova in 2021 (on January 1, 2022) there were 6396 people in penitentiaries, and on January 1, 2015 this number was 8054, in total the number of people detained in penitentiary institutions decreased by 1625 people or by 11.5%. From the data presented above, there is a decrease in the total number of prisoners by 4.27% and it is explained by the fact that the examinations within the Penitentiary Committees of the convicts' materials that meet the conditions for the application of the provisions of art. 91 /conditional release before the term/ and art. 92 /replacing the unexecuted part of the punishment with a milder punishment/ of the Criminal Code, the files of convicted persons were reviewed, to identify persons who meet the conditions of the provisions of art. 91 Penal Code on August 17, 2018, approved by Law no. 179 of July 26, 2018 for the amendment of some legislative acts, as well as the review of the files of convicted persons, which fall under the provisions of Law no. 210 of July 29, 2016 [7] regarding amnesty and Law no. 163 of July 20, 2017 [6] (humanization of criminal policy).

Penitentiary crime is dominated by the same laws regarding its existence and evolution that influence general crime, but at the same time, it also has some distinct features, determined by the specifics of the place and the contingent. Crimes committed in penitentiaries differ from general crime in terms of proportions and structure, because: a) some crimes can only be committed in penitentiaries, such as escaping from places of deprivation of liberty or under escort, evading the execution of a custodial sentence, terrorizing of the prisoners embarked on the path of correction, as well as attacks on the penitentiary administration; b) the behavior of the prisoners bears a strong influence due to the subculture of the penitentiary, which encourages the commission of some crime (escape, violent actions against prisoners embarked on the path of correction or against the staff of law enforcement bodies, evasion and hooligan actions) or severely punishes for some acts (usually, these are thefts from detainees); c) the criminogenic factors essentially change in places of confinement: some of them lose any influence in the penitentiary environment, but others are specifically generated by the latter.

It is necessary to dwell especially on the particular latency of crimes committed in penitentiaries. A certain number of these crimes, either for objective or subjective reasons, were not in the focus of the official bodies' attention. Some of them do not come to the attention of law enforcement bodies, because the victims do not report the committed crime. Another part is hidden by the administration of the penitentiary institutions, continuing to be under the rule of an outdated system of assessing the efficiency of its activity, according to which the more crimes are recorded, the lower the level of work appreciation. All these, taken together, have the effect of reflecting the distorted state in the statistical records. A number of crimes are not known to law enforcement bodies, and some of which they are aware of are camouflaged, being registered as discipline violations or accidents.

This fact is confirmed by the following data: the total number of disciplinary violations during the year 2021 is 4792 cases, the year 2020 – 4539 decreasing by 5.27%, the year 2019 – 2280 cases, the year 2018 – 3015 cases, 2017 – 2362, 2016 – 4068 and 2015 - 6812. Similarly, during the years 2015-2021, the number of cases of the use of alcoholic beverages and toxic substances have an increasing trend (954.28 (braga) liters were seized from convicts in 2021 /15718.2 (alcoholic beverages) liters) compared to 833.2 (braga) liters/11874.2 (alcoholic beverages) liters) [4].

Latency is characteristic, in particular, of crimes that to an essential extent have become a normal phenomenon of life in prison, such as: hooliganism, injury to bodily integrity, torture, inhuman or degrading treatment, violent actions of a sexual nature, thefts and robberies, robbery and blackmail, threat or violence committed against a person in a position of responsibility, illegal circulation of narcotic substances.

In the penitentiary institutions of the Republic of Moldova, in the period of 2016-2021, 1164 crimes were committed, on average they constitute 202 crimes per year, but it should be noted that, in different periods, a different number of crimes were committed. During 2021, in the penitentiaries of the Republic of Moldova, 168 intentional crimes were prevented by the prison security services, which is 12 crimes less than in 2020, in 2019 - 276 intentional crimes were prevented, in 2018 there were 282 intentional crimes were prevented in 2017 - 311 crimes prepared by detainees, in 2016 - 262 cases, in 2015 - 266 cases [4].

Studying the structure of crime in the penitentiaries of Republic of Moldova in the period 2016-2021 we found: on the first place is the illegal circulation of narcotic substances, psychotropic substances or their analogues on the territory of penitentiary institutions (85.57%) 2016 – 141, 2017 – 107, 2018 – 199, 2019 – 327, 2020 – 92, 2021 – 248 [4].

Analyzing the illegal circulation of narcotics, psychotropic substances or their analogues, we found that in 2016 they constituted 76.63% of the total number of crimes; 2017 – 73.28%; 2018 – 70.81%; 2019 – 91.11%; 2020 – 73.6%, 2021 – 81.8% [4].

Based on their statistics, it is confirmed that the highest number of crimes were registered in 2019, thus registering 327 criminal acts, subsequently observing an essential decrease in the number of crimes of illegal circulation of narcotic substances, psychotropic substances or their analogues on the territory of penitentiary institutions in 2020 to 92 crimes in 2021, this dynamic increasing up to 303 cases of illegal acts. Examining the dynamics of other types of crimes in the period 2016-2021, we found that in second place are crimes related to non-compliance with the requirements of the penitentiary administration by violence (art. 321 of the Criminal Code of the Republic of Moldova) and actions that disorganize the activity of the penitentiary (art. 286 of the Criminal Code of the Republic of Moldova) - 30 crimes, on the 3rd place the crime - threat or violence committed against a person with a responsible position or a person who fulfills his/her public duty (art. 349 of the Criminal Code of the Republic of Moldova) - 22 crimes, on the fourth place fraud (art. 190 of the Criminal Code of the Republic of Moldova) with 19 crimes, theft (art. 186 of the Criminal Code of the Republic of Moldova) – 16 crimes and Escape from places of detention, evasion from serving the sentence (art. 317; 319 of the Criminal Code of the Republic of Moldova) with 14 crimes [4].

Most of the crimes recorded are in semi-closed penitentiaries (83.6%).

A good part of the crimes committed in penitentiary institutions are violent criminal actions. In penitentiaries there are also frequent crimes with the purpose of hoarding,

a large number of them being accompanied by violence. However, we note that only one case of intentional homicide was registered during the reference period. In 2021, the following negative situations were recorded in penitentiary institutions: During 2021, the relevant services carried out a series of interventions, including: searches, special activities, actions to prevent the introduction of prohibited objects/substances, discovery operations/ prevention of the crimes that were prepared/committed in the penitentiary.

Thus, in 2021, 12107 searches were carried out (2020-10570), more by 12.69%, of which: planned - 5176 (2020-5279), less by 1.95% and unannounced - 6931 (2020 - 5291), more by 23.66%. Bodily injuries: 1153 cases detected in the prisoners' environment (2020-1024) which is an increase of 11.18%: 270 cases detected on arrival from the isolation cells of police inspectorates (2020-237) an indicator increasing by 12.22% , and respectively, 883 cases detected in convicts in penitentiary institutions (2020-787). All causes of bodily injury were investigated and reported to the relevant section of the General Prosecutor's Office [4].

Of the total number of bodily injuries, 144 were determined as a result of altercations between inmates [16]. Application of physical force: 475 cases (2020-377) and 389 cases of application of special means on detainees (2020-296), thus a 20.63% increase in the chapter on the application of physical force, and in the application of special means an increase of 23.90% compared to the period of the previous year. The most frequent cases occurred in penitentiaries: no. 11-Balti (66/70 cases), no. 13-Chisinau (58/30 cases), no. 5-Cahul (51/42 cases), no. 2-Lipcani (45/45 cases), no. 6-Soroca (40/33 cases), no. 17-Rezina (33/25 cases), no. 12-Bender (25/29 cases) and no. 18 – Branesti (31/16 cases). All these situations were properly documented, with the preparation of the necessary documents to ascertain the facts. Attack on employees: 22 cases being established as attempted attacks (2020-20 cases of attack), in penitentiaries no. 1 – Taraclia, no. 2 – Lipcani, no. 3 – Leova, no. 5 – Cahul, no. 6-Soroca, no. 7 – Rusca, no. 9 – Pruncul, no. 11–Balti, no. 12-Tighina, no. 13-Chisinau, no. 15 – Cricova, no. 17-Rezina and no. 18-Branesti. In all cases, the appropriate materials were drawn up, according to art. 273 Criminal Procedure Code and sent to the prosecutor's office, as a result of which criminal cases were filed. Hunger strike: 711 cases of declaring a hunger strike (2020-662 cases), an indicator increasing by 6.89%, the most frequent cases being registered in penitentiaries no. 3-Leova (67 cases), no. 6 – Soroca (77 cases), no. 11-Balti (77 cases), no. 13–Chisinau (70 cases) and no. 17-Rezina (63 cases). The fact that most cases were registered specifically in these institutions, is due to the status of a criminal detention facility that they hold, respectively the conditions and the detention regime. Self-mutilation: 839 cases (2020-743 cases), increasing by 11.44%, the most frequent cases were recorded in penitentiaries no. 3-Leova (70 cases), no. 5 – Cahul (69 cases), no. 6-Soroca (108 cases), no. 13–Chisinau (168 cases) and no. 17 – Rezina (107 cases) [4].

The number of convicts in respect of whom measures to ensure personal security have been applied, according to Article 206 of the enforcement Code, constitutes 719 detainees, compared to 619 registered prisoners in the previous year, by 13.90% more [4].

As I mentioned before, embezzlement is a separate group of crimes in penitentiary institutions, but their discovery is quite low. Very often in penitentiaries there are thefts from other convicts, which leads to physical reckoning. As a rule, the victims do not reclassify these actions. Examining the cases of evasion in the period 2015-2021, we notice that the thefts occupy the fifth place, constituting 1.58% of the total number of crimes registered

in this period, robbery and blackmail the sixth place, constituting 0.80%. Analyzing their dynamics, we notice that the share of evasions is zero cases in the period 2018-2021. From here we can conclude that the given criminal acts have an increased latency.

A crime specific to penitentiary institutions with a high level of latency is violent actions of a sexual nature (art. 171, 172 Criminal Code of the Republic of Moldova). Of all crimes committed in penitentiary institutions, their share is 0.3%. During the reference period, only four crimes of this kind were registered.

The informal groups created in places of confinement have a particularly negative role on the penitentiary environment. Thus, as a rule, most of the existing groups in local penitentiaries have a negative behavioral orientation. In general, three large structures were formed in all the penitentiaries of the Republic of Moldova, this delimitation was achieved according to the criterion of ethnic affiliation in the following way: rural group - mainly composed of Moldovans; the Chisinau group - composed of ethnic Russians, mostly from Chisinau; the Gagauz group - composed of ethnic Gagauz and Bulgarians. There are also small groups created according to the criterion of the place of residence [2, p.125].

It is known that in penitentiary institutions there are organized criminal groups that have under control all the resources collected from the penitentiary and those illegally brought from outside, management with convicts, conflict resolution, etc. This control is carried out by means of the supervisor in the criminal language “*положенец*”(crime boss) who is called by the “*thieves in law*”, he/she has a great authority among the convicts and is recognized by the prison administration.

The existence of these criminal organizations in the penitentiary leads to the disorganization of the activity of the penitentiary institutions by undermining the order by the component groups of this organization. The increase in the danger of these criminal groups is due to the fact that often the people who started on the path of correction having an impeccable conduct and a conscientious attitude towards work are disadvantaged and surrounded by an atmosphere of terror. Acts of violence or violence of a sexual nature are often applied to them (this is demonstrated by the studied empirical materials). Thus, convicts in penitentiaries are classified according to criminal traditions and customs. This leads to the reduction of the chances of re-education of the convicts. In order not to fall into the category of “rejected”, the detainees are forced to accept the behavior imposed by the subculture. Thereby, convicts commit regime violations and even serious or particularly serious crimes. Based on what has been reported, it can be rightly stated that in penitentiary institutions, the control is carried out by organized criminal structures, with the state only having the role of maintenance.

The share of actions that disorganize the activity of penitentiary institutions in the structure of penitentiary crime does not reach large proportions, but in the last period it has seen an increasing trend (11 cases were registered in 2021). These crimes present a particular danger for the stability of prison life, thanks to the fact that they are committed, as a rule, by recidivists and people with a stable criminal orientation. The increase in the number of disorganizational actions, which, according to their specifics, are directed against the prisoners embarked on the path of correction and against the penitentiary administration, indicate a rooting of criminal traditions and visions in the way of life of the prisoners. On the other hand, the increase in the number of these crimes is due to the control by the criminal structures over the life of the penitentiary and the relations between the convicts. The atmosphere in the penitentiary institutions is disturbed by the robberies between the groups at liberty or in detention, by the terrorizing of the detainees

who adopt a behavior not accepted by the criminal environment, by the incitement to violence between the convicts and against the administration of the institution.

Conclusions

Based on the empirical and doctrinal material analyzed in this scientific approach, we conclude that penitentiary crime has its specific laws and special structure. Therefore, it is viewed as a type of self-inflicted crime.

In the penitentiary institutions of the Republic of Moldova, from 150 to 250 crimes are committed per year and the level of crime per thousand convicts is from 35 to 40 crimes depending on the type of penitentiary.

At the same time, from the conducted study it was found that about 90% of the number of crimes committed in penitentiary institutions are the following types of crimes, which in fact form the core of prison crime: 1) violent disobedience to the requirements of the penitentiary administration (art. 321 of the Criminal Code of the Republic of Moldova)); 2) actions that disorganize the activity of penitentiaries (art. 286 of the Criminal Code of the Republic of Moldova); 3) the threat or violence committed against a person with a responsible position or a person who fulfills his/her public duty (art. 349 of the Criminal Code of the Republic of Moldova); 4) fraud (art. 190 of the Criminal Code of the Republic of Moldova); 5) theft (art. 186 of the Criminal Code of the Republic of Moldova); 6) escape from places of detention (art. 317 of the Criminal Code of the Republic of Moldova); 7) evading the execution of the prison sentence (art. 319 of the Criminal Code of the Republic of Moldova); 8) torture, inhuman or degrading treatment (art. 166/1 of the Criminal Code of the Republic of Moldova); 9) traffic of influence (art. 326 of the Criminal Code of the Republic of Moldova); 10) rape (art. 171 of the Criminal Code of the Republic of Moldova); 11) violent actions of a sexual nature (art. 172 of the Criminal Code of the Republic of Moldova).

Bibliography

1. BUJOR, V., BEJAN, O., ILIE, S., CASIAN, S. *Elemente de criminologie*. Chişinău: Ştiinţa, 1997, 86 p.

2. CARP, S. *Crima organizată - factor dezorganizator al activităţii penitenciarelor*. În: Criminalitatea organizată şi economia tenebroasă în Republica Moldova. Materialele Conferinţei ştiinţifico-practice. Chişinău: ARC, 1999, p. 206-212.

3. CARP, S. *Prevenirea criminalităţii penitenciare*. Chişinău, 2004, 214 p.

4. *Date statistice ale Administraţiei Naţionale a Penitenciarelor*. În: RAPORT privind activitatea sistemului administrației penitenciare pentru anii 2016-2021. http://anp.gov.md/rapoarte-de-bilant-semestriale-anuale (vizitat la 07.09.2022).

5. Legea Republicii Moldova cu privire la sistemul administraţiei penitenciare nr.300 din 21.12.2017. În: Monitorul Oficial al Republicii Moldova, 16.02.2018, nr.48-57/124.

6. Legea Republicii Moldova pentru modificarea şi completarea unor acte legislative nr.163 din 20.07.2017. În: Monitorul Oficial al Republicii Moldova, 20.10.2017, nr.364-370/616.

7. Legea privind amnistia în legătură cu aniversarea a 25-a de la proclamarea independenţei Republicii Moldova nr.210 din 29.07.2016. În: Monitorul Oficial al Republicii Moldova, 09.09.2016, nr.293-305/632.

8. OANCEA, I. *Probleme de criminologie*. Bucureşti: ALL, 1998, 208 p.

9. АЛЕКСЕЕВ, А. И., СОЛОПАНОВ, Ю. В. *Криминологическая характеристика и профилактика рецидивной преступности*. Москва: МВШМ МВД СССР, 1979, 101 p.

10. АНТОНЯН, Ю. М. *Преступность в местах лишения свободы и ее причины*. În: Уголовное право, 2002, №4, p. 101-104.

11. БУРЛАКОВ, В. Н., КРОПАЧОВА, Н. В. *Криминология*. Санкт- Петербург: Юпитер, 2002, 206 p.

12. ГИРЬКО, С. И. *Производство предварительного следствия по делам о пенитенциарных преступлениях: соразмерность участия*. În: Российский следователь, 2019, №11, p. 17-21.

13. *Криминология. Учебник для юридических вузов.* Под общей редакцией ДОЛГОВОЙ, А. И. Москва: Инфра-М-Норма, 1997, 784 p.

14. *Криминология: Учебник для юридических вузов*. Под редакцией ДОЛГОВОЙ, А. И. Москва, 2002, 912 p.

15. ПАРФИНЕНКО, И. П. *Общее понятие пенитенциарных преступлений: система и виды*.

Российский следователь, 2012, №7, p. 41-45.

16. *Пенитенциарная криминология: Учебник*. Под редакцией АНТОНЯНА, Ю. М., ГРИШКО, А. Я., ФИЛЬЧЕНКО, А. П. Рязань, 2009, 567 p.

17. *Пенитенциарная преступность: сущность и актуальные проблемы предупреждения*. Под общей редакцией КАЛИНИНА, Ю. И. Владимир: ВЮИ ФСИН России, 2005, 100 p.

18. СТАРКОВ, О. В. *Основы криминопено-логии*. Уфа, 1997, 263 p.

19. ФИЛИППОВА, О. В. *Преступность в местах лишения свободы и ее предупреждение*. Диссертация кандидата юридических наук. Томск, 2009, 190 p.

20. ФИЛЬЧЕНКО, А. П. *Пенитенциарная преступность: определимся с понятием*. În: Человек: Преступление и наказание, 2008, №2, p. 84-89.

21. ХОХРИН, С. А. *К вопросу об особенностях характеристик пенитенциарной преступности*. În: Вестник Тверского государственного университета. Серия: Право, 2014, №3, p. 224-229.

22. ШИХАНЦОВ, Г. Г. *Криминология*. Москва: Зерцало, 2001, 359 p.

CZU 343.162.1
DOI https://doi.org/10.52388/2345-1971.2022.e1.05

ON PROCEDURAL ACTS ISSUED BY INVESTIGATING JUDGES APPOINTED CONTRARY TO LAW 514/1995

Iulian RUSANOVSCHI
PhD student, Free International University of Moldova,
Chisinau, Republic of Moldova
e-mail: *rusanovschi_iulian@yahoo.com*
https://orcid.org/0000-0002-6066-1762

Everyone has the right to a fair examination and resolution of his or her case by an independent, impartial, lawfully constituted court acting in conformity with this Code. These guarantees take the form of the constitutional principle of free access to justice, the violation of which is sanctioned by declaring absolute nullity of procedural acts obtained or adopted contrary to this principle. There is sufficient evidence to show that the appointment of investigating judges during the period 2015-2018 was in violation of the provisions of Article 151 of Law No. 514/1995 on the Organization of Judges - that, in the editorial office up to January 12, 2018, which regulated that an investigating judge may hold that dignity only if he has previously held the position of judge for at least 3 years. Unfortunately, these deviations, whether consciously or mistakenly admitted by the Superior Council of Magistracy, have had and will have the most unexpected consequences, because those investigating judges accused of violating the law have committed a series of procedural acts that are thus rendered null and void.

Keywords: *law, Constitution, investigating judge, magistrate, Superior Council of the Magistracy, court, nullity.*

CU PRIVIRE LA ACTELE PROCEDURALE EMISE DE JUDECĂTORII DE INSTRUCȚIE NUMIȚI ÎN FUNCȚIE CONTRAR LEGII 514/1995

Orice persoană are dreptul la examinarea şi soluţionarea cauzei sale în mod echitabil, în termen rezonabil, de către o instanţă independentă, imparţială, legal constituită, care va acţiona în conformitate cu prezentul Cod. Aceste garanții îmbracă forma principiului constituțional al accesului liber la justiție, încălcarea cărora este sancționată prin declararea nulității absolute a actelor procedurale obținute sau adoptate contrar acestui principiu. Există suficiente dovezi pentru a demonstra că numirea unor judecători de instrucție în perioada 2015-2018 s-a făcut contrar prevederilor art. 15[1] din Legea nr. 514/1995 privind organizarea judecătorească, în redacția de până la 12.01.2018, care reglementa că un judecător de instrucție poate deține această demnitate, doar în cazul în care a deținut anterior funcția de judecător cel puțin 3 ani de zile. Cu regret, aceste abateri admise conștient sau eronat de către Consiliul Superior al Magistraturii, au avut și vor avea consecințe din cele mai neașteptate, deoarece acei judecători de instrucție numiți contrar legii, au adoptat o serie de acte procedurale care în consecință sunt lovite de nulitate absolută.

Cuvinte-cheie: *lege, Constituție, judecător de instrucție, magistrat, Consiliul Superior al Magistraturii, instanță, nulitate.*

SUR LES ACTES DE PROCÉDURE ÉMIS PAR LES JUGES D'INSTRUCTION NOMMÉS EN EXERCICE EN VIOLATION DE LA LOI 514/1995

Toute personne a le droit de voir son cas examiné équitablement et résolu dans un délai raisonnable par un tribunal indépendant, impartial et légalement constitué qui agira conformément au présent code. Ces garanties prennent la forme du principe constitutionnel du libre accès à la justice, dont la violation est sanctionnée par la déclaration de nullité absolue des actes de procédure obtenus ou

adoptés contrairement à ce principe. Il existe des éléments suffisants pour prouver que la nomination des juges d'instruction en 2015-2018 a été faite contrairement aux dispositions de l'art. 151 de la loi n ° 514/1995 sur l'organisation judiciaire, à la rédaction jusqu'au 12.01.2018, qui réglementait qu'un juge d'instruction ne peut exercer cette dignité que s'il a précédemment occupé le poste de juge pendant au moins 3 ans. Malheureusement, ces déviations consciemment ou à tort admises par le Conseil Supérieur de la Magistrature, ont eu et auront les conséquences les plus inattendues, car ces juges d'instruction nommés contrairement à la loi, ont adopté une série d'actes de procédure qui sont par conséquent frappés de nullité absolue.

Mots-clés: *loi,Constitution, juge d'instruction, magistrat, Conseil Supérieur de la Magistrature, tribunal, nullité.*

ПРОЦЕССУАЛЬНЫЕ ДОКУМЕНТЫ, ИЗДАННЫЕ СУДЬЯМИ, НАЗНАЧЕННЫМИ ВОПРЕКИ ПОЛОЖЕНИЯМ ЗАКОНА 514/1995

Каждый человек имеет право на справедливое рассмотрение и разрешение его дела в разумные сроки независимым, беспристрастным, законно учрежденным судом, который будет действовать в соответствии с настоящим Кодексом. Эти гарантии выражаются в форме конституционного принципа свободного доступа к правосудию, нарушение которого санкционируется признанием недействительными процессуальных действий, полученных или принятых вопреки этому принципу. Имеются достаточно доказательств того, что назначение следственных судей в период 2015-2018 годов было произведено вопреки положениям ст. 151 Закона №. № 514/1995 об организации судоустройства, в редакции до 01.12.2018, которым регламентировалось, что следственный судья может занимать эту должность только в том случае, если он ранее занимал должность судьи не менее 3 лет. К сожалению, эти уклонения, сознательно или ошибочно допущенные Высшим советом магистратуры, имели и будут иметь самые неожиданные последствия, так как назначенные вопреки закону следственные судьи приняли ряд процессуальных актов, которые, следовательно, признаются недействительными.

Ключевые слова*: закон, Конституция, следственный судья, магистрат, Высший совет магистратуры, суд, недействительность.*

Introduction

Given the principle of the rule of law, a "*court*" must always be constituted "*according to law*", otherwise it lacks the necessary legitimacy in a democratic society to hear the cases entrusted to it. The general principles and norms of international law and international treaties to which the Republic of Moldova is a party constitute elements of criminal procedural law and directly give rise to human rights and freedoms in the criminal process.

Art. 19 of the Criminal Procedure Code of the Republic of Moldova provides that "*every person has the right to the examination and resolution of his/her case fairly, within a reasonable time, by an independent, impartial, legally constituted court, which will act in accordance with this code*[1]", and art. 14.1 of the Covenant on Civil and Political Rights[2] operates with the notion of "*competent, independent and impartial tribunal, established by law*". The European Convention on Human Rights[3] and Fundamental Freedoms refers, in art. 6.1, to an "*independent and impartial court established by law"*

Main ideas of the research

The phrase "*according to the law*" refers not only to the legal basis of the court's very existence, but also to the court's compliance with the specific rules by which it conducts itself (*Sokourenko and Strygoun vs. Ukraine, paragraph 24*). The legality of a court must necessarily cover its composition [Buscarini

[1] Codul de Procedură Penală al Republicii Moldova, nr. 122 din 14.03.2003. Monitorul oficial nr. 248-251 din 05.11.2013.

[2] Pactul cu privire la drepturile politice și civile din 16.12.1966

[3] Convenția Europeană a Drepturilor Omului

vs. San Marino (dec.)]. In the guide on art. 6 of the ECHR[4] states that: "*Procedures regarding the appointment of judges should not be transferred to the level of internal practice*" (ibidem, points 154-156)... "*The law*" referred to in art. 6 § 1 is therefore not only the legislation relating to the establishment and competence of judicial bodies, but also any other provision of domestic law, the non-compliance of which leads to the participation of one or more judges in illegal cases (*DMD Group, A.S., vs. Slovakia, para. 59*). Failure by a court to comply with the provisions of domestic law basically implies a violation of art. 6 § 1 (*DMD Group, A.S., vs. Slovakia, § 61*)."

A court which, without any explanation, goes beyond its ordinary jurisdiction, deliberately disregarding the law, is not a "court constituted according to law" in the proceedings in question (Sokourenko and Strygoun vs. Ukraine, §§ 27- 28). Thus, a court that examines the merits of the case instead of the competent court is not a "*court constituted according to law*" (*Aviakompaniya A.T.I., ZAT vs. Ukraine, paragraph 44).*

In the recent practice of the courts in the Republic of Moldova, several situations can be observed in which the courts are constituted contrary to the law, in this case it is about several investigative judges.

According to art. 15[1] of Law no. 514/1995 on judicial organization[5], in the redaction up to January 12, 2018, it was regulated that: *from among the judges of the court, the judges who will exercise the powers of the investigating judge are appointed. (2)* ***The investigating judge*** *is* ***appointed*** *by the Superior Council of the Magistracy with its consent, upon the proposal of the president of the court,* ***from among the judges who have been active as a judge for at least 3 years, for a term of 3 years, without the possibility of serve two consecutive mandates.*** This rule was amended by the Parliament of the Republic of Moldova only on January 12, 2018 by excluding from the Law the phrase*: "... from among judges who have been active as a judge for at least 3 years, for a term of 3 years..."*

It is also worrying how the Parliament modified the text of art. 15[1] of Law no. 514/1995 (by excluding the phrase *"... from among the judges who have served as a judge for at least 3 years, for a term of 3 years...").* Respectively, by Government Decision no. 977 of November 15, 2017, the draft law was approved and presented to the Parliament for the amendment and completion of some legislative acts, which aimed to create the position of *deputy chief of the secretariat of the Chisinau Court*. Thus, Law 315/2017[6] in the original version did not provide for the exclusion of the phrase *"... from among judges who have been active as a judge for at least 3 years, for a term of 3 years...".* In fact, in the first and second reading (according to the transcripts of the Parliament) the deputies voted for the draft Law no. 315/2017 amending Law no. 514/1995 by creating the position of *deputy chief of the secretariat of the Chisinau Court,* and in the final version of the law it is legislated in a surprising way and in violation of the Parliament Regulation that the sentence from art. 15[1] of Law no. 514/1995 - *"... from among the judges who have been active as a judge for at least 3 years, for a 3-year term..."* - is excluded (without the Parliament having voted knowingly for this amendment).

Despite the requirements established by art. 15[1] of Law no. 514/1995 in the wording until January 12, 2018, although the magistrate V. B. was appointed to the position of judge by the decree of the President of the Republic of

[4] https://www.echr.coe.int/Documents/Guide_Art_6_RON.pdf

[5] Legea nr. 514/1995 privind organizarea judecătorească, publicată în Motitorul Oficial nr. 58 din 19.10.1995.

[6] Legea nr. 315 din 22.12.2017 privind modificarea și completarea unor acte legislative. Monitorul Oficial nr 7-17 din 12.01.2018.

Moldova no. 1712 of **08.05.2015**[7] for a period of 5 years, shortly after, by CSM (*Superior Council of Magistracy*) Decision no. 798/32 of 22.11.2016 V.B. is appointed investigating judge for the Buiucani Court, Chisinau municipality for a term until December 31, 2016. This appointment to the position of investigating judge of a magistrate who had not previously worked as a judge for at least 3 years, was carried out contrary to the provisions of art. 15^1 of Law no. 514/1995 on judicial organization, that is, the court was established contrary to the law.

By the same Decision of the CSM *(Superior Council of Magistracy*), the young magistrate A.N., who had also been appointed as a judge by the Decree of the President of the Republic of Moldova in 2015, was also appointed as an investigating judge. Later, by the CSM Decision no. 932/38 of 27.12.2018 the same magistrates are extended their duties as **investigating judges** for a new mandate (covering the period 01.01.2017-31.12.2017) in the newly created court (Chisinau Court, Buiucani headquarters). And on **19.12.2017 CSM** issues another decision with no. 836/37 appointing for the third consecutive time the judges A. N. and V. B. **for a period of 2 years, as investigating judges**. This state of affairs was confirmed by the CSM by letter no. 595 of March 9, 2022, indicating as the basis the editorial of article 15^1 of Law no. 514/1995 regarding the judicial organization for 2022, but not the one in force at the date of issuing the decisions described above.

In the criminal case *I.R*., these magistrates issued a series of decisions by which they authorized the carrying out of special investigative measures, postponed the notification of the recognition order as a suspect and found compliance with the legal requirements in the process of carrying out the interceptions and the surveillance of the person whose is charged with the crime of influence peddling, as follows:

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-6871/2017 of 27.12.2017 which authorized the extension of the special investigative measure – interception (Vol. I, page 65 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-366/2018 of 25.01.2018 authorizing the extension of the special investigative measure – interception (Vol. I, page 74 of the criminal case);

The conclusion of the investigating judge (and the court mandate) V.B. no. 11-365/2018 of 25.01.2018 by which the extension of the special investigation measure-the interception (vol. I, tab 108 of the criminal case) was authorized;

The conclusion of the investigating judge (and the judicial mandate) A.N. no. 11-6443/2017 of 01.12.2017 which authorized the special investigative measure – interception (Vol. I, page 127 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) A.N. no. 11-6889/2017 of 28.12.2017 which authorized the extension of the special investigative measure – interception (Vol. I, page 137 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-300/2018 of 23.01.2018 which found compliance with the legal requirements when conducting the interception (Vol. I, page 151 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-84/2018 of 10.01.2018 which authorized the extension of the special investigative measure – documentation with technical means (Vol. I, page 164 of the criminal case);

The conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-

[7] Decretul Președintelui Republicii Moldova nr. 1712 din 05.08.2015 privind numirea în funcție a unor judecători. Monitorul Oficial nr. 206-210 din 07.08.2015.

364/2018 of 25.01.2018 which authorized the extension of the postponement of informing the suspect I.R. of the order recognizing him as a suspect from 01.12.2017 (Vol. III, tab 162 of the criminal case);

Pursuant to art. 251 para. 2) CPP[8] (Criminal Procedure Code): "*violation of the legal provisions related to the competence according to the matter or according to the quality of the person, to the notification of the court, to its composition and to the publicity of the court session, to the participation of the parties in mandatory cases, to the presence of the interpreter, the translator, if they are mandatory according to the law, attracts the nullity of the procedural act*". In turn, art. 6 para. 1) The CPP (Criminal Procedure Code) defines the procedural document as: "*the document that records any procedural action provided for by this code, namely:* ***ordinance****, minutes, indictment,* ***conclusion****, sentence, decision, judgment, etc*.".

All these ordinances and conclusions are hit with absolute nullity because on the date of their issuance magistrates V.B and A.N. they could not be legally constituted in their capacity as investigating judges, because they had not previously worked as judges for at least 3 years, nor could they be appointed as investigating judges for the 3rd consecutive term.

Consequently, any person has the constitutional right to have his/her file examined by a legally constituted court, and the procedural documents, conclusions - adopted by a court constituted contrary to the provisions of art. 15^1 of Law no. 514/1995 on judicial organization are struck by absolute nullity and cannot be used as the basis of a court sentence, regardless of what it is.

At the same time, all *the evidence* acquired on the basis of these illegal conclusions adopted by the two investigating judges who held this capacity contrary to Law no. 514/1995 (edition up to January 12, 2018), are to be excluded from the file, as having been acquired contrary to the legal procedure and with the authorization of a court constituted illegally and unconstitutionally. Consequently, if the conclusion of the investigating judge (and the judicial mandate) V.B. no. 11-364/2018 of 25.01.2018, which authorized the extension of the postponement of informing the suspect I.R. of the order recognizing him as a suspect, are struck by absolute nullity, then the criminal case (which is currently pending before the Chisinau Court) is to be terminated, because the criminal investigation body violated the provisions of art. 63 CPP (Criminal Procedure Code) (the quality of being a suspect has ceased by law), a fact that generated the nullity of the indictment order against the defendant.

In such an interpretation, it is concluded that the prosecutor's order by which *I.R.* was recognized as a suspect, the right has expired until he is recognized as accused, and the indictment order is struck with absolute nullity, and all acts and actions of the criminal investigation body carried out after the expiry of the legal term for holding the person as a suspect, they are null and void.

Article 20 of the Constitution represents the founding block of the democratic system, in which any person has the right to effective satisfaction in case of violation of his/her rights. The first paragraph defines the scope of application of the article for "*any person*". The semantic interpretation of the notion "*any person*" unequivocally foresees that the action of the constitutional article extends to all citizens, foreigners or stateless persons. In addition to this general notion, the article contains notions that explain the application of the article to any person who has legitimate rights - here, the rights enunciated in the Constitution or in the international instruments to which the Republic of Moldova is a party.

[8] Codul de Procedură Penală al Republicii Moldova, nr. 122 din 14.03.2003. Monitorul Oficial nr. 248-251 din 05.11.2013

Conclusions

In the end, we consider that the appointment of the investigating judges during the years 2015-2018 contrary to art. 15^1 of Law no. 514/1995 regarding the judicial organization represents a violation of the provisions of art. 20 of the Constitution and of art. 6 of the European Convention, because the state was not able to ensure the legal constitution of a court (in this case, being the investigating judge). Although some members of the CSM *(Superior Council of Magistracy*) have raised these violations at one time, and art. 15^1 of Law no. 514/1995 was partially modified by excluding the phrase: *"... among the judges who worked in the position of judge at least 3 years, for a mandate of 3 years ..."* However, the CSM has again appointed magistrates V.B. and A.N. as investigative judges for the third consecutive term (in December 2017), despite the fact that a magistrate can be an investigative judge for at most two consecutive terms.

This serious deviation from the way of constituting the instructional courts, creates the premises of an insecurity of the legal relations and hits with absolute nullity the procedural documents issued by these instructional judges, and the persons to whom the legitimate rights and the free access to justice were damaged, in the case of an illegal conviction, ECtHR can be addressed to request the conviction of the Republic of Moldova and to obtain accordingly the trigger to review the criminal proceedings. At the same time, there are several cases before the Chisinau Court that are to be terminated in accordance with the provisions of art. 63, 251, 275 par. 9) CPP (Criminal Procedure Code) because the investigative judges mentioned above and constituted as such contrary to the law, issued procedural documents that are struck by absolute nullity, which consequently excludes the possibility of continuing the criminal prosecution of the person.

Bibliography

1. Legea nr. 514/1995 Privind organizarea judecătorească, publicată în motitorul oficial nr. 58 din 19.10.1995
2. Codul de Procedură Penală al Republicii Moldova, nr. 122 din 14.03.2003. Monitorul oficial nr. 248-251 din 05.11.2013
3. Pactul cu privire la drepturile politice și civile din 16.12.1966
4. Convenția Europeană a Drepturilor Omului
5. Legea numărul 315 din 22.12.2017 privind modificarea și completarea unor acte legislative. Monitorul Oficial nr 7-17 din 12.01.2018
6. Decretul Președintelui Republicii Moldova numărul 1712 din 05.08.2015 privind numirea în funcție a unor judecători. Monitorul Oficial nr. 206-210 din 07.08.2015
7.https://www.echr.coe.int/Documents/Guide_Art_6_RON.pdf (accesat - 22.09.2022)

CZU 341.9.
DOI https://doi.org/10.52388/2345-1971.2022.e1.06

PROTECTION OF OWNERSHIP IN THE REPUBLIC OF MOLDOVA, UKRAINE, EUROPEAN UNION. COMPARATIVE LEGAL ASPECT

Alexandru SOSNA
Doctor of law, Moldova State University,
Chisinau, Republic of Moldova
e-mail: *alexandru_sosna@mail.ru*
https://orcid.org/0000-0002-4806-1756

Iuliana GHERMAN
Master student of the Faculty of Law, Moldova State University,
PhD student of the "Ion Creangă" University,
Chisinau, Republic of Moldova
e-mail: *iulianababin1987@yandex.ru, iuliana@iic.md*
https://orcid.org/0000-0001-8717-7092

The paper deals with the problems of legal regulation of civil and legal protection of absolute civil rights in the Republic of the Moldova, Ukraine, as well as the European Union. Absolute civil rights, in particular, such as property rights, occupy an important place in the civil law system. These rights are fundamental not only to civil law, but also to the whole national legal system, because personal non-property rights are the basis of the vital activity of an individual, property rights, in particular property rights, are basic economic rights (rights intellectual property rights ensure the protection of literary, artistic, scientific and technical creative activity, and hereditary rights ensure effective civil succession). Therefore, a comprehensive scientific and legal general theoretical study of the whole range of issues concerning the grounds for the emergence of absolute civil rights, their place in the civil law system of Moldova, Ukraine and other countries, types of absolute civil rights in civil science, and their legislative consolidation is necessary and relevant. These surveys can be used in research, rule-making, educational activity.

Keywords: *absolute civil rights, property rights, limits to the exercise of absolute civil rights, Republic of Moldova, Ukraine, European Union.*

ASIGURAREA DREPTURILOR DE PROPRIETATE ÎN REPUBLICA MOLDOVA, UCRAINA, UNIUNEA EUROPEANĂ. ASPECTE LEGALE COMPARATE

Prezenta lucrare examinează aspectele problematice ale reglementării legale și ale protecției drepturilor civile absolute în Republica Moldova și Ucraina, precum și în cadrul Uniunii Europene. Drepturile civile absolute, în special, cum ar fi dreptul la proprietate, ocupă un loc important în sistemul dreptului civil. Aceste drepturi sunt fundamentale nu numai pentru dreptul civil, ci și pentru întregul sistem juridic național, deoarece drepturile personale, morale stau la baza vieții unei persoane, drepturile reale, în special dreptul de proprietate , sunt drepturi economice de bază (drepturile de proprietate intelectuală protejează activitatea de creație literară, artistică, științifică și tehnică, iar drepturile de moștenire asigură succesiunea civilă efectivă). Prin urmare, un studiu teoretic general științific și juridic cuprinzător al întregii game de probleme privind temeiurile apariției drepturilor civile absolute, locul acestora în sistemul de drept civil din Moldova, Ucraina și alte țări, tipurile de drepturi civile absolute în domeniul civil și consolidarea lor legislativă rămân necesare și relevante. Aceste cercetări pot fi utilizate în activități științifice, stabilire de standarde, educaționale și de predare.

Cuvinte-cheie: *drepturi civile absolute, drepturi de proprietate, limite ale exercitării drepturilor civile absolute, Republica Moldova, Ucraina, Uniunea Europeană.*

ASSURANCE DES DROITS DE PROPRIÉTÉ EN RÉPUBLIQUE DE MOLDOVA, EN UKRAINE ET DANS L'UNION EUROPÉENNE. ASPECTS JURIDIQUES COMPARÉS

Cet article examine les aspects problématiques de la réglementation juridique et de la protection des droits civils absolus en République de Moldova et en Ukraine, ainsi qu'au sein de l'Union européenne. Les droits civils absolus, en particulier, tels que le droit de propriété, occupent une place importante dans le système de droit civil. Ces droits sont fondamentaux non seulement pour le droit civil, mais aussi pour l'ensemble du système juridique national, car les droits personnels et moraux sont la base de la vie d'une personne, les droits réels, en particulier les droits de propriété, sont des droits économiques fondamentaux (les droits de propriété intellectuelle protègent l'activité créative littéraire, artistique, scientifique et technique, et les droits de succession assurent une succession civile effective). Par conséquent, une étude théorique scientifique et juridique générale complète de toute la gamme des questions concernant les motifs de l'émergence des droits civils absolus, leur place dans le système de droit civil de la Moldova, de l'Ukraine et d'autres pays, les types de droits civils absolus dans le domaine civil et leur consolidation législative restent nécessaires et pertinents. Cette recherche peut être utilisée dans des activités scientifiques, normatives, éducatives et pédagogiques.

Mots-clés: *droits civils absolus, droits de propriété, limites à l'exercice des droits civils absolus, République de Moldova, Ukraine, Union Européenne.*

ОБЕСПЕЧЕНИЕ ПРАВ СОБСТВЕННОСТИ В РЕСПУБЛИКЕ МОЛДОВА, УКРАИНЕ, ЕВРОПЕЙСКОМ СОЮЗЕ. СРАВНИТЕЛЬНО-ПРАВОВОЙ АСПЕКТ

В данной работе рассматриваются проблемные вопросы правового регулирования и защиты абсолютных гражданских прав в Республике Молдова и Украине, а также в пределах Европейского Союза. Абсолютные гражданские права, в частности, такие как право собственности, занимают важное место в системе гражданского права. Эти права являются фундаментальными не только для гражданского права, но и для всей национальной правовой системы, ведь личные неимущественные права являются основой жизнедеятельности физического лица, вещные права, в частности право собственности, являются базовыми экономическими правами (права интеллектуальной собственности обеспечивают охрану литературной, художественной и научно-технической творческой деятельности, а наследственные права обеспечивают эффективное гражданское правопреемство). Поэтому необходимым и актуальным огстается комплексное научно-правовое общетеоретическое исследование всего круга вопросов относительно оснований возникновения абсолютных гражданских прав, их места в системе гражданского права Молдовы, Украины и других стран, видов абсолютных гражданских прав в цивилистической науке и их законодательного закрепления. Данные изыскания могут быть использованы в научно-исследовательской, нормотворческой, учебно-преподавательской деятельности.

Ключевые слова: *абсолютные гражданские права, имущественные права, пределы осуществления абсолютных гражданских прав, Республика Молдова, Украина, Евросоюз.*

Introduction

Scientific studies of absolute civil rights and their types were carried out both during the Soviet era and in the independent Republic of Moldova and Ukraine. However, before the declaration of independence in Moldova and Ukraine, these studies were mostly of a general theoretical nature, since property relations were to a certain extent legally limited, and the personal non-property rights of a person were also not widely used. Despite this, it is worth noting the scientific works on certain absolute civil rights of such famous scientists as: *B. S. Antimonov, S. M. Bratus, D. M. Genkin, O. S. Ioffe, L. A. Krasavchikova, S. N. Landkof, Yu. G. Matveev, N. N. Malleina, M. S. Mallein, A. A. Podoprigora, Z. V. Romovskaya, E. A. Sukhanov* and others.

Main points

Moldavian jurist *Alexander Sosna* writes that *“property as a legal category means that property belongs to certain persons*

– individuals or groups – under certain conditions and in certain forms (the right of ownership in the subjective sense). Property is divided into two main forms: public and private. Public property is divided into state and municipal. Private property is property owned by individuals and legal entities that are not state or municipal enterprises. According to paragraph (1) Art. 315 of the Civil Code of the Republic of Moldova (hereinafter referred to as the Civil Code of the Republic of Moldova) No. 1107-XV of 06/06/2002, the owner has the right to possess, use and dispose of the thing[1]. Therefore, according to the research of the above-mentioned author, the owner has 3 powers:

1. *right of possession*;
2. *right of use* ;
3. *the right to dispose of property* .

In the work of the Moldovan author, we read that *"according to part (1) of Art. 303 of the Civil Code of the Republic of Moldova, possession is acquired by deliberately achieving the actual possession of a thing.* According to paragraph (1) Art. 285 of the Civil Code of the Republic of Moldova *"things are recognized as all objects that can be an individual or collective property, and property rights. Things are divided into immovable and movable*[2].

After modernization, the Civil Code of the Republic of Moldova was supplemented with some important norms protecting personal non-property rights. Yes, Art. 43 of the Civil Code of the Republic of Moldova provides that, *in accordance with the law, every natural person has the right to life, health, physical and mental integrity, to free expression of opinion, to the name, honor, dignity and professional reputation, to his own image, to respect for intimate, family and privacy, the protection of personal data, respect for one's memory and body after death, as well as other similar rights recognized by law. These rights are inviolable and inalienable*[3]. According to Art. 1 Civil Code of the Republic of Moldova, legislation is based on the recognition of the equality of participants in the relations they regulate, the protection of intimate, private and family life, the recognition of the inviolability of property, freedom of contract, the protection of good faith, the protection of consumer rights, the recognition of the inadmissibility of anyone interfering in private affairs, the need for the unhindered exercise of civil rights, ensuring restoration of violated individual rights, their protection by competent jurisdictional bodies.

In this article, we will try to determine the prerequisites for the implementation of absolute civil law, which should include: a) the presence of a specific right in a person, its legislative recognition in the form of general permission or direct consolidation in the rule of law, and the legitimate grounds for acquiring such a right by a specific person; b) the presence of a person - a subject of law - an appropriate amount of civil capacity; c) the absence of legal and factual obstacles to the corresponding behavior of the subject; d) the proper subject of the exercise of the right. A doctrinal approach to understanding the purpose of civil law protection of absolute rights is substantiated, which covers not only the reaction to the violation itself and its consequences, but is also aimed at preventing violations of both an absolute civil right and a legally protected interest. It also substantiates the advantages of civil law protection of absolute rights, due to a number of specific

[1] Сосна Александру, Защита права собственности. In: Legea şi viaţa. 2018, nr. 5(317), pp. 36-39. URL: https://ibn.idsi.md/sites/default/files/imag_file/36-39.pdf (дата обращения: 26.11.2021).

[2] The same source.

[3] *Гражданский кодекс Республики Молдова: Закон №133 от 15.11.2018. // Опубликован: 01.03.2019 в Официальном мониторе №66-75 art. №:132. Вступил в силу 01.03.2019.*

features and special legal approaches in the regulation of civil liability, the property nature of civil liability; additional burden for the violator of civil rights and interests; the horizontal nature of responsibility, due to the legal equality of participants in civil relations; compensatory (restorative) nature of civil liability; the initiative of the injured party to apply state coercion to the violator of his rights and interests, etc.

Scholar *Bogdan Shcherbina* from Ukraine believes that the current practice of the courts of individual countries of the European Union (hereinafter referred to as the EU) and the European Court of Human Rights (hereinafter referred to as the ECtHR, the European Court, the Court) is correct, since the courts must respond to the realities of social relations due to the development information technologies. In the EU countries, the provision of the European Convention on Human Rights (hereinafter referred to as the ECHR)[4] is a certain guideline for the uniform enforcement of property rights[5]. According to the well-known Ukrainian lawyer and Chairman of the Supreme Court of Ukraine *Y. Romanyuk* , the correct interpretation of the fundamental principles of protection of property rights in accordance with Article 1 of the Protocol to the Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) and the application of the relevant practice of the ECtHR becomes an impetus for the correct resolution of disputes by the courts at the national level[6]. Indeed, the right to private property, the possibility of its normal implementation and protection is a sign of a developed *legal state.*

It is known that the ECHR was founded in 1959, and is located in Strasbourg (a city in Eastern France), in the Palace of Human Rights. It is within the walls of the eminent building, designed by the British architect *Richard Rogers* , that the Court carefully monitors the respect for the human rights of millions of Europeans in the member states of the Council of Europe that have ratified the Convention[7]. The Court is a supranational, international judicial body competent to issue binding rulings (for States Parties) and on complaints filed individually by applicants, individuals and/or States about violations of the civil and political rights set forth in the Convention. Since 1998 it has been possible to file complaints directly. Thanks to the practice of the Court, the Convention is considered a powerful and dynamic tool for solving pressing problems and challenges, and strengthening the rule of law and democracy in Moldova. In order to understand what is the primary role of the European Court in protecting the rights of citizens, we will single out the most important rule that is indisputably observed: ***the court examines only cases of violation of those rights that are guaranteed by the Convention and its Protocols.*** *In all other cases, all complaints will be rejected.* Note that the Convention establishes civil and political rights, and most socio-economic rights are not enshrined in it. Of the economic rights, the Convention, in particular Article 1 of Protocol No. 1, protects only *the property right of* individuals and legal entities (that is, individuals who have the right to freely use their property). By virtue of Art. 1 of Protocol No. 1 to the Convention, *every natural or legal person has the right to respect for*

[4] Щербина Б. С. Абсолютні цивільні права: реалізація і захист. Київ. 2018. Дисс. на здобуття ст. докт. юрид. наук. с. 98.

[5] С наиболее точной информацией о ратификации данной Конвенции и ее Протоколов, заявлений, оговорок можно ознакомиться, переходя по ссылкам: www.conventions.coe.int. https://www.echr.coe.int/documents/convention_rus. pdf (дата обращения: 26.11.2021).

[6] Там же..

[7] Европейский Суд по правам человека. URL:https://www.coe.int/ru/web/moscow/european-court (дата обращения: 26.11.2021).

his property. No one may be deprived of his property except in the public interest and under the conditions prescribed by law and the general principles of international law. The practice of the ECHR provides for the possibility of such a trial in which the respondent is the plaintiff's own state. The basis is the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (hereinafter referred to as the Convention) and its Protocols[8].

The Convention is the basis of the activity of the Court and it protects not only the right of ownership in its classical form and understanding (*possession, use, disposal*), but also operates when violations of property rights are associated with an untimely court decision on a property dispute, excessive amounts of tax collection or fines, as well as the impossibility for the owner to use his property due to the deterioration of the environmental situation, disasters, during the liquidation of emergency situations (hereinafter - ES), during siege, military, emergency situations [9](hereinafter - PE), against the backdrop of the spread of pandemics, and with unreasonable deprivation / restriction of the legal right to inherit, disputes between the tenant and the owner, damage to property during martial law in the country, other situations with consequences [10]. It should be noted that the state of emergency in the Republic of Moldova provides for much more radical measures, including those restricting the freedoms and rights of citizens. In particular, it is during an emergency that the authorities have the right to temporarily relocate residents to safer areas, mobilize the able-bodied population, and urgently remove heads of state / non-state organizations from work. Thus, requisition, expropriation, forcible eviction of residents from their houses/apartments, planned *«in the name of the public good»* are not always humane, and also do not always provide legal protection for the property of vulnerable segments of the population. The right of private property and its protection on the territory of the Republic of Moldova are guaranteed, and this is officially enshrined in Art. 46 of the Constitution of the Republic of Moldova.

The European Court also clarified that the concept of "property" includes *"private law assets that are not physical property, such as shares or claims based on contract or tort".* As well as benefits arising from certain types of insurance [11]. Note that the *decision becomes final if it has not been appealed and procedures for its execution have been initiated.*

There are complex disputes about «property». Thus, for example, the Court considers that a license to engage in or other activity may be property, but only in cases where this implies the long-term nature of this license, the receipt of benefits and dependence on the emergence of reasonable legitimate expectations from the owner himself.

In addition to the usual content of property rights, the European Court also includes non-property (personal) rights, for example, we also include "reputation" in it, justifying this by the fact that in some situations and under certain conditions "reputation" can be equated with the right of ownership (for example, Van Marle and Others v. the Netherlands). In their

[8] Докипедия: Европейского Суда по правам человека в защите экономических прав (материал подготовила Н.В. Вильская, РФ).

[9] Ст. 17-27 Закон «О режимах чрезвычайного, осадного и военного положения» N 212-XV от 24.06.2004 (в силу 06.08.2004) // Мониторул Официал ал Р.Молдова N 132-137 ст.696 от 06.08.2004 (дата обращения: 26.11.2021).

[10] Maksurov A.A. Protection of property rights from unreasonable interference of the state in the rights of the owner in the European Court of Human Rights // *International public and private law.* 2011. No. 5. p. 13-17.

[11] Решение Европейского Суда по правам человека по делу "Stran" Greek Refineries and Stratis Andreadis v. Greece" (N 13427/87) // Европейский Суд по правам человека. Избранные решения. Т. 2. М.: Норма, 2000. с. 54-68.

comments on the jurisprudence, the compilers of the ECtHR Human Rights Bulletin quite rightly pointed out that a significant problem now raised by the applicants is the non-enforcement of court decisions in civil cases, on the payment of benefits, pensions and other types of compensation.

Another category of cases for the protection of property rights is represented by cases for the collection of taxes, fines and other debts, mandatory fiscal payments. In the Republic of Moldova, in the fight against illegal actions of credit institutions/banks, the provisions of *the Consumer Protection Law no* . 105 of 13-03-2003 significantly help lawyers [12].

When considering cases arising from property relations, the ECtHR characterized this problem differently, arguing that *“any derogation of the owner’s fund” is already an “encroachment”* on his property [13]. Consequently the question arises - is even the slightest encroachment on someone's property lawful without legal grounds? In the practice of the ECtHR, we distinguish other categories of cases for the protection of property rights in case of various types of deprivation of property - confiscation, expropriation, nationalization of property, which often represents a disproportionate interference, unjustified from the point of view of Article 1 of Protocol No. 1. This article does not guarantee the right to receive full compensation in all circumstances, since legitimate purposes are *“in the public interest”* (various economic reforms and other measures to ensure greater social justice) may claim compensation in the amount below the market value.

The phrase *“subject to the conditions provided by law”* requires that clear and accessible legal provisions be in place and properly enforced. The power of the European Court to review the compliance of the actions of the authorities with the norms of national legislation is limited, since the right to interpret and apply legislation primarily belongs to the country (in our case, Moldova and Ukraine). When considering cases related to the control of the use of property, the ECtHR draws attention to two points: whether the statutory control pursues the goal of ensuring *the “general interest”* and whether the functioning of the relevant legislation and, accordingly, the control provided for by it is proportionate to the legitimate aim pursued. Analyzing Art. 1 of Protocol 1 to the Convention, it should also be noted that this is the only article of the Convention and its Protocols, which, firstly, speaks directly about guarantees of the rights of not only individuals, but also legal entities, and, secondly, concerns the issue of property and real estate [14]. *Y. Romanyuk* also points out that Ukrainian legislation has not reached perfection in matters of regulating property rights and ensuring real guarantees of the rights of owners, since this area is constantly improving, changing, and the time has come for radical changes. This position deserves attention, since there are indeed separate legal norms on the right of ownership that need to be improved in order to eliminate contradictions in the relevant legal regulation (for example, on the acquisition of property rights by acquisitive prescription in relation to unauthorized construction objects).

[12] Опубликован: 27.06.2003 в Monitorul Oficial № 126-131 статья № 507 // ИЗМЕНЕНО ЗП168 от 26.07.18 МО 333-335 от 24.08.18 ст. 549; вступил в силу с 14.02.19.

[13] https://studref.com/319674/pravo/zaschita_prava_sobstvennosti_vzyskanii_nalogov_shtrafov_inyh_obyazatelnyh_fiskalnyh_platezhey (дата обращения: 26.11.2021).

[14] Рожкова М.А. К вопросу о понятии «собственность» в Конвенции о защите прав человека и основных свобод и практике ЕСПЧ. URL:https://cyberleninka.ru/article/n/k-voprosu-o-ponyatii-sobstvennost-v-konventsii-o-zaschite-prav-cheloveka-i-osnovnyh-svobod-i-praktike-evropeyskogo-suda-po-pravam-cheloveka (дата обращения: 26.11.2021).

However, in the national legislation of Moldova, Ukraine and the EU, regulating property relations, there is an appropriate level of norms on the right of ownership and other rights in rem, which are arranged logically and grouped according to the relevant institutions. Of course, taking into account the positive experience of the EU countries, it is possible to amend certain legal norms to eliminate gaps in law and problems in law enforcement in general.

The scientific literature notes the synchronism of approaches to the regulation of property relations in the EU countries. In particular, there is a three-level legal regulation of these relations: the national legislation of a certain EU country, the EU law and the ECHR. Moreover, EU law refers to the Charter of Fundamental Rights of the European Union. Also, in the scientific literature on this occasion, it is indicated that the essence of the adaptation of the legal system of Ukraine to the legal system of the EU lies in Ukraine's perception of the European concept of law in general and the concept of *private law* , in particular, taking into account that the latter in origin and ideology is a purely European concept [15]. At the same time, this is not about adapting *the "private law" of Moldova or Ukraine* to the *"private law of Europe"* , but about adapting the key domestic concept of civil law and the provisions of the civil legislation of a number of countries to the principles of European law (i.e., convergence of the conceptual foundations of private law of Moldova, Ukraine and EU private law).

A special place in this process is occupied by the principles of the functioning of legal institutions that determine the content of absolute civil rights, such as property rights (the basis of economic development), personal non-property rights (as the basis of physical existence and social existence), intellectual property rights (as the basis of creative potential). and scientific and technological progress) [16]. As we can see from the studied sources, legal scholars in the EU countries have been thinking about the codification of EU private law for a long time. The leading place among the institutions, the legal norms of which are proposed to be unified and codified, is occupied by *the institution of property rights* as an absolute civil right.

The relevance of this problem within the framework of our state is due to the fact that the right to respect for private property is guaranteed by Art. 46 of the Constitution of the Republic of Moldova and art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and that this right is very often violated [17]. The study of absolute civil rights in the scientific literature is characterized by the fact that, as a rule, they concern the scientific analysis of certain types of absolute civil rights (personal non-property rights, their types, property rights, other property rights, intellectual property rights, inheritance law). Each type of absolute civil rights has its own characteristics, an appropriate theoretical basis for research and special legal regulation. Summarizing scientific research on personal non-property rights, we note that their system includes both universal personal non-property rights, which are of a fundamental nature and belong to all individuals without exception, and special personal non-property rights, which are vested only in certain individuals (in cases expressly provided by law). We note the scientific works *of A. V. Dzeri* [18],

[15] Щербина Б.С. Абсолютні цивільні права: реалізація і захист. Київ. 2018. Дисс. на здобуття ст. докт. юрид. наук. с. 104.

[16] The same source

[17] Сосна Александру, Защита права собственности. In: Legea şi viaţa. 2018, nr. 5(317), pp. 36-39. URL:https://ibn.idsi.md/sites/default/files/imag_file/36-39.pdf (дата обращения: 03.11.2021).

[18] *Гражданское право Украины. Общая часть: учебник / под ред. О.В. Дзери, Н.С. Кузнецовой, Р.А.*

R. A. Maidanik [19], *Ya. Shevchenko* [20]on the institutions of law, which rightly emphasize the need for further research on this topic, which should be directed to the correct determination of directions for improving legislation in this area, taking into account the positive European experience. The study of inheritance rights is important in view of the fact that the exercise of the right to inheritance determines the emergence of another absolute civil right - *the right to property* . In our opinion, certain aspects of inheritance law need to be improved in the Republic of Moldova, the exercise by heirs of their right to inherit, to formalize an inheritance, to determine mandatory shares, and it is new doctrinal approaches that can help in solving these problematic issues. When considering inheritance cases, the court must indicate specifically what must be taken into account when recognizing a person as an “unworthy heir”, and all grounds for recognizing an heir as “bad” must be confirmed by a decision of the court.

Persons who, during the life of the testator, had a significant influence and psychological pressure on him, were forced to make a will in favor of outside “interested persons” (not legal heirs, i.e. relatives, but strangers, sometimes unfamiliar subjects), to cancel the will, or tried by any means in a way to put pressure on the testator or to force the legal heirs so that they renounce the inheritance of their parents / other relatives in advance (in writing), must be held criminally liable.

More attention should be paid to the legislator in terms of resolving disputes, according to the section of the general, i.e. jointly acquired property of the spouses, preventing the possibility of subsequent unjust enrichment of one of the spouses, *negotiorum gestio* (by breach of trust, deceit, blackmail, concealment of facts, etc.).

It should be noted that the crises that have arisen in connection with the COVID-19 pandemic have also threatened a whole range of fundamental human and civil rights, the rights provided for by national legislation and international human rights treaties, in particular *the right to property. “Domestic violence is a public problem, not a private one,”* says Ketelin Avksentiev [21]. The problem of domestic violence (whether physical, sexual, psychological, spiritual or economic) has become global today. During the period of forced isolation of citizens in the Republic of Moldova (2020-2021), the number of complaints and lawsuits filed increased regarding violations of the property rights of family members, where, paradoxically, often the victims of abusive behavior of spouses/ ex-spouses/cohabitants and other persons.

It is necessary to carefully check the information, take into account various conditions (season, age, position of persons, other facts), the true situation in the family (i.e. who sues whom and demands to forcibly leave the home within 24 hours [22]), respond promptly, and the main thing, despite the plaintiff's preemptive right of ownership,

Майданика. – К., 2010. – 974 с. / Гражданское право Украины: Особенная часть: учебник / под ред. О.В. Дзери, Н.С. Кузнецовой, Р.А. Майданика. – Киев, 2010. – 1176 с.

[19] Майданик Р. А. Проблемы доверительных отношений в гражданском праве: монография / Р.А. Майданик. – К., 2002. – 502 с. / Майданик Р А. Гражданское право: Общая часть. Введение в гражданское право: учебник/ Р.А. Майданик. – К. – 472 с.

[20] Шевченко Я. Н. Избранные труды (1964-2012 гг.). – Киев, 2012. – 404 с.

[21] Avxentiev C. Juridice MD. Ordonanța de protecție contra dreptului de proprietate. URL: https://juridicemoldova.md/11350/ordonanta-de-protectie-contra-drept-de-proprietate.html?fbclid=IwAR10yq-_1lYT_9K2Gq3azVLw31U8DEr8_wkyR04WgfT923GKOUz91mq2ig0. (дата обращения: 24.11.2021).

[22] Ст. 2787 п.(1) Гражданского процессуального кодекса Республики Молдова от 30 мая 2003 года № 225-XV (с изменениями и дополнениями по состоянию на 11.11.2021 г.).// Опубликован: 03-08-2018 в Monitorul Oficial № 285-294 статья № 436. Вступил в силу с 29.11.21.

is to find ways to protect pregnant women, mothers, elderly women, children and minors, as well as the disabled (often these are the future direct heirs of the property).

In this regard, we agree with the conclusions and recommendations of K. Avksentiev and other lawyers, who also drew attention to the global problem of the population in connection with the current challenges (pandemic, economic crisis, increase in divorces, military conflict between Russia and Ukraine, forced migration of citizens, « frozen» Transnistrian conflict, etc.). We are in solidarity with the mentioned author regarding what status and what rights citizens will have, what their further fate, in the event of a forced evacuation of subjects / "aggressors", we quote: [author's translation from Romanian *] and a severe measure of protection that can benefit the victim of domestic violence, for this reason a clear and precise regulation is needed that would encourage the courts to apply uniform and correct legal rules."* At the same time, we note that *«the aggressor's property right cannot be higher than the life and health of the victim.»* Article 55 of the Constitution of the Republic of Moldova states that *every person exercises his constitutional rights and freedoms in good faith, without violating the rights and freedoms of others.* Article 53 of the Constitution of the Republic of Moldova directly defines and protects the right of a person infringed by the authorities through an administrative act or by not satisfying the petition within the prescribed period. Thus, a person *can seek recognition of his right, annulment of the act and compensation for damage* . And *the state, according to the law, bears material responsibility for the damage caused by mistakes made in criminal proceedings by investigative bodies and courts*.

On the other hand, we note the role of such an important component in the system of checks and balances in the Republic of Moldova as the National Integrity Authority (hereinafter referred to as NIA), authorized to assess the honesty and integrity of public officials by carefully checking their property / property [23]. Since the rooted negative phenomena in our state (such as impunity, corruption, selectivity, bias of judges) should gradually disappear forever, and the state should strengthen supervision over the branches of government, ensure the observance of a culture of honesty and integrity in the community, respect for the principle of equality of all citizens before the law and court, compliance with the basic principles of ownership, according to Art. 9 of the Constitution of the Republic of Moldova. In part (2) Art. Article 9 of the Constitution states that *"property cannot be used to the detriment of the rights, freedoms and dignity of a person."*

Scientific research of the institute of intellectual property rights should also be aimed at creating an enabling environment for the proper protection and protection of the rights of intellectual property subjects. The current state of the legal protection of [24]intellectual property in Moldova and Ukraine requires more extensive and fundamental research on its problems. Most of the theories (concepts) were expressed and developed during the 20th century both by scientists of the general theory of law and the state, and by representatives of the science of civil law. It is substantiated that certain concepts have already lost their relevance, since a certain understanding of the legal relationship is widely used, in which subjects enter into

[23] Закон от 17 июня 2016 года № 132 Nº 132 «О Национальном органе по неподкупности» (с изменениями и дополнениями по состоянию на 07.10.2021г.). URL:http://continent-online.com/Document/? doc_ id=39799628#pos=0;0. (дата обращения: 26.11.2021).

[24] Щербина Б. С. Абсолютні цивільні права: реалізація і захист. Київ. 2018. Дисс. на здобуття ст. докт. юрид. наук. с. 248.

relationships to obtain certain benefits, in connection with which they have mutual rights and obligations. Therefore, theories that say that absolute legal relations (and absolute civil law) exist between the subject and the object, without requiring another (obliged) subject, are already outdated and do not reflect existing social relations.

In the Republic of Moldova, issues are increasingly being raised to establish measures to prevent illegal, unjustified enrichment [25], conflicts of interest, incompatibility provisions and combat them, as well as violations of the legal regime of restrictions and prohibitions. It is often impossible to prove the fact of unjust enrichment of one person to the detriment of another, for example, a business partner, spouse or other relatives, which is a problem for members of society, a drop in confidence in judges, respect for the law, unfair court decisions. Today, practice shows that sometimes Moldovan lawyers use confidential information about a client for their own material gain, divulge the secret of the client, overestimate the cost of their services, cooperate with the defendant of their own client. As a result, the client, in addition to moral damage, may suffer significant property damage; joint property of the spouses. We believe that the property rights of children and women after a divorce may be infringed if the court decides on the division of property equally, in the absence of an amicable agreement and the spouse submits an application for alimony. Since the phenomenon of malicious evasion of alimony payers is becoming more and more popular at present, non-payers hide abroad for years, and the authorities remain powerless. Citizens of Moldova are also concerned about the issue of property rights in case of unregistered marriage (dispute between cohabitants). In accordance with Art. 567 of the Civil Code of the Republic of Moldova, *in the case when the ownership right belongs simultaneously to several persons and none of them is the owner of one ideal share of the common property, the property is recognized as common joint.* Part 2, part 3 Art. 562 of the Civil Code of the Republic of Moldova establishes that *a participant in shared ownership has a pre-emptive right to transfer to him the housing in which he had his usual place of residence on the date of filing the claim for division, as well as, in circumstances, to the furniture with which the housing is furnished. A participant in shared ownership has a priority right to transfer to him the property that he used in the course of business or professional activities on the date of filing a claim for division, as well as to movable property that he had in his equipment.*

Yes, Art. 571 of the Civil Code of the Republic of Moldova states that the *division of common property between participants in joint ownership is carried out in proportion to the contribution of each to the acquisition of property. Until proven otherwise, the contribution of co-owners is assumed to be equal.* Art. 572 of the Civil Code of the Republic of Moldova determines that *property acquired by spouses during marriage is their joint property, unless a different legal regime for this property is established by law or an agreement concluded between them. Any property acquired by the spouses during the marriage is assumed to be their joint property until proven otherwise. If the common property represents a right, which, according to the law, is acquired by registration in the public register, and the right is registered only in favor of one of the spouses, either of the spouses may require that the status of this right be entered in the public register as a*

[25] Закон Республики Молдова от 17 июня 2016 года №133 «О декларировании имущества и личных интересов» // Monitorul Oficial № 245-246 от 30.07.2016 г. (дата обращения: 26.11.2021).

right of the common property of the spouses. According to Part 1 of Art. 573 of the Civil Code of the Republic of Moldova, the personal property of spouses is understood as *the property that belonged to each of the spouses before marriage, as well as received by him during marriage on the basis of a gift agreement, by inheritance or otherwise free of charge, is the exclusive property of the spouse to whom it belonged or by which it was received* [26]. Along with this, we note that in order to achieve a resolution of the dispute through the court in your favor, proving your rights to housing, you need to spend a lot of money, time, health, and free legal assistance is even more ineffective.

Further, the ECtHR also started to pass sentences on Moldova due to the unregulated annulment of final judgments and injustice/ illegality of actions [27]. This is the *case of Ozhog et al. v. Moldova* [28], which concerned an unlawful review of a decision that took place more than 15 years ago. The ECtHR ordered Moldova to pay 1.5 million euros in damages to the former shareholders of the Chisinau Gemenii shopping center for a lawsuit between private owners over real estate, as well as return part of the building and land to them. The claimant's material damage was then estimated at 1.5 million euros, non-pecuniary damage - 5,000 euros and 10,000 euros - were costs and expenses. In February 2020, the head of the Legal Resource Center, Vladislav Gribincea, on his Facebook page, commented with obvious indignation on this fatal mistake of Moldovan judges[29].

Findings

We believe that, despite the absolute nature of the studied civil rights, it should also be taken into account that these rights are still inherent in the presence of certain *restrictions.* However, these restrictions, although they affect the possibility of exercising these rights, outlining the boundaries of individual freedom, they are quite justified, given the motives for their installation. It is proved that the reasons for establishing certain restrictions on absolute civil rights are *the interests of society* as a whole (the so-called *public interests*) and the interests of other specific persons, because *the right of a person ends where the right of another begins.* That is why the legislator often justifiably provides for the limits of the exercise of a certain right or establishes certain restrictions. The absolute nature of the property right is emphasized by the legislative indication of the possibility of its implementation by the subject in accordance with the law, at his own will, regardless of other persons. The implementation of the right of ownership as an absolute right in rem covers any possibility of the owner to act in relation to the property belonging to him, including *possession, use, and disposal* - the *traditional triad* , as well as other powers. The content of these separate powers of the owner is not disclosed at the legislative level, but their interpretation in the scientific literature is generally accepted: ownership as the right of actual (physical or economic) dominance over property, etc. It has been established that the owner, exercising his right, relies on the general permissive principle : *everything*

[26] Гражданский кодекс Республики Молдова: Закон №133 от 15.11.2018. // Повторно опубликован: 01.03.2019 в Официальном мониторе №66-75 art. №:132. Вступил в силу 01.03.2019.

[27] ЕСПЧ: Молдова должна выплатить экс-акционерам торгового центра «Gemenii» в Кишинёве 3,5 млн евро. URL:https://esp.md/sobytiya/2020/02/18/espch-moldova-dolzhna-vyplatit-eks-akcioneram-torgovogo-centra-gemenii-v (дата обращения: 26.11.2021).

[28] CASE OF OJOG AND OTHERS v. THE REPUBLIC OF MOLDOVA. (Application no. 1988/06). URL: http://hudoc.echr.coe.int/eng?i=001-201134 (дата обращения: 26.11.2021).

[29] Грибинча, В. *Комментарий*. URL: https://www.facebook.com/100002542172880/posts/3058037324290977/?d=n (дата обращения: 26.11.2021).

that is not expressly forbidden is allowed. However, the owner must take into account the general and special limits of the exercise of his right. The owner has the right to perform any actions in relation to his property that do not contradict the law. When exercising his rights and fulfilling his obligations, the owner is obliged to observe the moral and ethical foundations of society. The practical application of the general boundaries of the exercise of the right of ownership is possible in combination with other legal norms, the prescriptions of which were violated by the owner and on the basis of which conditions and means of liability can be set.

Ukrainian authors (especially *B.S. Shcherbina, Ya. M. Shevchenko*) it is proved that the exercise of the subjective right of ownership should also cover the fulfillment of certain duties assigned to the owner. The provisions on the protection of private property and the binding role of the owner are constitutionally fixed (Art. 9 and Art. 46 of the Constitution of the Republic of Moldova, Art. 14 of the Constitution of Germany, Art. 13 of the Constitution of Ukraine).

It has been established that in Ukraine civil law protection of absolute rights can be carried out both by a court, including an economic court (depending on the subject composition of the relevant dispute), and by an arbitration court, the decision of which is also binding on the parties.

Bibliography

In Russian:

1. Антология украинской юридической мысли. редкол.: Ю. С. Шемшученко и др. - т. 6: Гражданское право; отв. ред. Я. Н. Шевченко. – Киев, 2003. – 584 с.

2. БАБИНА, Ю. Правовая природа адвокатуры Украины в современных условиях и процессах глобализации. În: *Realităţi şi perspective ale învăţământului juridic naţional: Culegerea comunicărilor*. Vol.1, 1-2 octombrie 2019, Chişinău. Chişinău: CEP USM, 2019, pp. 630-638.

3. *Гражданский кодекс Республики Молдова:* Закон № 133 от 15.11.2018. // Повторно опубликован: 01.03.2019 в Официальном мониторе №66-75 art. №:132. Вступил в силу 01.03.2019. – Кишинэу:Farmec-Lux, 2019 (F.E.-P. «Tipografia Centrală»). – 640 с.

4. *Гражданский процессуальный кодекс Республики Молдова* от 30 мая 2003 года № 225-XV *(с изменениями и дополнениями по состоянию на 11.11.2021г.).*//Опубликован: 03-08-2018 в Monitorul Oficial № 285-294 статья № 436. *ИЗМЕНЕНО ЗП178 от 11.11.21, МО280-284/19.11.21 ст.386; в силу с 29.11.21.*

5. *Гражданское право Украины.* Общая часть: учебник / под ред. О.В. Дзери, Н.С. Кузнецовой, Р.А. Майданика. – К., 2010. – 974 с.

6. *Гражданское право Украины: Особенная часть:* учебник / под ред. О.В. Дзери, Н.С. Кузнецовой, Р.А. Майданика. – Киев, 2010. – 1176 с.

7. ДЕМЕНЕВА, А. *Юридические последствия постановлений Европейского Суда по правам человека для Российской Федерации*: автореферат дисс. на соискание ученой степени канд.юрид. наук. Москва, 2010. – 30 с.

8. *Закон «О режимах чрезвычайного, осадного и военного положения»* N 212-XV от 24.06.2004 (в силу 06.08.2004).// Мониторул Офичиал ал Р.Молдова N 132-137 ст.696 от 06.08.2004 (дата обращения: 26.11.2021).

9. *Закон Республики Молдова «О Национальном органе по неподкупности»* от 17 июня 2016 года № 132 Nº 132 (с изменениями и дополнениями по состоянию на 07.10.2021г.). URL:http://continent-online.com/Document/? doc_id=39799628#pos=0;0. (дата обращения: 26.11.2021).

10. *Закон Республики Молдова «Об адвокатуре»* N 1260-XV от 19.07.2002 // Мониторул Офичиал ал Р.Молдова N 126-127 от 12.09.2002. URL: http://www.eurasian-advocacy.ru/respublika-moldova/613-zakon-respubliki-moldova-ob-advokature. (дата обращения: 21.09.2021).

11. ЗАХАРИЯ, С., ИГНАТЬЕВ, В,, ЗАВАЛЬНЮК, А. *Правовое регулирование деятельности хозяйствующих субъектов в Республике Молдова:* Учебное пособие/ Под общ. ред.В.П. Игнатьева; Комратский гос.ун-т. Юрид. фак., Каф. Частного права – Комрат: Б.и., 2009 (Tipogr. «Tehnica Info»). – 344 с.

12. ИГНАТЬЕВ, В., ПРОЦЕНКО, В. Граждане

как субъекты гражданского права. В: *Закон и Жизнь.* 2011, nr. 9(237), pp. 33-43.

13. ИГНАТЬЕВ, В., ПРОЦЕНКО, В. *Гражданское право.* Общая часть. Учебник. Кишинэу, 2010.

14. ИОФФЕ, Ол.. *Ответственность по советскому гражданскому праву.* Л.: Изд-во Ленигр. ун-та, 1955. 310 с.

15. *Конституция Республики Молдова* от 29 июля 1994 г. // Monitor Oficial al Republicii Moldova Nr. 1 от 12.08.1994. Кишинэу: Farmec-Lux, 2018 (F.E.-P. "Tipografia Centrală"). – 80 с.

16. *Конституция Украины* от 28 июня 1996 года №254к/96-ВР. URL: http://zakon2.rada.gov.ua/laws (дата обращения: 26.11.2021).

17. КЫРНАЦ, Т. *Конституционное право.* Гос. Унив.Молдовы.Академ. права, Кишинэу, Реклама, 2005. – 272 с.

18. МАЙДАНИК, Р. *Проблемы доверительных отношений в гражданском праве:* монография / Р.А. Майданик. – К., 2002. – 502 с.

19. МАЙДАНИК, Р. *Гражданское право: Общая часть. Введение в гражданское право:* учебник/ Р.А. Майданик. – К. – 472 с.

20. МАКСУРОВ, Ал. *Защита права собственности в Европейском Суде по правам человека.* М.: Инфра-М, 2014.

21. МАКСУРОВ, Ал. Защита права собственности от необоснованного вмешательства государства в права собственника в Европейском Суде по правам человека // *Международное публичное и частное право.* 2011. N 5.

22. *Постановление Пленума Высшей судебной палаты РМ* № 8 от 09.10.2006 (бюллетень Высшей судебной палаты № 3, 2007).

23. РОЖКОВА, М. *К вопросу о понятии «собственность» в Конвенции о защите прав человека и основных свобод и практике ЕСПЧ. // Журнал российского права. 2006. №12(120).* URL:https://cyberleninka.ru/article/n/k-voprosu-o-ponyatii-sobstvennost-v-konventsii-o-zaschite-prav-cheloveka-i-osnovnyh-svobod-i-praktike-evropeyskogo-suda-po-pravam-cheloveka (дата обращения: 01.12.2021).

24. COCHA, Ал., COCHA, Б. Определение природы, роли и места решений европейского суда по правам человека в системе источников права Республики Молдова. În: *Supremația Dreptului*. 2019, nr. 1, pp. 5-12.

25. COCHA, Ал. Защита права собственности. În: *Legea şi viaţa*. 2018, nr. 5(317), pp. 36-39. URL: https://ibn.idsi.md/sites/default/files/imag_file/36-39.pdf (дата обращения: 14.02.2020).

26. COCHA, Ал. О некоторых достоинствах и недостатках модернизированного гражданского кодекса Республики Молдовы. În: Materialele Conferinței Internaționale *Ştiinţa în Nordul Republicii Moldova: realizări, probleme, perspective.* Ediția 4, 26-27 iunie 2019, Bălți. Balti, Republic of Moldova: Tipogr. „Indigou Color", 2020, pp. 451-457.

27. COCHA, Б. Гражданское общество в Молдове: успех в действии. În: *Supremația Dreptului.* 2016, nr. 2, pp. 106-115.

28. *Союз адвокатов Республики Молдова бьет тревогу: нарушения прав человека принимают системный характер.* Электронный ресурс: http://uam.md/index.php?pag=news&id=875&rid=1112&l=ro. (дата обращения: 16.09.2021).

29. ШЕВЧЕНКО, Я. *Избранные труды (1964-2012 гг.)*. – Киев, 2012. – 404 с.

In Ukrainian:

1. *Право власності: європейський досвід та українські реалії.* Правовий тиждень. 2015. URL:http://legalweekly.com.ua/index.php?id=16061&show=news&newsid=123901 (дата звернення 20.04.2018).

2. ЩЕРБИНА, Б. *Абсолютні цивільні права: реалізація і захист.* Київ. 2018. Дисс. на здобуття ст. докт. юрид. наук. 294 с.

3. ЩЕРБИНА, Б. Абсолютні цивільні права в системі цивільного права України. *Часопис Київського університету права.* 2017. № 2. С. 172–175.

4. ЩЕРБИНА, Б. Види абсолютних цивільних прав. Актуальні проблеми юридичної науки: зб. тез Міжнар. наук. конф. *«Шістнадцяті осінні юридичні читання»* (Хмельницький, 20–21 жовт. 2017 р.). Хмельницький, 2017. Ч. 1. С. 152–154.

5. ЩЕРБИНА, Б. Здійснення абсолютного права власності в Україні. Збірник матеріалів міжнародної конференції *«Міжнародне та національне законодавство: способи удосконалення»* (Дніпро, 30–31 берез. 2018 р.). Дніпро, 2018. С. 121–125.

6. ЩЕРБИНА, Б. Право власності: окремі аспекти здійснення. Збірник матеріалів Міжнародної науково-практичної конференції *«Проблеми реалізації і захисту соціальних прав в Україні»* (Львів, 27 квіт. 2018 р.). Львів, 2018. С. 275–278.

7. ЩЕРБИНА, Б. Особливості цивільно-правового захисту абсолютних прав. Збірник матеріалів VIII Міжнародної науково-практичної

конференції *«Правове регулювання суспільних відносин на шляху до сталого розвитку»* (Київ, 15–20 трав. 2018 р.). Київ, 2018. С. 88–94.

Romanian:

1. AVXENTIEV, C. Juridice MD. Ordonanța de protecție contra dreptului de proprietate. URL:https://juridicemoldova.md/11350/ordonanta-de-protectie-contra-drept-de-proprietate.html?fbclid=IwAR10yq_1lYT_9K2Gq3azVLw31U8DEr8_wkyR04WgfT923GKOUz91mq2ig0. (vizitat: 24.11.2021).

2. GRIBINCEA, Vl. Comentariu. URL:https://www.facebook.com/100002542172880/posts/3058037324290977/?d=n (vizitat: 26.11.2021).

CZU 351.74/.75
DOI https://doi.org/10.52388/2345-1971.2022.e1.07

THE PROTECTION OF HUMAN RIGHTS IN THE PROCESS OF MAINTAINING AND ENSURING PUBLIC ORDER AND PUBLIC SECURITY [1)]

Ianuș ERHAN
Doctor of law, associate professor, senior researcher,
Research and Innovation Institute of the Moldova State University,
Chisinau, Republic of Moldova
e-mail: *ianuserhan@yahoo.com*
https://orcid.org/0000-0003-4110-8133

Human rights are considered supreme values in any modern state with an advanced democratic regime, and their guarantee by the law enforcement forces implies both respect for them and protection.In turn, public order and security is ensured, through all the measures taken by law enforcement, to achieve, maintain and, ultimately, restore public order. The law enforcement forces represent the institutional framework of the system of public order and public security, respectively this is a determining factor in the process of protecting human rights, and from the analysis undertaken, we highlight two public authorities with competences in the field of public order and public security, namely the Police and the Inspectorate General of the Carabineers.Maintaining public order is the main mission of the Police carried out through specific activities carried out by the responsible subdivisions, and restoring public order is the main mission of the Inspectorate General of the Carabineers. As for ensuring public order, it is the secondary mission, both for the Police and for the Carabineers and it can be carried out independently or through mutual support.The approach based on human rights must be the basis of all the activities of maintaining and ensuring public order, which requires to be unconditionally respected at all levels of activity and by all employees of the mentioned authorities, being, at the same time, incorporated in the regulations that determine these processes.

Keywords: *respecting and protecting human rights, law and order, law enforcement, public order and public security, maintaining and ensuring public order and public security.*

PROTECȚIA DREPTURILOR OMULUI ÎN CADRUL MENȚINERII ȘI ASIGURĂRII ORDINII ȘI SECURITĂȚII PUBLICE

Drepturile omului sunt considerate valori supreme în orice stat modern cu un regim democratic avansat, iar garantarea lor de către forțele de ordine, presupune atât respectarea, cât şi protecția acestora.La rândul său, ordinea şi securitatea publică se asigură, prin totalitatea măsurilor luate de forţele de ordine, pentru realizarea, menținerea şi, în ultimă instanță, restabilirea ordinii publice. Forțele de ordine reprezintă cadrul instituțional al sistemului de ordine şi securitate publică, respectiv acesta este unul determinant în procesul de protecție a drepturilor omului, iar din analiza întreprinsă evidențiem două autorități publice cu competențe în domeniul ordinii și securității publice, și anume Poliția și Inspectoratul General de Carabinieri.Menținerea ordinii publice este misiunea principală a Poliției realizată prin activități specifice executate de subdiviziunile responsabile, iar restabilirea ordinii publice este misiunea principală a Inspectoratului General de Carabinieri. Ce ține de asigurarea ordinii publice este misiunea secundară atât pentru Poliție, cât şi pentru Carabinieri şi poate fi realizată independent sau prin sprijin reciproc.Abordarea bazată pe drepturile omului trebuie să stea la baza tuturor activităților

[1)] *The article is developed within the postdoctoral project „Arhitectura juridică a mecanismelor naționale de ordine și securitate publică (Legal architecture of national public order and security mechanisms).*

de menţinere şi asigurare a ordinii publice, deziderat ce necesită a fi respectat necondiţionat la toate nivelurile de activitate şi de către toţi angajaţii autorităţilor menţionate.

Cuvinte-cheie: *respectarea şi protecţia drepturilor omului, ordine de drept, forţe de ordine, ordine şi securitate publică, menţinerea şi asigurarea ordinii şi securităţii publice.*

PROTECTION DES DROITS DE L'HOMME DANS LE CADRE DU MAINTIEN ET DE LA GARANTIE DE L'ORDRE ET DE LA SÉCURITÉ PUBLICS

Les droits de l’homme sont considérés comme des valeurs suprêmes dans tout État moderne doté d’un régime démocratique avancé, et leur garantie par les forces de l’ordre implique à la fois leur respect et leur protection.À leur tour, l’ordre et la sécurité publics sont assurés, à travers toutes les mesures prises par les forces de l’ordre, pour atteindre, maintenir et, finalement, rétablir l’ordre public. Les forces de l’ordre représentent le cadre institutionnel du système d’ordre et de sécurité publique, respectivement c’est un facteur déterminant dans le processus de protection des droits de l’homme, et de l’analyse entreprise, nous mettons en évidence deux autorités publiques dotées de pouvoirs dans le domaine de l’ordre et de la sécurité publique, à savoir la Police et l’Inspection générale des carabiniers.Le maintien de l’ordre public est la mission principale de la police menée à travers des activités spécifiques menées par les subdivisions responsables, et le rétablissement de l’ordre public est la mission principale de l’Inspection générale des carabiniers. Quant au maintien de l’ordre public, il s’agit de la mission secondaire, tant pour la Police que pour les Carabiniers, et elle peut être exercée de manière indépendante ou en s’appuyant mutuellement.L’approche fondée sur les droits de l’homme doit être à la base de toutes les activités de maintien et d’assurance de l’ordre public, qui exigent d’être respectées inconditionnellement à tous les niveaux d’activité et par tous les employés des autorités mentionnées, étant, en même temps, incorporées dans les réglementations qui déterminent ces processus.

Mots-clés: *respecter et protéger les droits de l’homme, la loi et l’ordre, l’application de la loi, l’ordre et la sécurité publics, maintenir et assurer l’ordre et la sécurité publics.*

ЗАЩИТА ПРАВ ЧЕЛОВЕКА В ПРОЦЕССЕ ПОДДЕРЖАНИЯ И ОБЕСПЕЧЕНИЯ ОБЩЕСТВЕННОГО ПОРЯДКА И ОБЩЕСТВЕННОЙ БЕЗОПАСНОСТИ

Права человека считаются высшими ценностями в любом современном государстве с развитым демократическим режимом, и их гарантия правоохранительными органами подразумевает как их соблюдение, так и защиту.В свою очередь, общественный порядок и безопасность обеспечивается за счет всех мер, предпринимаемых правоохранительными органами, для достижения, поддержания и, в конечном итоге, восстановления общественного порядка. Правоохранительные силы представляют собой институциональную основу системы правопорядка и общественной безопасности, соответственно это является определяющим фактором в процессе защиты прав человека, ана основе проведенного анализа мы выделяем два органа государственной власти, обладающих полномочиями в сфере правопорядка и общественной безопасности, а именно Полицию и Генеральный инспекторат карабинеров. Поддержание общественного порядка является основной задачей Полиции, осуществляемой посредством конкретных мероприятий, проводимых ответственными подразделениями, а восстановление общественного порядка является основной задачей Генерального инспектората карабинеров. Относительно обеспечения общественного порядка, то это второстепенная задача как для полиции, так и для карабинеров, и она может выполняться самостоятельно или при взаимной поддержке.Подход, основанный на правах человека, должен лежать в основе всей деятельности по поддержаниюи обеспечению общественного порядка, что требует безусловного соблюдения на всех уровнях деятельности и всеми работниками упомянутых органов.

Ключевые слова: *соблюдение и защита прав человека, законность, правопорядок, общественный порядок и общественная безопасность, поддержание и обеспечение общественного порядка и безопасности.*

Introduction

In recent years, we have witnessed various social, political and economic changes and transformations, which have also determined those challenges to which the national security system is exposed, in general, and in particular, the field of public order and security. More recently, the military conflict in Ukraine, located in the immediate vicinity, the increased flow of migrants generated, but also the uncertainty regarding its solution, require the revision of concepts and policies in order to ensure a high level of public safety.

At the same time, it is unanimously recognized that human rights and freedoms are privileges conferred by law. Pursuant to them, the holder of the right, i.e., any person, can adopt a certain conduct and ask others to behave in accordance with his/her right in order to capitalize on a personal, legitimate and legally protected interest, in accordance with the general interest and the rules of coexistence.

According to the constitutional provisions, citizens benefit from the rights and freedoms enshrined by the supreme law and by other laws, and the legal norms direct the activity of the state authorities towards ensuring the protection and respect of the rights of each person. The citizen also has constitutional levers aimed at ensuring an active behavior in relation to the public authorities.

From the analysis of legal competences, we distinguish the Ministry of Internal Affairs as the most important government institution, which, through subordinate public authorities, carries out the entire spectrum of activities in the field of public order and security.

The main ideas of the research

It is known that the security of the state and all its citizens, the safety of the person, the public order and peace, represents primordial social values underlying the existence, organization and functioning of any rule of law in which the multifaceted regulation of social relations, discipline, order in law represents natural requirements of democracy [1, p. 404].

The field of public order and security is viewed and treated as part of the general concept of national security. Under these conditions, ***public order*** is a state of law, its content being linked to the legal provisions, which allows achieving and maintaining the balance based on social consensus, the defense and respect of the fundamental rights and freedoms of citizens, the defense of public and private assets and the defense of values supreme in order to promote and affirm social progress in a democratic society [2, p. 20].

At the same time, public order constitutes the component of the "legal order" that expresses the state of effective functioning of the institutions of the rule of law, respecting the fundamental rights and freedoms of citizens, public and private property, ensured by the necessary set of legal regulations, behavioral norms, social values and specific institutions, including for the restoration of disturbed balances [3].

In turn, the ***legal order*** represents the state that implies the assurance through the legal norms of the conditions for the normal development of all social activities and is established in social relations as a result of strict compliance with the citizens and by the

state bodies. In the context of the correlation of both terms, the public order represents the order of law regarded in the aspect of normal and ordered development of public activity.

Public security, starting from the concept of “personal security”, is generally defined as “a state of protection of the person and society, against any type of danger, against any illegal action, against their consequences, as well as against the consequences of exceptional situations or social conflicts, natural disasters, epidemics, epizootics, catastrophes, accidents and fires, as the case may be” [4, p. 150].

According to the legal provisions, public security is the state of confidence, peace and social cohesion, lack of dangers and threats regarding life, freedom, well - being and prosperity of the population and community, ensured by specific actions by the authorized authorities [3].

From the analysis of the definitions mentioned above, we distinguish different elements/components: state, legality, institutions, provisions and regulations, public order being the process, and the goal/ result to be achieved within it, by combining the mentioned elements, is nothing but public security.

The public order involves three distinct but interdependent processes/components, namely: ***maintaining public order*** - the set of measures and actions organized and carried out daily for the protection and respect of the fundamental rights of citizens, of the norms of civic conduct, of the rules of social coexistence, of the other social values, of the public and private heritage, as well as for the normal functioning of state authorities;

- ***ensuring public order*** - the set of measures and actions taken during public events to respect the law, prevent and end mass disorder and/or violence;
- ***restoration of public order*** – the set of measures and actions undertaken during public events to return the situation to normality, when mass disturbances of various intensities occur.

The concepts given differ from each other, emerging from the degree of intensity and the impact that certain risks and threats can have on public order in proportion to those measures and actions carried out by the responsible authorities in response to them. At the same time, the given model, dividing public order and security into three distinct components, is one that is unanimously accepted worldwide.

What about maintaining and ensuring public order, this “illustrates all the measures, activities and operations carried out by the public order forces, and the guarantee of public order includes all the measures that are taken to respect the legality, prevent and discourage some actions that generate social disorders or manifestations of violence, of cultural and sporting activities, as well as other events in which a large number of people participate and ensure the main and support forces, according to the competences ” [5, p. 33].

In the given sense, for maintaining, ensuring and restoring public order, three categories of forces are involved, namely ***law enforcement*** - subdivisions of administrative authorities and institutions subordinate to the MAI *(Ministry of Internal Affairs),*

invested with powers in this sense, namely the Police and the General Carabinieri Inspectorate; ***support forces*** – subdivisions of administrative authorities and institutions subordinate to the MAI (*Ministry of Internal Affairs)*, which currently exercise other duties than those of maintaining, ensuring and restoring public order, but can be used to fulfill this type of missions, such as the Border Police, The Migration and Asylum Office and others, as well as ***complementary forces*** - bodies and authorities of the central and local public administration, as well as other organizations, which, through specific activities, can provide assistance to law enforcement and support forces.

As we see, public order and security are ensured, through all the measures taken by law enforcement, to achieve, maintain and, ultimately, restore public order. The law enforcement, in turn, represents the institutional framework of the public order and security system, respectively, it is a determining factor in the process of respecting and protecting human rights, and from the analysis undertaken, we highlight two public authorities with dedicated powers in the field of public order and security, namely the Police and the General Carabinieri Inspectorate.

According to the new public policy document in the field of internal affairs for the years 2022-2030, it is stated that "Public security is an area of intersection of the competences of the Police and the Carabinieri. The police exercise their duties by virtue of the mandate to maintain public order and thus reduce the crime rate, and the Carabinieri - have the function of maintaining, ensuring and restoring public order, in the context of public order events, in which a large number of citizens participate" [6].

The police are the specialized public institution of the state meant to defend the rights and freedoms of citizens, the interests of the society as a whole, but also those of the state. For these reasons, the activity of the police in a rule of law, based on the supremacy of the law, is extremely important.

The given thing was perfectly inserted in the Law on the activity of the Police and the status of the policeman/woman [7], which establishes that the Police are "a specialized public institution of the state, subordinate to the Ministry of Internal Affairs, which have the mission of defending the fundamental rights and freedoms of the person through activities to maintain, ensure and restore public order and security, to prevent, investigate and discover crimes and contraventions."

From the analysis of the legal provisions that determine the organization and functioning of the police, we determine the categories of duties, as follows:

a) prevention of crime and contraventions;

b) investigating offenses and contraventions, criminal prosecution;

c) maintaining, ensuring and restoring public order and security;

d) protection of the rights and legitimate interests of the person and community;

e) ensuring the execution of justice;

f) the assistance of the population and local public administration.

As can be seen, the protection of the rights and legitimate interests of the person passes

like a red thread through all the competences held by the Police, being one of the basic principles in the activity, but also one of the permanent and indisputable conditions for the achievement of the established attributions.

For its part, the Law on the General Carabinieri Inspectorate [8], expressly indicates that this is a specialized state authority, with military status, subordinate to the MAI (Ministry of Internal Affairs), which has the mission of defending the fundamental rights and freedoms of the person by executing the attributions of maintaining, ensuring and restoring public order, preventing and discovering crimes and contraventions, protecting objectives of particular importance, preventing and fighting terrorism, ensuring the state of emergency, siege or war regime.

As we deduce from both normative acts, both by one institution and another, human rights and liberties are realized specifically through the set/complex of measures to maintain, ensure and restore public order and security.

The fundamental rights and freedoms of man and citizen are not only a reality, but also a finality of all human, democratic and progressive activity [5, p. 30]. At the same time, human rights represent the main conditions that allow each person to develop and to apply his/her physical, intellectual, moral, socioemotional and spiritual qualities as effectively as possible. The rights derive from the increasingly pronounced aspiration of mankind for a life in which the dignity and value of each individual is respected and protected [9, p. 28].

In the contemporary world “human rights are approached at the national and international level considering the defense of state institutions and involving the issue of the human condition from a legal point of view through the protection of the person and his/her property” [10, p. 32], and “the mission of the police in all states being to respect the “norms of conduct in society, order and public peace” [11, p. 56].

Since among the main tasks of the police are preventing and countering crimes and other antisocial manifestations, as well as ensuring public order and security, their activity interferes with a wide range of fundamental human rights.

For example, the right to liberty and security aims to protect a person’s physical liberty against any arbitrary or abusive arrest or detention. The Constitution of the Republic of Moldova guarantees citizens the opportunity to enjoy freedom and, at the same time, ensures their legal security, protection and defense in their relations with the state authorities. The right to inviolability of the person also represents the set of guarantees not to be detained, prosecuted or punished illegally [12, p. 6].

The police are the first line of defense of human rights, and the police are the guardians of the law, including the regulations aimed at human rights [13, p. 14]. In this sense, it is considered that, in fulfilling their duty, police officials must protect human dignity, as well as maintain and respect the fundamental rights, but also the civil and political rights of the person [14, p. 5-8].

At the same time, the Police are endowed with special powers (including potentially

using force), to temporarily deprive people of their freedom, to limit their rights (for example, to stop, question, detain and arrest, seize property, take fingerprints, photograph and carry out body searches) and in extreme conditions, to use even force with lethal consequences. Police officers must, however, always respect the principles of the rule of law, in accordance with international policies and standards as well as the norms provided for in national legislation [15, p. 44].

In the opinion of the author Tudor Tomozei, the activity of the police in a democratic society influences the observance of "fundamental human rights, including the right to life, the right to freedom and the right to the freedom of the person"[16, p. 7].

Sara Pastor, in turn, believes that the police have the power to protect and to violate human rights. The aim of international police activity standards is to harness positive connections between police and human rights and to minimize potential negative conflicts between these two concepts [17, p. 1], respectively, on the one hand, ensure the non-admission of abuse of power, discriminatory or arbitrary treatment, on the other hand, protection and respect for human rights are being achieved.

Since the police represent the state in the most visible way, trust in the police equates to trust in the state. Without this trust, citizens will not be willing to report crimes or provide the police with the information they need to do their job effectively.

On the other hand, when the police are unable to retaliate promptly and are embarrassed to act harshly in critical situations, the state is criticized for its weakness. Almost as serious is when the police lose their authority and the representatives of the law enforcement agencies are directly defied, including being insulted and physically assaulted, this demonstrates an escalation of tensions in society, encourages the breaking of the law by other individuals, undermines the system of public security [18, p. 542].

With over nine thousand employees, the Police are one of the largest administrative authorities in the Republic of Moldova, and the impact of its activity has an immediate and direct effect on citizens' perceptions of the state's ability to cope with the tasks of ensuring a high public security climate. We must not forget the fact that the Police are among the most visible institutions of the state, and their employees are among the first to respond to citizens' calls, reports and complaints.

At the same time, being one of the legal bodies responsible for ensuring the security of citizens and defending their rights, any police employee must know at the highest level and be guided in the service activity by the responsibilities and rights stipulated for the fulfillment of the duties of the service.

Thus, the following requirements are submitted to Police employees in the activity process:

- prohibition of torture, inhuman and degrading treatments;
- respecting human rights when applying physical force, special means and firearms;
- prohibition of discrimination;
- ensuring the rights of victims of domestic violence;

- ensuring the rights of victims of human trafficking;
- respecting the right to defense in police activity [19, p. 35-36].

Beyond the basic task of countering crime, the police are also seen as a body for the protection of the population, support in cases of necessity and prevention of criminal acts against citizens. The fact, as safe as citizens feel in their own homes, greatly influences the image of the police [20, p. 94], as well as the state in general.

The level of criminality for the population is a direct indicator of the efficiency and professionalism of the police in fulfilling their duties. On the other hand, the professional conduct of the policeman/woman also has a considerable impact on the image he/she represents in general.

The relationship between the police and the public is a key element in a democracy. In this type of society, the police are responsible not only to the state, but also to the population, and their effectiveness depends, to a large extent, on the support of the latter. In this sense, the social function and public service quality of the police are important, also for their repressive function [21, p. 13].

By virtue of the abilities provided by the state, the police are the institution that have a double position, on the one hand ensuring/ guaranteeing the citizen's liberties, and on the other hand limiting or constraining them in case of violations or illegal actions. This fact requires that the activity of the police be carried out at a high level of competence and professionalism that would allow ensuring the tasks mentioned above efficiently and qualitatively [22, p. 387-388].

In the given order of ideas, a human rights-based approach to policing would facilitate the establishment of a fair balance of rights that would allow the state to use certain coercive powers and levers. Thus, in the case of police officers, it is considered that human rights:

- helps them determine what is permitted and what is prohibited;
- contribute to shaping the internal organizational structures of the police;
- specifies the duties of police officers, as representatives of the state, to respect and protect citizens;
- guarantees respect for the human values of police officers, when they themselves are holders of these rights.

According to the departmental regulations of the Ministry of Internal Affairs, the maintenance of public order is carried out by patrolling on established routes, contacts with the population, checking places with a risk of violating the law, as well as by other specific procedures in relation to the operative situation [23].

However, the given enumeration can be extended through the whole range of activities carried out by the Police, other than ensuring public order during various public events, as well as its restoration.

We agree with the researcher Iurie Bulai who believes that in order to ensure public order and security, the police had to undertake the following measures/actions: protection of life, health, honor, dignity and property; ensuring order in public places in order to

guarantee personal and public security; to ensure and carry out a communication with the public authorities regarding the events/ manifestations expected of a public nature and which have a potential danger for public and personal security [22, p. 390-391].

In recent years, at the Police level, more than 100 standard operating procedures have been developed and approved in the fields of: technical-criminological, operative reaction (intervention against some categories of people/situations), operational management, human resources, criminal investigations, assistance and legal representation, internal audit, etc.

The standard operating procedures are a novelty for the National Police, and the standardization of work processes determines the uniformity, at the country level, of police interventions for different situations, as well as additional guarantees for all subjects. At the same time, they describe in stages the actions of the police depending on the circumstances, conditions, the behavior of the people, developed in order to transpose the national regulations and intended to ensure the legality of the police actions, as well as the respect of human rights. A large part of these refer specifically to maintaining public order.

For example, according to the standard operating procedure "Documentation of cases of violation by citizens of public order" it is established that "When reporting cases of violation of public order by citizens, the police employee has the authority to carry out activities to identify and counteract the actions that threaten the life, freedom, health and integrity of individuals, private or public property, as well as other legitimate interests of the community. At the same time, the police employee has the right to request from people, including persons with a position of responsibility and public persons, the respect of public order and the cessation of illegal actions, and, in case of necessity, to ensure compliance with legal requirements, to intervene by applying physical force, special means or of the firearm provided, under the conditions established by law [24].

Another procedure, concerning the driving of the person to the police headquarters, determines that this is a police measure, with a coercive character, which consists in accompanying the persons from the place of interception to the police headquarters, in order to take legal measures against the persons:

1) who, through their actions, endanger people's lives, public order or other social values;

2) who have committed or are suspected of committing illegal acts;

3) whose identity could not be established under the law.

Driving the person to the police headquarters will be carried out in compliance with the constitutional rights of the persons, so that through the measures taken, the law enforcement body does not in any way harm the dignity of the person or any fundamental right of the person that is not related to the committed act and not to unjustifiably resort to force [25].

From the analysis of the provisions contained in the Law on the Police, namely

art. 25 which refers to the powers of the policeman/woman, among their multitude determines the one related to the request of people to identify themselves when entering a restricted perimeter, respectively, restricting their right of free movement through the prism of the rules and conditions established for access and discovery in a perimeter or location with restricted access.

Thus, according to his/her attributions, the policeman/woman can carry out preventive physical control over the person participating in public gatherings, and the conditions and limits of this control were established by the internal regulations, such as: preventive physical control over the person is an intervention measure that consists in checking by palpation and visual observation of the body, clothing and footwear, in order to discover objects, substances or products whose possession and circulation are prohibited. Preventive body control is carried out in the cases provided by law, on the person participating in public meetings or in other places where access with weapons, products or dangerous substances is prohibited, on the person who is in a state of unconsciousness, as well as on his/her luggage [26].

Regarding respect for human rights and freedoms in the context of ensuring public order in public gatherings, the European Court specified that the right to peaceful assembly provided by art. 11 of the European Convention on Human Rights represents a fundamental right in a democratic society, an essential element of public life. This right concerns not only the participants in a public demonstration, but also its organizers, who may be associates, organized groups or political parties [9, 122].

Today it is universally recognized that the right to peaceful assembly to protest, demonstrate, celebrate, commemorate and, in general, to collectively communicate opinions to the authorities and other citizens, is the basis of functioning democratic systems. This right is closely related to other cornerstones of democracy and pluralism, such as freedom of expression and freedom of association. It is considered that facilitating the right to freedom of peaceful assembly can be a challenge for the authorities. It is especially challenging for the police, who have the primary responsibility to create the conditions for an assembly to take place, while ensuring that public order is maintained and that the rights and freedoms of others are not disproportionately obstructed [27, p. 7].

A human rights-based approach must underpin all policing activities, including the policing of assemblies and demonstrations. At the same time, this does not mean that peaceful assemblies cannot be limited for reasons related to public order and security or the protection of the rights and freedoms of others. However, any such restrictions must be necessary and proportionate.

As for banning an assembly, this can only be done in exceptional circumstances which may include situations where there is a significant and real danger of criminal acts or public disorder, an imminent threat to national security, or in situations where the purpose of the assembly is to incite hatred or violence, to intimidate or threaten others,

or to intentionally deny the right of others to exercise their legitimate rights.

The legislation of the Republic of Moldova expressly establishes that gatherings aimed at:

- incitement to war of aggression, to national, racial, ethnic or religious hatred;
- inciting discrimination or public violence;
- undermining the national security or territorial integrity of the country, committing crimes, violating public order or organizing mass disturbances, violating public morality, the rights and freedoms of other people or endangering their life or health [28].

More recently, the General Carabinieri Inspectorate took over, starting January 1, 2022, the activity of restoring public order, which until this date was mostly carried out by the Police.

Thus, to this day, the maintenance of public order is the main mission of the Police carried out through specific activities carried out by the responsible subdivisions, and the restoration of public order is the main mission of the General Carabinieri Inspectorate. As for ensuring public order, it is the secondary mission, both for the Police and for the Carabinieri, and it can be carried out independently or through mutual support.

At the same time, the internal regulations of the MAI expressly provide that the prevention of mass disturbances of public order, guaranteeing the safety of participants, public and private assets and values, the infrastructure, as well as the response to antisocial acts committed during the course of public events are carried out through insurance actions of public order. [2. 3]

The legal basis for actions to ensure public order is Law 26/2008 on public gatherings [28], however, at the moment certain problems persist in the process of applying the given law, such as: the legal framework does not clearly establish the obligation of the local public authorities to include the Carabinieri in the approval committee of public meetings, likewise the informing of the Carabinieri by the organizers of public events is not regulated, the staff is partially trained for security missions and is able to ensure the management of public meetings with a low and medium level of risk. For public gatherings with a high degree of risk, conceptual support, tactics, techniques and procedures, trained staff, adequate equipment and supplies are needed.

Last but not least, the quality of data and information, the mechanism for obtaining them and the capacity for analysis are in their infancy, a fact that does not allow the planning, organization and coordination of forces to be carried out at the expected level.

In this context, the Plenum of the Supreme Court of Justice of the Republic of Moldova recommends that the courts apply the provisions of the Law on meetings in conjunction with the principle of proportionality, according to which, "when applying any restriction to the freedom of assembly, public authorities must respect the balance between the need for such a restriction in a democratic society and the exercise of the right of assembly. Courts, having the power to limit the exercise of the right to assembly, in particular, will examine the aspect of whether limiting the individual's right to assembly is strictly

necessary in a democratic society» and that of non-discrimination, according to which «the right to assembly is guaranteed to all persons, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth, social origin or any other criteria.» [29]

Conclusions

The state, through the responsible public authorities, especially the Police and the General Carabinieri Inspectorate, is to ensure all people's rights and freedoms according to national and international provisions.

In this sense, both by one institution and another, human rights and freedoms are guaranteed specifically through the set/ complex of measures to maintain, ensure and restore public order and security.

Thus, it is important to establish internally dedicated and clear procedures regarding the management of public events, as well as the management of crises that may arise during the conduct of public events. At the same time, their knowledge by all employees, especially by managers, is essential, and training is an important and mandatory process, in this sense.

Regarding the maintenance of public order, at the level of the Police, in recent years, dedicated tactics and procedures have been developed in which the necessary guarantees have been inserted in order to respect and protect human rights, today it is necessary to achieve them without deviations.

As we have seen, with reference to the institutional aspect, through the prism of the competences held, the Police is the first institution of the state called to respect and protect human rights and freedoms, but under certain conditions determined categorically and explicitly described by the legislation, in a proportional and impartial manner, their employees can restrict certain rights when public order and security are threatened, i.e., that state of legality, normality and balance established in society, of a nature that disrupts and immeasurably affects the most important values and freedoms that are opposable to all people.

In turn, the evaluation and improvement of the legal framework is a permanent necessity and a desired goal that will realize and guarantee human rights and freedoms through the prism of the activities of maintaining and ensuring public order, and the proposals for improvement must emerge from the recommendations of the organizations that monitor compliance of the human rights, as well as the results of internal evaluations.

Last but not least, ensuring permanent communication, but also showing the necessary openness to society and all interested actors in order to discuss and jointly solve the challenges and problems found in the implementation of the powers to maintain and ensure public order is vital for responsible authorities.

Bibliography

1. POSTOVAN, O. *Statutul, locul şi rolul Poliţiei comunitare în cadrul politicilor de ordine publică orientate către comunitate*. În: culegerea materialelor Conferinţei ştiinţifice cu participare internaţională „Protecţia drepturilor şi libertăţilor fundamentale ale omului în procesul asigurării ordinii şi securităţii publice”, Academia „Ștefan cel Mare” a MAI, Chişinău, 2022, pp. 402-414.

2. CUHUȚESCU, I. *Managementul ordinii publice în situaţii de normalitate şi de criză din perspectiva de ţară membră a UE şi NATO*. Bucureşti, Ed. Ministerului Administrației si Internelor, 2010. 153 p.

3. *Hotărârea Guvernului nr. 354 din 31.05.2017 cu privire la aprobarea Strategiei naționale de ordine și securitate publică pentru anii 2017-2020 și a Planului de acțiuni privind implementarea acesteia.* Publicată în Monitorul Oficial nr. 171-180 din 02.06.2017, art. 430.

4. ROBEA, M., POSTU, I. *Coraportul dintre noțiunile de ordine juridică, ordine de drept şi ordine publică*. https://www.tehnopress.ro/webfiles/books_documents/pdf_extras/46_interior%20manag%20excelentei.pdf (accesat la 02.10.2021).

5. MALAI, L., NASTAS, A. *Asigurarea ordinii publice şi a securităţii civile în cadrul întrunirilor.* În: Studii naționale de securitate. 2020, nr. 1(3), pp. 29-36. ISSN 2587-3822.

6. *Strategia de dezvoltare a domeniului afacerilor interne pentru anii 2022-2030*. https://gov.md/sites/default/files/document/attachments/subiect-12-nu-484-mai-2022.pdf (accesat la 20.10.2022).

7. *Legea nr. 320 din 27.12.2012 cu privire la activitatea poliției şi statutul polițistului.* Publicată în Monitorul Oficial nr. 42-47 din 01.03.2013, art. 145.

8. *Legea nr. 219 din 08.11.2018 cu privire la Inspectoratul General de Carabinieri.* Publicată în Monitorul Oficial nr. 462-466 din 12.12.2018, art. 770.

9. MUNTEANU, A., RUSU, S., VACARCIUC, O. *Manualul funcționarului public în domeniul drepturilor omului*; Oficiul Avocatului Poporului. Ed. a 2-a rev. și ad. Chișinău: Arc, 2015. 328 p.

10. GUCEAC, I., VOICU, P. *Experiența statelor europene în asigurarea ordinii publice şi respectare drepturilor omului.* În: Revista „Administrarea Publică". Chișinău. 2018, nr. 3, p. 31-37. ISSN 1813-8489.

11. UJA, R. *Probleme privind poliția. Abordate pe plan european. Drepturile omului și poliția.* Materialele Conferinței Științifice din 21.12.2000, Academia de Poliție „Ștefan cel Mare", Ministerul Afacerilor Interne al Republicii Moldova. Chișinău, 2001, p. 56.

12. VIERU, V., BOTNARENCO, M. *Ghid succint „Drepturile omului în activitatea Poliției"*. Fundația Soros Moldova. Chișinău, 2020. 53 p.

13. *Human Rights and Law Enforcement a Trainer's Guide on Human Rights for the Police.* Office of the United Nations High Commissioner for Human Rights Professional Training, series. 5/Add.2, United Nations, New York and Geneva, 2002.

14. *Handbook on Police Accountability, Oversight and Integrity* (Manual privind responsabilitatea, supravegherea și integritatea poliției), Viena, Naţiunile Unite (ONUDC), 2011.

15. *Manual de Instruire privind Integritatea Poliției*. Publicat de DCAF (Centrul din Geneva pentru Controlul Democratic al Forțelor Armate), Geneva, 2015.

16. TOMOZEI, T. *Probleme privind poliția. Abordate pe plan european.* Drepturile omului și poliția. Materialele Conferinței Științifice din 21.12.2000, Academia de Poliție „Ștefan cel Mare", Ministerul Afacerilor Interne al Republicii Moldova. Chișinău, 2001.

17. PASTOR, S. *Time for change in police culture.* Putting human rights at the centre of policing, Queens University, Belfast, 2014/2015. 97 p.

18. FURTUNĂ, D. *Homo Aggressivus – De ce nu se opresc războaiele și violența*. Chișinău, 2015. 660 p. ISBN: 978-9975-3079-4-9.

19. BELECCIU, Ș., ANTOCI, A. *Protecția juridică a drepturilor omului în activitatea Poliției*. Suport de curs. Editura Cartea militară. Chișinău, 2019. 180 p.

20. MANOLI, M., CHEIANU-ANDREI, D. *Metodologia studierii imaginii organelor de poliţie*. Studia Universitas, Revistă ştiinţifică a Universităţii de Stat din Moldova, 2011, nr.3(43). Seria „Ştiinţe sociale". pp. 89-98.

21. CREANGĂ, C., STAMATIN, Ș. *Ghidul deontologiei polițienești*. Chișinău: Centrul Editorial al Academiei „Ștefan cel Mare" a MAI, 2004.

22. BULAI, I. *Asigurarea drepturilor şi libertăţilor persoanei între mit şi realitate în procesul asigurării ordinii publice*. În: Culegerea materialelor Conferinţei ştiinţifice cu participare internaţională „Protecţia drepturilor şi libertăților fundamentale ale omului în procesul asigurării ordinii şi securității publice". Chişinău, Academia „Ștefan cel Mare" a MAI, 2022, pp. 387-395.

23. Ordinul Ministerului Afacerilor Interne Nr. 515 din 08.12.2021 „Cu privire la aprobarea Instrucțiunii privind organizarea şi executarea activităților de menținere, asigurare și restabilire a ordinii publice".

24. Ordinul IGP nr.101 din 28.02.2017 Cu privire la aprobarea Procedurii operaționale „Documentarea cazurilor de încălcare de către cetățeni a ordinii publice”.

25. Ordinul IGP nr.106 din 28.02.2017 Cu privire la aprobarea Procedurii operaționale „Conducerea persoanei la sediul poliției”.

26. Ordinul Inspectoratului General al Poliţiei nr. 108 din 28.02.2017 „Cu privire la aprobarea Procedurilor operaționale „Controlul corporal”, „Controlul bagajelor”.

27. Ghidul drepturilor omului pentru asigurarea ordinii publice la întruniri, https://www.osce.org/files/f/documents/6/0/439178.pdf (accesat la 02.10.2021).

28. Legea nr. 26 din 22.02.2008 privind întrunirile. Publicată în Monitorul Oficial nr. 80 din 22.04.2008, art. 261.

29. Hotărârea Plenului Curţii Supreme de Justiţie a Republicii Moldova „Cu privire la practica aplicării de către instanţele judecătoreşti a unor prevederi ale legislaţiei privind libertatea de întrunire şi libertatea de asociere prin prisma articolului 11 al Convenţiei Europene pentru Apărarea Drepturilor Omului şi a Libertăţilor Fundamentale nr.1 din 26.12.2011, În: Buletinul Curţii Supreme de Justiţie a Republicii Moldova, 2012, nr.2.

CZU 343.1:342.7
DOI https://doi.org/10.52388/2345-1971.2022.e1.08

DEVELOPMENT OF SPECIAL INVESTIGATION ACTIVITIES IN RELATION TO CRIMINAL PROCESS AND HUMAN RIGHTS [1)]

Boris GLAVAN
Doctor of law, associate professor,
"Stefan cel Mare" Academy of the Ministry of Internal Affairs of the Republic of Moldova,
Chisinau, Republic of Moldova
e-mail: *boris.glavan@mai.gov.md;*
https://orcid.org/0000-0002-3838-4308

The paper is devoted to the field of special investigative activity and criminal proceedings. Through the historical research method, the evolution of the special investigation activity in relation to the criminal process and the institution of human law is studied and analyzed. The study shows that no distinction was initially made between special investigations and criminal proceedings. Subsequently, as human rights are exploited, these two types of activity are divided, the criminal process becoming a public form of investigation of crimes and special investigations being kept secret, fulfilling the function of providing information on the criminal process and ensuring security. Our country's adherence to international law on human rights has led to the legalization of special investigations separately from criminal proceedings. Later, also under the influence of human rights, the partial reintegration of the two forms of investigations followed. Thus, the whole evolutionary process of special investigations is divided into four consecutive stages: the first stage begins in ancient times and ends in the ninentieth century. XIX; the second stage lasts until the end of the twentieth century. XX; the third stage begins with the legalization of the special investigation activity and the last stage begins with the reintegration of the special investigation activity and the criminal process.

Keywords: *special activity and investigative measures, criminal process, criminal prosecution, human rights.*

EVOLUȚIA ACTIVITĂȚII SPECIALE DE INVESTIGAȚII ÎN RAPORT CU PROCESUL PENAL ȘI DREPTURILE OMULUI

Prezentul articol este consacrat domeniului activității speciale de investigații și procesului penal. Prin metoda istorică de cercetare este studiată și analizată evoluția activității speciale de investigație în raport cu procesul penal și instituția drepturilor omului. Studiul arată că inițial nu s-a făcut deosebire între investigațiile speciale și procesul penal. Ulterior, pe măsura valorificării drepturilor omului, aceste două genuri de activitate sunt divizate, procesul penal devenind o formă publică de cercetare a infracțiunilor iar investigațiile speciale fiind ținute în secret, îndeplinind funcția de asigurare cu informații a procesului penal și cea de garantare a securității de stat. Aderarea țării noastre la actele internaționale cu privire la drepturile omului a determinat legalizarea investigațiilor speciale separat de procesul penal. Ulterior, tot sub influența drepturilor omului, a urmat reintegrarea parțială a celor două forme de investigații. Astfel, întreg procesul evolutiv al investigațiilor speciale este divizat în patru etape consecutive: prima etapă începe în epoca antică și se termină în sec. XIX; etapa a doua durează până pe la sfârșitul sec. XX; a treia etapă începe odată cu legalizarea activității speciale de investigații și ultima etapă începe cu reintegrarea activității speciale de investigații și procesul penal.

Cuvinte-cheie: *activitate și măsuri speciale de investigaţii, proces penal, urmărire penală, drepturile omului.*

[1)] *The paper is developed within the research project "Conceptual approaches on special investigative activity under the rule of law" Abordări conceptuale privind activitatea specială de investigații în condițiile statului de drept", cipher 22.00208.8007.07/PD I, supported from the state budget.*

DÉVELOPPEMENT D’ACTIVITÉS D’ENQUÊTE SPÉCIALE EN RELATION AVEC LA PROCÉDURE PÉNALE ET LES DROITS DE L’HOMME

Le document est consacré au domaine de l’activité d’enquête spéciale et des procédures pénales. À travers la méthode de recherche historique, l’évolution de l’activité d’enquête spéciale en relation avec le processus pénal et l’institution du droit humain est étudiée et analysée. L’étude montre qu’aucune distinction n’était initialement faite entre les enquêtes spéciales et les poursuites pénales. Par la suite, à mesure que les droits de l’homme sont exploités, ces deux types d’activités se divisent, la procédure pénale devenant une forme publique d’enquête sur les crimes et les enquêtes spéciales étant tenues secrètes, remplissant la fonction d’informer sur la procédure pénale et d’assurer la sécurité de l’État. L’adhésion de notre pays au droit international des droits de l’homme a conduit à la légalisation d’enquêtes spéciales distinctes des poursuites pénales. Plus tard, également sous l’influence des droits de l’homme, la réintégration partielle des deux formes d’enquête a suivi. Ainsi, l’ensemble du processus évolutif des enquêtes spéciales est divisé en quatre étapes consécutives: la première étape commence dans les temps anciens et se termine au XXe siècle. XIXe; la deuxième étape dure jusqu’à la fin du siècle. XX; la troisième étape commence par la légalisation de l’activité d’enquête spéciale et la dernière étape commence par la réintégration de l’activité d’enquête spéciale et de la procédure pénale.

Mots-clés: *activité spéciale d’enquête, mesures spéciales d’enquête, procédure pénale, poursuites pénales, droits de l’homme.*

РАЗВИТИЕ СПЕЦИАЛЬНО-СЛЕДСТВЕННЫХ МЕРОПРИЯТИЙ В КОНТЕКСТЕ УГОЛОВНОГО ПРОЦЕССА И ПРАВ ЧЕЛОВЕКА

Данная статья посвящена сфере специально-розыскной деятельности и уголовного судопроизводства. Методом исторического исследования изучается и анализируется эволюция специально-розыскной деятельности применительно к уголовному процессу и институту прав человека. Исследование показывает, что изначально не проводились различия между специальными расследованиями и уголовным судопроизводством. В последующем, по мере эксплуатации прав человека, происходит разделение этих двух видов деятельности, при этом уголовный процесс становится публичной формой расследования преступлений, а специальные расследования засекречены, выполняя функцию информирования об уголовном процессе и обеспечения безопасности государства. Приверженность нашей страны международному законодательству в сфере прав человека привела к легализации специальных расследований отдельно от уголовного судопроизводства. Со временем, также под влиянием института прав человека, последовала частичная реинтеграция двух форм расследования. Таким образом, весь эволюционный процесс специальных исследований делится на четыре последовательных этапа: первый этап начинается в древности и заканчивается в XIX веке; второй этап длится до конца XX века; третий этап начинается с легализации оперативно-розыскной деятельности, а последний начинается с воссоединения оперативно-розыскной деятельности и уголовного процесса.

Ключевые слова: *специально-розыскная деятельность, специальные розыскные мероприятия, уголовный процес, уголовное преследование, права человека.*

Introduction

An important role in solving the current problem of the special investigation activity (ASI) is played by the historical research method of this type of activity in relation to the criminal process (PP) and the rights of the person. It is known that the social purpose of ASI, like that of PP, consists in ensuring and protecting the supreme social values provided by the Constitution of the Republic of Moldova, among them fundamental human rights (the right to life, health, freedom, etc.). It is also known that ASI constitutes a very effective, or perhaps even the most effective, legal means of combating crime - an antisocial phenomenon that not only threatens or harms the respective values, but also damages them. The only inconvenience emanating from the

ASI consists in its specific (secret) character of realization which, more or less, is correlated with the restriction of some individual rights. In relation to this fact, panic, phobia, mistrust, skepticism is created in society, sometimes unjustifiably, sometimes intentionally questioning the importance and social utility of this activity.

Ignorance or insufficient knowledge of the evolutionary process of ASI in relation to PP and the rights of the person inevitably leads to underutilization of the anti-criminogenic potential of special investigations, or, on the contrary, leads to abuses by the bodies competent to carry out special investigative measures (MSI). The lack of necessary knowledge in this field can negatively influence the development prospects of ASI, especially in the conditions of the transformations of all social spheres caused by the global impact of the technological-scientific revolution in recent years. The reactive method of protecting constitutional values has recently proven to be less effective in identifying and removing threats that have literally already advanced into a new generation. Changes in the field of ASI have become not only necessary, but also inevitable, or the opportunities of new technologies will have a clear advantage over those who pay attention to social values, but not those who have the task of protecting them.

The problem of the changes that could be made in the field of ASI relates to finding and keeping the golden balance between the general interest of society regarding the protection of constitutional values against the new generation of threats, on the one hand, and the individual interest regarding the respect of the rights and freedoms of the person, on the other hand. Studying the historical aspects of the relationship between ASI and the concept of human rights will help us understand in which direction the balance will have to be tipped to bring it to a state of equilibrium.

The study methodology includes traditional research methods: logic, analysis and synthesis, deduction and induction, observation and comparison. Based on the analysis of relevant materials (specialized literature, national and foreign legislation, other relevant materials) appropriate conclusions are formulated.

Basic content and discussions

Stage I. The roots of ASI stretch back to the most remote times, the skills of tracking, observing, recognizing and searching were formed in our ancestors from the time when the only source of existence was hunting and gathering the harvest of the garden of heaven.

The emergence and development of primitive communities and the formation of organizational leadership structures determined the need for their protection and security, and the skills of surveillance and defense were successfully applied not only to predatory animals, but also to barbarians and scavengers. To neutralize the dangerous actions of the enemy, spies were used, being sent to the opposite camp to perform various tasks (gathering information, disinformation, recruiting former enemies, etc.). The achievement of these tasks was ensured by such actions as bribery, blackmail with the dissemination of compromising materials, exploitation of human weaknesses (the desire for revenge and affirmation, jealousy, etc.). Perhaps the decisive battles waged by such outstanding leaders as Alexander Macedon, Hannibal, Genghis Khan, Frederic II would not have been won without the application of methods and investigation procedures specific to the respective periods [1, p. 7].

Back then there was no distinction between what we call today ASI and PP. All investigations into conflict report resolution depended on the skills of the report participants. Due to the lack of professionalism for such works, the Divine judgment was most often resorted to (the oath; drawing lots; ordeals)

[2]. The situation at that time did not require the creation of specialized investigation bodies. The problems of the security of private life did not belong to the competence of the state, which only gets involved in exceptional situations (mass disturbances, calamities, etc.) [3, p. 4].

The concept of human rights at that stage was in the process of formation, being found in the thinking of the ancient philosophers Confucius (552-479 BC), Pythagoras (6th century-490 BC), Plato (427- 347 BC), Aristotle (384-322 BC). Back then, rights were only for certain social groups. Later, in the thinking of the Stoic philosophers, the idea of universal natural rights was promoted [4, p. 36].

Magna Charta (1215) was the first known text in history to guarantee some liberties to what were then called “free people”. This act appeared as a result of the struggle of various social categories against feudal absolutism [5, p. 30].

The struggle for power and the desire to maintain it, as well as the constant threat of riots and other crimes, led the leaders of the states to pay special attention not only to external security issues, but also to ensuring internal order, a fact that led at the establishment of police bodies whose duties included secret listening, tracking and denunciation as ways of obtaining information [6, p. 3].

It should be emphasized that investigative procedures throughout the evolution of ASI were used both for the purpose of combating crime and for informative and counter-informative purposes, to ensure the security of the state and its leader. Thus, the history of ASI cannot be divided from the history of special services [7, p. 12].

The centralization of power strengthened the role of the state in public life and, therefore, the competence of state bodies also expanded, including in the fight against crime. This trend led to the demise of the private criminal process. As a result, the process started regardless of the existence of the victim’s complaint, the criminal’s guilt being proven by the judicial authorities. The public and verbal form of the process was replaced by the secret and written one, and torture had become the main means of obtaining the recognition of guilt - the main objective of the criminal process [8].

The development of capitalism (16th-17th centuries) led to the emergence of the bourgeoisie in Europe, consisting of merchants and craftsmen. Their plea for equal rights with aristocrats [9, p. 40] led to massive riots resulting in the adoption of a series of important documents regarding the protection of human rights: Petition of Rights (1628) [10]; Habeas corpus (1679) and Bill of Rights (1689) [11, p. 28]; Virginia Declaration of Rights (1776) [12]; United States Declaration of Independence (1776) [13]; Declaration of the Rights of Men(1791) [14]; Declaration of the Rights of Man and Citizen (1789) [15].

The social upheavals of the XVIII century led to the change of the form of the criminal process from inquisitorial to accusatorial, the accused having the right to administer the evidence, and the sending to court being ordered by the people’s representatives, who also participated in the administration of justice through the Jury Courts [16, p. 9-10].

The influence of the French Revolution was particularly strong on the entire European continent, including the Romanian Countries. The aspirations of unity and national emancipation, corroborated with the great ideas of the French Revolution, were found in the program documents of the 1848 revolution in Transylvania, Moldova and Wallachia [17, p. 32-33].

In Russia, the French Declaration was perceived by many as contradicting the divine and natural principles that determined that people cannot be equal, including before the law [18, p. 10-15].

The appearance in the XIX-th century of professional and organized crime as a result of a combination of factors (the industrial revolution, the growth of the population of the cities, the expansion of the bourgeoisie, etc.) that "flooded" practically all the countries of Western Europe made it clear that the common sense and sound judgment that had started to lead the state organs were powerless in the fight against the new criminality [19, p. 97]. There was a need to create more effective means and methods, to develop special measures to protect citizens against criminal attacks, to ensure the inevitable punishment of the guilty [20, p. 14-15].

The first founder of the secret police is considered to be Eugene François Vidocq (France, year 1811 - "La Sûreté"). He is credited with inventing new methods of gathering information: undercover surveillance, disguise, searching for suspects, assisting during official searches, operative records of recidivists, publishing in newspapers the reports of wanted criminals, organizing brothels, traps and other techniques for detecting criminals who could not be identified by traditional means [21, p. 41].

The social context of the time required the formation and development on the French model of specialized criminal police subdivisions in England (1829 - "Scotland Yard") [22], in the USA (1844 - NYPD - New York City Police Department) [23], from Russia (1866 - "Сыскная полисия") [24].

Stage II. In the context of the worldwide expansion of the concept of human rights, the judicial reform of the 1960s of the 19th century of the Russian Empire separated the preliminary investigation from the activity of the police, which was tasked with carrying out by ASI. The basis of the reform was the idea of excluding unfounded procedural coercion. It was taken into account that the investigation was often started without a certain basis and therefore, people were brought to court pointlessly, and the judges in turn were busy with useless things. On the other hand, the problem of the guarantees of the coercive nature of the preliminary research needs to be solved. The solution was found in concretizing and detailing the evidentiary procedures. Therefore, it was agreed that only public procedural actions can and should be detailed (on-site investigation, search, collection of objects, presentation for recognition), the rest, i.e., special investigative actions, should remain secret, their performance remaining unexplained [25, p. 114]. As a model, the French experience was taken into account, which until then had proven its effectiveness [25, p. 83].

According to the CPP (Criminal Procedure Code) of 1864 of the Russian Empire [26] when the signs of the crime were unclear, doubtful or the sources of communication about the crime were unreliable, the police were obliged, before reporting the case to the criminal investigation body, to entrust themselves through the criminal investigation (дознание) if the case really took place and if it contained the signs of the crime (art. 253). When carrying out the criminal investigation, the police had the power to collect all the necessary information by means of special investigations (розыск), interrogations and secret pursuits without, however, carrying out searches or seizure of objects (art. 254). As a general rule, the performance of actions that implied an interference in the sphere of personal rights was allowed only within the framework of the criminal investigation, being the prerogative of the investigator (criminal investigation officer) who possessed true judicial independence [25, 84].

Thus, ASI stood out as an unofficial police activity aimed at secretly identifying the criminal [27, p. 89]. Later, in 1908, within the police subdivisions, then the militia, specialized subdivisions (сыскные одеждание) were created that carried out criminal investigation

and special investigative activity [28, p. 65]. The activity of these subdivisions was regulated by departmental instructions in which certain guarantees regarding the respect of the rights of the person were also found. The instruction of August 9, 1910 prohibited “the collection of information concerning the private lives of persons not connected with the duties of the police for the prevention, suppression and investigation of crime, such as the collection of personal and family information, information about divorce or the affairs of various persons, the collection of information about the solvency of individuals, or the collection of information in the interest of third parties” [29, p. 65]. In other words, it was about the prohibition of the restriction of the right to private life, if it was not related to solving the tasks of the police.

The research carried out allows us to state that until the Russian revolution of 1917, the unjustified restriction of the rights of the person by the state bodies was prevented in two ways. First, in unclear cases the person’s rights could not be restricted without a preliminary control. Second, the decision to interfere with someone’s rights was made by an independent and impartial body - the investigating judge.

With the establishment of Soviet power, these methods were liquidated. The criminal investigation (дознание) ceased to be regarded as an activity without interference with the rights of the person, and the investigator lost his judicial independence. As a result, the apparently solved problem regained its old relevance. According to Russian researchers, the political regime established after the October Revolution was, from a historical point of view, a step backwards, because it rejected such democratic values as individual freedom, the rule of law, human rights, state of the law [30, p. 185]. Since the previous decision was considered obsolete, the issue of guarantees of the rights of the person was solved by introducing a new procedural institution: *the initiation of criminal prosecution*, materialized formally by issuing an ordinance [31, p. 285-287].

In this context, it is worth noting that European states did not know such a guarantee, still keeping the traditional idea about the forms of preliminary investigation [32, p. 10]. Later, an alternative to the French version appeared in Germany (1974) and other European states that generally abandoned the prosecution phase, keeping only the criminal investigation phase. It must be said that Germany at that time was facing a series of terrorist acts, among which was the terrorist attack at the Olympic Games in Munich. During the criminal trials, the defense side abused a lot of its rights: it did not show up at the court hearings, sabotaged their proceedings, sent messages between the prisoners and their freed accomplices, etc. In this sense, the “Great Reform of Procedural Law” did not have a liberal-democratic character, but aimed at simplifying the criminal investigation procedure and suppressing abuses of rights by the defense [33]. Since the criminal investigation had retained its police nature and therefore still needed judicial legitimacy to carry out the MSI, the role of the mechanism for the protection of individual rights in these countries was transferred to the institution of judicial control [34, p. 29-32]. Such changes could not go unnoticed by researchers of the post-Soviet space. In the course of some modern polemics about the initiation of criminal prosecution, the view was expressed that the existence of the institution of initiation of criminal prosecution loses its meaning under the conditions of the emergence of judicial control [35, p. 38-40]. Moreover, the German approach became the main point of reference for post-Soviet reformers who are still debating whether to keep or drop the prosecution stage.

After the Second World War, a series of international acts were adopted, aimed at guaranteeing human rights internationally,

among them: the Universal Declaration of Human Rights (1948); International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (1966); first (1976) and second (1989) Optional Protocol on Civil and Political Rights.

The USSR was in no hurry to accede to the respective international acts. However, in the post-war years, several measures were taken to exclude the shameful experience of police bodies regarding non-compliance with the law, unjustified arrest of citizens, committing acts of corruption and other serious violations. However, the social value and effectiveness of ASI was never questioned. Arrears were only in the legal regulation of the procedures and techniques specific to this activity.

At the official level, there was very brief talk about ASI. In *the Basics of the criminal legislation of the Union and of the Union Republics* adopted in 1958 by the Supreme Soviet of the USSR there was a simple remark according to which the criminal investigation bodies were obliged "*to undertake the necessary operative investigative measures*" in order to detect the crimes and the persons who committed them (art. 29). Pursuant to this act, the Criminal Procedure Codes of all the Union Republics, including that of the RSSM (Moldovan Soviet Socialist Republic) from 1961, were developed, which included similar provisions.

In paragraph (1) of art. 100 of the CPP of the RSSM (Moldovan Soviet Socialist Republic) it was provided: "*It is the responsibility of the criminal investigation bodies to take operative investigative measures, including the use of video and sound recordings, filming, photography in order to discover the evidence of the crime and to the people who committed it, the identification of the factual data, which can be used as evidence in the criminal case after their verification, in accordance with the criminal procedure legislation*".

Pursuant to paragraph (2) of the same article, the criminal investigation bodies also had the obligation to take all the necessary measures to prevent and solve the crime and to apply, if necessary, state protection measures against the persons who provided help in the criminal process, if there was a danger to their life, health or property.

The predominantly secretive nature of ASI has often generated mistrust of its results by the judiciary, prosecutors, lawyers and criminal investigation officers, and for society, the operative activity has always been associated with illegalities and abuses by investigating officers.

A special role in the formation and development of the institution of human rights during the Soviet period was played by the adoption of the Constitution of the USSR in 1977 [36], in which, for the first time, the principle of legality was consolidated, obliging all state bodies to ensure the protection of law and order, the interests of society, the rights and freedoms of citizens (art. 4). In this Constitution, in addition to the previously guaranteed rights to the inviolability of the person (art. 54) and the inviolability of the home (art. 55), the right to the protection of private life of citizens (art. 56), the right to judicial protection (art. 57), the right to challenge the actions and demand compensation for the caused damage by the illegal actions of officials (art. 58).

Despite the constitutional guarantees, operative (special) investigative activity in the former USSR remained regulated at the level of secret departmental acts. In those acts, the concept of the rights of the person as a legal institution was not mentioned, the principle of socialist legality being considered a priority. The attention of the academic environment was focused on studying and developing the content of the principle of legality, this being understood not only as strict compliance with laws and regulations, but also as compliance

with the rights, freedoms and legitimate interests of citizens.

In the specialized literature of those years, attention was drawn to the fact that in the process of verifying primary information, situations could arise restricting the rights and legally protected interests of citizens, organizations, institutions and businesses. It was considered absolutely inadmissible to violate the rights and interests of citizens, and not only those not involved in the crime, but also those subject to checks. It was strictly forbidden to organize operative actions against honest citizens. Also, such actions as falsification, provocation and disloyalty were considered unacceptable (Atamadjitov V.M. - 1986).

Researchers Frolov V. Yu., Cecetin A. E., Penkin V. S., Mitrofanov E. A. by developing in 1991 the draft of the USSR Law “On investigative operative activity in the Ministry of Internal Affairs”, were among the first to try to fill the legislative vacuum regarding the protection of rights and the legitimate interests of citizens against crimes, as well as ensuring guarantees against abuses and the unfounded application of special investigative measures regarding law-abiding citizens[37, p. 119].

Stage III. The post-Soviet period can be considered as a new stage in the evolution of ASI in relation to PP (Criminal Procedure) and human rights. This stage is marked by the change of the paradigm of legal sciences, in which the idea of the rule of law and the equality of the parties in the relationship between the citizen and the state begins to prevail.

The adoption at the beginning of the 90s of the last century of a special law regarding operative investigative activity both in our country and in the rest of the ex-Soviet republics, marked a key historical moment in terms of the conceptualization of the relationship between ASI and rights the person.

In art.3 of Law 45/1994 were provided the fundamental principles of this kind of activity, among them, together with the principle of legality, was the principle of respecting the rights and freedoms of the person. Thus, the legislator separated the concepts of legality and respect for the rights of the person in ASI.

The content of the principle of respecting the rights and freedoms of the person in the operative activity of investigations was detailed in art.5, which ensured the right to challenge the actions of the body that exercises the operative activity of investigations to the higher hierarchical body, to the prosecutor or to the training judge (para. (2)); the right to request explanations about the unfounded application of the operative investigations (paragraph (3)); The right to compensation for the damage caused in the case of the violation by the body exercising the operative activity of investigating the rights and legitimate interests of the natural and legal persons (paragraph (4)). The guarantees of respect for the rights and freedoms of the individual were also included in a number of other provisions of the same law regarding the MSI (special investigative measures) (art.6); the grounds (art.7) and the conditions for their implementation (art.8) etc.

In a few months after the adoption of Law no.45/1994, the Constitution of the Republic of Moldova, July 29, 1994, which set the legal basis for a modern civilized state based on the principles of democracy, separation, priority and freedoms of person, was adopted. Because the Constitution has a supreme legal force and a direct effect of its norms, the state bodies in the field of ASI followed from that moment and further to rely on constitutional principles: the state recognition of the rights and freedoms and dignity of humans (art. 1), their guarantee in accordance with the recognized general principles and norms (art.4), equality of citizens before the law (art.16), the presumption of innocence (art.21), respect and protection of intimate, family and private life (art.28), inviolability of domicile (art.29), inviolability

of the secret of correspondence (art.30), and others.

While the attention of the Moldovan politics, as well as of the other ex-Soviet republics, was oriented towards glorifying the rights and freedoms of the person, the criminal environment took the maximum of this situation, appreciating it as the assignment of positions from the bodies of protection of law norms. In addition, the evolution of the technical-digital progress at the end of the millennium has made available to the interlocking world new opportunities for rapid, dynamic and unlimited distances. Very soon, national criminal groups have made strong connections with international ones. The expansion of new technologies (internet, mobile phones) and their exploitation in criminal interests have made traditional evidentiary procedures less effective for documenting new forms of criminality: acts of corruption, protectionism, trafficking in human beings, drugs, weapons, money laundering etc. The only adequate means of countering the new wave of organized crime remained MSI by conducting of which it was possible to obtain information necessary to control the pace of the rapid development of that phenomenon. Shortly thereafter, their advantage diminished significantly. The information obtained by performing the MSI was increasingly more difficult to cross the threshold of criminal evidence for more formal reasons: the evidence was canceled because it was collected until the start of the criminal investigation or because it was obtained by the investigation officers and not by the prosecution officers, because the investigation officers would have had only the competence to supervise but not to record the information obtained by carrying out the MSI, etc.

The situation had become extremely complicated and the shock produced by the US terrorist act on September 11, 2001 pushed the international bodies to issue a series of important acts against the new crime by which the national laws are recommended for the admissibility of the MSI to investigate serious crimes [38; 39; 40; 41; 42].

Stage IV. The first in the ex-Soviet space that made such legal reforms were the Baltic countries: Lithuania (2002), Estonia (2003) and Latvia (2005), integrating MSI in the CPP (Criminal Procedure Code) model. Later the same path was followed by Moldova (2012), Ukraine (2012), Georgia (2014), Kazakhstan (2014), Kyrgyzstan (2019).

It should also be mentioned that practically in all the countries that have followed the path of integrating the ASI into the CPP, the laws that directly regulate special investigations continue to operate at the same time, the only exception being Estonia, which has definitively renounced such a law.

Therefore, the MSI were divided into two categories: 1) MSI provided by the CPP performed only within the limits of PP and 2) MSI provided in separate law made outside PP. Respectively, the information obtained by carrying out the first category of measures are used in the probative process, and those obtained by the second category of measures cannot enjoy such value.

Thus, we note that the issue of capitalizing on the results obtained by carrying out MSI regulated by a law other than the CPP has remained unresolved. Only the capacities of reactive criminal investigations have been increased, while the potential of special preventive investigations has essentially decreased due to the reduction of the number of MSIs that could be carried out in this regard. In the implementation of the legal reform in 2012, an important role was played by the case of Iordache and others against Moldova, through which the ECtHR drew the attention of the national authorities to the fact that Law no. 45/1994 regarding operative investigative activity did not offer sufficient guarantees against possible abuse special investigative

measures. In the local interpretation, these observations were understood in the sense that the guarantees against possible abuses can only be ensured within the limits of the criminal process.

In this context, but also taking into account the increase of the crime level of some kinds of crimes, drug trafficking, corruption, organized crime, the question became extremely current: what would be more rational from the state bodies, to wait for the criminal intention and then to act, or to gather information and to suppress the criminal act immediately?

In the next years after the reform, crime, in the national space, has expanded even more, being more and more felt in the top management of the country. In the period 2012-2014, financial amounts of over 13.3 billion Moldovan lei (767 million dollars, equivalent to 12% of the country's annual gross domestic product and higher than the total liquidity of banks) were stolen from the country's banking system [43], the beneficiaries who are not currently held accountable for the criminal proceedings. In 2019, suffocated by endemic corruption, thefts and illicit privatizations in the public, total control over the judicial system, exercised by the oligarchy and the numerous attacks on citizenship rights and freedoms, the Parliament declared the Republic of Moldova "captured state" [44].

Perhaps the criminogenic situation would not have become so serious if the special investigation services had at least the same powers as before the reform. It is welcome to increase the reactive capacity of criminal investigations through the admissibility of carrying out MSI in the criminal investigation phase. The idea of diminishing the ability of special services to act until the start of the criminal investigation and after the termination of this procedural stage seems unsuccessful to us. The fact that special investigative services have been prohibited from carrying out MSI relevant to the performance of ASI tasks (art. 2 of Law no. 59/2012) is a matter that only benefits the criminal elements and in no way the honest law-abiding citizen. Practically all the potential of the ASI (special investigation activity) was concentrated in the criminal investigation phase, the rest of the PP segments, as well as those outside it, remained more vulnerable than before the reform. The situation has become so complicated that even the convicted persons who are evading the execution of the sentence can no longer be found, located, searched by carrying out the MSI authorized by the investigating judge and mostly by the prosecutor. In general terms, it can be stated that the effectiveness of the activity of the subjects who carry out special investigations has been considerably reduced.

It should also be mentioned that the said reform strongly shook the foundations of the theoretical-methodological system of the criminal process which prevents the understanding and uniform application of the legal provisions. First of all, there was confusion about the relationship between ASI and PP. It is not clear how they should be treated as part of a whole or as two distinct types of activity. According to the CPP, it would seem that we are talking about the same specialty. The very existence of Law no. 59/2012 already proves that ASI is distinct from PP. The nomenclature of scientific specialties [45] also divides these specialties: 554.03. - Criminal procedural law and 554.04. - Criminalistics, judicial expertise, operative investigations. In this context, the rhetorical question is imposed: to which of these two specialties are the research subjects related to the special investigative measures in the criminal process?

There are also uncertainties about the relationship between MSI and prosecutions, are both the evidentiary procedures or only the last? If we admit that MSI are probative procedures, then how do we explain that the evidence obtained after their performance has

a lower value than the evidence obtained by conducting the criminal prosecution actions (Article 101 paragraph (5) CPP). But doesn't this discrimination of evidence go against the PP principle: "*no evidence has a predetermined value for the criminal investigation body or the court"* (art. 27; art. 101 para. (3) CPP)? And in general, it is not clear whether the principles provided for in Law no. 59/2012 are the basis for carrying out the MSI provided for in the CPP, because some principles (of harmlessness; combining public and secret methods) provided for in the law are not found in the code.

In order to rectify this situation, through the Decision of the National Security, Defense and Public Order Commission CSN/7 no. 257 of June 10, 2015, it was decided that the Government, through the Ministry of Justice, should create a working group and submit, according to the established procedure, the draft law for the amendment and completion of some legislative acts aimed at the special activity of investigations resulting from the problems identified in the application of the legislation corresponding to. Since then, several drafts have been submitted to amend the ASI (special investigation activity) legislation, but due to conflicting opinions, the work continues today.

Conclusions

The entire evolutionary process of ASI in relation to PP and human rights can be divided into several consecutive stages, each stage being specific to certain special features.

The first stage is also the longest, covering the period between antiquity and the XIX-th century. Specific to this stage is the fact that there was no distinction between the procedures of ASI and those of PP. Because certain rights of the litigants were not required to be respected, evidence was collected both publicly and secretly. The general population had no rights, only the aristocracy enjoyed them. If the conflict report arose between an aristocrat and a peasant or slave, justice was always on the side of the aristocrat.

The second stage starts from the XIX-th century and lasts until the end of the 20th century. The recognition of the rights of the person conditioned the resolution of conflict reports based on the law, which led to the emergence of the CPP in which certain rules for collecting evidence to establish the truth were already indicated. Guaranteeing the rights of the person suspected of committing a crime was ensured by detailing the evidence collection procedure and offering equal chances for defense. As a result, there was a split between the special investigations and the criminal process, because non-transparent evidence collection procedures by their nature could not ensure equal chances of defense. In these conditions, ASI developed separately from PP as a kind of secret information activity, being focused on several directions: reactive, aimed at ensuring the good course of PP; preventive, aimed at revealing, preventing and ending crime preparation activities and threats that endanger the security of the state; search and identification of persons and bodies. During this stage, ASI was regulated by classified departmental acts. We should not lose sight of the fact that towards the end of this stage the standards of respect for human rights increased, which led to the removal of ASI from the secret initials.

The third stage begins with the legalization of ASI. For the Republic of Moldova this moment corresponds to the adoption of Law no. 45/1994 on the operative activity of investigations. Thus, for the first time at the law level, the legal instruments (MSI) have been informed to the general public. At the same time, certain guarantees have been established in order to respect the rights of the investigated persons, the performance of MSI being prohibited for the achievement of other purposes and tasks than those indicated in the

law. During this stage, special investigations continued to be developed in the same direction as in the previous stage.

The fourth stage begins by integrating ASI in CPP. In general, we can distinguish two models of integration: the first West-European and the second East-European. Specific to the first model is the full integration of ASI in the CPP, which has its beginning in the years after 1970. According to this model, the special investigations are carried out throughout the PP and does not matter whether or not the criminal prosecution is started because it does not exist. It is only the criminal investigation (дознание) exercised by the police in the activity of which the MSI are carried out. If necessary, the results of the special investigations are used in the court as evidence.

Specific for the second model is the fact that ASI is not integrated to the CPP. In the countries that have adopted this model, they continue to operate separate laws that regulate ASI. This model has its beginning in the early years of this millennium. Our country joined this model in 2012, the year in which the legal reform was made in the field of special investigations, producing essential changes at concept level and crime fighting strategy. Thus, by reforming ASI, it was tried to divide this kind of activity into two parts. The first part has a reactive character and is regulated by the CPP, and the second has a preventive character, of searching and revealing the threats to the citizen and the state and is regulated by Law no.59/2012 on the special investigation activity. Therefore, the first party is responsible for fulfilling the task of investigating and discovering crimes, and the second of the rest of the tasks indicated in art.2 of Law no.59/2012. In this way only the information obtained by performing the first part of the ASI are used in the probative process, the rest of the information will continue to be only informative.

Bibliography

1. ИЛЬИЧЕВ, В. А. *Оперативно-розыскная деятельность: курс лекций.* – М.: Эксмо, 2009 г. p. 7.

2. НИКИТИНА, Е. В. *Из истории развития средств доказывания.* Материалы международной научно-практической конференции «Уголовное судопроизводство: история и современность», посвященной 150-летию Устава уголовного судопроизводства Российской империи. Актуальные проблемы российского права. 2014. № 11 (48) ноябрь. С.2540-2545. . Disponibil: https://cyberleninka.ru/article/n/iz-istorii-razvitiya-sredstv-dokazyvaniya/viewer [Accesat 26.08.2021]

3. ЕЛИНСКИЙ, В. И. *История уголовного сыска в России (X – начало XX в.)*. М.,2004. С. 4.

4. *Введение в права человека.* Редакционная коллегия: Кнут В. Бергем, Гуннар М. Карлсен, Беата Слюдал. Норвежский Хельсинкский Комитет по правам человекаю Осло 2003. p. 36 Disponibil: https://iuristebi.files.wordpress.com/2011/07/e18390e18393e18390e1839be18398e18390e1839ce18398e183a1-e183a3e183a4e1839ae18394e18391e18390e183a2e18390-e183a8e18394e183a1e18390e18395.pdf [Accesat 26.08.2021]

5. DOLEA, I. *Drepturile persoanei în probatoriul penal: conceptul promovării elementului privat*. Chișinău. Cartea Juridică, 2009 (Tipogr. «Bons Offi ces» SRL). p. 30.

6. *Жандармы России* / сост. В. С. Измозик. СПб.: Нева, М.: Олма-Пресс, 2002 г. С. 3. [Accesat 26.08.2021] Disponibil: http://booksshare.net/books/history/izmokin-vs/2002/files/jandarmirospolrozisk2002.pdf

7. ЗАХАРЦЕВ, С. И., ИГНАЩЕНКОВ, Ю. Ю., САЛЬНИКОВ, В. П. *Оперативно-розыскная деятельность в XXI веке*. Юридическое издательство Норма. 2017. P. 12.

8. ВЛАДИМИРСКИЙ-БУДАНОВ, М. Ф. *Обзор истории русского права*. Киев, 1907. С. С. 659-661. Citat după Никитина Е.В. Из истории развития средств доказывания. Материалы международной научно-практической конференции «Уголовное судопроизводство: история и современность», посвященной 150-летию Устава уголовного судопроизводства Российской империи. Актуальные проблемы российского права. 2014. № 11 (48) ноябрь. С.2540-2545. [Accesat 26.08.2021] Disponibil: https://cyberleninka.ru/article/n/iz-istorii-razvitiya-sredstv-dokazyvaniya/viewer

9. *Введение в права человека*. Редакционная коллегия: Кнут В. Бергем, Гуннар М. Карлсен, Беата Слюдал. Норвежский Хельсинкский Комитет по правам человекаю. Осло 2003. p. 40 [Accesat 26.08.2021] Disponibil: https://iuristebi.files.wordpress.com/2011/07/e18390e18393e18390e1839be18398e18390e1839ce18398e183a1-e183a3

e183a4e1839ae18394e18391e18390e183a2e18390-e183a8e18394e183a1e18390e18395.pdf

10.https://ro.wikipedia.org/wiki/Peti%C8%9Bia_dreptului [Accesat 26.08.2021]

11. CERBA, V. *Aspecte privind drepturile și libertățile fundamentale ale omului și cetățeanului.* Legea și viața. Mai 2016. p. 28. Disponibil online: http://www.legeasiviata.in.ua/archive/2016/5-1/5.pdf

12. The Virginia Declaration of Rights. [Accesat 26.08.2021] Disponibil: https://www.law.gmu.edu/assets/files/academics/founders/VirginiaDeclaration.pdf

13. The Declaration of Independence, July 4, 1776. [Accesat 26.08.2021] Disponibil: https://www.constitutionfacts.com/content/declaration/files/Declaration_ReadTheDeclaration.pdf

14. Bill of Rights. [Accesat 26.08.2021] Disponibil: https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf

15. Declarația drepturilor omului și cetățeanului [Accesat 26.08.2021] Disponibil: https://dreptuladrepturi.weebly.com/1789-declara355ia-drepturilor-omului-351i-ale-cet259355eanului-franta.html

16. DOLEA, I. *Curțile cu juraţi în procesul penal.* Chișinău, 1996. P. 9-10.

17. DOLEA, I. *Drepturile persoanei în probatoriul penal: conceptul promovării elementului privat.* Chișinău. Cartea Juridică, 2009 (Tipogr. «Bons Offi ces» SRL). p. 32-33.

18. БАРБИН, В. В. и др. *Обеспечение прав и свобод человека и гражданина в деятельности органов государственной власти:* учебник. М.: Академия управления МВД России, 2020. p. 10-15.

19. ЗИМИН, Е. *Механизм обеспечения конституционных прав человека в сфере деятельности полиции* (на примере США). Диссертация на соискание ученой степени кандидата юридических наук. Москва – 2015. p. 97.

20. GOLUBENCO, Gh. *Criminalistică: obiect, sistem, istorie* / Gheorghe Golubenco. Univ. Liberă Int. din Moldova. – Ch.: F.E.-P. „Tipogr. Centrală", 2008. P. 14-15.

21. ПРОКОФЬЕВ, В. *История возникновения сыска - уголовного розыска.* Современные проблемы права, экономики и управления. №1/2015. p. 41. [Accesat 26.08.2021] Disponibil: https://elibrary.ru/item.asp?id=25027484;

22. Скотленд-Ярд [Accesat 26.08.2021] Disponibil:https://ru.wikipedia.org/wiki/%D0%A1%D0%BA%D0%BE%D1%82%D0%BB%D0%B5%D0%BD%D0%B4-%D0%AF%D1%80%D0%B4

23. Înainte de înființarea NYPD, populația din New York, în jur de 320.000, era deservită de o forță formată din 1 pază de noapte, 100 de mareșali din oraș, 31 de polițiști și 51 de ofițeri de poliție municipale. La 7 mai 1844, statul New York a adoptat Legea poliției municipale, o lege care autoriza crearea unei forțe de poliție și a desființat sistemul de veghe nocturn. La cererea Consiliului comun al orașului New York, Peter Cooper a elaborat o propunere de creare a unei forțe de poliție de 1.200 de ofițeri. John Watts de Peyster a fost un prim avocat al implementării disciplinei și organizării stilului militar în forță. [Accesat 26.08.2021] Disponibil: https://en.wikipedia.org/wiki/History_of_the_New_York_City_Police_Department

24. Poliția de investigații a fost un serviciu de poliție al Ministerului Afacerilor Interne al Imperiului Rus din perioada 1866-1917, a cărui sarcină era să descopere infracțiunile, să efectueze o cercetarea penală asupra acestora și să caute criminali și persoane dispărute. [Accesat 26.08.2021] Disponibil: https://ru.wikipedia.org/wiki/%D0%A1%D1%8B%D1%81%D0%BA%D0%BD%D0%B0%D1%8F_%D1%87%D0%B0%D1%81%D1%82%D1%8C

25. КОНОВАЛОВ, С. Г. *Элементы германской модели досудебного производства в уголовном процессе постсоветских государств.* Диссертация на соискание ученой степени кандидата юридических наук. Москва – 2018. p. 114.

26. Устав уголовного судопроизводства от 20 ноября 1864 г. [Accesat 26.08.2021] Disponibil: https://constitution.garant.ru/history/act1600-1918/3137/

27. НОВИКОВА, Е. А., ШУМИЛИН, С. Ф. *Следственная и оперативно-розыскная деятельность: интеграция или взаимодействие* // Судебная власть и уголовный процесс. 2018. № 2. С. 89.

28. КАРЯГИНА, О. В. *История становления института дознания в уголовном процессе России.* Вестник Таганского института управления и экономики N.1/2016. p. 65.

29. ЕЛИНСКИЙ, В. И., ИСАКОВ, В. М. *Становление и развитие уголовного сыска в России* (X – начало XX в.) М., 1998. С. 65. [Accesat 26.08.2021] Disponibil: https://ru.b-ok.global/book/6117329/f7bd7b

30. *Права человека* / отв. ред. Е.А. Лукашева. М., 1999. p. 185.

31. ШЕВЕЛЬ, Д. В., АЛИСОВА, Е. А. *Становление и развитие института возбуждения уголовного дела в Российском и зарубежном уголовном процессе* // Политематический сетевой электронный научный журнал Кубанского государственного аграрного университета. № 133. 2017. С. 275-287

32. ВОЛОДИНА, Л. М. *Проблемы регламентации возбуждения уголовного дела* // Библиотека криминалиста. 2013. № 4. С. 10. [Accesat 26.08.2021] Disponibil: https://studylib.ru/doc/2176375/problemy-reglamentacii-vozbuzhdeniya-ugolovnogo

33. *Уголовно-процессуальный кодекс Германии.*

[Accesat 26.08.2021] Disponibil: https://ru.wikipedia.org/wiki/Уголовно-процессуальный_кодекс_Германии

34. ГОЛОВКО, Л. В. Постсоветская теория судебного контроля в *досудебных стадиях уголовного процесса: попытка концептуального переосмысления* // Государство и право. 2013. № 9. С. 29-32.

35. ДИКАРЕВ, И. С. *Стадия возбуждения уголовного дела – причина неоправданных проблем расследования* // Российская юстиция. 2011. № 11. С. 38-40.

36. Конституция Союза Советских Социалистических Республик. Принята на внеочередной седьмой сессии Верховного Совета СССР девятого созыва 7 октября 1977 г. [Accesat 26.08.2021] Disponibil: http://www.hist.msu.ru/ER/Etext/cnst1977.htm

37. ФРОЛОВ, В. Ю., ЧЕЧЕТИН, А. Е., ПЕНКИН, В. С. Митрофанов Е. А. *Закон РСФСР «Об оперативно-розыскной деятельности органов внутренних дел»* (инициативный авторский проект) / Информационное и правовое обеспечение деятельности органов внутренних дел: межвуз. сб. науч. тр. – Ч. 2. – Омск, 1991. – С. 119

38. Rezoluția 1373 (2001) Consiliului de Securitate al Națiunilor Unite privind amenințările la adresa păcii și securității internaționale cauzate de acte de terorism (adoptată la 28.09.2001).

39. Al doilea Protocol adițional la Convenția Europenă de asistență judiciară în materie penală (adoptată la 08.11.2001).

40. Convenţia ONU împotriva corupţiei (adoptată la New York la 31.10.3003).

41. Recomandarea Consiliului Europei (2005)10 cu privire la tehnicile speciale de investigaţii (20.04.2005).

42. Convenția Consiliului Europei privind spălarea, descoperirea, sechestrarea și confiscarea produselor infracțiunii și finanțarea terorismului (adoptată la 16.05.2005).

43. Operațiunea Titirezul [Accesat 26.08.2021] Disponibil: https://ro.wikipedia.org/wiki/Opera%C8%9Biunea_Titirezul

44. Hotărârea parlamentului RM nr.39 din 08.06.2019 pentru adoptarea Declarației cu privire la recunoașterea caracterului captiv al statului Republica Moldova.

45. Hotărârea Guvernului nr.199 din 13 martie 2013.

CZU 343.33
DOI https://doi.org/10.52388/2345-1971.2022.e1.09

MERCENARY ACTIVITY - A CHALLENGE TO NATIONAL SECURITY

Vera MACOVEI
Doctor of law,
University of European Political and Economic Studies "Constantin Stere",
Chisinau, Republic of Moldova
e-mail: *veronicamacovei12@gmail.com*
https://orcid.org/0000-0003-3574-4942

War crimes, until yesterday - circumstances described in history books, today - bloody events that shock and threaten the entire world map. The security of any nature of the entire world is threatened by the events in Ukraine. In these circumstances, it is all the more important to discuss SECURITY today, since we are in a period when social, political, geopolitical events are planning a real threat to the security system of the Republic of Moldova. The security system of the Republic of Moldova, in addition to economic, social, political and corruption threats, is also threatened by the mercenary phenomenon, especially in the situation of the intensification of the war in Ukraine and the pre-existence of the separatist region on the left of the Dniester.

Keywords: *mercenary, soldier, conflict, freelancer, fight, misdemeanor, special status.*

ACTIVITATEA MERCENARILOR - O PROVOCARE LA ADRESA SECURITĂȚII NAȚIONALE

Infracțiunile de război, până mai ieri - circumstanțe descrise în cărțile de istorie, astăzi - evenimente sângeroase care șochează și amenință întreg mapamondul. Securitatea de orice natură a întregii lumi este amenințată de evenimentele din Ucraina. În aceste circumstanțe, este cu atât mai important să discutăm astăzi despre SECURITATE, cu cât, ne aflăm într-o perioadă în care evenimentele sociale, politice, geopolitice, planează o amenințare reală la sistemul de securitate al Republicii Moldova. Sistemul de securitate al țării noastre, pe lângă amenințările de ordin economic, social, politic, corupţional, este amenințat și de fenomenul mercenariatului, în special în situația intensificării războiului din Ucraina și a preexistenței regiunii separatiste din stânga Nistrului.

Cuvinte-cheie: *mercenar, soldat, conflict, liber profesionist, luptă, infracţiune, statut special.*

L'ACTIVITÉ MERCENAIRE - UN DÉFI À LA SÉCURITÉ NATIONALE

Crimes de guerre, jusqu'à hier - circonstances décrites dans les livres d'histoire, aujourd'hui - événements sanglants qui choquent et menacent toute la carte du monde. La sécurité de toute nature du monde entier est menacée par les événements en Ukraine. Dans ces circonstances, il est d'autant plus important de parler de SÉCURITÉ aujourd'hui, puisque nous sommes dans une période où des événements sociaux, politiques, géopolitiques planifient une menace réelle pour le système de sécurité de la République de Moldavie. Le système de sécurité de la République de Moldova, outre les menaces économiques, sociales, politiques et de corruption, est également menacé par le phénomène mercenaire, en particulier dans la situation d'intensification de la guerre en Ukraine et de préexistence de la région séparatiste à gauche du Dniestr.

Mots-clés: *mercenaire, soldat, conflit, freelancer, combat, crime, statut particulier.*

ДЕЯТЕЛЬНОСТЬ НАЕМНИКОВ - ВЫЗОВ НАЦИОНАЛЬНОЙ БЕЗОПАСНОСТИ

Военные преступления, еще вчера - обстоятельства, описанные в учебниках истории, сегодня - кровавые события, которые потрясают и угрожают всей карте мира. Безопасности во всем мире угрожают события на Украине. В этих условиях тем более важно сегодня обсудить БЕЗОПАСНОСТЬ, поскольку мы находимся в период, когда социальные, политические, геополитические события создают реальную угрозу системе безопасности Республики Молдова. Системе безопасности нашей страны, помимо экономических, социальных, политических и коррупционных угроз, также угрожает феномен наемничества, особенно в ситуации эскалации войны в Украине и существования сепаратистского региона на левом берегу Днестра.

Ключевые слова: *наемник, солдат, конфликт, фрилансер, борьба, преступление, особый статус.*

Introduction

In the context of the latest international events, in which the involvement of third parties in armed conflicts taking place in other states is increasingly attested, the negative impact of mercenaries' activity on the observance of the provisions of international law and the norms of international treaties must be highlighted.

However, the activity of mercenaries *of principle* is a transnational crime, if for its qualification the primordial condition is that the perpetrator is not a citizen and/or not enrolled in the army of states involved in the armed conflict.

Thus, in the situation where, at the basis of a social crisis, there are certain violent actions, directed against the sovereignty, territorial integrity, constitutional order of a state, we are obviously in the presence of violations of human rights both internally - of the citizens of the respective state, as well as internationally [12, p. 561-567].

Methodology and methods

The study of the proposed theme is based on the use of a combination of scientific research methods, in order to investigate some aspects less addressed in the doctrine.

Under the respective conditions, the use of the analytical and research method was indispensable to be able to highlight the problem of the mercenary activity and the threat that this phenomenon represents on the national security of the Republic of Moldova. Also, the use of the comparative method was necessary to establish the degree of danger of the studied crime as well as the facts found in the doctrine regarding this subject. Finally, as a logical continuity, the reasoning method (inductive-deductive) was used, the use of which allowed us to ascertain certain elements and to form an own opinion regarding the activity of mercenaries as a phenomenon of high threat to the state security.

Ideas and discussions

According to the Military Doctrine of the Republic of Moldova, approved by Parliament Decision no. 482/1995 regarding the military doctrine of the Republic of Moldova, "The main purpose of the military policy of the Republic of Moldova is to ensure the military security of the people and the state, the prevention of wars and armed conflicts through the means of international law" [8].

The Security Policy of the Republic of Moldova according to the Military Doctrine, stated above, "*is determined by its foreign and internal policy, by the permanent neutrality proclaimed constitutionally, and has an exclusively defensive character based on the following priorities:*

– *in the political field - the peaceful settlement of the contradictions arising between the states and the exclusion of the military confrontation through the collective efforts of the countries, starting from the principles and norms of international law; establishing political, economic and military relations, which exclude the injury and independence of the state;*

– *in the military field - maintaining the defense capacity of the state at the level that ensures military security; strengthening confidence measures, expanding mutually beneficial military collaboration based on the principles of respect for sovereignty, independence and non-interference in the internal affairs of other states"* [8].

The Republic of Moldova implements the Military Security system consistently performing the following activities:

– At the global level - participation in the activity of the world community in order to prevent wars and armed conflicts and the peaceful settlement of contentious issues; the creation of the conditions that, in case of an external military danger, will ensure the realization of the right of the republic to the assistance of international organizations; active participation in building the unique international collective security system;

– At the regional level - the establishment of bilateral and multilateral friendly relations with the states of the region, which will ensure a high level of mutual trust and openness in the military field, as well as mutual help in case of jeopardizing collective security;

– At the national level - the creation of a military potential, sufficient to ensure the military security of the state.

Military threats involve the use of force and, therefore, their effects are devastating for many of the entities targeted, regardless of the levels of socio-political cohesion and power that are characteristic of them. These types of threats can range from harassment and raids to territorial occupation, invasion, blockade and/or bombing. Consequently, security, on the one hand, has acquired a multidimensional character due to the various factors that influence it, and on the other hand, the security environment itself requires a deeply nuanced approach to old and new risks, dangers and threats. Also, security is no longer exclusively the domain of the armed forces, but involves the effective and efficient cooperation between all the components of the security sector, both at the national and international level, both from the military field and from the other fields of social life [14, p. 12].

Over time threat has been permanently present in the relationships between people, so it has perfected its specific forms and methods, under the basis of the causes of countless conflict states that shadowed the evolution of human society. Named as such or not «threat», whether it was expressed by words or by gestures, has always been a potential danger [1, p. 67].

The author Grigore Alexandrescu rightly argues that: "*The real perception and the appropriate reaction to the existing or emerging threats to the Security represents only an approach of this activity of major importance in strengthening the confidence between states. This is a sine-qua-non condition of achieving the team spirit in the fight against the threats of the 21st century and the construction of a stable international security system*" [2, p. 16].

On the other hand, says G. Alexandrescu: "*The existing military potential disproportion is likely to worry some states or groups of important states. The sewerage of military accumulations to solve the open historical problems between states explains the disproportionate emphasis placed on the military component of the Security, even in the current period when threats from other sectors present greater and closer dangers*." [Ibidem]

We believe that, military threat, military conflict is the danger that can lead to the most disastrous consequences, directly and seriously endangering the state security. This is also the opinion of the author I. Richicinschi who mentions: " *Moral, material or even human losses are considered as consequences of conflicts, which endanger the life and health of people, endangers the making of urgent*

and special significance decisions and which can generate instability in the region” [18, p. 110].

In the opinion of G. Alexandrescu, which we support: “*The military sector has an independent dynamic of development, even in the states where civil control over the army is effective. Whereas military capacity is still a reality whose existence is decisive both by supporting and promoting the interests of states in the international environment, as well as national security and, in the case of common alliances can be born the confusion of the signals that the states generate continuously. The fear of defeat determines the states to bring their armed forces to the parameters necessary to reject the effects of perceived threats*” [2, p. 16].

For the prospect of that consideration, some states, in parallel with the training of the armed potential, resort to attracting in the military conflicts between the states of mercenaries, among whom persons are often willing to execute any order. However, according to the specialized literature, “*the conflict implies the confrontation between various social groups, societies or states in the tendency to achieve contradictory interests and, in this sense, their outbreak is a reality, which we face. The impact of conflicts is a disastrous one because it causes disorder and destabilization, the society that is engaged is not able to ensure peace and social order, the confrontations are violent and the force is often applied ...* [18, p. 110]. In such circumstances, as recent events demonstrate, the practice of mercenary is widened, which is used in military conflicts on a large scale.

The author A. Cauia rightly claims that: “*As long as there have been people with legal status that allows them to use force to destroy the adversary, there have been different categories of people affected by hostilities who participated directly in them, having different goals*” [5, p. 34].

We only mention that the practice of mercenary activity does not always imply that the respective persons are affected in some way by the hostilities generated by the armed conflict and that this was the factor that motivated their decision to get involved in the conflict. For the most part, as the data available at the moment show, the decision to participate in mercenary activities was based on the precarious material and financial situation of the respective persons and their families, and in some cases - certain beliefs, personal ideas, etc.

Despite the significant reduction in the danger of the thawing of the armed conflict once caused by the self-proclaimed authorities on the left of the Dniester, supported by the Russian military forces, the Republic of Moldova continues to face threats of a military nature, which come, first of all, from the military formations of the separatist regime from Tiraspol. Coupled with the rather worrying participation of people from the left of the Dniester in the conflicts in Ukraine, confirmed by the judicial practice of the Republic of Moldova, [15] the situation in question continues to present a hypothetical danger for the national security of the Republic of Moldova.

In that context, we support the idea of Mr. Moraru Sergiu who states that: “*It is necessary to carry out the reform of the entire national security system as consistently as possible with the widest possible involvement of all concerned actors, in particular, civil society, which should have an important role in the regulation, supervision and democratic control over the security structures of the state*” [13, p. 50].

More than ten years ago, the conception of national security approved by Law no.112/2008 for the approval of the conception of national security of the Republic of Moldova stated that: “*National Security represents the fundamental condition of the existence of*

the people in the Republic of Moldova, of the Moldovan state and is an objective of the country. The objectives of the national security of the Republic of Moldova are: ensuring and defending independence, sovereignty, territorial integrity, constitutional order, democratic development, internal security, strengthening the state of the Republic of Moldova. A special place in this regard is the defense and promotion of national values, interests and objectives. National security is not only the security of the state, but also the security of the society and the citizens of the Republic of Moldova, both on the territory of the Republic of Moldova and abroad" [11].

In conception it was mentioned that, "*the existence of the separatist regime amplifies the discrepancy within the unique legal framework of the Republic of Moldova, conditioning the impossibility of providing legal assistance to the citizens of the Republic of Moldova from the left of the Dniester (Transnistria), at the same time endangering the international judicial cooperation in this segment.*

The Republic of Moldova, being a multi-ethnic and multinational state, threatening the appearance of elements of chauvinism, nationalism and separatism is persistent." [11]

We consider that the absence, and at present, of a control over the localities on the left of the Dniester (Transnistria) and on the Transnistrian segment of the Moldovan-Ukrainian border, on which the involvement of the organized crime in the migration of citizens is attesting to participate in military conflicts, can generate a serious threat to the national security of the Republic of Moldova. In the dramatic event of relaunching the military conflict on the territory of our country, this factor can also generate interest in recruiting mercenaries.

In this context, the opinion of the former MP in the Parliament of the Republic of Moldova, Mr. Roman Botan, is significant, according to which: "*The risk of expanding the instability area on the Ukrainian territory, joint exercises of separatist and Russian troops in the eastern districts, the informational-subversive actions, the involvement of foreign citizens and foreign legal entities in internal policy issues, foreign propaganda by which public opinion is distorted, have influence on groups with extremist attitudes in the Republic of Moldova*" [3].

The above-mentioned reasons for our conviction that the military security of a state is also greatly endangered by the presence of mercenary phenomenon on the territory of the state or in the respective geopolitical region. However, it is much more difficult to estimate the military forces involved in the conflict on the side of a certain state, if it uses the mercenary forces/services.

Mercenaries most often enter the epicenter of conflict in a practically invisible way in terms of control and evidence of traffic at the border. The practice shows that most mercenaries arrive in that country by illegally crossing the border. From here, it is important to mention that, in the prevention segment, first of all, it is to be emphasized on the security at the border, in order to avoid the penetration of the respective platforms on the territory of the state in which they are to be used as mercenaries. However, it is not excluded, neither is the legal crossing of the border by the recruited persons, taking into account the possibilities of the free traffic regime.

Thus, it is also necessary to strengthen the bilateral relations on the international scale in the context of ensuring international security. In the Decision of the Parliament no.153/2011 for the approval of the Strategy of the National Security of the Republic of Moldova, it is mentioned that "*international security depends directly on the quality of bilateral relations between the members of the international community, although the vision of the states and their contribution in*

this process is different. The essential role in ensuring international security is played by the states possessing major political-military, economic and informational resources, which thus influence the situation at both regional and global level” [16, p. 5; 9].

In the sense of the above, it is important to refer to the text of the military doctrine of the Republic of Moldova, according to which: “*The Republic of Moldova considers partners in the activities of maintaining international peace and security, preventing armed conflicts all states and international organizations, whose policy does not cause harm to its interests and does not contradict the Statute of the United Nations (the emphasis is ours). The state ensures the creation and optimization of the legislative framework of military security, improves the mechanism of elaboration of military policy, control over the adoption of military-political decisions, takes care of the preparation of citizens and armed forces to defend the homeland, to increase the prestige of the military service, to social insurance of the military”* [8].

In an interview for the Tribuna.md, Roman Botan claims that: “*The national defense field must be a major concern of the authorities and this was the desire of the Liberals in the Government. The military security of the Republic of Moldova can be ensured by well -organized armed forces, capable of acting promptly and efficiently for suppressing external military threats, especially - in the context that in the region there is an undeclared war between Ukraine and the Russian Federation. Fortifying the capacity of the National Army, strengthening the dialogue with international structures, political and military cooperation on the international arena, including NATO (in the context of the recent decision of the Constitutional Court of Neutrality), represents a necessity to protect national interests and to strengthen the defense capacity of the Republic of Moldova*“ [3].

On the other hand, according to the author N. Popescu, “*ensuring national stability and security should come back, first of all, to internal factors; and the competition of external forces should be just an additional element. However, the ability of Moldova to successfully overcome the crises that affect the security of the status is quite doubtful, which argues the possibility of direct involvement of external factors in resolving the security problems of Moldova, in order not to allow the proliferation of instability*”. [17, p.]

It is important to mention in the given context that, on June 22, 2018, the General Assembly of the United Nations adopted the UN resolution on the withdrawal of Russian military troops from Transnistria, which is an important step in carrying out the security policy of Moldova. Even more so as today “*we follow a continuous transformation of the international security environment, with political, economic, military, information, social, ethnic and cultural implications, in which armed conflicts in different regions of the world take place*” [9].

We return to the idea that the military security of one or another state depends, first of all, on its ability to respond to a military threat, but, as we convince ourselves, and on the effective counteracting the phenomenon of mercenaria. However, the activity of mercenaries in the last period knows a worrying ascendence worldwide. The more diverse forms of manifestation of the activity of mercenaries and the dramatic effects it produces do not fall, in any way, only in the domestic law of the states.

As the author A. Cauia rightly mentions, the activity of mercenaries “goes far beyond the limits of the domestic law of a state and constitutes an attack on social values that fall within the spectrum of the general interest of states, as well as on the stability of international relations. The activity of mercenaries violates all norms of peaceful cooperation between

nations and presents an increased danger for the entire international community" [6, p. 100].

On another note, we mention the opinion of the author A. Cauia, according to which "*belonging to the armed forces constitutes the criterion on the basis of which the differentiation of participants in military operations and their legal status can be achieved."* [ibidem]

In the given context, it is important to reiterate that the criminal law of the Republic of Moldova in article 141 of the Criminal Code of the Republic of Moldova criminalizes the activity of mercenaries - "*the mercenary's participation in an armed conflict, in military actions or in other violent actions aimed at overthrowing or undermining the constitutional order or violation of the territorial integrity of the state*" [7].

The notion of mercenary is defined in art.130 Criminal Code of Moldova, according to the provisions of which by "*mercenary is meant the specially recruited person, in the country or abroad, to fight in an armed conflict, which takes part in the military operations in order to obtain a personal advantage or a remuneration promised by one party to the conflict or on its behalf, who is neither a citizen of the party, nor a resident on the territory controlled by a part of conflict, is not a member of the armed forces of a part to the conflict and was not sent by a state, other than the party to the conflict, in an official mission as a member of the armed forces of the respective state*."

Paragraph (2) of art. 141CP RM qualifies as a crime: "*Employing, training, financing or other assurance of mercenaries, as well as their use in an armed conflict, in military actions or in other violent actions aimed at overthrowing or undermining the constitutional order or violation of the territorial integrity of the state*" [7].

We mention here the opinion of scholars S. Brinza and V. Stati, who claim that "for the qualification of the act based on paragraph (1) art. 141 of the Criminal Code, it does not matter if the participation in an armed conflict, in military actions or in other violent actions is or is not active. Such a circumstance can be taken into account when individualizing the punishment" [4].

In this context, we mention that *the mercenary activity* is not only the fact of a certain person being in the *epicenter* of the armed conflict. Important for the qualification is precisely the fact of undertaking certain actions as a method of the objective side of *the mercenary's activity*. Otherwise, when the deed takes the form of passive behavior, identifying the signs of the composition of the offense provided for in art. 141 of the Criminal Code of the Republic of Moldova will be a much more difficult logical-legal operation. [12, p. 561/567].

Starting from the belief, motivated previously, that the activity of mercenaries is at the top of the list of serious challenges to the security of the state, we can claim that the research of this negative phenomenon in order to optimize the legal framework that criminalizes it is the order of the day. The researches in the given field are as current as possible, being imposed, to a large extent, by the actual situation of the Republic of Moldova.

As I mentioned, the mercenary phenomenon in the Republic of Moldova recently shows a significant growth trend.

In an interview given to the Tribuna portal, the deputy in the Parliament of the Republic of Moldova, Roman Botan, president of the National Security, Defense and Public Order Commission, mentioned that "*the Republic of Moldova continues to face risks and threats to national security - both internal, as well as external. These come, obviously, from the foreign military formations stationed illegally on the sovereign territory of the Republic of Moldova and those of the separatist regime from Tiraspol, from the aggressive*

anti-constitutional policy carried out by its "leaders" [3].

Following what has been reported, we must recognize that the security system of the Republic of Moldova, in addition to economic, social, political and corruption threats, is also threatened by the mercenary phenomenon, especially in the situation of the intensification of the conflict in Ukraine and the pre-existence of the separatist region on left bank of the Dniester.

Conclusions

In conclusion, we express our conviction that, in the National Security Strategy of the Republic of Moldova, the component of combating the mercenary phenomenon should be given greater attention. In addition to the fact that the activity of mercenaries is criminalized in the criminal law, at the current stage, measures to prevent and combat this phenomenon are to be provided in the National Security Strategy, as it is a phenomenon that presents a real threat to national security.

Bibliography

1. Academia Română, Institutul de Lingvistică „Iorgu Iordan", Mic dicţionar academic, AC, Editura Univers Enciclopedic, Bucureşti, 2001, p. 67.

2. ALEXANDRESCU, G. *Ameninţări la adresa securităţii.* Editura Universităţii Naţionale de Apărare Bucureşti – 2004, p. 16.

3. BOȚAN, R. Interviu pentru Tribuna.md disponibil pe http://tribuna.md/2017/06/21/interviu-roman-botan-republica-moldova-continua-sa-se-confrunte-cu-riscuri-si-amenintari-la-adresa-securitatii-nationale/ (accesat – 20.08.2022).

4. BRÎNZA, S., STATI, V. *Tratat de drept penal.* Partea specială. Vol. I. - Chişinău: Tipografia Centrală, 2015. - 1328 p.

5. CAUIA, Al. *Calificarea juridică a participanţilor în cadrul conflictului armat din estul Ucrainei.* disponibil https://ibn.idsi.md/.../Profilul%20mercenarului%20in%20actiuni%20teroriste%20imp (accesat – 20.08.2022)*;*

6. CAUIA, Al. *Reglementarea juridică a statutului de mercenar în cadrul conflictului armat.* În: Edi-ficarea statului de drept şi punerea în valoare a patrimoniului cultural şi istoric al Moldovei în contextul integrării europene. Materialele Conferinţei ştiinţifice internaţionale anuale a tinerilor cercetători. Ediţia a II-a, 28 ma rtie 2008. Chişinău: Institutul de Istorie, Stat şi Drept al AŞM, 2009, p. 100.

7. Codul penal al Republicii Moldova nr.985/2002 Monitorul Oficial al R. Moldova, 128-129/1012 13.09.2002.

8. Hotărârea Parlamentului nr.482/1995 privind Doctrina militară a Republicii Moldova. Monitorul Oficial al Republicii Moldova Nr. 038 din 14.07.1995.

9. Hotărârea Parlamentului nr.153/2011 pentru aprobarea Strategiei securităţii naţionale a Republicii Moldova, Monitorul Oficial Nr. 170-175 din 14.10.2011 art Nr: 499.

10. Hotărârea Parlamentului nr.482/1995 privind doctrina militară a Republicii Moldova. Monitorul Oficial al Republicii Moldova Nr. 038 din 14.07.1995.

11. Legea nr.112/2008 pentru aprobarea Concepţiei securităţii naţionale a Republicii Moldova, Monitorul Oficial Nr. 97-98 din 03.06.2008, art Nr: 357.

12. MACOVEI, V. *Despre necesitatea sporirii răspunderii penale pentru infracţiunea de activitate a mercenarilor prevăzută de art. 141, alin. (2), codul penal al Republicii Moldova*. În materialele conferinţei ştiinţifice internaţionale Teoria şi practica administrării publice. P. 561-567. Chişinău, 2018.

13. MORARU, S. *Securitatea naţională a Republicii Moldova în contextul democratizării societăţii: Aspecte politico-informaţionale.* disponibil pe http://www.cnaa.md/files/theses/2015/22863/moraru_sergiu_thesis.pdf (accesat - 12.07.2022).

14. MOŞTOFLEI, C., SARCINSCHI, Al. *Militar – nonmilitar în Securitatea naţională. Dilema armatei.* Editura Universităţii Naţionale de Apărare Bucureşti, 2004 p. 12.

15. Pentru detalii a se vedea: Judecătoria Chişinău sediul Centru Dosarul nr.1-254/2017 20-1-854227032017 Sentința din 06.04.2017.

16. Proiectul Strategiei securităţii naţionale a Republicii Moldova. p. 5 disponibil pe http://www.presedinte.md/app/webroot/proiecte/SSN16.pdf (accesat - 12.07.2022).

17. POPESCU, N. *Republica Moldova în sistemul de securitate european.* disponibil pe www.ipp. md/old/public/files/Publicatii/2002/decembrie/N-Popescu (accesat - 12.07.2022).

18. RICHICINSCHI, I. *Riscuri şi ameninţări potenţiale la adresa securităţii internaţionale.* Administrarea publică: teorie şi practică Relaţii internaţionale şi integrare europeană.

19. Strategia naţională de Apărare 2016 http://www.army.md/img/userfiles/doconline/sna.pdf (accesat - 22.08.2022).

CZU 343.55
DOI https://doi.org/10.52388/2345-1971.2022.e1.10

THE IMPACT OF FAMILY CRIMINAL SITUATION IN COMMITTING VIOLENT CRIMES AND FORMING THE CUPIDITY PURPOSE

Mihai MIZDRAN
PhD student, Free International University of Moldova,
Chisinau, Republic of Moldova
e-mail: *mmizdranmihaita@gmail.com*
https://orcid.org/000000021754603X

Cristina BĂLOI
PhD student, University of European Political and Economic Studies "Constantin Stere",
Chisinau, Republic of Moldova
e-mail: *alegecorect24@gmail.com*
https://orcid.org/0000-0002-4247-1607

It was established that there are still families, whose climate creates premises for the formation of criminal personality such as: conflicting families, hyper-authoritarian families and hyper-permissive families, etc. So, the family environment can be appreciated in terms of structure, economic and social conditions and educational deficit. The family environment can have very different legal, social, moral, pedagogical deficiencies, related to situations such as: infidelity, abandonment, divorce, cohabitation, death, drug addiction, sexual vices, etc., without mentioning the very absence of the family environment, as in the case of orphaned, abandoned children in public care. Conducting this study, we notice that the role of the family in the formation of personality is considerable. We say this because children are born in the family, then in the same family they grow up and are educated, they acquire some habits, habits, thus forming certain personalities. The study found that the disorganized family has a special influence on the formation of deviant personality behavior, which is the family that loses its integrity due to the separation of the parties due to reasons such as: dissolution of marriage by divorce, death of one parent, etc.
Keywords: *family, delinquency, deviance, crime, personality.*

IMPACTUL SITUAȚIEI CRIMINOGENE A FAMILIEI ÎN COMITEREA INFRACȚIUNILOR VIOLENTE ȘI ÎN FORMAREA SCOPULUI CUPIDANT

S-a stabilit că există familii, climatul cărora creează premise pentru formarea personalității infracționale cum ar fi: familiile conflictuale, hiperautoritare și familiile hiperpermisive, etc. Deci, mediul familial poate fi apreciat sub aspectul structurii, al condițiilor economico-sociale și a deficitului educativ. Mediul familial poate prezenta carente foarte diverse de ordin juridic, social, moral, pedagogic, legate de diferite situații: infidelitate, părăsire, divorț, concubinaj, deces, narcomanii, vicii sexuale etc., fără a mai aminti de însăși absența mediului familial, ca în cazul copiilor orfani, abandonati, aflați sub tutela asistenței publice. Efectuând acest studiu, observăm că rolul familiei în formarea personalității este considerabil. Aceasta o afirmăm din cauza că în familie se nasc copiii, apoi în aceeași familie cresc și se educă, capătă careva deprinderi, obiceiuri, formându-se astfel anumite personalități. În concluzie, s-a constatat că o influență deosebită asupra formării comportamentului deviant al personalității o are familia dezorganizată - familia care își pierde integritatea ca urmare a separării părților datorită unor motive precum: desfacerea căsătoriei prin divorț, decesul unuia dintre părinți, etc.
Cuvinte-cheie*: familie, delincvență, devianță, criminalitate, personalitate.*

L’IMPACT DE LA SITUATION CRIMINELLE FAMILIALE DANS LA COMMISSION DE CRIMES VIOLENTS ET LA FORMATION DU BUT DE CUPIDON

Il a été établi qu’il existe encore des familles, dont le climat crée des prémisses à la formation de la personnalité criminelle telles que : les familles conflictuelles, les familles hyper autoritaires et les familles hyper permissives, etc. Ainsi, l’environnement familial peut être apprécié en termes de structure, de conditions économiques et sociales et de déficit éducatif. Le milieu familial peut présenter des carences juridiques, sociales, morales, pédagogiques très différentes, liées à des situations telles que : infidélité, abandon, divorce, concubinage, décès, toxicomanie, vices sexuels, etc., sans parler de l’absence même du milieu familial , comme dans le cas des enfants orphelins et abandonnés pris en charge par l’État. En menant cette étude, nous remarquons que le rôle de la famille dans la formation de la personnalité est considérable. Nous disons cela parce que les enfants naissent dans la famille, puis dans la même famille ils grandissent et sont éduqués, ils acquièrent certaines habitudes, habitudes, formant ainsi certaines personnalités. L’étude a révélé que la famille désorganisée a une influence particulière sur la formation d’un comportement de personnalité déviant, c’est-à-dire la famille qui perd son intégrité en raison de la séparation des parties pour des raisons telles que : dissolution du mariage par divorce, décès d’un parent , etc.

Mots-clés: *famille, délinquance, déviance, crime, personnalité.*

ВЛИЯНИЕ СЕМЕЙНОЙ КРИМИНАЛЬНОЙ ОБСТАНОВКИ НА СОВЕРШЕНИЕ НАСИЛЬСТВЕННЫХ ПРЕСТУПЛЕНИЙ И ФОРМИРОВАНИЕ КОРЫСТНОЙ ЦЕЛИ

Установлено, что до сих пор существуют семьи, климат которых создает предпосылки для формирования личности преступника. Таковыми являются: конфликтные семьи, гиперавторитарные семьи и гиперразрешительные семьи и др. Таким образом, семейную среду можно оценить с точки зрения структуры, экономических и социальных условий и дефицита образования. Семейная среда может иметь самые разные правовые, социальные, нравственные, педагогические недостатки, связанные с такими ситуациями, как неверность, оставление, развод, сожительство, смерть, наркомания, половые пороки и т.п., не говоря уже о самом отсутствии семейной среды, как и в случае осиротевших детей, брошенных на государственное попечение. Проводя данное исследование, авторы замечают, что роль семьи в формировании личности существенна. Утверждение обосновано тем, что в семье рождаются дети, затем в этой же семье они растут и воспитываются, приобретают какие-то привычки, повадки, формируя тем самым определенные личности. В рамках исследования установлено, что особое влияние на формирование девиантного поведения личности оказывает дезорганизованная семья, представляющая собой семью, утрачивающую целостность в связи с расставанием сторон по таким причинам, как расторжение брака путем развода, смерть одного из родителей, и т.д.

Ключевые слова: *семья, правонарушение, девиация, преступление, личность.*

Introduction

The family, like any other social institution, has always been characterized by misunderstandings. This is also understandable, because the family unites people who are interested in communicating with each other, on the one hand, and possessing their own interests that cannot always coincide with the interests of their life partner, on the other hand. At the current stage, the social institution of the family is suffering, it is going through a period of transition, due to the change in the role and position of women in society. In the conditions of the transition period, the inconsistency informs us that, the misunderstanding between the specific, historical family needs and the possibilities of satisfying these needs in the modern family are also present. Today, the family does not give the population what it expects - a good and permanent material supply; elderly parents no longer receive attention and warmth from children who are trained in the field of work; children are deprived of systematic control by their parents [8, p. 124].

The criminogenic subsystems of criminality are indispensably linked with the behavior that violates the law - criminal subsystems. Directly, this connection is made at the level of individual behavior, in the well-known triad form "personality - situation - crime".

Research methods. In order to achieve the goal and fulfill the proposed objectives, we resorted to the method of analysis and synthesis of information on the topic selected from the specialized literature, and the following methods were also used: the historical and systematic method, the comparative legal method. The analysis of judicial practice is also an important source in conducting scientific research on intentional murder.

The scientific works of scholars from Romania, the Russian Federation, and the Republic of Moldova were used in the study process. Important to the development of this work was the normative base that includes the national legislative acts: the Constitution of the Republic of Moldova, the Family Code of the Republic of Moldova.

Obtained results and discussions

Discovering *the social mechanism of action of the criminogenic family* - means to locate the nodes and characteristics of the crime of the criminogenic family with other subsystems of crime.

V. N. Cudreavtsev claims that the causes of illegal individual behavior cannot explain the causes of law violations in general, but on the contrary "only the plurality of social conditions of people's life gives the possibility to understand the life of some individuals" [5, p. 28]. It seems correct to attribute criminality to those social phenomena, which are not only related to some spheres of social life, but to all spheres of society's life - economic, political, spiritual. Criminality must be researched and viewed from the point of view of its real connection with the macrostructure of society, with its main legalities of operation and development.

Criminality has common roots with other social phenomena, also with positive phenomena. It is not the criminogenic factors that are in contradiction with the social structure, but its consequences, manifested through criminal behavior. Criminology faces the problem of determining which contradictions of the social level are related to the violation of criminal and legal prohibitions.

The macrostructural misunderstandings of the family, which are related to criminal behavior, are reduced to two groups:

a) characteristics of the family in all historical eras of existence;

b) those which emerge from the experiences that the family is now enduring.

The family, like any other social institution, has always been characterized by misunderstandings. This is also understandable, because the family unites people who are interested in communicating with each other, on the one hand, and possessing their own interests that cannot always coincide with the interests of their life partner, on the other hand. At the current stage, the social institution of the family is suffering, it is going through a period of transition, due to the change in the role and position of women in society. In the conditions of the transition period, the inconsistency, the misunderstanding between the specific, historical family needs and the possibilities of satisfying these needs in the modern family is also apparent. Today, the family does not give the population what it expects - a good and permanent material supply; elderly parents no longer receive attention and warmth from children who are trained in the field of work; children are deprived of systematic control by their parents [5, p. 28].

The analysis of the crime between different criminogenic subsystems, which form the criminality, allows to follow the way, which connects the uncertainties of

the family institute with other factors of the macrostructure, which forms the mass criminal behavior. The material inequality of the different contingents of the population, which determines the formation of the goal and the greedy interest of the least satisfied, is reflected on the “financial policy” of the family, orienting the family to dispossession, the size by any means of income. Alcoholism, like drug addiction, is also an important factor in the process of forming a person, predisposed to committing a crime and a disorganized family situation.

Conflict situations, for the most part, are determined by the subjective qualities of the people who participate, at the same time, of the offender and the injured party. That is why the macrostructural familial and extrafamilial relationships that lead to the negative formation of the personality at the same time determine the criminogenic situation in the family.

In criminology, socio-cultural factors have a predominant role in the positive or negative socialization of individuals. Numerous theories regarding the causes and conditions of the appearance of criminal behavior fall into the large group of sociological theories. These theories focus mainly on socio-cultural factors and highlight the inconsistency between cultural values and aspirations on the one hand and the norms and legitimate means on the other, hence the appearance of individuals who try to realize their aspirations, social and individual ideals and goals through the use of illicit means.

From birth, the individual gets to know the surrounding world and *socio-cultural factors*. From here, the child will socialize positively or negatively in his/her family relations, then school, profession, etc. [5, p. 180].

In asserting the fact that *biological factors* can independently generate *criminal behavior*, that the predisposition to such behavior is biologically determined and can be transmitted through heredity, data are often given about the fact that among criminals there are many people with mental disorders [5, p. 80].

Such attitudes can be noticed in people who refuse to collaborate, they cannot be impressed by moral discussions, arguments of this nature having no influence on their bad habits. This is how people who can’t stop biting their nails, those who eat greedily, those who eat loudly, etc. are characterized. This type of person does not do hard work, but is characterized by external disorder and unkempt appearance [2, p. 47].

In the difficult criminal process of trials and circumstances, which lead to the birth of criminality, an important role is played by some negative components of family relations. Interacting with each other in a certain way, and also with other determined criminogenic, lead to the commission of crimes.

Knowing the mechanism of action of criminogenic family factors gives the opportunity to forecast, to plan, to form a ring of the crime prevention system, which are directed at different aspects of this sphere. We imagine crime as a system, the structure of which includes as sub-systems blocks of criminogenic factors that are attributed to the class, group or individual level, on the one hand, and criminal behavior on the other.

Mechanism of antisocial action of criminal factors – this is the functioning of the system of phenomena that generates the occurrence of criminal behavior. This mechanism arises from the interaction of the set of factors, which are at different levels of the structure and also sets of the same level, rank and factors within the set. By means of a concrete link of the criminal mechanism, crimes occur, their particular types, the accumulation of crimes, and also the criminal factors themselves are reflected [3, p. 180].

In the crime system, the subsystem of criminogenic factors from the family sphere is interwoven or rather framed - the criminogenic family or family crime. The phenomenon of

family crime includes within itself the family causes of criminal behavior within the family.

Studying the problem of the correlation of the biological and the social in the personality of the criminal requires a multilateral approach, with the use of achievements in the field of philosophy, sociology, psychology, biology, criminology and other sciences, examining the individual not from abstract anthropological positions, but as a product of a concrete historical process. In this sense, people have a social nature, and personality can only be formed under the conditions of including the individual in the system of social relations. The social character of people's vital activity is their distinctive feature. This by no means is ignoring biological factors, which can only bear the character of conditions that favor criminal behavior.

In asserting the fact that biological factors can independently generate *criminal behavior*, that the predisposition to such behavior is biologically determined and can be transmitted through heredity, data are often brought about the fact that among criminals there are many people with mental disorders [4, p. 154].

At the level of individual behavior, the criminogenic family subsystem is presented as a criminogenic family situation, which is in bilateral contact with antisocial orientation and crime.

Committing a crime in criminology is accepted as a result of the interaction between the person and the situation. This moment of the crime is characterized by a longer period of time, in which the person accumulates in him/herself impulses that emanate from the situation, judging the situation, selects the possible variants of behavior and makes the decision to commit the crime.

Multiple researches confirm *the role and importance of the criminogenic family situation in committing violent crimes.*

The content of the criminogenic family situation consists in the contradictions that lead to the formation of family conflicts. The situation can be viewed at three levels:

- social level - the objective conflict existing in the sphere of family relations between different population groups: husbands and wives, daughters-in-law and mothers-in-law, parents and children, etc.;
- group level - conflicts in specific families;
- individual level - the subjective reflection of the conflict in the psyche of the participants in the conflict, concentrated in emotions, decision-making.

Following some research, we can say that every third or fourth crime committed against the husband can be explained by the fact that the wife had a provocative behavior [4, p. 154].

The analysis of the criminogenic family situation involves the determination of the accumulation of factors that influence the commission of the crime, their spread, the classification of the situations: the results of such an analysis are necessary for the differentiated substantiation of the prevention of conflict families.

At the current stage, we can mention the main criminogenic factors, which are the basis of serious crimes committed against spouses. These are the conflicts:

- of domination;
- infidelity of spouses;
- the tendency towards liberation;
- avarice.

Of course, in real life, these factors often appear not in isolation, but overlap each other.

The dominance conflict. At the basis of *the conflict were mutual claims, arising in connection with the consumption of alcohol by the husband or wife, or both, disagreements regarding domestic and family obligations, arguments with the parents of the husband or wife*, disagreements regarding the education of the children, the distribution of financial

means, the tendency towards authority in the family, the quarrels of one of the spouses with the friends of the other spouse.

The use of alcohol by one of the family members in correlation with the inability of others to form interpersonal relationships with this family member, as sociological research shows, not infrequently leads to the appearance of harshness, most often directed against the husband. It is known that alcohol is a catalyst that influences the commission of violent crimes.

Many criminals interviewed mentioned that they do not agree with how family obligations were carried out in their families. It also irritates the other spouse's tendency to burden him/her with some or other matters. The fight for the division of debts, but most often for the right not to execute them, in the genesis of crimes against the spouse, takes the third place, following the offender's alcoholism and the first place being self-confidence in the role of head of the family.

The investigated intra-family disagreements, which lead to the commission of crimes against one of the spouses, ultimately come down to the tendency to dominate, to disobey the rights acquired by the spouse and also to the possibility of acquiring new rights towards the spouse.

So, the dominance conflict is based on the opposite positions of the man and the woman regarding the most important issues within the family, the inability to agree with the interests of the partner, to cooperate in his/her activity with him/her, and the reliance on other people close to him/her.

The conflict of spouses' infidelity, which manifests itself by committing violent crimes against one of the spouses, develops under the influence of such factors as: detection of infidelity, doubts regarding fidelity, the presence of relationships with the husband or wife before marriage. As an individual factor, the "disordered" intimate life can also be highlighted, which in itself presents the next step after simple impermanence, which consists in the frequent change of partners. A more important situation is the already established infidelity itself, and first of all the infidelity of the injured party. The so-called disordered intimate life, which leads to the aggressiveness of the husband, is present in 6.7% of all criminogenic family situations.

The conflict of the tendency towards liberation is found in every fourth case of violence against the husband or wife. This is the situation, in which, after a while, one of the spouses becomes unbearable for the other, a fact that is related to the illness, pregnancy, bad character of the victim, with the difference in the psychological thinking of the parties and also with the appearance of interest or plans to remarry.

The conflict of cupidity is present in an *inconsiderable part of crimes between spouses*. Here we are talking about murder for the purpose of receiving inheritance, insurance, evading the obligation to pay alimony. Part of the intrafamilial cupidity murders are part of the so-called conjugal affairs.

Sometimes these kinds of crimes cross the boundaries of family relationships, for example the person who wants to receive some advantages faster, resorts to the services of a professional killer.

The family environment can be appreciated from the aspect of structure, economic-social conditions and educational deficit. The family environment can present very diverse deficiencies of a legal, social, moral, pedagogical nature, related to situations such as: infidelity, abandonment, divorce, cohabitation, death, drug addicts, sexual vices, etc., not to mention the absence of the family environment itself, as in the case of orphaned, abandoned children, in the care of public assistance.

The differentiation of social classes determines the existence of contradictory

relations between them. In this sphere of relations, estrangement appears mainly due to the contradiction between the equality of people, which is only declarative. In reality, there is enormous inequality in the distribution of the social product. This inequality determines the appearance of some forms of social inequity, makes some social groups occupy a disadvantageous position from a material and social point of view, manifesting, as a consequence, negative attitudes. Due to these conditions, aggravated by the economic crisis in our country, *there have been opportunities to get rich without work, generating enormous social parasitism*. Individualistic attitudes, disdain for work, ignoring or even violating the rights of other members of society appeared in terms of personality structures.

The unequal destruction of knowledge, in turn, leads to the separation of physical work from intellectual work, making certain social groups occupy a socially disadvantaged situation.

Greedy crime can be characterized as a subsystem, which is part of the "criminality" system. The "greedy crime" subsystem includes both the plurality of greedy crimes and the multitude of greedy factors.

Within these factors, at the social level, three contradictions play an important role:

- between different social groups with different levels of material development;
- between material needs and the possibilities related to their realization;
- between the official norms and the de facto behavior of a part of the population.

For the formation of the cupidity goal, an important role is played by the difference in material development of different social strata. Thus, the disproportions that establish personal incomes impose moral requirements on the members of society, especially those with a low income, the importance of which cannot be ignored. As long as there are people who prosper from a material point of view, there will appear individuals from among the others, who will claim to equalize the situation, or at least to get closer to the desired ideal.

The greedy orientation of criminals to a large extent is determined by family relationships, which activate misunderstandings between the needs of the material state and the possibilities of their realization and also the birth of the desire not to be left behind by other families.

The institution of the family contains its own determinants in the quality of which three misunderstandings arise: between the ***interests of the material order***; between material and spiritual beginnings; between the professional and family role of the woman. In the absence of soul understanding and also the disturbance of stability, selfishness, ignorance of the interests of those close to you, lack of mutual understanding can appear. As a result of this situation, conflicts related to wealth, in some cases, take on a fierce character. This is most often observed in the settlement of civil cases related to the division of wealth between spouses.

The absence of one of the parents reflects negatively on the character and intensity of family control over children's behavior. In this way, the absence of grandparents in the family also influences, which is more noticeable in families where one of the parents is missing.

For *adult greedy criminals*, a characteristic violation of family relationships is that most of them do not have families of their own. Not infrequently, even greedy criminals consider relationships with close relatives as a factor that can hold them back from committing a crime for fear of causing them to suffer.

Mutual understanding and mutual control decrease in alcohol-consuming families, and the members of such families, especially minors, are prone to criminogenic-cupidity action.

A person's cupidity orientation is usually formed gradually. Its appearance is largely related to the unfavorable correlation in the

individual consciousness of three dominant types of behavior:

- material enrichment needs,
- the needs in spiritual enrichment,
- respect for property.

The *family educational* regime proved to be the main cause of failure in the integration process and, implicitly, the essential cause of minors' behavioral deviance. The researched parents did education in an empirical way, based on intuition and habit. The family's educational deficiencies are manifested by: total lack of interest in the child's education; the excess of care, the indulgence of exaggerated affection; lack of unity of opinion in the educational measures of the family members; the parents' lack of moral authority due to character deficiencies, vices, etc.; the inability to provide the child with positive human models through their own example of behavior; lack of understanding and affection due to selfishness and indifference towards the child; excessive severity, unconscious or intentional, which creates an anxious family climate; the use of acts of violence as educational means.

The most frequent manifestation of *children's maladjustment*, *due to the deficiencies of the family environment, is vagrancy, 20% of minors left their family or school before committing crimes; among them, 18% come from behaviorally deficient families.* There are multiple forms of family structure deficiencies. In 20% of cases, the family had only one parent, due to its disorganization through divorce, 18% through abandonment and 3% through death; in 5% of cases the family had been reconstituted through marriage, having a stepparent, 88% of these families had a conflict environment.

The shock produced by the parents' separation was the decisive moment that marked the evolution towards behavioral deviance. The general deterioration of living conditions leads some people to look for solutions to obtain compensatory income by which they can improve their living conditions, using illegal means. There is a decrease in the authority and social control function of the family. The emergence of accentuated permissive states towards the deviant behaviors of minors is taking shape more and more.

Permissiveness in association with indifference towards the future of one's own children, negatively influences their personality, even causing them to commit criminal acts. The precarious living conditions of some families have contributed to the emergence of the social phenomenon known as "street children", who take shelter in train stations, bus stations, basements of buildings, heating networks and whose source of existence is begging, theft, etc. frequently becoming victims of pedophiles.

The family influences the formation of the child's behavior primarily through t*he relations between the parents*. When one of the parents *is a stepparent, he/she will generate in the child's soul a certain affective reserve and maybe even a feeling of rejection*. The attachment to the real parent, who has left the family (through divorce or death) creates this affective state of rejection or indifference for the child and leads some to acts of vagrancy. There are situations where the family consists of both natural parents, but the atmosphere is negative, either because they are alcoholics or because they are criminals themselves. These extreme attitudes generate either an exaggerated demand pushed to the point of terror, or an impermissibly great indulgence, with the child tolerating any kind of behavior. The child terrorized by beatings will look outside the family for a development through aggressive behavior towards younger peers. The one who is spoiled too much in the family will easily become a criminal by appropriating goods that do not belong to him/her, knowing that his/her parents will defend him/her. Parents will have to be concerned with providing the child with a model of

behavior that he/she can then imitate as an adult citizen [4, p. 154].

According to its functionality, the family environment can be analyzed according to several indicators, the most important of which are considered:

1) the interpersonal reporting model of the parents, meaning the level of closeness and understanding, agreement or disagreement in relation to various issues;

2) the degree of cohesion of the family members;

3) the way the child is perceived and considered;

4) the set of attitudes of the members in relation to different norms and social values;

5) the manner of manifestation of parental authority;

6) the degree of acceptance of various children's behaviors;

7) the level of satisfaction felt by the members of the family group;

8) the dynamics of the emergence of tense and conflictual states;

9) the model of application of rewards and sanctions;

10) the degree of openness and sincerity shown by the members of the family group 5 [4].

The child's choice of a pro-social or pro-delinquent behavior is influenced by the education styles and the relationships between the family members and the child:

1) authority-liberalism or coercion-permissiveness and

2) love-hostility or attachment-rejection [6, p. 119].

Conclusions

Therefore, it has been established that a disorganized family produces negative effects in the context of social relations, of the personality of the members, and through its appearance of "honorability" or "normality" it often prevents the active intervention of social protection and social control institutions. Highlighting the negative role of these family deficiencies on the process of human personality development, we list the following defense reactions:

- affective reactions: anxiety, depression, states of excitement, obsessions, phobias, insecurity; characterological reactions: aggressiveness, immaturity of affective processes;

- cognitive reactions: school performance failures;

- psychosocial reactions: conflicts with family, community, negative identification.

Thus, we determine that a dysfunctional family, by structure, by climate, by the educational style, by abuses of all kinds, generates dysfunctions at the psychological and structuring level of the personality starting from the period of minors, these constituting, more or less, as premises for a deviant or delinquent behavior of the child and adolescent, becoming a criminal at the age of majority. As we mentioned, children are educated according to the family situation, that is, they assimilate everything they see in the family. Thus, if violence prevails in the family, then when they become adults, they will also apply violence to their children.

The family educational regime proved to be the main cause of failure in the integration process and, implicitly, the essential cause of minors' behavioral deviance. Parents often educate children empirically, relying on intuition and habit. The family's educational deficiencies are manifested by: the total lack of interest in the child's education; the excess of care, the indulgence of exaggerated affection; lack of unity of opinion in the educational measures of the family members; the parents' lack of moral authority due to character deficiencies, vices, etc.; inability to provide the child with positive human models through their own example of behavior; lack of understanding and affection due to selfishness

and indifference towards the child; excessive severity, unconscious or intentional, which creates an anxious family climate; the use of acts of violence as educational means.

A pressing problem in the Republic of Moldova is *family violence*. As a rule, few people subjected to violence turn to law enforcement. It is worrying that the victims of violence are women and children. The phenomenon of aggression knows no socio-economic, racial, ethnic, religious or age limits.

However, there are also situations that demonstrate in one way or another the fact that a two-parent family is not absolutely necessary for the child to be happy. Children are much happier if the two parents who have permanent disagreements divorce. So, even if the family is complete, but the moral climate in it leaves something to be desired, it cannot constitute a good educational environment.

Bibliography

1. CIOBANU, I, A. *Criminologie*. Vol. II, Chişinău: Cartdidact 2004, p. 79.
2. LARIE, I. *Criminologie*, Chişinău, 2004, p. 47.
3. MIHAI, Gh., POPA, V. *Repere criminologice*, Bucureşti: Lumina Lex, 2000, p. 190.
4. MUTU-STRULEA, *Delincvența* juvenilă. Suport de curs – Chișinău: CEP USM, 2008, p. 154.
5. КУДРЯВЦЕВ, В. Н. *Правовое поведение*: *норма* и *патология*, Москва, 1982, p. 180.
6. КУЗНЕЦОВА, В. Ф., МИНЬКОВСКИЙ, Г. М. *Криминология* , Москва, 1998, p. 119.
7. СЕРЕБРЯКОВ, В. А., СЕРОВ, А. П. *Криминологические аспекты изучения сферы быта*, Москва, p. 112.
8. ШЕСТАКОВ, Д. А. *Семейная криминология*, Санкт Петербург, 2003, p. 124.

CZU 343.575
DOI https://doi.org/10.52388/2345-1971.2022.e1.11

CURRENT PROBLEMS OF PREVENTION OF ILLEGAL TRAFFICKING OF NARCOTIC AND PSYCHOTROPIC SUBSTANCES AMONG ADOLESCENTS AND YOUNG PEOPLE

Vasif GULIEV
PhD student, Center for Forensic Expertise of the Ministry of Justice of Azerbaijan,
Baku, Azerbaijan
e-mail: *quliyev889@mail.ru*
https://orcid.org/0000-0001-5988-1891

The article considers some topical issues of the status and dynamics of illicit trafficking of drug addiction and drugs, psychotropic substances among adolescents and young people. Dissertation works dedicated to the prevention of cases were noted on criminal-legal and criminological aspects of the fight against illicit trafficking of drug addiction, drugs, psychotropic substances, in particular, the prevention of drug addiction among adolescents and young people, causes and conditions of drug addiction and crimes committed on this ground among adolescents and young people, the study of the identity of this category of persons, the prevention of involvement of adolescents in the consumption of drugs and psychotropic substances. The current state of scientific research at the monographic level is analyzed. A set of criminological and criminal-legal issues that are important for scientific research and resolution has been identified and systematized in order to develop a conceptual, criminal-legal, socio-criminological and organizational-methodological framework for the prevention of drug addiction among adolescents and young people as well as the prevention of drug addiction and drug crimes by this category of persons.

Keywords: *drugs, psychotropic substances, drug addiction, drug business, youth, drug crimes, prophylaxis measures.*

PROBLEME ACTUALE DE PREVENIRE A TRAFICULUI ILEGAL DE SUBSTANȚE NARCOTICE ȘI PSIHOTROPICE PRINTRE ADOLESCENȚI ȘI TINERI

Prezentul articol tratează câteva probleme de actualitate ale prevenirii dependenței de droguri și ale traficului ilicit de stupefiante și substanțe psihotrope în rândul adolescenților și tinerilor. Acesta este dedicat dreptului penal și aspectelor criminologice ale luptei împotriva dependenței de droguri și traficului ilicit de stupefiante și substanțe psihotrope, în special - prevenirea dependenței de droguri în rândul adolescenților și tinerilor, caracteristicile criminologice ale infracțiunilor de droguri săvârșite de aceștia, studiul cauzelor și împrejurărilor care duc la apariția dependenței de droguri în rândul adolescenților și tinerilor și a infracțiunilor comise, studiul personalității acestor categorii de persoane, prevenirea implicării adolescenților în consumul de stupefiante și substanțe psihotrope. Stadiul actual al cercetării științifice, asupra problemei vizate, este analizat la nivel monografic. În vederea dezvoltării unor fundamente conceptuale, de drept penal, socio-criminologice, organizatorice și metodologice pentru prevenirea dependenței de droguri în rândul adolescenților și tinerilor și a infracțiunilor de droguri săvârșite de această categorie de persoane, au fost identificate și sistematizate un șir de probleme de drept penal, soluționarea cărora se atestă a fi una imperativă.

Cuvinte-cheie*: stupefiante, substanțe psihotrope, dependență de droguri, trafic de droguri, tineret, criminalitate, măsuri de prevenire.*

PROBLÈMES ACTUELS DE PRÉVENTION DU TRAFIC ILLÉGAL DE SUBSTANCES NARCOTIQUES ET PSYCHOTROPES CHEZ LES ADOLESCENTS ET LES JEUNES

Cet article traite de plusieurs questions d'actualité de la prévention de la toxicomanie et du trafic illicite de stupéfiants et de substances psychotropes chez les adolescents et les jeunes. Il est consacré au droit pénal et aux aspects criminologiques de la lutte contre la toxicomanie et le trafic illicite de Stupéfiants et de substances psychotropes, en particulier - prévention de la toxicomanie chez les adolescents et les jeunes, caractéristiques criminologiques des délits liés à la drogue commis par eux, étude des causes et des circonstances conduisant à l'émergence de la toxicomanie chez les adolescents et les jeunes et des crimes commis, étude de la personnalité de ces catégories de personnes, Prévention de l'implication des adolescents dans la consommation de stupéfiants et de substances psychotropes. L'état actuel de la recherche scientifique sur le problème concerné est analysé au niveau monographique. Afin de développer des fondements conceptuels, juridiques pénaux, socio-criminologiques, organisationnels et méthodologiques pour la pré-arrivée de la toxicomanie chez les adolescents et les jeunes et des délits liés à la drogue commis par cette catégorie de personnes, un certain nombre de problèmes de droit pénal ont été identifiés et systématisés, dont la solution est attestée comme impérative.

Mots-clés: *stupéfiants, substances psychotropes, toxicomanie, trafic de drogue, jeunesse, criminalité, mesures de prévention.*

АКТУАЛЬНЫЕ ПРОБЛЕМЫ ПРЕДОТВРАЩЕНИЯ НЕЗАКОННОГО ОБОРОТА НАРКОТИЧЕСКИХ СРЕДСТВ И ПСИХОТРОПНЫХ ВЕЩЕСТВ СРЕДИ ПОДРОСТКОВ И МОЛОДЕЖИ

В данной статье рассмотрены некоторые актуальные вопросы профилактики наркомании и незаконного оборота наркотических средств и психотропных веществ среди подростков и молодежи. Отмечены диссертационные работы, посвященные уголовно-правовым и криминологическим аспектам борьбы с наркоманией и незаконным оборотом наркотических средств и психотропных веществ, в частности, - вопросам профилактики наркотизма среди подростков и молодежи, криминологическим особенностям совершаемых ими наркопреступлений, изучению причин и обстоятельств, приводящих к наркомании среди подростков и молодежи и совершаемых на этой почве преступлений, изучению личности данной категории людей, профилактике вовлечения подростков в потребление наркотических средств и психотропных веществ. Проанализировано современное состояние научных исследований проблемы на монографическом уровне. В целях разработки концептуальных, уголовно-правовых, социально-криминологических и организационно-методических основ предупреждения и профилактики наркомании среди подростков и молодежи и наркопреступлений, совершаемых данной категорией лиц, выявлен и систематизирован комплекс криминологических и уголовно-правовых вопросов, исследование и решение которых представляется необходимым.

Ключевые слова: *наркотические средства, психотропные вещества, наркомания, наркобизнес, молодежь, наркопреступность, меры профилактики.*

Introduction

Among the negative social and legal phenomena that have been rapidly spreading since the end of the 20th century, in the globalizing world, drug addiction and drug trafficking should be especially noted, which are extremely dangerous for the health of the nation, deform public consciousness, in recent years have become dangerous, cause serious damage to the economies of countries, negatively affect the moral and moral spirit of society, undermine national security [1, p. 3-4].

It is no coincidence that in the «Concept of the National Security of the Republic of Azerbaijan» dated May 23, 2007, among the threats to the national security of the Republic of Azerbaijan, along with attempts on the independence, sovereignty, territorial integrity and constitutional order

of Azerbaijan; actions directed against the performance of state functions in the field of ensuring the rule of law, protecting public order and protecting human rights and freedoms; separatism, ethnic, political and religious extremism, regional conflicts and transnational organized crime, including human trafficking and drug trafficking, were also noted.

The "State Program to Combat Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Their Precursors and Drug Addiction for 2019-2024", approved by the Decree of the President of the Republic of Azerbaijan dated July 22, 2019, states: "Today, illicit drug trafficking and drug addiction is one of the main problems that concern the whole world. This problem is a factor that deals a big blow to the moral and ethical values of human society, negatively affecting socio-economic development, posing a serious threat to human life and health, leading to an increase in crime."

Content

Drug addiction, which is a socio-legal and medical pathology, and the illegal circulation of narcotic drugs and psychotropic substances, which is spreading on this soil and acquiring dangerous proportions, has become one of the most negative factors that adversely affect the physical and mental health of the population, the socio-demographic situation, and the economic situation of society. , politics, law and order, social stability and the future of the nation, have become one of the most serious disasters faced by every country and the whole world as a whole.

Narcologist A. Kangerli notes: "Historically, many peoples of the world were subjected to genocide by other peoples ... Today, genocide began, directed not against any one nation, but against the whole of humanity: the drug mafia, choosing teenagers and youth as a target all over the world, turns them into its victims and destroys them regardless of language, religion, race, gender, place of residence and other characteristics" [2, p. 3].

I. V. Kobzeva notes that the fight against drug addiction, due to its social and political significance, has now come to the fore and, having overcome the borders of individual states, has become a worldwide problem [3, p. 3].

It should be noted that special international organizations have been created and are working to unite efforts in the fight against drug trafficking, and programs aimed at joint activities of states are being adopted and implemented. At the end of the 20th century, the UN General Assembly declared 1991-2000 the Decade of Combating Drug Addiction and invited each state to adopt comprehensive national programs to combat drug addiction and drug addiction [4, p. 3-4].

Adolescents and young people involved in the use of narcotic drugs and psychotropic substances lose positive socially significant ties with society, and in many cases, as a result of drug addiction, they themselves commit criminal acts related to drug trafficking and other crimes of increased public danger [5, p. 4].

Adolescents and young people have overcome the barrier of fear of drugs, some of them already perceive psychostimulants and other drugs as an element of youth subculture, evidence of entry into reference groups [6, p. 3-4].

If earlier this social evil was an attribute of only marginalized sections of the population, today drugs, psychostimulants and their use have even penetrated into schools. Drugs

have become available to anyone who is interested in them. The terrible consequences of drug addiction and the devastating effects of drugs on the human body are often not well understood by teenagers and young people. The widespread and intensive spread of drug addiction, especially among adolescents and young people, is largely due to these circumstances [7, p. 3-5].

Since the end of the 20th and beginning of the 21st centuries, there has been an increase in the use of more dangerous psychoactive substances by adolescents. This, in turn, leads to a higher level of physical and mental dependence of minors on narcotic drugs and psychotropic substances, tendencies to a constant increase in the dose of consumption and, ultimately, to their rapid social and psychophysiological degradation [8, p. 5-7]. As E. G. Gasanov rightly notes, “unlike alcohol, a person who has experienced temporary relief and improvement in well-being when taking drugs has an acute need for repeated drug use. Then there is a habit of taking drugs and a desire to take them in large doses or try drugs with a stronger effect. Gradually, a person finds himself in a state of drug addiction, suffers from the disease of drug addiction, and, as a rule, degrades as a person” [9, p. 10].

The social danger of drug addiction also lies in the fact that people who use drugs for non-medical purposes inevitably become drug addicts, weak-willed and irresponsible people who, being under the influence of drugs or in a state of drug syndrome, can commit a variety of crimes. The need to take drugs, high prices for illegally distributed drugs and lack of funds to purchase them will provoke many drug addicts to commit crimes against property [4, p. 4-5]. Drug addicts who do not have any source of income to overcome the withdrawal syndrome commit mercenary and mercenary-violent crimes - theft, robbery, robbery, etc. And this is no coincidence. So, according to 2019 data, the retail price of 1 kg of opium on the black market was 10-15 thousand dollars, heroin - 40-50 thousand dollars, marijuana - 8-12 thousand dollars, hashish - 6-8 thousand US dollars. Thus, we can say that there is a close relationship between drug addiction and crime.

Drugs and psychostimulants have become widespread means for turning the younger generation into immoral and weak-willed people, destroying their future [3, p. 3-4]. The undermining of the foundations of the family, the weakening of family ties, the irresponsibility and socio-psychological incompetence of parents, their immoral lifestyle, the growth of domestic violence, etc., affect the still weak psyche of adolescents, in some cases leading to their drug addiction [10, p. five; 16, p. 3].

Practical measures to improve the adolescent environment are often fragmented, covering only some aspects of the socialization of the younger generation, and the implementation of these measures is very difficult due to the unresolved other problems [12, p. four].

In the last decade, the fight against the growing drug addiction of the population has become especially relevant, since ensuring the health of the nation is one of the most important tasks of the state, and the future of each state and society depends on the solution of this task. Accordingly, the negative social and legal changes taking place in society pose the task of developing new and improving traditional forms and methods for the prevention of negative social deviations, primarily drug addiction, before the social and human sciences, including criminology [13, p. 3-4].

At present, when new, more dangerous forms and types of drug addiction among adolescents and young people are increasingly appearing, it seems impossible to strengthen the fight against drug crime and increase the effectiveness of preventive activities in this direction without the use of criminological knowledge and conducting criminological research.

As you know, the main task of criminology as a science is to develop methods and means of preventing crime in general and its individual, especially dangerous types based on the study of the state and dynamics of crime, its structural elements, specific trends and patterns characteristic of this negative socio-legal phenomenon. in a certain section of time and space, the causes and conditions of crime and crimes, the identity of the offender.

E. O. Alaukhanov specifically emphasizes that in the modern era of globalization and regionalization, the solution of urgent problems of combating crime seems impossible without taking into account the results of criminological research and analysis, a deep and comprehensive study of existing trends and patterns in a real criminological situation [14, p. 4.-5].

All this testifies to the exceptional importance of the development and implementation of a complex of criminal-criminological, organizational and methodological measures aimed at preventing illicit trafficking in narcotic drugs and psychotropic substances among adolescents and young people.

It should be noted that, given the exceptional relevance of the fight against drug addiction, this problem has always been given great attention by legal scholars, numerous scientific articles, monographs have appeared, dissertations devoted to the study of various aspects of the problem have been written and defended.

General theoretical, as well as criminological and criminal law problems of illicit drug trafficking, the essence and content of the concept of «narcotism», legal aspects of the fight against drug crime, the identity of drug users and their typology, issues related to the latency of drug addiction, general social and special criminological aspects and organizational foundations for the prevention of illicit trafficking in narcotic drugs and psychotropic substances were studied by such authors as V. M. Aliev, A. A. Gabiani, A. N. Anisimov, K. E. Igoshev, S. E. Vitsin, V. N. Burlakova , T. A. Bogolyubova, I. I. Karpets, V. N. Kudryavtsev, N. F. Kuznetsova, B. S. Zaidov, E. G. Gasanov, F. M. Dzhavadov, I. M. Ragimov, Sh Samedova, G. M. Minkovsky, V. I. Omigov, L. I. Romanova, Kh. J. Alekberov, N. T. Aliev, S. V. Borodin, Yu. I. Gilinsky, E. G. Gasanov , K. K. Goryainova, A. A. Muzyka, A. V. Naumov, E. F. Pobegailo, L. I. Romanova, M. L. Prokhorova, V. I. Luneev, D. A. Shestakov, V D. Malkov, V. S. Ovchinsky , Yu. V. Golik, A. I. Dolgova, M. P. Kleymenov, etc. Issues of differentiation of criminal liability for crimes committed by adolescents and youth, problems of lawmaking and improvement of current legislation in this area, criminological aspects, features of prevention and prevention criminal acts committed by this category of persons are considered in special monographic studies, including at the level of doctoral dissertations, carried out by such authors as V. A. Pleshakov (1998), A. I. Osintsev (2000), N. G. Andryukhin (2002), P. S. Myasnikov (2002), N. A. Selezneva (2004), D. B. Dryzhenko (2004), V. V. Sharapova (2004), G. M. Pogorelova (2004), E V. Kosheleva (2005), Yu. A. Melnikov (2007),

N. A. Telesheva-Kuritskaya (2007), V. V. Popandopulo (2007), V. N. Tkachev (2007), K. A. Dolgopolov (2008), I. V. Chernenko (2008), V. M. Voloshin (2008), A. S. Laushkin (2008), R. A. Kolonichenkov (2009), N. Yu.

Komlev (2009), R. V. Novikov (2010), A. V. Davidenko (2013), N. Yu. Skripchenko (2013), etc.

Among the dissertations devoted directly to the prevention of drug addiction and drug addiction among adolescents and youth, criminal law and criminological aspects of the fight against illicit trafficking in narcotic drugs and psychotropic substances, the criminological features of such crimes, the study of the causes and conditions leading to drug addiction among adolescents and youth and the crimes committed on this basis, the study of the personality of this category of offenders, the prevention of cases involving adolescents in the consumption of narcotic drugs and psychotropic substances, it should be noted the monographic studies conducted by such authors as S. L. Panov (1998), V. A. Zhabsky (1999), A. E. Metsaeva (1999), B. P. Prudnikov (1999), O. P. Rybalkina (2001), V. N. Drannikov (2001), T. M. Sudakova (2002), I V. Kobzeva (2003), T. G. Gazizova (2003), A. P. Alekseeva (2004), A. A. Kornilov (2004), E. A. Moskina (2006), E. P. Novikova (2006), N. Yu. Zhilina (2009), I. Yu. Samo Khvalov (2009), L. V. Gotchina (2011), R. T. Ismailov (2013), L. S. Kuzina (2020) and others.

It should be noted that the problems of combating drug addiction and drug trafficking in general, and, in particular, the illegal circulation of narcotic drugs and psychotropic substances among adolescents, have been studied in Azerbaijan at the level of dissertations. Thus, the criminological and criminal procedural aspects of this problem have become the subject of scientific research by such authors as Sh. A. Babaev (Features of the methodology for investigating drug crimes committed by minors, 2010), S. Yu. narcotic drugs and psychotropic substances, 2001), S. S. Mamedov (Manifestations of drug crime in society and the problems of combating them by means of criminal procedure legislation, 2006), and dissertations of such authors are devoted to criminal law and criminological aspects of the problem, as G. G. Aslanov (Criminal-legal and criminological struggle against the cultivation of plants with narcotic properties, 2008), G. G. Aliyev (Social-legal and criminological problems of drug addiction, 2005), A. G. Gasanov (Criminal - legal and criminological problems of combating the smuggling of narcotic drugs and psychotropic substances, 2007), E. G. Gasanov (Criminal legal and criminological problems of combating drug crimes: anti-drugs, doctoral dissertation, 2000), B. S. Zaidov (Actual problems of combating drug addiction and drug trafficking in Azerbaijan, doctoral dissertation, 2005).

At the same time, it should be noted that a comprehensive and systemic, scientifically-theoretically and methodologically verified and perfect concept and strategy for the prevention of illicit trafficking in narcotic drugs and psychotropic substances among adolescents and youth, criminal law, criminological and organizational and methodological foundations for the fight against drug addiction and drug addiction among adolescents and young people is not yet developed to a level adequate to modern threats and challenges [11, p. 7-8].

According to Doctor of Law B. S. Zaidov, “Despite the study of various aspects and manifestations of drug-criminal acts in the science of criminal law and criminology

of the independent Azerbaijan Republic, comprehensive criminal law and forensic studies on international, regional and national aspects have not yet been carried out. problems of drug addiction and drug trafficking in the long, medium and short term, as well as on topical issues of effective combat and prevention of such forms of universal and global criminal manifestations" [15, p. 5].

Against the background of an increase in the level of the spread of drug addiction among adolescents and young people, there is an insufficient level of development of preventive measures and mechanisms for their implementation. The characteristic criminological, socio-demographic and psychological features of this category of persons have not been fully studied, their typology has not been carried out. The complex of factors that determine drug addiction in adolescents and young people, the totality of the causes and conditions that cause it, have not been sufficiently studied at the monographic level. The combination of all these facts necessitates the development of a scientific concept for preventing the spread of drug addiction among adolescents and young people and a new set of preventive measures, optimal and effective mechanisms for their implementation, which should be reflected in this concept and strategies and action plans based on it [11, p. 4-6].

We believe that in order to develop a conceptual, criminal law, socio-criminological, organizational and methodological basis for the prevention and prevention of drug addiction among adolescents and young people and drug crimes committed by this category of persons, it is necessary to provide a scientific solution to the following set of tasks:

- comparative analysis of the state and dynamics of illicit trafficking in narcotic drugs and psychotropic substances among minors and youth in the Republic of Azerbaijan and abroad;

- identifying the main trends and patterns that determine the modern criminological characteristics of crimes related to drug trafficking and psychotropic substances committed by adolescents and youth, based on a study of the state, structure, dynamics and level of this type of crime at the national and regional levels;

- study of the main stages of the formation and development of the criminal legislation of Azerbaijan and foreign countries, which determines the responsibility for involving adolescents in criminal activities, including illicit trafficking in narcotic drugs and psychotropic substances;

- comparative legal analysis of modern legislation that defines responsibility for crimes committed by minors in Azerbaijan and abroad, including for illegal trafficking in narcotic drugs and psychotropic substances;

- analysis of objective and subjective elements of crimes related to the involvement of adolescents in the consumption of narcotic drugs and psychotropic substances;

- definition of objective and subjective elements of crimes, enshrined in Articles 234-239 of the Criminal Code of the Republic of Azerbaijan, providing for criminal liability for minors;

- development of proposals for improving the provisions of the criminal legislation providing for liability for crimes in the field of illicit trafficking in narcotic drugs and psychotropic substances committed by adolescents and youth;

- creation of criminological and socio-psychological «portraits» of juvenile delinquents involved in drug trafficking, and

adolescents with drug addiction, based on the study of their socio-demographic and moral and psychological characteristics;

- statistical and criminological analysis of drug crime among adolescents and young people and its structural elements, taking into account latency and geographical factors;

- study of a complex of factors contributing to the spread of drug addiction among adolescents and young people, the main causes and conditions of illicit trafficking in narcotic drugs and psychotropic substances in educational institutions;

- determination of the characteristics of crimes committed by adolescents on the basis of drug addiction, as well as victimological characteristics of adolescent and young drug addicts, the causes and conditions for their crimes;

- study of the causes and conditions that determine the criminal behavior of adolescents who use drugs, determining the place of drug addiction and drug intoxication in the system of criminogenic factors;

- analysis of the dynamics of the regional distribution of narcotic drugs and psychotropic substances (marijuana, hashish, opium, heroin, amphetamine, methamphetamine, etc.) among adolescents and young people, distribution of narcotic drugs and psychotropic substances by their types, increase or decrease in different seasons, generalization of results analysis, identification of existing trends, conducting criminological and analytical studies aimed at determining a set of circumstances and factors that contribute to the commission of drug crimes by adolescents and young people, and on this basis, the development of preventive scientific and theoretical provisions and practical recommendations aimed at improving the effectiveness of measures to combat drug addiction among adolescents and youth;

- carrying out work on the collection, statistical, criminological and analytical research of information about persons and criminal structures involved in drug trafficking, the most common methods of illegal production and packaging of narcotic drugs and psychotropic substances, places of their illegal production (manufacturing), types of newly emerging psychoactive substances etc.;

- development of criminological maps of regions where drug addiction among teenagers and young people is most often registered, and drug crimes committed by them;

- study of the scientific, theoretical and methodological foundations for the creation of criminal law, criminological, socio-psychological, organizational, technical and information support for the fight against drug addiction and drug addiction;

- identification of prerequisites that actualize the renewal and improvement of the system for the prevention of drug addiction and drug crime among adolescents and young people in the modern period;

- analysis of the practice of preventing drug addiction and drug crime among adolescents and youth in foreign countries, studying the effectiveness of this practice, studying the possibility of applying the most effective set of measures in Azerbaijan;

- analysis of the current state of the formation of a system of legal support for the prevention of drug addiction among adolescents and youth at the international and national levels, development of sound proposals for identifying existing problems in this area, improving the existing system of organizational and legal support for the prevention of these problems;

- development of a set of socio-psychological, organizational and legal proposals and recommendations aimed at improving the activities for the prevention of drug addiction among adolescents at the republican and regional levels;

- studying the state, structure and dynamics of crimes related to drug addiction and illicit trafficking in narcotic drugs and psychotropic substances among adolescents and youth in Azerbaijan, making short-term and medium-term forecasts based on identifying existing trends and patterns;

- development of strategies and tactics to combat drug crime among adolescents and young people, special action plans that combine a set of urgent legal, organizational, technical, socio-economic, scientific and methodological measures for the short and medium term.

Findings

The possibilities of conceptualizing the drug prevention system among adolescents and youth should also be explored. In our opinion, it is necessary to develop and implement the «Concept of Comprehensive Prevention of Drug Abuse among Adolescents and Youth», a strategy based on this concept for the prevention of drug trafficking among adolescents and youth, as well as appropriate action plans [13, p. four; 11, p.7-10].

Thus, it should be noted that the measures taken so far to prevent and eliminate the dangerous socio-economic, psychological, criminological, medical and other consequences of drug addiction among adolescents and young people in Azerbaijan have not yet yielded the expected results. Consequently, activities in this area should be reorganized more thoroughly and comprehensively, systematically. A resolute and uncompromising fight against drug trafficking among adolescents and young people, especially drug addiction, should be a priority, and a set of organized and urgent measures should be developed and implemented in this area.

In the implementation of this set of measures, not only public control, health and education bodies, but also non-governmental organizations, in a word, all structures of society, should take an active part, scientific foundations, methodology and mechanisms for systemic and comprehensive joint efforts should be developed.

Bibliography

1. САМОХВАЛОВ, И. Ю. *Противодействие преступлениям, совершаемым несовершеннолетними в сфере незаконного оборота наркотических средств и психотропных веществ: уголовно-правовой и криминологический аспект.* Автореферат диссертации на соискание ученой степени кандидата юридических наук. Нижний Новгород, 2009.

2. КЕНГЕРЛИ, А. *Наркотическое вещество – «оружие» для разрушения семьи.* Баку, 2017. (на азербайджанском языке).

3. КОБЗЕВА, И. В. *Профилактика наркотизма несовершеннолетних в образовательных учреждениях: криминологический и правовой аспекты.* Рязань, 2003.

4. МЕЦАЕВА, А. Э. *Криминологические проблемы борьбы с наркотизмом среди несовершеннолетних и молодежи.* Автореферат дисс….к.ю.н. М., 1999.

5. НОВИКОВА, Е. П. *Криминологическая характеристика и предупреждение преступлений несовершеннолетних, связанных с незаконным оборотом наркотических средств, психотропных веществ и их аналогов.* Автореферат диссертации на соискание ученой степени кандидата юридических наук. Воронеж, 2006.

6. ПАНОВ, С. Л. *Криминологическая характеристика и предупреждение наркотизма среди несовершеннолетних.* Автореферат диссертации на соискание ученой степени кандидата юридических наук. Омск, 1998.

7. ПРУДНИКОВ, Б. П. *Преступления несовершеннолетних наркоманов: криминологический анализ.* Автореферат диссертации на соискание ученой степени кандидата юридических наук. М., 1999.

8. КОРНИЛОВ, А. В. *Уголовно-правовые и криминологические вопросы предупреждения наркотизма несовершеннолетних.* Автореферат диссертации на соискание ученой степени кандидата юридических наук. Томск., 2004.

9. ГАСАНОВ, Э. Г. *Наркотизм: тенденции и меры по их устранению.* Баку, 1999. (на азербайджанском языке).

10. ГАЗИЗОВА, Т. Г. *Криминологическая характеристика преступлений несовершеннолетних, связанных с незаконным оборотом наркотиков, и их предупреждение*. Автореферат диссертации на соискание ученой степени кандидата юридических наук. Омск., 2003.

11. ГОТЧИНА, Л. В. *Молодежный наркотизм в современной России: криминологический анализ и профилактика.* Автореферат диссертации на соискание ученой степени доктора юридических наук. СПб., 2011.

12. ИСМАИЛОВ Р. Т. *Вовлечение несовершеннолетних в употребление наркотических средств и психотропных веществ и его предупреждение органами внутренних дел* (по материалам Кыргызской Республики и РФ). Автореферат диссертации на соискание ученой степени кандидата юридических наук. Бишкек, 2013.

13. АЛЕКСЕЕВА, А. П. *Комплексное предупреждение наркотизма среди молодежи на региональном уровне: теоретические и прикладные аспекты.* Автореферат диссертации к.ю.н. 2004.

14. АЛАУХАНОВ, Е. О. *Криминологические проблемы предупреждения корыстно-насильственных преступлений.* Алматы, 2002.

15. ЗАИДОВ, Б. С. *Актуальные проблемы борьбы с наркотизмом и наркобизнесом в Азербайджане (уголовно-правовые и криминологические аспекты).* Автореферат диссертации д.ю.н. Баку, 2005. (на азербайджанском языке).

16. СУДОКОВА, Т. М. *Криминологическая характеристика преступного поведения несовершеннолетних, употребляющих отдельные виды психоактивных веществ*. Автореферат диссертации на соискание ученой степени кандидата юридических наук. М., 2002.

CZU 343.572
DOI https://doi.org/10.52388/2345-1971.2022.e1.12

ELEMENTS OF COMPARATIVE LAW ON CRIMINAL LIABILITY FOR ACTS COMMITTED WHILE INTOXICATED

Alexandru MARIŢ
Doctor of law, university professor, University of European Political and Economic Studies "Constantin Stere", Chisinau, Republic of Moldova
e-mail: *alexmarit123@gmail.com*
https://orcid.org/0000-0002-3198-8398

Constantin BUJOR
PhD student, Free International University of Moldova,
Chisinau, Republic of Moldova
e-mail: *bujorconstantin8@gmail.com*
https://orcid.org/0000-0001-9180-0457

The implications that alcoholism has for modern human culture are quite concerning. Nothing spreads faster than the vice of alcohol. On the one hand, alcoholics, drug addicts are always ready to commit antisocial acts, alcohol consumption and drugs being one of the major causes of crime, and on the other hand they produce degeneration, children of alcoholics and drug addicts very often also become criminals or physically and intellectually degenerate. consumption, drug addiction and substance abuse. It is a social problem for modern society. This sinister and misguided understanding of alcohol consumption, which has caused regrettable criminal acts and great harm to the individual, gives up nothing in favor of understanding what alcohol actually represents. The consequences of drunkenness (usually due to the consumption of alcohol in large quantities) and unrestrained habits are also detrimental to the general well-being of society as they are fatal to the happiness of the individual.

Keywords: *alcoholism, severe alcoholism, drug addiction, substance abuse, mental disorder.*

ELEMENTE DE DREPT COMPARAT PRIVIND RĂSPUNDEREA PENALĂ PENTRU FAPTELE SĂVÂRŞITE ÎN STARE DE EBRIETATE

Dimensiunile pe care le ridică alcoolismul în societatea contemporană sunt de-a dreptul alarmante. Nimic nu se răspândeşte mai iute ca viciul consumului de alcool, narcomania şi toxicomania. Ea reprezintă o problemă socială pentru societatea modernă. Pe de o parte, alcoolicii, narcomanii sunt gata oricând să comită fapte antisociale, consumul de alcool şi substanţele drogante fiind una din cauzele majore ale criminalităţii, iar pe de altă parte ele produc degenerescenţă, copii alcoolicilor şi a narcomanilor foarte frecvent devin şi ei infractori sau degeneraţi din punct de vedere fizic şi itelectual. Această sinistră si eronată înţelegere a consumului de alcool, care a provocat regretabile acte criminale şi deosebite daune pentru individ, nu cedează nimic în favoarea înţelegerii a ceea ce reprezintă alcoolul în fapt. Consecinţele stării de ebrietate (datorată de obicei consumului de alcool în cantităţi mari) şi obiceiurile netemperate sunt, de asemenea, prejudiciabile bunăstării generale a societăţii aşa cum sunt fatale şi pentru fericirea individului.

Cuvinte-cheie*: alcoolism, etilism, narcomanie, toxicomanie, tulburare mentală.*

ÉLÉMENTS DE DROIT COMPARÉ SUR LA RESPONSABILITÉ PÉNALE POUR LES ACTES COMMIS EN ÉTAT D'ÉBRIÉTÉ

Les dimensions que l'alcoolisme soulève dans la société humaine contemporaine sont carrément alarmantes. Rien ne se propage plus vite que le vice de la consommation d'alcool, de la toxicomanie et de la toxicomanie. Il représente un problème social pour la société moderne. D'une part, les alcooliques et les toxicomanes sont toujours prêts à commettre des actes antisociaux, la consommation d'alcool et de drogues étant l'une des principales causes de criminalité, et d'autre part ils produisent une dégénérescence, les enfants d'alcooliques et de toxicomanes deviennent très souvent des criminels ou dégénèrent physiquement et intellectuellement. Cette compréhension sinistre et erronée de la consommation d'alcool, qui a causé des actes criminels regrettables et des dommages particuliers à l'individu, ne donne rien en faveur de la compréhension de ce que représente réellement l'alcool. Les conséquences de l'ivresse (généralement due à la consommation d'alcool en grande quantité) et des habitudes non tempérées sont également préjudiciables au bien-être général de la société car elles sont fatales au bonheur de l'individu.

Mots-clés: *alcoolisme, éthylisme, toxicomanie, trouble mental.*

ЭЛЕМЕНТЫ СРАВНИТЕЛЬНОГО ПРАВА ОТНОСИТЕЛЬНО УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ ЗА ДЕЯНИЯ, СОВЕРШЕННЫЕ В СОСТОЯНИИ АЛКОГОЛЬНОГО ОПЬЯНЕНИЯ

Масштабы, которые алкоголизм привносит в современное общество, вызывают серьезную тревогу. Ничто не распространяется быстрее, чем порок алкоголизма, наркомании и токусикомании. Это социальная проблема современного общества. С одной стороны, алкоголики и наркоманы всегда готовы к антиобщественным действиям, потребление алкоголя и наркотиков является одной из основных причин преступности, а с другой стороны, они вызывают дегенерацию, дети алкоголиков и наркоманов очень часто становятся преступниками или физически и интеллектуально вырождаются. Это зловещее и ошибочное понимание потребления алкоголя, которое привело к прискорбным преступным деяниям и особому ущербу для личности, ничего не дает в пользу понимания того, что на самом деле представляет собой алкоголь. Последствия пьянства (обычно из-за употребления алкоголя в больших количествах) и неумеренных привычек также пагубны для общего благополучия общества, поскольку они губительны для счастья личности.

Ключевые слова: *алкоголизм, наркомания, потребление, злоупотребление, патология, психическое расстройство.*

Introduction

The analysis of the phenomenon of drunkenness or the state of intoxication along the evolution of historical periods and respectively of the evolution of the regulations related to it, an example of those at the national level from the first written Romanian regulations of Vasile Lupu, Matei Basarab, later the Caragea Code and Callimachus; of modern regulations such as the Romanian Penal Code of Alexandru Ioan Cuza from 1865, as well as that of Carol II from 1937, respectively of the contemporary ones from 1969, correspondingly, the new Penal Code of Romania from June 28, 2004.), systematic (analysis of the aspects of the institution of drunkenness or the state of intoxication of the crime in relation to other institutions of criminal law in the system of the branch of criminal law, such as those of the phases or stages of the crime, the unity and plurality of the crime and criminals, the individualization of the criminal punishment, as well as in relation to a series of crimes from the special part of the Criminal Code), comparative (appreciation of the concepts related to the institution of drunkenness or the state of intoxication of the offender in relation to other criminal legislations of other countries, respectively, of their doctrines and judicial practice in the field; also as a method of comparison the presentation or analysis of the old criminal legislation in relation to the new or current criminal regulations was used.

Researching the correlation between drunkenness, alcoholism and crime, legal scholars, unfortunately, often do not make a demarcation between such notions as "intoxicated state", "drunkenness" and "alcoholism". And a confusion of these notions complicates finding out their essence and that connection with crime, which we can trace when we delve deeper into the consequences of alcohol abuse [5, p. 6.].

During the process of biological and social maturation, the individual forms his/her own personality by gradually learning and assimilating the prevailing socio-cultural model, which favors antisocial personality orientation [7, p. 52.].

The family is the first way of socialization of the individual. The family is the one that offers the most suitable framework for the transmission of behavioral models, norms and values. The first steps of the transformation of the biological being into the human being take place within the family. The first life experiences, the first social contact, the first notions regarding duty, responsibility, the first rules of behavior, the person learns them in the family [8].

Drunkenness and alcoholism lead to the destruction of the personality, degradation, loss of social qualities and particularities, the formation of a solid antisocial orientation, which is expressed in the neglect of family interests, in aggressive actions and in committing crimes against those who try to opposes drunkenness. Drunkenness has always brought serious moral, physical and material damage to the personality, as a result, people lose everything, sometimes fortunes. But its influence during the economic crisis is particularly harmful, when many families live in miserable conditions, without receiving their salaries month after month, without other sources of livelihood, they beg.

In such situations, the father or mother, who drinks, presents a tragedy, an impasse for the family. Under the influence of drunkenness, the person becomes malicious, vindictive, jealous, aggressive, ready to commit the most serious crimes [6, p. 29].

In families where the parents lead a parasitic way of life, do not work, systematically and abusively consume alcoholic beverages, where greed, selfishness, cupidity prevail, or have criminal antecedents, the risk of antisocial manifestations in children is greatly increased [7. p. 52].

Used materials and applied methods. In the preparation of this work, the juridical-normative normative-historical, regional and national legal framework that ensures the legal protection of people with alcoholic deviance, drug addiction in terms of the history of criminal law, aspects of comparative criminal law, and criminology were studied and used. The following methods were used: historical, comparative, logical, analysis and synthesis, systemic.

Obtained results and discussions

The French criminal law used, until the new Criminal Code, an identical expression both for the justifying facts (art. 327-328) and for those that exclude imputability (art. 64), namely, *il n'y a crime, ni delict*, similar situation, in a way, to the Romanian criminal law. However, doctrine and jurisprudence have translated the above expression differently (in contrast to Romanian doctrine and jurisprudence), as it refers to justifying facts (and which produce effects *in rem*), or it refers to causes of imputability (and which produces effects *in personam*).

Thus, most authors group the causes of non-responsibility into objective causes of non-responsibility (justifying facts) and subjective causes of non-responsibility (causes of non-responsibility). Keeping the same grouping, other authors call the causes of imputability as causes of innocence [1]. Such differentiation was also made in the Romanian criminal

doctrine elaborated on the basis of the Penal Code from 1936, in the sense that the existence of explicit causes of non-imputability (causes of innocence) and implicit causes of non-imputability (justifying facts; self-defense, state of necessity, the order of the law, etc.).

Italian criminal legislation adopts a position close to the French one. The legislator uses the same *non e punibile* (non-punishable formula), both in the case of objective causes of non-punishability (legitimate defense, state of necessity and others), as well as in the case of subjective causes (error of fact, fortuitous case, physical coercion, etc.).

Although under an identical regulation, the doctrine distinguishes the two categories in relation to their specific effects; thus, the objective causes (justifying causes) exclude the criminal offense, the act being committed under the conditions of the law and in fulfillment of a right or obligations imposed by the law; while subjective causes are circumstances that affect guilt (*colpevolezza*). Other authors divide the causes of non-punishability into causes of exclusion or modification of imputability (accidental case, error, age, mental alienation, drunkenness) and causes that exclude criminal responsibility (order of the law, self-defense, state of necessity); there are also authors who believe that there are causes likely to exclude imputability (age, mental alienation, drunkenness, deaf-mutism); causes that exclude the normality of the volitional act (physical coercion, fortuitous case, error, etc.), and justification causes or objective causes, which exclude the crime (legitimate defense, state of necessity, order of the law); the act committed in these circumstances is not illegal, but in accordance with the law.

Unlike *the French and Italian* legislation, *the German* one uses its own terminology for each of the causes of exclusion of responsibility that we have referred to. Thus, § 32, referring to self-defense, the state of necessity, etc., uses the expression “does not act unlawfully” *(handelt nicht rechts-widrig),* and in the case of circumstances that exclude guilt, §35 uses the expression “acts without guilt” (*handelt ohne Schuld*); as a result, in the doctrine a clear distinction is made between the causes that remove the illegality of the act and the causes that remove the guilt. *In German doctrine, the notion of imputability is used with a different meaning than in the works of French and Italian authors; it refers to the legal situation in which a person is found who has been attributed the commission of a criminal act.* These latter causes could intervene only after the illegal nature of the act has been established (so the assessment of guilt is a later stage and only concerns the acts that did not previously benefit from a cause that removes their illegal nature).

A similar regulation is contained in *the American model Penal Code* which provides, in separate chapters, the causes of justification (for example, the state of necessity, self-defense); causes that exclude culpability (for example, ignorance, coercion, etc.) and causes that exclude responsibility (for example, mental alienation).

In foreign legislation, there are other causes that remove the existence of the illegal act or guilt, in addition to those that would coincide with the regulations of *the Romanian criminal law*. Thus, the Italian criminal law considers justified the deed of the one who harms or endangers a social value with the consent of the one who can legally dispose of it (art. 50 of the Italian Penal Code); likewise (art. 51^1 Criminal Code), if the person who commits an act, apparently illegal, was in the exercise of a right (for example, the person who benefits from an easement to pass through another person’s garden cannot be considered to have committed an act of domestic violence); also, if the agent acted in fulfillment of an obligation imposed by law or by an order of the legitimate authority (art. 51^1 Penal Code); likewise, according to art. 53 of the Penal Code, it is

justified for the civil servant to use weapons in the specific situations provided by the law (for example, to respond to violence or to defeat active resistance).

Italian doctrine discusses the existence of tacit justifying facts such as medical-surgical activity, violent sports activity and the provision of commercial information.

In *German law*, the act committed with the approval of the authority (for example, gambling) is considered justified; likewise, if the apparently illegal act was committed with the victim's consent, or if the subject used state coercion as a result of the law's order (service order, military order), or as a result of a limited right to correction; also, if the citizen acted "pro magistru" replacing the state authority (for example, any citizen can detain the one who is suspected of committing a crime, even if doing so would cause him/her bodily harm), still thus, it can be legally opposed to a person's attempts to remove the constitutional-democratic order (for example, it is justified to oppose by any means the establishment of a military dictatorship).

It does not constitute a guilty action, according to German legislation, that committed by the agent by exceeding the limits of legitimate defense due to disturbance, fear or fright (§33, German Penal Code); or if the subject fulfilled a non-mandatory service provision, believing it to be mandatory; or if the agent acted in error regarding the illegal nature of the deed (§ 17).

In *the German doctrine*, it is also discussed whether the permitted risk could be considered an autonomous justifying cause; in one view, only the legislator can create justifying causes; outside the law, no other justifying causes can be conceived; as a result, the permitted risk could be a structural principle common to several justifying causes and not an autonomous justifying cause. So, for example, in the case of necessity, the agent is allowed to act, even if saving the values protected by law is uncertain and his/her action is risky, provided that he/she has proceeded to the scrupulous verification of the conditions in which he/she acts and the chances of success of salvation. With these duties, the one who acts risky, without the existence of the premises of a justifying cause, can benefit from such a privilege (state of necessity, consent of the victim), even if, until the end, his/her action did not succeed because the premises of success, scrupulously evaluated by agent, have not been confirmed. Thus, the pilot who tries to save a group of people isolated and threatened by the flood, using an old plane, given to reform, therefore an inadequate means for achieving the proposed goal, will not be responsible if in the end the action fails and the plane is destroyed, in the extent to which an objective evaluation would have shown that there were chances of success and the attempt was worth making. Likewise, the doctor who attempts a risky operation, without the patient's consent (not being able to obtain it), being convinced that there are chances of saving him/her [1, p. 211]. In such situations, the agent acts with eventual intention regarding the illicit result, but the existence of some possibilities, thoroughly verified, of success and the state of emergency that required a quick decision justifies the rescue attempt even in these conditions.

In *the French criminal doctrine*, the order of the law (command of the legitimate authority) is admitted as an explicit, general character justifying fact, in addition to the legitimate defense. They also have the character of justifying facts, the state of necessity and the consent of the victim. In addition to these, there are also particular justifications for certain crimes (truth proof, therapeutic abortion).

In the Romanian Penal Code of 1936, the execution of the order of the law or the order of the authority were provided as justifying acts, in addition to some implicit justifying causes

(the authorization and consent of the victim, the exercise of a profession, arts, crafts; the performance of the ritual of recognized cults, sports and sports competitions).

In *the Romanian criminal doctrine*, it was widely discussed whether the acts committed in a state of voluntary drunkenness could be attributed to the agent as having been committed only with intention or if he/she could be held responsible for fault, since he/she, at the time of committing the act, did not have the full capacity to understand and act and, as such, could not predict the outcome.

In *the American doctrine*, it is emphasized that the courts tend to interpret the notion of voluntary drunkenness very broadly; if such a state was not reached through coercion or fraud, the agent is liable for all crimes committed while intoxicated, even if the drunkenness was particularly profound, completely altering the subject's ability to understand and will, the subject reaching a state similar to mental alienation. In the doctrine, this tendency is combated by proposing that the state of mental alienation caused by drunkenness (for example, *delirium tremens*) excludes the liability of the agent; also, voluntary drunkenness is a mitigating circumstance in the case of an inexperienced person.

According to some authors and part of the jurisprudence, the person in a state of voluntary drunkenness is to answer, just like the person who would not have been in such a state, according to whether he/she committed the act with intention or through fault: thus, the drunk who kills his/her rival will commit intentional homicide, and a drunk driver who causes a traffic accident by driving at excessive speed will be responsible for manslaughter. In reality, the drunk person is not in normal mental conditions, because his/her perceptions and reactions are strongly influenced by the consumption of alcoholic beverages; in this case, the assimilation of the drunk person with a normal person who could commit an act intentionally and out of fault leads to a fiction of mental capacity, to an occult form of objective responsibility.

To overcome this impasse, part of the doctrine resorted to the *actio libera in causa* hypothesis, arguing that there was the mental capacity of the subject at the time when he/she consumed the alcoholic beverages, becoming irresponsible. As a result, the agent could be liable for an illegal act committed while intoxicated; he/she will be liable for an intentional act (willful intent) if he/she had the idea that in the state he/she is in he/she could cause an illegal result and accepted this eventuality, or he/she will be liable for a negligent act, if he/she should and could have provided that in a state of intoxication it could cause an illicit result.

Such a solution would, however, leave unpunished the acts committed by fault when the law only provides for the possibility of them being committed with intent (for example, theft, outrage, disturbance of public peace, etc.), i.e., precisely the acts that drunk persons commit frequently. But the solution appears debatable in the case of complete voluntary drunkenness and because the agent's ability to understand you is seriously altered, as a result of the distortion of mental processes caused by voluntary drunkenness, it is impossible to hold the subject's intention or culpa. One is the agent's intention or culpability to become intoxicated and another is his/her intention or culpability in relation to the illegal acts committed while intoxicated. The solution proposed by other authors seems closer to the truth, namely, to avoid a principled solution and to solve this issue, case by case, in relation to the concrete situation; there could be circumstances when the agent, in a state of voluntary drunkenness, would have committed the deed provided for by the criminal law with intent (direct or indirect) or through fault, as there could be situations when the agent's state of irresponsibility appears obvious and

when any criminal liability to be excluded [1, p. 243].

In *the French doctrine*, Merle and Vitu argue that they would take another point of view, namely, that the person in a state of complete voluntary drunkenness must always answer for a crime committed with possible intent; however, the French Court of Cassation admitted that, being a matter of fact, the decision must be taken on a case-by-case basis; Garraud is of the opinion that in the above situation there would be liability for fault if the crime committed is sanctioned due to fault; in the opposite case, only the crime of drunkenness will be punished. Pannain shows that the Italian doctrine and jurisprudence considers that it is not possible to decide, in principle, whether the crime committed while drunk should be considered as having been committed with intent or by mistake, but only in relation to the concrete data. Padovani proposes a reconsideration of the whole matter regarding the state of drunkenness. According to his opinion, the agent who put him/herself in a state of incapacity should be liable for an intentional act if he/she had the representation of the illegal consequences and accepted the risk of their production. If he/she acted out of fault, he/she should be punished with a lesser punishment than for the intentional act (to avoid the solution of not being punished if the said act is not criminalized and when it is committed out of fault).

The experience of German legislation is interesting. The German Penal Code criminalized, in paragraph 323 a, the intentional or negligent provoking of drunkenness by the perpetrator him/herself (voluntary drunkenness), as an autonomous crime, if the agent in this state committed an illegal act that cannot be punished because of due to drunkenness the agent became irresponsible. According to some authors, the agent could be sanctioned by applying §323 a, even if he/she did not foresee the possibility of committing an illegal act in this state. In jurisprudence, it was argued, on the contrary, that the possibility of committing an illegal act must have been foreseeable by the agent. Finally, other authors consider that the provisions of §323a would constitute an autonomous crime, a reality in itself, independent of the act committed while drunk, the only condition being that there was such an illegal act and that it could not be punished; this condition has an objective character, not being necessary to exist in the representation of the agent. In this way, complete voluntary drunkenness can no longer lead to the removal of the crime (when the fact committed in this state would emanate from an irresponsible person) but is incriminated by itself.

This conception of voluntary drunkenness, criminalized as an autonomous fact, was criticized in its turn, the most important objection being that in this way, a way of life is criminalized and not a determined fact that affects social values protected by the criminal law. To support the incrimination, the theory of exceeded risk was invoked; voluntary drunkenness can be criminalized because it creates an inadmissible risk, that of committing a crime while drunk. In this vision, the risk would be a third fundamental form of guilt that would be between dishonesty and fault, which would contravene the traditional conception according to which beyond dishonesty and fault *tertium non datur*.

The number of interpretations due to drunkenness in public places is among the indicators of socially disruptive behavior often present in statistical analyses. To be useful, international comparisons between these indices must be based on a definition of "intoxication in public places" and the police must conduct uniform action based on this definition. This says that the social, ethnic and economic situation determines the risk of drunkenness in public places as well as the amount of alcohol absorbed. Subjects from

the lower social class often tend to behave, under the influence of alcohol, in a noisy manner. On the other hand, as they generally consume alcohol in public places and then have to return home, their exuberant behavior has many chances to attract the attention of the police. The same thing happens in the case of immigrants who not only suffer from the same inconveniences, but in addition often present difficulties related to housing, difficulties that lead to an increase in the appetite for scandal and fighting in the unwelcoming barracks where they live.

In addition, some social groups - immigrants and some young people - present their own way of general behavior, which can influence both their particular behavior and the amount of alcohol they consume. Also, “drunken behavior” depends not only on alcohol consumption, but also on the position and social context of each individual.

Disregarding the differences in behavior when consuming the same amount of alcohol, international comparisons between the number of arrests for drunkenness can distort the reality due to the variety (differences) of the regulations applied by the police, which can be explained by the lack of police force or the need to concentrate attention also on more serious cases of delinquency.

In *England and Wales*, the absolute number of drunken offenses found increased from 47,717 in 1950 to 108,871 in 1974 and their number per 10,000 inhabitants aged min. 15 years went from 14 in 1950 to 21.2 in 1968; per 10,000 inhabitants aged 14 or over, this number, which was 27.9 in 1970, fell to 26.9 in 1974.

In *Finland*, arrests for drunkenness varied from 146,998 in 1950 to 276,206 in 1976, respectively from 5,210 to 7,485 per 100,000 inhabitants aged at least 15 years. It is interesting to note that the ratio of the number of arrests for drunkenness to the total amount of alcohol consumed in Finland has also decreased over the same period. Since the attitude of the police towards alcohol consumers has not changed during this period, this proves that either Finns behave much better in society under the influence of alcohol, or that they consume more at home, where drunken states are lesser visible. It is also possible that the volume of alcohol consumed in Finland on each occasion is reduced and instead the number of occasions to drink is increased, although the surveys carried out in this country do not confirm this last hypothesis.

In *Sweden*, the number of people imprisoned for drinking increased from 103,041 in 1971 to 110,187 in 1976, respectively from 16.2 to 16.9 per 1,000 inhabitants aged 15 and over. The number of convictions for such offenses increased from 67,996 to 75,531 in 1975.

In *Poland*, the number of prosecutions for drunken offenses per 100,000 inhabitants over the age of 15 fell from 1,239 in 1953 to 717 in 1975. The number of people detained in rehab centers per 100,000 inhabitants was 1,295 in 1959 and 1,252 in 1975. The number of drunken prosecutions and rehabs per 100,000 liters of alcohol consumed was considerably lower in 1975 than in 1955, thinking, as in the case of Finland, if the police followed a constant policy during this period, the behaviors under the influence of alcohol improved.

The diversity of societies’ attitudes and reactions to abnormal behavior clearly shows that it depends on the level (%) of blood alcohol tolerated by drivers in Europe, which varies from 0 in some Eastern European countries to mc/100 ml of blood in Ireland. This big gap between opinions and between practices in the matter of alcoholism at the wheel shows not only the diversity of attitudes in Europe, but also the impossibility of international comparison of statistics related to the state of intoxication at the wheel [9, page 15]. An international organization, for example WHO, on its own or with the road safety organizations, should perhaps deal with the normalization of

the maximum levels of blood alcohol tolerated in Europe.

Statistics with prosecutions for offenses related to driving under the influence of alcohol are greatly influenced by the way the police enforce the regulation, in addition to the number of cars and km. routes can change the spectacular part in limited periods. The number of crimes related to driving under the influence of alcohol depends not only on mileage, but also on the number of drivers or cars on the street.

We must take into account, equally, the improvement of road networks (high-ways) and the construction of automobiles. It is also true that, from an epidemiological point of view, alcohol plays a substantial role in the number of traffic accidents and has an important contribution to fatal traffic accidents. In reality, even if up to 50% of drivers killed on the road have blood alcohol levels above the legal limit, fatal accidents occur equally in Muslim countries where no alcohol is consumed at all [2].

Some personality characteristics, such as aggressiveness or impetuosity, also contribute to accidents. Their combination with excess alcohol, which is often found in young people, can be disastrous. This is why several groups are particularly exposed to road accidents, even if alcohol consumption is relatively low; even if it is not possible to reveal the general trend of European countries, accidents made under the influence of alcohol represent an important proportion of the total number of road accidents. In some countries, random blood alcohol tests have been banned; when the law was changed to allow these police checks of drivers, the result was that the number of crimes decreased. Such surprise controls, carried out in several states of the United States of America, carried out on the basis of the law, produced the same effects [3].

It was not possible to obtain long-term statistics related to the consequences of driving under the influence of alcohol, on representative groups of people from European countries. On the contrary, according to information from several countries, the situation has deteriorated over time. In Norway, for example, there were, in 1950, 710 convictions for such crimes; in 1976 their number reached 7,156. In Sweden the number of drunk driving convictions increased from 7,052 in 1971 to 8,482 in 1975; the number of convictions for driving under the influence of alcohol increased from 7,722 in 1971 to 8,755 in 1976. The total number of these 2 types of crimes, which are distinct from each other, therefore went from 14,774 to 17,237 and the number of convictions from 13,497 to 15,382. In France, the number of drunk driving license suspensions increased from 2,429 in 1954 to 9,683 in 1977.

Also, in countries where statistics exist, the total number of consequences due to drunkenness has increased. However, it is not known exactly whether the ratio of convictions between drivers and kilometers traveled has also increased. In the case of Finland, it has been calculated that if the absolute number of drunk driving cases "known to the police" increased considerably between 1950 and 1975, the number of cases of drunk driving in relation to the number of automobiles, multiplied by the consumption of alcoholic beverages experienced a vertical and observed decrease during the 1950s to 1960s, then remained constant during the 1970s.

All countries publish the number of victims in traffic accidents, some of them even the names of the injured, but most of them do not indicate the number of deaths attributed to alcohol. In fact, according to a recent analysis, only 8 countries publish this data. Switzerland, which is one of them, had 111 deaths in traffic accidents due to alcohol consumption in 1954, reaching 270 in 1977. The number of fatal accidents due to alcohol expressed as a % of the total number of fatal road accidents increased in Poland from 32.2% in 1950 to

30% in 1975. In Finland, the number of deaths in road accidents known to the police and due to alcohol reached 83 in 1950 and 194 in 1975, respectively 22.7% and 23% of the total fatal traffic accidents [9, page 18].

In countries (the majority) which do not distinguish alcohol-related fatal traffic accidents from all accidents, traffic fatality per 100,000 inhabitants generally increased from 1950 to 1975. It can be believed that in most of these countries the proportion of alcohol-related accidents reached at least if not exceeded 25%. It can be concluded that the mortality in traffic accidents involving alcohol has increased a lot and that it is high in most European countries. Romania reports the figure of 10.8% as representing road accidents due to alcohol, France registering 30% [4].

Conclusions

In conclusion, it should be mentioned that drunkenness and alcoholism bring serious moral, physical and material damage to the personality. Consequently, people lose everything.

So, people who abuse alcoholic beverages or illicitly consume drugs and other psychotropic substances, including people suffering from chronic alcoholism, drug addiction and substance dependence can benefit from treatment in outpatient or inpatient narcological institutions, as well as short-term treatment in curative and preventive territorial institutions.

Combating crimes committed while intoxicated would be reduced if the state prohibited the sale of alcoholic beverages to minors, the sale in unauthorized places, by creating correctional institutions and reducing the number of alcoholics, raising the general level of training, technical-professional training and creating vacancies for work.

It is understandable that situations in which individuals consume alcohol or other substances in order to give themselves courage in order to commit the crime without which, being aware of their conscience, they might not have committed it, would be well appreciated in the sense of aggravating the punishment. But when the crime was committed while intoxicated by a minor at the urging of adults, or when the effect of these substances was not known to them from the start, due to circumstances beyond their control, these situations could be appreciated as mitigating or at least, not to be taken into consideration when determining the punishment.

Bibliography

1. ANTONIU, G. *Vinovăţia penală*, Ed. Academiei, Bucureşti, 2002, p. 211.
2. BOTNARU, S., SAVGA, A., GROSU, V., GRAMA, M. Drept Penal, partea generală, vol.1 Chişinău, 2005.
3. DUŢU, T. Cauzele care înlătură caracterul penal al faptei şi cauzele justificative, Ed. Europolis, Constanţa, 2007.
4. DIACONU, Gh. Răspunderea penală, Ed. Lumina Lex, Bucureşti, 2008.
5. FLOREA, V. N. *Beţia şi încălcarea dreptului*, Chişinău, 1985, p. 6.
6. FLOREA, V. N. *Pedepse pentru crimele săvârşite din motive de beţie şi alcoolism*. //Legea şi viaţa, 1996, nr.2, p. 29.
7. LARII, Iu. *Criminologia*, Chişinău-2004, p. 52.
8. STĂNOIU, R. M. *Familia - factor de bază în dezvoltarea personalităţii şi în prevenirea delicvenţei juvenile.* Comunicare prezentată la simpozionul naţional de crininologie, 11-12 decembrie,1981.
9. POP, O. *Alcoolismul ca fenomen social*, Ed. Mirton, Timişoara, 2002, p. 15.

CZU 364.3
DOI https://doi.org/10.52388/2345-1971.2022.e1.13

SPECIALIZED PUBLIC AUTHORITY - METHOD OF ACHIEVING THE RIGHT TO SOCIAL SECURITY OF CITIZENS

Nicolae BARBUȚA
PhD student, Academy of Public Administration,
Chisinau, Republic of Moldova
e-mail: *barbutanicu@yahoo.com*
https://orcid.org/0000-0001-7356-9597

Central public administration is a component of a state's global public administration system, both as an activity and as a system. Being in close relationship with society and the state, the dynamism of political, social, economic and cultural processes imposes on central public administration the need to adapt to new realities in order to remain functional. The role of the specialized central public authorities subordinated to the Government in carrying out the state policy consists largely in the activity of these public administration authorities that have attributions in a single branch or in a concrete field of activity and are created to exercise only a specialized side of the administration public, works in areas, concrete branches of activity. According to a Government-approved regulation, public administration authorities are subject to state records in order to maintain transparency and availability.

Keywords: *social protection, social security, social assistance, financing, National House of Social Insurance.*

AUTORITATEA PUBLICĂ DE SPECIALITATE – MIJLOC DE REALIZARE A DREPTULUI LA ASIGURAREA SOCIALĂ A CETĂȚENILOR

Administraţia publică centrală, atât ca activitate cât şi ca sistem, reprezintă o parte a sistemului global al administraţiei publice a unui stat. Fiind într-o relaţie strânsă cu societatea şi statul, dinamismului proceselor politice, sociale, economice și culturale impune administraţiei publice centrale necesitatea adaptării la noile realităţi pentru a rămâne funcţională. Rolul autorităților publice centrale de specialitate din subordinea Guvernului în realizarea politicii de stat constă în mare măsură în activitatea acestor autorități ale administrației publice care au atribuții într-o singură ramură sau într-un domeniu concret de activitate și sunt create pentru a exercita doar o latură de specialitate a administrației publice, activează în domenii, ramuri de activitate concrete. Pentru asigurarea transparenţei şi eficienţei decizionale, autorităţile administraţiei publice centrale de specialitate sunt supuse evidenţei de stat, conform unui regulament, aprobat de Guvern.

Cuvinte-cheie: *protecție socială, asigurări sociale, asistență socială, finanțare, Casa Națională de Asigurări Sociale.*

AUTORITÉ PUBLIQUE SPÉCIALISÉE - MOYENS DE RÉALISER LE DROIT À L'ASSURANCE SOCIALE DES CITOYENS

L'Administration publique centrale, à la fois en tant qu'activité et en tant que système, fait partie du système global d'administration publique d'un État. En relation étroite avec la société et l'État, le dynamisme des processus politiques, sociaux, économiques et culturels impose à l'Administration publique centrale la nécessité de s'adapter aux nouvelles réalités pour rester fonctionnelle. Le rôle des autorités publiques centrales spécialisées subordonnées au gouvernement dans la mise en œuvre de la politique de l'État consiste en grande partie dans l'activité de ces autorités de l'administration publique qui ont des attributions dans une seule branche ou dans un domaine d'activité concret et sont créées pour exercer uniquement un côté spécialisé de l'administration publique, elles travaillent dans des domaines

concrets, des branches d'activité. Afin d'assurer la transparence et l'efficacité de la prise de décision, les autorités spécialisées de l'Administration publique centrale sont soumises aux registres de l'État, selon un document approuvé par le gouvernement.

Mots-clés: *protection sociale, assurance sociale, aide sociale, financement, Maison Nationale de l'assurance sociale.*

ПРОФИЛЬНАЯ ВЕТВЬ ГОСУДАРСТВЕННОЙ ВЛАСТИ – СРЕДСТВО РЕАЛИЗАЦИИ ПРАВА НА СОЦИАЛЬНОЕ СТРАХОВАНИЕ ГРАЖДАН

Центральное публичное управление (и как деятельность, и как система) представляет собой часть глобальной системы управления государством. Находясь в тесной взаимосвязи с обществом и государством, динамизм политических, социальных, экономических и культурных процессов налагает на центральное публичное управление необходимость адаптации к новым реалиям, чтобы оставаться функциональным. Роль специализированных центральных органов государственной власти, подчиненных Правительству, в реализации государственной политики заключается в основном в деятельности этих органов государственного управления, обладающими полномочиями в одной отрасли или в конкретной сфере деятельности и созданных для осуществления только одной стороны специализированных в государственном управлении, действуя в конкретных областях, отраслях. Для обеспечения прозрачности и эффективности принятия решений органы центрального профильного государственного управления подлежат государственному учету в соответствии с положением, утвержденным Правительством.

Ключевые слова: *социальная защита, социальное страхование, социальная помощь, финансирование, Национальная касса социального страхования.*

Introduction

The central public administration, both as an activity and as a system, represents a part of the global system of public administration of a state. Being in a close relationship with society and the state, the dynamism of political, social, economic and cultural processes imposes on the central public administration the need to adapt to the new realities in order to remain functional. The central public administration is carried out by the authorities of the executive power with general powers, primarily by the Government and the Head of State, to the extent that they exercise administrative functions, along with the specialized central public administration bodies [1, p. 177].

Exposure of basic content

From a wide variety of definitions, we mention a few, presented by Ioan Alexandru in the *Tratat de administraţie publică* (Treatise on public administration), definitions formulated by different American authors, such as: John J. Corson and J.P. Harris, who concisely define central public administration as the activity through which the aims and objectives of the government are achieved. We notice that the author makes a delimitation between the Government and the central public administration. We find the same idea in Dwight Waldo who revealed that “the process of public administration consists in the actions to achieve the government’s intention or desire. John Pfiffner and Robert Presthus reveal that public administration, as a field of activity, is mainly concerned with the means for implementing political values, and we observe a clear involvement of the government in the central public administration. We find the same idea in James W. Davis who states that public administration can be best identified with the executive branch of government. Nicholas Henry formulates a complex definition of public administration, which differs from political trends, both by emphasizing bureaucratic behavior and, above all, by the system of its own structures and methodologies applied to achieve government goals [2, p. 66].

From all of this, we conclude that the presented definitions are helpful, because

public administration involves activity, is tangential to politics, tends to be concentrated in the executive branch of government, differs from private administration and is concerned with law enforcement.

The national authors defined the central public administration as an autonomous power of the state, consisting of a set of authorities and public bodies, vested by law with a certain competence for the purpose of administering the public domain of the state, implementing for this purpose the legislative-normative framework which regulates important relations related to the realization of the administrative function of the state. Both in terms of organizational structure and in material-functional terms, the public administration has dug a new philosophy, acquiring a unique configuration in the global system of administration. Being designed to satisfy the general interest expressed by the law, the public administration constitutes the activity by practicing the law, being very closely related to the executive power [3, p. 221].

So, the central public administration consists of the specialized central public administration authorities and the autonomous administrative authorities. The specialized central public administration includes all the administrative authorities, established to satisfy, under the leadership of the Government, the general interests of society at the level of the entire country. The authorities of the specialized central public administration translate into life, based on the law, the Government's policy, ensure the execution of its ordinances, decisions and provisions, manage the areas entrusted to them and are responsible for their activity.

The structure of the specialized central bodies of the public administration is constituted by: the ministerial administration (ministries) and the extra-ministerial administration (other central administrative authorities subordinate to the Government).

Ministries and other central authorities of the public administration constitute a distinct category of bodies within the system of public administration authorities, having the role of organizing the execution and concrete execution of the laws, being, thus, specialized, relevant bodies. We also specify the fact that they carry out this activity throughout the country, being central authorities of the public administration.

The determining role in the activity of the specialized central authorities is constituted by two elements: material competence and territorial competence. These elements mainly define the place of these bodies in the system of public administration authorities as an important link, subordinate to the Government, as the central authority with general material competence, which coordinates and controls the entire activity of the ministries and other specialized central bodies of the public administration.

According to the Supreme Law, ministries are specialized public administration bodies that implement the Government's policy and exercise, in accordance with the law, public administration in the fields of activity for which they are responsible [4].

The fields of activity and the structure of the specialized central bodies are not established by constitutional norms, the initiative for this purpose belongs to the Parliament, being carried out by organic laws. In all the states of the European Union, the minister is responsible for the organization and internal management of his/her ministerial department, subject to the application of the general regulations in the field of public office and public accounting. The minister combines the political function with the administrative one [5, p. 98].

Thus, the specialized central public administration authorities are legal entities under public law, they have a treasury account, public patrimony under administration and a seal with the image of the State Coat of Arms and their name in the state language. The specialized central public administration authorities are financed from the state budget.

To ensure transparency and decision-making efficiency, the authorities of the central specialty public administration are subject to state records, according to a regulation approved by the Government.

If we were to consult the legislation in force on the set topic, we would find that the specialized central public administration carries out its activity respecting the following organizational principles: a) institutional hierarchy; b) delimitation of the functions of developing and promoting policies from the functions of their implementation; c) clear assignment of responsibilities and competences, avoiding their ambiguity, duplication and overlap; d) deconcentration of public services; e) simplicity and clarity of the institutional structure [6, art.4].

The national specialists in the administrative sphere in the specialized works establish the attributions of the specialized central public administration in terms of organization that it indisputably represents - from a quantitative and qualitative point of view - one of the most important aspects through which the administration carries out its functions within the social system. Knowing the fact that the limits and content of administrative activity derive from the attributions of public authorities established by the Constitution and other normative acts and observing their nature, we will be able to state that, within the public administration, the activities related to the organizational side have a greater weight in relation to with the other sides or attributes of the management process.

The command attribute can be found in the activity of the specialized central public administration in two ways. On the one hand, the public administration collaborates in the adoption of political decisions by preparing them, and on the other hand, it adopts administrative decisions aimed at creating the organizational framework and concrete conditions for the implementation of political decisions. Control is also an important moment of administrative activity; it is intended to measure the results of the administrative action in the application of political decisions and to reschedule the activities, making the necessary corrections. The control must determine an intensification of the implementation of administrative actions to ensure the performance of public administration functions [7, p. 22-23].

Art.107 of the Constitution of the Republic of Moldova establishes more precisely the fact that the central specialized bodies of the state are the ministries. They translate into life, under the law, the Government’s policy, its decisions and dispositions, manage the areas entrusted to them and are responsible for their activity. In order to lead, coordinate and exercise control in the field of economic organization and in other fields that do not directly fall under the attributions of the ministries, other administrative authorities are established, under the law. [4, art. 107].

In our view, the currently functioning ministerial network corresponds, in principle, to the needs required by the competences related to the activity of the specialized central public administration. For comparison, we will mention that in such countries as Austria, Hungary, Spain, Ireland, Norway, Switzerland there are 10 to 12 ministries, 16 ministries each in Albania, Denmark, Lithuania, Poland and Romania [9, p. 85].

If we are to examine the manner of constitution of the specialized central bodies, we can refer to art. 10 of Law no. 98 of May 4, 2012 regarding the specialized central public administration where it is mentioned that the Ministries are established, reorganized and dissolved by the Parliament under the conditions of Law no. 98 of May 4, 2012 regarding the specialized central public administration and in accordance with Law no. 64-XII of May 31, 1990 regarding the Government. The proposals regarding the establishment of the ministries must contain arguments regarding

the legal basis for their establishment, the mission, the basic functions, the limited staff and the structure of the ministries, as well as regarding the budgetary allocations necessary to ensure their activity. The creation of ministries is carried out in accordance with the priority directions and primary tasks of the Government's activity, established in its activity program [6, art.10].

In addition to the ministries, other central administrative authorities are part of the structure of the specialized central public administration, namely: the National Bureau of Statistics; the Agency of Land Relations and Cadastre; Office of Interethnic Relations; Moldsilva Agency; Material Reserves Agency; Tourism Agency. The central administrative authorities under the Government are constituted by the Parliament, at the proposal of the Prime Minister, for the purpose of management, coordination of the activity and exercise of control in the field of organization of the economy, as well as in other fields, which do not directly fall under the attributions of the ministries. They are led by general directors or executives, appointed or released from office by the Government. State inspectorates are formed by the Government, in order to exercise control over the execution of the laws of the republic.

So, what concerns the organization of the central specialized bodies, they fall under the Law on the Government and their constitution. Administrative authorities such as: the National Bank, the Court of Accounts, the Information and Security Service, the Central Electoral Commission, the National Commission of the Financial Market have central competence and ensure administration through specialized central bodies and do not fall under the jurisdiction of the Government [9, p 68].

As a result of the identification of the specialized APC (*Central Public Administration*), we can mention that the general characteristic of the Central Public Administration subordinated to the Government in the functional framework, consists in the fact that each specialty central authority exercises the functions underlying the administration in the respective field. The administrative capacity for use and exercise is a subject of administration and, obviously, a subject of administrative law, each of these authorities obtains it from the moment it becomes a legal person. The tasks, functions and powers of each central branch authority are determined by the Internal Regulation of each authority, approved by the Government Decision.

At the same time, according to the doctrine, all central specialized authorities, regardless of the branch (sphere) they administer, exercise a series of identical functions, which can be grouped into:

– strategy functions, which ensure the establishment of sectoral objectives for the implementation of the Government Program;

– regulatory functions, with the aim of developing and submitting for approval the normative and institutional framework necessary to achieve the strategic objectives in the respective field;

– functions of representation, internally and externally, of the state of the Republic of Moldova and of the Government in the relevant field;

– state authority functions that ensure the follow-up of the application of the regulations in the field;

– administrative functions of his patrimony and public property in the respective field;

– functions of synthesis, as well as guidance, support and control. The functions of each specialized central body as a subject of public administration, in part, are fixed in the internal regulation of organization and operation [10, p. 157].

Carrying out the state policy, the specialized central public authorities, subordinated to the Government, carry out their activity respecting the following principles:

1) organizational: a) institutional hierarchy; b) delimitation of the functions of developing and promoting policies from the functions of their implementation; c) clear assignment of responsibilities and competences, avoiding their ambiguity, duplication and overlap; d) deconcentration of public services; e) simplicity and clarity of the institutional structure;

2) functioning: a) legality; b) effectiveness in achieving objectives and accomplishing set tasks; c) economic management of public property and efficient use of allocated public funds; d) strategic planning; e) inter-institutional collaboration; f) ensuring internal public financial control; g) responsibility for the activity; h) rationalization and promptness of procedures and administrative activities; i) efficient service to citizens; j) ensuring access to information, the publication of public government data and transparency in the decision-making process [6, art.4].

The principles of the central specialty public administration are applied:

a) to the Government's exercise of control over the legality and appropriateness of the activities of ministries, other central administrative authorities and organizational structures within their sphere of competence;

b) to the verification and assessment by the Government of the health of the public interest services provided by the ministries, other central administrative authorities and the organizational structures within their sphere of competence;

c) to the exercise by the ministries and other central administrative authorities of the hierarchical control over the legality and appropriateness of the activity of the organizational structures within their sphere of competence, as well as to the verification and evaluation of the quality of the public interest services they provide;

d) to the performance by the competent administrative court, in accordance with the legislation in force, of the judicial control of the legality of the administrative acts issued by the ministries, other central administrative authorities and the organizational structures within their sphere of competence.

Conclusions

Thus, we can conclude that the place and role of the specialized central public authorities subordinated to the Government in the implementation of state policy largely consist of the activity of these public administration authorities that have powers in a single branch or in a concrete field of public administration activity and are created to exercise only a specialized side of public administration, they operate in fields, concrete branches of activity [11, p. 18].

Bibliography

1. RUSU, Vl. *Organizarea sistemului administraţiei publice centrale în Republica Moldova: evoluţie şi perspective*. În: Administraţia statului Republica Moldova la 20 de ani de independenţă, sesiune de comunicări ştiinţifice nr. 5, Chişinău, 2011.

2. IOAN, Al. *Curs de drept administrativ.* SNSPA, Editura Economică, 2002.

3. NEACȘU, S. *Unele aspecte teoretice privind obiectivele administraţiei publice*. În: Studii Juridice Universitare, ULIM, Nr.1-2, Anul IV/23011, Chişinău, 2015.

4. *Constituţia Republicii Moldova,* adoptata la 29.08.1994, Monitorul oficial al Republicii Moldova nr. 1 din 12.08.1994.

5. Apostol TOFAN, D. *Instituţii administrative europene.* Ed. C. H. Beck, Colecţia Master, Bucureşti, 2006.

6. Legea Republicii Moldova nr. 98 din 04.05.2012 privind administrația publică centrală de specialitate, M.O. al RM nr. 160-164 din 03.08.2012.

7. RUSU, Vl. *Ştiinţa administraţiei*. Suport de curs. Universitatea de Stat ALECU RUSSO, Bălţi, 2014.

8. NEWTON STEPHEN, J., SOROCEAN Ch. ş. a. *Perfecţionarea structurii Guvernului Republicii Moldova este solicitată de realitate*. În: Momentul din 05 februarie 1999 Chișinău.

9. ŞAPTEFRAŢI, T. *Concepţii cu privire la teoriile clasice şi contemporane de administrare.* În: Administrarea Publică, revistă metodico- ştiinţifică, nr.3-4, Chișinău, 2009.

10. MANDA, C. *Drept administrativ: tratat elementar.* Ed. Lumina Lex, Bucureşti, 2007.

11. MOCANU, V., MUNTEANU, V. *Note de curs drept administrativ* (ciclul I), Ed. Universitatea de Studii Europene din Moldova, Chișinău, 2013.

CZU 349.2
DOI https://doi.org/10.52388/2345-1971.2022.e1.14

MANDATORY INSURANCE WITHIN THE FRAMEWORK OF EMPLOYMENT RELATIONS [1)]

Aliona CHISARI-RURAK
Doctor of law, Moldova State University,
Chisinau, Republic of Moldova
e-mail: *chisarialiona@yahoo.com*
https://orcid.org/0000-0003-0764-6843

The right to work is one of the fundamental human rights stated in both local and international acts. It is usually realized on the basis of an individual employment contract, resulting in the formation of a legal relationship between the employer and the employee. The relevance of mandatory social insurance and mandatory health insurance organizations cannot be overstated. Obligatory insurance in work relationships strives to give socio-economic assurances to employees who are legally required to be insured by both the public social security system and the compulsory health insurance system. The monthly payment of the social insurance contribution by the employer and the health insurance premium by the employee generates the right to multiple benefits and services established by law.

Keywords: *employee, employer, insured social risk, social security contribution, premium and social security benefit.*

ASIGURĂRI OBLIGATORII ÎN CADRUL RAPORTURILOR DE MUNCĂ

Unul din drepturile fundamentale ale omului, proclamat atât în actele interne cât și în cele internaționale este dreptul la muncă. Realizarea acestuia are loc, de cele mai multe ori, în baza contractului individual de muncă, generând apariția raportului juridic între angajator și salariat. O importanță deosebită o au instituțiile asigurărilor sociale obligatorii și a asigurărilor obligatorii de asistență medicală. Asigurările obligatorii în cadrul raporturilor de muncă au drept scop oferirea garanțiilor socio-economice salariaților care, în virtutea legii, sunt asigurați obligatoriu atât în sistemul public de asigurări sociale cât și în sistemul asigurărilor obligatorii de asistență medicală. Achitarea lunară a contribuției de asigurări sociale de către angajator și a primei de asigurare medicală de către salariat generează dreptul la multiple prestații și servicii stabilite de lege.

Cuvintele-cheie: *salariat, angajator, risc social asigurat, contribuție de asigurări sociale, primă și prestație de asigurare socială.*

ASSURANCES OBLIGATOIRE DANS LES RELATIONS DE TRAVAIL

L'un des droits fondamentaux de la personne proclamés dans les lois nationales et internationales est le droit au travail. Sa réalisation a lieu, la plupart du temps, sur la base du contrat de travail individuel, générant l'apparition de la relation juridique entre l'employeur et l'employé. Les institutions d'assurance sociale obligatoire et d'assurance maladie obligatoire revêtent une importance particulière. L'assurance obligatoire dans les relations de travail vise à fournir des garanties socio-économiques aux salariés qui, en vertu de la loi, sont obligatoirement assurés à la fois dans le système public d'assurance sociale et dans le système d'assurance maladie obligatoire. Le paiement mensuel de la cotisation d'assurance sociale par l'employeur et de la prime d'assurance maladie par le salarié donne droit à de multiples prestations et services établis par la loi.

Mots-clés: *employé, employeur, risque social assuré, cotisation d'assurance sociale, prime et prestation d'assurance sociale.*

[1)] *This article was developed within the Project "Consolidated protection of the patient's rights in the mandatory medical assistance insurance system" (Protecția consolidată a drepturilor pacientului în sistemul asigurărilor obligatorii de asistență medicală) with code 20.80009.0807.30, State Program (2020-2023), carried out within the Interuniversity Center of Medical Law of the Research Institute and Innovation, Moldova State University.*

ОБЯЗАТЕЛЬНОЕ СТРАХОВАНИЕ В РАМКАХ ТРУДОВЫХ ОТНОШЕНИЙ

Одним из основных прав человека, провозглашенных как во внутренних, так и в международных актах, является право на труд. Его реализация чаще всего происходит на основании индивидуального трудового договора, порождающего видимость правоотношения между работодателем и работником. Особое значение имеют институты обязательного социального страхования и обязательного медицинского страхования. Обязательное страхование в рамках трудовых отношений направлено на предоставление социально-экономических гарантий работникам, которые в силу закона застрахованы в обязательном порядке как в системе государственного социального страхования, так и в системе обязательного медицинского страхования. Ежемесячная уплата взноса социального страхования работодателем и взноса медицинского страхования работником порождает право на множественные льготы и услуги, установленные законом.

Ключевые слова: *работник, работодатель, застрахованный социальный риск, взнос социального страхования, страховая премия и пособие социального страхования.*

Introduction

One of the fundamental human rights, proclaimed both in domestic [1] and international acts [2], is the right to work. Its realization takes place, most of the time, on the basis of the individual employment contract, generating the appearance of the legal relationship between the employer and the employee. At the same time, considering the multiple risks that do not always result from being an employee, but can affect him/her during the exercise of the right to work, the legislation in force establishes a series of socio-economic guarantees intended to contribute to the removal or reduction of the consequences of social risks. In this context, the institutions of mandatory social insurance and mandatory healthcare insurance are of particular importance. The purpose of these regulations is to intervene in situations where the employee is affected by a certain insured social risk (age, disability, accident, illness, maternity, job loss or death) or the insured event is present (illness or condition).

The essence of the public social security system

The public social insurance system in the Republic of Moldova is regulated by Law no. 489 of July 8, 1999 [3] and aims to protect insured persons in the event of social risks. According to art. 4 of the law stated above, the person who carries out activity based on the individual employment contract is among the categories of persons who are compulsorily insured, by the effect of the law. This quality conditions the benefit of social insurance, which represent monetary or in-kind rights that belong to insured persons under the law, correlative to social insurance contributions.

It is important to mention that, by Law no. 60 of April 23, 2020 [4], changes were made in Law no. 489 of 07.08.1999 regarding the public social insurance system. According to the changes entered into force from January 1, 2021, the obligation to pay the individual social insurance contribution from salary payments calculated for the period starting in January 2021 was canceled for employees. Thus, from this date, only employers pay contributions to the state social insurance budget. The size of the contribution is provided for in Law no. 489 of July 8, 1999.

Social insurance benefits guaranteed to the employee

The social insurance benefits offered to the employee, in the event of the occurrence of social risks, are various and their granting is conditional on the presence of the contribution period. The latter constitutes the entirety of the contributory periods as well as the non-contributory ones, established by law, which the employee confirms. Regulations

in this sense are contained in articles 5, 50 of Law 156 of October 14, 1998 [5]. Among the multiple periods that are included in the internship, the period of caring for an adult or a severely disabled child stands out. Although undeniably important from a social point of view, this period, after 1999, caused multiple controversies and was not always included in the contribution period. Starting from January 01, 2017, only the period of care of a child with a severe disability under the age of 18 by one of the parents, guardian, curator, until employment as a personal assistant began to be included in the contribution period [6]. The period of care for an adult with a severe disability remained outside the legal regulations. In this context, the intervention of the Constitutional Court of the Republic of Moldova was needed, which *constitutionally* recognized the text "of a child with a severe disability under the age of 18" from article 5 para. (2) let. d) from Law no. 156 of 14.10.1998 regarding the public pension system, to the extent that the period of care of the person with a severe disability by one of the parents, guardians, curator, up to their employment as a personal assistant is assimilated to the contribution period, regardless of the age of the severely disabled person [7]. Starting from 01.01.2020, the employee's contribution period includes the period of care of a child with a severe disability under the age of 18 or a person with a severe disability by one of the parents, by the guardian or curator, until employment in the position of personal assistant [8]. Although in order to benefit from social security benefits the employee or former employee must confirm the period of contribution, its duration will be different, depending on the benefit category.

Addressing pensions, we highlight that at the current stage in the Republic of Moldova, in the public social insurance system, the following categories of pensions are offered: *old-age pension; disability pension; survivor's pension; special pension; early retirement for long career* [5].

The old-age pension will be granted to people who confirm a minimum contribution period of 15 years and the age established by law. According to the provisions of art. 41, 42 of Law 156 of 14.10.1998, in order to benefit from a full pension, men must confirm in 2022 the retirement age of 63 years and the contribution period of 34 years, and women - the age of 60 years and the period of 33 years (for women, the increase will occur on 01.07.2022). In the case of the *disability and survivor's pension*, the age is directly proportional to the contribution period, which varies from 2 to 15 years. From 01.01.2022, employees (former employees) can also benefit from a long-career pension, if they confirm a contributory contribution period of 5 years greater than that generally established by law, regardless of age. At the same time, certain categories of employees can realize their right to a special pension [9].

We must note that, in the situation where the person meets the conditions to benefit from several categories of pensions, he/she can only opt for one of them. At the same time, starting from 01.01.2019, the right to pension is also offered to people who have established their residence abroad of the Republic of Moldova [10]. The amendments were based on the Decision of the Constitutional Court of the Republic of Moldova regarding the exception of unconstitutionality of art. 36, paragraph (1) of Law 156 of October 14, 1998 on the public pension system [11].

In addition to pensions, the public social insurance system guarantees employees several social insurance benefits offered in the form *of allowances, aids or balneosanatorial treatment.* Among them we highlight: *the allowance for temporary incapacity for work caused by common illnesses or accidents not related to work; allowance for disease prevention (quarantine); benefit for the*

recovery of working capacity; maternity allowance; the allowance for raising the child up to the age of 3; allowance for the care of a sick child; death aid. In this case, the total contribution period to be confirmed is 3 years. Insured people who have a total contribution period of up to 3 years, benefit from the right of social insurance payments if they confirm a contribution period of at least 9 months in the last 24 months preceding the date of occurrence of the insured risk or the date of birth of the child in the case of the risk ensured the growth of the child. Regardless of the duration of the contribution period, the allowance will be granted for temporary incapacity for work caused by tuberculosis, AIDS or an oncological disease; maternity benefit and death benefit [12].

The condition of contribution period of a certain duration is not necessary to be met even in the case of benefits for work accidents and occupational diseases. In this case, the employee is entitled to *benefits for medical rehabilitation; benefits for the recovery of working capacity; benefits for professional rehabilitation; allowance for temporary work incapacity; allowance for temporary transfer to another job; disability allowance; death benefit* [13].

The public social insurance system also provides for a series of protection mechanisms for people looking for a job. Among them, former employees who are actively looking for a job and are registered with the territorial subdivisions of the National Employment Agency stand out. At the current stage, employment measures include: *measures to promote employment (employment services; active employment measures); employment facilitation programs; unemployment insurance.* Employment measures are provided from the state budget and the state social insurance budget, as well as from other financial sources. The unemployment benefit will be established for the unemployed who cumulatively meet the following conditions: they do not earn income from work activities at the time the unemployment benefit is established; have activated and completed a contribution period in the public state social insurance system of at least 12 months in the last 24 calendar months preceding the date of registration; does not refuse a suitable job or participate in the active employment measures offered by the territorial subdivision according to the individual employment plan of the unemployed [14].

The essence of mandatory health care insurance

Mandatory medical assistance insurance represents an autonomous system guaranteed by the state for the financial protection of the population in the field of health care by establishing, on the principles of solidarity, from the account of insurance premiums, money funds intended to cover the costs of treating the states conditioned by the occurrence of the insured events (illness or condition). This institution has enough tangents with the other institution of compulsory insurance, which we have addressed above. Although compulsory health care insurance (as a legal institution approached in a strictly formal sense) largely follows the classic cliché of the structure of the insurance institution in the field of civil law, they have common elements, especially in terms of the characteristic features, with the institution mandatory social insurance from the branch of social security law [15, p. 247].

The mandatory healthcare insurance system also covers employees, who have the dual status of insured and insured person. According to the provisions of Law 1585 of 27.02.1998, the insured for employed persons (employees) is the employed person him/herself, including the natural person, other than the one employed by individual employment contract [16]. It is important to note that in the case of social insurance, the contribution is paid only by

the employer, and in the case of mandatory medical assistance insurance – only by the employee. Thus, in the insurance premium payment report, the employee has the status of insured, and consequently the quality of insured person is generated. This statute gives the employee the right to benefit from the full volume of medical assistance provided for in the Single Program of mandatory medical assistance insurance (hereinafter Program) [17]. Assistance is provided by medical service providers contracted by the National Medical Insurance Company. The size, manner and terms of payment of compulsory health care insurance premiums are regulated by special law [18].

It is welcome to note that any employee can, in addition to the services provided under the mandatory medical assistance insurance, also benefit from other services based on the optional health insurance or through direct payments offered to the medical service provider. This fact is also valid for the pension system, the legislation of the Republic of Moldova, regulating optional pension funds [19]. Although these aspects go beyond the limits of mandatory insurance in employment relationships, they offer the employee additional possibilities to benefit from certain benefits or services.

As an insured person, the employee has the right to choose his/her family doctor; to be given medical assistance throughout the territory of the Republic of Moldova; to benefit from medical services in the volume and quality provided by the Program, regardless of the size of the paid insurance premiums; to initiate actions against the insured, the insurer, the medical service provider, including to obtain material compensation for the damage caused by their fault.

At the same time, the legislation in force highlights for him/her a series of obligations, among which: registration with the family doctor and presentation of the act at the time of addressing the medical and pharmaceutical service provider.

Assistance and medical services intended for the employee

According to the Program, every employee, if he/she confirms illnesses and conditions that require medical assistance financed from the means of compulsory medical assistance insurance, has the right to various types of assistance and medical services: *emergency pre-hospital, primary, specialized ambulatory assistance, including dental, hospital; high performance medical services, community and home medical care, palliative care.*

Prehospital emergency medical care is provided in case of medical - surgical emergencies and includes activities aimed at stabilizing the vital physiological parameters of the patient, and the *primary one* includes activities of prophylaxis, early detection of diseases, consulting, with curative and support purposes, aimed at meeting the health needs of the people registered with the doctor family, within the limits of his/her competences. We emphasize that both the medical -surgical emergencies, which condition the provision of urgent pre-hospital medical assistance, as well as the illnesses and conditions that give the right to primary medical assistance, are provided for in the Program.

Specialized ambulatory care is granted to the persons insured by the professional specialist doctor together with the average staff involved in the medical act and includes all the activities, including organizational-methodical ones, which belong to the competence of the specialist and the respective staff. In contrast to this, *hospital medical assistance* is granted to people through hospitalization in cases when all possibilities of providing medical assistance in ambulatory conditions are excluded or the patient's health condition requires to be supervised in hospital conditions. Treatment in hospital conditions

for all profiles is considered short-term, except phthisiopneumology, psychiatry, narcology, oncological radiotherapy (curative cases) and hemablastoses, which are considered long-lasting. Both the professional specialist and the family doctor have the right to prescribe *high-performance medical services.*

Of particular importance are *community and home medical care.* Beneficiaries of home medical care are people who suffer from chronic diseases and /or have undergone major surgical interventions and geriatric patients who present a certain level of dependency and a limited ability to travel to a health care provider. A welcoming thing was the coverage by the Program, starting from 01.01.2022 of community medical care. The list of community and home care services provided from the mandatory medical assistance insurance funds is established by the normative acts approved by the relevant Ministry. These include community mental health services and youth-friendly health services provided by community mental health centers and youth-friendly health centers.

Also starting with 01.01.2022 has been covered by the program palliative care. This represents the provision of health services for the active and complex support of patients whose disease no longer responds to curative treatment. Palliative care services are provided by health care providers authorized for that type of service, regardless of the type of ownership and legal form of organization. Beneficiaries of palliative care are patients of all ages, with advanced chronic diseases and other diseases with a limited prognosis, who have a life expectancy of less than 12 months, with uncontrolled symptoms, significant psycho -emotional or spiritual suffering and/ or who present a certain level of addiction.

Conclusions

In conclusion, we highlight that both mandatory social insurance and mandatory medical assistance insurance, although they can be supplemented by optional insurance, constitute important guarantees offered to employees (former employees). Both people who are employed in the field of work, and those who no longer have the status of employee, but have a period of contributions during their life, are entitled to various benefits and social insurance services. At the same time, each employee will benefit from various types of assistance and medical services.

Bibliography

1. Constituția Republicii Moldova, adoptată la 29.07.1994, în vigoare din 27.08.1994, (art. 43).

2. Declarația Universală a Drepturilor Omului, adoptată și proclamată de Adunarea Generală a ONU prin Rezoluția 217 a (III) din 10.12.1948, (art. 23).

3. Legea Republicii Moldova privind sistemul public de asigurări sociale, nr. 489, din 08.07.1999, În: Monitorul Oficial, nr. 1-4, din 06.01.2000.

4. Legea Republicii Moldova privind instituirea unor măsuri de susținere a activității de întreprinzător și modificarea unor acte normative, nr. 60, din 23.04.2020 În: Monitorul Oficial, nr.108-109, din 25.04.2020.

5. Legea Republicii Moldova privind sistemul public de pensii, nr. 156, din 14.10.1998, În: Monitorul Oficial, nr. 111-113, din 17.12.1998.

6. Legea pentru modificarea și completarea unor acte legislative, nr. 290, din 16.12.2016, În: Monitorul Oficial, nr. 478-490, din 30.12.2016.

7. Hotărârea Curții Constituționale pentru controlul constituționalității unor prevederi din Legea nr. 156 din 14 octombrie 1998 privind sistemul public de pensii, nr. 19, din 24.09.2019, https://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=707 [accesat la 03.03.2022].

8. Legea pentru modificarea unor acte legislative, nr. 161, din 06.12.2006, În: Monitorul Oficial, nr. 367-377, din 13.12.2019.

9. Legea asigurării cu pensii a militarilor și a persoanelor din corpul de comandă și din trupele organelor afacerilor interne, nr. 1544, din 23.06.1993, În: Monitorul Oficial, nr. 7, din 30.07.1993.

10. Legea pentru modificarea Legii nr. 156/1998 privind sistemul public de pensii, nr. 258, din 22.11.2018, În: Monitorul Oficial, nr. 480-485, din 14.12.2018

11. Hotărârea Curții Constituționale privind excepția de neconstituționalitate a art. 36, alin.(1) din Legea 156 din 14 octombrie 1998 privind sistemul public de pensii, nr. 10, din 08.05.2018, https://www.

legis.md/cautare/getResults?doc_id=111028&lang=ro [accesat la 25.02.2022].

12. Legea Republicii Moldova privind indemnizațiile pentru incapacitate temporară de muncă și alte prestații de asigurări sociale, nr. 289, din 22.07.2004, În: Monitorul Oficial, nr. 168-170, din 10.09.2004.

13. Legea asigurării pentru accidente de muncă și boli profesionale, nr. 756, din 24.12.1999, În: Monitorul Oficial, nr. 31-33, din 23.03.2000.

14. Legea Republicii Moldova cu privire la promovarea ocupării forței de muncă și asigurarea de șomaj, nr. 105, din 14.06.2018, În Monitorul Oficial, nr. 259-308, din 10.08.2018.

15. SADOVEI, N. Drept medical. Teoria generală a dreptului medical. Chișinău: CEP USM, 2020. – 356 p.

16. Legea Republicii Moldova cu privire la asigurarea obligatorie de asistenţă medicală, nr. 1585, din 27.02.1998, În: Monitorul Oficial, nr. 38-39, din 30.04.1998.

17. Hotărârea Guvernului Republicii Moldova cu privire la aprobarea Programului unic al asigurării obligatorii de asistență medicală, nr. 1387, din 10.12.2007, În Monitorul Oficial, nr. 198-202, din 21.12.2007.

18. Legea Republicii Moldova cu privire la mărimea, modul și termenele de achitare a primelor de asigurare obligatorie de asistență medicală, nr. 1593, din 26.12.2002, În: Monitorul Oficial, nr. 18-19, din 08.02.2003.

19. Legea privind fondurile de pensii facultative, nr. 198, din 20.11.2020, În: Monitorul Oficial, nr. 344-351, din 18.12.2020.

20. Hotărârea Guvernului Republicii Moldova cu privire la modificarea unor hotărâri ale Guvernului, nr. 85, din 16.06.2021, În: Monitorul Oficial, nr. 159, din 01.07.2021.

CZU 343.573
DOI https://doi.org/10.52388/2345-1971.2022.e1.15

ALCOHOLISM, DRUG USAGE AND ABUSE - DETERMINANTS OF CRIME

Constantin BUJOR
PhD student, Free International University of Moldova,
Chisinau, Republic of Moldova
e-mail: *bujorconstantin8@gmail.com*
https://orcid.org/0000-0001-9180-0457

Alexandru MARIŢ
Doctor of law, university professor,
University of European Political and Economic Studies "Constantin Stere",
Chisinau, Republic of Moldova
e-mail: *alexmarit123@gmail.com*
https://orcid.org/0000-0002-3198-8398

The attempt to define alcoholism has been almost permanently marked by uncertainties, conflicts and ambiguities, the definitions used reflecting the cultural, religious or scientific ideas of the moment. Multiple definitions of alcoholism represented a barrier in communication between doctors and researchers and prevented an accurate diagnosis.The term alcoholism is maintained signifying a behavioral disorder with complex determinism, socio-psychological and biological, manifested by repeated and excessive alcohol consumption, with individual repercussions, affecting the mental and somatic health of the drinker, as well as his/her family and professional relationships, its economic and social status. The type and amount of beverage are less relevant to the diagnosis of chronic alcoholism, as well as the duration of consumption, due to individual differences in "sensitivity" to alcohol, its rate of metabolism, the rate at which tolerance and dependence are established, and the time interval in which complications occur.
Keywords: *alcoholism, drug addiction, addiction, pathology, mental disorder.*

TOXICOMANIA, ALCOOLISMUL, NARCOMANIA - DETERMINANTE ALE CRIMINALITAŢII

Încercarea de a defini alcoolismul a fost marcată aproape în permanenţă de incertitudini, conflicte şi ambiguităţi, definiţiile folosite reflectând ideile culturale, religioase sau ştiinţifice ale momentului. Multiple definiţii ale alcoolismului au reprezentat o barieră în comunicarea dintre medici şi cercetători şi a împiedicat un diagnostic de acurateţe. Termenul de alcoolism se menţine semnificând o tulburare de comportament cu determinism complex, socio-psihologic şi biologic, manifestată prin consum repetat şi excesiv de alcool, cu repercusiuni individuale, afectând sănătatea psihică şi somatică a consumatorului, precum şi relaţiile sale familiale şi profesionale, statutul său economic şi social. Tipul şi cantitatea de băutură sunt mai puţin relevante pentru diagnosticul de alcoolism cronic, la fel ca şi durata consumului, datorită diferenţelor individuale privind "sensibilitatea" la alcool, viteza lui de metabolizare, viteza cu care se instalează toleranţa şi dependenţa, şi intervalul de timp în care apar complicaţiile.
Cuvinte-cheie*: alcoolism, etilism, narcomanie, toxicomanie, patologie.*

TOXICOMANIE, ALCOOLISME, NARCOMANIE - DÉTERMINANTS DE LA CRIMINALITÉ

La tentative de définir l'alcoolisme a été marquée presque continuellement par des incertitudes, des conflits et des ambiguïtés, les définitions utilisées reflétant les idées culturelles, religieuses ou scientifiques

du moment. Les définitions multiples de l'alcoolisme ont été un obstacle à la communication entre les cliniciens et les chercheurs et ont empêché un diagnostic précis. Le terme alcoolisme est maintenu signifiant un trouble du comportement au déterminisme complexe, socio-psychologique et biologique, se manifestant par une consommation répétée et excessive d'alcool, avec des répercussions individuelles, affectant la santé mentale et somatique du consommateur, ainsi que ses relations familiales et professionnelles, son statut économique et social. Le type et la quantité de boisson sont moins pertinents pour le diagnostic de l'alcoolisme chronique, tout comme la durée de la consommation, en raison des différences individuelles de "sensibilité" à l'alcool, de son taux de métabolisme, de la vitesse à laquelle la tolérance et la dépendance se développent et du délai dans lequel les complications surviennent

Mots-clés: *alcoolisme, éthylisme,narcomanie, toxicomanie, pathologie.*

ТОКСИКОМАНИЯ, АЛКОГОЛИЗМ, НАРКОМАНИЯ - ДЕТЕРМИНАНТЫ ПРЕСТУПНОСТИ

Попытки дать определение алкоголизму почти всегда были отмечены неопределенностями, конфликтами и двусмысленностью, используемые определения отражали культурные, религиозные или научные идеи того времени. Множественные определения алкоголизма представляли собой барьер в общении между врачами и исследователями и препятствовали постановке точного диагноза. Термин алкоголизм сохраняется и обозначает расстройство поведения со сложным детерминизмом, социально-психологическим и биологическим, проявляющееся в многократном и чрезмерном употреблении алкоголя с индивидуальными последствиями, влияющими на психическое и соматическое здоровье пьющего, а также на его семейные и профессиональные отношения, на его экономический и социальный статус. Тип и количество напитка имеют меньшее значение для диагностики хронического алкоголизма, а также продолжительность потребления из-за индивидуальных различий в «чувствительности» к алкоголю, скорости его метаболизма, скорости установления толерантности и зависимости, и временной интервал, в котором возникают осложнения.

Ключевые слова: *алкоголизм, наркомания, потребление, злоупотребление, патология, психическое расстройство.*

Introduction

The attempt to define alcoholism was almost constantly marked by uncertainties, conflicts and ambiguities, the definitions used reflecting the cultural, religious or scientific ideas of the moment. Multiple definitions of alcoholism represented a barrier in communication between clinicians and researchers and prevented an accurate diagnosis. Although the basic elements of the concept of alcoholism have been described since antiquity, from the time of Hippocrates, until the 19th century, scientific methods were not applied in its study. The use of psychiatric hospitals as a place of treatment for alcoholics, the development of the public health movement and the promotion of the disease concept in alcoholism encouraged research in the field of alcoholism.

The polymorphism of clinical manifestations and the multitude of psycho-social problems, with etiological implications for the abusive consumption of alcohol, have determined numerous attempts at classification, by establishing various typologies or by differentiating according to the stage of the process. In the 20th century, the American researcher Elvin Morton Jellinek tried to emphasize in several works, more and more elaborated, the types of alcohol consumption, through the criterion of dependence. Thus, the last of these works [8, p. 56] is considered to be the most complex and practical for specialists in the fields of medicine, psychology and criminology. Jellinek distinguishes four phases of alcoholism. There is a pre-alcoholic stage, when someone will find relief in alcohol, after which consumption will become a pleasure and not any other, but downright sought and desired. In the prodromal stage , amnesias or

actions in short-circuit states of consciousness intervene. The subject does not frequently remember what he/she did or said (it is an extremely dangerous moment). In a third, crucial stage, alcoholism sets in. The subject drinks uncontrollably and a lot, frequently and at any part of the day; professional activity suffers great damage. Finally, the last stage is that of chronic alcoholism, characterized by continuity, systematic intoxication, psychotic centering of life on alcohol consumption.

Alcoholism, as a disease, was recognized in 1933 by the American Medical Association and the American Psychiatric Association and was introduced into the standard nomenclature of diseases so that in 1934 it was also included in the manual for the codification of the causes of diseases. In 1952, the first edition of the “Diagnostic and Statistical Manual” (Diagnostic and Statistical Manual of Mental Disorders 1st Edition - “DSM-1”) of the American Psychiatric Association where alcoholism was regarded as an alcohol „*addiction*” and was included in the non - psychotic mental disorders chapter.

Used materials and applied methods. The international normative framework was studied and used in the preparation of this paper, regional and national framework that ensures the legal protection of people with deviant alcoholism, substabce dependence, drug addiction in matters of criminal law, legal medicine, psychology and criminology. The following methods were used: logical, comparative, analysis and synthesis, systemic.

Obtained results and discussions

Alcoholism is the set of pathological phenomena determined by alcohol abuse [4, p. 23]. Alcoholism or acute alcoholism is the transient condition caused by the consumption of a large amount of alcoholic beverages in a short period of time, usually characterized by excitement with mental confusion and, sometimes, by coma.

The harmful effects of alcohol on the human body are expected over time with greater probability, as the average daily dose of ingested alcohol exceeds approximately 40 grams of pure alcohol. And from a conceptual point of view, learning to drink alcoholic beverages repeatedly and in large quantities leads to alcoholism, to acute alcoholism. Therefore, an alcoholic is a person who abuses alcohol (also called hyperconsumption). A drinker, a consumer of alcoholic beverages is not to be confused with an alcoholic, although according to a US statistic, out of 70 million drinkers, about 5 million can be considered alcoholics.

On the other hand, according to the definition from 1949, given by the World Health Organization , the category of alcoholics can include “those excessive drinkers whose dependence on alcohol has reached such a degree that they present a sensitive mental disorder or an interference with their physical and mental health, with their interpersonal relationships and with their social and economic function that cannot be exercised normally or that presents developmental disturbances”.

More than a century ago, French professor and criminologist Georges Vidal stated that “alcoholism is not only a serious danger for the individual, whose health is ruined and death is hastened, it directly threatens the family and society, first the family through the disastrous effects of heredity, then through misery, the demoralization of its members, leaving and the corruption of children that always pushes them to begging, to prostitution, to vagrancy, through public demoralization, the increase of suicide, madness and crime”.

According to other authors, such as Robert Goldenson [5, p. 87], an alcoholic shows the following symptoms: increasing consumption, morning consumption under various pretexts, uncontrolled and absurd behavior, “white spots of consciousness “, the so - called “breaks of film” (amnesia episodes). Alcoholism

involves an intermittent but rhythmic drugging of the brain by alcohol, which over time leads to a series of organic and psychotic disorders: pathological intoxication, vitamin and nutritional deficiencies, vulnerability to various diseases, alcoholic delirium ("*delirum tremens*"), hallucinations, Korsakoff syndrome and Wernicke's syndrome.

Specialists in psychology believe that alcoholism is a neuropsychic disease that requires appropriate treatment and recovery measures. It uses the method of conditioned responses (association of alcohol with repulsive reactions), psychotherapy and sociotherapy. However, the psychologist Anthony Ward Clare pointed out the confusing nature of the term "alcoholism", showing that lately it has been replaced by the term " alcohol dependence syndrome " (" *dependent drinker* "). The latter defines a state characterized by seven essential elements [1, p. 76]:

- an uncontrollable need to drink alcohol;
- a stereotypical way of drinking, namely the ingestion of alcohol at regular intervals to prevent or remove the symptoms of abstinence syndrome;
- alcohol intake comes to the fore in relation to other activities;
- change in alcohol tolerance, which is usually increased, and its increase is an important sign of growth alcohol addiction;
- repeated abstinence syndromes that appear 8-12 hours after the last drink, as a result of the decrease of alcoholemia; characteristically - they appear in the morning upon waking up;
- *relief drinking* which represents the habit of drinking early in the morning;
- *reinstatement* after a period of abstinence.

Alcoholism represents an extremely important problem for medicine and psychology today, because the repeated consumption of alcohol transforms the ingested substance into a drug, and it is very widespread throughout the world and at all ages (from childhood to old age). Having such a magnitude, the dire consequences of this monodrug alone or in combination with other drugs determine the destruction of human life, perhaps of creative destinies: in music, painting, plastic arts, science, fiction, etc. That is why the problem of alcoholism is a central health problem, which must concern public authorities in all countries. The negative effects are far too great and humanity must pay far too much for the misfortunes and dramas caused by this drug addiction, alongside of course the other abusive consumption of narcotics.

Chronic alcoholism is the state of intoxication due to long-term abuse of alcoholic beverages. It is characterized by damage to internal organs (liver, stomach, brain, etc.), nervous disorders (for example, tremors), decreased physical and intellectual capacity, mental disorders, etc. [2, p. 11]. A similar phenomenon is ***dipsomania*** (from " *dipsa* " = thirst) and (" *mania* " = madness), which represents a psychopathic manifestation consisting in the abusive consumption of alcoholic beverages.

The deterioration of the personality with the loss of its characteristic features becomes more and more obvious and constant, and it is no wonder that eventually alcoholics come to resemble each other so strikingly. Memory, attention, ideation, the critical and self-critical sense decrease a lot, the will almost disappears and is replaced by an indolence with an inability to control and resist sudden impulses, their activity and behavior finally being reduced to how to be able to procure and ingest alcohol [6, p. 25].

Physiological addiction is earlier and signifies the imperative psychological need, with a pathological character, to continue drinking alcohol in order to resolve a subjective feeling of comfort to reduce mental tension. Physical dependence, later, means

the rapid appearance after no more than 24 hours of a withdrawal syndrome when alcohol consumption has been stopped or reduced. The withdrawal syndrome involves complex somatic and mental symptoms, embarrassing for the patient - digital and tongue tremors, sweating (often extremely serious), confusional - dream episodes, and "*delirium tremens*" [9, p. 14].

Specialists in the medical field and scientists have reached a consensus regarding the fact that alcoholism represents the initial stage of a disease. For example, the American Medical Association considers alcohol as a drug and stated that "drug addiction is chronic, it is a disease of the human brain characterized by the compulsive search for that drug and its use despite its devastating consequences. This results from a complex interconnection of biological vulnerability, environmental exposure and other favorable factors". Currently, statistics have shown that in both men and women, alcoholism is a genetically determined disease in the proportion of 50-60%, the remaining 40-50% representing the consequences the influences of external factors [3 p. 151-157].

A study from 2011-2018 by the National Institute of Alcohol Abuse and Alcoholism was conducted on a group of 4,422 adults considered alcoholics and discovered that, after one year, some of them were no longer alcoholics, even though only 25.5% of those analyzed had received adequate medical treatment, with the following results:

- 25% remained dependent on alcohol consumption;
- 27.3% are in the process of healing (some of the symptoms of alcoholism can still be observed in them);
- 11.8% are asymptomatic drinkers (those drunks considered clinically and psychologically abnormal, but not always pathological);
- 35.9% recovered completely, and of these approximately 17.7% were considered alcohol consumers with a low risk of addiction, and another 18.2% were those coming after a long period of abstinence.

On the other hand, however, the results of a long-term study (of 60 years) carried out by George Vaillant from Harvard Medical School, during which the behavior of two groups of men was considered alcoholics followed, indicated the following: "the return to controlled alcohol consumption rarely lasted more than 10 years without returning to the two extremes - total abstinence or falling into alcoholism". Also, G. Vaillant observed that "the return to controlled alcohol consumption, as reported in short-term studies, is often an illusion" [10, p. 1043-1051].

The number of people who use and abuse alcohol is constantly increasing, at the same time, a continuous decrease in the age of onset of consumption is noted. Also, in Romania and the Republic of Moldova (together), the number of alcohol-dependent patients is estimated at approximately 2 million, one in six men and one in twenty women consuming alcohol frequently and in large quantities [9, p. 14].

From a psycho-social point of view, but also from a legal point of view, many problems (in the family, marital, work or medico-legal) can be recognized as being related to alcohol consumption, and mainly to excessive consumption (which leads to alcoholism). The tense family climate generated by the alcohol consumption of one of the partners frequently causes neurotic decompensations in the non-drinking partner, which in turn burdens the case file of psychiatric hospitals. Alcohol consumption by one or both parents has negative consequences on the children's personality formation, a large part of which will present behavioral, neurotic and even psychotic disorders requiring repeated hospitalizations in child neuropsychiatry and psychiatry departments. Fetal alcohol syndrome, encountered quite frequently in

alcohol-dependent women and especially in those who abuse alcoholic beverages during pregnancy, is characterized by a complex somato -psychic symptomatology, dominated by the disruption of the normal development of the structure of the future personality of these children [6, p. 25].

Among the medico-legal cases, a large share is represented by abusive consumers or alcohol addicts. One murder out of two, one suicide out of four, 15% of work accidents, one third of traffic accidents are due to alcohol. The number of work accidents is 4-5 times higher among alcoholics than among the general population, and 20% of crimes seem to be attributable to alcohol; however, the data are difficult to interpret due to the increased frequency of antisocial personality disorder among alcoholics [7, p. 11].

Conclusions

In today's society, there is a dramatic increase in alcohol consumption at all ages, in all socio - economic categories and in the case of both sexes. Alcoholism represents a problem with deep implications, which go beyond the clinical or psychological aspects, and are also interesting the social life of communities, within the peoples of the whole world.

The expenses borne by society for the consequences of excessive alcohol consumption, to which is added the cost of the treatment of traffic victims due to alcohol and the sums invested for the alcoholic beverages industry, represent an extremely important problem of every state, all over the world. There is no clearly determined border until the phase when alcohol becomes toxic for the human body, and this fact is depressing, as some drinkers become "addicted". Non-dependent and the so-called "small consumers" use alcohol for pleasure and for the benefit it brings. Dependent consumers, however, use the drink to fight against the unpleasant and very upsetting symptoms of frustrations accumulated throughout life. The explanation lies in psychological factors, based on the anxiolytic effect of alcohol. The drama, however, lies in the addiction that alcohol creates.

A first distinction must be made between the acute and chronic effects of alcohol consumption. The short-term effects are the equivalent of acute ethanolic intoxication, from the state of alcoholic impregnation to drunkenness, its signs disappearing completely after the elimination of the toxic. Chronic alcoholism manifests itself over time and is due to important metabolic disorders, which regress slowly and not always completely. It generates serious complications, the most common of which are those of the nervous system (from polyneuropathy to dementia) and the digestive system (the most common being cirrhosis of the liver). Just before the appearance of somatic complications, in chronic alcoholics important mental disorders appear with serious repercussions on the level of social adaptation and sometimes on the medico-legal level. Chronic alcoholism implies, with defining value, the notions of tolerance and especially from mental and /or physical addiction.

Tolerance means the need to increase the doses of the substance over time, in order to achieve the same effect. The opposite of tolerance is sensitization, which involves achieving the state of intoxication with smaller and smaller amounts of alcohol. Alcohol tolerance is variable from one subject to another, it depends on age, sex, credit predispositions, eating habits, physical and mental state, oldness of intoxication.

The place that alcoholism occupies in psychiatric pathology is considerable. Knowledge of the problems raised by alcohol consumption, as well as the somatic and psychiatric complications induced or aggravated by alcohol, proves necessary not only for medical personnel, but also for

humans, who daily face situations in which alcohol plays the main role. Although it is viewed with tolerance, it is actually a real social scourge, which endangers certain categories of the population both through the mental and somatic degradation it causes, as well as through the medico-legal consequences.

High rate of psychotic complications disorders caused by the abusive consumption of alcoholic beverages is reported very frequently in the specialized literature of the last decades. A particularly important aspect is the therapeutic approach to this severe complication, since there is no universally accepted therapeutic scheme. In this sense, the comparative evaluation of different therapeutic schemes quantifying their effectiveness is particularly interesting. It should not be neglected that in addition to an adequate therapy of the patient's psychosomatic condition, it is also necessary to institute an individual, group or even family cognitive and persuasive psychotherapy to consolidate the results.

Epidemiological studies in all civilized or less civilized countries emphasize the wide spread of the pathological level of drunkenness (alcoholism), with its harmful, organic and social consequences.

Bibliography

1. CLARE, Anthony Ward, *Psychiatry in Dissent*, Mandarin Publishing, London, 1993, p. 76.

2. KORY-CALOMFIRESCU, Șt., MOȘ, A. M. KORY-MERCEA, M. *Complicaţiile alcoolismului cronic*, Ed. Imprimeria de Vest, Oradea, 1997, p. 11.

3. DICK, D. M., BIERUT, L. J. *The genetics of alcohol dependence*, in Current psychiatry reports no. 8 (2), 2006, p. 151-157.

4. *Dicţionarul explicativ al limbii române*, Ed. Univers Enciclopedic, Bucureşti, 1998, p. 23.

5. GOLDENSON, R. *Encyclopedia of Human Behaviour*, Dell Publishing, 1976.

6. GABOȘ-GRECU, I., GABOȘ-GRECU, M. *Personalitate normală şi patologică. Tulburări anxioase şi de dispoziţie*, Ed. Prisma, Târgu Mureş, 2001, p. 25.

7. CRAIG, E., WIECZOREK, Hanson, William F. *Alcohol mortality: a comparison of spatial clustering methods*, Elsevier Science Ltd., Buffalo, 1997, p. 11.

8. JELLINEK, E. M. *The Disease Concept of Alcoholism*, Hillhouse, New Haven, 1960, p. 56.

9. MIHAI, A. *Delirium tremens – complicaţie a alcoolului*, Ed. Risoprint, Cluj-Napoca, 2007, p. 14.

10. VAILLANT, G. E. *A 60-year follow-up of alcoholic men*, in Addiction no. 98, 2003, p. 1043-1051.

INTERNATIONAL SCIENTIFIC JOURNAL

”SUPREMACY OF LAW”

REVISTĂ ȘTIINȚIFICĂ INTERNAȚIONALĂ

”SUPREMAȚIA DREPTULUI”

МІЖНАРОДНИЙ НАУКОВИЙ ЖУРНАЛ

«ВЕРХОВЕНСТВО ПРАВА»

JOURNAL SCIENTIFIQUE INTERNATIONAL

”SUPRÉMATIE DE DROIT”

МЕЖДУНАРОДНЫЙ НАУЧНЫЙ ЖУРНАЛ

«ВЕРХОВЕНСТВО ПРАВА»

Nr. 1, anul 7 (2022)

Formatul 60x80 $^{1}/_{8}$.
Coli de tipar 19,5. Coli editoriale 15,9.
Tirajul 200 ex.

Centrul Editorial-Poligrafic al USM
str. Al. Mateevici, 60, Chişinău, MD 2009