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GOOD FAITH IN LAW. GOOD FAITH AS THE FOUNDATION OF LEGAL EQUITY

Volume coordinated by

Manuela Tăbăraş,
Felicia Maxim, Mădălina Dinu

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INTERNATIONAL CONFERENCE ON LAW, EUROPEAN STUDIES, AND INTERNATIONAL RELATIONS, 12TH EDITION

"Good Faith in Law. Good faith as the foundation of legal equity"

12th Edition
Faculty of Law
Titu Maiorescu University, Bucharest
Bucharest, May 16-17, 2024

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Starting from the Kantian categorical imperative, ***„act only according to that maxim whereby you can at the same time will that it should become a universal law,"*** good faith represents a fundamental concept in law and is recognized in all areas of the legal world. It can be argued that good faith is an essential pillar in the legal system, promoting ethical conduct and strengthening trust in legal relationships. Aspects related to good faith are encountered in contract law, influencing their interpretation and execution, as well as in family law, where the principle of good faith can play a significant role in various situations, such as exercising parental authority or dividing common property. Parties are encouraged to act in the best interest of children and cooperate in resolving disputes. Good faith is also relevant in the area of exercising procedural obligations in civil or criminal procedural law. The mentioned aspects are just a few fragments of the research horizons generated by the proposed conference theme. Multiple topics from these thematic areas, as well as from areas such as labor law, transportation law, constitutional law, or international public law, will be analyzed

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In a world where legal systems increasingly intersect, and legal experience undergoes constant evolution, we aim to analyze together the doctrinal foundations and discover appropriate practical solutions. The scientific research, by bringing together the thoughts and creative energies of this conference, will generate a perpetual and necessary upgrade to respond to diversity. „***Good faith is not just a moral principle but also an essential tool for safeguarding equity in any legal system."*** – (Lon L. Fuller).

We are confident that this significant scientific event will be one of the most prestigious in the national legal calendar, with international resonance. It provides an opportunity to discuss current issues related to the universality of succession law, serving as a reference for society, economic, cultural, and linguistic environments, the legal community, aiming to highlight new solutions and interpretations between legislative tradition and modern values.

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Section A

VISIBILITY OF THE „*BONA FIDES*" PRINCIPLE WITHIN THE FRAMEWORK OF COMPANY LAW. *AFFECTIO SOCIETATIS*

Prof. PhD **Smaranda Angheni**
Titu Maiorescu Law School

Abstract

This study puts under scrutiny the visibility of the „bona fides" principle as part of company law, more precisely, the element specific to the company entities „de iure" or even „de facto" – „affectio-societatis".

The natural question to ask in any scientific endeavour is the following: is it necessary to theoretically explore the concept, which has become a principle, of good faith in law, i.e. „bona fides in iure"? What is ***the practical usefulness*** *of investigating 'good faith' today, when artificial intelligence and automation tend to overshadow, to the point of 'suppression', the psychological, emotional element that has been specific to the human being since the beginning of his existence?*

Beyond any controversy concerning the conceptual or institutional framework, „affectio-societatis" is a subjective element of a volitional nature present in any associative structure constituted by the will of at least two natural or even legal persons (will expressed in the decisions of the statutory governing bodies), a will which takes the form of the intention „animus" of associating to form a company with or without legal personality, in other words, „de jure" or „de facto".

The intention, the subjective will of associations to associate means, in essence, the idea of collaboration in carrying out an activity, with the aim of obtaining benefits (results) which they share, bearing losses equally.

The bond that is formed between the partners even from the previous phase of the establishment of a company is based on ***trust*** *which is the basis of the intention, the will, to associate, i.e. „affectio societatis".*

Keywords: *Good faith, „affectio societatis", fairness, justice, trust, common interest, visibility*

Introduction

The „*bona fides"* principle, so secular and seductive, enshrines good faith and remains a cause for reflection from the perspective of legal institutions that are mainly claimed by private law.

The natural question to ask in any scientific endeavour is the following: is it necessary to theoretically explore the concept, which has become a principle, of good faith in law, i.e. „*bona fides in iure"*? What is the **practical usefulness** of investigating 'good faith' today, when artificial intelligence and automation tend to overshadow, to the point of 'suppression', the psychological, emotional element that has been specific to the human being since the beginning of his existence?

The psychological, moral, legal and social components of the „*bona fides"* concert lead us to state that it is necessary and useful to highlight, until the discovery of the valences of

good faith from the perspective of other legal institutions, in order to talk about „fairness", „justice", society etc.

Not infrequently, in law, some concepts are based on legal fictions but with multiple legal consequences/effects that highlight the importance of theoretical reflections of undisciplined research, multidisciplinary values with both theoretical and practical implications.

In this context, the present study analyses the visibility of the principle of „bona fides" in the framework of company law, specifically the specific element of „*de jure"* or even „*de facto"* corporate entities – „*affectio-societatis"*.

1. On „*affectio-societatis"*

1.1. **The Conceptual Framework**

Placing our research within the framework of company law, Romanian and foreign doctrine, but especially case law, have highlighted a sometimes controversial concept, namely the concept of „*affectio-societatis"*, a Latin expression that translates as „bond", state (of company).

Beyond any controversy over the conceptual or institutional framework, *'affectio-societatis'* is a subjective element of a volitional nature present in any associative structure formed by the will of at least two natural or even legal persons (expressed in the decisions of the statutory governing bodies), a will which takes the form of the *'animus'* of association to form a company with or without legal personality, in other words, *'de jure'* or *'de facto'*.

The intention, the subjective will of associations to form a partnership, essentially means the idea of collaboration in carrying out an activity, with the aim of obtaining benefits (results) which they share, while also bearing losses.

What is specific to societies is the **common interest** of associations, the achievement of the common purpose on equal terms, trust in good faith, loyalty, confidentiality, behaviour, an attitude which must exist throughout the existence of the society.

The bond that is formed between the partners even from the phase prior to the formation of a company is based on **trust**, which is the basis of the intention, the will, to associate, i.e. „*affectio societatis"*.

The trust between the partners is manifested at the time of incorporation by the pooling of assets, knowledge, activity necessary to carry out the proposed activity. The contribution of each partner is evidence of the subjective element „*affectio societatis"* which is subsequently manifested throughout the life of the company.

Participation in the „life" of the company means involvement in the organisation and functioning of the company by participating in the adoption of the resolutions/decisions that express the will of the company, as a legal entity or even only in fact.

"Affectio societatis" is more visible in the case of partnerships which have a strong „*intuitu persoane"* character, given that, in the history of the establishment of partnerships, they were formed within families or between people whose relationships were based on trust, partnerships in which the contribution (contribution of each person) consists of work – the so-called contribution in industry.

The *'intuitu-personae'* character of society in its early days, dating as far back as ancient Rome, was based on a sense of emotional belonging to a community.

The community to which the associations belonged was modelled on the family community where the *'pater familias'* was the head, a task taken on within the society by its administrator or the founder who initiated the establishment of the society. The affective bond that exists between the associates makes the partnership contract special, differentiating it from other contracts, as Ulpian said that it must be ascertained to what extent the contracting parties had or had not*"animus contrahendae societatis".*

1.2. **Theories regarding the „*Affectio Societatis*" Concept**

In specialised doctrine, coupled with case law, several theories have been argued in order to crystallise the notion, the content of „*affectio societatis"*, starting from the premise that a company cannot exist without the will of association of its founding members/associations.

The first, classic theory, put forward by specialists in the field, was the theory which enshrined the **unitary conception** of the expression *'affectio societatis'*, according to which *'affectio societatis'* is the **voluntary** and **active**, **interested** and **egalitarian cooperation** of those who associate, on the grounds that voluntary cooperation distinguishes society from other forced associations which exist, for example, with regard to co-ownership, trade unions or other *'de jure'* or *'de facto'* entities; collaboration is self-interested in companies because each partner aims to achieve a result/profit/benefit or to make a saving, which distinguishes the company from non-profit associations.

However, the unitary concept of „*affectio societatis"* has been criticised because, in reality, the participation of associations **is not always active** in the life of the company, **nor is it always equal**, since there are members who act as the company's bosses, while the other member or members only wish to control the activity and management exercised by the other member or members.

Under these circumstances, some theorists consider that *'affectio societatis'* is rather the will to achieve a union or convergence of interests, which is not in all cases absolute, unlike other contracts, such as synallagmatic contracts, where each contracting party pursues its own interest.

Convergence of interests is dissipated when, for example, some members wish to distribute dividends while others wish to transfer them to the company's reserves.

On the other hand, it should not be ignored that „*a priori"* in company law there is an **original intentional element**, but this is not to be confused with consent, which is a condition for the validity of any contract. The **intentional volitional element** *'affectio societatis'* differs substantially from **consent** and **cause** as sides of the **intention to contract**, even if, at the time of the formation of the company on a contractual basis, they are related concepts[1].

'Affectio societatis', unlike consent and cause, exists throughout the company's existence as regards the effects of the company contract, effects which do not concern consent and which exist at the time of the conclusion of the contract and are instantaneous.

As has been rightly pointed out, affectio societatis translates into the **obligation of good faith** incumbent on both majority and minority shareholders throughout the life of the company[2].

[1] For details, see L.B. Săuleanu, Element specific al contractului de societate – *affectio societatis* (*Affectio Societatis* – Specific Element of Company Contract) – in Revista de Drept Comercial (The Commercial Law Magazine), no. 1/2012, p. 83;

[2] Ph. Merle, Droit commercial. Sociétés commerciales, Dalloz, Paris, 1992, p. 51;

The unitary concept of „*affectio societatis"* has known limits justified by the legislative evolution of the different forms of companies, especially commercial companies.

Thus, in the case of single-member companies or public limited companies, the visible, defining components of ***'affectio societatis'*** disappear or even disappear, if we consider the cooperation that must exist between the partners or active participation in the life of the company.

The second theory, which has emerged and developed, particularly in French doctrine, puts forward the idea of a **pluralist conception** of *'affectio societatis'*, supported by case law, which demonstrates a certain ambiguity of the concept of *'affectio societatis'*.[3].

According to the pluralist conception, the notion of „*affectio societatis"* is **multifaceted**; associations constitute society for a profit-making purpose, either to obtain benefits or to profit from an economy. These common characteristics, which are of a very general nature, cannot determine the characteristics of „*affectio societatis"*. According to the multifaceted conception on the definition of „*affectio societatis"*, **four characters** have been identified in the doctrine, namely: the **voluntary** dimension of collaboration between at least two persons, for example, if they lived in cohabitation although, the existing factual situation in this case does not always lead to the conclusion of the will of cohabitants to create a company, to start and develop a business; **participation** in the management of the company is a second dimension which creates the concept of *'affectio societatis'*, even though not all partners actually participate in the management and running of the company, but it is sufficient for them to exercise their right of control over the activities of those who run, administer or manage the company's affairs; convergence or, conversely, divergence of interests is, according to some authors, the main characteristic for defining 'affectio societatis'.

There is „*affectio societatis"* in the situation where all the associates pursue the same goal – to obtain benefits/profit. This character is used to distinguish the partnership contract from other contracts such as the contract of sale, publishing contract, concession, franchise etc.; **fourthly**, there is „*affectio societatis"* whenever there is **no relationship of subordination** between the partners, a subordination specific to the employment contract and excluded in the case of the partnership contract where the partners are treated on an **equal footing**, each partner having independence of action and decision within the partnership.

Analysing the four characteristics that characterise the partnership contract, we consider that **the most visible characteristic is that of the convergence of the will and interests of the partners**, i.e. the intention to associate in order to carry out a joint civil or commercial activity.

From this point of view, the *'affectio societatis'* is a specific condition for the validity of the partnership contract, which is why, in the absence of this condition/element called 'spirit', the consequence would be that the contract would be null and void.[5]

This concept of *'affectio societatis'* is based on the theory of the complex legal act, as a source of obligations specific to commercial law; in the case of the partnership contract, the partners have common interests, interests which are established both at the time of incorporation and subsequently during the company's existence, interests which are embodied in the decisions taken by the collective management bodies.

Unlike the other categories of contracts, where **the principle of unanimity existent** at the time of the conclusion of contracts, in the case of the company, in its institutional meaning,

[3] M. Cozian, A. Viandrier, Fl. Deboissy, Droit de societes, 32º ed., Ed. Lexis Nexis, 2019, p. 95-96;

there is **the principle of majority for passing the decisions**, which means that, if unanimity exists at the time of incorporation, during the life of the company, the will of the associations may be divided by accepting or not accepting all decisions.

At the same time, whether or not the wills of the members are in agreement during the life of the company also depends on the type and form of the company (partnership or limited liability company) or whether it is a simple company governed by the Civil Code.

2. The Place of the Subjective Company Element – „*affectio societatis*" within the Legal Framework

In order to answer this question, the analysis turned to the provisions of the Civil Code governing the company contract, in particular the provision of Art. 1881 para. (1) which defines the partnership contract, a text according to which, „*By the partnership contact two or more persons mutually oblige each other* ***to cooperate*** *in the performance of* ***an activity*** *and to contribute to it by means of monetary contributions, in goods, in specific knowledge or services, with the aim of sharing the benefits or making use of the savings that may result".*

The legal text referred to does not provide „*expressis verbis"* for the volitional, intentional element – „*affectio societatis"* but, on the contrary, the law maker emphasises the contractual dimension of the obligations of the parties to the partnership contract, **to cooperate in carrying out an activity** for which contributions are required, whatever their nature, with a view to sharing the benefits or making use of the savings which result or may result from the association, while obviously also bearing the losses (Article 1881(2)).

"*Affectio societatis"*exists both as *a prerequisite* of the company contract, of the company from an **institutional** point of view – as a legal person, whenever a company acquires legal personality, but also at the time the contract is concluded and subsequently throughout the company's existence.

"Affectio societatis" is explained in the doctrine as a jurisprudential creation focused on the main defining aspect – **the collaboration between the contracting parties** – who become associates to which is added **the joint carrying out of an activity** which, in practice, can only be summed up as participation in the adoption of decisions in the collective management bodies and in management control.

Sometimes the term 'collaboration' is missing from some definitions of partnership structures and the question is rightly raised as to whether or not there is *'affectio societatis'* from this perspective.

This is the case of the joint venture governed by Article 1949 of the Civil Code, according to which *„The joint venture contract is the contract whereby a person grants one or more persons a share in the profits or losses of one or more operations which he undertakes".* As can be seen, the legislator does not use the term „collaboration", which is why the question has been raised as to whether *„affectio societatis"* also exists in the case of joint ventures.

The question is not irrelevant from the point of view of determining the obligations of the parties, the obligations of „cooperation" and the legal consequences of its non-existence.

The majority of authors of works on the legal institution of joint ventures take the view that there is *'affectio societatis'*, an idea which is supported by the fact that the legal provisions complement those of the partnership contract, where, by definition, its main component, i.e. **collaboration**, is expressly present.

Any association/partnership presupposes the existence of the subjective, volitional, psychological element – animus, i.e. *'affectio societatis'*, which may be more pronounced in certain types/forms of company or, on the contrary, as in the case of joint ventures, where one

of the partners participates with goods, services etc. in the business of the other partner with the aim of sharing the benefits and obviously bearing the losses.

In this situation, the subjective, psychological element is not as visible as in the case of partnerships because all the conceptual components of *'affectio societatis'* are missing.

3. The Legal Relevance of the Existence of the *Äffectio Societatis"* as Part of Company Law

The legal importance of the subjective element *'affectio societatis'* lies primarily in the legal qualification of the contract concluded, in so far as the legal construction is entitled 'contract' or 'agreement' and not a company contract.

Secondly, the legal relevance of *'affectio societatis'* exists throughout the life of the company, with situations/disagreements sometimes arising between the partners, which have been described in both doctrine and case law as causes of the loss of trust, of the psychological, even sentimental, bond between the partners, in other words, the subjective element specific to the partnership contract, namely the *'affectio societatis'*, has disappeared, leading ultimately to the dissolution of the partnership on the grounds of serious disagreements between the partners (Art. 227 para. (1)(e) of the Companies Act No 31/1990, republished, as revised).

Conclusions

Therefore, following the analysis undertaken by both doctrinarians and practitioners, some defining features of *'affectio societatis'* have been outlined, which converge towards the crystallisation of the conceptual framework, namely: constitutive element of the company characterised by the will of the associations to collaborate in the management and conduct of the activity in order to obtain benefits to be shared, controlling the management of the company, accepting common risks, depending on the form of the company and the quality of the associations.

What is important is that the will to associate is voluntary, egalitarian and collaboration is of the nature of *'affectio societatis'* but not always of its essence. We must emphasise the idea that the existence of *'affectio societatis'* is the feeling of belonging to a community of interests, mainly the obtaining of benefits/profits, even if this also means bearing losses, in other words, assuming the risks of the activity.

A particularly complex subjective element, *'affectio societatis'* implies good faith (bona fides), trust, loyalty, non-competition, fairness and equal opportunities for each partner.

The legal consequences of the disappearance of *'affectio societatis*', especially in the event of a finding of abuse of law by the majority and minority shareholders, would mean a blockage of the activity and even the existence of the company, intervening, as the case may be, the withdrawal, exclusion of the shareholders or even the dissolution of the company due to serious misunderstandings between the shareholders, considering, in case law, but also in theory, that the psychological, intellectual, volitional element – *'affectio societatis'* – has in fact disappeared.[4].

[4] See CSJ, Secția comercială (Commercial Section), Decision no. 419/1996, in Revista Dreptul (The Law Magazine) no. 3/1997, p. 128; R.N. Catană, Admisibilitatea acțiunii în dizolvarea societății comerciale pentru neînțelegeri apare între asociați (The Admissibility of the Action to Dissolve a Commercial Company for Disagreements between Associates), in Revista de Drept comercial (The Commercial Law Magazine), no. 2/2008, pg. 61 and the following.; I. Urs, M. Duțu (general coordinators) Enciclopedia Juridică Română (The Romanian Legal Encyclopaedia), vol. I, A-C, Ed. Universul Juridic, București, 2018, p. 215.

A WIDE OCEAN OF PRIMARY AND SECONDARY LEGISLATION. THE CORALS OF GOOD FAITH AND THE ACTION TO ANNUL THE BUILDING PERMITS AND THE URBAN PLANNING DOCUMENTATIONS

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Abstract

Good faith is a fluid and elastic principle found in both private and public law. At the confluence of the two, urban planning law is often faced with the need for clarity, the consolidation and consolidation of overabundant legislation, the reorganisation of secondary rules and finally codification. Good faith survives with difficulty in an acid legislative environment where rights and obligations, sanctions and non-sanctions remedies are hard to come by. Bad faith use of rights recognised by special legislation can create major economic imbalances, the real estate sector being notorious for the scale of resources used.

Keywords: *good faith, urbanism law, building authorization, action to annul, urbanism certificate.*

Section 1. Good Faith – A Necessary Substratum

The provisions of Article 14 of the Civil Code, as a rule of common law, place all subjective rights and obligations on the basis of good faith. Good faiththus becomes part of the cellular structure of all subjective rights and correlative obligations. The huge range of subjective rights and obligations makes the principle fluid, but at the same time makes it theoretically difficult to concentrate it in an all-encompassing definition. We therefore end up capturing it in concrete hypotheses through the duties it generates (e.g. to take certain steps, to emerge from a certain passivity or state of legal ignorance), through the benefits it creates for the person to whom it is recognised (e.g, More often, however, we come to see the opposite of good faith – bad faith – and define good faith as the opposite of bad faith, builder of good faith etc.). More often, however, we come to see the opposite manifestations of good faith – bad faith – and define good faith as the opposite of negative manifestations.

In a particular form, the requirements and benefits of good faith are also apparent in the field of urban planning law. On the one hand, the construction of buildings is a point of private interest of any citizen (e.g., the construction of a dwelling or its alteration by raising it, extending existing works, consolidating, altering the roof, replacing a window or adding a balcony etc.) – in a much more complex dimension and an economic objective, an activity of a professional – and on the other hand a point of public interest, of urban/social development, necessary to be controlled by imperative rules since the development of collective units, residential complexes, the creation of industrial buildings or buildings destined to carry out economic activities must represent a social progress and not a factor of imbalance in the infrastructure of a locality. In this wide-ranging urban planning environment, we will deal

with good faith from the limited perspective of the building permit and the right to challenge it.

Section 2. Legislative Complexity and Diversity as an Antagonistic Element to Good Faith

The concept of good faith, which is ubiquitous in private law, is specifically interwoven in the branches of public law, creating requirements of predictability and predictability for legal rules. The more technical the field of regulation becomes, the more the addressees of legal rules, the subjects of law, often find themselves in the midst of a vast normative ocean, having to navigate between primary legislation (laws, government emergency ordinances etc.) – often non-uniform and uncoordinated – and secondary legislation (orders issued by ministers, heads of institutions – e.g. the State Building Inspectorate – I.S.C.), which is often of questionable legal force when an inconsistency with primary legislation can be identified. The overall picture of regulation and implicitly of subjective rights and obligations is only visible when the legislative puzzle is completed. As a consequence, the acquisition of a building for the purpose of construction is often a difficult step for legal subjects who do not have technical knowledge of town and country planning. The degree of complexity increases with the lucrative purpose that can be pursued from the development of real estate projects involving substantial investment capital. Is this the path of good faith?

The legislation on building permits is an eloquent example of a legal regulation with a technical content that is not very accessible to the legal subjects seeking to legally acquire a right of ownership over immovable property through construction. The primary seat of the matter is to be found in Law 51/1990 on the authorisation of building works. For its implementation, methodological rules were approved by Order 839/2009 for the approval of the methodological rules for the implementation of Law 50/1991 on the authorisation of construction works, issued by the Ministry of Regional Development and Housing. These legal provisions are joined by a series of primary legal norms that complete the legislative picture, such as Law 350/2001 on spatial and urban planning, Law 10/1995 on quality in construction, Law 422/2001 on the protection of historical monuments etc.

The execution of construction works is allowed only on the basis of a construction or demolition permit, issued under the conditions of Law 51/1991 at the request of the holder of a real right over a building – land and/or buildings – identified by cadastral number, unless otherwise provided by law [art. 1 para. (1) of Law 51/1991]. The procedure for authorizing the execution of construction works begins with the submission of the application for the issuance of the urban planning certificate in order to obtain, as a final act, the construction permit art. 2 para. (21) of Law 51/1991. The purpose of the Urban Planning Certificate is to provide the applicant with information on the legal, economic and technical status of the land and buildings existing at the date of the application, in accordance with the provisions of the urban plans and their regulations or the land-use plans, as the case may be, endorsed and approved by law. However, when the information provided is incomplete, it may result in a restriction in the exercise of subjective rights or even become a source of prejudice that the subjects of rights will have to bear. The lack of or incomplete mention in the planning certificate of the restrictions imposed by the existence of limitations or restrictions will result in the continuation of the procedure for obtaining the necessary documentation and approvals for the building permit, a process which involves the commitment of financial resources to obtain the necessary approvals for which, however, there can be no finality in legally obtaining

the building permit. The difficulty of gaining real and early knowledge of the legal regime imposed for carrying out a construction is visible if we observe the lack of primary and complete legislation on building restrictions. By way of example, it is sufficient to recall the restrictions imposed by the Technical Rule on the delimitation of protection and safety zones related to energy capacities, approved by A.N.R.E. (National Authority in the Field of Energy) Order no. 239 of 20 December 2019 for the approval of the Technical Rule on the delimitation of protection and safety zones related to energy capacities.

This results in restrictions imposed by energy capacity protection zones i.e. zones adjacent to the energy capacity, spatially extended, in which prohibitions on access of persons and building regulations are introduced.

Also, a number of restrictions in the legal regime of constructions are established by Order no. 735/2015 for the approval of the Romanian Civil Aeronautical Regulation on the establishment of areas with civil aeronautical easements and the conditions for the approval of technical documentation related to objectives in these areas or in other areas where they may constitute obstacles to air navigation and/or may affect the safety of flight on the territory and in the airspace of Romania RACR-ZSAC, edition 1/2015. Also, the provisions of Art. 16 para. (1) of the Emergency Ordinance 202/2002 on the integrated management of the coastal zone delimits a strip of land 50-150 m wide measured from the furthest seaward line, depending on the width of the coastal zone, along the entire length of the coastline, in which any kind of permanent construction is prohibited, the Norms of hygiene and public health concerning the living environment of the population, approved by the Order of the Minister of Health no. 119 of 4 February 2014, published in the Official Gazette of Romania, Part I, no. 127 of 21 February 2014, which provide for limitations imposed on the location of buildings intended for dwellings that must ensure that they are sunny for a minimum of 1, 1/2 hours at the winter solstice, the living rooms in the building and in neighbouring dwellings. These translate into a state of uncertainty created for the subjects of law. An electricity pole does not allow a subject of law to build on a certain stretch of land, or at a certain height, the proximity of the property to certain points of public interest prevents the attributes of private property rights from being exploited by building a structure etc. As a result, the essential problem facing subjects of law is that of planning incidents which limit property rights. These restrictions become apparent as the effort to allocate time and economic resources to obtain the approvals required by the town planning certificate becomes more and more apparent, depending on the objective or sometimes subjective judgement of the representative of the administrative-territorial unit.

In this context, the good faith of the parties must withstand the test of elasticity created by the uncertainty of the existence or non-existence of legal restrictions on the construction of a building. They often configure their legal acts of conveyance in respect of immovable property to include guarantees from the seller as to the legal status of the land, so as to allow the construction of the buildings envisaged by the acquirer. The subsequent identification of restrictions on the construction of buildings may constitute grounds for invoking the termination of the contract. In such cases, it is difficult for the notary public to draw up authentic legal documents, as mere declarations by a party concerning the legal status of the property and the absence of restrictions are often regarded as insufficient. The use of an urban planning certificate is, as we have also noted, sometimes insufficient to reveal any restrictions on the construction of a particular building. Alternatively, legal acts are concluded under suspensive conditions whereby the seller assumes the obligation to obtain planning

permission, at which point it is transferred and the legal act of transfer becomes effective. Nor is it excluded that the rights and obligations of the parties are affected by the negative resolutory condition that there is no restriction on carrying out a certain construction.

De lege ferenda, the difficulty of fully knowing the legal regime governing an immovable property can be overcome by regulating all restrictions in a separate title in a possible future planning and building permit code and including all information on legal restrictions in the planning certificate.

In the same sphere of regulation regarding the town planning certificate, the legal provisions stipulate not only that a town planning certificate is required for the dismemberment of an immovable property, which is a sine qua non requirement in relation to the number of plots or the purpose of the dismemberment in order to build a construction, a hypothesis that we can understand from the perspective of the affectation of the new buildings, the access to them etc, But what we are interested in is that the legislator requires the same urban planning certificate for the simple apartment building of one's own dwelling, without this time being able to find justification for this request from the perspective of regulating a right of way or from another perspective of the new affectation, as long as the local authority tells you that you do not need a building permit to demolish two walls, so why is it that an urban planning certificate is required without limit and in any situation for the apartment building of one's own individual unit? *De lege ferenda,* as a matter of law, the requirement for a planning permission certificate should be abolished in the case of an individual unit.

The legal process does not end when the building permit is issued, as the statistics of real estate developments in recent years show. Once the building permit has been obtained, it can be challenged before the courts, with all the legal and economic risks that can arise from such a dispute: (i) suspension of work, (ii) blocking of bank financing, early repayment of loans, (iii) registration of the dispute in the land register and loss of confidence on the part of potential buyers (loss of an important source of finance from advances obtained through promises to sell), (iv) resources allocated to the process.

In a context where actions for cancellation of building permits are based on increasingly subtle issues such as non-compliance with an accompanying study [2], increased attention to obtaining legal planning permission is justified.

Secton 3. Filing Action for Cancellation of Planning Permit. Good or Bad Faith of the Plaintiff

The building permit is the final act of authority of the local public administration on the basis of which the execution of construction works is allowed in accordance with the measures provided by law concerning the location, design, construction, operation and post-use of buildings [Article 2 paragraph (1) of Law 51/1991], having the legal nature of an individual administrative act. In the event that the building permit has been issued without complying with the legal provisions [3] and, if it can no longer be revoked by the issuer [e.g., art. 7 para. (1) of Law 554/2004] since it has entered into the civil circuit and has produced legal effects [4] [art. 1 para. (6), of Law 554/2004], a wide range of persons (e.g., a person who considers that he or she has been harmed in a right or legitimate interest, the Prefect, the Public Prosecutor's Office, the People's Advocate, in order to bring an action for annulment [Article 12(1) of Law 51/1991].

The provisions of Article 902 para. (2) item 19 of the Civil Code allows the registration in the land register of actions for the defence of real rights registered in the land register,

actions for partition, actions for the dissolution of the legal act for nullity, termination or other causes of ineffectiveness, actions for revocation, as well as any other action concerning other rights, facts, other legal relationships in relation to the registered real estate. A notation is defined as „A notation is an entry by which rights, other than rights in land registers, deeds, legal acts or legal relationships, in relation to immovable property in the land register become enforceable against third parties or are entered with information effect" [Art. 12 para. (1) of the Regulation on the reception and registration in the land register and land register records approved by the Order of the Director of the National Agency for the Protection of Industrial Property 600/2023] [5]. According to art. 7 paragraph (234) of Law 50/1991, the registration in the land register of the building permit will also have the effect that the content of the building permit will be considered as having been brought to the attention of the interested social bodies, with an impact on the deadline for the formulation of the action for the cancellation of the building permit [art. 12 paragraph (3) of Law 51/1991]. Being an administrative act, the building permit also enjoys the iuris tantum presumption of legality overturned by its annulment [6]. In this context, the action for annulment of the building permit can also be noted in the land register of the building. The purpose of this noting is recognised by the law in order to publicise the action and the possible judgment against third party purchasers. The land register entry of the dispute concerning the cancellation of the building permit must always be subject to the purpose recognised by law. It must be 'neutral' for the holders of rights in rem, and the publication of an action whose outcome is uncertain must not constitute a limitation on the attributes of the right of ownership. This informative character can be easily observed by the absence of an unavailability effect on the property or by the absence of a prohibition to conclude legal acts (which will produce, at a certain moment, according to the law, translative effects – sales of future property – or non-translative effects – promises of sale, promises of donation, closing etc.) with regard to the future property for which the contested building permit has been issued. So the dispute, once noted in the land register, does not prevent the alienation of the property or its encumbrance with ancillary rights in rem such as a mortgage on real estate. By noting the action for annulment, third parties wishing to conclude legal acts in respect of the property to be built or on which construction is to take place are informed of the existence of potential grounds for annulment of the building permit, without overturning the presumption of legality which it enjoys. What puts into perspective the rights to be acquired by the conclusion of legal acts in respect of a building in respect of which there is an action pending for the annulment of the building permit is the remedy of dismantling the construction [1]. Nor does the existence of a dispute in the land register concerning the cancellation of the building permit prevent the property from being recovered by enforcement.

However, the practice does not exclude cases where the initiation of a dispute concerning the cancellation of a building permit and its entry in the land register are exercised outside the internal limits of the rights recognised to the complainants, placing the whole issue in the field of abuse of rights and the remedy of tort. E.g., the registration of the action for annulment[7] is in fact made in order to discourage the sale of the property, the existence of the dispute being clearly a discouraging factor for the buyer, or to prevent the buyer from obtaining the necessary credit to complete the construction[8], or simply in a discouraging manner. The length of time until the land register entry will remain in force (final settlement of the dispute

and resolution of the request for cancellation, as provided for in Article 192(2) of the EC Treaty) is a long time. (1)(a) of the Regulation on the receipt and entry in the land register and land registry approved by Order of the Director of the National Agency for the Protection of Industrial Property 600/2023) only increases the burden on the defendant who is the beneficiary of the building permit.

The bad faith formulation of an action for the cancellation of a building permit may constitute a basis for **the plaintiff's liability in tort.** However, the holder of the action in tort will have to prove with difficulty that the action has been misused for a purpose recognised by law, that he is guilty, that he has suffered damage and that there is a causal link, the plaintiff being presumed to be acting in good faith – qui suo iure utitur neminem laedit.

De lege ferenda, the presumption of guilt and the introduction of minimum compensation that does not need to be proven may discourage the formulation in bad faith of claims for the cancellation of planning permission with the most economically forceful consequences.

Reference

[1] See Ovidiu Podaru, *Dreptul amenajării teritoriului, al urbanismului şi al construirii (Law of Land Planning, Urban Planning and Building),* Vol. IV, Un deznodământ nefericit: desfiinţarea construcţiilor (An unfortunate outcome: the dismantling of buildings), Ed. Hamangiu, Bucureşti, 2015, p. 34.

[2] See E.g., Decison no. RJ 5929de57e/2022 din 16-feb-2022, Alba Iulia Court of Appeal, available on-line on www.sintact.ro. The Court notes in its reasoning: ‚The Court finds that Article 3(3)(b) of the EC Treaty provides that 1 of Chapter I ‚Hygiene rules relating to living areas' of the Hygiene and Public Health Rules on the Living Environment of the Population, approved by Order of the Minister of Health No 119 of 4 February 2014, published in the Official Gazette of Romania, Part I, no. 127 of 21 February 2014 in the form in force on the date of issue of the permit states: (1) The location of buildings intended for residential use must ensure that the living rooms in the building and in neighbouring dwellings are kept in the sun for a minimum of 1 ½ hours at the winter solstice (...). The term „sunning" is not defined by law, so it must be referred to the definition given by the Explanatory Dictionary of the Romanian Language, i.e.: ÎNSORÍRE, însoriri, n. The act of sunning and its result. – V. însori. ÎNSORÍ, însoresc, vb. IV. Refl. 1. To brighten; to make the sun appear. 2. To sit in the sun, bask or tan in the sun. – In + sun. Note that there is no distinction in the level of sunshine to be provided, so that one cannot speak of ‚full' or ‚complete' sunshine and ‚partial' sunshine, it being sufficient for a ray of sunlight to remain in the room for an hour and a half on the day of the winter solstice'.

[3] See e.g., the elements checked by the State Building Inspectorate – I.S.C., provided for in art. 8 of the 2022 State Control Procedure on compliance with the legal provisions when issuing construction/demolition permits approved by Order 310/2022 issued by the Ministry of Development, Public Works and Administration, published in M.Of. (Official Gazzette of Romania) 337 of 06.04.2022.

[4] See, by way of example, the case law of the national courts on this matter, as noted by the High Court of Cassation and Justice in its Decision No 74/2018 on a preliminary ruling for a preliminary ruling on questions of law relating to the issue of a building permit.

[5] See also M. Nicolae, Tratat de publicitate imobiliară (Treatise of Real Estate Publicity), ed. Universul Juridic, Bucureşti, 2011, pp, 815, 817.

[6] See Verginia Vedinaş, Drept administrativ. Curs universitar (Administrativ Law. University Course), Ed. Universul Juridic, Bucureşti, 2012, p. 112.

[7]regarding good faith, see, M.Dinu, Drept procesual civil, Ed.Hamangiu, 2020, p. 46, see also A.-M Axente, Curs de drept privat roman, Ed. Hamangiu, Bucureşti, 2022, p. 106

[8]See, M.C.Niţă, Designation of the Law Applicable to the Individual Employment Contract According to Regulation (EC) no. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), in Proceedings of the international conference of law, European Studies and International Relations, 11th Ed, May, 18-19 2023, pp. 273-285

THE EMPLOYMENT CONTRACT AND THE GOOD FAITH OF THE PARTIES UPON ITS CONCLUSION

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Abstract
Labour legislation includes an application and circumstantiation of civil law rules regarding good faith in pre-contractual negotiations. In addition, it also includes a number of special rules that specifically detail the content of the information obligation. This paper proposes an analysis of the good faith shown by the parties upon the conclusion of the employment contract and before this moment.
Keywords: *Goodfaith, employment contract, the obligation to inform*

1. Good Faith in the Context of Freedom of Employment

In the Labour Code, the principle of good faith is enshrined in Article 8(1), followed by its application provided in paragraph (2): „For the proper conduct of employment relationships, participants in employment relations shall inform and consult each other, under the conditions provided by law and collective labour agreements." The reciprocal obligation to inform therefore concerns both the employee and the employer, and it may even precede the conclusion of the contract, addressing their conduct during the pre-contractual negotiation period.

Within such negotiations, the starting point is the freedom of employment, an application of contractual freedom which, concerning the employee, entails the freedom to „choose the place of work and the profession, trade, or activity to be performed" (Article 3(2) of the Labour Code). Corresponding to this freedom is the employer's right to choose future employees, a right susceptible to abuse. Thus, selection must be made with the aim of identifying the most suitable candidate, without any „hidden agenda"; in other words, it must be conducted in good faith. The increasingly frequent use of artificial intelligence in this stage, especially in the form of recruitment algorithms, undoubtedly complicates the landscape of good faith conduct during the candidate selection phase.

Once the candidate or candidates for negotiation have been identified, the employer must demonstrate good faith in all interactions with the candidate, especially during the job interview. For example, the employer could not simulate the negotiation of an individual employment contract solely to induce a certain candidate to resign from their current job, without actually intending to hire them. This, moreover, constitutes an application of the provisions of Article 1.183(3) of the Civil Code, according to which „conduct initiating or continuing negotiations without the intention of concluding the contract is contrary to the requirements of good faith." Similarly, pre-contractual negotiations cannot be conducted solely to obtain information about the salary system and working conditions from the current employer.

Regarding the scenario of negotiations breaking down, bad faith does not concern the termination process itself [since the non-conclusion of the contract is always possible under Article 1183(1) of Civil Code], but rather the continuation of negotiations after a party has already decided not to conclude the contract. In other words, the cessation of negotiations

cannot in itself be considered bad faith, but rather the conduct of the party prior to this cessation. No one can be held accountable for their decision not to conclude a contract; however, damages can be claimed if negotiations continue despite the decision having been made, information not shared with the negotiating partner.

It can be argued that the party that no longer wishes or is no longer able to conclude the contract has a positive obligation to promptly inform the other party thereof. Article 1183 is violated by failing to fulfill this obligation, rather than by the subsequent breakdown of negotiations.

Alongside the application of these common law rules to the specific case of the individual employment contract, in labour law we encounter a series of specific legal norms that qualify the obligation to inform – a component of good faith – by indicating concretely the information that the parties must communicate to each other[1].

2. The Obligation to Inform upon Conclusion of the Employment Contract

In the Civil Code, there is no express provision that enshrines the pre-contractual obligation to inform. A certain reference to this obligation is however found in Article 1214(1) of the Civil Code. [2]: the text thus establishes the existence of this obligation, for the scenario where the contract has been concluded, wherein fraud can only be invoked if the omission of information occurred 'fraudulently.' However, beyond this provision, the obligation to inform is inferred from the construction of the principle of good faith, without being expressly mentioned, let alone specific information that the parties must communicate to each other being specified.

In labour law, things are quite different. Here:

- the obligation to inform is expressly established[3];

- the information that the employer must disclose to the candidate for employment is expressly listed by law [4];

- the extent to which the candidate for employment could have accessed this information through another means is irrelevant. In labour law, informational imbalance at the conclusion of the contract is presumed;

- failure to comply with the obligation to inform triggers the other party's right to compensation even if the contract has not been concluded[5];

- and the candidate for employment may even notify the control authorities (labour inspection) in case of omission of information.

The above should be viewed as derogations from common law; however, the latter applies in supplementation. On the one hand, fraud can be invoked in an employment contract

[1] For developments, see R. Dimitriu, *Bună credință și confidențialitate la negocierea contractului individual de muncă*, „In honorem Corneliu Bîrsan", Hamangiu Publishing House, 2023, vol. II, p. 628-649.

[2] „ Consent is vitiated by fraud when one party has been misled by the fraudulent maneuvers of the other party or when the latter has fraudulently omitted to inform the contracting party about circumstances that should have been disclosed.".

[3] Art. 17-19 of the Labour Code. For an analysis of the duty to inform, see Al. Athanasiu, A-M Vlăsceanu, *Dreptul muncii*, CH Beck Publishing House, 2017, p. 56 – 57

[4] Art. 17 (3) and art. 18 (1 (of the Labour Code.

[5] Art. 19 para. (3) of the Labour Code provides: „In the event that the employer fails to fulfill its obligation to inform (...), the person selected for employment or the employee, as the case may be, has the right to appeal to the competent court and to request compensation corresponding to the damage suffered as a result of the employer's failure to fulfill the obligation to inform".

by applying the provisions of Article 1214 of the Civil Code. And the obligation to inform will not only concern the aspects listed in Articles 17 and 18 but, as an element of good faith, also any other relevant information. Moreover, the enumeration is exemplificative („The person selected for employment or the employee, as applicable, shall be informed about at least the following elements..."). For example, an employer who fails to inform a prospective employee that the company is to be dissolved in the near future manifests bad faith. Such information could have led the employee not to enter into the employment contract; if they did, they may claim damages (for instance, if they gave up another job to work here, under the assumption that the employer knew the temporary nature of the newly concluded employment relationship).

Therefore, the obligation to inform primarily finds its basis in law, with the Labour Code regulating it expressly and thoroughly. In this case, it is not necessary to invoke the employer's bad faith, as their subjective attitude is practically irrelevant: it suffices to establish that they failed to fulfill a legal obligation, causing prejudice to the other party. Only as a supplement will the obligation to inform be interpreted in the context of common law, namely as an element of good faith in pre-contractual negotiations.

Regarding the content of the obligation to inform, according to Article 17(1) of the Labour Code, prior to concluding or modifying the individual employment contract, the employer is obligated to inform the person selected for employment or, as the case may be, the employee, about the essential clauses they intend to include or modify in the contract. The obligation to inform constitutes a concrete implementation in Romanian law of the provisions of Directive 2019/1152 of the European Parliament and of the Council on transparency and predictability of working conditions in the European Union[6].

According to Article 17(3) of the Labour Code, the employer has the obligation to inform the person selected for a position at least about the following elements:

a) the identity of the parties;

b) the workplace or, in the absence of a fixed workplace, the possibility for the employee to perform their activities in different workplaces, as well as whether the transportation between them is provided or reimbursed by the employer, as applicable;

c) the headquarters or, as the case may be, the domicile of the employer;

d) the position/occupation according to the Romanian Classification of Occupations or other normative acts, as well as the job description, specifying the duties of the position;

e) the criteria for evaluating the employee's professional activity applicable at the employer's level;

f) the specific risks of the position;

g) the date from which the contract is to take effect;

h) in the case of a fixed-term employment contract or a temporary employment contract, their duration;

i) the duration of the annual leave entitlement;

j) the conditions for giving notice by the contracting parties and its duration;

k) the base salary, other components of the salary, highlighted separately, the periodicity of payment to which the employee is entitled, and the method of payment;

[6] The Official Journal of the European Union, *L 186/105, 11.7.2019.*

l) the normal working hours, expressed in hours/day and/or hours/week, the conditions for performing and compensating or paying overtime hours, as well as, if applicable, the organization of work in shifts;

m) indication of the collective labour agreement regulating the employee's working conditions;

n) the duration and conditions of the probationary period, if any.

o) the procedures for using electronic signatures, advanced electronic signatures, and qualified electronic signatures.

p) the right and conditions regarding professional training provided by the employer;

q) the employer's coverage of private medical insurance, additional contributions to the employee's optional pension or occupational pension, as provided by law, as well as the provision, at the employer's initiative, of any other rights, when these constitute financial benefits granted or paid by the employer to the employee as a result of their professional activity, as applicable.

Article 17(4) provides that the elements of this information must also be included in the content of the individual employment contract, except for the information provided in points m), o), and p). The interpretation of Article 17 is not without difficulties.

Firstly, because, among pre-contractual information, the aspects listed in paragraph (3) are automatically transformed by paragraph (4) into contractual clauses. As a result, they become subject to negotiation, and any subsequent modification of them will need to be approved by both parties.[7] In other words, these pieces of information transition from the unilateral will of the employer into aspects subject to negotiation, dependent on the agreement of the employee. The legislator excluded the obligations provided in points m), o), and p) sensing their non-negotiable nature, however, did not exempt other elements, which, at the conclusion of the contract, will transform from preliminary information into contractual clauses. For instance, it is natural for the employer to inform the candidate about the evaluation criteria to be considered during the employment contract, but due to paragraph (4), these enter the actual content of the contract and cannot be modified without the employee's consent. The employer cannot modify their bonus policy either, as all constituent elements of salary are included among the preliminary information.

Therefore, it would have been more appropriate for paragraph (4) to be detached from paragraph (3), so that not all information provided by the employer automatically converts into contractual clauses. Indeed, some of the information included in paragraph (3) cannot be subject to negotiation due to their nature, such as the identity of the parties, the employer's headquarters/domicile, the applicable collective labour agreement, or even the specific risks of the position. Others may undergo changes between the time of informing and the conclusion of the contract, as a result of negotiations between the parties.

Hence, it would be useful, from a legislative standpoint, to provide a list of mandatory information that must be provided by the employer in the pre-contractual stage and, distinctly, a list of mandatory contractual clauses. Only the modification of the latter during the individual employment contract should depend on the employee's consent. The negotiation of contractual clauses should naturally be based on the information provided by the employer, while still maintaining the distinction between the unilateral nature of the information and the bilateral nature of the contractual clauses.

[7] Art. 41 (1): „The individual employment contract can only be modified by agreement of the parties".

Secondly, some of the elements of information listed in Article 17(3) are not present in all employment contracts. For example, if the contract is concluded for an indefinite period, its duration cannot be communicated. If the parties have not agreed on a probationary period, information on this subject cannot be part of the obligation to inform.

As we have shown, the list of information should be considered merely illustrative. Essential information for the future contract must also be communicated to the employee, as ruled by the Court of Justice of the European Union in Case C-350/99, Wolfgang Lange[8]. Moreover, even in the expression of the Romanian legislator, informing concerns „at least" the enumerated elements. If the employee is to carry out their activities abroad, a series of additional information must be communicated to them, namely:

a) the duration of the work period to be performed abroad;

b) the currency in which their salary rights will be paid, as well as the payment methods;

c) the cash and/or in-kind benefits related to carrying out activities abroad;

d) the climate conditions in the respective country;

e) the main regulations of the labour law in the respective country;

f) the local customs, non-compliance with which could endanger their life, freedom, or personal safety;

g) the conditions for the repatriation of the worker, as applicable.

During the negotiation of the individual employment contract, either party may be assisted by an external consultant specialized in labour law or by a representative of the union of which they are a member, according to their own choice. According to Law no. 213/2020, [9] which amended the Labour Code, external consultants can be lawyers, experts in labour law, or mediators specialized in labour law. In this pre-contractual stage, the candidate is not yet an employee, and thus (usually) not a member of a union; therefore, the possibility of assistance is generally limited for them to consultants specialized in labour law.

From the formulation of Article 8 paragraph (2) of the Labour Code, the reciprocal nature of the right to information and consultation is evident, it not being established as an exclusive right of the employees towards the employer, but as a mutual right and obligation. Indeed, as noted,[10] the obligation to inform is biunivocal; and the prospective employee is equally obligated to provide the employer with information regarding their competencies and abilities in the perspective of carrying out the activity. Naturally, the application of the principle of good faith will not be entirely symmetrical. For instance, it is not in bad faith for the employee to fail to inform the employer that she is pregnant, and therefore her employment contract is to be suspended. Conversely, the employer cannot inquire during the interview about the prospective employee's possible pregnancy, and, pursuant to Article 27 paragraph (4) of the Labour Code, pregnancy tests at the time of hiring are prohibited.

Once the employment contract is concluded, the fact that the candidate exercised their right to information cannot result in reprisals from the employer; for example, Article 59 letter c) of the Labour Code states that dismissing employees for such a reason is prohibited. If the

[8] ECLI:EU:C:2001:84. In this case, the employer had not communicated to the employee that he would be required to work overtime whenever requested (given that it is a legal system where overtime hours can be unilaterally imposed by the employer). For an analysis of the consequences of this jurisprudential solution, see S. Panainte, *Dreptul individual al muncii*, Hamangiu Publishing House, 2021, p. 82-83.

[9] Published in the 'Official Gazette of Romania', Part I, no. 893 dated September 30, 2020.

[10] Al Țiclea, *Buna credință – principiu al dreptului muncii*, in Romanian Labour Law Review, no. 11/2013, p. 20.

employee suspects that the real reason for dismissal is the exercise of the right to information, he may request the employer to provide, in writing, in addition to the general provisions regarding the content of the dismissal decision, the reasons on which it was based (Article 62 paragraph 4 of the Labour Code).

Beyond the cited texts, good faith would oblige the employer to communicate other information, perhaps even more relevant than some of those listed in the law. Thus, one very important piece of information, often overlooked, upon employment, concerns the manner in which the employer intends to use artificial intelligence in the execution of the employment relationship. Algorithmic management, a reality of the current labour organization system, can have a formidable impact on the employee and how he will effectively exercise his rights after the contract is concluded. Monitoring the employee through the use of artificial intelligence, the intensity of work (which, through the implementation of automated monitoring methods, has reached unprecedented levels today), tracking his online activity, the often intrusive methods of supervising his activity, or making automated decisions without establishing a right of recourse, challenge, or defense in relation to these decisions – deeply concerns current labour market analysts. And one of the first problems identified in practice is the lack of information for the candidate and, later, for the employee, regarding how artificial intelligence will be used in supervising his activity. Similarly, the algorithms used in his selection and recruitment are unknown to the candidate. These remain a „black box", inaccessible as a system, and of which the employee will only take note when he feels the effects of their use.

The consequences of digitization have been studied especially concerning work on digital platforms. Concerns expressed in legal literature and by practitioners have ultimately translated into a European directive project[11] aimed at „humanizing" the type of interaction of workers in this segment of the labour market and introducing some healthy presumptions regarding the nature of the contracts concluded by them. However, the reality is that even „standard" employees are affected by the explosion of artificial intelligence usage in the workplace. And this, I would emphasize, especially against the backdrop of a lack of information regarding how it is being used. In this context, I believe that the general obligation to inform – closely related to the principle of good faith at the conclusion of the employment contract – should include specific details about how direction, control, monitoring, and supervision of employees will be conducted, in the case (very likely) that this involves the use of artificial intelligence.

3. Confidentiality in the pre-contractual stage

The obligation of confidentiality in pre-contractual negotiations, enshrined in Article 1184 of the Civil Code, partially constitutes an application of the principle of good faith in the pre-contractual stage. According to this provision, „when confidential information is communicated by one party during negotiations, the other party is obliged not to disclose it or use it for its own benefit, regardless of whether the contract is concluded or not. Violation of this obligation entails the liability of the party at fault." Just as the premise of Article 1183 was the right of the parties to freely initiate, conduct, or terminate contractual negotiations, against which the legislator imposes some limitations, here too the premise is the right of a person to use the information they possess as they see fit. The limitation intervenes by

[11] Proposal for a Directive of the European Parliament and of the Council on improving working conditions for platform work, COM(2021) 762 final.

reference to the special situation in which the parties find themselves during the negotiation of the contract: often, negotiation itself is not possible without the provision of a set of confidential information. Protecting this information actually encourages negotiation and contract conclusion, as otherwise, the parties would exhibit excessive reluctance. The stage preceding the conclusion of the employment contract is „pre-contractual" in relation to it, but it may include the conclusion of contracts separate from the employment contract, such as the confidentiality agreement[12].

According to the Labour Code, regarding the information provided prior to the conclusion of the individual employment contract or during its execution, including during the conciliation process, a confidentiality agreement may be entered into between the parties. The obligation of confidentiality stipulated in such a contract removes the liability for the disclosure of confidential information provided from the realm of tort liability. The disclosure of confidential information, acquired by any of the parties (most commonly the job candidate), will entail contractual liability of the debtor of this obligation, not based on the employment contract, but pursuant to this autonomous confidentiality contract.

Thus, Article 17 paragraph (7) of the Labour Code provides for the possibility of concluding a confidentiality agreement regarding the information provided prior to the conclusion of the individual employment contract. Such a contract has a civil nature,[13] as the individual employment contract has not yet been concluded between the parties. However, even if such a contract has not been concluded, the obligation of confidentiality arises from the provisions of common law contained in Article 1.184 of the Civil Code.

For the application of Article 1.184, the following conditions must be met simultaneously:

- The information must be of a confidential nature. Information that is already public or has a certain degree of publicity is not eligible for protection. Additionally, the confidentiality of information ends when the interest of the other party loses legitimacy. For example, if one party becomes aware during negotiations of a breach of the law committed by the other party, the disclosure of this information will not entitle them to compensation (Whistleblowers are protected);

- The information must be communicated during negotiations with an express or implicit mention of its confidential nature. To the extent that the confidential nature of the information has not been expressly communicated by the other party, it is necessary to prove that for a reasonable person such a character would have been apparent. It must either arise from the nature of the information itself (for example, the proposed salary) or from the circumstances of Its communica"Ion.'However, given the difficulty of proving confidentiality in the absence of an express mention, it has been argued that the holder of the confidential information should be diligent and mitigate this difficulty by communicating the Information In easily provable forms, such as documents with the mention „confidential" or equivalent warnings[14];

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[12] See, with reference to civil law, M. Floare, *Buna și reaua-credință în negocierea și executarea contractelor de drept comun*, Universul Juridic Publishing House, Bucharest, 2015, p. 165.

[13] F. Roșioru, *Dreptul individual al muncii*, Universul Juridic Publishing House, 2017, p. 314. The author adds that nothing prevents the conclusion of a confidentiality agreement with third parties who attend pre-contractual negotiations.

[14] R. Dincă, *Protecţia secretului comercial în dreptul privat*, Universul Juridic Publishing House, Bucharest, 2009, p. 496.

- The use of information obtained in this way must be for a purpose outside the conclusion of the contract (for the benefit of a third party or for one's own interest). However, it is generally legitimate to use them during the negotiation of the contract itself.

As stated, [15] the norm contained in Article 1184 of the Civil Code is not – unlike that in Article 1183 – of public order; in other words, the parties may condition and even remove the content of the confidentiality obligation through this pre-contractual agreement.

Regarding the compensation due in case of disclosure of information received confidentially from the other party during the negotiation of the contract, we note that the Romanian text of civil law does not include here the benefit obtained through the disclosure of information,[16] limiting itself to covering the damages thus caused.

Previously, Article 19 of the Labour Code provided that the person selected for employment or the employee, as the case may be, has the right to bring to the competent court within 30 days from the date of non-fulfillment of this obligation, and to request corresponding compensation for the damage suffered as a result of the employer's failure to inform. The text has been criticized in legal literature, arguing that the term is unreasonably short and does not start, as would have been appropriate, from the date the candidate/employee became aware of the damage caused by the non-disclosure of information. [17] After the amendment of the Labour Code by Law no. 283/2022,[18] the text (now Article 19 paragraph (3)) eliminated any express term, thus common law becoming applicable again.

4. Conclusions

The labour legislation encompasses both an application and a refinement of common law rules regarding good faith in pre-contractual negotiations. However, it also includes a series of special norms that detail the content of the obligation to inform, particularly in the context of labour relations. Compared to civil law, the pre-contractual stage is much more extensively regulated in labour law; here, the parties (especially the employer) have legally established obligations to fulfill that go beyond simply prohibiting bad faith negotiation breakdowns, extending to the smallest details regarding recruitment and selection policies. In other words, labour law regulates the individual employment contract, but extends its jurisdiction even before its finalization, stepping back to the very inception of the contract, before the offer has even met acceptance.

Thus, the obligations that the employer must make available to the candidate are enumerated. The legislator emphasizes: all this information becomes clauses of the future individual employment contract. Essentially, information can be protected through confidentiality clauses, but the category of whistleblowers is exempted from the obligation of non-disclosure, as long as they have the right to report information regarding actual or potential law violations, including reasonable suspicions, within public institutions or private companies.

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[15] B. Oglindă, *Dreptul afacerilor*, Universul Juridic Publishing House, Bucharest, 2012, pp. 175-176.

[16] In this respect, see N. Turcu, *Noul Cod civil, Legea nr. 287/2009*, C.H. Beck Publishing House, Bucharest, 2011, p. 19.

[17] F. Roșioru, *op. cit*., p. 318.

[18] The law amending and completing Law no. 53/2003 – the Labour Code, as well as Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the „Official Gazette of Romania", Part I, no. 1013 from October 19, 2022.

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GOOD – FAITH OF PUBLIC AUTHORITIES IN THE INTERPRETATION AND APPLICATION OF LEGAL RULES

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Abstract

Carrying on research that aimed at the concept of constitutional loyalty, the present study analyses the conduct of public authorities in the interpretation and application of legal rules, subject to the concept of good faith. The separate mention of the principles of good faith and constitutional loyalty in relation to the conduct of public authorities in the constitutional reasoning would imply a clarification regarding the effects of violating these principles. Since the violation of good faith, i.e. bad faith in the interpretation and application of the constitutional rules, seems an „aggravating factor" of the lack of constitutional loyalty, which finds a definite sanction of constitutional rank as regards the conduct of magistrates, in a future revision of the Constitution a separate debate could refer to the effects of finding an infringement of the constitutional obligation of good faith by the public authorities.

Keywords*: Good faith, bad faith, constitutional loyalty, public authorities*

I. Introduction

Good faith is a fundamental value which can be put at the foundation of the entire legal order in any legal system (Kotzur, M, (2012), 508). The Constitution of Romania expressly enshrines it in Article 11 (1), which obliges the Romanian State to fulfil „*as such and in good faith its obligations as deriving from the treaties it is a party to*" and in Article 57, which obliges Romanian citizens, foreign citizens, and stateless persons „*to exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and liberties of others*". However, good faith is not limited to the scope of defining the relationships between the national and international legal order or/and the exercise of fundamental rights and freedoms. The universality of this value was emphasized by the Constitutional Court of Romania (CCR) since its very first decisions, where it noted that „*good faith was brought by the Constitution to the level of constitutional categories, thus imposing itself on all legal subjects and all legal relationships, regardless of their nature"* (CCR Decision No 2/1995, Official Gazette no. 5 of 13 January 1995) In this light, good faith can be considered an implicit constitutional principle, in terms of which all legal relationships and the conduct of the legal subjects, both individual and collective, can be judged. Furthermore, Article 52 (3) of the Constitution regulates the liability of the magistrates „*who exercised their mandate in bad faith or grave negligence*", which implies the obligation to carry out in good faith the activities specific to the judicial authority.

However, if in terms of individual legal subjects, both the doctrine and the case law are full of embodiments and analyses, in terms of collective legal subjects and, above all, public authorities, the subject is less approached. Another related concept, with a more recent development and without an express enshrinement in the Constitution, has benefited from

more attention in this regard, namely „constitutional loyalty". Thus, in the present study, continuing the research that aimed at the concept of constitutional loyalty (Safta, M (2013)), we will focus on the conduct of public authorities in the interpretation and application of the legal rules, subject to the concept of good faith, usually mentioned by the CCR in conjunction or in the context of invoking constitutional loyalty.

II. **Terminological examinations. Good faith and the constitutional normative order**

Etymologically, the concept of good faith has Latin origins. The expression „bona fides" combines the adjective „bonus" – good, with the meaning of good man, honest man, virtuous man and the noun „fides" – faith, trust, honour.

In a general definition (DEX), good faith means „the obligation of correct conduct that the parties must respect when concluding and fulfilling contracts or, in the case of States, treaties" and, in a more general meaning, „one's conviction that (s)he is acting under a right and according to the law or what is proper."

As for the legal definition, examining the case law of the CCR we find that the constitutional court had the opportunity to emphasize rather the meaning of the opposite concept, namely that of bad faith. Thus, the Court ruled that, according to the Explanatory Dictionary of the Romanian language, the phrase „bad faith" has the meaning of incorrect, dishonest attitude (Decision No 439/2016, Official Gazette, no. 877 of 2 November 2016). Likewise, the Court observed that in the doctrine it was noted that, in common language, several meanings are assigned to the antithesis of bad faith, namely: obligation of correct conduct that the parties must respect when concluding and fulfilling conventions; one's conviction that s/he is acting under a right and according to the law or what is proper; sincerity, honesty, honour. In this light, the Court emphasized the „notable ethical nature of the rules that govern the two concepts in opposition", bad faith can be qualified as that attitude of a person who commits a fact or an act in violation of the law or other norms of social coexistence, fully aware of the illegal nature of his/her conduct (Decision No 447/2021, Official Gazette no.1130 of 26 November 2021). Further, the Court held that the exercise by a person of a right recognized by law cannot justify, by itself, a presumption of bad faith. (Decision No 73/1995, Official Gazette no. 177 of 8 August 1995).

In the equation of the legal definition of good faith, another concept characterized by the CCR in its case law is noteworthy, in our opinion, namely that of „constitutional normative order", together with that of „constitutional loyalty", already mentioned. In this regard, the CCR clarified that „respect for the rule of law (...) implies, on the part of public authorities, constitutional behaviours and practices originating in the constitutional normative order, seen as a set of principles that establish the social, political and legal relationships of a society. In other words, this constitutional normative order has a wider meaning than the positive rules decreed by the legislator, establishing the specific constitutional culture of a national community." (Decision No 611/2017, Official Gazette no. 877/2017). Similarly, the CCR held that the constitutional normative order also aims at „respect for a Constitution" which „cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for State institutions, sets out their powers and their obligations. The purpose of these provisions is to enable a smooth functioning of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, the Judiciary, all serve the common purpose of

furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the office holder. Even if an institution is in a situation of power, when it is able to influence other state institutions, it has to do so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority." (Decision No 70/2023, Official Gazette no.211 of 14 March 2023)

Therefore, examining the case law of the CCR, we note the close correlation between legal categories such as „constitutional normative order", „constitutional loyalty", „good faith". What „good faith" seems to distinguish in relation to these concepts alongside which it is invoked when the conduct of public authorities is in question is, or should be, the ethical, psychological component. The distinctions are fine and difficult to achieve as long as we are referring to collective legal subjects. As a result, the invocation of good faith apart from the constitutional loyalty regarding them naturally raises questions concerning the differences in nuance and/or the legal consequences of identifying, in fact, the violation of the obligation of good faith and its legal effects.

III. **Jurisprudential landmarks**

1. **Parliament and good faith in the interpretation and application of the legal rules**

As for the activity of parliamentarians, the obligation of good faith is expressly enshrined in Article 11 of Law No 96/2006 on the Statute of Deputies and Senators, with the marginal title *Principle of legality and good faith*, a text that obliges to „*fulfil the mandate in good faith*".

Transgressing this obligation which lies with each parliamentarian to the activity of the Parliament as a whole, the CCR held that «both in the legislative process and in the activity of control of Government or in carrying out the other constitutional powers, parliamentarians, in their official capacity are, according to Article 69 (1) of the Basic Law, „in the service of the people". (…). Parliamentary debate of important issues of the nation must ensure observance of the supreme values enshrined in the Basic Law, as well as the rule of law, political pluralism and constitutional democracy. This is why the Constitutional Court considers it necessary to exercise in good faith constitutional rights and obligations both by the parliamentary majority and by the minority and cultivation of conduct of political dialogue that does not *a priori* exclude consensus even if motivations are different, when the interests of the nation are at stake. » (Decision No 209/2012, Official Gazette no. 188 of 22 March 2012) In this context, good faith seems to overlap with constitutional loyalty, focused on respect for the Constitution, in its letter and spirit.

A more expressive meaning, but without a clear embodiment/definition of good faith in relation to constitutional loyalty seems to be apparent from a number of decisions in which the CCR refers to the principle of parliamentary autonomy stating that it represents „the expression of the rule of law, of democratic principles and can operate only within the limits set by the Basic Law. Statutory autonomy cannot be exercised discretionary, abusively, in breach of the constitutional power of the Parliament or of the imperative rules regarding the parliamentary procedure. Regulatory standards are legal instruments that allow parliamentary activities in order to meet the constitutional powers of the legislative forum and must be

interpreted and applied in good faith and in the spirit of loyalty to the Basic Law." (Decision No 209/2012, cited)

Embodying the application in good faith of the principle of statutory autonomy in another decision, the CCR held that „although Parliament as a whole and each of its two Chambers enjoy full autonomy in determining the legal rules that govern their organization and functioning, through its own resolutions or special laws that govern the way in which powers of Parliament are carried out, the interpretation and application of the statutory and legal norms which establish such procedural rules must always be carried out in good faith, in the spirit of loyal conduct to the Basic Law. Otherwise, the result would be blocking the activity of the institution, in terms of meeting constitutional powers, with negative consequences for democratic structures on which the State is based upon." (Decision No 428/2021, Official Gazette no. 616 of 23 June 2021) It follows from the same decision that it represents a behaviour contrary to the good faith to „combine legal provisions whose incidence is determined by meeting distinct and mutually exclusive conditions" that led to „an erroneous interpretation of the legal rules regarding the procedure for appointing a new Board of Directors of the Romanian Broadcasting Society" (Decision No 428/2021, cited). This finding led to the admission of the referral of unconstitutionality and the finding that the Decision of the Parliament no. 32/2021 regarding the appointment of the interim general manager of the Romanian Broadcasting Company is unconstitutional. (Decision No 428/2021, cited)

Likewise, good faith appears as a requirement for carrying out parliamentary scrutiny through the mechanism of the motion of censure, but again without a clear specification of specific differences in the legal regime. Analysing in this regard, for example, the criticisms related to the submission of a motion of censure outside the ordinary parliamentary session and establishing that „no constitutional provision prohibits the submission of a motion of censure outside the ordinary sessions", the CCR held that the issue regarding the variable nature of the number of extraordinary sessions that can be convened arises, which consequently multiplies the number of the motions of censure that can be submitted. In this regard, with reference to its case law in the matter (Decision No 611/2017, Official Gazette no. 877 of 07 November 2017), the CCR emphasized the role of contributing to the configuration of the principle of loyal cooperation and mutual respect which lied with the institutions/authorities in the position to cooperate: „these must shape/structure the possible forms that a loyal conduct can take considering the legal competences of each of the cooperating institutions/authorities and considering the constitutional values and principles implied by the respective cooperation. Cooperation must take the forms set by law, and where the law is silent, public authorities must identify and establish, in good faith, those forms of cooperation that value the constitutional normative order and do not affect the constitutional principles under which they operate and cooperate or the fundamental rights and freedoms of the citizens in whose service they conduct their activity. Good faith must therefore be manifested in order to find solutions to overcome possible institutional deadlocks and to ensure the efficient functioning of each authority, in accordance with the powers assigned by law. If the identification of these good practices is difficult to achieve and the settlement of the interinstitutional disputes fails, the public authorities have the possibility to resort to the constitutional mediation instruments, respectively to the procedure for settling legal conflicts of a constitutional nature, provided by Article 146 (e) of the Constitution, which aims at restoring the constitutional normative order, by interpreting the applicable norms of the Basic Law and by establishing concrete landmarks of loyal conduct towards the constitutional

values and principles." Thus, defining the relationships between the authorities, the CCR concluded that „the submission of the motion of censure within the convened extraordinary sessions must be carried out in good faith in the spirit of the constitutional rules, so as not to alter the very reasoning of this instrument for carrying out the parliamentary scrutiny." (Decision No 609/2020, Official Gazette no. 980 of 23 October 2020) Consequently, we would conclude that the exercise of parliamentary scrutiny contrary to good faith would involve an intentional bullying conduct, likely to distort the role of this constitutional instrument.

According to the CCR, the parliamentary scrutiny is subject to the same obligations, since „the regulatory standards are legal instruments that allow parliamentary activities to be carried out in order to meet the constitutional powers of the legislative forum and they must be interpreted and applied in good faith and in the spirit of loyalty to the Basic Law (Decision No 209/2012, Official Gazette no. 188 of 22 March 2012, Decision No 261/ 2015, Official Gazette no. 260 of 17 April 2015, or Decision No 293/2016, Official Gazette no. 425 of 6 June 2016), therefore, also as a jurisprudential development of the provisions of Article 1 (5) of the Constitution. Under these conditions, the Court found that parliamentary scrutiny should not be isolated from the constitutional principle of loyal cooperation between the State institutions and authorities and from that of loyalty to the Constitution, but in conjunction and correlated with them. Therefore, it is obvious that the representatives of the institutions must cooperate in carrying out the parliamentary scrutiny and the principle of balance between the powers of the State is realized". (Decision No 416/2019, Official Gazette no. 605 of 23 July 2019). This reasoning can lead to the conclusion that the CCR considers both the concept of good faith and that of constitutional loyalty as being based on the provisions of Article 1 (5) of the Constitution regarding the general obligation to respect the Constitution and the laws.

2. **The President of Romania, the candidate for the office of Prime Minister and good faith in the interpretation and application of legal rules**

Perhaps the most representative decision (Decision No 85/2020, Official Gazette no. 195 of 11 March 2020) for the harnessing of good faith in the constitutional reasoning, in terms of sanctioning the intention that appears in the conduct of the public authorities, is the one by which the CCR found a legal dispute between the Parliament and the President in a procedure for the investiture of the Government.

Thus, regarding the obligations of the parties during such consultations, the Court emphasized the importance of a „real inter-institutional dialogue of the persons representing the respective institutions", showing that „the entire institutional conduct must reflect the interpretation in good faith of the relevant constitutional and legal principles and rules. It must be applied by the public authorities, and not just stated, on a theoretical and formal level, by them." Likewise, the CCR stated that the consultation of the political parties by the President of Romania, in view of designating the candidate for the office of Prime Minister, is not a formal act, but it must be carried out in a sincere and responsible manner, so that it exists the certainty that the person designated by the President following the consultation will succeed in obtaining the support of the majority of parliamentarians, therefore, the vote of confidence for the new Government. The consultation to which the constitutional rules refer is not an act of courtesy, it is not a simple exchange of opinions, but a real and responsible dialogue, which takes important effects in the economy of the procedure set forth by Article 103 (1) of the Constitution, in the sense that it objectively represents the foundation for the President's

assessment and decision to designate the Prime Minister. In order to achieve the purpose for which this procedure was established, the appointment of the candidate for the office of Prime Minister must be based on the conviction of the President of Romania that the designated person will be able to coagulate a parliamentary majority in view of the investiture of the Government, based on objective elements arising, on the one hand, from the consultations with the parliamentary political parties, and, on the other hand, from the political composition and acts of the Parliament (Decision No 85/2020, cited).

It can be noted the harnessing in the constitutional reasoning of certain psychological, volitional elements (responsibility, conviction) as well as the sanctioning of the intentional use of a constitutional procedure contrary to the purpose for which it was established (not for the investiture of the Government but for the refusal of the investiture of the Government), the intention arising from the statements of the actors involved. Thus, the CCR notes that „the entire set of acts/facts/statements of the President of Romania proves the distortion of the natural meaning of the constitutional rules regarding the appointment of a candidate for the office of prime minister, the fact that there was not even the intention of appointing a candidate who would obtain the vote of confidence of the Parliament, but rather that there was an intention not to obtain it, as well as, in this light, an antagonistic positioning of the President in relation to the Parliament, in breach of the obligation of constitutional loyalty that governs the interpretation and application of the Constitution and the relationships between the public authorities of constitutional rank, which consequently results in a legal dispute of a constitutional nature between the President of Romania and the Parliament."

Based on this finding supported by extensive legal reasoning, the CCR allowed the requests made by the president of the Chamber of Deputies and the president of the Senate and found the existence of a legal dispute of a constitutional nature between the President of Romania and the Parliament of Romania, concerning the designation by the President of Romania of the candidate Ludovic Orban for the office of Prime Minister by Decree No 82/2020, published in the Official Gazette of Romania, Part I, no. 88 of 6 February 2020. The Court established that in carrying out the power provided for in Article 103 (1) of the Constitution, the President of Romania shall make a new designation as to the candidate for the office of Prime Minister.

3. Courts of law and good faith in the interpretation and application of legal norms

If with regard to other public authorities the dichotomy of good-bad faith has no express enshrinement in the Constitution and no clear delimitation (in relation to other related concepts) in the constitutional case law, with regard to the courts of law the Constitution comprises distinct rules to which provides clear legal effects. Thus, carrying out in bad faith of the office by the magistrates results in their material liability. Given the drastic sanction and of constitutional rank, the definition of bad faith has been a challenge for the Romanian legislator and lively debates in various environments in the recent years. Without analysis these debates, which can constitute, in itself, a distinct research topic, we will only quote the current legal definition of bad faith, which is likely to provide guidance regarding the distinct legal regime of good faith in the conduct of the public authorities. Thus, pursuant to Article 272 (1) of Law No 303/2022 regarding the status of judges and prosecutors, it establishes that „*Bad faith exists when the judge or prosecutor knowingly violates the rules of material or procedural law, pursuing or accepting the injury of a person*."

IV. **Conclusions**

The brief examination of case law is just an introduction to the subject covered. Certain preliminary conclusions could form the support for extended research.

Thus, it is obvious that the obligation of good faith is equally incumbent not only on the Parliament, the President and the courts of law, but also on the State and other authorities, in which sense the CCR held, for example, in a case „that it is the role and obligation of the State to submit all the diligence for the achievement and fulfilment of the legal obligations provided by the law, through its authorities that have general competence regarding the administration of fiscal receivables and the exercise of control over them, and not to remain passive regarding the establishment and individualization of the fiscal obligations owed by taxpayer to the State budget, to act with loyalty and good faith, in order to meet the requirements of the law, aspects which are valid for all the authorities involved in carrying out procedures in fiscal, criminal and insolvency matters that have an impact on the case. (Decision No 303/2021, Official Gazette no.1107 of 22.11.2021, see also Decision No 534 of 2 July 2020, Official Gazette of Romania, no. 1.172 of 3 December 2020, paragraph 27, or Decision No 471 of 17 September 2019, Official Gazette of Romania, Part I, no. 991 of 10 December 2019, paragraph 27)

It is difficult to achieve, at least based on the case law of the CCR in the recent years, a clear delimitation between good faith and constitutional loyalty of the public authorities. Both good faith and constitutional loyalty mean respect for the Constitution in both its letter and spirit. However, it could be stated that constitutional loyalty entails more of a constructive, proactive attitude of interpreting the Constitution as a homogeneous whole, without gaps, but also of refraining in the sense of avoiding disputes between authorities. Good faith seems to refer more to a destructive attitude and its sanction, in the sense of attitude/action intended to interpret and apply the Constitution and the law in general contrary to its meaning, pursuing a goal contrary to constitutional principles and values. In any case, the separate mention of the two values would still require a clearer delimitation or jurisprudential clarification, in order not to give the impression of redundancy or lack of consistency of the constitutional reasoning.

Similarly, the distinct mention of the principles of good faith and constitutional loyalty in relation to the conduct of public authorities would entails a clarification regarding the effects of violating these principles. Violation of good faith, i.e. bad faith in the interpretation and application of constitutional rules seems to be an „aggravator" of the lack of constitutional loyalty, which finds a definite sanction of constitutional rank regarding the conduct of magistrates. Isn't bad faith just as serious in the case of other public authorities when they act, as a whole, intentionally, against the letter and spirit of the Constitution? Perhaps in a future revision of the Constitution a separate debate could aim at the effects of finding a breach of the constitutional duty of good faith by public authorities. Given the ethical/psychological element, would this entail more than the unconstitutionality of acts/deeds committed in bad faith? For example, could the violation of the obligation of good faith represent a serious act of violation of the Constitution with express sanctions of constitutional rank?

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CCR Decision No 447/2021, Official Gazette no. 1130 of 26 November 2021
CCR Decision No 70/2023, Official Gazette no. 211 of 14 March 2023

SOME CONSIDERATIONS ON ABUSE OF RIGHTS IN CIVIL AND CIVIL PROCEDURAL MATTERS

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Abstract

Abuse of law has been and will remain an interesting challenge for both legal theorists and practitioners. The boundary between good faith and bad faith in the exercise of a right is a „thin, relative" and sometimes difficult to identify. Abuse of rights in fact challenges the answer to two questions: (1) its identification and the legal mechanisms for establishing the existence of abuse of rights and (2) the sanctioning of abuse of rights and the effects of these sanctions. This problem has led us to address a number of issues in this legal area, without claiming to be exhaustive.

Keywords: *abuse of rights, good faith, bad faith*

I. Introductory aspects

From a doctrinal perspective, abuse of rights in civil matters is analysed on two different levels: (1) abuse of civil law and (2) abuse of civil procedural law. This 'split' may be accepted for theoretical reasons and for reasons of teaching/understanding the two concepts, but in practice the two concepts do not necessarily require a strict demarcation.

It is obvious and we do not dispute the fact that abuse of civil law and abuse of civil procedural law are two different institutions which have common elements but also differences. On the other hand, in the practical application of the law, the incidence of an abuse of rights also implies, in many cases, the incidence of an abuse of procedural rights, which justifies a joint analysis of them. This conclusion is also warranted by the close correlation between the subjective civil right and the rule of civil procedure, which protects this substantive right when it is not respected voluntarily. Moreover, the civil process is an activity carried out by the court, the parties, the enforcement bodies and other persons or bodies participating in the dispensation of justice in civil matters by the courts[1].

II. The concept of abuse of rights

The analysis of abuse of rights implies reference to the concept of „good faith", i.e. the good faith exercise of a subjective civil right or civil procedural right. According to Article 57 of the Romanian Constitution, Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others. Thus, good faith (bona fides) becomes a constitutional rule, an aspect also enshrined in the jurisprudence of the Constitutional Court of Romania: „good faith was raised by the Constitution to the level of constitutional categories, thus imposing it on all subjects of law and all legal relationships, regardless of their nature. This is why the judiciary

[1] V.M. Ciobanu, Theoretical and practical treatise on civil procedure. General theory, vol. I, National Publishing House, Bucharest 1997, p. 148.

and, of course, the constitutional judiciary as well, is obliged to take it into account in judging any proceedings"[2].

On the basis of this constitutional rule, it has been pointed out in doctrine[3] that abuse of rights „can be considered a veritable legal antonym of good faith", in the sense given by the Constitutional Court: „the abusive exercise of a right occurs only when the right is exercised for a purpose other than that for which the law recognised it"[4]. Although the principle of the exercise of a right in good faith is enshrined in the Constitution, the author concludes that „abuse of a right remains an indeterminate legal concept, lacking a legal definition, identified eminently by case-by-case means". As far as we are concerned, we agree with this conclusion, but we consider that this „conceptual indeterminacy" is imposed, as we shall show in this material, by the difficulty of establishing in concrete terms the factual situation proving that a person has exercised a right in bad faith.

The constitutional rule referred to in Article 57 of the Constitution is taken up both in the Civil Code and in the Code of Civil Procedure.

Thus, Article 15 NCC provides that no right may be exercised with the aim of injuring or harming another or in an excessive and unreasonable manner contrary to good faith, and Article 14 of the same normative act states that any natural or legal person must exercise his rights and perform his civil obligations in good faith, in accordance with public policy and good morals, good faith being presumed until proven otherwise.

From a civil law perspective, the concept of good faith is also seen, inter alia, „as a psychological state of an individual legal subject" which manifests itself in the form of refraining from causing any harm in the performance of obligations and contracts[5]. At the same time, by reference to Article 14(1)(a) of the EC Treaty, it is clear that the concept of „the right to a fair hearing" is not a matter of „the right of defence". 2 NCC, it is clear that the legislator has established a relative legal presumption which can be overturned by any means of evidence, including simple presumptions.

Based on the postulate of good faith, the abuse of a civil right takes the form of the bad faith exercise of a subjective civil right in order to harm or damage another subject of the right, by diverting the right from its economic and social purpose (violation of internal limits)[6].

In the case law of the Supreme Court, it has been held that „abuse of rights is qualified as a wrongful act, committed with guilt, and liability for abuse of rights is nothing other than a particular form of manifestation of tort liability, so that it cannot be engaged in the absence of guilt, damage caused to another person and the causal link between them"[7].

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[2] Dec. CCR no. 2/1995 and Dec. CCR no. 146/1999.

[3] S.E. Tănăsescu, The Constitution of Romania. Commentary on articles, Publishing House C.H. Beck, Bucharest 2008, p. 564.

[4] Dec. CCR no. 73/1995.

[5] P. Perju, The New Civil Code. Commentary on articles, Publishing House C.H. Beck, Bucharest 2012, p. 14; the abuse of contractual law can be manifested by exercising a contractual right in an excessive and unreasonable manner or with the intention of prejudicing the contractual partner, which can be characterized as a manifestation contrary to good faith, including the abusive use of the right to request or declare the resolution of an agreement – Summary decision no. 1966/2022 of 20-oct-2022, High Court of Cassation and Justice Bucharest, sintact.ro.

[6] The abuse of law does not mean exceeding the material and legal external limits of the respective right, a hypothesis in which we would be the presence of a legal act committed without right – G. Boroi, C. A. Anghelescu, I. Nicolae, Civil law files. General part, 7th Edition, Hamangiu Publishing House, Bucharest 2022, p. 25.

[7] High Court of Cassation and Justice, Second Civil Section, Decision no. 705 of March 7, 2018, sintact.ro.

With regard to the Code of Civil Procedure, Article 12(2)(b) of the Civil Procedure Code states that 1 of the Civil Procedure Code provides that procedural rights must be exercised in good faith, in accordance with the purpose for which they are recognised by law and without infringing the procedural rights of the other party. Similar to the civil regulation, in the procedural field, the rule is the same: whoever diverts the procedural right from the purpose for which it was recognised and exercises it in bad faith or in violation of the procedural rights of another party commits an abuse of procedural rights[8].

Based on the concept of the exercise of rights in good faith, enshrined as such at constitutional and legal level, it can be said that abuse of rights does not fall within the area of „unlawful" or „unlawful", but remains within the realm of a legal right, recognised by law, a right which is diverted from its economic and social purpose. Although the abusive exercise of a right in bad faith is prohibited by law, the abuse of a right will always be based on a legally recognised right which is exercised within its external limits, but for which another purpose is pursued. Consequently, misappropriation of the purpose of the right is punishable by law and constitutes an unlawful act. Obviously, if the party exercises a right which is not recognised by law, there is no abuse of right, but there will be an „illegal" or „unlawful" situation which is not protected by the text of the law and is not permitted to the subject of the right.

III. Elements of abuse of rights

Whether we look at abuse of civil law or abuse of civil procedural law, its structure is similar. Thus, abuse of rights always involves two elements: (1) the subjective element, i.e. the exercise in bad faith for the purpose of mischief[9], and (2) the objective element, i.e. the misappropriation of the right from its legal purpose.

On the basis of these constituent elements, the doctrine[10] has set out the conditions necessary to establish whether there is abuse of rights in a specific case, conditions which are identical in both civil and civil procedural law: (1) there must be a right (civil or procedural subjective) – which presupposes compliance with the external limits of the right; (2) the author must be the holder of the right in question and capable of exercising it; (3) the right must be directed towards the achievement of a purpose other than that for which it was recognised by law; and (4) the right must be exercised in bad faith.

In view of these elements and conditions, the question arises as to whether abuse of rights can be established, i.e. the conditions under which such a finding can be made and who could establish such a situation.

With regard to abuse of procedural rights, it has been stated[11] that it is for the courts to assess whether procedural rights have been exercised improperly, in the sense that, depending on the circumstances of the case, the judge will make this determination by showing what elements have enabled him to conclude that a right has been exercised improperly. It is also suggested that, in civil matters, the court should intervene to remedy the bad faith exercise[12].

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[8] V.M. Ciobanu, New Civil Procedure Code commented and annotated, vol. I, Second Edition, Universul Juridic Publishing House 2016, p. 34.

[9] V.M. Ciobanu, T.C. Briciu, C.C. Dinu, Civil procedural law, Basic course for the license, seminars and exams, Universul Juridic Publishing House, Bucharest 2023, p. 202.

[10] V.M. Ciobanu, Treaty..., *op. cit*., p. 321.

[11] V.M. Ciobanu, The Code..., *op. cit*., p. 35-36.

[12] G. Boroi, C. A. Anghelescu, I. Nicolae, *op. cit*., p. 26.

For our part, we believe that, in addition to the court's power to find and punish abuse of rights, the parties to the civil circuit may also, if there is an expressed will to do so, establish the incidence of abuse of rights and may proceed accordingly to remedy it, as long as there are rights at their disposal.

We consider that the existence of an abuse of rights (civil or procedural) is not necessarily conditional on the existence of an express legal provision to that effect. The basic rules laid down in art. 57 of the Constitution, art. 15 NCC and art. 12 NCPC supplemented by the complementary requirements that the doctrine has established are sufficient to decide one way or the other[13]. However, there are situations regulated by law which, although they fall within the pattern of abuse of rights, are permitted by law and thus not sanctioned. In these cases, a legal provision is mandatory to remove the existence of abuse of rights. For example, the Civil Code provides for several situations in which rights are allowed which can be exercised at will, which excludes abusive exercise: art. 1051-1053 NCC[14] which covers voluntary revocation of wills (in both forms – express and tacit) and withdrawal of revocation, art. 1074-1075 NCC[15] which allows the right to disinherit legal heirs within the limits of the available share, art. 1100 NCC[16] which provides for the right of option of succession. It can be seen that, in these cases, whether these rights are exercised in good faith or in bad faith is irrelevant in terms of the existence and punishment of abuse of rights[17].

Sometimes, the legislator, in order to make it easier to establish the existence of abuse of rights and to punish it, has expressly regulated cases of abuse by referring, as a rule, to the concept of „bad faith" or „abusive". For example, in the Civil Code, we can list, without claiming to be exhaustive, the following cases of abuse of rights, expressly regulated: art. 582 NCC – autonomous works of a lasting nature carried out in bad faith, art. 897 NCC – effects of the action for a tabular benefit against the third party acquirer in bad faith, art. 1032 NCC – relative nullity of the gift made to the spouse in bad faith, art. 1119 NCC – forced acceptance, art. 959 lit. b NCC – judicial unworthiness, art. 948 para. 5 NCC – acquisition of fruits by

[13] For example, it has been established, without there being an express provision in this regard, that the formulation several times, within the insolvency procedure, of requests to refer to the Constitutional Court and to suspend the trial of the case, by the debtor and by those creditors who are either shareholders or former administrators of the debtor, takes the form of the abuse of procedural law – Trib. Bucharest, 7th commercial section, conclusion of December 12, 2006, sintact.ro.

[14] Art. 1051 NCC – (1) A will cannot be expressly revoked, in whole or in part, except by an authentic notarial act or by a subsequent will; Art. 1052 NCC – (1) The testator can revoke the holographic will also by destroying, breaking or erasing it. The deletion of a provision of the holographic will by the testator implies the revocation of that provision. The changes made by deletion are signed by the testator; Art. 1053 NCC – (1) The revocation provision can be expressly withdrawn by an authentic notarial deed or by will.

[15] Art. 1074 NCC – Disinheritance is the testamentary disposition by which the testator removes from the inheritance, in whole or in part, one or more of his legal heirs.

[16] Art. 1100 NCC – The person called to inherit under the law or the will of the deceased can accept the inheritance or renounce it.

[17] See, the same meaning, but nuanced: D. Chirică, Normative acts commented – A look at the New Civil Code. The preliminary title (II), Roman Pandectele 4 from 2011: „any rights are susceptible to abuse, whether it is the right to property or other real rights, or debt rights, or even power rights considered to be" discretionary rights", because these too can sometimes be exercised with the aim of harming or damaging another or in an excessive and unreasonable way. There are power rights that are really not susceptible to abuse, which must give the holder the opportunity to express himself in complete freedom, as is the case with the right to lift or not the option in the case of a unilateral promise to sell, the right to revoke a previous will, the right of a person to disinherit his non-reserved legal heirs or even the reserved ones within the limits of the available share of the inheritance, or the right of any co-divider to request the exit from the division at any time".

possession in good faith, Art. 269 para. 1 NCC – liability for breach of engagement, art. 378 para. 3 NCC – refusal of civil registrar or notary public, Art. 467 NCC – refusal of parents to give consent, Art. 641 para. 3 NCC – acts of administration and disposal, Art. 1353 – exercise of rights, Art. 1800 NCC – change of form or destination of the property and misuse.

The Code of Civil Procedure also contains a number of cases of abusive exercise of procedural rights, such as the cases under Art. 187 para. 1 NCPC – the introduction, in bad faith, of main, accessory, additional or incidental claims, as well as for the exercise of an appeal, manifestly unreasonable, the formulation, in bad faith, of a request for recusal or relocation, the obtaining, in bad faith, of the summons by publicity of any party, obtaining, in bad faith, by the plaintiff whose application has been rejected, protective measures by which the defendant has been defrauded, or contesting, in bad faith, the writing or signature of a document or the authenticity of an audio or video recording.

This way of expressly regulating cases of abuse of rights has several practical advantages, including: (1) the express indication of the case of abuse of rights and the way in which it is to be defined; (2) the determination of whether or not the right in question allows, from a legal point of view, a discretionary exercise by the holder; and (3) the specific determination of the sanction applicable to the case of abuse of rights.

IV. Sanctioning abuse of rights

Given that abuse of rights is, in principle, unlawful conduct, prohibited as such by law, it is only natural that there should be a corresponding sanction, which involves a multi-pronged approach.

First of all, especially from a practical point of view, the sanctioning of abuse of rights differs according to whether a subjective civil right or a procedural civil right is concerned, a distinction which is determined by the purpose of the two types of rights.

Secondly, within each category of abuse of rights (civil and civil procedural) the sanctions differ, i.e. they can be applied separately or cumulatively, as will be shown below.

In the case of abuse of civil law, it has been shown[18] that there can be three categories of sanctions: (1) general sanctions which in fact consist in the perpetrator's civil liability in tort, implying damage to property or moral damage; (2) special sanctions when they are expressly provided for by the special rule; and (3) the measure of cessation of the abusive exercise of the right ordered by the court seised.

With regard to these sanctions, we consider it useful to make a few comments. Thus, the existence of an abuse of rights is not always conditional on the occurrence of damage. For example, Article 641 para. 1 in relation to para. 3 NCC provides that acts of management, such as the conclusion or termination of leases, transfers of real estate income and the like, in relation to the common property may only be done with the consent of the co-owners who hold the majority of the shares. However, the co-owner or co-owners concerned may ask the court to substitute the consent of the co-owner who wrongfully opposes the performance of an act of management which is essential to maintain the usefulness or value of the property, which does not imply proof of damage triggering civil liability in this case.

At the same time, the sanctions applicable to the abuse of law (regardless of whether they are general or special) are based on the principle of repairing the damage caused: (1) the obligation to pay compensation – art. 269 NCC – the party who breaks the engagement

[18] G. Boroi, C. A. Anghelescu, I. Nicolae, *op. cit*., p. 25-26.

abusively may be obliged to pay compensation for the expenses incurred or contracted for the purpose of the marriage, to the extent that they were appropriate to the circumstances, as well as for any other damages caused; (2) conclusion of the act only by one of the spouses, without the consent of the other – art. 367 lit. c NCC – the obligation of the agreement of both spouses for the conclusion of certain administrative acts; in this case, if one of the spouses opposes abusively, the other spouse can conclude the act alone, but only with the prior approval of the guardianship court; (3) obtaining interest damages – art. 1800 NCC – if the lessee modifies the property or changes its destination or if he uses it in such a way as to harm the lessor, the latter may demand damages and, as the case may be, the termination of the contract; (4) return of the asset to the debtor – art. 2492 para. 1 NCC – the debtor cannot demand the restitution of the asset only after he has fulfilled the obligation, except in the case where the creditor uses or preserves the asset abusively; (5) – refusal to accept the right of retention – art. 2496 para. 1 NCC – the right of retention cannot be exercised if the possession of the property originates from an illicit act, is abusive or illegal or if the property is not susceptible to compulsory prosecution; (6) the obligation to return the fruits – art. 566 para. 2 NCC – the possessor in bad faith or the precarious holder will be obliged, upon request, to return the fruits produced by the asset until it is returned to the owner; (7) conferring passive procedural quality – art. 897 paragraph 1 NCC – the action for tabular performance may also be directed against the third-party acquirer previously registered in the land register, if the legal act invoked by the plaintiff is prior to the one under which the third-party acquirer's right was registered, and it was in bad faith on the date of conclusion of the act; (8) judicial indignity – art. 959 lit. b NCC – the person who, in bad faith, hid, altered, destroyed or falsified the will of the deceased; (9) the relative nullity of the legal act – art. 1032 NCC – the nullity of the marriage entails the relative nullity of the donation made to the spouse in bad faith; (10) the presumption of acceptance of the inheritance – art. 1191 para. 1 NCC – the inheritor who, in bad faith, stole or hid assets from the inheritance patrimony or hid a donation subject to the ratio or reduction is considered to have accepted the inheritance, even if he had previously renounced it; (11) failure to fulfill the condition – art. 1405 para. 2 NCC – the condition is considered unfulfilled if the party interested in the fulfillment of the condition determines, in bad faith, the realization of the event.

Similarly, the court can order, ex officio or upon request, specific sanctions that do not directly and necessarily involve a prejudice: (1) removal of the natural parents' refusal to adopt – art. 467 NCC – the guardianship court can overrule the refusal of the natural parents or, as the case may be, the guardian to consent to the adoption, if it is proven, by any means of proof, that it is abusive; (2) replacing the non-existent, but abusive agreement – art. 641 para. 3 NCC – the interested co-owner or co-owners can ask the court to supplement the consent of the co-owner who abusively opposes the performance of an administrative act indispensable to maintaining the utility or value of the asset; (3) censoring the refusal of the task holders – art. 879 para. 3 NCC – the gluing or ungluing of a property encumbered with encumbrances can only be done with the consent of the owners of those encumbrances. The refusal of the task holders must not be abusive, it can be censured by the court.

We are of the opinion that, in the event of an abuse of law, one of the sanctions from the three stated categories can be applied, cumulation is not possible because when there is an express/specific sanction, the general sanction of repairing the damage based on tort liability is removed, and when the court is empowered to order a measure by which the abusive exercise of the right ceases, the possibility of future damage is also removed.

In the case of the abuse of civil procedural law, three categories of sanctions may also be imposed: (1) procedural sanctions; (2) sanctions in the form of judicial fines and (3) civil sanctions to cover the damage.

These sanctions are enshrined in art. 12 para. 2 and 3 of the NCPC, which state that the party exercising its procedural rights abusively is responsible for the material and moral damages caused. She may be obliged, according to the law, to pay a judicial fine.

If the court finds the existence of the abuse of civil procedural law, it will reject the said request as unfounded, manifestly unfounded, unfounded etc[19]. Thus, if a main, accessory, additional or incidental request is introduced in bad faith, as well as for the exercise of an appeal, these being clearly groundless, the rejection solution will be accordingly. The solution is similar in the case of bad faith introduction of requests for recusal or displacement.

In addition to the rejection of requests made in bad faith, other procedural sanctions can be applied, such as: (1) cancellation of all procedural documents that followed the citation by publicity, in bad faith, according to art. 167 para. 5 NCPC – if the subpoena appears and proves that it was subpoenaed by advertising in bad faith, all the procedural documents that followed the approval of this subpoena will be annulled; (2) the consideration of a document or material means of evidence as having won the cause – art. 187 lit. e NCPC – contesting, in bad faith, by its author the writing or signature of a document or the authenticity of an audio or video recording; (3) the lack of effects of the choice of the competent court (forum) – art. 1068 para. 2 NCPC – the choice of court is without effect if it leads to the abusive deprivation of one of the parties from the protection provided by a court provided by Romanian law.

In accordance with art. 12 para. 2 NCPC in conjunction with art. 187 para. 1 point 1 NCPC, the abuse of procedural law can also be sanctioned with a judicial fine of 100 lei to 1000 lei, a fine that is applied by the court and for the cases mentioned in art. 187 para. 1 point 1 lit. a-e NCPC of exercising a procedural right in bad faith.

Finally, according to art. 12 para. 2 NCPC in conjunction with art. 189 NCPC, the author of the abuse of procedural law can be obliged to cover the material and moral damages caused (civil liability), obviously under the conditions of the civil law, therefore also with the proof of the existence and amount of the damage[20]. In the doctrine[21], it was argued that this type of civil sanction constitutes the main procedural sanction for the abusive exercise of rights.

Regarding these specific sanctions, we understand that we specify the following: (1) they can be applied separately, but also cumulatively, as the case may be. For example, a summons brought with bad intent, being manifestly groundless, can only be rejected on the merits (procedural sanction), it can be rejected on the merits and court costs awarded to the defendant (procedural sanction and civil liability) or it can be rejected on the merits, court costs awarded to the defendant and a judicial fine applied to the plaintiff (context in which we have all three categories of sanctions: procedural, civil, judicial fine); (2) sanctions can be applied, depending on the circumstances, at the request of the interested person or ex officio. For example, a procedural sanction of rejecting the request as clearly unfounded will be

[19] It should be borne in mind that the rejection of a summons or an appeal, a request for recusal or displacement etc. does not automatically lead to the conclusion that the party abused the subjective civil right or the procedural right – V.M. Ciobanu, Tratat...*op. cit*., p. 323; in the same sense, see the Bucharest Court, dec. No. 32/1998, in Collection of civil judicial practice for the year 1998, p. 196.

[20] Bucharest Court of Appeal, Dec. No. 137/A/2005 in V.M. Ciobanu, Codul...*op. cit*., p. 37.

[21] I. Leş, The New Code of Civil Procedure. Commentary on articles, Publishing House C.H. Beck, Bucharest 2013, p. 20.

pronounced at the request of the opposing party or, even without this express request of the party; the sanction of the judicial fine can be applied at the request of the interested party or ex officio if we consider art. 187 para. 1 NCPC in conjunction with art. 190 NCPC; material or moral damage can be covered only at the request of the interested person, under the terms of the civil law; (3) the applicable sanctions may have an exclusively punitive nature (those from the procedural level or the judicial fine) or they can have an exclusively reparative nature (the civil sanctions[22]); (4) these sanctions are also applicable in case of non-fulfilment of procedural obligations in good faith[23].

As a corollary of the above-mentioned, in the doctrine[24] it was concluded that the abusive procedural act will be devoid of the effects for which it was carried out, effects contrary to the purpose for which the procedural right was recognized.

V. The conclusions

This brief passage through the matter of the abuse of law, under its two components (substantive civil law and civil procedural law) reveals the complexity of the institution itself and the inherent practical difficulty in this context.

From our point of view, we consider that the abuse of law is located in the „gray zone" of law because it presupposes the existence of a legally enshrined right that is exercised abusively, being diverted from the purpose established by the legislator. If, from a theoretical point of view, the elements and conditions of the abuse of law have a consolidated consecration, from a practical point of view it is quite difficult to appreciate, by reporting the factual situation configured by the evidence, a situation that involves bad faith and the pursuit of another goal, hidden than the one drawn by the legislator.

The exercise of a right in good faith is, after all, a test of a people's morality. When good faith is suppressed, in addition to the effects in terms of morality, an intervention of the coercive force of the statute is also necessary to „regulate" the civil circuit, because a natural exercise of a right cannot create an injustice regarding another the person. Eloquent in this sense is the thought of Immanuel Kant who shows that „the universal law of justice is to act outwardly in such a way that the free use of our will is compatible with the freedom of anyone, according to a universal law."

[22] I. Leş, idem, p. 21.

[23] G. Boroi, M. Stancu, Civil procedural law. The general part. Judgment before the first instance, 6th edition, Hamangiu Publishing House, Bucharest 2023, p. 46.

[24] V.M. Ciobanu, Tratat...*op. cit*., p. 323,preluat din D. Florescu, R.R.D. nr. 2/1973, p. 95-97.

A FEW OBSERVATIONS REGARDING THE ASSESSMENT OF GOOD FAITH IN THE MATTER OF MATERIAL PUBLICITY OF THE LAND REGISTER

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Abstract

In the present study, we make a few observations about some controversial aspects in the qualification of good faith in the matter of the principle of material publicity of the land register, we make a chronological inventory of the different views of the legislator and of the doctrine, respectively of the judicial practice on the subject, and finally we discuss the legal problems existing de lege lata.

Keywords: *land register, material publicity, third-party acquirer, good faith*

1. Preliminary aspects

According to art. 901 of the Civil Code [1]:

„(1) Unless otherwise provided by law, anyone who acquired in good faith any real right entered in the land register, by virtue of a juridical act by onerous title, shall be deemed to be the holder of the right entered in their favor, even if, upon request of the true holder, the right of the predecessor is deleted from the land register.

(2) The third-party acquirer shall be deemed to be acting in good faith only if, at the time of registration of the application for the registration of the right in their favor, the following conditions are met:

a) no lawsuit challenging the content of the land register has been registered;

b) there is no reason, in the content of the land register, to justify its rectification in favor of another person; and

c) they did not know, through any other way, the inaccuracy of the content of the land register.

(3) The provisions of this article shall also apply to the third party who has acquired in good faith a hypothecary right by virtue of a juridical act concluded with the land register holder or their successor in title, as the case may be.

(4) However, the provisions of this article cannot be invoked by a contracting party against the other contracting party nor by their universal successors or successors by universal title, as the case may be".

The text represents the legal basis for the principle of material publicity[2] of the land register (hereinafter: „l.r."), a capital principle for ensuring the stability and consolidation of

[1] Law no. 287/2009 on the Civil Code (hereinafter: „CC") was republished in Of. M. no. 505 of July 15th 2011 and entered into force on the 1st of October 2011, according to art. 220 para. (1) from Law no. 71/2011 for the implementation of Law no. 287/2009 (published in Of. M. no. 409 of June 10th 2011 and hereinafter cited: „LPA").

[2] See I. Albu, *Land law course*, The Lithography and Print House of the Education System, Bucharest, 1957, p. 412.

land ownership, as well as for the safety of real estate operations[3], especially the hypothecary credit[4]. What is essential with regard to this principle is that, if the stipulated conditions are met, the true holder of the real right loses this right, and the third-party acquirer becomes the holder of the real right in question, even though the juridical act by which he acquired was flawed[5].

Of course, in order to give the true holder the opportunity to act in order to prevent the patrimonial loss, the material publicity of the l.r. is suspended in certain time frames. We are particularly interested in art. 909 para. (3) and (4) CC: „(3) (...) subject to the prescription of the right to file the legal action on the merits, the action for rectification, based exclusively on the provisions of art. 908 para. (1) items 1 and 2, may also be brought against the third parties who have registered any real right, acquired in good faith and through a juridical act by onerous title or, as the case may be, under a hypothec contract, based on the content of the land register. In these cases, the period shall be 3 years, calculated from the date of registration of the registration request filed by the direct acquirer of the right whose rectification is requested, except for the case when the conclusion, by which the registration that is the object of the rectification lawsuit was ordered, was communicated to the entitled person, in which case the period will be one year from its communication. (4) The periods provided for in para. (2) and (3) are forfeiture periods"[6].

The good faith of the third-party acquirer is, however, essential for the acquisition of the real right through the effect of the material publicity of the l.r. We will, in the following pages, make some observations about what is controversial in the qualification of good faith in this matter, then we will try to chronologically inventory the different views of the legislator and the specialized literature, respectively the practice of the courts on the subject, in order to finally move on to the existing problems in the law.

2. The problem of knowing the content of the l.r. in the verification of good faith

In the application of the material publicity principle of the l.r., the third-party acquirer cannot obtain any right if he was not acting in good faith. In essence, he is not acting in good faith if he knew or should have known the inaccuracy of the content of the l.r. In practice, especially, the problem arises when, by applying the general rules of civil law, the one who transferred or constituted the real right in question to the third party did not have the right to do so.

Art. 901 para. (2) letters a) and c) CC do not raise very big questions. The following lines will focus on the content of art. 901 para. (2) letter b) CC. The third-party acquirer is not considered to be acting in good faith if, at the time of registration of the application for the registration of the right in his favor, there is no reason, in the content of the l.r., to justify its rectification in favor of another person. But what does „content of the l.r." mean?

In the practice of transmissions and constitutions of real estate rights, the persons involved use, as a basic element, the extract of l.r. This is because art. 35 para. (1) thesis V of

[3] M. Nicolae, *Treaty of real estate publicity*, vol. II, *The new land registers*, Universul Juridic Publishing House, Bucharest, 2006, p. 442.

[4] See also M. Pașcanu, *The land credit in the Romanian parts of the former Hungary,* Cartea Românească Publishing House, Bucharest,1920, pp. 10-11.

[5] For details, see M. Nicolae, *op. cit.*, pp. 357-451.

[6] The periods being forfeiture periods, it means that art. 2548 CC is applicable. For the criticism of this solution, see A.-A. Chiș, *Real estate publicity in the conception of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012, pp. 229-230.

Law no. 7/1996 of the cadastre and real estate publicity[7] shows that „[a]t the authentication of notarial deeds by which a real estate right is transferred, modified or constituted, the public notary will request an extract from the land register for authentication (...)".

The notary checks the extract obtained and, if there are problems in its content, advises the parties accordingly. It seems quite natural to us, therefore, to consider that art. 901 para. (2) letter b) CC should be correlated with art. 35 para. (1) thesis V of Law no. 7/1996, which would mean that the content of l.r. which is of interest for the verification of good faith in the sense of the material publicity of the l.r. is, in fact, the content of the extract from the l.r. for authentication.

What happens if the public notary does not fulfill his duties properly, and the extract includes causes that justify the rectification of the l.r. in favor of another person? The third-party acquirer can no longer plead good faith, although he may not even have had the curiosity to read the extract in question. But the acquirer *could* have take cognizance of the existing problem. Of course, he relied on a legal professional, holder of delegated public authority, so he will be able to act in the liability of the instrumenting notary, whose professional liability insurance should work properly.

Is the extract enough to check the „content of the l.r." in the sense of art. 901 para. (2) letter b) CC? We strongly believe that it should be. However, in the specialized literature and practice of the courts, things do not seem to be so clear.

The Civil Code shows at art. 883 para. (1) that „[a]ny person, without having to justify any interest, may examine any land register, *as well as the documents completing it, in accordance to the law. The folder with the documents that were the basis of the entries in the land register can be consulted by any interested person, in compliance with the legal provisions regarding the processing of personal data and the free circulation of such data*" (o.u. – A.A.M.). And para. (3) of the cited article has the following content: „No one will be able to claim that they were not aware of the existence of any entry made in the land register or, as the case may be, of an application for registration registered at the cadastre and real estate publicity office".

Then, in art. 21 para. (3) and (4) of Law no. 7/1996 the following is stated: „(3) The land registers drawn up and numbered in the administrative territory of each locality make up, together, the cadastral register of real estate publicity of this territory, which is kept by the territorial bureau within the territorial office in whose activity area the respective property is located. (4) *This register is completed with the entry register, with the cadastral plan, with the cadastral register of immovables, indicating the cadastral number of the immovables and the serial number of the land registers in which they are entered, with an alphabetical index of the owners and a folder in where registration applications are kept, together with a copy of the deeds proving the legal acts or facts subject to registration*" (o.u. – A.A.M.).

At the same time, in art. 207 para. (3) from the Regulation of reception and registration in the cadastre and land register records[8], it is explicitly spoken about the documents „with which the land register is completed".

Therefore, there are normative acts in force that consider that a l.r. is not sufficient in itself, but needs to be completed with other registers and documents. If it is considered that a

[7] Republished in Of. M. no. 720 of September 24th 2015.

[8] Approved by the Order of the general director of The National Agency of Cadastre and Real Estate Publicity no. 600/2023 (published in Of. M. no. 125 bis of February 14th 2023).

l.r. in itself has such a need, we can reasonably suspect that even the extract from the l.r. would have a relative value.

These norms (which benefit from some normative stability, in the sense that we find their avatars in different stages of the legislation in the matter, as we will see) are not ignored. As a quick example, we can cite the following words, written by a judge, at that time president of the Cluj Court of Appeal, the 1st civil section, who considers that the principle of material publicity „is the rule according to which the content of the land register is considered accurate for the benefit of those who have registered any real right in the land register, acquired through a juridical act by onerous title or free title, if at the time of acquiring the right no lawsuit was entered in the land register to challenge its contents, *or if from the entries and the documents with which the land register is completed the inaccuracy is not shown*" [9] (o.u. – A.A.M.).

The practical stake is extremely serious. Because it is one thing for the third party to be considered in good faith based strictly on the content of a l.r. extract, and another is for him to be considered in good faith based also on, for example, the general entry register or, even more severely, on all the deeds that are in the archives of the cadastre and real estate publicity office regarding the l.r. in question. In the first case, it would be necessary for the third party to read only the l.r. extract, which in general should not raise problems for a person of average training. In the second case, the third party should do research of the level of due diligence done by law firms. Is it fair to claim obligations of the latter kind? A historical excursion is required above all.

3. The system of the former Land Register Regulations

We will start with the Land Register Regulations of 1855 and 1870 (hereinafter: „Rcf.") applicable in the territories of our country where Hungarian and Austrian laws were in force[10]. Rcf. do not contain rules drafted very precisely according to the standards of the current jurist. Nevertheless, they represented some remarkable normative acts and, in any case, essential for the l.r. system from our country, and the specialized literature and practice of the courts based on them have great relevance even today, considering that the principles of l.r. have not changed appreciably.

According to art. 62 para. (2) and (3) Rcf.: „(2) The intabulation or prenotation (the current provisional registration – o.p., A.A.M.) gives real right only regarding the right which was registered. The judge, thus, will always designate in the decision exactly the right whose registration is made and will also show the essential characteristics of that right for registration in Lr. (3) *The closer determinations of the registered right, which cannot be found from the Lr. itself, will be judged according to the content of the document, on the basis of which the inscription was admitted*" (o.u. – A.A.M.) [11].

[9] Tr. Dârjan, *The land register – the identity card of the immovable*, Hamangiu Publishing House, Bucharest, 2013, p. XIII. The issue of whether the material publicity of the l.r. includes the case of a juridical act with a free title is controversial, the dominant opinion seeming to be that this method of acquisition should be reserved for acts with an onerous title. In fact, even the quoted author, when he analyzes in more detail the principle of material publicity (*ibidem*, pp. 121-135), completely omits the fact that, previously, he had also referred to juridical acts with a free title, and in *ibidem*, p. 131 he expressly denounces them.

[10] The regulation of 1870 had only a few changes from the one of 1855, the stake being the expansion of the latter in Transylvania. See I. Papp, P. Balașiu, *The land register. Collection of laws, regulations, ordinances and forms, relating to the land registers of Transylvania*, vol. I, „Carmen" Printing House, Petru B. Barițiu, Cluj, 1922, p. 9.

[11] *Ibidem*, p. 59.

Based on para. (3) of this article, Prof. Camil Negrea said the following: «Sometimes the text of the registration will refer to the document on the basis of which the registration was approved, for the more detailed determination of the registered right (art. 62 par. 3 Rcf.). The reference has the effect that the document or the parts to which the reference is made are considered as a constitutive part of the registration, so it also determines the situation of third parties who claim to have trusted the „content" of the lr.» [12].

Prof. Negrea, therefore, only discusses the case where the text of the entry in the l.r. refers to a *specific* document (which, *nota bene*, the current practice of l.r. enshrines as a rule[13]). Only in this case, the „content of the l.r." would be complete with that document. Prof. Negrea's solution seems to correspond to the Swiss system, where art. 971 para. (2) Swiss CC has the following content: „L'étendue d'un droit peut être précisée, *dans les limites de l'inscription*, par les pièces justificatives ou de toute autre manière" [14] (o.u. – A.A.M.).

Prof. Ştefan Laday's opinion, stated 17 years before, seems much more severe to us: „The documents have the importance that, in the event that a wrong entry was made in the l.r., the party that bases its rights on this entry cannot rely on the l.r. if he could have found the mistake from the documents. This also emerges from art. 62 (Rcf. – o.p., A.A.M.) last paragraph"[15]. Prof. Laday uses the plural „documents" and does not specify whether or not there would be an additional condition that, in the text of the l.r. entry, reference should be made to those documents. It seems that the mere existence of the documents in the related folders of the l.r. is enough that the party loses any good faith if he does not consult them.

The practice of the courts under Rcf. does not bring much clarity. In 1946, the Court of Cassation considered that: „[i]nsofar as the institution of the land register does not include only the actual land register, but among others, the entry registers, the documents relating to registrations and plans, all of which are an integral part of the complex of the land register, the court made a good application of art. 62 last para. of the land register regulation, establishing that only he can invoke trust in the land register, who also examined the folder containing the documents regarding the registrations (...)"[16].

But, in the previous decades, there was at the level of the Timişoara Court of Appeal a rather constant opinion, in the sense that, in relation to art. 62 Rcf., for there to be good faith of the third party, the documents from the base of the l.r. should have been researched *only if*

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[12] C. Negrea, *Local civil legislation remaining in force after the extension of the civil legislation of the Old Kingdom. Book I. Introduction. Part I: land registers. Course held at the Faculty of Law in Cluj-Sibiu, in the school year 1943/1944*, „Cartea românească din Cluj" bookstore, Sibiu, 1944, pp. 304-305.

[13] Compare with art. 23 point B) letter b) from Law no. 7/1996, with the mention that, currently, the registrars of l.r. no longer refer to the type of juridical act (eg, sale, donation etc.) submitted for registration.

[14] See also V. Rossel, F.-H. Mentha, *Manuel du droit civil suisse*, t. 2, *Des droits réels – Titre final – Lois et ordonnances complémentaires. Tables*, Librairie Payot & Cie, Lausanne, 1911, p. 381, where an additional condition is added: supporting documents are an integral part of the l.r., provided they relate to an entry *and do not contradict it*.

Art. 974 para. (1) Swiss CC also presents interest: „Lorsqu'un droit réel a été inscrit indûment, l'inscription ne peut être invoquée par les tiers qui en ont connu ou dû connaître les vices". As we will see later, in the text, it is debatable whether the Swiss CC should be taken as a reference in the interpretation of the rules applicable in our system, BGB being much closer to the solution established later by Decree-law no. 115/1938.

[15] Şt. Laday, *The land registers*, 2nd edition, „Cultura" Institute of Graphic Arts, Cluj, 1927, p. 85.

[16] Cas., dec. no. 723 from June 26th 1946, in I.-D. Chiş, *The Land Register*, vol. I, *Law no. 7/1996, Jurisprudence and doctrine from Romanian legal periodicals. 1886-2011*, Universul Juridic Publishing House, Bucharest, 2012, p. 84.

from the l.r. itself any doubt appeared, including the case when the entry in the l.r. was not clear[17].

This last correction brought by the judgments of the court of appeal seems to us remarkable and of an exemplary lucidity. First of all, it is worth noting that this seems to be the solution in the ABGB system[18], the comparative law argument being particularly important, knowing that our system of l.r. was also inspired by the Austrian law. Second, since the principle of legality of entries in the l.r. implies the fact that a public authority exercises (of course, within the limits of a non-contentious procedure) a legality check on the documents necessary for registration, then, if from the extract or copy of l.r. nothing unclear results, there is no point in additional verifications from the interested party[19]. On the contrary, if additional verifications are always required from the party, there is no sense of the existence of a verification, by an authority, of the legality of the documents submitted to the l.r. [20].

4. The system of Decree-law no. 115/1938

According to art. 33 of Decree-law no. 115/1938 for the unification of the provisions regarding the land registers[21]: „The content of the land register, with the exception of the legal restrictions and exceptions, is considered accurate for the benefit of the one who acquired by a juridical act by onerous title any real right, if at the time of acquiring the right it was not registered in the land register any legal action by which its content is contested, or if he did not know this inaccuracy in another way"[22].

The final sentence of the quoted text indicated what was necessary so that the third-party acquirer could be considered in good faith. Nowhere was it said that the third party had to do additional research such as verifying the documents that were the basis of the registration[23]. However, art. 6 of the cited decree had the following content: „The land register is completed with the plan, the documents regarding registrations and the entry register". From here, the

[17] See, e.g., Timişoara C. Ap., Ist section, dec. no. c. I. 1505/23/1927 from July 9th 1928, in *ibidem*, pp. 80-81. In a similar sense, see Timişoara C. Ap., Ist section, dec. no. C. I. 2841/45/1930 from April 4th 1932, in *ibidem*, p. 83. In the matter of the hypothecary right, see Timişoara C. Ap., Ist section, dec. no. 3979/1927 from November 24th 1930 in *ibidem*, p. 453.

[18] See Ş. Mircioiu, *Transfer of ownership by sale. Study of comparative law*, Universul Juridic Publishing House, Bucharest, 2014, p. 266: „[t]he protection granted by the principle of material publicity to *bona fide* third parties refers to the existing entries in the land register (*Hauptbuch*), without it being, in principle, necessary for them to also consult the documents regarding the entries". In *ibidem*, 2nd note, it is stated, however, that in order for the third party to be considered in good faith, it is necessary to consult the documents when „there are question marks regarding the accuracy of the land register or there are differences between the entries and the documents regarding registrations". In what concerns the differences between the entries and the documents regarding the registrations, the solution seems strange to say the least. How could the third party be aware of such differences without consulting the documents themselves?

[19] Similarly, see M. Nicolae, *op. cit.*, vol. II, p. 428. Even authors who support the completion of the l.r. with other documents note the difficulty of such an action for a person without legal studies (Tr. Dârjan, *op. cit.*, p. 133).

[20] As was said (but under the BGB system), it is difficult to assume *a priori* that a l.r., the administration of which is the responsibility of the public authority, contains inaccurate statements (see the comment under art. 892 BGB in C. Bufnoir, P Cazalles, J. Challamel, J. Drioux, F. Gény, P. Hamel, H. Lévy-Ullmann, R. Saleilles, *Code civil allemand traduit et annoté*, t. 2, Imprimerie Nationale, Paris, 1906, p. 495, 2nd note, 2nd item).

[21] Published in Of. M. no. 95 of April 27th 1938 and repealed by art. 230 letter g) LPA.

[22] Art. 705 of the Carol II CC [republished in Of. M. no. 206 of September 6th 1940 and repealed by art. 230 letter h) LPA] had an almost identical content, but this cannot be surprising since this code was drafted for a correlated application with Decree-Law no. 115/1938.

[23] For the same opinion, see M. Nicolae, *op. cit.*, vol. II, p. 427.

practice of the courts drew the conclusion that the deed of the person transferring the right had to be verified[24], and the specialized literature spoke of the verification of the „content of the land registers *and the annexes*" (o.u. – A.A.M.) [25].

Instead, Prof. Salvator Brădeanu, one of the draftsman of this decree, remarks that «by the „*content of the land register*" we must understand those entries, which, on the one hand, have a constitutive effect of right, and on the other hand, can have an absolute evidential power (principle of evidential force)» [26], so he seemed to have in mind only actual entries in the l.r. In addition, to us art. 33 of the decree seems quite similar to art. 892 para. (1) thesis I BGB according to which: „To the benefit of the person who acquires a right in a plot of land or a right in such a right by legal transaction, the contents of the Land Register are presumed to be correct, *unless an objection to the accuracy is registered or the inaccuracy is known to the acquirer*" (o.u. – A.A.M.)[27]. And, under the BGB system, it was said that „[d]ocuments from the land folders are important for understanding the land registers, *but they are not part of the material publicity of the land registers*" (o.u. – A.A.M.)[28].

5. The system of Law no. 7/1996

Very predictable, the initial form of Law no. 7/1996 had a content similar to art. 33 of Decree-law no. 115/1938. Thus, in art. 34 of Law no. 7/1996 the following were stated: „The content of the land registers is considered accurate, for the benefit of that person who acquired, through a juridical act by onerous title, a real right, if at the time of acquiring the right, no legal action was registered in the land register by which its content is contested or if he did not know, in another way, this inaccuracy". At the same time, art. 20 para. (5) of this law provided that the cadastral register of real estate publicity of a locality (consisting of all l.r. drawn up and numbered on the administrative territory of each locality) „is completed with a special entry register, with the plan of identification of the real estate, with the repertoire of the real estate, indicating the cadastral number of the parcels and the serial number of the land registers in which they are entered, with an alphabetical index of the owners and with a folder where the registration requests will be kept, together with a copy of the deeds proving the juridical acts or facts subject to registration".

In the application of these provisions, the specialized literature seemed to continue to demand the maintenance of the *status quo* from under the rule of Decree-Law no. 115/1938, and therefore to consider that the good faith of the acquirer also depended on the research of the elements with which the l.r. was completed; however, the practice of the courts was not always receptive to these ideas[29].

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[24] See the judicial practice from the years 1956 (Supreme Court) and 1959 (Brașov Regional Court) cited by M. Nicolae, *Treaty of real estate publicity*, vol. I, *Introduction to real estate publicity*, Universul Juridic Publishing House, Bucharest, 2006, p. 407, 2nd note.

[25] P. Demény, *The land registers*, Clusium Publishing House, Cluj-Napoca, 1993, p. 22.

[26] S. A. Brădeanu, *Towards a new land legislation*, „Literary Life" Printing House, Bucharest, 1938, p. 88.

[27] For the same conclusion, see M. Nicolae, *op. cit.*, vol. II, p. 429.

[28] F. Bauer, *German Land Registers*, in The Romanian Review of Private Law no. 4/2007, p. 23. Similarly (however, with the exception of the consent for registration, but only if the entry in the l.r. refers to it), see the comment under art. 892 BGB from C. Bufnoir, P. Cazalles, J. Challamel, J. Drioux, F. Gény, P. Hamel, H. Lévy-Ullmann, R. Saleilles, *op. cit.*, p. 493, 1st note, item IV.

[29] See, e.g., A. Rusu, *Note* to The High Court of Cassation and Justice, com. s., dec. no. 1367 of April 5th 2006, in *idem*, *Real estate publicity. Land registers (2). Judicial practice*, Hamangiu Publishing House, Bucharest, 2009, p. 159, whose opinion is in dissonance with the one of the supreme court in this case, the latter considering that the extract from the l.r. was sufficient to establish the buyer's good faith.

By Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures[30], art. 34 (subsequent art. 31 after the 2006 republication) of Law no. 7/1996 was amended and a paragraph (2) was introduced which dictated as follows: „The acquirer is considered to be in good faith if, on the date of registration of the application for registration of the right in his favor, no legal action has been registered whereby the content of the land register is contested, or if there is no inconsistency, in the transferor's deed or the content of the land register, between it and the real legal situation". In addition, art. 20 para. (5) was also amended in the sense that the cadastral register of real estate publicity of a locality „is completed with the entry register, with the cadastral plan, with the cadastral register of the real estate, indicating the cadastral number of the real estate and the serial number of the land registers in which they are registered, with an alphabetical index of the owners and with a folder where the registration requests are kept, together with a copy of the deeds proving the juridical acts or facts subject to registration".

Law no. 247/2005 therefore eliminated, among the causes of bad faith of the third-party acquirer, the *effective* knowledge – by means *other* than the deed of the transmitter, the content of the l.r. and, possibly, the general entry register – of the inaccuracy of the content of the l.r., which is why the solution was severely criticized, since, in practice, it removed the moral content from the rules of tabular law. At the same time, it was rightly stated that the verification (without any time limit) of the deed of the transmitter had the role of providing only limited information, since many causes of invalidity of a juridical act could not directly result from that deed. In addition, if the said deed contained information about other deeds from the history of ownership changes, the question was rightly raised whether those deeds should not have been consulted as well? For reasons of ensuring the safety of the acquirer, the problem of checking the history appeared, moreover, even in situations where *no* reference was made to this history in the deed[31].

What seems important to us is that, practically, by Law no. 247/2005, the legislator admitted that the notion of „deed of the transmitter" was not automatically included in the notion of „content of the l.r.", otherwise he would not have felt the need to mention it expressly.

6. Preparatory work for the entry into force of the Civil Code

Initially, in the draft of the new Civil Code in the form adopted by the Senate, art. 669 para. (4) had the following content: „The acquirer is in good faith if, in relation to the date of acquisition of the right, the following conditions are fulfilled, cumulatively: a) no legal action was registered in the land register against any of the holders of the previous entries made in the statute of limitation period of the action for rectification; b) the basis of the legal action on the merits did not emerge from the content of the land register nor from the content of the deed invoked for the registration immediately prior to the one made in favor of the acquirer". Thus, the project continued with the distinction between the deed of the transmitter and the content of the l.r.

[30] Published in Of. M. no. 653 of July 22nd 2005.
[31] M. Nicolae, *op. cit.*, vol. II, pp. 428-430.

Following the adoption of the amendments[32] developed by the commission established by the Ministry of Justice after the adoption of the project mentioned above, art. 669 para. (4) was eliminated, and art. 662 para. (2) acquired the following content: „The third-party acquirer is considered to be in good faith only if, on the date of registration of the application for registration of the right in his favor, the following conditions are met: a) no legal action has been registered by which the content of the land register is contested; b) from the content of the land register results no reason to justify its rectification in favor of another person; and, finally, c) he did not know, in any other way, the inaccuracy of the content of the land register". Therefore, the text acquired a form almost identical to that of art. 901 para. (2) CC. Observation no. 2 formulated next to art. 662 of the draft showed the following: „As for the notion of good faith, it was reformulated by reintroducing the hypothesis when the third-party acquirer learned of the inaccuracy of the content of the land register in another way, a solution expressly provided by art. 33 of D.L. no. 115/1938 and abandoned without a serious justification by the Project and the last form of art. 31 para. (2) from Law no. 7/1996".

It should be pointed out, however, that Prof. Marian Nicolae, a member of the commission that formulated the amendments mentioned above, in the 2006 edition of his Treaty of real estate publicity, proposed *another* option for amending art. 662 para. (2) of the project: „The acquirer is considered in good faith only if, on the date of registration of the application for registration of the right in his favor, no legal action was registered against the content of the land register, *and from the entries made in the land register results no reason to justify any legal action to rectify them*" (o.u. – A.A.M.). We express our regret that the final thesis of this proposal did not become the current art. 901 para. (2) letter b) CC.

7. Current regulatory framework

Currently, according to art. 901 para. (2) letter b) CC, unfortunately, things do not seem different compared to the interpretations given under Decree-Law no. 115/1938. The reference to the content of the l.r. is automatically seen as a reference to art. 883 para. (1) CC and, consequently, to the documents with which the l.r. is completed[33].

We cannot share such a conclusion. The simple fact that the main drafter of the CC norms regarding the institution of the l.r. was Prof. Marian Nicolae (who, as we saw above, had a completely different interpretation of the texts of Decree-Law no. 115/1938 and Law no. 7/1996), forces us to believe that the intention of the legislator was *different*. As it was remarkably shown[34], the fact that the law sometimes provides that the l.r. is completed with other documents, cannot be applicable as such *except in the relations between the contracting parties*[35], because only between them the legal relations are always resolved according to the deed drawn up by them, and *not* according to the entry in the l.r.

In any case, the very fact that the legislator did not take over the solution of Law no. 7/1996 after the amendment by Law no. 247/2005, nor the solution of the project of the CC adopted by the Senate, justifies the interpretation that, within the notion of „content of the l.r."

[32]The proposed amendments were available at: http://www.just.ro/sections/comunicate/comunicate decembrie2008/5decembriev2/tabid/957/Default.aspx, last accessed on May 29th 2012.

[33] A.-A. Chiș, *op. cit.*, pp. 228-229; Tr. Dârjan, *op. cit.*, p. 133, as well as M. Mîneran, *The commentaries of the Civil Code. The publicity of rights and juridical acts and facts. The land register*, Hamangiu Publishing House, Bucharest, 2012, p. 147.

[34] M. Nicolae, *op. cit.*, vol. II, p. 427.

[35] Cf. art. 901 para. (4) CC.

in the sense of art. 901 para. (2) letter b) CC, the „deed of the transmitter" can no longer be included. And, *a fortiori*, if the legislator does not consider this deed relevant, why would other ascertaining documents from the history of l.r. be relevant?

So, practically, as far as third-party acquirers are concerned, art. 901 para. (2) letter b) CC *is derogating* from art. 883 para. (1) CC and art. 21 para. (4) from Law no. 7/1996, just like the former art. 34 (later 31) of Law no. 7/1996 was derogating from the former art. 20 para. (5) from the same normative act.

This being so, in our opinion, in the present, apart from the situations in art. 901 para. (2) letters a) and c) CC, *only the actual entries in the l.r.* (and *not* the documents with which it is completed) must be considered relevant for the assessment of the good faith of the third-party acquirer, *as well as the general entry register*. This is due to art. 883 para. (3) CC, cited above[36].

Even so, the solution does not seem at all fortunate to us. In a future law, we consider that what must be considered relevant, at least for the matters where authentication is required, is *only the extract from the l.r.* used for the conclusion of the juridical act by the acquiring third party, because only this (and *not* the actual sheet of l.r.[37]) must be requested by the public notary when authenticating the deed and, therefore, only this can be requested by the third party, in turn, from the notary for research. Even the requirement to check the general entry register seems excessive to us, this being very burdensome for a person in the current conditions in which the cadastre and real estate publicity offices manage their activity.

8. Conclusions

Every author that writes regarding the l.r. underlines the major role of this publicity system in ensuring the dynamic security of the legal circuit: the fact that the third-party acquirer of good faith, in certain scenarios, is protected from the abolition of the deed of its author. However, it seems more than strange to us that many authors that praise the system of l.r. for this feature, opt for an excessively formal interpretation of the texts that lay the basis for the principle of material publicity of the l.r. Such interpretation has, bizarrely, the role of making difficult, we believe, to the point of non-application, the conditions for the operation of this principle, striking precisely in the security that seemed to be valued so much. It is necessary to promote, as we have tried to show in the lines above, a looser vision and, in any case, one in line with the practical reality and the expectations of the participants in the transmissions and constitutions of real estate rights.

[36] See also M. Nicolae, *op. cit.*, vol. II, p. 428, for the same idea regarding the general entry register, under the rule of Law no. 7/1996, after the amendment by Law no. 247/2005.

[37] As it seems to be required, for example, in Tr. Dârjan, *op. cit.*, p. 133: „The third-party acquirer must actually research the content of the land register (...)". Or, checking the extract of the l.r. does *not* represent an *actual* check of the content of the l.r., because the extract is issued *on the basis* of the l.r. (and sometimes also involves certain selection operations made by the registrar), but it is *not* the l.r. itself.

BONA FIDES IN THE NOTARIAL ACTIVITY

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Abstract

A notary is a public officer in charge with authenticating agreements between parties or their unilateral statements. He is solely responsible for exercising his duties, as is his liability, carrying out his activity in an office regulated by law. The notary office is the place where any of us enter at least once in our lives. Thus, an approchement is created between the notary and his clients. For this relationship to work effectively, trust is needed first and foremost. This presentation aims to analyze to what extent the principle of good faith makes its way into the relationship between the notary and his clients, but also in the relationship between the notary and his other colleagues. The objective is to demonstrate that in order to ensure an efficient and quality service there must be bona fides, especially since notarial activity involves working with the non-contentious part of the legal system. After analyzing the nature of the relationship between the notary and those who use his services, we will study in turn, referring to both French case-law and Romanian legislation, how this principle of law applies in the notary-client relationship, but also in the notary-notary relationship.

Keywords*: notary, client, good faith, deontology, professional secret*

Introduction

The rule is that the notarial deed has effects between the parties as well as against third parties. However, the notarial deed concluded also produces a number of effects between the notary and the signatory parties. The notary's activity is not just about drafting documents, but means much more. The relationship of trust between a notary and his client is based on the principle of good faith (*bona fides)*. Thus, in order for the act to be properly concluded and to produce all the effects provided for by law, a relationship of mutual trust must be created between the notary and the applicant for the service.

In order to better understand how the principle of good faith works in the notary client relationship, we should first define what is the legal relationship that is created between the self-employed person and the citizen who uses his services. Next, we will present the main situations in which the principle *Bona Fides* manifests itself between the notary and his client, taking turns analysing each other's conduct. Finally, we will briefly analyze how good faith is manifested between notaries, by imposing and observing rules of deontology to be applied to everyone.

1. The nature of the relationship between the notary and his client

It is French doctrine that has developed several theories regarding the nature of the relationship that the notary has with his client. Moreover, it has been held that the nature of the relationship between the notary and the client is most often invoked when the authenticated document is flawed, respectively when the notary's civil liability must be incurred. Thus, several theories have been developed:

1. The theory that the notary acts as an agent of the parties. Developed by Henri and Leon Mazeaux and Andrè Tunc[1], this theory is based on the mandate that the parties give to the notary to handle their deed, as is the case with other liberal professions (doctors, lawyers etc.). It is a theory quite difficult to accept, even its elaborators having doubts. Firstly, if he acted as an agent, the notary would have the power to represent the parties on the basis of the mandate, which is not the case, as the notary is only an official witness to the drawing up of the deed representing the will of the signatories. Also, the request for authentication of a notarial document cannot in any way be assimilated to an offer of mandate. However, it is accepted that the notary has certain qualities specific to a trustee, but to a trustee of the State, and not of one or all parties; basically, according to this thesis, the notary has no clients, but one: the State. The theory according to which the nature of the relationship between notary and client takes the contractual form of a mandate cannot be accepted for two reasons: the notary is obliged to deal with the deeds requested of him, this obligation being a violation of the principle of contractual freedom, and the notary's fees are not set freely by him, but are of minimum values imposed by the State, hence this violates the principle of negotiation which is at the basis of any convention.

2. The theory according to which the relationship between notary and client arises both on the basis of a contract and on the basis of law (mixed theory). It was elaborated by authors Georges Ripert, Jean Boulanger[2] and Renè Savatier[3], and is based on the ration of holding the notary liable in the event of defective authentication of a document. Thus, it is considered that, depending on the situation, it must be examined whether the notary acts as agent for the parties (for example, when he carries out real estate advertising operations on their behalf, or when he requests documents from various institutions on their behalf) or when he acts in his official capacity as delegate of the State (when he carries out the authentication procedure which is his responsibility). Also from the point of view of liability, we also specify that when acting as an agent of the parties (so the relationship between the notary and them is of a contractual nature), then there may be limitations on the notary's liability in case of bad faith (we will often find in contracts the absolutely useless phrase „(...) relieving the notary public of any responsibility in this respect (...)", or when acting as delegate of State power, liability is tortious, so there can be no grounds for reducing or relieving the notary's liability.

3. The theory according to which the nature of the relationship between notary and client is based exclusively on legal provisions. Designed by Maurice Picard[4], Jeanne de Poulpiquet[5] and Jean-Luc Aubert[6], this theory refers to the fact that the notary acts exclusively as a public officer to whom part of the power of the State has been delegated. Therefore, his clients use his services, considering him a „genuine magistrat based on public trust"[7]. Therefore, in

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[1] Henri and Leon Mazeaux, Andrè Tunc, Traitéthéorique et pratique de la responsabilité civile délictuelle et contractuelle, Montchrestien Publishing House, 6th edition, Paris, 1965, tome I, pp. 206-513.

[2] Georges Ripert, Jean Boulanger, Traitèèlèmentaire de droit civil, LGDJ Publishing, Paris, 1951, tome II, pp. 531-532.

[3] RenèSavatier, Traitè de la responsabilitè civil en droitfrançais civil, administratif, professionel, procèdural, LGDJ Publishing, Paris, 1951, tome II, p. 409.

[4] Maurice Picard, *La gestion d'affaires dans la jurisprudence contemporaine, gestiond'affaires et responsabilitèNotary*Revue trimestrielle de droit civil, 1921 edition, p. 431.

[5] Jeanne de Poulpiquet, *La responsabilitè civile et disciplinaire des notaires, de l'influence de la profession sur les mècanismes de la responsabilitè,* LGDJ Publishing, Paris, 1974, pp. 468ff.

[6] Jean-Luc Aubert, *La responsabilitè civile des notaires,* Defrenois Publishing House, Paris, 2008, p. 22.

[7] *Idem.*

practice, we often encounter the situation in which a citizen enters a notary's office to ask questions that are not always within the competence of the notary (for example, the chances of winning a lawsuit, or information in the field of insurance or social assistance, which does not fall within the notary's duties etc.). This is because the citizen sees in the notary office a space where they can find legal information of all kind, a place where they can contact the State as a law-forming unit.

Of these three theories, the most accepted is, of course, the mixed theory. Depending on each situation, the relationship between notary and client and which rules govern it must be analyzed. Depending on these, we can analyze how the principle of good faith is transposed into the notary-client relationship, and what are the elements that make it functional.

2. The notary's good faith towards his client

2.2. Obligation to advise clients

The notary is not just a simple document editor. He has a duty to clarify to the parties all legal aspects of the act he is handling; He must ensure that their interests are not harmed, but protected, as well as expose to them the rights and obligations that arise at the same time as the conclusion of the contract. Also, the notary must expose to the parties the risks, if any, when concluding a certain deed under certain conditions (for example, if a buyer assumes to acquire a property that is encumbered by a mortgage, or with an unpaid and taken over debt), but also what are the instruments at their disposal in case of litigation. This duty to advise the parties is an essential characteristic of a notary and is a matter of good faith in relation to his client.

However, in order to fulfil this role, a number of intrinsic human qualities are required which the notary must possess. The most important is loyalty to the client: the notary must never conceal from the client the essential elements of a contract, whether favourable or unfavourable, unless professional secrecy requires it. At the same time, the notary must be an altruistic person: this altruism does not mean that the notary must offer his services free of charge, but refers to the fact that the client's interest must come first, before personal interest. A notary who shows good faith in relation to the citizen is a notary who will not unjustifiably refuse to draw up a document, or will refuse on the grounds that it is too crowded, or the deed does not involve a sufficiently high fee.

In relation to the financial part, the notary must show good faith when advising his clients, in the sense that he must find the most effective solution to their problem, but also referring to their financial situation. A notary who will advise on the conclusion of the most expensive act, where the fees are the highest, or who will suggest the conclusion of acts that are not necessary to be concluded, just because they involve the payment of a fee, is not a notary who demonstrates good faith in relation to his clients.

Another essential quality in performing one's duties in good faith is the intellectual capacity but also the technical competence of the notary. When exercising his profession, he must show a lot of dynamism, be interested and always up to date with the latest laws in the field, and we do not refer here only to the laws in the notary field, but also to the other adjacent laws, such as those on tax rules, criminal procedure, money laundering, real estate laws etc. This quality also translates into the obligation that notaries have to ensure continuous

improvement[8]. A lazy notary, who no longer feels like being up to date with legislative changes, and who goes on the principle of „let it go like this", one cannot say that he is a notary who shows good faith in his relationship with clients.

However, dinamism and total involvement in client matters does not mean that the notary's caution in handling a document must be sacrificed, because correct advice is not only about the current situation, but also about the effects that a contract may have in the future.

In short, the notary, through his advisory activity, must ensure the legal certainty of his clients' documents. The prestige of exercising a liberal profession is based on two considerations: technical competence in a permanent process of improvement and unquestioned moral integrity. These two qualities must be demonstrated by a notary when he assumes the role of official intermediary between the private individual availing himself of his services and the legal order which he must ensure as agent of the State. It is unacceptable to conceive that the function of a notary involves only the drafting and authentication of documents containing the declaration of the parties. It is not rare for a person to go to a notary without knowing exactly what act he wants to conclude. Although they know the end they want to reach, most people, not having legal knowledge and a specific language formed, do not know what form they want to give to their will, as well as its legal consequences. Thus, it is the duty of the notary to highlight all these aspects, but also, equally, as proof of good faith, to explain to the parties whether they have requirements contrary to the law or to the principles of justice and equity, and to refuse to instrument an act under these conditions.

2.2. Professional secrecy

But probably the greatest proof of good faith in the relationship with his clients is given when the notary respects professional secrecy and discloses only under the law the content of the documents he handles. The Romanian Penal Code states that „The disclosure, without right, of data or information regarding the private life of a person, likely to harm another person, by the one who has become aware of them by virtue of his profession or position and who has the obligation to maintain confidentiality regarding these data, is punishable by imprisonment from 3 months to 3 years or by fine"[9]. Although notaries are not expressly individualised, it is clear that by the nature of their profession they become aware of different elements of clients' lives, and are therefore bound by this secrecy.

It should be noted, however, that these are not only professional secrets of an economic nature (for example, the price paid or the offer submitted by a potential buyer to an owner who wants to sell) but, more importantly, also secrets of a family and of personal nature. Good faith translates not only into the patrimonial value it implies, but also into non-patrimonial values, because a correctly drawn up and authenticated document can ensure the peace of mind of a person which is often more valuable than the material peace (for example in the case of a will)[10]. We would also point out that professional secrecy is not only the responsibility of the notary, but also of the employees of his office.

If he fails to observe professional secrecy, in addition to criminal and disciplinary sanctions, damages may also be claimed from the notary.

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[8] Art. 72 letter h) of Law 36/1995 on notaries public and notary activity; Art. 9 of the Deontological Code of Notaries Public in Romania.

[9] Art. 227 of the Criminal Code.

[10] See also Jean Yaigre, Jean François Pillebout, *Droit professionel notarial*, LexisNexis Publishing House, Paris, 2019, pp. 139-149.

The importance of professional secrecy can be analyzed from two perspectives: firstly, from the perspective of protecting a person's private interest, it is important that the one who uses the services of a notary has the certainty, but also the guarantee that the information he discloses to this „indispensable confidant"[11] are protected and will not come to the knowledge of those who have no right to know them, and under no circumstances can they be used against it; thus, the *bona fides* notary becomes the depository of a persons' most valuable information, such as his patrimonial status (the value of the property, the way it is divided etc.), but also in terms of moral aspects (for example, the recognition of a child or the conclusion of a will that the heirs do not know about until the death of the testator etc.). In addition to private interest, however, there is also a general interest that is protected. Keeping professional secrecy is one of the foundations of the notary profession; thus, in his capacity as delegate of State power, the notary must offer sufficient guarantees and sufficient confidence to the citizen to use his services, knowing that what is discussed in the notary office will not be disclosed to other persons.

Only confidential information in the possession of a notary in his capacity as a self-employed person is covered by the obligation of professional secrecy. A notary who comes into possession of information independently of his profession is no longer obliged to keep it for himself, unless it is subject to other laws. However, the question arises whether a notary who has come into possession of information that one party in a document wishes to be confidential, but this information would affect the other party (for example, the existence of an easement or mortgage, or certain prohibitions on building when buying land), is still bound by professional secrecy? French case-law has held that no, since the obligation to inform and advise is more important in these cases[12].

However, professional secrecy may be violated only under the conditions and in the situations expressly provided by law. Thus, the notary is obliged to communicate information from his archive, for example at the request of the prosecutor or the court when judging a criminal case[13] or to the tax authority when necessary to clarify the situation of a taxpayer[14].

Finally, a point to be made in matters of professional secrecy is the situation in which a notary is called as a witness in a trial. In that situation, the legal professional would find himself in a thankless situation: on the one hand, he must show good faith towards his client, therefore he has the obligation, if the law allows him, to invoke professional secrecy when he has to answer certain questions; But the notary must also show good faith towards the act of justice, therefore, if he does not answer the judge's questions, and avails himself of them, then he could be accused of hindering the delivery of justice, and betraying his oath as a jurist. A common case is when the notary is asked, în the conclusion of a contract of sale is requested, whether he has attended oral discussions in his office about the price of the transaction, and whether it has been discussed to pass a lower price per deed in order to avoid paying taxes. It was French case-law which analysed this case, and concluded that, in this situation, the principle of good faith is not infringed if the notary refuses to answer on the grounds of professional secrecy[15].

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[11] Idem.

[12] Decision of the French Court of Cassation no. 24865/11.05.1991.

[13] Art. 169 of the Code of Criminal Procedure.

[14] Art. 64 Code of Fiscal Procedure.

[15] Judgment of 23.10.1952 of the Paris Court of Appeal, taken from the publication *Defrenois,* 1953, no. 1, p. 9.

3. Good faith of the client towards the notary

3.1. Choice of notary

Clients have the absolute right to choose the notary to handle their act, without any restrictions in this respect, except for legal restrictions (for example, in the case of territorial jurisdiction, they can only choose a competent notary, or in the event that there is a family relationship between the notary and one of the parties, he cannot instrument the act). The principle of free choice of notary is a legal principle, since notaries are obliged by law to deal with all citizens' claims by concluding an act or rejecting the application.

3.2. Providing correct information to the notary

In order for an act to produce all the effects provided for by law and desired by the parties, the notary must draw up that act in such a way that it meets all the mandatory constituent elements and these elements correspond to reality.

In the performance of their duties, the parties and the information they provide are important for the preparation of a correct act. However, the contribution of the parties must not be taken for granted by the notary, who must, even if certain information is provided by them, also verify the information received through their own investigations, for example by consulting land registers, consulting doctrine and case-law, consulting civil status registers etc.

Most of the time, however, although clients are in good faith, they do not have a legal background or do not understand certain legal aspects, therefore, without being in bad faith, they can provide incomplete or misinterpreted information to the notary. Therefore, the notary must verify all the information available to him.

The correct provision of information to the notary has another positive effect: being aware of the facts, the latter can give the best and most appropriate advice to the parties. If the notary is not informed about all aspects (for example, the real price in a real estate transaction is hidden), then he cannot prevent through the instrumented act any disputes that may arise, or he cannot ensure its proper enforcement in case of non-payment of the arising debt.

However, there are practical situations where the actual notary has nowhere to check what the parties provide. For example, the number of children that the donor or testator has and which is inserted in the donation contract or will. Thus, if the applicant for the deed is in bad faith, and does not correctly provide the number of reserved heirs, the notary cannot explain to him exactly how the reserved inheritance principle would apply or what is the share due to reserved heirs and beneficiaries of the will in case of reduction. Therefore, the exchange of information between the notary and the client must be correct, complete, and based on the good faith of the two.

3.3. Payment of the fee

The custom is that the fee due following the conclusion of a notarial deed is borne by the party to whom the conclusion of the agreement benefits or in whose favour a real right arises, such as ownership or use. Thus, the general rule, but of a suppletory nature, is that in the case of a contract for the sale of immovable property, it is the buyer who pays the notary's fee, or if for example a mortgage is paid, the fee is borne by the released debtor.

Even if the above rule is a generalized custom, from the notary's point of view, the parties are jointly and severally obliged to pay all the fees involved in an instrumented deed, even if

the parties have an understanding otherwise, and even if there is an agreement between them concluded under private signature (in practice we often encounter the situation in which parties who use a real estate agency when buying a property, and in the real estate brokerage contract it is stipulated that the purchaser of the real estate pays the notarial fee)[16]. Notarial practice and French case-law have held that a notary is allowed to take an payment în advance before dealing with any act, or processing an application[17].

If, however, the parties fail to pay the notarial fees due, the notary may enforce either party for the entire debt, and they will recover the amounts paid by recourse action against the other.

4. Good faith between notaries

4.1. Behaviour towards other colleagues

The notary must always behave in good faith with his colleagues, in accordance with the honor and probity that the job implies. Notaries must respect each other, advise each other and assist each other when necessary. If a notary learns through various sources of inappropriate behaviour by another fellow notary, he must refrain from denigrating that colleague towards his clients and must elegantly suggest to that fellow notary that his practice is not correct.

Naturally, in the event that a notary becomes aware of certain crimes or contraventions that another fellow notary commits, he must notify, like any citizen, the competent bodies, otherwise he may be accused of the crime of „omission of notification"[18].

Another proof of respect and good faith between notaries is given by the acceptance of a colleague to be delegated to another colleague's office, when he cannot exercise his profession for a certain period. The delegation is made by the Chamber of Public Notaries, and the delegated notary will collect the fee and enter in his own registers the instrumented acts (unless the two notaries, the delegate and the delegate, exercise their profession in the district of two different courts)[19].

It is also forbidden for a notary to share his fee with third parties, such as real estate agents, or to receive a separate fee for the performance of his profession.

In the event that a fellow notary does not show good faith, then the affected party may refer the matter to the competent Chamber of Notaries Public, or Disciplinary Council organized at the level of the National Union of Notaries Public in Romania, which can take appropriate measures.

4.2. Good faith towards clients of another notary

The notary must show respect for the clients of his colleagues. As a general rule, notarial acts are concluded in the notary's office, either at the main office or at the secondary office, during working hours, and only exceptionally can the notary go to another location to conclude an act (for example, to a disabled person who cannot move and proves this by a medical certificate) or outside working hours[20].

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16 Jean Yaigre, Jean François Pillebout, *op. cit.,* p. 139.
17 Idem.
18 Art. 267 Penal Code.
19 See also art. 26, point 6, letter b of Law 36/1995 on notaries public and notarial activity.
20 Art. 101 of the Regulation implementing Law 36/1995 on Notaries Public and Notary Activity.

A notary is prohibited from opening his office in the same building as another notary, unless he has the consent of the latter[21]. However, we must mention that in recent years, given the huge increase in the number of notaries, as well as the increasing demand for notary services, the rules regarding the distance required to open an office have been relaxed. In practice, we encounter situations in many cities where notary offices are all open on the same street, in the center, at a very short distance from each other.

The notary must collect at least the minimum fee stipulated by the Order of the Minister of Justice for each notarial operation[22]. He must not grant discounts except in the circumstances provided, and under no circumstances must he grant unaccounted discounts, whether positive or negative (for example, to specify in the document that he has received a fee, but in reality to receive a lower one) in order to unfairly attract his clientele.

Conclusion

We note from the above that good faith in notarial matters, whether it refers to the relationship between notaries, or to the relationship of notaries with their clients, is based on a series of deontological rules. In fact, *Bona Fides* translates in all branches of law aş having an appropriate behavior in society, which ensures stability of the civil circuit.

The lack of good faith translates into sanctioning the one who does not have such appropriate behavior, the sanction can be disciplinary, civil or even criminal. The status of notary in the society implies the existence of respect on the part of its members towards the legal professional. In his capacity as guarantor of the non-contentious civil circuit, the notary must prove an impeccable conduct, but the same irreproachable conduct must have the client who uses notary services, so that a bond of trust is created between the notary and the beneficiary of the notarial deed.

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[21] Art. 28 lit. j of the Code of Ethics for Notaries Public.

[22] Order 177/C/2024 of the Minister of Justice approving minimum fees for notary services.

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[2] Deontological Code of Notaries Public in Romania

[3] Criminal Code

[4] Code of Criminal Procedure

[5] Tax Procedure Code

Case law

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BONA FIDES IN ROMANIAN REGULATIONS OF THE EARLY 19TH CENTURY. PECULIARITIES REGARDING *USUCAPIO* AND THE EFFECTS OF THE SALE CONTRACT IN THE CARAGEA LEGISLATION

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Abstract

Good faith is an essential element for correctly understanding private law of Romano-Germanic origin. The foundations of the concept were laid by the Romans back two millennia, and the concept of bona fides from antiquity is still current.

This article aims to identify a series of applications of good faith in the Caragea Legislation, a Romanian regulation from the beginning of the XIX-th century, relevant for understanding the particularities of private law, prior to the adoption of the 1864 Romanian Civil Code.

The introductory section includes a conceptual delimitation of good faith, as it results from Roman law. The work is divided into two substantial sections, the first concerning the regulation of the acquisition of a right by usucapion, and the second, particularities related to the conclusion and effects of the sales contract. The last section is intended for conclusions, starting from the analyzes previously undertaken.

Keywords: *bona fides, Caragea Legislation, usucapion, acquisition of property, history of Romanian law*

1. Introduction

Good faith is a constant element in all legal systems of Romano-Germanic origin, under three different meanings: (i) rule of interpretation for conventions, (ii) condition for conclusion and execution of contracts and (iii) condition for acquiring property or another real right.

The correct understanding of bona fide, as a concept, depends on identifying the original meaning of the notion, specific to the society that created it. In Latin, the term „fides" means trust, and „bona fides" can be translated as good faith.

After the appearance of the formal procedure, in Roman law, actions in good faith appeared, by including in „*intentio*"[1] the terms „*oportere ex fide bona*"[2], terminology that established a different standard of interpretation of the contract that was subjected to litigation.

[1] The first part of the formula introduced by the *Lex Aebutia de formulis*, adopted between 149-126 BC, according to A.J. Andrei – Particularitățile sistemului juridic roman, Universul Juridic Publishing House, Bucharest, 2015, pg.144

[2] The phrase can be contextually translated by „must be in good faith", in the sense of interpreting the contract sanctioned by action according to the intention of the contracting parties, which prevails over the content of the act by which the document is materialized.

In a Romanian text from the 1st century BC, good faith was defined by Cicero[3] as „*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*". Contextually, it assumes that the foundation of justice is faith, that is, sincerity in what a person says and fidelity in respecting the commitments assumed.

As we have shown on another occasion, in a collective work[4], good faith implies: „(i) sincerity at the time of contracting, respectively at the time of concluding the agreement and (ii) fidelity to the co-contractor in fulfilling the assumed obligations".

Regarding good faith as a condition for the acquisition of real rights, we note that a relevant definition of it results from Justinian's Institutions[5], namely the title referring to the usucapion: „*qui bona fide ab eo qui dominus non erat, cum crediderit eum dominum esse, rem emerit vel ex donatione aliave qua iusta causa acceperit*"[6]. Essential to determining the meaning of the term, in this matter, is that the usucapant has the belief that the person from whom he acquired property is the owner.

Starting from these meanings of good faith, as they have been transmitted to us from Roman law until now, for the purpose of this paper, we will restrict our analysis to the matter of usucapion and the sale-purchase contract, as they were regulated by the Caragea Legislation. This represents an important codification of Romanian law adopted in Wallachia by order of Lord Ioan Caragea in the last years of the Phanariot regime, and which was applied as the main civil legislation, between September 1, 1818 and December 1, 1865, the date of entry into force of the Civil Code 1864[7]. In interwar literature[8] it was shown that the provisions of the Caragea Legislation probably constitute „the expression of the law applied before its enactment", thus justifying the representative character of the legislation for the first half of the 19th century, in Wallachia.

All the texts reproduced in this paper from the Caragea Legislation refer to the critical edition elaborated under the coordination of the Andrei Rădulescu, member of the Romanian Academy, in 1955[9].

2. Acquisition of a right by *usucapio*

In Roman law, good faith was a condition of usucapion[10], a fact expressly stipulated in Justinian's Institutions[11].

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[3] Cicero – *De officiis*, 1.27, available online athttps://www.gutenberg.org/files/47001/47001-h/47001-h.htm#Pg167, accessed on 24.02.2024

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[5] Inst.2.6.pr., available online athttps://droitromain.univ-grenoble-alpes.fr/Corpus/just2.gr.htm#6, last accessed on 24.02.2024.

[6] Contextually we translate the text as follows: „the one who in good faith buys an asset from someone who was not the owner, believing him to be the owner, or it is donated to him or acquired for any other just reason".

[7] E.Cernea, E.Molcuț – Istoria statului și dreptului românesc, Universul Juridic Publishing House, Bucharest, 2013, pg.192

[8] A.Cazacu – Dreptul de protimis – origina și evoluția lui în dreptul românesc, doctoral thesis, Alexandru Țerek Printing House, Iași, University of Iași, Faculty of Law, 1937, pg.132

[9] A.Rădulescu (coord.) – Legiuirea Caragea – ediție critică, Academy of the Romanian People's Republic Publishing House, Bucharest, 1955

[10] E.Molcuț – Drept privat roman, Universul Juridic Publishing House, Bucharest, 2011

[11] Inst.2.6.pr.

Although the Caragea Legislation does not distinctly regulate usucapion as a way of acquiring real rights, we note that it has an application in the matter of servitudes. Thus, in part II, entitled „For things", chapter 2, entitled „For the enslavement of things", paragraph 4, there are rules regarding the acquisition of servitudes through long-term use. The previously mentioned text provides: „He who without bargaining acquires ten years' servitude, without the opposition of the master of the enslaved object, shall always acquire it, after the completion of ten years". Analyzing the provision, we note that its hypothesis is represented by the effective use of a servitude for ten years, without a prior agreement between the owner of the dominant fund and the enslaved fund. The simple completion of the ten-year period is not sufficient for the acquisition of servitude through usucapion, because it is also essential that the owner of the enslaved fund does not show any opposition, either factual or legal.

Regarding the content of the regulation, we note, derogating from classical Roman law, that the acquisition of real rights is not conditioned by good faith of the person in whose favor the acquisitive prescription period runs. We consider that the lack of concrete opposition, namely the passive attitude of the owner of the enslaved fund, cannot determine the possession exercised by the owner of the dominant fund as being in good or bad faith.

As an effect of completing the ten-year term, in these conditions, the person who previously possessed the servitude acquires the right and, therefore, this provision regulates an acquisitive prescription.

The previously rendered provision must be correlated with the provisions of part VI, entitled „For judgments", chapter 1, with the name „For persecutions", rule 7, paragraph 4, which stipulates: „For enslaving immovable things, up to ten years from the beginning of the enslavement".

First of all, we must bear in mind that the term „persecution" has the meaning of „starting a judgment", a fact expressly indicated in Caragea Legislation, part VI, chapter 1, paragraph 1. Secondly, the provisions of paragraph 7, paragraph 4 of the same chapter establish the terms in which the trial can be started for different categories of disputes. The text provides a term in which the judicial process can be started for the removal of servitudes on immovable property. Therefore, the text refers to a negative real estate easement action.

We appreciate that in the case of rule 7, paragraph 4 of part VI, chapter 1, the rule establishes a term of extinguishing prescription, in which the negative action can be introduced in order to protect the rights of the owner regarding the enslaved fund. We note that the ten-year term related to the extinguishing prescription is correlative to the ten-year term regulated by the provisions of Part II, rule 2, paragraph 4, which refers to an acquisitive prescription.

Between the regulations of the two forms of prescription there is a difference of object, respectively the text regarding acquisition of servitude through usucapion does not distinguish between movable and immovable servitudes[12], while the text referring to the extinguishing prescription[13] expressly refers to immovable property. Despite the difference resulting from the text, we note that the second chapter, Part II of the Caragea Legislation repeatedly refers to real estate servitudes. In addition, the exercise of a ten-year servitude over movable property appears possible but unlikely. Thus, to make sense, the text must be related to immovable property.

[12] Part II, rule 2, paragraph 4: „he who without bargaining acquires ten years of enslavement (...)"
[13] Part VI, rule 1, paragraph 7, line 4: „for enslavement of immovable things (...)"

Under these conditions, we appreciate the regulation to be hermetic, given that, alongside the extinction of the dominant fund owner's material right to action, a servitude is born in the patrimony of the owner of the enslaved fund.

Paradoxically, the Caragea Legislation did not also regulate the acquisition by usucapion of property, limiting itself to the previously mentioned application for real estate servitudes.

An interesting regulation is found in part VI, chapter 1, rule 7, paragraphs 1 and 2, according to which: „Of the prosecutions for money: (...) The one for possession in bad faith of movable and immovable things, starts up to thirty years from the beginning of the possession; The one for possession in good faith, will be for movable things, up to 3 years; and for non-movable and for gypsies from the beginning of the possession, up to ten years, if the parties reside in Wallachia, and up to twenty years, if they reside elsewhere".

Starting from the effects, we note that we are in the presence of an extinguishing prescription, which limits the material right to action of the owner who does not exercise possession of his asset, in different intervals, depending on the good or bad faith of the asset owner.

The hypothesis consists in the possession loss of the asset, either movable or immovable, by the owner, in favor of another person, who became the possessor. On the one hand, as long as the possession of the asset was acquired in bad faith, the possessor knowing either that he acquired property from a non-owner or that he is not entitled to possess, the latter can be sued by the owner in order to recover his possession, within 30 years from the date on which he began to possess the asset. After the completion of the 30-year term, as an effect of the previously rendered provision, the owner loses the right to use the coercive force of the state to recover possession of the object, and the possessor's situation is not consolidated in any way.

On the other hand, as long as the possession was acquired in good faith, the possessor having the belief that he acquired from the true owner and, as a result, is entitled to possess the asset, the limitation periods are much shorter and different according to the nature of the asset on which he bears the right subjected to prescription: 3 years for movables, 10 years for immovable assets, when both litigating parties live in Wallachia and 20 years for immovables, if the litigating parties live outside the country.

When the term was completed, its effect was the loss of the material right of action, of the owner against the possessor in good faith. Equally, the situation of the latter is not strengthened in any way, as it does not acquire its own right over the asset.

Unlike the situation of servitudes, for which both an extinguishing prescription and an acquisitive prescription are regulated, in the matter of property, the regulation is not hermetic. Such an omission appears as difficult to understand, given that the homologous legislation in Moldova from the beginning of the XIX-th century, respectively the Callimachus Code, expressly regulates usucapion in section 1907.

In reality, the drafters of the Caragea Legislation were tributary to the concept according to which the right of property cannot be extinguished by lack of use, a fact that constitutes an expression of exclusive and absolute private property[14], specific to classical Roman law and modern law.

[14] C.I.Murzea, R.Matefi – Evoluția statului și a dreptului românesc, Hamangiu Publishing House, Bucharest, 2015, pg.78

Thus, because usucapion was not regulated, the reminiscences of divided property, specific to feudal law, which recognized the possibility of losing the right of ownership in favor of the possessor, were not actual anymore. We believe that such a reason does not constitute a real justification for abandoning the regulation of a means of acquiring property recognized since antiquity. However, we believe that this is as actual evidence of the legislation's transition to modernity.

Preliminarily, we conclude that the manner of regulating the acquisitive prescription in Caragea Legislation appears to be different from Roman sources mentioned in the first section of the article, the condition of good faith of the acquirer not being imposed. Equally, in the matter of the extinctive prescription, the mechanism is, broadly speaking, taken over from the institution of *prescriptio longi temporis*, created at the end of the II century AD[15], a fact that explains, once again, the Roman origin of Romanian law from the XIX-th century[16].

3. Conclusion and execution of the sale contract

Property transfer contracts are currently the main way of acquiring ownership, and the degree of detail in their regulation has grown considerably in recent centuries, along with their multiplication to the detriment of other derivative ways such as inheritance and donation[17].

For the purpose of this paper, we will refer to the regulation of the sale contract from the Caragea Legislation, found in Part III, the second chapter of the rule.

First of all, we consider that the sale-purchase contract was, as a general rule, consensual, the meeting of agreement of contracting parties being sufficient for its conclusion. Equally, the Caragea legislation also introduces exceptions to this rule, regarding the form of the sale purchase contract, requiring that it be made in writing when it concerns immovable property and slaves[18]. This fact was explained by the high importance of those assets[19]. Since contracts in written form involve content, sometimes susceptible to different meanings, the rules regarding good faith interpretation of the convention are entirely applicable.

Caragea legislation provides in part III, the first rule, paragraph 5, that: „*Cunning and forced bargains are not valid*". Under these conditions, at the time of contracting, the use of malicious manipulations or the forcing of the consent of another party determines the lacks the contract of effects. We cannot maintain the existence of an identity between good faith and the absence of any defects of consent at the time of contracting, since a party may be in good faith even if he misrepresents the obligations arising from the contract. In our opinion, the rendered text sanctions with nullity, respectively the lack of legal effects, only those defects of consent that involve: (i) the exercise of intentional, unfair manipulations, intended either to create a wrong image for the co-contractor regarding his own performance or the provision of other parties or (ii) the exercise of acts of violence, physical (*vis*) or moral (*metus*), by which

[15] M.Guțan – Istoria Dreptului românesc, 2nd edition, Hamangiu Publishing House, Bucharest, 2008, pg.29

[16] Prescriptio longi temporis was an institution used to protect provincial property in the classical era of Roman Law. For the analysis of its conditions and effects, see A.J.Andrei – Istoria statului și a dreptului românesc – De la prestatalitatea tracă la formarea Legii Țării și Descălecat, 2nd edition, Universul Juridic Publishing House, Bucharest, 2023, pg.70

[17] I.Ceterchi (coord.) – Istoria Dreptului Românesc, vol. II, part I, Academy of the Socialist Republic of Romania Publishing House, Bucharest, 1984, pg.264

[18] According to paragraph 6, chapter 2 of rule 2, of part III: „The sale of movables shall be made either in writing or without a letter, and of immovables and gypsies, only in writing."

[19] C.Dariescu – Istoria statului și dreptului românesc din antichitate până la Marea Unire, CH Beck Publishing House, Bucharest, 2008, pg.187

consent was either completely removed or was flawed, not representing the real will of the parties.

We believe that both meanings are incompatible with the good faith of a contracting party, in the meaning resulting from Cicero's definition, as it was rendered in the first part of this work, being circumscribed to the notion of *dolus* (cunning) and *metus* (forced), therefore being a violation of the obligation to act honestly at the time of contracting.

The sanction for the violation of good faith, in the forms indicated, at the time of contracting consists in the termination of the contract, as provided for in the 12th paragraph of the first end of the rule of Part III: „To spoil the bargains: (...) When by force they will haggle; When they will bargain cunningly (...)".

Regarding the execution of the obligations arising from the contract, we note that good faith is limited to faithfulness in execution of the commitment made, designated by „veritas et constantia", in the definition of Cicero, which I referred to in the first part.

We note that faithfulness in complying with the commitment requires performing the services in a natural, usual way compared to the specifics of the agreement. In this sense, as an example, we note that the execution of the obligation to deliver the asset sold to the place agreed by the parties implies the obligation of the seller to ensure the transport of the good to that place. Compliance with the obligation to act in good faith produces effects in terms of civil liability towards the party that suffered damage, the size of the compensation being dependent on the debtor's good or bad faith.

The first hypothesis we will analyze regarding the sale-purchase contract consists in the violation of the *protimisis*[20] when concluding the sale of real estate[21].

According to paragraph 7, the second chapter of the rule from part III of the Caragea Legislation, „Those who sell immovable things, cannot sell to others, unless they will first inform those who have preference or protimisis, or their epitropes and those, not wanting to buy, will sign the sale contract. (...)".

The text establishes a right of preemption for certain categories of buyers listed exhaustively in the following paragraph: direct relatives, collateral relatives, neighbors, co-owners.

Good faith implies that the seller informs the person entitled by *protimisis* about the offer to sell the asset. To the extent that this obligation is not respected, we consider that the incident sanction has a dual nature: on the one hand, the deed of sale will be voided, and on the other hand, the seller will be obliged to pay compensation to the holder of *protimisis*.

In this sense, we note that paragraph 4, from the first rule of Part III states: „Bargaining against written rules and good tempers, shall not be concluded". Correlatively, paragraph 12 from the same end of the rule states: „To spoil the bargains: (...) When those who bargain and for what they bargain, do not have the power to bargain (...)". Corroborating the two texts, we note that the law establishes an express prohibition to sell, if the right of *protimisis* is not respected, and concluding the sale in violation of it will be considered „against the rules". The conclusion is strengthened by the fact that in case of violating the right of pre-emption, the seller does not have the possibility to dispose of his property, respectively the contractors

[20] An equivalent for the right of preemption.

[21] In the Caragea Legislation the sale of real estate and slaves was subject to the right of protimis. In this sense, see A.J.Andrei – Istoria statului și a dreptului românesc – De la regimul fanariot, la Unirea Principatelor Române, Universul Juridic Publishing House, Bucharest, 2023, pg.94

„have no power to bargain", and if he concludes the act even under these conditions, it will be voided.

As for the seller's obligation to pay compensation to the holder of *protimisis*, we note that in accordance with paragraph 11 of the second rule of part III, „Whoever sells an immovable thing or a gypsy and hides any of those with protimisis and afterwards they will appear, to pay that one, as punishment, the tenth part of the price of the asset they sold". Thus, regardless of the sanction related to property transfer contract, the seller will be obliged to pay compensation, in an amount previously established by law, to the buyer. The role of this provision is to discourage such practices, based on the bad faith of the seller, who concealed the existence of the sale from a holder of *protimisis*.

The second relevant hypothesis in the matter of the sales contract regulated by the Caragea Legislation consists in establishing liability in case of selling an asset affected by hidden defects.

The relevant text can be found in paragraph 42 of the second rule of Part III, according to which: „When the seller knows the defect of the thing he is selling and keeps it quiet, and as a result damage will occur to the buyer, he owes compensation for the damage, and when he doesn't know it, he doesn't get into debt. The same will happen if, not knowing, one will sell a flock that is shriveled, and other sheep will shrivel as well, and others like that".

First of all, we note that „the defect" of the asset concerns its hidden vices, which either make it difficult or impossible to use. We believe that this notion cannot be extended beyond the notion of material defects of the asset sold, since the existence of a servitude or the lack of title of the seller justify the warranty for eviction, and not for defects. Equally, by „shriveled" herd we mean a herd affected by a contagious disease.

We note that the seller will be obliged to pay compensation only in the event that he was in bad faith and knew the defect of the asset sold, failing to communicate it to the buyer. In such a situation, the basis of liability consists precisely in the violation of the obligation of sincerity at the time of contracting and of fidelity in the execution of the commitment made. We consider that the obligation to compensate has a contractual nature, being inherent to the conclusion of sale, and is conditioned by the bad faith of the seller.

In the situation when the seller acted in good faith, not knowing the defect at the time of contracting, therefore not violating his duty of honesty towards the co-contractor, he will not be required to pay compensation, the risk of losing the asset having already been transferred to the buyer.

4. Conclusions

Unlike contemporary law, the regulations of the past centuries constitute an extremely fertile ground for the exploitation of theses regarding the evolution and limits of certain institutions. Perennial concepts, such as good faith, equity, civil liability, can be found in different forms in the history of law, and their specificity is not accidental, being dependent on the degree of legal development of each society in its time.

In this paper we have identified a number of applications of good faith regarding the acquisitive prescription and the sale contract in a legislation from the beginning of the XIX-th century. Some of these applications don't seem to be justified from a contemporary point of view, while others are almost identical to modern regulations. From the first category, we mention the lack of provision for the acquisition of property by usucapion, under the conditions in which the acquisition of servitudes through acquisitive prescription is

recognized, or the lack of good faith as a condition of usucapion, although this is a condition for the extinguishing prescription in real estate matters. From the second category, we retain the sanction for violating the right of preemption, respectively the conditions for granting the warranty for defects.

We noticed that in any of the hypotheses, the legislator established the size of legal effects of various institutions, in proportion to good faith of the contracting parties, thus, sincerity and fidelity in contracting and execution of commitments led to exoneration of the seller's liability for defects, and the honest belief of the possessor that he is entitled to possess an asset led to the regulation of a reduced limitation period in his favor.

These examples reinforce the conclusion that good faith was an adjustment factor of fairness in the conduct of any legal relationship, being therefore the foundation of legal equity.

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SOME THEORETICAL AND JURISPRUDENTIAL REFLECTIONS ON „GOOD FAITH" AND „THE ABUSE OF PROCEDURAL LAW"

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Abstract

The present research aims to analyze the provisions regarding the procedural implications of „good faith" and „abuse of law". In this sense, we will start the analysis by observing the current regulation of the institutions to be analyzed (from the perspective of substantive and procedural law). Next, let's identify the structural elements, the conditions of existence of the abuse of procedural law, but also the applicable sanctions in case of its commission, by the procedural subjects in question. The dynamic part of the research will be limited to the observation of some solutions pronounced by the national courts on aspects related to the identification and application of sanctions in the event of an abuse of procedural law. When carrying out this research, the legal provisions in force were also analyzed, as well as the opinions of specialists transposed into the existing specialized doctrine in the matter.

Keywords: *good faith; abuse of procedural law; regulation; material law; sanction; court solutions*

One of the fundamental principles of the civil process refers to the good faith exercise of procedural rights and obligations by the participants in the trial [1]. Thus, art. 12 Code of Civil Procedure, establishes that „*procedural rights must be exercised in good faith, according to the purpose for which they were recognized by law and without violating the procedural rights of another party. The party that exercises its procedural rights abusively is liable for the material and moral damages caused. She may be obliged, according to the law, to pay a judicial fine. Also, the party that does not fulfill its procedural obligations in good faith is liable under the conditions provided by law"*. As it follows from the contents of the previously presented provisions, the party that exercises its procedural rights and obligations contrary to good faith, i.e. is in bad faith in exercising them, commits an abuse of procedural right.

Considering the, we believe that it is necessary to make a useful clarification, namely, to note that we are discussing an abuse of procedural law and not a substantive abuse of law. Thus, in material law, [2] „*any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals. Good faith is presumed until the contrary is proved"*. And art. 15 of Civil Code, regulates the abuse of rights, in the sense that no right can be exercised with the aim of harming or damaging another or in an excessive and unreasonable way, contrary to good faith [3]. At the same time, we remind you that good faith is also regulated in the Romanian Constitution, art. 57 which establishes that „*Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of*

others"[4]. Even at the European level, the European Convention on Human Rights (C.E.D.O.), sanctions by art. 17 abuse of right [5].

As stated in one of the opinions formulated in the specialized literature, good faith (bona fide) appears as a psychological state of a subject of individual law, which manifests itself on a legal level (both in terms of the right substantive as well as in terms of procedural law), whereby the subject of law in question has a fair, diligent attitude in terms of the exercise of his right or obligations in order to refrain from causing any damage through their abusive exercise. Thus, the abuse of rights occurs by exercising the right in violation of good faith and the purpose for which it was recognized by law or by exceeding its internal limits, i.e. when its owner, in bad faith, diverts it from its legal purpose [6]. However, we naturally ask ourselves what bad faith refers to and how it manifests itself procedurally. I identified an answer in this sense in the jurisprudence of the Constitutional Court of Romania, where it was held that „*by Decision no. 439 of June 21, 2016, published in the Official Gazette of Romania, Part I, no. 877 of November 2, 2016, paragraphs 17 and 18, it was ruled that, according to the Explanatory Dictionary of the Romanian language, the phrase „bad faith" has the meaning of incorrect, dishonest attitude. In the doctrine, it was noted that, in common language, the antithesis of bad faith is attributed to several meanings, namely: obligation of fair behavior that the parties must respect when concluding and executing conventions; persuading a person that he is acting within a right and in accordance with the law or what is proper; sincerity, honesty, honor. Somewhat similar valences also exist on the legal level, given the prominent ethical character of the norms that govern the two opposing concepts. Thus, it can be concluded that bad faith is a form of guilt, the expression of deceit, fraud, and serious guilt, having as a common denominator cunning, deception and obviously intentional omission. Considering these aspects, the Court considered that bad faith can be qualified as that attitude of a person who commits a fact or an act contrary to the law or other norms of social coexistence, fully aware of the illegal nature of his conduct. In its jurisprudence, the Court also held that the exercise by a person of a right recognized by law cannot justify, by itself, a presumption of bad faith"[7].*

In our opinion, the discussion regarding procedural good faith and committing an abuse of procedural right, must be started from the subjects who can commit such procedural acts harmful to the opposing party. From our point of view, we will include in this category the original parties (plaintiff and defendant), third parties intervening or other participants in the trial, who according to the law benefit from procedural rights or incur obligations in the case in which they participate. For each of them there is the possibility of committing abusive procedural acts, considering that each party has rights but also obligations specific to the position they occupy in the process, these must be exercised in good faith and within the limits established by law. For example, the plaintiff has the right to file a summons request, to propose the administration of evidence, to file recusal requests etc., but also specific obligations, such as the obligation to fulfill the procedural documents under the conditions and in the established order by court or law.

Returning to the procedural implications of the abuse of law, in the specialized literature it was considered that it has a mixed composition, consisting of a subject and an objective element [8]. As for the subjective element, it even aims at the bad faith use of procedural law, often with the aim of harassing the opposing party, given that a special and legitimate interest is not pursued nor justified, but only an exclusive injury to the adverse party is desired, either to delay the resolution of the case or to cause the adverse party to abandon its own defense

methods. Regarding the objective element, as it was unanimously stated in the specialized literature, it consists in diverting the procedural right from the purpose for which it was recognized by the law, namely, from its legal purpose, by violating the procedural rights of another party [9]. The same characteristics of the constitutive elements of the abuse of law can also be found jurisprudentially, in the sense in which „*the abuse of procedural law is considered an illicit legal fact, with two constitutive elements: the subjective element, as an intentional, mental factor of the exercise of the procedural right constituted of its two components, one intellectual (of conscience) and the other volitional (of will), and the objective element, which consists in the removal, diversion of procedural law from the social-economic purpose for which it was recognized, from its legal finality"* [10].

Considering the two previously mentioned elements, we can distinguish when a procedural act is done in bad faith if several conditions are cumulatively met. The first condition refers to the author of the act, who must be the owner of the abusively exercised procedural right and, at the same time, he must have the procedural capacity to exercise it [11]. For example, the plaintiff has the right to file a summons request, and if he files an obvious number of summons requests only for the purpose of harassing the opposing party to fulfill the first condition, it is necessary that he have procedural capacity to formulate the summons request. Regarding this aspect, in judicial practice it was noted that „*with regard to the request of the Prosecutor's Office attached to the Hunedoara Court, to fine the applicant for filing the request in bad faith, according to art. 187 para. 1 point 1 lit. of the Civil Procedure Code, considering that the plaintiff filed the claim for harassing purposes, the court will reject it, as it could not be proven that the plaintiff filed the claim without the intention of producing legal effects and knowing that she would not be able to prove her claims. In addition, the abuse of procedural law represents the diversion of the right from the purpose for which it was recognized by law, the right being thus exercised in bad faith. In this case, neither the objective element of the abuse of procedural law, which consists in diverting the right from the purpose for which it was recognized by the law, nor the subjective element that involves exercising it in bad faith, with the aim of harming the other party, was proven. Thus, it was not proven that the plaintiff would have brought this action for the purpose of harassment"* [12].

Another condition concerns an exercise of the procedural right that is carried out within its external limits, exceeding the purpose provided by the law [13]. For example, making a request for a declaration of death, although the person who made the request knows that the person in question is not deceased. Regarding this aspect, in the judicial practice it was rightly held that „*the non-payment of the stamp duty represents a legal administrative task and does not constitute an object of the judicial activity, therefore, the analysis of the stamp duty is a matter that precedes any procedural act carried out in the case and does not involve research on the rights asserted by the party. Considering these considerations, because the obligation to pay the judicial stamp duty was not fulfilled within the established term, based on the legal provisions stated above, the court will admit the exception of nullity and will, accordingly, cancel the summons request in judgment as unstamped" [14].*

Another condition refers to the diversion of the procedural right from the purpose for which it was recognized by law [15]. At the same time, another condition concerns even the exercise of the procedural right in bad faith, whereby its owner seeks to cause damage to the other party by exercising the formulated procedural act. In the previously mentioned example, regarding the formulation of a request for a declaration of death, the holder of the request can

cause moral damages (of image) to the party he requests to be declared deceased. Regarding this aspect, we find in judicial practice a solution aimed at an abuse of law from the perspective of the return of court costs by the party that won the trial. Thus, in the considerations of the pronounced decision, the court held that „*reported reduction of lawyers' fees under the conditions of art. 451 para. 2 Code of Civil Procedure considers the hypothesis of an abuse of rights by the party that wins the trial, which tends to impose on the other party an obligation that clearly does not reflect the value of the trial and/or the workload of the lawyer. The party is free to pay the lawyer any amount as a fee, but this can be charged to the opposing party only up to the limit of the abusive exercise of this right, since, according to art. 12 para. 1 Code of Civil Procedure, procedural rights must be exercised in good faith, according to the purpose for which they were recognized by law and without violating the procedural rights of another party. Based on the facts of the case, the workload of the plaintiff's lawyer and the nature of the litigation, the defendant's request regarding the reduction of the lawyer's fee in proportion to the work actually performed by the lawyer appears unfounded, the court deeming that the amount charged as the lawyer's fee is justified and is not obvious disproportionate compared to the work actually performed by the defender"* [16]. Finally, it is also necessary that the abusive exercise of the procedural right has resulted in the violation of the procedural rights of another party. An example in this case refers to the repeated formulation of unfounded requests to recuse the panel of judges, which can be abusive, as it leads to the violation of the right of the other party to resolve the case in an optimal and predictable term [17]. However, in judicial practice it was rightly noted that „*by exercising the right of appeal in file no. xxxx/197/2017, respectively by exercising procedural rights in defense of her legitimate rights and interests, the plaintiff would be the only one responsible for the damage caused by the court costs of the appeal, since, as the appellant also indicated, from the documents attached to the summons in court, it follows that, on the date of the appeal, it was not published in Official Gazette decision in the interest of law no. 4/2018, by which it was ruled on the interpretation of the applicable legal provisions, and the judicial practice at the time regarding the legal issue brought to the judgment in that file was not uniform. Thus, from this perspective, it could not be held that the exercise of the procedural rights was carried out in an abusive manner, to impute to him the court costs incurred in the appeal" [18].*

The task of assessing and ascertaining the performance of an abusive procedural act rests with the court. Moreover, regarding this aspect, also the previously mentioned case (note 7), the Constitutional Court of Romania also held that „*the assessment of the abusive exercise of procedural rights rests with the court that determines the cases in which a participant in the trial acts contrary to good faith, which, as it has been shown, must take the form of good intentions, diligence and refraining from causing any harm to the other parties, in accordance with the observance of public order and the good morals that characterize social relations. Therefore, considering that the judge is the one who leads the debates, seeking to respect the procedural equality of the participants in a litigation, he will be the one who, depending on the circumstances of the case and in case of failure of the presumption of good faith, will assess to the guilt of the party and the violated legal order and will apply the judicial fine, having sufficient criteria for its individualization, such as the situations and limits established by law or the concept of good faith, showing, at the same time, the reasons that led to this measure. Therefore, it cannot be held that in the absence of a definition of the notion of „bad faith", the judge is given the opportunity to interpret this term as he likes, given that the criticized legal text refers to the introduction with „bad faith" of an obviously unfounded*

request, the phrase „obviously unfounded" suggesting the fact that the request has no foundation, an aspect that the author of the request is aware of. It is obvious that, according to the way in which the request was formulated, the reasons given, the possible repeated requests for summons etc., the court can form a conviction and assess whether the plaintiff introduces a request for summons in bad faith; or the text of the law does nothing but legitimize the judge who finds such a situation to sanction it. For the exploitation of legitimate rights and interests, the parties must act in good faith, and not in an abusive, harassing, vexatious spirit for the magistrates or the court.

Regarding the sanctioning of the abuse of procedural right, we will note that from a procedural point of view, the procedural act carried out abusively will be devoid of the effects for which it was formulated, effects contrary to the purpose for which the procedural right was recognized by law. If the abusive act has an independent existence, the sanction will produce its effects only with respect to that act, but if that act is the basis of other procedural acts after the abusive act, the lack of effects will also occur with respect to them [19]. From the perspective of the party injured by the act formulated in bad faith, it has the possibility to request reparation for the material and moral damages caused by the author of the procedural act formulated abusively. At the same time, the author of the act may be obliged to pay a judicial fine. It is necessary to note that obliging the party to pay material or moral damages does not remove the possibility of sanctioning it with a judicial fine, the legal nature of the amounts being distinct, the damages have a reparative role, while the judicial fine has a sanctioning function [20]. Regarding this last aspect, art. 187 para. (1) point 1 letter a) Code of Civil Procedure, establishes that „*the introduction, in bad faith, of some main, accessory, additional or incidental claims, as well as for the exercise of an obviously groundless appeal, is punishable by a judicial fine from 100 lei to 1000 lei"* [21]. Moreover, regarding this aspect, also in the jurisprudence of the Constitutional Court of Romania, regarding the criticism regarding the lack of criteria for the gradualization of the judicial fine, it was held that „*through the conclusion by which the court obliges the payment of the fine or compensation, this is subject to judicial control through the possibility of formulating a request for re-examination under the conditions of art. 191 of the Code of Civil Procedure, on which occasion, if it is judged that the ordered measure is too vigorous, the request will be accepted and the amount of the fine or compensation will be reduced. Regarding the limits of judicial fines, the Court considers that the legislator established their amount in accordance with his constitutional mandate conferred by art. 126 of the Constitution to ensure a good administration of justice and does not constitute an obstacle in the exercise of the right of free access to justice. The judge falls within the range of values established by the legislator depending on the circumstances of the case and the fact that led to the application of such a measure"* [22].

In recent judicial practice, the court held that „*as far as the procedural conduct of the petitioner is concerned, the court holds that he submitted a request with general considerations, invoking the fortuitous case on the grounds that he was overtaking another vehicle, although from viewing in the video recording it can be seen that the petitioner tried to mislead the court as he was not in any overtaking, being alone on the road section caught by the radar device. Thus, the contravention complaint and its effects were recognized by the legislator precisely in order to ensure a procedural framework for respecting the rights of persons sanctioned contravention and to ensure a person's access to justice, a right provided by the fundamental law, not being in any way to allow the petitioners to formulate such*

informal requests before the court to divert the purpose of a civil lawsuit or to benefit from the possible benefits that come with the introduction of a contravention complaint. The abuse of rights committed by the petitioner meets the constitutive elements of this judicial misconduct, being a request introduced in bad faith and which is clearly unfounded in view of its uninformative nature and the disinterest of the petitioner in the fate of the process, as well as in view of the legality and soundness of the sanctioning act attacked. Also, analyzing the petitioner's contravention record, he has also been fined for exceeding the legal speed limit by more than 50 km/h, he has filed contravention complaints and, in those situations, complaints which were definitively rejected by the courts so that the court appreciates that the petitioner filed this contravention complaint only for dilatory purposes. For these reasons, the court will impose on the petitioner a judicial fine of 850 lei, for the introduction in bad faith of an obviously unfounded request. The court appreciates that this fine, set towards the special maximum, can ensure general and special prevention by the fact that it will constitute a deterrent for other people, in general, and for the petitioner, in particular, to introduce, in the future, informal requests, thus diverting the purpose for which the legislature legislated such legal possibilities for a litigant in good faith. Through his conduct, the petitioner used these legal provisions in bad faith, contrary to the reason for which they were enacted, committing a true abuse of law" [23].

In another case, it was held „*that the plaintiff requested the order to suspend the enforced execution through the presidential ordinance with manifest bad faith, under the conditions that this measure can be requested and ordered exclusively under art. 719 Code of Civil Procedure, with strict compliance with the conditions provided by this normative text, provisions of which the plaintiff understood to avail herself of in the files specified in the exposition of the factual situation. Moreover, the reasons cited by the plaintiff through this presidential ordinance are relatively the same as those cited in the requests for provisional suspension that were the subject of files no. xxx/320/2024 and xxx/320/2024. Thus, the court notes that by diverting from the usual purpose of the legal provisions that regulate the procedure regarding the issuance of the presidential ordinance, the plaintiff has vested the court in a purely formal manner with such a request, her real intention being that of obtaining, through an artificial procedure, the suspension of forced execution, in the conditions in which this desired was not obtained through the requests that were the subject of files no. xxx/320/2024 and xxx/320/2024 and reiterating the same reasons as those invoked in the latter files. Therefore, the plaintiff's procedural conduct is equivalent to the commission of an illegal act consisting in the judicial misconduct provided for by the provisions of art. 187 para. (1) point 1 letter a) Code of Civil Procedure, being committed with intent, under the conditions in which the court found his bad faith. The damage caused by the plaintiff, who, through her conduct characterized by bad faith, requested the measure of suspension of enforced execution both under the special procedure provided for by art. 719 Code of Civil Procedure, as well as under the provisions of art. 997 Code of Civil Procedure, relating to the procedure regarding the issuance of the presidential ordinance, belongs to the state and aims at affecting the process of administration of justice, as a public service, by burdening the role of the court with manifestly inadmissible requests and this, especially in the conditions where the applicant benefited from specialized legal assistance, respectively of consultation, assistance and representation by lawyers"*[24].

Finally, as follows from the provisions of art. 12 Code of Civil Procedure, failure to fulfill the procedural obligations in bad faith by the parties is likely to lead to their being obliged to

pay a judicial fine, as well as, at the request of the injured party, to compensation for the material and moral damage caused. For example, the non-presentation of a document by the party that owns the document, by the deadline fixed for this purpose by the court, constitutes a judicial misconduct sanctioned by law with a fine.

In conclusion, the „principle of good faith" is one of the fundamental principles regulated at the level of the current Code of Civil Procedure. Its importance results from the implications that a contrary conduct would bring on the procedural level, through which the procedural subjects can commit an abuse of procedural law. As I mentioned in the content of the research, the institution of procedural „abuse of law" involves an analysis of its structure as well as observing the fulfillment of the conditions that characterize a procedural act as abusive. As we have observed, the court is the one that assesses and analyzes on a case-by-case basis the abusive nature of a formulated procedural act, applying in this sense the sanctions provided by law.

REFERENCES

[1] See also the provisions of art. 723 Code of Civil Procedure 1865.

[2] See art. 14 of Civil Code.

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STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION (SLAPP) – DETERMINATION CRITERIA AND CURRENT REMEDIES IN ROMANIAN LEGISLATION IN THE EVENT OF ACTIONS DIRECTED AGAINST JOURNALISTS

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Abstract

Freedom of press and the protection of the journalist's independence represent a constant and consistent element in the policy of democratic states and international organizations in recent decades.

Despite this fact, a new category of litigation has gained momentum in recent years, namely strategic lawsuits directed against public participation (Slapp), precisely against journalists, for their activity. Paradoxically, the worrying increase in the number of such litigations was not accompanied legislation updates, which led to an inconsistent practice at European Union level.

At the moment there are three acts adopted by the European institutions, without binding legal force, namely a recommendation, a resolution and a proposal for a directive, however, their content predictably allows us to outline the conditions for placing a legal action in the Slapp category.

Keywords: *SLAPP, strategic process, journalist's civil liability, press freedom, communication law*

1. Introduction

In a democratic society, the role of journalists is essential in maintaining a balance between public and private interests and in facilitating public debate, respectively ensuring a coherent information flow.

This flow cannot be limited only to opinions and ideas, as information of interest to society is also represented by concrete facts, data about public figures or even simple curiosities.

In an extremely expressive way, point 8 of Recommendation (EU) 2022/758 of the Commission's preamble[1] states that „a healthy and thriving democracy requires that people are able to participate actively in public debate".

Preventing a public debate, by taking dissuasive and intimidation measures against the journalist for information brought by him to the public, with the involuntary help of the judicial system, is an illegal act, contrary to the spirit of a democratic society based on freedom and pluralism.

[1]From 27.04.2022, regarding the protection of journalists and human rights defenders involved in public mobilization actions against manifestly unfounded or abusive judicial procedures, published in the Official Journal of the European Union L138/30 of 17.05.2022

The term „Slapp" is the abbreviation of the phrase „Strategic law-suits against public participation", and its definition has known multiple forms in specialized literature, especially from the North American continent.

The definition that we currently consider complete starts from the preamble of the European Parliament Resolution of November 11, 2021[2], which, in letter E provides: „Strategic Lawsuits Against Public Participation (SLAPPs) are lawsuits or other legal actions (e.g. injunctions, asset-freezing) brought forward by private individuals and entities, and also by public officials, public bodies and publicly controlled entities, directed at one or more individuals or groups, using a variety of legal bases mostly in civil and criminal law, as well as the threats of such actions, with the purpose of preventing investigation and reporting on breaches of Union and national law, corruption or other abusive practices or of blocking or otherwise undermining public participation".

At European level, the main relevant regulations lack binding legal force, being represented, in chronological order, by (i) the Resolution of the European Parliament of 11 November 2021 on the consolidation of democracy and media freedom and pluralism in the EU, (ii) the Recommendations (EU) 2022/758 of the Commission on the protection of journalists and human rights defenders involved in public mobilization actions against manifestly unfounded or abusive judicial proceedings and (iii) the Proposal for a Directive of the European Parliament and of the Council on the protection of persons involved in mobilization actions public against clearly unfounded or abusive judicial procedures[3].

Statistically, in recent years, the number of Slapp-type cases directed against journalists at European level has seen a significant increase, from less than 100 cases in 2018 to more than 820 cases in 2023, according to a 2023 CASE report[4]. The same study indicated that in certain countries the number of cases of this nature is clearly higher than the documented one, a fact that determines the reasonable assessment that the real number of disputes is much higher[5].

In Romanian legislation there are no regulations dedicated to protection against this type of lawsuits, however, as we will see in the section on current remedies, a number of procedural means are stipulated, but they are ineffective.

2. Criteria for determining a SLAPP type process

Referring to the European acts adopted in this matter, we note that the proposed directive of 27.04.2022, previously cited, defines in article 3, point 3 of its content abusive legal proceedings against public mobilization, as: „court proceedings brought in relation to public participation that are fully or partially unfounded and have as their main purpose to prevent, restrict or penalize public participation. Indications of such a purpose can be: (a)the disproportionate, excessive or unreasonable nature of the claim or part thereof; (b)the existence of multiple proceedings initiated by the claimant or associated parties in relation to

[2]on strengthening democracy and media freedom and pluralism in the EU: unjustified recourse to civil and criminal law actions to silence journalists, NGOs and civil society published in the Official Journal of the European Union C205/2 of 20.05. 2022

[3]From 27.04.2022, available online at:https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52022PC0177, last consulted on 25.02.2024

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[5]idem

similar matters; (c)intimidation, harassment or threats on the part of the claimant or his or her representatives".

We note that the European provisions have an exemplificative nature, and the classification of a litigation in the category of strategic processes directed against public mobilization cannot be carried out starting from them. To the extent that a series of concrete, cumulative conditions would be established, the qualification of the process could be carried out in a summary, adversarial procedure and in accordance with the right to a fair trial for both parties.

In our view, the essential criteria should combine the features of Slapp-type lawsuits with the specifics of civil liability for the abusive exercise of a right. Contrary to the previously cited provisions of the proposed directive, we do not consider that the second indication, regarding the existence of multiple procedures initiated by the plaintiff, is essential for classifying a dispute in the Slapp category. Although it is obvious that initiating several actions before forums of different jurisdictions invariably attracts higher litigation costs and aggravates the effect that this type of process has on the journalist, we note that a trial can correspond to the definition given in letter E of the preamble of the Resolution of the European Parliament from November 11, 2021 even if there are no other similar disputes between the parties.

We consider it appropriate to identify the specifics of Slapp-type trials starting from the definition we agreed on in the first section of this paper and from the provisions of art. 15 of the Civil Code[6]regarding the abuse of law[7]. Therefore, in our view, the processes in question present, essentially, the following cumulative characteristics:

1. They are initiated by natural or legal persons, private or public, in a position of authority or financial or political superiority over the persons summoned to court, from among journalists or persons who have contributed to journalistic activity;
2. Claims made through litigation are predominantly unfounded, excessive or abusive;
3. The litigation is subsequent to journalistic investigative activities or the public communication of materials that concerned irregularities committed by the plaintiffs or the persons associated with them;
4. The real purpose of the litigation is, contrary to good faith, to harass, silence or retaliate for the journalist's exercise of freedom of expression.

Analyzing *the first condition*, we note that there must be an imbalance of power between the plaintiff and the defendant, a fact that can result both from the ongoing relationships between them, for example employer – employee, teacher – student, tutor – pupil etc., and from differences in economic or political power, or even from placing the plaintiff in a position of public authority, including vis-à-vis the defendant. In the case of current reports, the initiation of a legal proceeding by a teacher against a student or former student, can lead to the process being classified in the Slapp category both in the consideration of the relationship of educational dependence and in the consideration of the relationship of authority, institutional or moral existing between them.

According to a study published in November 2023 at the request of the European Parliament – LIBE Committee[8], the profile of the plaintiff in Slapp-type cases is represented

[6]Law no. 287/2009 on the Civil Code, republished in the Official Gazette, Part I, no. 505/15.07.2011

[7]Art.15 Civil Code provides: „No right can be exercised with the aim of harming or damaging another or in an excessive and unreasonable way, contrary to good faith".

[8]J.Borg-Barthet, F.Farrington – Open Slapp Cases in 2022 and 2023 – The incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union, pg.30, available online at:

by 42.6% of public figures from among politicians and civil servants, 21.3% by companies, including entities owned by them. Equally, comparable values of approximately 9 and 10 percent were allocated to natural persons from the legal field and to persons from other fields, outside the political sphere and public administration.

Correlatively, the person summoned to court, in most cases, 44.7%, is represented by a journalist, acting as a natural person, and legal entities operating in the media field represented 28.4% of the defendants[9].

As for *the second condition*, according to which the claims made through litigation are predominantly unfounded, excessive or abusive, we note that in most cases, the claims are aimed at compensation of a civil nature for defamation, which represent 74.5% of the cases according to the previously cited report[10].

The patently unfounded character of the claim follows from its content and, together with the excessive and abusive character, must be established on a case-by-case basis. In general, the amount of compensation requested is extremely high, and the supporting evidence is confusing, oversized and predominantly based on subjective assessments of the claimed damage.

In general, when the claims concern moral damages, the quantification of the damage is not possible in an objective manner, the determination of the compensation is left to the overall judgment of the court.

Determining the excessive character of the claims that are the subject of the litigation cannot be achieved by abstracting from the concrete situation of the defendant. Thus, if in an action directed against a press trust the claim can be of hundreds of thousands or even millions of euros, most likely, it has an excessive and intimidating character. For an independent journalist or a small publication, the claim of a few thousands or tens of thousands of euros leads to the same result.

It is particularly important, in our opinion, that the claims requested by the plaintiff are perceived at a global level, thus, if in an action directed against a journalist the plaintiff requests symbolic damages of 1 euro, to which he adds court costs in an excessive amount, in the order of tens of thousands of euros, we consider that the second condition is met. A strictly procedural problem exists in the hypothesis where the plaintiff reserves the right to ask for court costs separately. We believe that latter litigation, being an accessory to the main litigation, must be resolved taking into account the possibility of qualifying it as Slapp, even if its legal cause is represented strictly by the recovery of court costs incurred in a previous litigation.

Analyzing *the third condition*, regarding the birth of the dispute following journalistic investigative activities or the public communication of materials that concerned irregularities committed by the plaintiffs or the persons associated with them, we consider it essential that the dispute was caused by the activity of the journalist or his collaborators. It is not necessary for a press material to have been published, the gathering of information or the carrying out of investigative activities known to the applicant being sufficient. If the notification to the court takes place prior to the public communication of a press material, the person who has the initiative of the process undertakes a preventive action, likely to block the publication of

https://www.europarl.europa.eu/RegData/etudes/STUD/2023/756468/IPOL_STU(2023)756468_EN.pdf, consulted on 25.02.2024

[9]J.Borg-Barthet, F.Farrington – *op. cit*., pg.32

[10]J.Borg-Barthet, F.Farrington – *op. cit*., pg.33

the material. If the notification to the court takes place after the public communication of the news, the purpose of the judicial action can be a repressive one, of harassment, through which the withdrawal of the material or even the publication of a refutation is sought.

In the hypothesis that a journalist collaborates with other persons, through whom he gathers the necessary information, the process can be started either against the journalist or the persons who are the source of the information, or against all those involved, the determining cause of the litigation being the carrying out of the investigative activity that led to the publication of a press material.

With regard to *the fourth condition*, according to which the real purpose of the litigation is, contrary to good faith, to harass, silence or retaliate for the manner in which the journalist exercised his freedom of expression, we consider that this must be met to attract the incidence of substantial abuse of right.

The first essential aspect consists in the formulation of the request for summons in bad faith, without the real intention to obtain a reparation of the prejudice felt. In national law, good faith is presumed, according to art. 14, paragraph 2 of the Civil Code, which is why establishing the bad faith with which the plaintiff acted in his procedural approach must be done concretely. We believe that the cumulative meeting of the first three conditions constitutes a consistent, and sometimes sufficient, benchmark for evaluating the plaintiff's bad faith at the time of filing the action. In general, bad faith can be easily established in the conditions of introducing repetitive actions, or directed against multiple people involved in the journalistic activity that led to trial.

The second essential aspect is the purpose of harassing, silencing or retaliating for the way the journalist, his collaborators or sources have carried out their work. Identifying the purpose can only be achieved by evaluating the consequences that judging the process, with bearing the related costs, or even admitting the action would have on the journalist. As long as the conduct of the defense in such litigation would substantially reduce or even annihilate the possibility of further investigation or material development activities, we consider that the fourth condition would be met.

Other authors[11] showed that the reason for starting the litigation consists in dissipating the defendants' energy and distracting them from the activity undertaken, in order to formulate the defense in an untimely judicial procedure.

Therefore, within the framework that we have previously proposed, we believe that a correct classification of the dispute as Slapp can be made with a high degree of precision.

3. Current remedies in Romanian legislation?

Considering the established classification of Slapp-type processes as illegal judicial actions, which should be blurred or at least limited, we note that the contemporary Romanian legislation does not offer sufficient procedural or substantial remedies.

Thus, any such judicial procedure is intended to follow the usual course, in the procedure of the trial at first, second, and in most cases, third instance. Compared to the average length of a civil trial and the interest of one of the parties to prolong the duration of the procedure as much as possible, such litigation can predictably last between 2 and 5 years.

[11]A.Glover, M.Jimison – SLAPP Suits: A First Amendment Issue and Beyond, North Carolina Central Law Review, Vol. 21, 1995, pg.125

The main dissuasive procedural provision for the plaintiff consists in the application by the court of a judicial fine for the formulation of the action in bad faith. Thus, according to art. 187, paragraph 1, letter a of the Code of Civil Procedure: „Unless the law provides otherwise, the court, according to the provisions of this article, will be able to sanction the following acts committed in connection with the process, as follows: 1. with judicial fine from 100 lei to 1.000 lei: a) the introduction, in bad faith, of main, accessory, additional or incidental claims, as well as for the exercise of a clearly groundless appeal".

Considering the maximum amount of the fine, of 1.000 lei, presuming, ad absurdum, that it would be applied in each procedural phase, we would reach a cumulative sanction of 3.000 lei for the plaintiff, approximatively 600 euros, a value that cannot be considered relevant to the object, purpose and foreseeable duration of the process.

Another way to impose a sanction on the plaintiff, but with a post-factum effect, after the final judgment of the case, consists in obliging him to bear the court costs incurred by the defendant, under the terms of art. 453, paragraph 1 of the Code of civil procedure[12]. The deficiency of this procedural mechanism consists in the fact that the defendant must advance his own court costs in order to face the trial, and, at the end of it, he will be able to recover the amount.

Although the defendant has the formal opportunity to obtain compensation for the abuse of rights committed by the plaintiff, this may involve a separate process, which in turn entails other costs.

As regards the advancement of legal expenses necessary for the defendant by the state, we note that this fact can only be achieved under the conditions of the granting of public judicial aid, according to Government's Emergency Ordinance no. 51/2008[13], however, its criteria are relatively rigorous and its benefits are intended for people who, based on their monthly income, would not be able to support themselves by facing the costs of a lawsuit.

4. Perspectives

The regulation of protective measures against Slapp has appeared in national legislation, respectively in common law judicial systems, the United States, Australia and Canada[14], where the regulations were foreshadowed by jurisprudence. According to the same study[15], the essential measures found in the anti-Slapp laws aim at three directions of action: a) preventing the dissuasive effect of Slapp-type processes on the protection of human rights, freedom of expression and public participation in matters of general interest, b) ensuring rapid rejection mechanisms of requests, c) providing a remedy to cover the costs inherent in judicial procedures.

Although there is no comparable regulatory framework in Romania, we note that similar measures can be found in the content of the Proposal for a Directive of the European Parliament and the Council of 27.04.2022, previously referred to.

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[12]Art.453, paragraph 1 of the Romanian Code of Civil Procedure provides: „the party that loses the case will be obliged, at the request of the party that won, to pay court costs".

[13]Regarding public judicial aid in civil matters, published in the Official Gazette, Part I, no. 327/25.04.2008

[14]L. Bollinger, C. Botero-Marino – How are courts responding to SLAPPs? Analysis of selected court decisions from across the globe, Columbia Global Freedom of Expression, 2023, pg.7, available online at:https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2023/04/GFoE-Article19-SLAPPs-paper.pdf, consulted on 25.02.2024

[15]L. Bollinger, C. Botero-Marino – *op. cit*., pg. 8

Corresponding to the first category of measures, art. 16 of the proposed directive establishes that the courts can impose effective, proportionate and dissuasive sanctions on the party that initiated the legal procedure, a fact that would discourage it from starting such an action.

The second category of measures is regulated by art. 9 of the proposed directive, which imposes a filter-type procedural mechanism, according to which the national courts can issue a rejection decision in an abbreviated procedure, carried out expeditiously, if at a brief review of the file, the action appears to have an abusive character. By its nature, such a procedural institution entails low costs for defendants. In the same sense, art. 12 of the proposed directive reverses the burden of proof, with the plaintiff having the obligation to prove that his action is not manifestly unfounded.

We believe that implementing the directive, after its adoption by the European bodies, should be done through a detailed regulation of a special, summary, adversarial procedure and subjected to an appeal carried out with full respect of the right to a fair trial, as guaranteed by art.6 of the European Convention on Human Rights.

The third category of measures seems to be covered by the proposed directive only in terms of the recovery of court costs incurred by the defendants, including some compensation for the damages suffered, however, the establishment of a mechanism for the advancement of procedural costs by the state does not result from the content of the European act. Under these conditions, in agreement with other authors[16], we consider that the remedy is partially ineffective, since until the litigation is completed and the court costs are recovered, the journalist will bear a series of expenses capable of limiting his freedom of expression during the legal proceedings and causing him to be unwarrantedly cautious in the preparation of subsequent materials. In literature[17], approximately three decades ago, it was shown that the scope of Slapp-type litigation constitutes an appropriate field for providing *pro bono* legal assistance to the defendant.

5. Conclusions

The protection of press freedom remains a constant and imperative concern of democratic states and international organizations competent in this sphere.

Worryingly, the increase in the number of strategic lawsuits, formulated with the aim of intimidating or silencing the plaintiff journalists, calls for the need to take energetic measures including at European Union level, given that national regulations are reduced and ineffective, and the cross-border nature of exchange of information calls for a standardization of treatment at European level.

Through this article, we have established a series of delimitation criteria between Slapp-type legal actions and other trials formulated against journalists and we have identified some remedies in the current Romanian legislation, which have proven to be ineffective in relation to the risks that this type of processes imply.

After the finalization and adoption of the Proposal for a Directive of the European Parliament and the Council of 27.04.2022, a relatively effective framework for the protection of press freedom at European level will be ensured, and under these conditions it is essential

[16]S.S.Tu, N.F.Stump – Free Speech in the Balance: Judicial Sanctions and Frivolous Slapp Suits, Loyola of Los Angeles Law Review, vol.54, no.2/2020, pg.639

[17]R. Abrams – Strategic Lawsuits against Public Participation (SLAPP), Pace Environmental Law Review, vol.33, 1989, pg.43

that the transposition of the act into national law preserves the particularities of the protection offered.

Although in the Commission's recommendation and in the proposed directive we did not identify the absence of good faith as a condition for delimiting Slapp-type processes from other types of litigation, we observed that it is inseparable from any form of abuse of law, its role being that of to restore the legal balance. Therefore, in a synthetic expression, Slapp suits can be circumscribed as *mala fides litigantum*.

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Section B

FORMS OF ARTIFICIAL INTELLIGENCE AND HUMAN RIGHTS: AN ISSUE OF LEGAL EQUITY

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Abstract

Artificial intelligence acknowledges that its prototype is the human being and human reasoning, thus acting by imitating human behavior, having as final aspiration reaching the complete similarity with the human being. Translated into legal matters, this similarity raises the issue of reconciling the emergence of new technologies that imitate the human being and human rights. The steps taken at the European level in the field of recognizing and regulating forms of artificial intelligence as a special way of manifesting have also crystallized at the legal level through the establishment of some initial regulations. The design of the latter had at its core the respect for human rights – these becoming a unit for measuring the degree to which the application of forms of artificial intelligence is desirable and useful in society. Our work is structured around the idea that forms of artificial intelligence are managed in good faith to the extent that they comply with recognized human rights standards. Nevertheless, the mechanism for quantifying the respect of human rights in the context of applying new technologies is fragile if we consider the fact that the responsibility for the actions of artificial intelligence is placed under uncertainty. There cannot be a good configuration of respect for human rights in the conditions where the black box principle of operating artificial intelligence prevents the attribution of an autonomous consciousness to the latter.

Keywords: *equity, good faith, human rights, artificial intelligence, accountability, human rights-based approach, risk-based approach.*

I. Elements of context

The interaction between forms of artificial intelligence and the field of human rights is atypical to say the least, leading to multiple scenarios in which can be captured the outcomes of this possible interaction. The field of human rights has been established, at a scientific level, as being related to the human being, with his rights as well as with the human experiences arising from the exercise of these rights. The introduction of artificial intelligence into the sensitive field of human rights poses an essential dilemma for democratic societies: will the traditional status of man – regarded as the holder of rights and freedoms – be undermined by the emerging forms of artificial intelligence, or will a *modus vivendi* between human forms and artificial ones be identified so that human rights are safeguarded and possibly extended to anticipate this accommodation?

First of all, artificial intelligence is not an element that is traditionally inscribed in social existence. The emergence and the ways of applying forms of artificial intelligence are aspects that have put pressure on the usual patterns of social existence, determining the reconfiguration of human interactions, the sphere of individual rights and freedoms, as well as the manner of their regulation. The recent emergence of forms of artificial intelligence has

led to limitations in the process of their exploration and conceptualization. Among the first formalized attempts to associate artificial intelligence were the programmatic documents of the European Union that presented forms of artificial intelligence *as systems that exhibit intelligent behaviors by analyzing their environment and that take measures – with a certain degree of autonomy -in order to achieve specific objectives. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, voice and facial recognition systems) or AI can be embedded in hardware devices (for example advanced robots, autonomous vehicles, drones or Internet of Things applications).* [1]

Second, the challenges that artificial intelligence brings arise from its mimicry of the human environment. Artificial intelligence is mimetic because it represents an automated translation of the surrounding reality without creating, by itself, added value in a certain given pose.

Third, for the field of human rights, artificial intelligence poses ontological and interpretive problems. It is clear that, with regard to human rights, natural law is the first foundation. Easily explained, by guaranteeing certain rights to individuals in light of their human nature, natural law ensures people dignity and rights, by virtue of birth. Conversely, if human nature changes into a variable that can be easily substituted with new (artificial) forms of existence, then the foundation of human rights is likely to undergo important changes. Moreover, the entire normative system faces the difficulty of generating norms able to accommodate a specific reality that tends to imitate the human being and to question new forms of conceptualizing human rights.

Fourth, the coexistence of *human-artificial forms* implies a new approach to regulation. Moreover, the insertion of forms of artificial intelligence into the field of human rights requires caution in regulating the results of the actions of the former as well as care for the intact preservation of the sphere of human rights (with the consideration of possible further extensions). The ideal form of interaction between the two forms is *osmosis* as the influences exerted by individuals and those specific to artificial intelligence are reciprocal. However, the classical foundation of human rights cannot be dramatically restructured, by moving away from humanist values and/or principles of the exercise of human rights. New international human rights regulations designed to accommodate artificial intelligence will be particularly concerned with observing the risks (significant or medium) to which individuals are susceptible. However, the osmotic typology of the relationship between humans and artificial intelligence requires that individuals simultaneously show caution and openness in interacting with artificial forms of existence. The human rights-based approach that must animate the new regulation referring to the impact of artificial intelligence on human rights will be based on the simultaneous cultivation of prudence and trust: *prudence* is paramount to ensure optimal protection of individual rights and *trust* equates to openness in the use of intelligent applications in order to ease social existence.

II. In Search of Equity: The Case of Applying Artificial Intelligence to Human Rights Standards

In combining the protection of human rights with the use of new forms of artificial intelligence in everyday life, it is necessary to create international norms that meet the requirements of equity. In this case, fairness involves the use in good faith of forms of artificial intelligence so that the fundamental rights and freedoms of individuals are not only

safeguarded and promoted but also refined. A mutual inter-conditioning is required: developments in artificial intelligence shed light on human rights by problematizing their evolution. At the level of common sense, equity expresses the administration of justice in accordance with natural law and by taking into account all individual rights and freedoms. At the legal level, equity is based on good faith. Both are dominated by the psychological element that involves the conviction of the person that he/she is acting in accordance with respect for human rights and fundamental freedoms. The legal systems of the nation-States are particularly sensitive to the principle of good faith, – this being explained especially in the regulations of private law. Thus, in article 14 of the Romanian Civil Code, good faith is a requirement according to which any natural or legal person exercises his rights and fulfills his obligations. In the same spirit, French or German civil regulations recognize good faith as a standard of human conduct that involves respect for fundamental human rights and freedoms. [2]

Thus, to follow the degree to which equity is ensured in the application of artificial intelligence to human rights means, in a first stage, to guarantee, in favor of the respective forms of artificial intelligence, the existence of a consciousness capable of developing a subjective attitude directed towards the respect of human rights. The issue of developing an autonomous consciousness of artificial intelligence forms is associated with the design mode chosen by its human creator. In creating forms of artificial intelligence, man cannot arrogate in favor of himself the status of a demiurge of consciousness given that he does not endow the artificial intelligence with a proper consciousness but only gives it the rudimentary tools of action that mimic human action. It is clear that the individual creator of artificial intelligence is bound, by the principles of fairness and good faith, to design a form of artificial intelligence capable of respecting human rights. However, the possibility of acquiring, by forms of artificial intelligence, a completely autonomous consciousness from that offered at a rudimentary level by the creative individual is intensely debated in the specialized literature. In this sense, multiple theories have been developed: (1) the problematization of the possibility of the emergence of consciousness from a new form of matter; in other words, if we accept that artificial intelligence constitutes another form of organization of matter, benefiting from a wide sphere of autonomous action, then, by way of consequence, we must accept that there is the possibility that it benefits from a corresponding consciousness; (2) autonomous consciousness involves self-perception and perception of the surrounding world; under these conditions, artificial intelligence can be appreciated as having an autonomous form of consciousness to the extent that it can act autonomously on itself as well as on the environment of which it is a part; (3) the development of a possible autonomous consciousness by forms of artificial intelligence presupposes the recognition of their existential particularities; consequently, technological consciousness will be different from individual consciousness; the characteristics of artificial intelligence consciousness will consist of: global availability (information will be available and accessible to artificial intelligence) and self-monitoring (the cognitive system is able to monitor its own processing and obtain information about itself). [3]

In the same vein, guaranteeing equity in the application of artificial intelligence to human rights will also directly depend on how the consciousness of forms of artificial intelligence might encompass the meaning of the notion of *human rights*. Closely related to this problem is another: in the case of acquiring self-awareness, to what extent will forms of artificial intelligence be able to understand the individual and his rights? The specialized literature

anticipated the ways of relating between artificial intelligence and the individual, emphasizing the idea that at the current moment when we cannot debate upon a true consciousness of the forms of artificial intelligence, the individual allocates in their favor a privileged legal status (for example, the case of the robot Sofia who acquired the citizenship of Saudi Arabia). It is clearly a form of one-way communication – in which artificial intelligence is protected and promoted. However, in the case of the reversal of the paradigm, if artificial intelligence acquired an autonomous consciousness would it guarantee the individual a fair status, based on the respect of fundamental rights and freedoms?

III. Ethical-legal developments of the relationship between artificial intelligence and human rights at the level of the European Union

Pursuing the reconciliation of the human factor with new forms of technological manifestation related to artificial intelligence, an appropriate regulatory framework was designed at the European Union level to capture the issues related to ethics and good faith in the use of forms of artificial intelligence. Although, at the moment the normative framework is limited to a proposal of the European Commission with the object of adopting the Regulation establishing harmonized rules on artificial intelligence (Law on artificial intelligence) and amending certain legislative acts of the Union [4], the forecast regarding the entry into force of this legal instrument is optimistic in the context of the expression of the Provisional Agreement between the 2 European co-legislators (the European Parliament and the Council). [5]

Legal documents of soft *law* typology that were precursors of the proposal for the Regulation established a direct link between the protection of human rights and the guarantee of ethics and good faith in the application of artificial intelligence technologies. In this sense, we note that the *European Ethical Charter on the use of artificial intelligence in judicial systems and in their environment* reflects, in the first principle of ethical conduct, *the guarantee that artificial intelligence services and tools are compatible with fundamental rights*. [6] On the other hand, the ethics of using technologies circumscribed to the sphere of artificial intelligence have been subjected to scrutiny at the international level as well within the UN human rights protection system. In a conceptualization document developed under the auspices of UNESCO, the notion of *ethics* contextualized in the use of artificial intelligence was explained including from the point of view of respecting and promoting individual human rights and freedoms: *a dynamic basis for the normative evaluation and guidance of artificial intelligence technologies, which refers to human dignity, well-being and the prevention of harm, as a compass anchored in the ethics of science and technology*. Equally, the document emphasizes respect for human rights and fundamental freedoms by including human dignity among the core values of using artificial intelligence. In this order of ideas, human dignity and human rights become benchmarks of the action of artificial intelligence, being expressly mentioned: *the protection and promotion of human dignity and rights, as established by international law, including human rights legislation, are essential throughout the cycle life of AI systems*. [7]

At the level of the European Union, the most representative step taken in the period leading up to the debate concerning the Regulation was the adoption, by the European Commission, of the programmatic document intended to launch a critical evaluation of the implications of artificial intelligence on the protection of human rights. In this sense, the *White Paper – Artificial Intelligence – A European approach to excellence and trust* opens the

scenario of the problems related to the risks that artificial intelligence can bring in relation to human rights. First, the paper draws attention to the construction of forms of artificial intelligence. The poor conception of forms of artificial intelligence may result in the circumvention of any form of human supervision and the consequent allocation of absolute autonomy in favor of the artificial. Also, the use of data without correcting the potential bias can lead to inaccurate results, which will reflect only the male reality, not the female one, or only the specific data of adults, without taking into account the peculiarities of children. Obviously, vulnerable categories will be placed in a state of marginalization. At the same time, the autonomy of artificial intelligence means is subject to the risk of becoming a means of evaluation harmful to fundamental rights and freedoms. Moreover, the algorithms used by artificial intelligence, designed based on the *black box* criterion, are able to develop behavioral models by studying the specifics of human actions. Or, they may lead to violations of the right to privacy or o breaches in the confidentiality of personal data. Equally, artificial intelligence raises the issue of accountability for decisions taken that may have repercussions on people's fundamental rights and freedoms. Given that artificial intelligence works according to the *black box* model, the evaluation method proposed by it is difficult to follow and verify and, in the event of identifying a limitation in the evaluation mechanism, accountability remains an expectation that is difficult to be directed against a certain person. [8]

It is true that the prospect of a detailed regulation of artificial intelligence is likely to lead to cleavages in the area of protection of fundamental rights and freedoms. In the Regulation Proposal, the stake of the regulatory is not singularly given by a comprehensive level of promotion of artificial intelligence; such an assumption is essentially reductionist. On the contrary, the red thread of regulation directly depends on the degree to which the risks brought by artificial intelligence technologies can be properly limited/controlled so that they do not irreversibly degrade the scope of human rights protection. Recital 1, amendment 3 [9] advocates for *human-centered and reliable artificial intelligence* in order to ensure a *high level of protection of health, safety, fundamental rights, democracy and the rule of law.*

Therefore, two approaches to the regulation of artificial intelligence are intertwined: (1) *the human rights-based approach* – which has been affirmed, over time, in the general theory of human rights, and (2) *the risk-based approach* – introduced by the Regulation Proposal and correlative to the first: risks are assessed through the lens of the degree of respect for fundamental rights and freedoms. *Unacceptable risks* and *high risks* are crystallized. The former are destructive to the sphere of fundamental rights and freedoms and will, in principle, be subject to prohibition. In this category can be observed: the social score having as its object the classification of people according to behavior, socio-economic status or personal characteristics or the biometric identification and classification of natural persons. Their prohibition will not be of an absolute nature, being still allowed for exceptional situations: „real-time" remote biometric identification systems and „subsequent" remote biometric identification systems – where the identification takes place after a significant period has passed of time. [10] High risks may question the respect for fundamental rights and freedoms, being applied only following a thorough evaluation. Such risks affect artificial intelligence systems applicable including in the fields related to: Management and operation of critical infrastructure; Vocational education and training; Employment, worker management and access to self-employment; Access and use of essential private services, as well as public services and benefits; Law enforcement; Management of migration, asylum and border control; Assistance in the interpretation and application of the law. [11] In the conceptual

framework advanced by the Regulation, the *meaning of the risk was explained* in the sense of *achieving a combination between the probability of causing a damage and its severity*, while *the significant risk designates a risk whose importance results from the combination of the severity, the intensity, the probability of the occurrence, the duration of its effects and its ability to affect an individual, a large number of individuals or a specific group of individuals.* [12]

Bearing in mind the risks posed by artificial intelligence within the field of human rights protection, the latter constitutes a veritable benchmark expressly recognized in the content of the Regulation. The fundamental condition for the implementation of artificial intelligence systems is given by the viability of human rights. According to the instrument, the general rule is that *the assessment of the impact of artificial intelligence on human rights must be materialized in a detailed plan that describes the measures or instruments that will contribute to mitigating the identified risks to fundamental rights from the moment of application*. [13]

Under the given conditions, the Regulation proposal establishing harmonized rules regarding artificial intelligence (Artificial Intelligence Law) touches on the major subject of the violation of the fundamental rights and freedoms of individuals, but subsumes it to the preservation of the essential human condition. The autonomy assumed by the specific artificial intelligence systems can come into conflict with human autonomy. The latter is intrinsic to the human condition and natural to the individual, while the autonomy of artificial intelligence is, in turn, called into ontological doubt given the fact that, on the one hand, artificial intelligence systems run on a computer, being based to some extent and the human factor. Among the general principles of handling forms of artificial intelligence, human involvement and supervision are expressly mentioned. This framing of the issue would lead to the idea that human freedom and autonomy are maintained while the autonomy of artificial intelligence is restricted, being instrumentalized for the benefit of humans and in accordance with human dignity. Thus, artificial intelligence preserves its autonomy in a specific environment of surveillance and control coordinated by the human factor. [14] However, at this point another dilemma opens: is the human factor prepared to evaluate and correct the action of artificial intelligence? The assessment of the degree to which the human factor can objectively and responsibly appreciate the action of artificial intelligence is undoubtedly an open discussion. Bias and discrimination can also manifest in human reasoning (regardless of the intentional or unintentional form of prohibited human action); by itself, humanity cannot constitute a guarantee against discrimination, violence, abuse in the handling of personal data etc. The human factor that controls artificial intelligence may involve the same shortcomings in delivering a decision contrary to human rights if we consider the subjectivity specific to any human evaluation. By way of consequence, if the advancement of artificial intelligence mechanisms would impose, correlatively, a human control, then by default the human being must self-censor any impulses that may produce consequences contrary to the protection of human rights and fundamental freedoms. Seen from this angle, artificial intelligence is a catalyst for the protection of human rights by driving a human and inter-human ethics. Given the fact that the human being and the artificial intelligence are interrelated, it is desirable to combine the human action and the artificial intelligence action in a third resulting action in which the consciousnesses of the two entities can resonate being guided by the common good that mirrors both the individual and the collective interest.

The Regulation problematizes the protection of human rights and human dignity through the lens of the three generations of rights: civil and political rights; economic, social and cultural rights; solidarity rights. We observe that the progressivism of artificial intelligence

produces impact, based on the principles of the unity and interdependence of human rights, on all typologies of rights, without specifically targeting exclusively the rights of recent emergence. In the matter of civil and political rights, the protection of personal data is highlighted, as it is expressly mentioned that artificial intelligence systems are capable of classifying natural persons by using known or inferred sensitive or protected characteristics (such as gender, gender identity, race, ethnic origin, migration or citizenship status, political orientation, sexual orientation, religion, disability etc.), are particularly intrusive, violating human dignity and presenting a high risk of discrimination. [15] With regard to second generation rights, the Regulation proposes, in general terms, that its provisions do not affect: *the Union law regarding social policy and internal labor law and practices; the exercise of fundamental rights, as recognized in the Member States and at the Union level, including the right or freedom to strike or take other actions regulated by the specific labor relations systems of the Member States, in accordance with the law and/or internal practices; collective bargaining practices, the right to negotiate, conclude and enforce collective agreements or take collective action in accordance with national law and/or practice; the right of the Commission to propose specific legislation on the rights and freedoms of workers affected by artificial intelligence systems.* [16] Environmental protection considerations were taken into account for limiting the use of artificial intelligence; in this note, the Regulation prescribes that, *in order to better understand the impact of artificial intelligence systems on the environment, technical documentation developed by suppliers should include information on the energy consumption of the artificial intelligence system, including consumption during development and expected consumption in during use*. [17]

IV. Ethical-legal developments of the relationship between artificial intelligence and human rights in the system of the European Convention on the Protection of Human Rights and Fundamental Freedoms

The conventional law system is much more focused towards assessing how new technologies affect the protection and promotion of human rights. It is true that, although the study perspective is much denser within the conventional legal system and fundamental rights and freedoms are placed at the center of the assessment of the impact of new technologies, the conventional legal system does not directly address the issue of the use of forms of artificial intelligence. However, in the jurisprudence developed by the European Court of Human Rights in the matter of the impact produced by new technologies on fundamental human rights and freedoms, the approach based on the definition of artificial intelligence as derived from the recommendations of the Organization for Economic Cooperation and Development cannot be denied. At the core of the latter, *an AI system is based on machines that, for explicit or implicit goals, infer, from the input it receives, how to generate results such as predictions, recommendations, or decisions that can influence physical or virtual environments.* [18] Starting from the core of this definition – respectively the results expected to be produced by these technological tools – predictions, recommendations, decisions that can influence physical or virtual environments, the European Court of Human Rights assessed the potential impact on fundamental human rights and freedoms.

In the case of *Centrum för Rättvisa v. Sweden* [19] was examined the situation where national legislation allowed the mass interception of electronic signals of individuals in favor of foreign intelligence services. Although initially, by the decision of the Chamber of June 19th, 2018, it was unanimously ruled that such a situation is not incompatible with the

protection of the right to private and family life, later the case was referred to the Grand Chamber. [20] Judging the case in the referral procedure, the European Court identified some limitations in the collection and management of personal data that led to the violation of the right to private life in the dimension recognized by Article 8 of the Convention. First, the Swedish legal system did not clearly and predictably specify the procedure for destroying material collected as a result of surveillance if it did not contain personal data. It was also noted the absence of a statutory requirement to consider the individual privacy interests of personal data-collected as a result of surveillance, before it is disseminated to external partners. In this context, it was absolutely necessary to verify the existence of clear guarantees to prevent the unauthorized and automatic transmission of personal data; the absence of these requirements led to precariousness in guaranteeing the rights provided for in Article 8 of the Convention. At the same time, the lack of effective ex-post control over the mass interception of communications or private data of individuals led to the endangerment of fundamental rights as well as to the Swedish state exceeding the margin of appreciation in evaluating the fair public-private balance, leaving room for abuse and the violation of Article 8 of the Convention, -which was recognized by the Court. [21]

In relation to the subject matter of the previously analyzed case regarding the handling of individuals' personal data, is also placed the case *Catt against the United Kingdom*. [22] In this case, the subject matter of the case centers around the fact that the applicant, a former peace activist since 1948, began to participate in violent demonstrations organized by a protest group in 2005. Although the applicant was not convicted of committing crimes and the risk of him being involved in violent crime was particularly low, his personal data was entered into a police database known as the 'extremism database'. Regarding the claims made by the applicant according to which the collection and storage of his personal data in the police records was not legitimate given the guarantees stipulated by Article 8 of the Convention, the European Court ruled separately on the two issues. Thus, regarding the aspect of the *collection of personal data*, the European Court emphasized that the extraordinary circumstances of the applicant (the participation in the violent activities of a protest group) justified the collection of his personal data. Regarding *the need to keep the collected data*, the Court ruled that there were no indications to justify such an action – at least, for an unlimited period of time. Any holding of personal data must be judiciously correlated with specific guarantees that prevent any violation of the right to private and family life. Consequently, the violation of Article 8 of the Convention was unanimously held. [23]

In another case, was discussed a sensitive topic related to artificial intelligence technologies – the protection of the right to privacy of prisoners in the conditions where they were subjected to permanent surveillance with video cameras belonging to a closed circuit. The Court ruled in favor of the applicants, noting the violation of the right to private life in these circumstances, underlining the lack of predictability of the domestic legal provisions designed to protect the rights of persons deprived of their liberty from the arbitrary intervention of public authorities. [24]

The European Court of Human Rights has also analyzed the use of new technologies in line with their applications in the judicial field. In the case of S. *and Marper against the United Kingdom of Great Britain* [25] was analyzed the problem of storing the personal data (capable of reconstructing the genetic profile) of the plaintiffs after the completion of the criminal trial. In its reasoning, the Court specified that the use of modern scientific means of investigation and identification is not incompatible with the provisions of the Convention. However, the

detail of the registration and retention of the fingerprints and DNA data of the applicants – suspected of committing criminal offenses in criminal law proceedings – must be evaluated in terms of ensuring a fair proportion between the public interest of the administration of criminal justice and the private interest of the protection of the rights of individual plaintiffs. Ruling on the violation of Article 8 of the Convention in the analyzed case, the European Court reiterates that the protection of the right to private life would be unacceptably compromised if the use of modern scientific data in the criminal justice system were allowed without carefully balancing the potential benefits of the large-scale use of new technologies compared to their impact on the private life of litigants. States' margin of appreciation in allowing possible intrusions into private life is correspondingly restricted. The retention of the personal data of the complainants in a database specially configured for the record of persons suspected of being the authors of crimes is divergent with the protection of the right to private life given the fact that the way of managing this database is specific: the retention of the recorded data is not time limited as there are no appropriate guarantees for reviewing the retention measure of personal data based on rigorously defined criteria. Also, from a substantive point of view, the storage of personal data for an unlimited period of time in a database that maintains a record of persons *suspected* of committing criminal acts impermissibly damages the presumption of innocence in the conditions where the storage and management of personal data is indistinct compared to that applied to *convicted* persons. [26]

On the other and, the study perspective of the European Court changed under the conditions in which the storage of data in a database specially organized for the record of persons guilty of committing sexual crimes was evaluated. The indication of an extended period of preservation of personal data (30 years) was compatible with the right to private life from the perspective of the objective pursued – that of preventing the commission of similar crimes.[27]

V. Conclusions

The regulation of the use of artificial intelligence is dominated by *risk*[28]. The uncertainty that accompanies the application of various forms of artificial intelligence in everyday life results, on the one hand, from the construction algorithms of new technologies (which are, in principle, non-transparent and difficult to manage by the human being) and on the other hand, from the difficulty of identifying a distinct formula for holding new technologies accountable in case of damage or violation of human rights. Human rights become a limit to the action of artificial intelligence. The emulation of the human being has been the basis of the design of forms of artificial intelligence and, by way of consequence, their compliance becomes a natural limit of the use of artificial intelligence. In the same sense, equity and good faith in the application of forms of artificial intelligence are expressed by the degree of respect for human rights. Currently, the discussion about artificial intelligence acknowledge human rights as its endpoint; the thesis is valid in the conditions where the present has not demonstrated that forms of artificial intelligence can be attached to an *autonomous consciousness*. The problem becomes more complex and difficult to resolve in the hypothesis that forms of artificial intelligence will benefit from an autonomous consciousness, inspired by the human one. In such a scenario we must discern what can be the benchmark for evaluating and controlling the actions of artificial intelligence. The line of demarcation given, in the previous scenario, by the protection of fundamental human rights

and freedoms will become more and more blurred if artificial intelligence develops its own consciousness.

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[6] European Commission for the Efficiency of Justice (CEPEJ) European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment, adopted at the 31st plenary meeting of the CEPEJ (Strasbourg, 3-4 December 2018), p. 7. We note that ethical principles 2-5 are also complementary to the protection of the fundamental rights and freedoms of individuals: *The principle of non-discrimination*: prescribes preventing the development or intensification of any discrimination between individuals or groups of individuals; *The principle of quality and security*: regarding the processing of judicial decisions and data, it is necessary to use certified sources and intangible data by reference to models developed in a multidisciplinary manner, in a secure technological environment; *The principle of transparency, impartiality and fairness*: the use of accessible and easy-to-understand data processing methods, authorization of external audits; *The „user controlled" principle*: excluding a prescriptive approach and guaranteeing users' information and autonomy.

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THE ROLE OF THE PRINCIPLE OF GOOD FAITH IN INTERNATIONAL RELATIONS

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Abstract

The principle of good faith was first applied in contractual relationships specific to private law, later being incorporated into international law, which qualifies it as a general principle of law derived from national legal systems—a principle compatible with the international legal system contributing to its coherence. The principle of good faith had its first general application in public international law in the context of treaties. In specialized literature, it is emphasized that the most controversial aspect of good faith in international law is the abuse of rights. The principle of estoppel in international law is based on the principles of justice, good faith, and consistency. Whether it involves the intent of international law subjects to regulate an area of international law by entering into an international treaty or the recourse to negotiations to resolve an international dispute, good faith must be present in the relationships among the involved parties.

Keywords: *good faith, general principles of law, abuse of rights, estoppel, negotiations*

1. General considerations

The analytical approach to the role of the principle of good faith in public international law involves a thorough investigation of the norms of public international law that govern this principle, as well as international practice and jurisprudence. According to the opinions expressed by the majority of public international law scholars, the principle of good faith falls within the category of general principles of law regulated by Article 38(c) of the Statute of the International Court of Justice. Given the need to clarify this aspect and the arguments that underpinned the decision of the United Nations International Law Commission (ILC) to include in its work program the topic titled „*General Principles of Law*," we will briefly review the progress made by this commission to justify placing the principle of good faith in the category of general principles of law according to current trends in contemporary international law.[1] As is known, general principles of law are principles accepted internally, forming part of the national law of all states, so they are common principles of the internal legal order as well as common principles of the international order.[2] The definition used has led to the identification of a considerable number of aspects regarding general principles of law that should be clarified. Thus, in his first report, the ILC Special Rapporteur highlighted that in analyzing general principles of law, consideration will be given to: the legal nature of general principles of law as sources of public international law; the origins of general principles of law and corresponding categories; the identification of general principles of law; the functions of general principles of law and their relationship with other sources of public international law.[3] Analyzing the 2023 report on the status of the ILC's work on general principles of law, we outline the rules that this commission sent for review to the UN Secretary-General and the governments of UN member states, namely: for a general principle of law to exist, it must be recognized by the international community; general principles of

law include principles derived from national legal systems, but also principles that can be formed within the international legal system; in the case of general principles of law derived from national legal systems, it is necessary to ascertain that we are in the presence of a common principle across different legal systems around the world and that it has been transposed into the international legal system; to determine a common principle across the major legal systems of the world, a comparative analysis of the national legal systems in different regions of the world is required, and the transposition of these principles into the international legal system is determined by their compatibility with this system; in order to identify general principles of law formed within the international legal framework, it is necessary to establish that states have recognized the principle as being intrinsic to the international legal system; in determining general principles of law, decisions of international courts, decisions of national courts, as well as the works of the most qualified experts in the field of law can be taken into account, these being considered a subsidiary means of determining these principles; general principles of law are invoked when international law does not completely regulate a matter, and general principles contribute to the coherence of international law; general principles of law are not in a hierarchical relationship with treaties and customary law, and in case of conflict, techniques of interpretation and resolution of international disputes are applied.[4] Referring to the above, we should discuss whether the principle of good faith falls into the category of general principles according to the criteria established so far by the ILC. In this regard, we should determine whether this principle is derived from national legal systems or a principle that formed within the international legal system. At first glance, it could be included in both categories, but the identification of the two categories of general principles of law by the ILC requires a rigorous analysis of the emergence of this principle and precise classification. To precisely classify the principle of good faith into one of the two categories of general principles of law identified by the ILC, we start our research from a historical perspective, emphasizing that good faith was initially promoted in private law, particularly in contract law. Thus, we mention the presence of the concept of good faith in Roman contract law, a regulation that would have been impossible without inspiration from the Greeks. However, we should not forget that the first treaties were concluded in ancient times, and in ancient Rome, treaties were respected in good faith in accordance with the principle of *pacta sunt servanda.*[5] Specialized studies indicate that Roman private law formed the basis for early theories of modern international law, and the principle of good faith, which was an important principle of Roman civil law, influenced international law in multiple dimensions, primarily in the area of international treaty law. Specific principles of Roman private law were also applied in the sphere of international law because Grotius classified states as private actors.[6] During the medieval period, good faith became a general principle for both national and international commerce, with feudalism being the era during which the practice of concluding treaties was developed. In the modern era, the application of the principle of good faith became a constant in both national and international law. Considering the presented arguments, it is observed that the principle of good faith was first applied in contractual relationships specific to private law, later being incorporated into international law, which qualifies it as a general principle of law derived from national legal systems, a principle compatible with the international legal system, contributing to its coherence.[7]

2. The scope of application of the principle of good faith in public international law.

2.1. *Pacta sunt servanda*

The principle of good faith first had general applicability in public international law in the context of treaties. Thus, according to Article 2 of the United Nations Charter, all UN members must fulfill in good faith the obligations undertaken according to the provisions of the Charter[8], and based on the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, according to the United Nations Charter, adopted in 1970 by the UN General Assembly, good faith was established in the form of the principle of fulfilling international obligations in good faith, creating for each state the obligation to meet its commitments according to the UN Charter, as well as the obligation to fulfill in good faith the obligations it bears under generally recognized principles and rules of international law. The principle of fulfilling international obligations in good faith is also stated, along with other fundamental principles of public international law, in the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki in 1975. According to the provisions outlined in the mentioned document: states will fulfill their obligations in good faith in accordance with international law; in exercising their sovereign rights, states will comply with their legal obligations under international law; states will properly apply the provisions of the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki in 1975; states recognize that in case of conflict between the obligations of United Nations members under the United Nations Charter and their obligations under any other treaty or international agreement, the obligations established by the UN Charter will prevail; states declare their intention to conduct their relations with all other states in the spirit of the principles established in the mentioned document. Regarding the obligations undertaken by states, we specify that the regulation of the Helsinki Final Act considers both obligations arising from the generally recognized principles and norms of international law, as well as obligations arising from treaties or other agreements, in accordance with international law, to which they are parties. The 10 principles regulated in the Helsinki Final Act are reconfirmed in the Paris Charter for a New Europe from 1990.[9] According to Article 26 – *Pacta sunt servanda* – of the Vienna Convention on the Law of Treaties adopted in 1969, which came into force in 1980, „Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Thus, *pacta sunt servanda* represents the fundamental principle of the law of treaties, according to which treaties are binding on the parties and must be fulfilled in good faith. According to doctrine and especially international practice and jurisprudence, the principle of good faith is a legal principle that is an integral part of the rule of *pacta sunt servanda*. Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties states that „*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." When interpreting treaties, good faith implies a rational interpretation of the treaty terms according to applicable legal norms and the intent of the parties at the time the treaties were concluded. International law doctrine considers that the provisions of Article 31, paragraph 1 reflect rules formed by customary practice, and international jurisprudence supports this position. For example, in the La Grand case, the International Court of Justice had to rule on the divergences between the parties, namely the United States and Germany, regarding the interpretation of Article 41 of the Statute of the Court. The Court determined that interpretation would be made according to customary international law, as reflected in

Article 31 of the Vienna Convention on the Law of Treaties from 1969, considering the object and purpose of the provisions invoked. [10]

Among all the rules for interpreting treaties, the rule of good faith is considered the general rule, with other interpretation rules being seen more as applications to special circumstances of this rule. Good faith, in the usual sense of the term, represents the intent and awareness that one's attitude aligns with truth and legal norms.

The purpose of interpretation is to clarify what is obscure, so interpreting treaties in good faith requires an accurate determination of the facts related to interpretation, starting from the exact text of the treaty and applying various interpretation rules only if the treaty does not have a clear meaning.

Regarding the application of the principle of good faith in the context of treaties, we can also refer to the ILC's 2012 work on the topic „Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties," which established that subsequent agreements and subsequent practice can be considered means of interpreting treaties within the general rules of interpretation as provided in Articles 31 and 32 of the 1969 Vienna Convention. Paragraph 2 of Conclusion 2 of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties reproduces the text of Article 31(1) of the 1969 Vienna Convention, considering its importance for the topic under analysis. Article 31 (1) is the starting point for any interpretation of a treaty. The mention of the provisions of this article aims to ensure balance in the interpretation process between evaluating the treaty terms in their context and in the light of its object and purpose, on the one hand, and considerations regarding subsequent agreements and subsequent practice in the draft conclusions, on the other.[11]

The International Court of Justice found that *pacta sunt servanda* is not a principle applicable only to obligations arising from treaties; states can have obligations through unilateral acts, and the principle of good faith also applies in this context. In the Nuclear Tests case, the International Court of Justice noted that one of the basic principles governing the creation and fulfillment of obligations is good faith.[12] The ILC established that unilateral acts of states are public declarations through which states express their intention to create obligations at the international level. [13]

Therefore, regardless of the source of the obligation, whether obligations assumed based on custom or obligations arising from treaties, whether obligations determined by the application of a general principle of international law or obligations imposed by decisions adopted by a competent body of an international organization, whether obligations arising from the decisions of the ICJ or from arbitral decisions or obligations assumed based on a unilateral act of the state, they must be fulfilled in good faith.

2.2. The abuse of rights

Specialized literature highlights that the most controversial aspect of good faith in international law is the abuse of rights. In international law, the abuse of rights refers to a state's exercise of a right either in a way that prevents other states from exercising their own rights or for a purpose different from the one for which the right was created, to the detriment of another state. Thus, abuse of rights can manifest in international law in the following forms: a state exercises a right in such a way as to prevent another state from exercising its right; a state exercises a right for a purpose for which it was not intended; the arbitrary exercise of a right that causes harm to another party.[14] International practice and jurisprudence have

adopted the theory of abuse of rights from national legal systems, applying it at the international level as a general principle of law or as part of customary international law. Thus, the application of the theory of abuse of rights has been identified in a series of international disputes submitted to arbitration tribunals as well as judicial courts. In the case of the Nuclear Tests, Australia and New Zealand each initiated proceedings before the International Court of Justice regarding the nuclear tests that France intended to carry out in the South Pacific region. The two states argued that if France exercised its right to conduct atmospheric nuclear tests in the South Pacific region, it would be a case of abuse of rights.[15] Abuse of rights has also been identified in international disputes involving environmental protection, especially in cases where one of the states has constructed or plans to construct an industrial facility that could affect the territory of the neighboring state through pollution. Considering the sovereignty of states over natural resources, they can use their resources in a manner that does not infringe on the rights of the neighboring state. The bad faith exercise of rights can lead to abuse of rights. Therefore, exercising rights in good faith, as well as fulfilling obligations in good faith, leads to respecting the rights of neighboring states, avoiding abuse of rights, and preventing the occurrence of transboundary harm. This aspect reflects the application of the principle of equitable use of natural resources, which emphasizes the idea of using what is yours without causing harm to others.[16] Abuse of rights is also present in international regulations, reiterating the duty of states to fulfill their international obligations in good faith to avoid abuse of rights.[17]

2.3. The Estoppel

Estoppel requires states to be consistent in their attitude toward a particular situation, fact, or right, an attitude that provides stability and predictability in international relations. In international relations, estoppel is a principle according to which a state cannot act contrary to what it has previously stated or done. In international law, it is important that a state does not benefit from its inconsistent attitudes that could cause harm to another state. A state must act without ambiguity in international law, act voluntarily and unconditionally, and act in good faith.[18] The principle of estoppel in international law is based on the principles of justice, good faith, and consistency. The International Court of Justice (ICJ) has examined the theory of estoppel in several cases, but the most significant case, from the perspective of identifying the nature of estoppel, was the dispute over the Preah Vihear Temple between Cambodia and Thailand. Cambodia filed a claim against Thailand at the ICJ, arguing that Thailand had occupied part of its territory around the ruins of the Preah Vihear Temple and asked the ICJ to declare that territorial sovereignty over the temple belongs to Cambodia. In its 1962 ruling, the ICJ found that the relationship between the two states was based on a Franco-Siamese treaty from 1904 and a map created by a joint boundary commission, documents indicating that the temple was on the Cambodian side. Thailand argued that the map was not binding, that it had never accepted it, and that if it was assumed to have accepted it, it was because it had a mistaken belief about the border indicated on the map. The Court found that Thailand had accepted the map, and the temple was located on Cambodian territory. Thailand had not raised any objections to the map for a long period. Based on the theory of estoppel, the ICJ determined that a state cannot, through subsequent acts, oppose prior acts to which it had not protested for a long time.[19]

Even though the theory of estoppel has been analyzed by specialized doctrine and has been identified through extensive jurisprudence, a series of divergent and conclusive opinions

have led to an unclear definition and the inability to accurately identify its scope of application.[20]

2.4. The role of good faith within negotiations

Negotiations constitute the first phase in the process of concluding treaties and the most commonly used political-diplomatic means of resolving international disputes. Whether it's the intention of international law subjects to regulate an area of international law by concluding an international treaty, or whether it's the resort to negotiations to resolve an international dispute, good faith must be present in the relationships among the involved parties. States have the sovereign right to choose whether or not to conclude an international agreement; however, if they decide to participate in the negotiation of an international treaty, they are obligated to negotiate in good faith to reach a satisfactory agreement. Among the political-diplomatic means of resolving international disputes are negotiations, good offices, mediation, international investigation, and conciliation. Negotiations consist of direct debates between the disputing parties, conducted through various means and in different forms, to find a mutually acceptable solution.[21] Conducting negotiations in good faith is an obligation of the disputing parties and a guarantee of their effectiveness. The parties to the international dispute must act in a way that gives negotiations meaning and identifies the possibility of a compromise. They are not obligated to resolve the dispute through negotiations, but they must make efforts in this direction and not use negotiations in an abusive, purely formal manner. Negotiations offer the possibility of reaching, in a relatively short time, an equitable solution agreed upon by the involved parties, without the need for arbitration or judicial proceedings, which take time and involve a binding decision by an independent body. In several cases brought before the International Court of Justice, the international court has analyzed the obligation of states to negotiate in good faith to resolve disputes. In the dispute between Bolivia and Chile concerning the „Obligation to Negotiate Access to the Pacific Ocean," before examining the legal grounds invoked by Bolivia regarding Chile's alleged obligation to negotiate access to the Pacific Ocean, the ICJ determined that states are obligated under international law to initiate negotiations and continue them in good faith.[22] On April 24, 2024, the Republic of the Marshall Islands filed a complaint with the International Court of Justice against nine states, accusing them of failing to meet their obligations regarding the rapid cessation of the nuclear arms race and nuclear disarmament. The Marshall Islands claimed that the United Kingdom had violated the provisions of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to which both states were parties. According to this article, each party „undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, as well as on a treaty on general and complete disarmament under strict and effective international control."[23]

Conclusions

The principle of good faith was first applied in contractual relationships specific to private law, then incorporated into international law, which qualifies it as a general principle of law derived from national legal systems, a principle compatible with the international legal system that contributes to its coherence. It is an old yet still relevant principle applied in all areas of international life, both at a universal and regional level.

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[13] „1.Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations....."Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.

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ON PUNISHMENTS AND OFFENCES: EXAMINING THE DYNAMICS OF LAW, CRIME AND GOVERNANCE IN MODERN SOCIETIES

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Abstract

Laws serve as the boundaries or nets that hold civilisations intact. They serve as regulatory measures drafted by as upon the convenience of the government to eradicate and deter undesirable traits and outcomes among its subjects. The law drafted would either be based on the sentiments of the society or a widely accepted global standard. Laws achieve their purpose of regulating human conduct by interfering with the personal interactions of each member of society. They do so by imposing the duty to follow the set standard and backing the same with legal sanctions. These sanctions, however, vary in severity depending on the objective that the particular legislation seeks to achieve. Most criminal laws seek to censure actions that are undesirable by imposing penalties. The effectiveness of legislation in curbing undesirable behaviour depends on the austerity of the sanction and the stigma it leaves behind. [3] What actions are to be penalised are determined by factors such as the severity of the act and the feasibility of criminalising it. Legislations across the globe more or less penalise the same kinds of offence, but the manner in which they draft their laws vary greatly- with some legislations being minimalistic in their approach to classifying crimes, and others further sub-dividing a particular category of crime to include as much as variation of elements that make up the act as possible. Would the principle of „Fair Labelling" lead to more restrictive laws, or would the principle of „Representative Labelling" lead to several injustices being overlooked on a loophole obtained through an oversight in the taxonomy of legislation? Through an analysis of the legislations of a select few countries, a relation between the type of legislation and crime rates shall be attempted to be made. The Executive's role in addressing societal issues shall also be examined.

Keywords: *punishments, offences, dynamics of law*

Introduction

Legislation is society's mechanism to regulate human behaviour. It is the tool by which society achieves its desired state and maintains order. The society comprises two parts- the Government which is inclusive of the legislation, executive and judiciary, and its Subjects, those that are governed by the Government. The Subjects have the positive obligation to obey the laws laid down by the Government and the Government has the positive obligation to draft laws as and when the Society requires it. The Government must ensure that in trying to impose laws on its subjects, it does so in a manner that respects individual rights, without excessive interference with individual autonomy.

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[3] Anderew Ashworth, *Positive Obligations in Criminal Law*, Preface pg. v (2013)

The question, therefore arises of the acceptable degree of interference in the private domain of an individual. To what extent can the law regulate or criminalise the actions of the common man? Would more restrictive legislation achieve the aim of a peaceful and orderly society? Are criminal legislations the most effective tool by which deviant behaviour can be controlled?[4] Are the number of classifications of a particular type of crime detrimental to achieving reduced crime rates?

It is a well understood concept that what constitutes an offence is determined by society's existing level of tolerance. Once an act crosses this threshold of what society considers acceptable behaviour, it would be condemned and thereby penalised. Would this imply that any act which stands out from what is viewed by the majority to be mainstream is to be treated as a crime, or would certain principles dictate the conditions that are to be met to declare a certain act to be an offence? Public censure by State imposed sanctions is how criminal laws curb harmful actions of persons in society.

The concept of fair labelling allows for the elaboration of variation in elements of a particular type of crime. By addressing the modus operandi or the intentions (or the lack thereof), a crime of the same nature may be penalised differently in proportion to its severity.

Criminal Law and Society

Laws, being the response to society, could be assumed to list the limits of what behaviour society is willing to tolerate as acceptable. The government, which would often be the embodiment of a particular region's ideals, would formulate laws that conform with the religion and cultural norms observed by its people. With the emergence of the various philosophical schools that pondered on what was to be termed as either a „right" or a „wrong", society evolved further to include various other classifications of crimes, while still preserving the existing norms.

With the growing awareness of individual rights, and the increasing clamour for equality, if a certain portion of society were to strongly advocate that their actions were to be viewed as a right and not an offence, and take measures to lower society's resistance to it, it would reform the law of the land and decriminalise it- examples of the same include the abolition of various class/race/caste-based crimes in India. In this manner, law evolves to accommodate the changing ideals of the society it regulates.

Criminal Law as a Means for Regulating Behaviour

Criminal laws are a measure taken to correct „wrong" behaviour. It is the authority's response to curb actions that would result in an undesirable outcome.[5]

Earlier societies would only go to the extent of punishing the wrongdoer for the act that was committed by him. With the development of criminal law theories, concepts such as mens rea and actus reus would introduce the possibility of attempts also being penalised, further restricting and thereby reducing the possibility of a crime.[6]

While criminal laws punish the offenders for their actions, the mere existence of a law that is backed by sanction via the authority conferred to the State to do so serves as deterrence.

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[4] Andrew Ashworth, Positive Obligations in Criminal Law, 1(2013)

[5] Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 New Criminal Law Review: An International and Interdisciplinary Journal 542 (2012).

[6] Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 New Criminal Law Review: An International and Interdisciplinary Journal 543 (2012).

to any who would have otherwise committed the act. Some provisions under criminal law go so far as to criminalise even mere preparation to do a certain act, depending on the degree of harm the consequences of such harm would bring.

A few other instances wherein criminal law shoulders a preventive role is by criminalising actions that could be presumed to be an indicator of participation in an offence- for instance, being a member of an assembly of individuals well known to be associated with acts of terrorism, or being caught in possession of an explosive that could cause considerable damage in a place where there would be no need for such instrument.[7] Here, despite the actions not being yet carried out and no damage being done, penal law would punish such individuals to further reiterate society's non-tolerance of such threats.

However, the law also provides for the offender to take up defences, to not be gravely implicated by an act that was not ill-intended. In order to impose a sanction and the corresponding stigma for having committed a crime, the State (the government) that has been entrusted with the authority, by following the procedure established by law, must prove the culpability of the offender[8] via the forum provided by the Judiciary. Most legal systems, with the exceptions of a few instances, presume the innocence of the wrongdoer and it is upon the prosecution to prove the accused's guilt beyond any reasonable doubt.[9] The accused may also seek lenience by way of exceptions laid down in the statue- the most common ones being ones of private defence or mistake of fact.

It can thus be seen that laws are not simply formulations that adhere to society's whims, but that they follow certain objectives. The primary function of criminal law is to censure deviant or harmful behaviour in society.[10] Depending on the severity, the law lays down preventive measures in the form of punishments for actions that have or could potentially cause grave harm to the public at large. Certain actions or omissions are prohibited by not only to satisfy the demands and ideals of society, but also to prevent the infliction of some greater harm.

The Principle of Fair Labelling: Do We Need More Divisions of a Particular Class of Crime?

An act must only become an offence when absolutely necessary. Lord Williams of Mostyn in his written reply to Lord Dholakia stated a few factors that were to be considered when an action (or the lack thereof) were to be penalised. These factors considered the severance of the consequence brought about by such an act and the magnitude of harm it wreaked on the public. It would also consider the feasibility of penalising an act- whether the enforcement of a law to curtail it would be practical and efficient, as well as whether the proposed sanction would be adequate (proportional) to the nature and consequence of the crime.[11]

The objective of criminal law is the censure of anti-social human behaviour. An act is penalised only when heavy sanctions are the only recourse to curtailing such actions that pose a threat to society at large. Civil penalties are not imposed on acts such as murder. The primary

[7] Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 New Criminal Law Review: An International and Interdisciplinary Journal 544-546 (2012).

[8] Andrew Ashworth, *Positive Obligations in Criminal Law*, 16 (2013)

[9] Article 6.2 of the European Convention on Human Rights

[10] Andrew Ashworth, *Positive Obligations in Criminal Law*, 13 (2013)

[11] Andrew Ashworth, *Positive Obligations in Criminal Law*, 5 (2013)

objective in punishing an offender for murder is not to compensate the victim's loved ones, it is to deter others from exacting the same harm to another. It is a response to calming society's fear of the same happening to them. A criminal act is not merely an act against the individual. It is a threat to the very fabric of order and peace in society. Therefore, criminal laws allow for the public condemnation and stigmatisation of an act.[12]

With regards to how and to what degree and act was to be criminalised, two approaches with respect to the wording of the legislation could be used- „representative labelling" as coined by Andrew Ashworth and a much more specific „fair labelling" of crimes as coined by Glanville Williams.

Representative labelling considers that while culpability is a key factor in criminal liability, the punishment for the committed offence would be restricted to the offence in a manner that represents solely the act. The extent of culpability is not of the same importance as the crime that is committed. In response to this principle, Glanville William promulgated the concept of fair labelling, which was later acknowledged by Ashworth.

The principle of fair labelling lays importance on the magnitude of wrong and accountability of the offender to the said wrong. It allows for the categorisation and distinction of offences in terms of degree of seriousness and provides for the imposition of appropriate sanctions.[13] Furthermore, the categorising of offences increases the efficiency of the administration of Justice.

By classifying and lying down the constituents of a particular class of crime, it not only allows the State to punish the wrongdoer, it decreases the burden on the Judiciary by treating like cases like. If labelling of crimes were not practised commonplace, the Judiciary would have to spend considerable time arguing upon merely the facts of the case and adjudicating according to the common understanding of the concerned crime. Sentencing would be discretionary for broadly classified offences. Labelling eases this process since it would group certain elements to constitute a particular offence, allowing for Courts to simply rely on the classifications and determination of the absence or presence of the elements that make up a crime.[14]

Since the State has the positive obligation to publish legislation for the reference of the common man, the absence of labelling of crimes would create a scope of vagueness. It would catch the common man unaware of the act that he has committed since the legislation that governs him is vague on the same. It would clearly list the permissible and prohibited actions that he may execute. Therefore, legislation being specific would not lead to increased restrictions, rather, it allows for greater ease of functioning within society's limits since they are well defined. Vague laws would be subjected to arbitrariness and inequality when deciding like cases. Specific and detailed laws would ensure conviction only for those named offences. Sentencing is also determined within a preset template.

Hence, if it is collectively felt in a society that there exists a tendency to over-criminalise the actions of its subjects, it is an indicator of a lack of substantive principle of what is to be considered a crime. The numerous provisions in the legislation are not the cause of excessive

[12] Andrew Ashworth*, Positive Obligations in Criminal Law*, 9-18 (2013)

[13] James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 The Modern Law Review 218-219 (2008).

[14] James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 The Modern Law Review 220-224 (2008).

criminalisation- as can be concluded by the convenience provided by fair labelling. The lack of understanding of the nature and scope of „criminal" law is the reason for unclear laws. [15]

Judicial Mechanisms- Substantive And Procedural Law: Its Relation To Crime Rates In Countries

To expand on the relation legislations have on the well-being of a country, a comparison is drawn between three countries – Norway, India and Venezuela. Norway has a Happiness Score of 7.32 out of 10[16] and ranks low on crime rate having a crime index of 32.5.[17] One among the several reasons cited for these figures is the efficiency of laws and the low crime rates. India ranks 126 out of the total 198 Countries in terms of happiness, with a score of 4.05 out of 10 and has a crime index of 44.4. Venezuela has a happiness index of 5.61 but has a very high crime rate, the highest in 2023- 83.76[18]

These countries also have a historical background of law that is different from the others. Norwegian law finds its basis as do other Nordic countries, in its National Roots. The present-day Norway was once several regional kingdoms, with each kingdom having their own laws. Later a collective was formed by virtue of a general assembly, with representatives from each region- called the Althing. King Magnus Lagabøte compiled various regional legislations and made a national code called Magnus Lagabøtes Lov. [19]

India is a commonwealth country and most of its legislation is either derived from preexisting British laws or was drafted while still being a colony.

Venezuelan laws have influences from Napoleonic, Spanish and Italian criminal justice systems.[20]

A comparison between these countries shall be made with the use of a common crime- that of homicide.

Norway: Crime Index- 32.5

Norway ranks low on the crime index and has a relatively high resilience rate- 7.92 out of 10. Its government is an active participant in many international organisations that attempt to reduce crime rates globally. The country is also proactive in updating itself, assessing its criminal legislation often to ensure its efficiency. The judicial and law enforcement systems are well trusted by the public. [21]

Section 275 of the Norwegian Penal Code states that any person who kills another person will be imprisoned for a term not less than 8 years and not exceeding 21 years. In a provision of the Ordinary Civil Penal Code which now stands repealed, Section 233 of the Code punished persons who either caused or contributed to the death of another. It also had provisions in relation to death caused by negligence or contribution to suicide to be included as murder. No such distinctions are made in the present law. Furthermore, there is no mention of the death penalty in the entire Code.

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[15] Mike C. Materni, *The 100-plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)*, 18 New Criminal Law Review: An International and Interdisciplinary Journal 333 (2015)

[16] *Happiest Countries in the World 2023*, https://worldpopulationreview.com/country-rankings/happiest-countries-in-the-world.

[17] *Crime Rate by Country 2023*, https://worldpopulationreview.com/country-rankings/crime-rate-by-country.

[18] *Crime Rate by Country 2023*, https://worldpopulationreview.com/country-rankings/crime-rate-by-country.

[19] Pål A Bertnes, *Legal information in Norway* 8 (5th ed. 2012).

[20] *Venezuela*, The Criminal Justice System http://www.country-data.com/cgi-bin/query/r-14600.html.

[21] *Criminality in Norway*, The Organized Crime Index https://ocindex.net/country/norway.

India: Crime Index- 44.4

India has a relatively moderate crime index and its resilience score is at 5.42 out of 10. Its legislation is said to be reactive in nature and a major portion of its organised crime is politically motivated. It is a major contributor among South Asian countries, in regards to crimes such as human trafficking and sexual exploitation. Although Constitutionally its judiciary is guaranteed to be independent, it is not to a great extent entirely free from political interference. It also has frequent unrest owing to Maoist violence or religious extremism. India has the lowest proportion of law enforcement owing to its sizable population. The lack of federal structure has led to many gaps in the law, which State legislations would try to bridge themselves. Most laws in India are reactionary, with the need for major unrest occurring being responded to with recommendations of law committees that aid in the drafting of legislations that address the issue. [22]

The Indian Penal Code categorises homicide based on culpability. Intention and circumstances play a vital role in the determination of the liability of the offender. Sections 299 to 316 enlist various instances of homicide some amounting to murder and some not. The legislation is a great example of the principle of fair labelling as it prescribes a provision for each variation of homicide depending on the circumstances and the seriousness of the wrong. Special care is being given to the protection of vulnerable groups such as persons of unsound mind, minors, or pregnant women, with the punishments being generally harsher than that which would have been awarded if it was the homicide of the general circumstance.

Venezuela: Crime Index- 83.76

Venezuela ranked the highest in crime rates in 2023 and it has a very low resilience score- only 1.88 out of 10. Its government is frequently suspected of corruption, with many reports of high-ranking officials having ties with criminal organisations and active mafia-style groups. The criminal scene in Venezuela is complicated owing to various interested domestic and foreign parties. It is a very popular hotspot for crimes such as smuggling of drugs and precious metals, human trafficking etc. In terms of its resilience mechanisms, the government has been facing many political crises and is in a precarious state. With political instability, the government is not adept nor able to deal with issues pertaining to organised crimes and the government's move to deinstitutionalise its military has led to the proliferation of various other militant groups. The Government is said to lack credibility and there is a severe lack of transparency or accountability on the part of the State bodies. The judiciary is reported to lack independence and political figures are often known to influence judges' decisions- who may either follow willingly or be coerced into giving favourable pronouncements. [23]

Although, like in India, the provision for culpability of homicide depends on various factors and circumstances, with the state of the judiciary, and the interference of organised crime groups, these provisions lack effectiveness, with convection rates being dismally lower than murder rates. With the lack of trust towards State institutions, the actual numbers to determine murder rates are subject to inaccuracy. Together with external interference in the judicial process, these crimes have often been mislabeled and hence not reported as murder. An alarming number of deaths have been at the hands of security forces. With reasons such

[22] *Criminality in India*, The Organized Crime Index https://ocindex.net/country/india.
[23] *Criminality in Venezuela*, The Organized Crime Index https://ocindex.net/country/venezuela.

as opposition or disruption of a public official's duties being cited several deaths have been attributed to the doing of the very bodies that were supposed to protect citizens.[24]

The Role of Procedural Law in Society.

While the role of legislation in society is undisputed, it loses its meaning when there are no agencies by which these laws can be enforced. The mere substance is insufficient, society would also require the means to enforce these regulations. Substantive and procedural criminal law go hand-in-hand, for without the other, they lack force[25]. For a wrong to be recognised as a crime- laws must exist, and for a crime to be punished, it must be spotted and hence investigated. [26]

Deliberations on what should be criminalised would not address the root of the problem. When laws are formulated but the procedure by which these laws are to be followed is neglected, there emerges a gap, a loophole in the administration of justice. To penalise and impose sanctions for an act, the accused and the prosecution must go through a process of investigation. Such investigation is often done by the State's Executive body, following the process as laid down in procedural laws.

With increasing research on the relation between the substantive and procedural aspects of law, the gap between the *ought to* and *is* in criminal law becomes more glaringly apparent.[27] Procedural law becomes important as one realises that justice is obtained through the interaction of various State agencies. The procedure ensures the representation of the offender and the victim. The procedure ensures clarity of facts as produced through investigation by the Executive body. The procedure ensures compliance with international standards and conventions.

By criminalising an act, we as a society are allowing the State to interfere with an individual's personal liberty. We permit the use of force by the executive on the accused in the exercise of his duties. Special attention must hence be placed on the use of such power. A lapse of judgment or negligence on the part of the investigating officer could lead to a distortion of the facts of the case, which may be detrimental to the sentencing of the accused.[28] It is also to be noted that Criminal law cannot execute itself. The execution of criminal law is in the hands of man, who is subject to bias.[29]

One major difference between civil and criminal wrongs is the fact that a civil wrong would be assisted by agents of the State, while the parties to the dispute concerned remain the main participants to such a suit. However, in the case of a criminal wrong, it is no longer a matter between two parties, but the State becomes an active participant.

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[24] Keymer Avila, *Homicides in Venezuela let's go over the figures again*, openDemocracy (Apr. 1, 2020), https://www.opendemocracy.net/en/democraciaabierta/homicidios-en-venezuela-vamos-de-nuevo-con-las-cifras-en/.

[25] Mike C. Materni, *The 100-plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)*, 18 New Criminal Law Review: An International and Interdisciplinary Journal 334 (2015)

[26] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 308 (2018).

[27] Herbert L Packer, *Two Models of the Criminal Process*, 113 University of Pennsylvania Law Review 3 (1964).

[28] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 309 (2018)

[29] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 310 (2018)

When we as a society decide to condemn an action as a criminal offence, we empower the State to investigate, detain and punish.[30] Criminal punishments bring with them a legal stigma, unlike civil liability. This stigma does not wash off even after the individual has served their sentence.[31] Hence, when sentencing an offender, adequate considerations and precautions must be taken, so as to not cause irreversible harm to an innocent accused.

Since the criminalisation of an act would mean State enforcement, costs must also be considered. In this regard, trivial offences must not be criminalised as the costs for implementation are far greater than the benefit derived. Such requirement of state enforcement thus imposes normative constraints on criminal law. Criminal law must then only include those offences that truly deserve penal consequences.[32] Here, costs incurred are not restricted to monetary costs but also mean to include the consequences of imposing criminal liability on an individual- the deprival of their personal liberty, the loss of reputation and the eternal stigma.

Criminalisation authorises the executive to exercise discretion. It allows, for instance, the police to arrest a person who was caught in the midst of committing a crime. The fact that such authority rests on an agency that is still, at the end of the day human, there exists the scope of discrimination[33]. Laws must hence, take care to reduce this scope of discrimination by laying down proper provisions that oversee the executive process.

Conclusion

Not all that Society deems to be undesirable or harmful behaviour can be criminalised. Criminalisation incurs a cost- both in terms of monetary interests and individual autonomy. Legislation being specific does not mean that there is excessive restriction. When done right, fair labelling allows for clarity in law and easier administration of justice. It is not just legislation alone that functions as a tool for the correction of anti-social behaviour. Legislation cannot stand on its own and requires enforcement by way of procedural laws that aid in its execution. The absence of procedure would lead to the eventual breakdown of the judicial system. Without proper executive backing, no matter how comprehensive the legislation is or how many acts it criminalises, crime rates would increase and society would gradually lose trust in its agencies. Overcriminalisation and weak enforcement structures would lead to the decline of civilisation.

[30] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 319 (2018)

[31] Thomas Søbirk Petersen, *Some Ethical Considerations on the Use of Criminal Records in the Labor Market: In Defense of a New Practice*, 139 Journal of Business Ethics 443 (2016).

[32] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 320-322 (2018)

[33] Alice Ristroph, *The Thin Blue Line From Crime to Punishment*, 108 The Journal of Criminal Law and Criminology 327 (2018)

CASE OF WAŁĘSA VERSUS POLAND – SETTING THE GROUND AFTER THE CRISIS

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Abstract

Poland experienced the illiberalisation of the constitutional system that affected the most the rule of law and human rights protection to such an extent that in November 2023, the European Court of Human Rights recognised systemic problems connected with domestic legislation and practice malfunctioning. The judgment on the case of Wałęsa v. Poland was announced one month after the parliamentary election on 15 October 2023, which resulted in a change of the ruling majority. However, the new ruling coalition faces systemic obstacles from the illiberal option still in force and the illiberal constitutional court. Based on the ECtHR judgement of 23 November 2023 in the case of Wałęsa v. Poland (Application no. 50849/21), the paper demonstrates the most problematic issues, including the violation of Article 6 and Article 8 of the European Convention of Human Rights. Further, it discusses the context of the remnants of illiberal constitutionalism still working in Poland that limits the legal possibilities of the rule of law restoration.

Keywords*: Poland, rule of law, judiciary, right to court, the National Council for Judiciary*

1. From 2015 to 2023, Poland experienced the illiberalisation of the constitutional system[2]. This exercise affected the rule of law and human rights protection to such an extent that in November 2023, the European Court of Human Rights (ECtHR) recognised systemic problems connected with domestic legislation and practice malfunctioning. The judgment on the case of Wałęsa v. Poland was announced one month after the parliamentary election on 15 October 2023, which resulted in a change of the ruling majority. However, the new ruling coalition faces systemic obstacles from the illiberal option still in force[3] and the illiberal constitutional court[4].

This piece, based on the ECtHR judgement of 23 November 2023 in the case of Wałęsa v. Poland (Application no. 50849/21), demonstrates the most problematic issues and discusses them in the context of the remnants of illiberal constitutionalism that are still working in Poland.

2. The case relates to the infringements of Art 6 § 1 of the European Convention of Human Rights (the Convention, the ECHR) in connection with a tribunal established by law, the independence of courts, impartiality of judges, and fair trial. According to the ECtHR, the applicant's private life (Art 8) was also violated. The ECtHR decided on the case in a pilot-judgment.

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[2] Drinóczi, T. Bień-Kacała, A. (2021). Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law, Routledge: Abington, New York.

[3] The President of the Republic and the First President of the Supreme Court.

[4] Drinóczi, T. (2022) Illiberal constitutional courts of Hungary and Poland (some features and danger they pose), Państwo i Prawo, No 8, pp. 3-25.

2.1. Violation of Art 6 § 1 ECHR results from, firstly, manifest breaches in appointing judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court (CERPA) following legislative reform. Second, it results from the scope of the CERPA's competences, which creates the Chamber's uncircumscribed power in all matters concerning the Polish judiciary's independence. Third, the violation is caused by the extraordinary appeal procedure's significant shortcomings, which make it incompatible with the principle of legal certainty.

2.2. Infringement of Article 8 of the Convention results from a final judgment being reversed by the CERPA. The final civil defamation judgment was taken in the applicant's favour ten years earlier. However, the Prosecutor General submitted an extraordinary appeal to revert the final judgment. In the analysing case, the critical factor was that the interference with the right to private and family life must be based on a „law" that guarantees proper safeguards against arbitrariness. First, there must be a safeguard to ensure that the discretion left to the executive is exercised following the law and without any abuse of powers. However, such a safeguard does not exist as the CERPA cannot be recognised as an „independent" and „impartial" „tribunal established by law". Secondly, the legal configuration of the extraordinary appeal procedure is incompatible with the principles of legal certainty and *res judicata*. Finally, the State authority abused the procedure to pursue its political opinions and motives.

2.3. The ECtHR pilot-judgment results from systemic problems stemming from Polish „judicial reform". According to the judgment, Poland should take rapid and adequate legislative and other measures to secure the requirements of an „independent and impartial tribunal established by law" and the principle of legal certainty.

3. The circumstances of the case are connected to the so-called „reform of the judiciary" in Poland, which was initiated in 2017 and has been implemented by successive amendments of laws. The case mainly concerns the Amending Act of 12 July 2017 on the National Council of the Judiciary and certain other statutes[5], which modified the procedure for the election of judicial members of the National Council of the Judiciary (NCJ). This body is responsible for recommending judges of ordinary courts, the Supreme Court, the Supreme Administrative Court, administrative courts, and military courts for appointment by the President of Poland. Its composition should properly balance political and judicial components to avoid political pressure on the NCJ functioning. Another issue is linked with the Act of 8 December 2017 on the Supreme Court[6], which established two new chambers of the Supreme Court (the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs) and introduced an extraordinary appeal into the Polish legal system. The ECtHR has already adjudicated many times, finding a violation of Article 6 § 1 of the Convention because of the inherently deficient procedure for appointing judges, including those appointed to the CERPA.[7]

[5] Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Dz.U. 2017 poz. 1452.

[6] Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym, Dz.U. 2018 poz. 5.

[7] The Court's judgments in Reczkowicz v. Poland (no. 43447/19, §§ 4-53, 22 July 2021), Dolińska-Ficek and Ozimek v. Poland (nos. 49868/19 and 57511/19, 8 November 2021), Advance Pharma sp. z o.o. v. Poland (no.

The facts of the case concern that the applicant – Mr Lech Wałęsa – is the former leader of the „Solidarity" (Solidarność) trade union, former President of Poland (from 1990 to 1995), and laureate of the 1983 Nobel Peace Prize. In 2000, the applicant was a candidate for the presidential elections. The law required the „lustration declaration" concerning collaboration with the communist security services during the People's Republic of Poland. Mr Wałęsa declared that he had not collaborated with any of these services. In July 2000, the Warsaw Court of Appeal initiated a „lustration" (vetting) procedure concerning Mr Wałęsa and, in August 2000, held that he had filed a true lustration declaration. However, the supposition that Mr Wałęsa was a secret collaborator has not disappeared. The strongest, most vocal and categoric public statements have come from the circles of members and supporters of the Law and Justice party and Mr Jarosław Kaczyński – the leader of the ruling coalition between 2015-2023.

Another sequence of circumstances relates to the applicant's victim status. In November 2005, the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation as a competent body granted such a status to Mr Wałęsa. According to the statutory regulation, he was a „person in respect of whom organs of the secret service collected information based on purposefully gathered data, including in a secret manner". Victim status cannot be granted to those who collaborated with the communist State security organs. The media widely reported these events. One of the former friends and associates of Mr Wałęsa – Mr Wyszkowski – stated in the press that the victim status does not mean that Mr Wałęsa was not an informant or a secret collaborator. As a result, the applicant lodged a civil claim with the Gdańsk Regional Court against Mr Wyszkowski for infringement of his personality rights. The case was adjudicated in favour of Mr Wałęsa on 30 November 2011 when the Supreme Court refused to entertain a cassation appeal lodged by Mr Wyszkowski.

Six years later, in 2017, after the Law and Justice, led by Mr Kaczyński, won the majority and formed the government, the extraordinary appeal procedure was introduced and entrusted to CERPA. On 31 January 2020, the Prosecutor General, Mr Zbigniew Ziobro, lodged an extraordinary appeal against the relevant judgment to reverse it in favour of Mr Wyszkowski. During the procedure, in April 2021, Mr Wałęsa requested to exclude seventeen judges currently sitting in the CERPA from examining the case. It was indicated that the procedure for appointing judges raised severe doubts relating to the rule of law and the participation of the reformed NCJ in this procedure. The motion was dismissed. Consequently, in April 2021, the CERPA could adjudicate against Mr Wałęsa. At this point, the case matured to be submitted to the ECtHR.

4. Based on the ECtHR judgment, five structural problems might be identified. They relate to the CT, the NCJ, the CERPA, the extraordinary appeal procedure, and the political abuse of the procedure. The problems are consecutively analysed below.

4.1. The attitude of the Polish CT towards the Convention and jurisprudence of the ECtHR is highly problematic. The Constitutional Tribunal adjudicated twice on the incompatibility of Article 6 of the Convention to the Polish Constitution.[8] However, according to the ECtHR, these opinions cannot affect its final judgments and should be considered void

1469/20, §§ 4-78 and 95-225, 3 February 2022), Grzęda v. Poland ([GC], no. 43572/18, §§ 14-28, 15 March 2022), Żurek v. Poland (no. 39650/18, 16 June 2022), Juszczyszyn v. Poland (no. 35599/20, 6 October 2022), and Tuleya v. Poland (nos. 21181/19 and 51751/20, 6 July 2023).

[8] The CT judgments of 24 November 2021 (case no. K 6/21) and 10 March 2022 (case no. K 7/21).

for three reasons. Firstly, the CT was adjudicated in a panel including a person unconstitutionally appointed to the CT. In the light of the *Xero Flor w Polsce sp. z o. o.* judgment, the presence of such a person affects the validity and legitimacy of the judgment taken. Secondly, the hasty actions of the Polish CT aimed at preventing the execution of the ECtHR judgments in *Broda and Bojara v. Poland*[9], *Reczkowicz*, *Dolińska-Ficek and Ozimek* and *Advance Pharma sp. z o.o.* that violates Article 46 of the Convention. Thirdly, Article 32 of the Convention allocates to the ECtHR the competence to decide on the jurisdiction to interpret and apply the Convention and its Protocols. Consequently, the ECtHR, not the CT, decides on its jurisdiction in a particular case. Moreover, according to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a State cannot invoke its domestic law, including a constitution, as justification for its failure to respect its international law commitments.

Another issue that makes the CT decisions questionable is their merit. According to the ECtHR, the CT evaluation of legislation on NCJ and „judicial reforms" must be regarded as arbitrary. The CT acted within the logic of illiberal judicialisation of politics, creating legal justification for the political needs and agenda of the populist rulers of the day.[10] Therefore, the ECtHR did not consider such an evaluation and found a manifest breach of the domestic law involved in the procedure for judicial appointments to the CERPA.

The last issue connected to the CT is its competence to adjudicate constitutional complaints. In its jurisprudence[11], the CT made the procedure ineffective in case of a constitutional challenge of the status of a judge appointed with the participation of the NCJ as established under the 2017 Amending Act. The CT found that the amended model of election of judicial members of the NCJ was compatible with the Constitution. This way, the CT preserves the new judicial appointment procedure involving the recomposed NCJ.

4.2.The National Council for Judiciary is a constitutional body engaged in nominating judges' procedures. Like other bodies of that kind in Europe and outside the continent, it should be independent and separated from potential political influence by the executive and legislative branches of the government. The Polish Constitution provides legal grounds to ensure the status of this body. Until 2017, the NCJ composition ensured the proper balance between political and judicial members, which is needed for independent actions. The 2017 Amending Act deprived the judiciary of the right to elect judicial members of the NCJ. The legislative and executive branches of government achieved a decisive influence on the composition of the NCJ. The ECtHR underlined that the amendment practically removed both the previous representative system and the safeguards of independence of the judiciary in that regard. Consequently, the ECtHR concluded that the breaches of the domestic law arising from non-compliance with the rule of law, the principle of the separation of powers and the independence of the judiciary inherently affected the judge's appointment procedure. Such a procedure that disclosed undue influence of the legislative and executive powers on the appointment of judges was *per se* incompatible with Article 6 § 1 of the Convention and, as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed.

[9] The judgment of 29 June 2021 (nos. 26691/18 and 27367/18).

[10] Bień-Kacała, A. (2023). Illiberal Judicialization of Politics in Poland and Hungary, (in:) J. Cremades, C. Hermida (eds), Encyclopedia of Contemporary Constitutionalism, Springer, Cham, Switzerland, pp. 1-12, https://link.springer.com/referenceworkentry/10.1007/978-3-319-31739-7_214-1

[11] The CT judgments of 25 March 2019 (no. K 12/18), 20 April 2020 (no. U 2/20), 2 June 2020 (no. P 13/19).

This way, the executive and the legislature are free to interfere directly or indirectly in the judicial appointment procedure, a possibility that these authorities have taken advantage of. The Polish president nominated a growing number of judges, with the participation of the reshaped NCJ, including the CERPA—a chamber of the SC created during „judiciary reforms".

4.3.Politically contaminated CERPA had been treated with the test established by the ECtHR in the *Guðmundur Andri Ástráðsson*[12] case and applied previously in other cases against Poland[13]. The threshold test consists of three criteria. These criteria are taken cumulatively to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to violate the right to a „tribunal established by law" and whether the State authorities had struck a balance between the competing principles.

Regarding the Ástráðsson test, the ECtHR found that there had been a manifest breach of the domestic law, which adversely affected the fundamental rules of procedure for appointing judges to the CERPA of the Supreme Court. Despite the participation of NCJ in the nomination procedure, the Polish President disregarded the ongoing procedure before the Supreme Administrative Court concerning the legal validity of the NCJ recommending resolution and appointed judges to the CERPA. The ECtHR stated that the President manifestly disregarded the rule of law by making the judicial assessment of the nomination illusionary. President's actions had clearly been taken with the ulterior motive of not only influencing the outcome of the pending court proceedings but also preventing the proper examination of the resolution's legality that recommended candidates for judicial posts and, consequently, rendering judicial review of the resolution meaningless. These actions aimed to ensure that the judicial appointments as proposed by the NCJ would be given effect even at the cost of undermining the authority of the Supreme Administrative Court, one of the country's highest courts, and despite the risk of setting up an unlawful court. Finally, the ECtHR found no procedure under Polish law whereby the applicants could challenge the alleged defects in appointing judges to the CERPA. In conclusion, the ECtHR held that irregularities in the appointment process compromised the legitimacy of the CERPA to the extent that it lacked the attributes of an independent and impartial tribunal established by law under Article 6 § 1 of the Convention.

The unlawful composition of the CERPA also affects the right to court in another way. There is no legal possibility to have the case adjudicated by lawfully appointed judges. Mr Wałęsa asked to exclude seventeen judges sitting in the CERPA and individually, the judge rapporteur and a judge who handled the request for exclusion. The basis of the motions was severe doubts about the appointment procedure from the point of view of the rule of law, especially the recommendation for appointment by the reformed NCJ, which constituted a deficient procedure under the 2017 Amending Act. However, the CERPA consists of unlawful judges only, and these judges have the power to adjudicate on the exclusion of the panel. Consequently, every such decision may be challenged. Aware of irregularities in appointment procedures, lay judges sitting in CERPA refuse to adjudicate with judges unlawfully

[12] The ECtHR judgment of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland (no. 26374/18).

[13] Cases: Xero Flor w Polsce sp. z o.o., Reczkowicz, Dolińska-Ficek and Ozimek v. Poland, Advance Pharma sp. z o.o, and Juszczyszyn.

appointed.[14] Therefore, in practice, it might not be easy to achieve any decision resulting from submitting the extraordinary appeal.

4.4. The legal framework of the extraordinary appeal raises concerns. First, the appeal violates the principle of legal certainty in its requirement of the binding force of a final ruling. This requirement means that where the courts have finally determined an issue, their verdict should not be called into question. According to the ECtHR jurisprudence, this aspect of legal certainty presupposes respect for the principle of *res judicata*, which ensures the stability of the judicial system and contributes to public confidence in the courts. The *res judicata* principle requires that no party is entitled to seek a review of a final and binding judgment merely to obtain a rehearing and a fresh determination of the case. The review should not be treated as an ordinary appeal in disguise, and the mere possibility of two views on the subject is not grounds for re-examination. In the examined case, the final decision may be appealed against because of „an obvious contradiction between significant findings of the court and the content of evidence collected in the case". Therefore, the ECtHR underlined that, in practice, in civil cases even many years after the events, the CERPA may act as the tribunal of fact at the third or fourth level of jurisdiction, even though the lower courts had established the facts on the evidence directly taken or heard before them. This solution undermines both the stability of final judicial decisions and the individual's legitimate expectation to be protected by law from repeated litigation of a matter that has already been finally determined. The examined case reveals that the extraordinary appeal is an ordinary appeal in disguise. Thus, a fresh examination of the case can be obtained, contrary to the *res judicata* principle.

Additionally, the ECtHR noticed that the extraordinary appeal may be logged to ensure compliance with the principles of social justice. The idea of „social justice" is intertwined with the democratic rule of law under Article 2 of the Polish Constitution. Thus, the purpose of the procedure may seem legitimate. However, the idea of „social justice" is generic in nature and vague, as there is a reasonable disagreement about its meaning. This disagreement produces room for divergent interpretations and, thus, a broad degree of discretion of the adjudicating body and bodies authorised to lodge an extraordinary appeal. Consequently, this opens the door to possible arbitrariness, misuse of legal remedies, and abuse of process.

4.5. Exactly, this is the case in Poland. Lech Wałęsa, as was mentioned above, is an iconic political figure in Polish and European history. He is a symbol of the peaceful transformation to democracy of 1989. At the same time, for right-wing parties of the Polish political scene, Mr Wałęsa is a traitor who betrayed the ideals of the Solidarity movement. Therefore, the illiberal and populist rulers attacked him with an extraordinary appeal procedure initiated by the Prosecutor General Zbigniew Ziobro.

The case has two levels of political abuse. The first is broad and provides the context. The second is narrow and gives individual focus. For the context, the ECtHR underlined that the former Prosecutor General – Zbigniew Ziobro – is also an active politician who performed the functions of Minister of Justice as a member of the party forming the ruling government coalition in 2015-2023. He is the primary author of the far-reaching reorganisation of the

[14] UCHWAŁA Rady Ławniczej Sądu Najwyższego II kadencji nr 3/2023 z dnia 12 października 2023 r. w sprawie dalszych zaleceń odnośnie do orzekania ławników Sądu Najwyższego, https://konstytucyjny.pl/wp-content/uploads/2023/10/uchwala-3-2023-RL-SN.pdf

Polish judicial system, which started in 2017 and, among other things, significantly increased the powers of the Minister of Justice concerning the internal organisation of the courts and the appointment and dismissal of the presidents and vice-presidents of the courts.[15] The changes also extended his powers in the areas of promotion and discipline. Mr Ziobro exerted significant political influence on the composition of the NCJ as established by the 2017 Amending Act, a body entrusted with recommending candidates for judicial office, including the CERPA. According to the ECtHR, entrusting the Prosecutor General with the unlimited power to contest virtually any final judicial decision creates more than a hypothetical risk that the legal remedy may become a tool of political supervision over court judgments by the executive. This ruins a means designed to protect an individual's fundamental rights and turns it into an arm aimed at political opponents.

The individual focus of the case is more than evident when a Polish political background is considered. The ECtHR noticed that the circumstances indicate the abuse of legal procedure by the State authority in pursuance of its own political opinions and motives. The real purpose of the case may be demonstrated by the example of Mr Wyszkowski's application, who complained that judicial decisions in his case had violated Article 10 of the Convention. These are precisely the decisions in favour of Mr Wałęsa that were subject to extraordinary appeal.

In July 2021, the ECtHR struck the case of *Wyszkowski v. Poland* (no. 34282/12) out of the list of cases as the matter had been resolved. The Polish Government had acknowledged a violation of Article 10 of the Convention regarding the interference with Mr Wyszkowski's freedom of expression. It offered to pay him 20,000 Polish zloty, which would constitute the case's final resolution. Since the ECtHR had not been informed of the extraordinary appeal lodged by the Prosecutor General on Mr Wyszkowski's behalf or the judgment given by the CERPA in April 2021, those developments were not referred to in the ECtHR strike-out decision.

As referred by the ECtHR, in September 2021, the Polish Supreme Court published a press release entitled *European Court of Human Rights, confirming the ruling of the Supreme Court*.[16] According to the press release, the ECtHR, in its recently published decision of 1 July 2021, found a violation of Article 10 of the Convention because of the interference with the freedom of expression and ordered payment of compensation to Mr Wyszkowski. Poland unilaterally admitted a violation of the Convention. The basis of this declaration was the CERPA decision finding the violation of Article 10 of the Convention in April 2021. After examining the case, the CERPA allowed an extraordinary appeal lodged by the Prosecutor General against the judgment ordering Mr Wyszkowski to make apologies to Mr Wałęsa for accusing him of cooperation with the communist secret services. This way, the formal decision of the ECtHR acknowledging the admission of the violation of the Convention made by Poland was turned into a substantive judgment taken after examining the case's merit. Thus, the ECtHR decision was abused for political purposes against Mr Wałęsa – a political enemy of the illiberal and populist rulers.

[15] Sadurski, W. (2019). Poland's Constitutional Breakdown, pp. 211–213.

[16] https://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=466-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach&rok=2021

These circumstances – the context and the focus – display the real picture of the rule of law problems in Poland that are of a systemic nature and ready for political abuse. Therefore, the ECtHR decided to deliver a pilot-judgment.

5. The pilot-judgment procedure responds to the growth in the ECtHR caseload and the potential inflow of future cases caused by a series of cases deriving from the same structural or systemic dysfunction recognised previously in Poland. The procedure aims to ensure the long-term effectiveness of the Convention system. Therefore, the particular State is required to eliminate the source of the violation for the future and to provide a remedy for the past prejudice suffered by the individual applicant in the pilot case and all other victims of the same type of violation. According to the findings of the ECtHR, the main problem to be solved is the defective procedures for judicial appointments involving the NCJ, as established under the 2017 Amending Act. Considering the CERPA, issues related to the lack of independence in the context of competences to deal with any motion for the exclusion of judges involving a plea of lack of independence of a judge or a court and to deal with their cases challenging the defective appointment which equals breach of the fundamental principle *Nemo iudex in causa sua*. Despite problems concerning the judiciary system, the extraordinary appeal procedure should be adjusted to the standards of fair trial and the principle of legal certainty to eliminate potential political abuse of the procedure.

The ECtHR provided a set of recommendations. They include elaborating measures to restore the independence of the NCJ by introducing legislation guaranteeing the right of the Polish judiciary to elect judicial members of the NCJ. Poland should address the status of all judges appointed in the deficient procedure involving the NCJ as constituted under the 2017 Amending Act and of decisions adopted with their participation. The state must also ensure effective judicial review of the NCJ's resolutions proposing judicial appointments to the President of Poland, including the Supreme Court. The CERPA competences should be revised, especially in the case of a motion involving a plea of lack of independence of a judge or a court. The Polish State must ensure that the independence of judges is determined by a court or courts that are themselves an „independent and impartial tribunal established by law" in light of the Convention standards. Regarding the defective operation of the extraordinary appeal procedure, Poland must adopt appropriate legislative measures, mainly removing the basis for discretion in interpreting the grounds for an extraordinary appeal and removing the possibility of using the extraordinary appeal procedure in practice as an „ordinary appeal in disguise". Additionally, Poland is obliged to put safeguards against abuse of process and exclude instrumentalisation of the procedure for political reasons.

6. The Wałęsa case shaped a picture of the rule of law violations made by the ruling coalition from 2015 to 2023. Most of these violations require statutory changes to be improved. The new governing majority, established after the 2023 parliamentary elections, has declared its commitment to restore the rule of law. However, its realisation may be difficult as the President of the Republic and the Constitutional Tribunal still follow the illiberalised constitutionalism rules. Therefore, it is challenging to pass new legislation adjusting the system to European standards set by the ECtHR. Additionally, the Polish President declared he would not confirm any vetting mechanism for judges he appointed based on rules

established in 2017. The CT adjudicated twice, conforming to the constitutionality of the new NCJ composition. Consequently, before the Presidential election and rebuilding the authority of the CT, changes are not expected to be in force. Moreover, restoring the properly functioning constitutional review might require even constitutional change and, thus, agreement of all political options. Unfortunately, the former ruling coalition is not open to dialogue. Therefore, ensuring compliance with the rule of law standards requires time.

Undoubtedly, one thing can be done in a shorter term. It is the political and societal context set out by the rule-of-law-aware milieu. Poland seems to be learning its lessons and becoming ready to observe them.

PRINCIPLE OF UNIVERSALITY, GOOD FAITH, AND MULTICULTURALISM: KANTIAN PERSPECTIVE FOR JUSTICE AS AN INCLUSIVE PUBLIC POLICY IN BRAZIL

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Absract

This paper explores the application of the Kantian principle of universality and the principle of good faith within Brazilian public policies, emphasizing the necessity of adapting these principles to multiculturalism through diatopic hermeneutics. The analysis, grounded in a conceptual examination of Kant, seeks to elucidate how Kantian deontological ethics, with its categorical imperative and the notion of good will, can support political actions that uphold human dignity and foster the autonomy of citizens in a diverse and multicultural setting. The central hypothesis posits that diatopic hermeneutics, by enabling intercultural dialogue, presents an effective method to adjust and temper Kant's ethical universalism to Brazil's diverse cultural landscapes, facilitating the creation of public policies that are equitable, inclusive, and respectful of various cultural traditions. Therefore, this study underscores the significance of Kantian ethics in the development of public policies in Brazil, reiterating the importance of commitment to good faith and recognition of the nation's cultural diversity for truly inclusive and equitable governance.

Keywords: *Kantian Ethics; Public Policies; Multiculturalism; Diatopic Hermeneutics; Good Faith.*

Introduction

This article aims to assess the applicability of Kantian ethical principles, specifically the principle of universality and the notion of good faith, to the domain of Brazilian public policies through a multicultural lens. Employing a conceptual analysis primarily based on Kant's „Foundations of the Metaphysics of Morals," this paper intends to clarify how deontological ethics, anchored in the categorical imperative and the concept of good will, can contribute to crafting public policies that not only respect human dignity and promote individual autonomy but also are sensitive to the cultural diversity inherent in Brazil. Central to this analysis is the use of diatopic hermeneutics, a methodology that promotes intercultural dialogue and facilitates the adaptation of Kantian ethical universalism to the complexities of multiculturalism. This methodological approach is aimed at developing public policies that are fair, inclusive, and culturally respectful, thereby reaffirming the relevance of Kantian ethics in the formulation of public policies driven by good faith and attentive to Brazil's vast cultural diversity.

The Categorical Imperative as the Foundation of Kantian Universal Ethics

For Kant, philosophy is defined as „a science of the supreme maxim of the use of our reason," serving as „the knowledge of the relation of all knowledge and of all use of reason to the ultimate end of human reason, to which, as the supreme end, all other ends are subordinate" (Kant, 1992, p. 42). Within this domain, he poses fundamental questions: a)

What can I know? b) What should I do? c) What can I hope for? d) What is man? These questions correspond to the fields of Metaphysics, Morals, Religion, and Anthropology, respectively (Kant, 1992). Immanuel Kant was pivotal in shaping ethical theorization that transcended the contingencies of external motives. His ethical framework, detailed in „Foundations of the Metaphysics of Morals" (1785), „Critique of Practical Reason" (1788), and „Metaphysics of Morals" (1797), is rooted in formalism and guided by the necessity of rational action, thus forming the basis of Deontological Ethics.

Contrasting with the moral philosophy of antiquity, which was teleologically oriented towards virtuous human development and the pursuit of happiness, Kant championed ethics grounded in actions free from external influences. He advocated for good will, defining it not by its outcomes or efficacy in achieving ends but as inherently valuable: „A good will is not good because of what it effects or accomplishes, because of its fitness to attain some proposed end, but only because of its volition, that is, it is good in itself and, regarded for itself, is to be valued incomparably higher than all that could merely be brought about by it in favor of some inclination and indeed, if you will, of the sum of all inclinations" (Kant, 2011, p. 23). This good will, steered purely by reason, epitomizes true freedom, detached from personal desires, and fosters an objective and autonomous framework for action, compelling individuals to act out of duty.

Kantian ethics primarily addresses practical human action, encapsulating it in the fundamental question, „What should I do?" The answer is formulated through the „categorical imperative," a universal ethical principle. To fully grasp it, one must distinguish it from „hypothetical imperatives," which are conditional and aimed at specific outcomes, such as health guidelines. If someone wishes to lead a healthy life, they should maintain a balanced diet and engage in regular exercise. This constitutes a hypothetical imperative, as it ought to be adhered to only if one's goal is to achieve good health. In contrast, the categorical imperative holds unconditional validity, imposing an absolute duty, with truthfulness often cited as a prime example.

The categorical imperative is articulated through maxims that provide a formal, ostensibly objective guide for ethical action. Kant delineates three formulations of this imperative, each offering a different perspective but converging in their support for ethical universality. The first, central to this discussion, is the principle of universal law: „ act in accordance with a maxim that can at the same time make itself a universal law" (Kant, 2011, p. 62). This necessitates the adoption of action maxims that, when universalized, do not lead to contradiction or inconsistency. The second formulation emphasizes the inherent value of humanity, prohibiting its instrumentalization: „Act in such a way that you treat humanity, whether in your own person or in that of another, always at the same time as an end and never merely as a means" (Kant, 2011, p. 73). The third formulation invokes the concept of a Kingdom of Ends, highlighting the dignity of the human person: „ act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends" (Kant, 2011, p. 81).

Adjacent to this third formulation, Kant elaborates on human dignity: „ In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity. (Kant, 2011, p. 82). This underscores the inestimable value of humanity, asserting its irreplaceable status within the moral realm. Such an emphasis on dignity is mirrored in the Brazilian Constitution, where it is enshrined as a foundational

principle, signifying its enduring relevance and protection: „Art. 1. The Federative Republic of Brazil, constituted by the indissoluble union of the States, Municipalities, and the Federal District, is a Democratic State of Law and has as its foundation... III – the dignity of the human person" (Brazil, 2024).

Finally, for Kant, Law grounds its authority on a moral basis that obligates individuals to behave in a specific manner, not merely because it aligns with the norm's will, but because the law should encapsulate the moral concept of justice. Consequently, its essence signifies an essential duty by taking the form of a categorical imperative derived from reason (Lima Junior, 2016; Höffe, 1998).

Good Faith as a Requirement of Kantian Practical Reason

Good faith can be understood as a principle of individual action that entails acting in an honest, sincere, and truthful manner, consistent with respect for others and thereby upholding the dignity of the human person. Within the realm of public policies, acting in good faith necessitates an understanding of the Public Administration's conduct towards its citizens. This understanding reveals the need for probity and truthfulness and the obligations to avoid deceit, concealment, manipulation, or the omission of pertinent data and information in this legal relationship. Moreover, good faith encompasses respect for the rights and moral duties owed to others, spanning both professional and public relations and the intimate realm of individual conscience.

Thus, good faith transcends mere valuation in private actions or contractual agreements between parties. It serves as a mediator that fosters equality and equity in the social relations among citizens and, crucially, with the State. Good faith aligns with the Kantian principle of the autonomy of the will, a foundational concept: „Autonomy of the will is the property of the will by which it is a law to itself (independently of any property of the objects of volition). The principle of autonomy is, therefore: to choose only in such a way that the maxims of your choice are also included as universal law in the same volition" (Kant, 2011, p. 90). The essence of the categorical imperative, according to Kant, is manifest in actions undertaken with freedom, achievable only through the autonomy of action — the capacity to act uninfluenced by external motives, guided solely by reason. This implies that acting with justice and good faith is an exercise in rational autonomy, enabling the universalization of virtuous conduct such as truthfulness, loyalty, honesty, and sincerity. In essence, good faith is a principle whose outcomes are universally beneficial, rendering it fully capable of universalization.

Beyond the capacity for self-guidance according to reason (autonomy), Kantian morality views good faith as necessitating the acknowledgment of others as absolute and unconditional values — as ends in themselves and not merely as means to an end. This perspective is underscored by the second formulation of the categorical imperative, which highlights the inherent value of the human person, aligning with the Brazilian constitutional principle of dignity. To act in good faith, then, is to treat individuals with respect due to equals, as rational and autonomous beings, rather than as inferiors, objects, or tools. Acting in good faith demands honesty and sincerity, devoid of hidden agendas or manipulation. Thus, adherence to the categorical imperative, in any of its formulations, mandates that both the State and its citizens embody ethical conduct, marked by intentional transparency and a commitment to what is just for both the public and the individual: this epitomizes acting in good faith.

Multiculturalism as a Challenge and Opportunity for Kantian Good Faith and Ethics

In this study, the Law is regarded as a construct of human intelligence and, therefore, a product of culture, as proposed by Reale (2001, p. 24): „Well, 'culture' is the set of everything that, in the material and spiritual planes, man constructs based on nature, either to modify it or to modify himself". From this premise, it can be inferred that both Law and Ethics significantly benefit from multiculturalism, as it provides a crucial context for understanding and enriching the principle of good faith. However, multiculturalism also presents a unique challenge to the standardizing and universalizing tendencies of these fields. This is because the multicultural perspective inherently involves a variety of cultures and acknowledges the existence of systems of domination among them, wherein certain cultures – such as the Western one – are often considered hegemonic over others, which are deemed peripheral or subordinated: „This hegemony has perpetuated unequal patterns of existence, cultural marginalization, and contemporary forms of neocolonialism" (Dantas; Lima Junior, 2022, p. 153). Nevertheless, multiculturalism is also seen as a valuable arena for dialogue and conflict among diverse social and cultural experiences. Santos (1997, p. 19) asserts, „Multiculturalism, as I understand it, is a precondition for a balanced and mutually enhancing relationship between global competence and local legitimacy, which constitutes the two attributes of a counter-hegemonic human rights policy in our time."

Consequently, multiculturalism embodies a social phenomenon characterized by an acknowledgment of cultural diversity, identities, and meanings within society, highlighting the coexistence of various ethnic, political, religious, and linguistic groups. This diversity presupposes the existence of differing values, traditions, customs, and norms, thereby posing a significant challenge to the foundational premises of Kantian ethics, which are universal, rational, and autonomous by nature. This reveals the ethnocentric character of Kantian morality, which purports to be universally applicable across all cultures, despite being predominantly a product of Western, modern, Enlightenment thought.

In response to this dilemma, the perspectives of Santos (1997) and Panikkar (2006) offer potential solutions. Diatopic hermeneutics, as proposed by Raimon Panikkar and embraced by Boaventura de Sousa Santos, employs an intercultural methodology to bridge the gap between Kantian universalism and multiculturalism, facilitating dialogue among various cultural traditions as a means of mutual understanding and recognition of cultural plurality. This approach acknowledges the existence of diverse and potentially divergent „universes of meaning" among cultures, which, through comprehensive analysis, can be reconciled to prevent cultural domination and promote dialogue (Santos, 1997). Such reconciliation necessitates the integration of knowledge and symbology, logos and mythos, transcending mere goodwill to embrace the 'Other' and foster genuine interculturality: „Culture is the encompassing myth of each worldview in a determined time and space" (Panikkar, 2006, p. 14-16). When applied to Kantian ethics, diatopic hermeneutics mandates the reinterpretation and application of universal principles in a manner that respects cultural nuances without compromising ethical integrity. This approach enriches Kantian ethics through the acknowledgment of cultural diversity and the pursuit of a truly intercultural global ethic that harmonizes universal ethical principles with the vastness of human diversity.

The exploration of diatopic hermeneutics offers an intriguing method for reconciling Kantian ethical universalism with the recognition of multicultural diversity. It presents an interpretive model that suggests engaging in robust cross-cultural dialogues can help identify

adaptable principles of justice that remain consistent with universally applicable moral norms. Among these principles is good faith, characterized by loyalty, truthfulness, and other virtues, which is thought to significantly benefit the relationship between the State and its citizens by necessitating actions characterized by probity, honesty, transparency, and loyalty – values that align with diverse cultural traditions. This potential for dialogue, even at a preliminary level, underscores the productive possibilities that align with the state's obligations in public policy formulation, striving for utmost transparency and honesty, in accordance with the moral principle enshrined in Article 37 of the Brazilian Federal Constitution: „Art. 37. The direct and indirect public administration of any of the Powers of the Union, of the States, of the Federal District, and the Municipalities shall obey the principles of legality, impersonality, morality, publicity, and efficiency..." (Brazil, 2024).

So, a viable path forward could involve developing a conception of Law that seeks to be historically fair, theoretically critical, and politically feasible. Fair Law is a law that evolves, incorporates new ideas, and renews itself, but also remains open to intercultural dialogue. This dialogue should occur on a horizontal plane rather than a vertical one, as it must consider the ways of being of other peoples with respect and critique, without hegemonic or totalizing impositions (Santos, 1997). Law, and human rights in particular, can be understood as a minimum common language among various cultures, moving away from its position as merely the product of a single dominant culture. This form of intercultural translation[1] aims to build means of mutual intelligibility between the varied experiences and projects of cultures, creating points of convergence that seek to identify, understand, critique, and transform reciprocal misunderstandings, facilitating the establishment of arenas for open and equal dialogue – this is the role of diatopic hermeneutics. In this way, Kantian ethics could be reformulated from an intercultural perspective that acknowledges the diversity and plurality of cultures, without renouncing the pursuit of universal principles that ensure human dignity in public policies. For this to happen, one interesting path is to think of Kantian ethics as a common language among cultures, which can be translated and dialogued, rather than as an absolute and unquestionable norm. But this idea needs more time to be thought about, to be tested and to be criticized.

Conclusion

The integration of the Kantian principle of universality, the principle of good faith, and multiculturalism provides a robust conceptual framework for formulating inclusive public policies in Brazil. Kant's deontological ethics, centered on the categorical imperative, advocate for moral actions that are autonomous and detached from contingent interests, highlighting the importance of goodwill and the primacy of human dignity – principles that resonate with the values enshrined in the Brazilian Federal Constitution.

In the context of public policy formulation and implementation, good faith serves as an essential operational principle, guiding interactions between individuals and between

[1] By extending ties between cultures, one is also understanding, interpreting, and translating ways of being and acting of people who, often, have developed in very different ways from one another. The lessons from Bassnett (1999, p. 2) are interesting when pointing out a project of intercultural translation: „First, and very obviously: translation does not happen in a vacuum, but in a continuum; it is not an isolated act, it is part of an ongoing process of intercultural transfer. Moreover, translation is a highly manipulative activity that involves all kinds of stages in that process of transfer across linguistic and cultural boundaries. Translation is not an innocent, transparent activity but is highly charged with significance at every stage; it rarely, if ever, involves a relationship of equality between texts, authors or systems".

individuals and the State towards honesty, sincerity, and mutual respect. Adherence to these principles is essential for ensuring the efficacy and fairness of public policies, aligning them with the requirements of transparency, loyalty, and fairness, and upholding the autonomy and dignity of citizens.

Meanwhile, the notion of multiculturalism, acknowledging the coexistence of diverse traditions, values, and perspectives within society, necessitates ongoing re-evaluation and, where possible, alignment with Kantian ethical universals. In this regard, diatopic hermeneutics emerges as a potent tool with the potential to foster genuine intercultural dialogue, attempting to reconcile Kantian ethical universalism with cultural diversity. This approach suggests that incorporating diverse perspectives and respecting cultural differences can enrich public policies, making them more inclusive and effective. This is particularly desirable from the perspective of a State continually confronted with complex public issues amplified by significant economic and social disparities in Brazil.

Therefore, the application of Kantian principles to public policies in Brazil extends beyond the observance of good faith and human dignity, also necessitating the recognition and valuation of cultural diversity. Such consideration aids in the development of public policies that are not only consistent with universal ethical principles but are also tailored to cultural nuances, fostering genuine and effective inclusion in a context as diverse as Brazil. The principle of good faith, especially guided by Kantian universal law, exemplifies a universal precept that can also resonate with, or be adapted to, other cultural contexts without implying the imposition of one culture over another. This presents a promising and attainable proposition, warranting further exploration and depth in future research.

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SECURITY ISSUES AND LIABILITY FOR UNAUTHORIZED ACCESS TO ONLINE PLATFORMS

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Abstract

The paper deals with cybersecurity issues and liability for unauthorized access to online platforms that are essential in the state's defense capability, its economic and social development. The dynamics of cybercrime in Ukraine and the world is analyzed. Investigation of violations related to the use of Zoom and Microsoft Teams is given. Liability for unauthorized access to the online services Zoom and Microsoft Teams is analyzed. Ways to uncover cybercrime and bring to responsibility have been identified.

Keywords: *online platform, cyber-attack, cybersecurity, responsibility, data, security system.*

I. INTRODUCTION

Due to the constant development of modern technology, the ability to communicate through Internet resources has expanded significantly. Active use of various online platforms for personal, business or management communication has created a number of advantages, however, is often accompanied by violations of user rights. In addition, the growing popularity of online platforms among people of all ages and in order to meet a variety of needs, objectively creates the preconditions for an increase in cases of fraud, theft, violations of the right to privacy on the Internet.

Cybercrime is a global problem because it poses a threat not only to the sovereignty of one country, but also to the world order as a whole. Therefore, over the past five years, Ukraine has experienced a wave of high-profile hacking attacks, the largest of which the Petya virus has damaged the country by 0.5% of GDP. Important state and private enterprises were also subjected to cyberattacks (for example, regional oblenergos in Chernivtsi and Transcarpathians regions, and a cyberattack on the Ukrenergo substation in the Kyiv region even became the hero of a large-scale Wired investigation) [1].

An obvious prerequisite for the intensification of cybercrime in the world is the global quarantine associated with COVID-19. Such circumstances have forced the whole world to temporarily restrict social contacts and communicate online with the help of modern video communication programs. Therefore, working meetings, schooling, lectures and trainings, as well as friendly gatherings are now translated by more than 50% online. However, as

Europol's website rightly points out, technical innovations can not only be used for the public good, but can also be used for wicked purposes [2]. Therefore, the fight against cybercrime is extremely important in the work of Europol and in cooperation with other organizations.

Many scholars in both the legal and technical fields have researched issues related to unauthorized access to various online platforms and breaches of confidential information. In particular, the works of such scientists as Jan Bernd Nordemann [3], O. Dovhan, L. Litvinova, S.Dorohih [4], Inge Graef, Sih Yuliana Wahyuningtyas, Peggy Valcke [5] Martin Peitz [6].

Nevertheless, many issues remain unresolved and need to be analyzed. Thus, despite the creation of a legal framework for bringing cybercriminals to justice, there are still many issues that need to be explored in more detail. Cyberattacks are taking on new forms, are having an increasingly aggressive impact on the personal lives of citizens, as well as on issues of business and public administration, and therefore require their detailed study and constant rethinking. First, it is necessary to investigate the security component of the activity of a platform, as a better-developed security system of the online platform creates the preconditions for its safe use.

II. THE PROBLEM OF CYBERSECURITY OF ONLINE PLATFORMS

One of the results of remote work was the popularity of such online platforms as Cisco, Webex Meetings, FaceTime, Google Meet, GoToMeeting, Messenger Rooms, Microsoft Teams, Slack, Webinar Meetings, WhatsApp, Zoom and more. In this work, we will focus on Microsoft Teams and Zoom, because these resources are the most popular among users.

Although Zoom has gained general popularity due to the emergence of the corona virus (according to Zoom, the number of users due to quarantine has increased from 10 million to 200 million in total – from March 2021 to March 2023) [7], at least half a dozen Fortune 500 companies have already used it in 2021. Microsoft Teams has a similar story, as Microsoft has had relationships with both business and universities, so it has been and remains no less popular.

However, these programs were vulnerable to hackers because they could not guarantee a sufficient level of security and confidentiality. This resulted in an increase in cyberattacks on the resources of Zoom and Microsoft Teams users. Therefore, you should compare the security issues encountered with the Zoom and Microsoft commands, and consider some recommendations that could potentially protect users from these issues. Before conducting a comparative analysis, it is also necessary to analyze the statistics of the use of these services. This will allow us to see not only the dynamics of growth in the number of users, but also serve as one of the important factors in assessing security systems in a COVID-19 pandemic.

So Zoom has invariably benefited from the spread of the COVID-19 virus. Back in 2017, there were about 3 million users, in 2018 – 5 million [8]. Its use increased sharply in March 2023, and the average number of participants in daily meetings was 200-250 million. In April, it reached 300 million. The same thing happened with Microsoft Teams, as the number of active users of the corporate messenger reached 115 million per day. This figure has grown by 60% since April 2023 [9].

Microsoft Teams also has some security issues. First, it is owned by Microsoft, which manages most computing devices in the world and is a monopolist in the data services market. Second, a group of independent developers noticed a drawback related to the ability to use Microsoft Teams user data if left unattended. In addition, existing methods of hacking users' passwords and the possibility of losing personal information are of particular concern.

The COVID-19 virus has also created unemployment, and more and more job seekers are desperately looking for a source of income to support themselves. Their vulnerability led to phishing scams through Zoom Video Call Invites. These invitations were disguised as opportunities to contact potential employers and forced those present to disclose their confidential information.

Advertisers are also exacerbating the situation with the Zoom security system. He clearly shares the data with his advertisers, and since most users use the free tariff, he switches to advertising to generate revenue. Zoom collects personal data, this personal data can then be used on the Internet and will therefore infringe on the privacy of users.

In December 2019, Microsoft announced that it had encountered a breach of customer database security that affected the collection of confidential information from the platform. A similar incident was reported in April 2020, when Evil Gif stole data from various groups. This only affected Teams versions for desktops and browsers, but this flaw revealed that there were problems with Microsoft's method of processing authentication tokens for image files. A server that could be easily stolen, allowing hackers to organize their attacks handled tokens.

Like Zoom, the rise of Microsoft Teams has also led to many fake Microsoft Team login pages. These login pages are constantly used to retrieve passwords, and because they appear to be genuine, they require money to get more Office features. As of May 1, 2020, researchers reported that more than 50,000 users had fallen victim to the attack.

Accordingly to the analysis, it can be argued that the leakage of confidential information occurred through the following channels, shown in Fig.1.

Fig.1. Channels of leakage of confidential information

In essence, both Teams and Zoom are telecommunications applications. Their features overlap, which is also responsible for competition among them. In terms of accessibility, both platforms are available for use on smartphones (Android and iOS), as well as on Windows and MacOS devices. However, when it comes to the security system, there are some differences [10].

Microsoft Teams requires a secure connection and uses the SRTP protocol to transmit data. User authorization meets the requirements of the OAuth specifications, and the AES algorithm (256-bit) additionally encrypts the content.

The service supports multi-factor authentication and uses Advanced Threat Protection (ATP) tools to monitor application actions, link security, and block malicious file transfers.

Security features also include waiting rooms, flexible distribution of conference participants' rights based on a role model, and limited guest access.

All Teams data is stored in Microsoft's distributed data centers, and the system administrator sees in which region the servers that process application-specific information are located. The service allows the user to delete the accumulated data about themselves from both local devices and Microsoft servers.

Disadvantages of Microsoft Teams security include the lack of end-to-end data encryption. In the spring of this year, a bug was found in the solution, the operation of which could lead to hacking of the user's account due to a malicious GIF file. In terms of security, Zoom allows the user to transmit data over a secure HTTPS connection. Encryption of transmitted data by 256-bit AES GCM algorithm. User authentication with login and password or single sign-on (SSO) technology. Restrict access to the conference by password. Waiting rooms for participants, which allow the organizer of the video conference not to allow unverified participants.

However, there are drawbacks that can affect its security, namely Zoom does not provide end-to-end data encryption. In addition, IS specialists regularly detect vulnerabilities in Zoom, some of which could cause data leakage?

In April this year, researchers found that in some cases, the service uses weaker 128-bit content encryption, and security keys are transmitted through servers located in China. Zoom does not provide the user with the ability to delete data about themselves from the service repositories, but allows you to manage information on the client side [11]. In the table.1 shows a comparison of platforms by specific criteria.

Name of the service	Data encryption	Two-factor authentication	Customer-side personal data management function	Personal data management function on the server	Availability of a waiting room	Number of MIRTE vulnerabilities
Microsoft Teams	-	+	+	+	+	1
Zoom	-	-	+	-	+	14

Table 1. Comparative table of platforms for video conferencing Zoom and Microsoft Teams

III. INVESTIGATION OF VIOLATIONS RELATED TO THE USE OF ZOOM AND MICROSOFT TEAMS

Direct intervention in meetings and chats. Thus, on March 27, 2020, The Guardian published a material about hacking attacks on the Zoom program [12]. In particular, it is about hacker interference in the meeting of various communities and groups, which allowed the violator to illegally distribute prohibited content. In addition, there are more cases when

hackers break into other people's chats and break into other people's conversations, interrupting them (they write obscene or aggressive messages in the chat, show pornography or scenes of violence instead of presenting on the screen etc.). In addition, hackers practice sending links via chat, which can harm your computer. Similar cases have also been described in publications such as The New York Times, The Washington Post, Daily Mail and others.

Importantly, even the Federal Bureau of Investigation, the US Department of Homeland Security, and the Canadian Cybersecurity Center warn of the dangers of using Zoom on their website.

In addition, Zoom users are exposed to the risk of illegal distribution of their personal data and breach of privacy. According to The Washington Post, thousands of private video calls that have been recorded have been made public on the YouYube and Vimeo platforms. The publication studied a number of videos, including collective calls for staff training, business meetings, financial statements, and personal conversations, including intimate ones. Also in the public domain were conversations of patients with doctors, during which telephone numbers, names and surnames etc. were announced. In addition, the leak affected young children – the video captured their faces and personal information [13]. As a result, New York schools have banned the use of Zoom [14].

Despite the lack of physical threat to students or pupils and given the remote nature of the meeting, such illegal behavior is extremely serious. Safety and a proper learning environment, whether online or offline, are extremely important. Such an intervention is tantamount to someone entering the classroom, and it is definitely an invasion of privacy [15].

In summer, 2019, the issue of webcam vulnerabilities on MasOS computers was investigated. On them, the Zoom application secretly installed a web server that could automatically connect the user to video calls on command from any web page. Moreover, this server remained on the computers even after uninstalling Zoom and could even reinstall the application [16]. Danger of distribution and transfer of personal data by the Zoom application to Facebook We are even talking about those people who are not even registered in this social network [17]. In view of the above, a number of large companies (eg SpaceX Ilona Mask and Google) as well as government agencies (including Taiwan, Germany) have abandoned the use of Zoom because of its questionable reputation [18].

IV. LIABILITY FOR UNAUTHORIZED ACCESS TO THE ONLINE SERVICES ZOOM AND MICROSOFT TEAMS

The legal framework for prosecuting for unauthorized access to the online platforms Zoom and Microsoft Teams is provided in a number of international regulations and national laws. In particular, the Law of Ukraine „On Basic Principles of Cyber Security of Ukraine" defines cybercrime as a socially dangerous crime in cyberspace and / or with its use, liability for which is provided by the Law of Ukraine on Criminal Liability and / or recognized as a crime by international treaties of Ukraine. In fact, it is any crime committed in an electronic environment.

The Council of Europe Convention on Cybercrime (Ukraine has ratified this Convention since 11.10.2005) provides a classification of cybercrimes, among which four main types are identified: offenses against the confidentiality, integrity and availability of computer data and systems (provides for illegal access, illegal interception, interference with data, interference with the system, misuse of devices); computer-related offenses (counterfeiting or

computer-related fraud); offenses related to the content (offenses related to child pornography); offenses related to infringement of copyright and related rights. Liability for committing cybercrimes is provided by the Criminal Code of Ukraine, in particular Articles 361, 362 and 363.

Thus, criminal offenses are acts that are related to the following actions: unauthorized interference in the work of electronic computers, automated systems, computer networks or telecommunication networks (Article 361 of the Criminal Code of Ukraine); unauthorized actions with information processed in electronic computers (computers), automated systems, computer networks or stored on the media of such information, committed by a person who has the right to access it (Article 362 of the Criminal Code of Ukraine); violation of the rules of operation of electronic computers (computers), automated systems, computer networks or telecommunication networks or the order or rules of protection of information processed in them (Article 363 of the Criminal Code of Ukraine); interference with the work of electronic computers (computers), automated systems, computer networks or telecommunication networks through the mass distribution of telecommunication messages (Article 363 of the Criminal Code of Ukraine).

The above criminal acts are subject to such sanctions as fines, restraint of liberty and imprisonment with deprivation of the right to hold certain positions or engage in certain activities.

However, according to case law, prosecuting cybercrime is not as easy as it seems. In addition, the relatively low level of responsibility for cybercrime in Ukraine is one of the prerequisites for their active spread. For example, the situation related to the distribution of malicious software by a citizen of Ukraine A. for stealing passwords through various forums and programs Skype and Telegram. The Slobozhansk Cyberpolice Department of the State of Emergency of Ukraine found that the citizen had organized a video blog on YouTube, where he talked about the use of malicious software for a fee. According to this fact, criminal proceedings were instituted under Article 361-1 of the Criminal Code of Ukraine (the sanction of this article provides for up to two years in prison) [19].

In total, according to the materials of the cyber units of the Security Service of Ukraine, in 2023, 496 criminal proceedings were initiated. Of these, 129 cases – for unauthorized interference in the operation of computer networks and automated systems [20].

V. CONCLUSIONS

Obviously, the impact of cybercrime can be devastating due to the high risk of data loss and other negative consequences for businesses and governments, as well as for individuals. Data breaches or theft of personal data, problems with devices – mobile phones or PCs can cause not only theft of personal data, but also financial losses. Moreover, losses can be worse than money, when cyberbullying, harassment, and mental violence haunt individuals. However, as practice shows, it is quite difficult to detect cybercrimes and bring the perpetrators to justice. The cross-border nature of this crime, its severity and high public danger require effective laws and close international cooperation endowed with special technical knowledge of law enforcement officers. The rapid pace of technological innovation requires dynamic and balanced decisions, effective rules of law to adequately address all possible forms of cybercrime. In addition, given the high social danger of cybercrime, an

adequate punishment should be established at the level of criminal law of the states. This approach will have some protection and will serve as a preventive measure to prevent cybercrime.

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PROFESSIONAL ETHICS AND ACCOUNTANCY OF LAWYERS: A COMPARATIVE ANALYSIS BETWEEN INDIA AND ROMANIA

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Abstract

The legal profession is guided by a collection of ethical principles that govern the behavior of lawyers in practice. This study aims to investigate the professional ethics and accountability of lawyers in the countries of India and Romania. Through an analysis of their responsibilities towards the court, clients, adversaries, colleagues, and society, we provide light on the parallels and distinctions between these two legal frameworks. This study offers a comprehensive examination of the professional ethics and advocacy environment among legal professionals in two nations. We employ a sophisticated lens to analyse the complexities that influence this terrain, offering perceptive and comprehensive data.

Keywords: *professional ethics, accountancy of lawyers, legal profession*

INTRODUCTION

Advocacy fosters fairness and preserves societal harmony. Legal experts guarantee equitable treatment for all individuals and protect their rights. Their work is crucial for fostering a fair society and facilitating constructive transformation. Legal professionals, including lawyers, judges, and other legal practitioners, bear the responsibility of interpreting and upholding laws, safeguarding the rights and interests of individuals and entities, and delivering legal counsel and advocacy to their clientele. The legal field is regulated by a collection of ethical principles and codes of conduct that delineate the anticipated norms of conduct for legal professionals. The primary objective of these ethical values is to guarantee that legal professionals exhibit integrity, honesty, and professionalism when engaging with clients, courts, colleagues, and the broader society. The Advocates Act of 1961 governs the legal profession in India. This legislation establishes the specific criteria and regulations that advocates are required to adhere to. As per the legislation, an advocate is an individual who is duly registered with a State Bar Council and possesses the legal authority to engage in the practice of law within the jurisdiction of said council. The legislation facilitates the creation of Bar Councils, operating at both the State and national levels, with the purpose of overseeing the legal profession and advancing its ethical principles.

REGULATIONS FOR ADVOCATES IN INDIA

According to the Advocates Act of 1961, advocates are obligated to adhere to specific obligations and limitations. Adherence to the values of preserving the integrity of the legal profession, respecting the law and justice, and refraining from engaging in any behaviour that

could potentially harm the profession's reputation is of utmost importance for advocates. As legal practitioners, advocates are obligated to adhere to a set of ethical principles that require them to maintain the confidentiality of their clients' information. In accordance with Section 126 of the Indian Evidence Act, legal practitioners are prohibited from divulging any pertinent details pertaining to their client's case without obtaining the explicit approval of their client. Nevertheless, there are specific situations in which the act of revealing information may be allowed, such as when the client is at risk of causing harm to themselves or others, or when the advocate is legally required by a court order to reveal information. However, it is imperative for advocates to consistently prioritise the preservation of client anonymity to the utmost degree feasible.

The legislation additionally includes provisions for initiating disciplinary actions against legal professionals who contravene the established rules and regulations of their profession. According to sections 35, 36, 36A, and 36A of the law, the Bar Councils possess the jurisdiction to suspend or revoke the licence of an advocate in cases of professional misconduct. This include actions such as accepting bribes, manipulating the court, or indulging in any other form of unethical conduct.The Act additionally encompasses the creation of the Bar Council of India, an entity entrusted with the task of overseeing the legal profession on a national scale and advancing the standards of legal practice and education inside the nation.

Advocates are bound by the Code of Ethics and Professional Conduct, which outlines the anticipated standards of behaviour and professional conduct for advocates, in addition to the Advocates Act. Advocates are obligated by the Code of Ethics to uphold the utmost levels of integrity and to prioritise the welfare of their clients. In addition, the Code of Ethics explicitly forbids advocates from participating in any actions that may undermine their autonomy or neutrality, such as advocating for opposing interests or receiving directives from individuals lacking proper authorization.

Advocates in India are subject to norms and regulations that aim to uphold the utmost levels of professionalism and integrity within the legal profession. Advocates play a vital role in upholding justice and maintaining by adhering to these criteria. According to sections 35, 36, 36A, and 36A of the law, the Bar Councils possess the jurisdiction to suspend or revoke the licence of an advocate in cases of professional misconduct. This include actions such as accepting bribes, manipulating the court, or indulging in any other form of unethical conduct. Legal governance in society. Legal practitioners are bound by several legal and regulatory systems that control their conduct, in addition to their ethical commitments. The frameworks exhibit variations across different countries and encompass a range of elements such as professional licencing prerequisites, disciplinary protocols, and other mechanisms of supervision. The Advocates Act of 1961 governs the legal profession in India, establishing the norms and regulations for advocates. While legal systems may differ among nations, the legal profession shares a collective objective of safeguarding justice and advancing the principles of the rule of law. Legal professionals are of utmost importance in safeguarding the rights and interests of both persons and organisations, facilitating the resolution of conflicts, and upholding societal cohesion.

REGULATIONS FOR ADVOCATES IN ROMANIA

The legal profession in Romania is regulated by the Romanian Bar Association (BAROU), which establishes rules for all practicing advocates inside the nation. The ethical

norms presented below contain a wide range of dimensions pertaining to professional behaviour, including but not limited to confidentiality, honesty, integrity, and respect for both clients and the legal system. In order to maintain the integrity and credibility of the legal profession in Romania, it is imperative to adhere to these standards.

Independence:

Advocates are obligated to exclusively serve the best interests of their clients, giving utmost importance to their clients' requirements, objectives, and entitlements. Individuals in this role are required to exercise their professional judgement and legal experience when making choices and offering advice, ensuring that their actions are not influenced by personal interests, biases, or external influences. Advocates must uphold autonomy in their decision-making process in order to uphold the concept of independence. They must remain unaffected by any external factors, such as the client, fellow lawyers, or external individuals or organisations. Their autonomy enables them to offer impartial and unbiased counsel and advocacy, guaranteeing the safeguarding of their client's interests. Advocacy is characterised by the crucial element of impartiality. Advocates are required to adopt an impartial and unbiased stance when dealing with any case or issue, ensuring equitable and unbiased treatment of all parties concerned. It is imperative for individuals to refrain from allowing personal beliefs or preferences to influence their judgement, and to ensure that their representation remains unaffected by external circumstances or pressures. Advocates can uphold the integrity of the legal profession and provide optimal legal representation for their clients by adhering to the principles of independence and impartiality. This ensures that their clients' rights and outcomes are not compromised by conflicts of interest or external pressures.

Conflict of Interest:

Upon becoming cognizant of a potential conflict of interest, an advocate is obligated to divulge it to the client. This information provides the client with the necessary information to make a well-informed choice regarding whether to continue with the advocate's representation or explore alternative advocates who do not possess conflicting interests. In certain circumstances, a conflict may emerge subsequent to the commencement of legal representation by the advocate for a client. In the event of such an occurrence, it is typically incumbent upon the advocate to disengage from the case. This practice serves to mitigate the influence of competing interests on the advocate, so enabling the client to pursue alternative representation. The act of withdrawing from a legal case as a result of a conflict of interest is a decision that advocates should not approach casually. It is imperative for individuals to thoroughly evaluate the potential adverse effects on the client's interests and the ramifications for the administration of justice. Advocates in certain jurisdictions may be required to obtain court approval or adhere to specified protocols before to withdrawing from a case. Conflicts of interest regulations differ among jurisdictions and can be intricate. Guidelines and norms of conduct are typically provided by professional bodies or bar associations to assist advocates in the identification and management of conflicts of interest. The purpose of these guidelines is to maintain the values of autonomy, allegiance, and moral obligation that advocates have towards their clients.

Confidentiality:

Advocacy necessitates the adherence to a rigorous code of confidentiality in relation to all the material divulged by their clients. This commitment continues to be applicable, unless the customer has explicitly given approval or legal requirements necessitate differently.

Diligence and Competence:

Advocates, in their capacity as legal representatives, bear the responsibility of delivering exceptional services to their clients. In order to effectively carry out their responsibilities, individuals must demonstrate a high level of care and dedication when managing their cases. Furthermore, individuals must consistently endeavour to improve their professional expertise and understanding through ongoing education and activities aimed at acquiring new abilities. By doing this, advocates can remain updated on the most recent legal advancements, optimal methodologies, and developing patterns, and offer their clients the utmost legal support.

Upholding the Rule of Law:

Advocates are those who possess legal expertise and play a pivotal role in upholding the principles of the rule of law and guaranteeing the administration of justice. The individuals in question bear the responsibility of advancing equitable and unbiased results, and are obligated to comply with the professional regulations and ethical guidelines set forth by the Bar Association. Advocates can uphold the utmost levels of integrity and preserve the trust bestowed upon them by their clients and society at large by adhering to and abiding by these norms.

Professional Conduct:

Within the legal field, it is anticipated that advocates will uphold a commendable level of professionalism in all their interactions. This include their interactions with clients, fellow counsellors, and the judicial system. It is imperative for advocates to consistently demonstrate integrity, respect, and civility, refraining from engaging in any conduct that may potentially undermine the integrity of the legal profession.

In the context of Romania, the legal profession places significant emphasis on the significance of professional ethics, recognising that any transgressions against these ethical principles can result in grave repercussions. Attorneys who violate professional ethics may be subject to disciplinary measures, such as monetary penalties, brief imprisonment, or even permanent expulsion from the legal profession. Adhering to the utmost standards of ethics and professionalism in their conduct is of utmost importance for advocates. In addition to bolstering their reputation, this practice also fosters a sense of assurance among their clients and stakeholders. Hence, it is imperative for individuals to keep a steadfast dedication to ethical standards and adhere to the ideals connected with their respective occupation.

CONCLUSION

In summary, it can be observed that both India and Romania have undertaken substantial endeavours to foster and uphold professional ethics within the legal field. The need of adhering to ethical norms that ensure equitable and impartial legal proceedings has been acknowledged by both nations. The professional ethics of advocates are of utmost importance in upholding the effective operation of the legal system and safeguarding the rights and interests of both clients and the general public.

Advocates are required to adhere to a comprehensive code of conduct established by the Bar Council of India. The aforementioned code emphasises the importance of honesty, integrity, and confidentiality in interactions with clients, coworkers, and the court. In addition, the Bar Council provides disciplinary actions to address complaints or violations of professional ethics, guaranteeing responsibility and fairness. In a similar vein, Romania has implemented professional regulations for legal practitioners with the objective of fostering principles of integrity, loyalty, and adherence to legal principles. Discipline committees have been created by the Romanian National Union of Romanian Bars and the Romanian Bar Associations to ensure that legal advocates are held responsible for any breaches of professional ethics. Furthermore, these organisations play an active role in the education and training of advocates about ethical conduct.

While both India and Romania have a shared dedication to professional ethics, there exist certain difficulties that necessitate attention and resolution. In order to secure the universal adherence to professional ethics, it is imperative for both nations to enhance their enforcement procedures. Furthermore, it is imperative to provide ongoing training and awareness initiatives for advocates in order to cultivate a climate of ethical behaviour.

Advocating for professional ethics in India and Romania is of utmost importance in order to preserve the integrity of the legal profession and uphold the principles of justice and fairness. Both nations are making efforts to establish a setting in which advocates uphold the utmost levels of professional behaviour by implementing ethical codes, disciplinary actions, and continuous training. India and Romania will further enhance their legal systems and guarantee the administration of justice for all by leveraging their existing endeavours. In summary, professional ethics are of utmost importance in upholding the principles of fairness and justice within the legal profession.

Comparative Analysis of Good Faith in India and Other Jurisdictions

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Abstract

The essence of criminal law lies in the maxim, „actus non facit reum nisi mens sit rea," which means that there can be no crime, large or small, without an evil mind. It underscores the basic principle that the core of an offense is the wrongful intent, without which no criminal liability can exist. This research paper conducts a comparative analysis of the concept of good faith as it is interpreted in India and other comparative jurisdictions, illustrating how this principle influences the application of criminal law globally. Good faith, often serving as a shield against liability where wrongful intent is absent, varies significantly across legal systems. The paper explores these variations, examining statutory frameworks, judicial interpretations, and the practical application of good faith in different countries. Through a detailed comparison, this study highlights the differences and similarities in how legal systems around the world mitigate the harshness of law by recognizing the role of good intentions and the absence of malice in preventing wrongful convictions.

Keywords: *Criminal law, intention, liability, jurisdiction, malice.*

Introduction

Good faith is the basic principle of a criminal jurisprudence which plays a crucial role in determining the liability and the innocence of an accused. It refers to a state of mind where a person acts honestly and without the intent to defraud, deceive, or harm others.[1] The courts have time and again reiterated that absence of mens rea while doing an act is simply a negligence and carelessness. Any act which is done with due care and caution and without malafide intention is said to have been done in good faith. In India, The General Clauses Act, 1897 defines good faith as „A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not". Just believing something isn't enough to qualify as good faith; that belief must be based on some logic, and it should not be unreasonable. While the concept of good faith is recognized in almost all legal systems around the world, its application and significance may vary.[2]

The concept of good faith in the criminal justice system in India finds its roots in the ethical and moral principles from an ancient time. In ancient India, the notion of dharma (righteousness) played a central role in shaping legal and moral codes. The Manusmriti, Yajnavalkya Smriti, and other ancient texts emphasized the importance of honesty, integrity, and good faith in human conduct. Acts done in accordance with dharma were considered to

[1] Robinson, P. H. *Criminal Law Defenses*, (West Academic Publishing, 2005)
[2] Dressler, J., & Garvey, S. P., Criminal Law: Cases and Materials, (West Academic Publishing, 2016).

be in good faith. This ancient understanding of good faith is reflected in modern criminal jurisprudence, where the intention behind an action is crucial in determining culpability. Similarly, in ancient India, judges were expected to dispense justice impartially, considering not only the action itself but also the intention behind it. Contracts and agreements were also expected to be entered into in good faith, with parties expected to fulfil their obligations honestly. Thus, the concept of good faith in the criminal justice system has deep roots in the ethical and moral principles of ancient India, highlighting a continuity of values across centuries.

In India, the idea of good faith is adopted in many laws and court decisions. For instance, the Indian Penal Code from 1860 says that if someone does something in good faith without any evil intention and to help others, they aren't considered guilty of a crime. Section 52 of the IPC states that „Nothing is said to be done or believed in „good faith" which is done or believed without due care and attention."[3]

Overall, the principle of good faith plays a significant role in criminal law, providing a defense for individuals who act honestly and without malicious intent. However, its application can be complex and may vary depending on the legal system and the specific circumstances of each case.

'Good Faith' in Indian Legal Context

It is crucial to understand the concept of good faith in various defenses and exceptions provided under the Indian Penal Code. Good faith is generally defined as an honest belief or intention to act without deception or malice. In IPC, the concept of good faith is enshrined in several sections, primarily under the Chapter titled „General Exceptions."

The most important provision regarding good faith in IPC is Section 52[4], which defines „good faith" itself. According to this section, „nothing is said to be done or believed in good faith which is done or believed without due care and attention". The term 'with due care and attention' is used in this section but is not defined anywhere in the Code. Courts have tried to clarify its meaning through various judgments and interpretations. They have concluded that good intentions coupled with due care and caution are crucial in assessing whether an act was done in good faith. Moreover, it's crucial to consider the specific circumstances, abilities, and understanding of the individual when evaluating their actions.

Other relevant provisions under IPC:

Section 76 of IPC states „Acts done by a person bound, or by mistake of fact believing himself bound, by law"[5]. This section of the IPC provides that the actions performed by individuals under legal obligation or under the mistaken belief that they are legally compelled are justified and will not be liable for any penalty or punishment.

Section 77 of IPC is „Act of judge when acting judicially"[6]. This section is about the actions taken by a judge while performing his judicial duties. It provides that judges are not liable for the acts done in the exercise of their judicial functions, as long as they act in good faith and within the limits of their authority.

[3] India Penal Code, Act No. 45 of 1860, Sec. 52
[4] Ibid
[5] India Penal Code, Act No. 45 of 1860, Sec. 76
[6] India Penal Code, Act No. 45 of 1860, Sec. 77

Section 78 of IPC states „Act done pursuant to the judgment or order of court"[7]. This section covers actions performed in compliance with a judgment or order issued by a court. It essentially means that if someone acts based on what a court has directed, they are protected from legal liability for those actions, assuming they are carrying out the order as specified.

Section 79 of IPC which states „Act done by person justified, or by mistake of fact believing himself justified, by law"[8]. This section basically provides legal protection to individuals acting under the belief that their conduct is lawful, whether or not that belief is correct, as long as the mistake is reasonable.

Section 92 of IPC also provides „Act done in good faith for benefit of a person without consent"[9]. This section says that the action done in good faith for the benefit of some other person, even if that person has not given consent. It recognizes situations where an individual acts with the intention to help another, believing that their actions are necessary and beneficial, even without the other person's approval. Such actions are protected under the law, provided they are done in good faith.

Section 93 of IPC which states „Communication made in good faith"[10]. This section refers to statements and communications made in good faith, where the person communicating believes the information to be true and makes it without any intent to cause any harm. Such communications are protected under the law, provided they are made honestly and without malice.

The sections mentioned above fall under the category of general exceptions work as legal excuses for actions taken under specific circumstances. However, the concept of good faith is also directly or indirectly enshrined in various other provisions of the IPC. Some of these include:

Section 300, Exception 3 of IPC states „When culpable homicide is not murder"[11].

This exception excuses murder if it is committed without malicious intention or personal motives. If an individual, being a public servant, genuinely believes that their actions are within legal boundaries and that they have the authority to act according to the circumstances, they will not be charged with murder. This provision empowers public servants to proactively manage situations, that could become major public issues, by providing them with legal protection to act in the public's interest.

Section 499, Exception 7 of IPC states „Censure passed in good faith by a person having lawful authority over another"[12]. According to Section 499, defamation is a criminal offense. however, there is an exception that offers a protection to the person who, in good faith, criticizes someone over whom they have lawful authority. Constructive criticism that is not intended to harm the other person mentally, emotionally, or physically is not considered an offense. This exception effectively supports the notion that well-intentioned feedback should not be penalized.

[7] India Penal Code, Act No. 45 of 1860, Sec. 78
[8] India Penal Code, Act No. 45 of 1860, Sec. 79
[9] India Penal Code, Act No. 45 of 1860, Sec. 92
[10] India Penal Code, Act No. 45 of 1860, Sec. 93
[11] India Penal Code, Act No. 45 of 1860, Exception 3 of Section 300
[12] India Penal Code, Act No. 45 of 1860, Exception 7 of Section 499

Landmark Judgements in Indian Law

Doraswami Pillai v. The King-Emperor[13]

In this case a police officer was acting on orders from a magistrate to monitor the accused. He visited the accused's home at midnight along with another constable. They persistently knocked to verify the accused's presence. The accused reacted by verbally abusing them and after that he brought a stick from inside the house and threatened to attack. The court ruled that while the officer had official orders, but it did not justify trespassing at midnight, and his actions could not be excused as done in good faith. Consequently, the court found the accused guilty of assault but also held the officer liable for trespassing, as he exceeded his authorized duties.

Sukaroo Kobiraj v. The Empress[14]

In this case, the appellant was convicted under Section 304A of the Indian Penal Code for causing a patient's death by performing a dangerous operation that led to fatal bleeding. The defense argued that the appellant had previously conducted similar operations without causing death and that he acted in good faith and without intending harm and also with the patient's informed consent. However, the court found it challenging to confirm that the appellant acted 'with due care and attention' as required by Section 52, especially given doubts about his surgical expertise. Despite this, recognizing the patient's consent to the surgery, the court decided not to impose a severe penalty. The appellant was fined ₹100, with the stipulation of facing three months of rigorous imprisonment if he failed to pay the fine.

State of West Bengal v. Shew Mangal Singh[15]

In this case, police officers, following orders from the Deputy Commissioner, engaged in open firing while pursuing suspects, resulting in the deaths of two individuals. The deceased's brother sued for negligence by the police. However, the High Court emphasized that the officers were merely executing the orders they had received and acted in good faith within the constraints of those orders. The court noted that to establish guilt, it would be necessary to demonstrate either that the orders were unlawful or that the officers exceeded the scope of the instructions given to them.

Dharam Pal v. State of Haryana[16]

The Court reiterated that good faith is a state of mind and must be judged based on the facts known to the person at the time of the act. The Court also emphasized that good faith does not require a person to be free from error in judgment.

These judgments highlight the nuanced understanding of the concept of good faith by the Supreme Court and other Courts of India and emphasize the importance of honest intention, belief, and due care and attention in determining whether an act was done in good faith or not. The Courts also highlighted that the notion of good faith is subjective and varies based on the facts and circumstances of each individual case but mere assertion of good faith without supporting evidence is not sufficient.

[13] (1903)13MLJ285
[14] (1887) ILR 14CAL566
[15] AIR 1981 SC1917
[16] AIR 2013 SC 3018

The Application of Good Faith in various International Jurisdictions

United Kingdom

In the early developmental phases of criminal law, the mental state of the wrongdoer was given the least significance, and courts often rendered guilty verdicts without requiring a showing of culpable mental state.[17] This framework of strict liability offences persisted in England throughout the feudal period. However, canon law influenced the legal system a lot during the thirteenth and fourteenth centuries that prompted the evolution of moral culpability as a fundamental aspect in determining criminal conduct.[18]

Almost three hundred years later, common law started considering mens rea as an essential element in deciding guilt in criminal cases. However, the nineteenth century witnessed a resurgence of strict liability offenses, marking a tussle between strict liability offences and good faith defense. The landmark case of *R v. Tolson*[19] is a standing example of the same. The case involved a charge of bigamy, which falls within the category of strict liability offences wherein courts often tend to give the literal interpretation. However, in *Tolson*, the defendant contended that she had been informed that her husband, who had deserted her five years earlier, had perished in a shipwreck. Despite the statute mandating guilt irrespective of the defendant's awareness of her husband's survival, Justice Wills refrained from applying the law in the literal sense and pronouncing the guilt. Instead, it was interpreted that the statute necessitated mens rea in the given circumstances. This decision can be viewed as a departure from the literal interpretation of the statute, towards the accommodation of good faith defenses.

Furthermore, a concurring opinion by Justice Cave carved out an alternative perspective on good faith defenses, where strict liability offences typically do not require the proof of the defendant's mens rea but still permitted a good faith defense to safeguard the morality of the statute. This interpretation construed strict liability statutes as establishing a presumption of unlawful intent, which defendants could rebut by demonstrating an honest and reasonable belief in their actions.

The decision of House of Lords in *Sweet v. Parsley*[20] further exemplified the British practice of the good faith defense. In this case, the defendant, a landlord, faced charges related to the management of premises where cannabis was consumed. Despite her lack of knowledge about the illicit activities on her property, the defendant was convicted based on precedent that deemed the offense a strict liability crime. However, the House of Lords diverged from this precedent, opting to explore the viability of the good faith defense. Lord Reid's articulation of the defense emphasized its role as a pragmatic solution to the challenges posed by strict liability doctrines, particularly in cases where convicting individuals lacking personal culpability would be unjust.

Lord Morris of Borth-Y-Gest echoed this sentiment, advocating for a nuanced approach that recognized the limitations of holding defendants accountable for acts beyond their control. However, the good faith defense was not applied uniformly by British judges. In his concurring opinion, Lord Pearce cited notably the precedent set by *Woolmington v. Director*

[17] J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE LJ. 31,34 (1936)

[18] Frank J. Remington & Orrin L. Helstad, *The Mental Element in Crime-A Legislative Problem*, 1952 Wis. L. Rav. 648.

[19] 23 Q.B. 168 (1889)

[20] [1970] 1 App. Gas. 132 (1969)

of Public Prosecutions[21] as compelling him to reinterpret statutes as necessitating proof of criminal intent. Despite acknowledging the merits of the good faith defense, Lord Pearce's adherence to legal precedent constrained his acceptance of the halfway house approach.

The halfway house or good faith defense, in short, emerged as a crucial recourse for defendants facing presumptions of culpability and highlighted the efficacy of the good faith defense as an alternative to rigid applications of strict liability doctrines. However, the lack of consistent application underscored the need for further refinement in its implementation within the British system.

The evolution of the good faith defense in response to strict liability crimes reflected broader shifts within the system, balancing the imperative of preserving moral culpability with the practical challenges of enforcing criminal statutes. While the British approach provided valuable insights, its variability underscored the need for a more cohesive and standardized application of the defense. Ultimately, the good faith defense served as a vital mechanism for safeguarding defendants' rights and upholding principles of justice within the criminal justice system.

Canada

In Canada, the implementation of good faith is more uniform than in the British legal system.[22] In contrast to the UK, Canadian courts typically view the use of this defense as a rule in their criminal justice system, rather than an exception.[23] This form of defense, typically seen as a „ halfway house," aims to find a careful equilibrium between punishing real crimes and penalizing individuals who are not guilty based on strict liability. In Canada, defendants are allowed to plead that while intending to do something legal, they unknowingly did something illegal because they honestly and reasonably believed they were acting within the law.[24]

Canada has created a group of quasi-criminal offenses that are punished appropriately due to the recognition that strict liability offenses may still involve a level of criminal intent. Instead, these crimes create a legal assumption of innocence that can be challenged. Canadian courts use a standard of „preponderance of probabilities" for the good faith defense, requiring defendants to prove their actions were performed in good faith.[25]

While most Canadian courts acknowledge the good faith defense, there are case were reluctance to completely abandon the idea of absolute liability are traceable. In cases with minor offenses that involve only a fine, courts may give more importance to protecting the public from harm rather than the defendant's right to claim good faith when penalized for their actions, thus not allowing the good faith defense.[26]

Yet, recent decisions by the Canadian Supreme Court have offered clarity on the matter, stating that crimes with absolute liability resulting in compulsory imprisonment violate fundamental rights outlined in the Canadian Charter of Rights and Freedoms. This choice has essentially required the acknowledgment of good faith defense in these instances, with the

[21] 1935 App. Cas. 462

[22] Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993)

[23] G.L. Peiris, *Strict Liability in Commonwealth Criminal Law*, 3 LEGAL STUD. 117 (1983).

[24] The Queen v. Finn, 8 C.C.C.2d 233, 236 (Ont. C.A. 1972).

[25] Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 401 (1993)

[26] G.L. Peiris, *Strict Liability in Commonwealth Criminal Law*, 3 LEGAL STUD. 129 (1983).

goal of guaranteeing fairness and justice in the legal system. Before this decision, Canadian courts used a case-by-case method to decide whether a good faith defense was admissible, causing inconsistencies and inefficiencies in the legal system. To address these difficulties, the Canadian Supreme Court stepped in to create a more structured method, highlighting the significance of fundamental freedom and safeguarding the rights of accused individuals.[27]

Australia

The legal system in Australia, although taking cues from English law, has shown a more uniform stance in applying the good faith defense. Throughout a period exceeding sixty years, only three Australian courts have refused to accept the good faith defense, demonstrating the broad approval of this principle in the legal system. Australian law adopts a broad approach by accepting a basic rule that views reasonable mistakes of fact as a valid reason for exoneration in both common law and statutory offenses, without any discrimination. Australian courts, in contrast to other Commonwealth jurisdictions, have a strong tendency to utilize the good faith defense for offences considered „strict liability."[28]

Even if the statutory text seems clear-cut in Australia, the legal system views it as placing the responsibility on the defendant to prove they were acting based on a reasonable mistake of fact. Australian courts generally permit good faith defense unless specifically outlawed by law, demonstrating a dedication to fairness and justice in the legal system. Furthermore, in Australia, the good faith defense is clearly outlined and includes specific criteria and standards set by the courts.

The responsibility of proving an honest and reasonable mistake of fact lies on the defendant, who must do so by showing evidence by a balance of probabilities. Moreover, Australian courts have specified the standard of care required from the defendant to meet the reasonableness aspect of the defense. In essence, if the accused had the opportunity to use information but did not, their failure to seek out that information is seen as culpable, thus denying the benefit to the defense. Therefore, the defendant must make active and sensible efforts to confirm the truth in order to effectively use the good faith defense.

Although the good faith defense is widely accepted in Australia, there has been minimal critical examination of its influence on strict liability prosecutions. Nevertheless, the limited criticism typically revolves around the absence of substantial legal precedents backing up the assumption of a good faith defense. However, most commentators see the doctrine positively, hailing it for its ability to reject simplistic assessments of probability and improve the fairness of the legal system.

Australian courts avoid hastily classifying crimes as either strict liability or negligence. Rather, they employ the good faith defense to evaluate whether the defendant merits punishment. This method prioritizes moral culpability over concerns for efficiency in the literal application of statute, showing a commitment to maintaining justice and fairness in the Australian legal system.[29]

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[27] Ibid

[28] Id at 132.

[29] Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 Cornell L. Rev. 447 (1993)

New Zealand

In New Zealand, the strict liability law principles are similar to Australia's law, but there is a notable difference. Both countries agree on the presence of a defense based on good faith, but they have different ways in which it functions.[30] In New Zealand, a defendant must provide a valid reason for their mistake, after which the responsibility falls on the government to prove that the act was not a mistake. This is different from the Australian method, where defendants are required to not only make reasonable effort to prove good faith by balance of probabilities.[31] The difference has sparked a lot of discussion in New Zealand about how effective and justified the good faith defense is. There are worries about the possible consequences of defendants being able to change the burden of proof onto the prosecution by providing a reasonable explanation for a mistake. This situation might encourage more defendants to use this defense, which could lead to inefficiencies in the judicial system in handling of strict liability cases. Thus, numerous courts in New Zealand are considering a different method that is more in line with the Australian system. This different method would involve defendants not only presenting a valid proof for their mistake but also showing that they took all necessary actions to prevent the unlawful results, thereby showing their lack of guilt. Nevertheless, even with the debates around implementing this different method, there is still inconsistency in how the good faith defense functions in the legal system of New Zealand.

In general, although New Zealand and Australia have similarities in acknowledging the good faith defense in strict liability law, the contrasting use of this defense highlights the importance of carefully deciding on the right approach. In New Zealand, defendants are only required to have a reasonable basis for their mistake, while in Australia, they must show reasonable efforts to find the truth and prove mistakes by a balance of probabilities. Differences in approaches have caused varying views in New Zealand about the legitimacy and impact of the good faith defense.[32]

Romania

The principle of good faith, historically entrenched in Article 970 of the former Civil Code, mandates that agreements be carried out with integrity, encompassing all consequences determined by equity, custom, or law. Originally specific to certain scenarios, such as usucapio in property possession, the doctrine expanded to become a general principle. Notably, good faith has been recognized as a constitutional principle in Romania, finding its place in the 2003 revised Constitution, particularly in Article 57 (previously Article 54) and Article 11. Even before its explicit regulation in the new Civil Code, good faith was enshrined in constitutional texts, underscoring its status as a fundamental principle applicable across the legal system.

Article 57 of the Romanian Constitution addresses the exercise of constitutional rights and freedoms, stipulating those individuals, regardless of nationality or status, must exercise these rights and freedoms in good faith, without infringing upon the rights and liberties of others. This obligation, abstract in nature, applies universally, emphasizing its significance beyond specific legal domains. Elevating good faith to a binding constitutional rule underscores its supreme legal force and intrinsic moral value, aimed at fostering the exercise of rights and freedoms.

[30] Peiris at 136
[31] Id at 138
[32] Ibid

In addition to expressly consecrating the principle of good faith, Article 57 of the Constitution also imposes an outward limitation on the exercise of rights and constitutional freedoms by emphasizing the principle of respecting the rights and liberties of others. The mechanism of good faith entails transcending individual consciousness, moving beyond the desire to act within one's rights to considering relationships with others. This involves exhibiting attitudes and behaviors that do not impinge upon the rights of others, reflecting a pattern of conduct aligned with the principles of good faith.

Furthermore, the limitation of an individual's rights or liberties is contingent upon the rights or freedoms of others, highlighting the interconnectedness of social dynamics and the necessity of adhering to universal values. Article 57 not only mandates the exercise of rights and freedoms in good faith but also delineates a standard of conduct characterized by actions that do not undermine the rights and liberties of others. This implies that the principle of good faith extends beyond individual actions, acquiring a social dimension by linking an individual's behavior to broader societal norms and the well-being of others.

In essence, the constitutional dimension of the principle of good faith underscores its foundational role in legal systems, transcending mere contractual obligations to become a fundamental aspect of citizenship and social cohesion. By enshrining good faith in constitutional texts, Romania recognizes its importance in fostering a just and harmonious society where individual rights and freedoms are exercised responsibly and with due regard for the rights of others.[33]

Conclusion

The comparative study of the concept of good faith in India and other jurisdictions reveals that while the basic principle of criminal law is universally recognized but its application and interpretation vary across different legal systems. This study underscores the importance of intent in determining criminal liability and how good faith acts as a crucial determinant in mitigating potential injustices. Across jurisdictions, good faith serves both as a defense and a moral criterion, essential for ensuring that the law does not unjustly penalize actions devoid of malicious intent. The authors would like to suggest that a deeper understanding and harmonization of good faith principles may benefit the global legal community, promoting fairness and justice in legal proceedings worldwide. By acknowledging the role of good faith, legal systems can better align their criminal justice processes with the fundamental human principle of moral responsibility.

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[33] Mirela Carmen DOBRILĂ, *Considerations on The Express Regulation Of The Bona Fide Principle In The Constitution Of Romania And In The New Romanian Civil Code After The Model Of Encodings On The European Level*, 5 JOPAFL, 179 (2014)

CANCELLATION OF THE COURT DECISION OR THE DECISION OF THE COURT OF APPEAL AS AN EFFECT OF THE BREAKING OF THE GENERAL JURISDICTION

Alexandru Prisac[1]

Abstract

In this article, two effects of the violation of the general jurisdiction of the court were analyzed: 1) annulment of the court decision; 2) canceling the decision of the court of appeal. These two effects were analyzed in the light of the Civil Procedure Code of the Republic of Moldova. Obviously, the respective effects were analyzed as powers of the court of appeal and the court of appeal. In the same way, certain imperfections of the Civil Procedure Code of the Republic of Moldova were highlighted in the regulation of the two consequences of violating the rules regarding the general jurisdiction of the courts.

Keywords: *annulment, effects, court, grounds, competence.*

Introduction

The general competence is that interbranch legal institution that fulfills the function of delimiting the cases to be examined and resolved by the court or other jurisdictional bodies. For example art. 41 of the Family Code of the Republic of Moldova, provides for the general competence of the courts to declare the nullity of the marriage, and art. 37 The Family Code of the Republic of Moldova[3] provides for cases of dissolution of marriage only by judicial means. The norms of the institution of general jurisdiction are also provided by the Civil Code of the Republic of Moldova (art. 168, art. 546, para. (2), art. 554 CC) and other laws [8, p. 392].

Violation of the rules of general jurisdiction of the courts produces certain legal effects. Violation of the rules of general jurisdiction produces certain procedural consequences not only in the examination of the civil case in the first instance, but also in the examination of the case in appeal and appeal. In particular, they are: 1) annulment of the court decision; 2) canceling the decision of the court of appeal.

Methodology

The results of the work were obtained following the use of the following knowledge methods: synthesis, analysis, and comparison. The latter contributed to highlighting the way of regulating the effects of violating the rules regarding the general jurisdiction of the courts in the Republic of Moldova.

Result

In the local specialized literature, there is the opinion that if the general competence was not respected, including, in the first instance, then the court of appeal should cancel the decision of the first instance and send the case for retrial to the first instance competent to solve this case based on Art. 388 para. (1) lit. i) and art. 385 lit. d) CPC [4, p. 100]. However, those provisions refer to the violation of jurisdictional jurisdiction [7, p. 282], but not of

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general jurisdiction. In this context, we observe an imperfection in the regulation of the basis for annulment of the court decision by the court of appeal related to the failure to respect the general jurisdiction of the courts, although the rules of jurisdictional jurisdiction do not have a greater degree of importance than those of general jurisdiction.

As the author E. Borisova mentions, „civil procedural legislation in most European states, including Austria, Great Britain, Hungary, Germany, Denmark, Italy, Spain, Lithuania, Poland, Slovakia and Switzerland, vests appeal courts, in certain cases, with the power to overturn the court decision and send the case for retrial in the first instance. As a rule, these cases refer to not notifying the defendant in the appropriate manner about the place, date and time of the court hearing, the trial of the case by an illegally composed panel of judges, the violation of general jurisdiction, the need to ascertain certain important circumstances for the resolution of the case, the development a new evidentiary process" [9]. Thus, we note that the constant grounds for annulment of the court decision by the court of appeal in most European states do not refer to jurisdictional competence, but to general competence. The above-mentioned author's synthesis regarding the grounds for annulment existing in the procedural legislation of the European Union states allow us to state that the annulment of the decision of the first court in relation to the violation of general jurisdiction is no less important than the violation of jurisdictional jurisdiction to ensure the legality of the court decision.

According to art. 388 para. (1) of the CPC, the decision of the first instance is to be quashed, regardless of the arguments of the appeal request, if:

a) the case was judged by an illegally composed panel of judges;

b) the case was judged by the court in the absence of a trial participant who was not informed of the place, date and time of the court session;

c) in judging the case, the rules regarding the language of the process were violated;

d) the court resolved the issue of the rights of persons not trained in the process;

f) the decision is not signed by the judge or by one of the judges, or the decision is not signed by that judge or those judges who are mentioned in the decision;

g) the minutes of the court session are missing from the file;

h) the minutes regarding the performance of a procedural act are missing in the file;

i) the case was examined in violation of jurisdictional competence.

From the analysis of these provisions, it follows that in art. 388 para. (1) of the CPC does not stipulate a basis for annulment of the court decision on the grounds of violation of exclusive general jurisdiction, nor is it correct to state that it would be possible to apply the provisions of art. 388 para. (2) CPC and order the case to be retried in the first competent court to resolve the case. All this considering that according to the Advisory Opinion of the Plenum of the Supreme Court of Justice regarding the application of art. 385, 388 CPC in case 4ac-13/13 before the Court of Appeal Bălți[1] it was explained that the case can be returned for retrial in the first instance, only if the first instance committed the violations stipulated in art. 388 para. (1) lit. b), d) and i) CPC. Through the advisory opinion of the CSJ Plenary mentioned above, the following were mentioned: „[…] in accordance with art. 388 para. (1) lit. b), d) and i) CPC, the decision of the first instance is to be quashed, independently of the arguments of the appeal request, with the return of the cause for retrial in the first instance, only if: the cause was judged by the court in the absence of a participant in the trial, who was not notified of the place, date and time of the court hearing; the court resolved the issue of the rights of untrained persons in the process; the case was examined in violation of the jurisdictional competence". So, the grounds for retrial in the first instance by the appellate

court are exhaustively provided in art. 388 para. (1) CPC, and they do not refer to the violation of exclusive general jurisdiction, which is contrary to existing procedural codifications in European states.

Therefore, we conclude that it is necessary to be expressly stipulated in art. 388 para. (1) CPC a ground for annulment of the court decision by the court of appeal that refers to the violation of the general jurisdiction, because they mostly contain imperative legal norms regarding the jurisdiction of the jurisdictional bodies. Starting from the mentioned, we propose by law ferenda to complete the provisions of art. 388 para. (1) CPC with the letter „î)" containing the following words: „the case was examined in violation of the general competence".

A similar problem exists when applying the grounds of appeal stipulated in art. 432 para. (1) CPC. According to art. 432 para. (1) CPC, the appeal is admitted if:

a) the interpretation of the law in the contested decision is contrary to the uniform jurisprudence of the Supreme Court of Justice;

b) by admitting the appeal, the jurisprudence of the Supreme Court of Justice is changed or consolidated;

c) an appeal filed late was unfoundedly admitted or an appeal filed within the deadline was rejected as late;

d) the judgment or decision concerns the rights of the person who was not involved in the process;

e) the ruling or decision is arbitrary or is decisively based on an obviously unreasonable assessment of the evidence;

f) the court was not composed according to the law or the judgment was pronounced in violation of jurisdiction.

Regarding the grounds for quashing the decision of the court of appeal, the same situation existed before the entry into force of Law no. 246 of 31.07.2023 for the modification of some normative acts (modification of the normative framework related to the reform of the Supreme Court of Justice) [6]. Until the entry into force of this law, art. 432 para. (2) and (3) of the CPC stipulates the following: It is considered that the rules of material law have been violated or erroneously applied if the court:

a) did not apply the law that should have been applied;

b) applied a law that should not have been applied;

b1) applied a law that was declared unconstitutional;

c) misinterpreted the law;

d) erroneously applied the analogy of law or the analogy of law.

(3) It is considered that the rules of procedural law have been violated or incorrectly applied if:

a) the case was tried by a judge who did not have the right to participate in its trial;

b) the case was tried in the absence of a trial participant who was not informed of the place, date and time of the court session;

c) in judging the case, the rules regarding the language of the trial were violated;

d) the court resolved the issue of the rights of some persons who were not involved in the trial;

e) the minutes of the court session are missing from the file;

f) the decision was pronounced in violation of jurisdictional competence.

The provisions of art. 432 para. (1) lit. f) CPC do not allow the appeal to be admitted and the decision of the court of appeal and the decision of the first court to be annulled on the grounds of violation of general jurisdiction. They stipulate the following: „The appeal is admitted if the court was not composed according to the law or the decision was pronounced in violation of the jurisdiction". So, based on these provisions, the appeal on the grounds of violation of general competence cannot be admitted, because the phrase „jurisdictional competence" does not include the meaning of the notion of general competence. But, as I mentioned above, the annulment of the decision of the court of appeal and the decision of the first court by the court of appeal in relation to the violation of the general jurisdiction is not less important than the violation of the jurisdictional jurisdiction to ensure the legality of the acts of disposition of the court of appeal, because a decision would not be rendered by the court of appeal or by another court within the judicial system, but by another judicial body outside this system.

Likewise, we note that the inclusion in art. 432 para. (1) CPC of a ground of appeal that would refer to the violation of general competence, would fall into the category of grounds regarding the verification of the legality of the decision of the court of appeal or the decision of the first court. This is specific for the appeal, the appeal that has been permanently characterized in the judicial system of the Republic of Moldova as a priority legal appeal, but not a de facto one. However, after the adoption and entry into force of the provisions of Law no. 246 of 31.07.2023 for the modification of some normative acts (modification of the normative framework related to the reform of the Supreme Court of Justice) [5], the appeal obtained a different nature once the grounds for appeal stipulated in art. 432 para. (1), lit. e) CPC, which stipulates: „the appeal is admitted if the judgment or decision is arbitrary or is decisively based on an obviously unreasonable assessment of the evidence". This basis allows to question the appeal court and certain factual circumstances. But the respective modification of the grounds of appeal does not change the opportunity to introduce a ground of appeal regarding the violation of general jurisdiction.

As the Russian author N. Maniak mentions „[…] the very fact of the possible possibility of the court of appeal quashing the adopted judicial acts of disposition highlights the preventive nature of the appeal, which stabilizes the process in the first instance" [10, p. 42]. Considering that there is no basis for appeal regarding the violation of general jurisdiction, the appeal in the Republic of Moldova is devoid of preventive character for possible violations committed by the first instance regarding this legal institution. The respective situation in the regulations of the grounds of appeal allows the court of appeal and the first court to neglect the observance of the rules regarding the general competence of the jurisdictional bodies.

Conclusions

The provisions of art. 432 para. (1) of the CPC, contains certain inadvertences regarding the effects of violating the rules regarding the general jurisdiction of the courts. Starting from the mentioned, regarding the grounds of appeal, we propose by law ferenda to complete the provisions of art. 432 para. (1) CPC with letter g) stipulating the following: „the decision was pronounced in violation of the general competence".

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THE EFFECTS OF BREAKING THE JURISDICTION OF SOME JURISDICTIONAL BODIES IN THE REPUBLIC OF MOLDOVA

Alexandru Prisac[1]

Abstract

In the activity of judicial bodies, there are different situations when their competence is confused. Following the failure to comply with the general competence, the law of the Republic of Moldova provides specific consequences for their violation, which are different from those in the case of breaking of the powers of the court. In this article, we have analyzed some of the effects of breaking the jurisdiction of the jurisdictional bodies, other than the court, starting from the issue of their regulation and their importance for the system of the jurisdictional bodies.

Keywords: *effects, jurisdictional bodies, breaking, jurisdiction.*

Introduction

It is obvious that of all jurisdictional bodies the most questionable effects of the breach of general jurisdiction are those of the courts. However, we could not overlook the effects of violating the general jurisdiction of the Constitutional Court of the Republic of Moldova, of arbitration, of administrative-jurisdictional bodies etc.

In particular, the effects of violating the general competence of the Constitutional Court of the Republic of Moldova have a specific character. A distinct peculiarity is that the violation of the competence of the Constitutional Court of the Republic of Moldova is equivalent to the violation of its general competence, because within the system of constitutional jurisdiction there are not several types of competence of the constitutional jurisdiction to state that one or the other has been violated. The regulations of the Constitution of the Republic of Moldova and the organic laws of the Republic of Moldova on the effects of violating the general jurisdiction of the Constitutional Court are also specific, but also problematic. The statement given starts from the fact that some effects of the violation of the general jurisdiction of the Constitutional Court of the Republic of Moldova do not have a basis for legal regulation, although the Constitutional Court pronounces decisions that provide for these effects.

Methodology

The results of the work were obtained following the use of the following knowledge methods: synthesis, analysis, and comparison. The latter contributed to highlighting the way of regulating the effects of violating the rules regarding the general competence of the various jurisdictional bodies in the Republic of Moldova.

Result

The regulations of the Constitution of the Republic of Moldova[6] and the organic laws of the Republic of Moldova on the effects of violating the general competence of the Constitutional Court are also specific, but also problematic. The statement given starts from

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the fact that some effects of the violation of the general jurisdiction of the Constitutional Court of the Republic of Moldova do not have a basis for legal regulation, although the Constitutional Court pronounces decisions that provide for these effects.

The provisions of art. 6 para. (1) The Code of Constitutional Jurisdiction[5] stipulates the following: „The Constitutional Court only resolves issues within its competence. If during the examination process issues of the competence of other bodies arise, the Court sends them the materials or communicates the fact to the interested parties and bodies, giving rigorous explanations". The mentioned provisions stipulate two effects of the violation of the general competence of the Constitutional Court of the Republic of Moldova: 1) referral of the matters to other jurisdictional bodies; 2) communicating the fact of the violation of the Constitutional Court's general jurisdiction to other jurisdictional bodies, giving strict explanations. So, according to art. 6 para. (1) The Code of Constitutional Jurisdiction does not establish a stage of the admissibility of the referral for those referrals that are submitted in violation of the general jurisdiction of the Constitutional Court of the Republic of Moldova. However, the provisions of point 28 letter a) from the Regulation regarding the examination procedure of referrals submitted to the Constitutional Court, approved by Constitutional Court Decision no. 3 of 03.06.2014 [7], stipulates another effect, which is the inadmissibility of the notification. Point 28 lit. a) of the Regulation regarding the examination procedure of referrals submitted to the Constitutional Court provides the following: „the referral is to be declared inadmissible if the resolution of the referral does not fall within the competence of the Court". Thus, the provisions of the Regulation impose the stage of examining the admissibility of the referral in the constitutional jurisdiction procedure, but the Constitutional Jurisdiction Code of the Republic of Moldova does not stipulate such a stage in the constitutional jurisdiction procedure. This notion of admissibility of notifications addressed to the Constitutional Court regulated in point 28 letter a) from the Regulation regarding the examination procedure of referrals submitted to the Constitutional Court has been criticized in the local specialized literature. The author A. Bot mentions the following: „[…] the unfounded character of a referral cannot be a problem of admissibility, just for the simple reason that the notion of admissibility has no basis for regulation in the Constitution, Law on the Constitutional Court, no. 317 of 1994 or in the Constitutional Jurisdiction Code of 1995. Probably, the desired was copied from art. 35 of the European Convention for Human Rights, which, among other things, uses, including, the notion of a manifestly unfounded complaint. However, the legal regulations on the basis of which the Constitutional Court operates do not include such specific provisions. The institutions of admissibility and unfounded referrals were not built by the national legislator, which, moreover, did not delegate special powers to the Constitutional Court for issuing general regulatory norms. The futile character of the notion of admissibility is also demonstrated by the Study of Individual Access to Constitutional Justice, no. 538/2009, issued between 17-18 December 2010, by the Venice Commission. Thus, the Commission concluded that specific regulations regarding the admissibility of a referral exist in many of the member states and observers of the Venice Commission. For example, in Moldova, where the constitutional court can reject a referral at the preliminary stage due to procedural errors or lack of competence of the Constitutional Court. In other words, an unfounded referral should not be considered as an admissibility issue (page 35 of the study)" [2]. We fully support the author's opinion, because according to art. 2 of Law no. 317 of 13.12.1994 regarding the Constitutional Court[15], „The Constitutional Court is governed in its activity by the Constitution, by this law, the Code of Constitutional Jurisdiction." Thus, the procedure of the

constitutional jurisdiction cannot contravene these three legislative acts mentioned above and exceed their regulatory scope, including even through a regulation of the Constitutional Court. However, the Regulation on the examination procedure of referrals submitted to the Constitutional Court goes beyond this legal framework. Starting from the mentioned, we find that the declaration of the inadmissibility of the referral by the Constitutional Court is an effect of non-compliance with the general jurisdiction of the Constitutional Court, but without having a regulatory basis in the Constitution of the Republic of Moldova, the Law on the Constitutional Court and the Code of Constitutional Jurisdiction.

Although, according to art. 6 para. (2) The Constitutional Jurisdiction Code, the Constitutional Court itself establishes the limits of competence, however the declaration of inadmissibility of the referral in relation to the violation of the Constitutional Court's general competence represents an effect of the constitutional jurisdiction procedure that cannot be regulated by the Constitutional Court through an approved regulation by his decision. In this sense, it is important to mention what was stated by the author V. Balmuş, who states the following: „The Regulation on the examination procedure of referrals submitted to the Constitutional Court cannot establish „specific procedures for the examination of referrals submitted to the Constitutional Court", which do not are provided for by the Constitutional Jurisdiction Code" [1, p. 98]. From what was reported by the mentioned author, it follows that this Regulation could not even be adopted by the decision of the Constitutional Court, because the law does not allow it to adopt decisions for this field. According to the author: „The analysis of the norms of the Code of Constitutional Jurisdiction highlighted the following cases in which the Constitutional Court, the President and the judges of the Court pronounce decisions:

- examination of appeals (...) to the decisions taken by the judges of the Constitutional Court regarding court costs (art. 5 letter g));
- suspension of the action of the acts subject to constitutionality control, (..) until the substantive resolution of the case with the issuance of a final decision or ruling (art. 71 paragraph (1));
- the adoption of the decision to suspend the action of the contested act by the plenary session of the Constitutional Court with the vote of at least 3 judges or in case of impossibility of convening the plenary session of the Court, the suspension decision is issued by a provision of the President of the Constitutional Court, with subsequent mandatory confirmation by the plenary session of the Constitutional Court (art. 71 par. (1), (4));
- adoption of the decision of the Constitutional Court to take the notification for examination and to include it in the agenda (art. 20 para. (3) letter a));
- the recusal of the judge of the Constitutional Court is carried out, after hearing him, through a reasoned decision of the Court (art. 27 par. (5);
- the disposition to carry out the expertise is legalized by the nominal requirement of the reporting judge or by the decision of the Constitutional Court, with the indication of the deadline for the written presentation of the expertise report (art. 32 paragraph (1);
- if the notification is included on the agenda, it is returned by the decision of the Constitutional Court upon the request of its subject to withdraw (art. 41);
- if the Constitutional Court has issued a decision regarding a normative act (partially or as a whole), a repeated referral is not allowed, and if the subject has withdrawn the referral, a repeated referral is only allowed after 9 months (art. 42); demersurile participanţilor la proces prezentate în scris sau oral se soluţionează în şedinţă, prin decizia Curţii Constituţionale

(decizie protocolară pronunţată de Curtea Constituţională). La fel prin decizia sau dispoziţia Curţii Constituţionale se dispune citarea la proces a noi persoane (art. 50, art. 52 alin. (1) lit. l));

the decision regarding the postponement of the meeting is taken by the majority of the judges of the Constitutional Court (art. 59 para. (2));

- in the case of the substantive resolution of the referral, a decision is issued or an opinion is issued, and in the case of non-resolution of the referral, a decision is issued that is drawn up as a separate act or recorded in the minutes (art. 61);

- the review of the decision and the opinion is carried out only at the initiative of the Constitutional Court, by decision, adopted with the vote of the majority of its judges (art. 72);

- the correction of inaccuracies and editorial mistakes is done only in the session of the Constitutional Court, with the pronouncement of the respective decision (art. 73 paragraph (2));

- measures to ensure normal conditions for the exercise of constitutional jurisdiction are undertaken by decision of the president of the meeting (art. 82 paragraph (2));

- if the disciplinary investigation panel finds that the referral is unfounded, the case is classified by a decision of the President of the Court or the Court (art. 84 paragraph (3))" [1, p. 96-97].

Therefore, in our view, it is appropriate that in its practice the Constitutional Court of the Republic of Moldova applies only the effects stipulated in art. 6 para. (1) The Code of Constitutional Jurisdiction, when a notification is submitted to the Constitutional Court in violation of the Constitutional Court's competence: 1) remittance of materials to other jurisdictional bodies; 2) communicating the fact of the violation of the general jurisdiction of the Constitutional Court, to other jurisdictional bodies, giving strict explanations. Thus, the Constitutional Court proceeded correctly, when it ordered the restitution of notification no. 4a of 06.01.2017 regarding the control of the constitutionality of the Decree of the President of the Republic of Moldova no. 16-VIII of January 3, 2017 regarding the withdrawal of the citizenship of Mr. Traian Băsescu [18], on the grounds that the requirement would be the competence of the courts. So, the words „restitution of the notification" in relation to the violation of the general competence is closer to the meaning of „remitting the materials" to other jurisdictional bodies than the „inadmissibility of the notification" which starts from non-compliance with the conditions of admissibility. If the dispute was resolved by another judicial body, if it is assigned to the exclusive jurisdiction of the courts, the act issued by the judicial body will be without legal effects[17, p. 146]. Special attention to the analysis of the effects of violation of the general competence of other jurisdictional bodies attracted us to the issue of establishing the nullity of the administrative-jurisdictional act, the abolition and non-approval of the execution of arbitration decisions. First, we will analyze the finding of the effect of the nullity of the administrative acts, then the effect of the annulment and disapproval of the execution of the arbitral decisions.

The administrative-jurisdictional act is not defined in the legislation of the Republic of Moldova, although starting from the cases admitted by the legislation of the Republic of Moldova to be resolved by administrative act, these acts also exist in the Moldovan legal system. A definition of the administrative-jurisdictional act can be found in the Romanian legislation. According to art. 2 para. (1) lit. d) from the Administrative Litigation Law no. 554 of 02-12-2004 of Romania[14]: „The administrative-jurisdictional act is the legal act issued by an administrative authority with jurisdictional powers in the resolution of a conflict, after

a procedure based on adversariality and ensuring the right to defense". So, the administrative-jurisdictional act, likewise, is an administrative act, but which has a special character issued, under the law, for the settlement of a dispute.

Issuing an administrative-jurisdictional act in violation of the general competence will also be void of legal effects. Such administrative acts were categorized by the authors V. Guţuleac and E. Comarniţcaia as non-existent administrative acts[9]. Starting from the opinion of T. Draganu[8, p. 59], the authors mentioned above consider that the non-existent act is characterized by the lack of essential elements related to its nature and object, without which it cannot be conceived, such as the act issued by an obviously incompetent authority or by a person who is not a public official[9]. In our view, the administrative-jurisdictional act issued in violation of the general competence of the judicial body is null, but not non-existent, because it refers to an imperative violation of the law, which requires a finding by a competent authority. They are struck by absolute nullity.

The absolute or relative nullity of administrative acts must be invoked and ascertained by certain competent bodies. This can be ascertained and disposed of by the issuing authority, by the higher hierarchical body or the courts of common law, or by the administrative litigator[10, p. 45]. According to art. 143 para. (2) and art. 148 para. (1) The Administrative Code of the Republic of Moldova: „The assessment of the legality or illegality of an individual administrative act is made depending on the situation at the time of its issuance, and in the case of conducting a prior procedure – on the situation at the time of the adoption of the decision regarding the prior request". Likewise, according to art. 148 para. (1) from the Administrative Code of the Republic of Moldova: „Withdrawal, revocation or cancellation of an indisputable individual administrative act is decided by the competent public authority according to art. 53 – 59 or according to other legal provisions". If the competent authority has not established the illegality of the jurisdictional act in relation to the non-compliance with the general jurisdiction, the court has the right to declare the nullity of this act. So, the administrative-jurisdictional act, in relation to the incompetence of the jurisdictional body, is not canceled by law by the effect of the law, but it is necessary to establish this illegality by the issuing authority, by the higher hierarchical body or by the courts.

The finding of the illegality of the administrative-jurisdictional act issued by an incompetent authority takes place through the declaratory action, because it constitutes an absolute nullity that is established, but not declared, it being null, but not voidable. According to art. 206 para. (1) lit. d) The administrative code of the Republic of Moldova: „An action in administrative litigation can be filed to establish the existence or non-existence of a legal relationship or the nullity of an individual administrative act or an administrative contract (action in ascertainment)". In relation to the declaratory action, the author I. Jimbei mentions: „this action was taken from the Code of Procedure of the Administrative Courts of Germany (Verwaltungsgerichtsordnung (VwGO)) §43, according to which the establishment of the existence or non-existence of a legal relationship or the nullity of an administrative act can be requested through an action if the plaintiff has a justified interest in establishing this fact as soon as possible" [12, p. 170]. So, the administrative-jurisdictional act issued in violation of the general competence is a null administrative act, and the justified interest of the plaintiff determines the finding of nullity through the declaratory action.

With regard to the abolition and disapproval of the execution of arbitration decisions in relation to the violation of general jurisdiction, we note that they are ordered by the court starting from the priority of the judicial form of defense over the public one. However, the

legality of judicial acts cannot be verified by the arbitral court, but the court can control the arbitral decisions as the only authority empowered to administer justice.

The lack of general jurisdiction to resolve a dispute by arbitration constitutes an inarbitrability. The national provisions stipulating arbitrability differ from state to state, depending on its economic and cultural development and the principles of political and economic-social order, that is, on considerations related to public order[13, p. 92]. In the Republic of Moldova there is a „double" judicial control regarding arbitration decisions. Thus, this can be done through an appeal request that can result in the annulment of the arbitral award, or at the stage of approving the forced execution of the arbitral award, when the release of the enforceable title can be refused[3, p. 143].

The most liberal legal systems regarding arbitrability are those of the USA and Switzerland. In the USA, several fields considered non-arbitrable have been liberalized for international arbitration, in particular: in the field of stock market law, competition law, intellectual property rights and establish few exceptions in the field of insurance and insolvency. In the category of non-arbitrable disputes, we can find, most often, „matters related to the capacity and status of persons, those regarding divorce and separation from the body", or matters „of interest to public order" [13, p. 92].

We identify the civil procedural regulations in the Republic of Moldova regarding the abolition and disapproval of the execution of arbitral awards in relation to the violation of general competence in the provisions of art. 480 para. (2) lit. a) CPC (grounds for annulment of the arbitration decision) and art. 485 para. (2) CPC (grounds for refusal to issue enforceable title). In essence, these grounds are similar. The provisions of art. 485 para. (2) CPC stipulates the following: „The court also refuses to issue an enforceable title if it finds that the dispute examined by the arbitration cannot be the object of the arbitral debate according to the imperative of the law [...]". This legal text does not refer to the violation of the general competence, the violation of the fundamental principles of the legislation of the Republic of Moldova or good morals, which, in the local specialized literature [19, p. 51], is analyzed in a distinct manner. These provisions from art. 485 para. (2) CPC are similar to those stipulated in art. 480 para. (2) lit. a) from the CPC with the exception of the phrase „imperative of the law" stipulated in art. 480 para. (2) lit. a) CPC. That phrase means that the court will refuse to issue an enforceable title, if the imperative provisions relative to the general competence of the jurisdictional bodies, which theoretically mean the exclusive general competence, have been violated. From the analysis of the disputes that refer to the non-arbitrable ones, we notice that they all refer to those that include imperative legal norms regarding general jurisdiction. The stipulations of art. 3 of the Law of the Republic of Moldova on Arbitration, which states that the following claims cannot be the subject of an arbitration agreement:

a) claims related to family law. These refer to:

- civil status cases (declaration of nullity of marriage, restoration of marriage in the event of the appearance of the spouse declared dead or missing, divorce);
- wealth sharing;
- establishing the domicile of the minor child in case of divorce;
- collection of the maintenance pension of the minor child;
- receiving the pension for maintenance of parents from adult children;
- receipt of the pension for maintenance of the spouse;
- establishing or contesting paternity;
- forfeiture of parental rights or restoration of these rights;

- adoption.
- other litigation in the field of family law[11];

b) the claims arising from the rental contract of the residential premises:

c) claims and patrimonial rights regarding housing [16, p. 1296].

As the mandatory legal norms were violated and the parties to the dispute did not respect the limits of the discretionary right established by the jurisdictional body (arbitration), we conclude that the disapproval and abolition of the arbitral decision occurs when the rules of exclusive general jurisdiction and general contractual jurisdiction are violated.

Conclusions

In order to ensure the balance between the grounds for annulment of arbitration decisions and the grounds for refusing to issue an enforceable title referring to the specification of the meaning that they are attributed to the violation of the imperative legal norms of exclusive general jurisdiction, we propose *de lege ferenda* to be introduced in the provisions of art. 480 para. (2) lit. a) CPC the word „imperative" after the words „the dispute examined by arbitration cannot be appropriate".

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Section C

EXERCISE OF PROCEDURAL RIGHTS AND DUTIES BY PARTIES TO CIVIL PROCEEDINGS – BETWEEN GOOD FAITH AND ABUSE OF RIGHTS

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Abstract

Both in substantive and procedural law, good faith is a fundamental principle, as each party involved in a civil legal relationship or litigation has certain obligations corresponding to certain rights recognized by law.

Good faith presupposes the exercise of rights in relation to the purpose for which they were recognised by the legislator, and the party is under an obligation not to misuse the right for which it was recognised, failing which it may be liable for the damage caused to the other party if the court finds an abuse of procedural law.

The existence of abuse of rights is often difficult to identify and sanction in practice, as it is often difficult to prove that the party intended to misuse the right for the purpose for which it was recognised by law. Also, the party concerned does not invoke the existence of this abuse on the part of the opposing party, which is why it often remains unsanctioned.

Keywords: *abuse of rights, bad faith, procedural rights, procedural obligations, intent, subjective element, objective element*

1. General Aspects

In the old regulation, procedural abuse of rights was expressly regulated within the scope of Article 723 paragraph (3) of the Civil Procedure Code (CPC), which established the obligation to exercise both civil subjective rights and procedural rights in good faith. Good faith has existed and been consecrated since ancient times, being a cornerstone of society, with the exercise of rights and corresponding obligations existing since roman times[1]. From these beginnings, it manifested as a legal concept of Roman law and, following the separation of law from morality, acquired its own construction under bona fides, being adopted by most legal systems, including Romanian law[2].

In the current Romanian civil procedural regulation, Article 13 of the CPC introduces the obligation to exercise rights and civil obligations in good faith, and in case of non-compliance, the party may be obliged to pay damages under tort law. Thus, according to Article 12 paragraph (2) of the CPC, „the party who abuses its procedural rights is liable for material and moral damages caused. It may also be liable, under the law, to pay a judicial fine," and according to Article 12 paragraph (3) of the CPC, „the party who does not fulfill its procedural obligations in good faith is liable under paragraph (2)." The parties to the civil proceedings have the obligation to fulfill procedural acts under the conditions, order, and deadlines established by law or by the judge. From the perspective of such desiderata, the bad faith exercise of a procedural right or procedure can have negative consequences by disrupting the

[1] for details, see Axente, A.-M., Curs de drept privat roman, Ed. Hamangiu, București, 2022, pp. 106
[2] M.C.Paul, *Rolul și formarea voinței juridice*, Ed. Universitară, București, 2014, pp. 86

smooth conduct of the process, by prejudicing another party's procedural right, or in another manner.

In other words, the party that diverts the procedural right from the purpose for which it was recognized by law and exercises it in bad faith or, in bad faith, does not fulfill its procedural obligations commits procedural abuse of rights, and may be held responsible if, through the abusive exercise of a right or through the non-fulfillment of an obligation, material or moral harm is caused to another party. Thus, the party that abuses its procedural rights is liable for the material and moral damages caused to the adverse party, and may also be obliged, under Article 12 paragraph (2) of the CPC, to pay a judicial fine, under the conditions of Article 187 paragraph (1) of the CPC.

In other words, the bad faith exercise of a procedural right can constitute an abuse of rights, which must be determined by the court, sanctioning it with the engagement of liability for the material and moral damages caused, as well as the obligation to pay a judicial fine[3]. It is worth mentioning that not only the parties but also third parties must respect good faith in exercising obligations; they may be compelled to assist in the administration of justice, under penalty of paying a judicial fine and, if applicable, damages, by reference to the provisions of Article 11 of the CPC, which imposes the obligation on every person, under the law, to support the administration of justice. Thus, as a rule, according to Article 10 paragraph (1) of the CPC, „the parties have the obligation to fulfill procedural acts under the conditions, order, and deadlines established by law or by the judge, to prove their claims and defenses, to contribute to the prompt conduct of the process, seeking its completion," and according to paragraph (2), „if a party possesses a means of proof, the judge may, at the request of the other party or ex officio, order its presentation, under penalty of paying a judicial fine."

Good faith must exist throughout the civil process, i.e., both at the time of filing the action and throughout the civil process, both in the trial phase and in the enforcement phase until the obligation established by enforceable title is fulfilled, both by the parties and by other participants in the civil process. Otherwise, the abuse of rights can be identified, and liability can be engaged. However, it should be noted that good faith, as a legal institution, does not impose an obligation on the parties to exercise their rights exclusively for the benefit of the other party or for the benefit of a third party, but to exercise their rights only in accordance with the purpose for which they were established, i.e., for the achievement of the social values protected by law. Thus, good faith can constitute an argument in the enforcement phase to prevent the initiation of real estate foreclosure against the debtor in certain situations and with the fulfillment of certain conditions.

In order to avoid abusive enforcement actions and excessive enforcement costs relative to the value of the claim, according to Article 812 paragraph (5) of the Civil Procedure Code (CPC), real estate enforcement proceedings cannot be initiated for claims whose value does not exceed 10,000 lei, unless the debtor does not possess any other traceable movable assets[4].

[3] M.Dinu, Drept procesual civil, Ed. Hamangiu, 2020, p. 46

[4] According to the provisions of Article 812(5) of the Civil Procedure Code (CPC), in the case of enforcement titles regarding claims whose value does not exceed 10,000 lei, the sale of the debtor's immovable property can only be carried out if the debtor does not have other enforceable assets or if they have enforceable assets, but they cannot be realized. The unjustified refusal of the debtor to provide the judicial executor with the necessary information, clarifications, and evidence, as well as the bad-faith provision of incomplete information regarding the existence and value of movable assets or income to be realized in order to cover the entire claim, allows for the initiation of real estate enforcement even if the value of the claim does not exceed 10,000 lei.

In other words, real estate assets of the debtor will not be pursued if three conditions are cumulatively met: the claim in the enforcement title does not exceed a value of 10,000 lei (for any amount exceeding this threshold, real estate assets can be subject to enforcement); the debtor possesses other traceable assets, including both movable assets and the income they generate; the debtor acts in good faith, meaning they inform the judicial officer about the existence of movable assets in their patrimony or disclose their income. The absence of any of these three conditions will trigger the pursuit of the debtor's real estate assets, even if the creditor's claim is below the 10,000 lei threshold[5].

2. Conditions for the Existence of Abuse of Right

Procedural abuse of right necessarily entails two elements, one subjective and the other objective.

Regarding the subjective element, it manifests in the exercise of the right in bad faith, either with the aim of harassing the adversary or deliberately to coerce them into certain concessions or even to abandon their own rights. In other words, the subjective element consists of the bad faith (mala fides) exercise of procedural right, for the purpose of harassment, without justification of a special and legitimate interest, but solely with the intention of infringing upon the rights of the opposing party, either by limiting or delaying their process of asserting rights or means of defense, or by exerting pressure to relinquish claims or to reach compromises[6].

As for the objective element, it materializes in the diversion of the right from its social-economic purpose for which it was recognized and guaranteed by law.

To characterize a procedural act as abusive, it is necessary, first and foremost, for the author of the act to be the holder of the procedural right in question[7], meaning that there can be no abuse of right unless the one exercising the right is its holder. Additionally, the holder of the right must exercise the respective procedural right in bad faith.

Furthermore, another condition that must be fulfilled is that the one diverting the right from its intended purpose recognized by law must have the legal capacity to exercise that right. Therefore, the existence of abuse of right cannot be questioned in persons who benefit from special protection or legal counseling[8].

Another requirement that must be met is that the party exercises their right within the external limits set by law, meaning they must comply with the legal provisions regarding the exercise of the right, the conditions of validity of the act related to the form and timing in which the procedural act must be performed. It is worth mentioning in this regard that there

[5] M.Dinu, R.Stanciu, *Executarea silită în Codul de procedură civilă,* Ed.Hamangiu,Buc., 2017, p. 515, for details regarding force execution, see M.Tăbăraș, *Contestația la executare*, ed.a.II-a rev., Ed. C.H.Beck, 2006

[6] The Decision of the Constitutional Court of Romania no. 675 of November 6, 2018, published in the Official Gazette no. 1116 of December 29, 2018, DECISION 675 06/11/2018 – Legislative Portal (just.ro) (last accessed on April 15, 2024), point 22.

[7] V.M. Ciobanu, T.C. Briciu, C.C. Dinu, *Drept procesual civil, Curs de bază pentru licență, seminare și examene,* Ed. Universul Juridic Buc., 2023

[8] For details regarding the means of protection for individuals through special guardianship and legal counseling, please see, G.Boroi, C.M.Anghelescu, Fișe de Drept Civil, vol I, Editura Hamangiu, Buc., 2022, pp. 323-345

will be no procedural abuse of right in the case of a procedural act performed beyond the external limits, meaning an illegal procedural act[9].

Another necessary condition for qualifying an act as abusive is that the party directs the procedural right towards achieving a different goal than the one for which it was recognized by law[10].

3. Manifestations of Abuse of Right in the Judgment Phase in Civil Proceedings

In the field of procedural law, doctrine[11] and practice have identified the following situations that can be included in the sphere of procedural abuse of right:

-the introduction, in bad faith, of main, accessory, additional, or incidental claims, as well as for the exercise of an appeal, clearly unfounded;

-the formulation, in bad faith, of a challenge or transfer request; it is worth mentioning that, under the current regulations, the formulation of a challenge request solely for the purpose of delaying the proceedings is no longer applicable, considering that such a request results in the postponement of the decision in question until the challenge request is resolved. Unlike the current regulation, under the old legislation, the formulation of challenge requests could lead to the abuse of right, as the proceedings were suspended until the challenge was resolved, thereby allowing the guilty party to obtain a postponement of the trial.

-obtaining, in bad faith, the service of process by public notice of any party; this is the scenario in which the plaintiff requests the service of process by public notice of the opposing party as well as the appointment of a curator (under the provisions of Article 167 paragraph 3 of the Civil Procedure Code), on the grounds that, despite making the necessary efforts, they failed to ascertain the defendant's domicile, but later the defendant appears in court and proves that they were served with process by public notice in bad faith since the plaintiff knew the defendant's identification data, domicile, or residence; in this situation, all acts performed by the plaintiff will be null and void after the approval of the service of process by public notice; in this regard, Article 167 paragraph 5 of the Civil Procedure Code provides that „if the person served with process appears and proves that they were served with process in bad faith, all procedural acts following the approval of this service will be annulled, and the plaintiff who requested service by public notice will be sanctioned according to the provisions of Article 187 paragraph (1) point 1 letter c)", meaning that they can be fined judicially between 100 lei and 1000 lei.

-the submission of identical requests, repeated within a short time interval after the rejection of the previous one, solely for the purpose of harassing the defendant;

-filing a lawsuit against the defendant after they have fulfilled the obligation for which the plaintiff addresses the court; it is worth mentioning that the existence of abuse of right can only be established in the event of the defendant's performance of the obligation prior to the filing of the lawsuit; if the defendant fulfills their obligation after being served with the

[9] the sanctions in the case of an illegal procedural act are totally different from those of an abusive procedural act.

[10] For example, even though the offender knows that they have been rightfully sanctioned by the reporting officer and their right to drive has been suspended for a certain period of time, they file an appeal against the offense report and sanctioning process. By exercising this specific appeal route, the effects of the offense report are suspended, and they will be reinstated in the right to drive until the final resolution of their appeal.

[11] G.Boroi, M.Stancu, *Drept procesual civil*, Ed. a 6-a, vol I, Ed.Hamangiu, 2023, p. 125

plaintiff's lawsuit, the incidence of procedural abuse of right is no longer questionable, and the plaintiff is entitled to file such a lawsuit;

-the revocation of the legal assistance contract at various stages of the legal proceedings, when the party has an interest in requesting a postponement of the trial;

-obtaining, in bad faith, by the plaintiff whose request for precautionary measures has been rejected, measures that prejudice the defendant; for example, the plaintiff files a claim seeking to compel the defendant to pay a sum of money that they do not owe, and the plaintiff knows this, and separately or incidentally requests the imposition of a precautionary measure (seizure or attachment) on the movable and immovable property of the defendant as well as on the amounts of money in their accounts up to the amount claimed in the lawsuit; considering that at the time of requesting the imposition of the precautionary measure, the plaintiff has no court decision recognizing their claim, and subsequently such a request is rejected, if before the court's decision on the merits the request for seizure/attachment has been granted, it is evident that until this measure is annulled, the defendant is prejudiced by the abusive exercise of rights by the plaintiff;

-the contestation, in bad faith, by its author, of the writing or signature of a document or the authenticity of an audio or video recording, even though the person making such a request knows that the respective document/recording corresponds to reality;

-repeated requests for adjournment of the trial; in this regard, Article 221 paragraph (1) – (2) of the Civil Procedure Code expressly provides that the adjournment of the trial based on the agreement of the parties can only be granted once during the proceedings, and if after such an adjournment, if the parties do not persist in the trial, it will be suspended, and the case will be reinstated only after the payment of court fees, according to the law. Also, according to Article 221 paragraph (3) of the Civil Procedure Code, the legislator imposes on the court the obligation to examine whether the adjournment requested by the parties for a specific reason tends to delay by agreement of the parties; such a request for adjournment, to which the other party may object, is considered as such.

-the invocation of a procedural exception[12] of public order directly in the appeal, the interested party proving that the person who invoked the respective procedural exception was aware of its incidence even from the first instance, but did not invoke it; in this regard, Article 247 paragraph (3) of the Civil Procedure Code expressly provides that „the parties are obliged to invoke all means of defense and all procedural exceptions as soon as they become known, otherwise, they will be liable for the damages caused to the adverse party, the provisions of Articles 189-191 being applicable"; therefore, in this situation, the court will discuss with the parties the invoked exception, which it may admit if invoked in time and is well-founded, but even in the case of admitting the exception, if by not invoking the exception as soon as it became known, the adverse party has suffered prejudice, the latter may be compensated by the party who did not fulfill the obligation to invoke the exception. The above situations are illustrative and not exhaustive, in practice, there are many other situations where the abuse of procedural rights occurs. It is worth mentioning that the rejection of a request, a procedural exception, a request for adjournment, a request for registration of forgery, an objection to execution etc., does not automatically lead to the conclusion that the party who filed the

[12] For details regarding procedural exceptions, see, Tăbăraș, M., *Excepții de fond în procesul civil* – ediția a II-a revizuită, Ed. C.H.Beck, Buc., 2009

respective request has exercised an abuse of procedural rights, but this will be assessed on a case-by-case basis, depending on the specific circumstances of the case.

3. Invocation of procedural abuse of rights

Invocation of procedural abuse of rights can be requested either incidentally within the proceedings where it is relevant or by filing a separate request in the main proceedings by the party considering themselves the victim of the abuse of rights within 3 years from the date on which the injured party became aware or should have become aware of the damage and the one responsible for it, according to Article 2528 paragraph (1) of the Civil Code. In the event that the court finds procedural abuse of rights, the party who has exercised the right abusively may be ordered to pay a civil fine and/or damages to the opposing party. It should be noted that if the court invokes and finds ex officio the incidence of procedural abuse of rights (for example, if the motion for recusal is rejected, and the party abuses the right to challenge the judge), it can only impose a fine on the party, not oblige them to pay damages.

Damages (represented by a sum of money) are awarded only upon request of the party who has suffered harm as a result of the abusive exercise of rights by the other party. It is natural for it to be so, as interpreting it otherwise would amount to a violation of the principle of availability, with the court being obliged to rule only on the requests with which it was invested, without the possibility of granting more than what was requested (plus petita).

Moreover, the mere invocation of procedural abuse of rights by the interested party is not sufficient to engage the liability of the other party. Although the legislator does not expressly provide the basis for awarding damages, it is evident that it is represented by tort liability for one's own act regulated by the provisions of Articles 1357 and following of the Civil Code, which means that the victim of the abuse of rights must prove the four specific conditions of this form of liability, namely: the existence of an unlawful act (diversion of the right from the purpose for whi"h it'was recognized by the legislator), the existence of damage (actual harm caused by the unlawful act, which can be of a material or moral nature, as applicable), the existence of a causal link between the unlawful act and the damage, and the fault of the party – the perpetrator of the unlawful act.

Conclusions

The existence of good faith is an essential, foundational element in any civil proceeding. The rights and obligations of the parties must be exercised both by them and by the court, as well as by other participants in the civil process, in good faith according to the purpose for which they were recognized by law.

The existence of good faith represents an important consideration regarding the commission of abuse of rights in other areas as well, such as criminal law or disputes between consumers and professionals etc., to the extent that the laws regulating them do not contain contrary provisions, considering that in accordance with the provisions of Article 2 paragraph (2) of the Civil Procedure Code, the civil procedure code applies in other matters as well, to the extent that the laws regulating them do not contain contrary provisions. In other words, where there is good faith, there can be no abuse of rights, and to the extent that a right is exercised in bad faith, by diverting it from its economic and social purpose for which it was recognized and, respectively, by violating the rights of another person, it can no longer benefit from legal protection.

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THE GOOD FAITH OF THE JOURNALIST AND TORT LIABILITY

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Abstract

Under the conditions regulated by the provisions of the current Civil Code and the provisions of the Romanian Constitution, the freedom of expression of the press must be exercised in such a way that it does not affect the personal non-patrimonial rights of other legal subjects. Recently, in the practice of the courts, the conditions for the employment of tort liability of journalists are analyzed for the damages caused by the publication of denigrating articles, the courts also analyzing the good faith with which the journalists acted in the exercise of the profession.

Moreover, the practice of the supreme court is to the effect that the freedom of expression invoked by journalists cannot be enforced if the journalist did not act in good faith.

Keywords: *good faith, freedom of expression, right to private life, tort liability*

introductory considerations

The Civil Code regulates in Article 70 et seq. personality rights, and non-patrimonial personal rights that enjoy a strong protection of the law [1].. As is well known, the right to free expression is a fundamental right, enshrined in Article 30 of the Romanian Constitution. Being a fundamental right, this right can only be exercised with respect for the right to dignity, honor, private life and the right to one's image.

According to Article 72 of the Civil Code, any person has the right to respect for his dignity, being prohibited any harm to the honor or dignity of the person, without his consent or without observing the limits provided by Article 75 of the Civil Code.

From the legal provision cited above, it follows that not only public figures, with notoriety, have the right to private life and the protection of dignity and honor, but any natural person has these rights, which are protected from violations that are not limited to the exceptions provided by Article 75 of the Civil Code.

By Decision no. 1576/07.12.2011, the Constitutional Court ruled that human dignity is an inalienable attribute of the human person, a value that imposes on each member of society a behavior of respect and protection of other individuals and the prohibition of any humiliating or degrading attitude towards man.

The right to dignity, the right to honor and the right to reputation are some examples of personality rights or facets of the right to private life [2]. The right to honor represents the right of every natural person not to be affected by his consideration, honor representing both the feeling that the person has that he is beyond reproach from a moral and legal point of view, as well as the fact that the person is valued in society according to the same criteria.

The right to private life has been described in the commentaries of the Civil Code [3] as representing the vast territory in which human existence is carried on; respecting the right to life gives its holder the power to keep secret aspects of his life and establishes a negative obligation on third parties not to interfere with intimate, personal or family life.

These non-patrimonial personal rights enjoy an *erga omnes* opposability, all other legal subjects having an obligation not to, that is, not to infringe upon the personality rights[4].

Considering the existence of several fundamental rights that must be exercised in such a way as not to affect the fundamental rights of another subject of law, it is necessary to specify the fact that in the last period there is a large jurisprudence in the matter of tort liability based on the violation of the right to private life, the right to dignity and honor.

Regarding the defense of personal non-patrimonial rights, the provisions of Article 253 of the Civil Code establish that „*the natural person whose personal non-patrimonial rights have been violated or threatened can ask the court at any time: a) to prohibit the commission of the illegal act, if it is imminent; b) termination of the infringement and prohibition for the future, if it still lasts; c) ascertaining the illegality of the act committed, if the disorder it caused persists"*[1].

Particularly important for this article is the regulation Article 253 (2) Civil Code which establishes that „*as an exception to the provisions of paragraph (1), in case of violation of non-patrimonial rights by exercising the right to free expression, the court can order only the measures provided for in paragraph (1) letters b) and c)",* as I quoted them above. Consequently, in the analysis of the judicial practice that we will carry out in this article, we will analyze the violation of the right to private life, dignity and honor through the exercise of freedom of expression.

In what follows, we will examine the judicial practice that we have judged to be relevant, without denying the existence of other valuable court decisions that express the real value of personal non-patrimonial rights protected by the previously mentioned legal provisions.

ANALYSIS conducted BY THE review COURT ON THE PROTECTION OF FREEDOM OF EXPRESSION

The High Court of Cassation and Justice decided that, in accordance with the jurisprudence of the European Court, although it must not exceed the limits related in particular to the protection of the reputation and rights of the person, in fulfilling the task of communicating information and ideas on matters of general interest, journalists are protected by Article 10 of the Convention, even if they cannot prove the truth, if it is proven that they acted in good faith, based on credible statements. In this sense, the partial inaccuracy of the presented facts does not exclude the protection of Article 10 if the journalist did not act in bad faith and the subject is of public interest. The High Court held that, in this case, since there is a criminal investigation in relation to the fact that led to the journalistic investigation, there is thus a factual basis that justifies the judgment of value, the journalistic statements were not carried out exclusively in a media campaign of denigration directed against the plaintiff, as they do not present situations without any supporting evidence, but contain reliable information that can be considered credible[2].

[1] By Decision no. 1/2023, the High Court of Cassation and Justice admits the appeal in the interest of the law and establishes that, in the interpretation and uniform application of the provisions of Article 253 paragraph (1) letter c) of the Civil Code, the court is the competent authority regarding the resolution of cases concerning requests for the determination of the illicit nature of acts infringing non-pecuniary rights, requests based on the provisions of Article 253 paragraph (1) letter c) of the Civil Code, when they are formulated simultaneously with requests based on the provisions of Article 253 paragraph (4) of the Civil Code to award damages for non-pecuniary harm caused, which do not exceed the amount of 200,000 lei inclusive.

[2] In this regard, please consider Decision no. 1790 of September 23, 2015, rendered in appeal by the Civil Chamber I of the High Court of Cassation and Justice, available at the web address. https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery[0].Key=id&customQuery[0].Value=126170.

In the summary of the decision pronounced by the court it was noted that *the press has the duty to alert the public when it has information of general interest, however, when they directly involve specific persons, they must provide a factual basis and take into account the public context in which the person concerned acts and the nature of the circumstances that are the subject of the articles. And, according to the jurisprudence of the European Court, although it must not exceed the limits related in particular to the protection of the reputation and rights of the person, in fulfilling the task of communicating information and ideas on matters of general interest, journalists are protected by Article 10 of the Convention even if they cannot prove the truth, if it is proven that they acted in good faith, based on credible statements.*

Thus, as the incriminated articles concerned a possible criminal act committed by the plaintiff – in relation to which there was also a criminal investigation – the journalistic statements found in them are not totally devoid of a factual basis, because they were not carried out exclusively in a media campaign of denigration directed against the plaintiff, since they do not present situations without any evidentiary support, but contain reliable information that can be considered reliable.

Considering what the High Court held in the decision cited above, it is appropriate to mention the rigorous analysis carried out by the court on the analysis of the rights invoked by the parties. On the one hand, journalists invoke freedom of expression and on the other they counterbalance the right to reputation and other personality rights. Thus, from our point of view, in cases whose object is tort liability for the statements made in the press, the courts must also take into account the coordinates drawn by the European Court of Human Rights (hereafter ECHR) which, in turn, made an extensive analysis of the personality rights that is in opposition in the disputes to which we refer.

Thus, by way of example, in the constant jurisprudence of the ECHR it has been ruled that a distinction must be made between value judgments and factual accusations[3]. With regard to value judgments, the ECHR held that they cannot and should not be proven, their essence being subjective, the only requirement being that of a minimal reality from which the opinions are extracted. In the absence of it, the opinions can be considered excessive, likely to attract the responsibility of the one who launches them in the public space[4].

Unlike opinions, statements of fact must be proven by the person making them. The condition of proof is assessed rigorously, going down to the last details of the factual accusation. Any deviation from the presented reality is circumscribed to the illegal act that has as a direct consequence the damage brought to the honor and reputation of the natural person targeted by the respective press article[5].

Compared to the aspects analyzed by both the High Court and the ECHR, from our point of view, the condition of good faith in the exercise of the right to free expression must also be analyzed. The activity of the press should therefore be carried out in compliance with the condition of good faith, in accordance with Resolution no. 1003/1993[6] which establishes that the journalist shall act in good faith and to prove the accusations issued and, equally, the

[3] In this regard, please refer to Pfeiffer v. Austria, Lingens and Oberschlick v. Austria, available at www.hudoc.echr.coe

[4] In this regard, please refer to Ivanciuc v. Romania, Cumpănă and Mazăre v. Romania, available at www.hudoc.echr.coe.

[5] Chauvy v. France, available at www.hudoc.echr.coe

[6] Published in the Official Gazette of Romania No. 265 on September 20, 1994.

dissemination of news must be done respecting the truth, only after they have been rigorously verified, and the facts must be exposed, described and presented with impartiality. Information should not be confused with rumors. Journalism requirements adopted at the European level were also adopted at the domestic level; thus, according to Article 2 of the Journalist's Code of Ethics, „*the journalist can publish only the information if they are certain of its veracity, after checking them beforehand, as a rule, from at least 2 credible sources".* At the same time*, „the journalist does not have the right to present his opinions as facts. The press release must be accurate, objective and not contain personal opinions".*

While the condition of good faith is not explicitly specified as a prerequisite for imposing tort liability on journalists, it is undoubtedly implied by the provisions cited earlier.

Thus, in order to remember that freedom of expression has been achieved, within the limits of regulation, courts also analyze the journalist's requirement of good faith. In the decision issued by the High Court, it was noted that, in the analysis of the good faith of the journalistic approach, the court of appeal also verified the assertion regarding the purpose pursued by the publication of the articles, which would not have been of public but personal interest and, contrary to the appellant's statements, motivated the removal of his assertions that tended to overturn the presumption of good faith. In this sense, the court of appeals shows that the subject is of public interest (the death of a man and the functioning of justice in a broad sense) and the fact that the journalist's motivation to get justice does not exclude the one claimed by the plaintiff (respectively, that the journalistic investigation would have been triggered by the negative opinion the journalist had about a certain person, in this case the alleged arrogance). The important thing, states the appeal court, is that the journalist did not only have the intention to damage the reputation of the person concerned, a circumstance which, moreover, was not proven (good faith being presumed). The requirement imposed by the European Court to establish that Article 10 has been respected is that of the existence of a sufficient factual basis, which creates the journalist's conviction that the presented facts are real, putting a symbol of equality between this and good faith, in the context of discussing matters of general interest.

In such conditions, from our point of view, good faith must be analyzed in any litigation having as its object an action in tort liability based on the violation of personality rights through freedom of expression.

Thus, it is up to the courts to establish what is the fine line between freedom of expression and the right to private life, the right to dignity and honor. How can the presumption of good faith be overturned? Is it enough for the journalist to invoke a topic of general interest to make any statements about a particular person?

From our point of view, when analyzing the conduct of the journalist, it is necessary to analyze all the conditions outlined in the ECHR jurisprudence and in the reference decisions pronounced by the High Court of Cassation and Justice, in order to ensure the right to a fair trial for the parties involved in the litigation. It is true that the situations can be extremely different, so that we cannot speak of a pattern in the analysis of such litigious situations, but it is particularly important that the fundamental rights invoked are carefully analyzed, weighed, put in the balance, in order to finally give effectiveness to the right that was exercised in good faith and without the intention of harming the rights and legitimate interests of another person.

good faith, a necessary condition for invoking the protection offered by freedom of expression

The High Court of Cassation and Justice decided in a case with the object of action in tort liability[7], in the analysis of the conditions required by law for a journalist to be protected by freedom of expression the fact that „*in order to be enrolled within the coordinates of legally protected expression, it is not sufficient for the information provided by the journalist to be based on an adequate factual basis, but it is necessary to be rendered in a manner that corresponds to minimum social and educational standards..*

The use of expressions that carry insulting, offensive, or denigrating meanings excludes good faith and the protection of journalists from the perspective of Article 10 of the European Convention. Moreover, assuming a particular role through holding a political position does not automatically entail acceptance of any form of insults issued by the press or even private individuals. Although the nature of the position may bring about greater visibility to one's life, it still remains private and protected by legal provisions.

Therefore, the injurious terms used within the content of the incriminated article, with a clear, undisguised intention to outline a negative perception of the plaintiff, which have no connection to the factual basis regarding certain aspects of their life and activities made public, and which do not justify their relevance in terms of public information, being purely personal assessments of the journalist, whose biased connotations exclude impartiality and objectivity, exceed the limits of the right to freedom of expression, placing them outside the protection offered by Article 10 of the European Convention on Human Rights. As such, the manner in which the journalist conveyed certain information to the public, being defective, determines the incidence of the sanction resulting from tort liability".

The decision cited above holds, in our view, particular significance in the analyzed field, with the High Court conducting a comprehensive examination in determining the scope of freedom of expression. As gleaned from the decision summary, the good faith of the journalist cannot be upheld if they employ insulting, offensive, or denigrating expressions, as these utterances are incompatible with the notion of good faith. Thus, although freedom of expression is invoked whenever we encounter a dispute involving tort liability for statements made through the press, it is especially important for the courts to conduct a thorough analysis of the fundamental rights being invoked.

As evidenced by the decisions rendered by the High Court, freedom of expression is not an absolute right. On the contrary, to ensure the protection of the individual invoking freedom of expression, it is crucial that the person exercising this freedom can prove that it was done in good faith.

From our perspective, as long as articles are published through the press without considering a minimum factual basis, if the journalist fails to adequately research the subject matter, if they violate professional ethics and standards, if they deviate from their role in a democratic society, which is to exercise the inviolable right to freedom of expression for the sake of the public's right to be accurately informed, then tort liability will be incurred by the journalist.

The provisions existing in the Journalist's Code of Ethics are also not to be neglected, according to which „*the journalist is duty-bound to express opinions based on factual grounds. In reporting facts and opinions, the journalist will act in good faith*." We consider that good faith is an element inseparable from freedom of expression, a fact confirmed by the

[7] In this regard, please see the High Court of Cassation and Justice, Civil Chamber I, Decision no. 190 of February 8, 2023, available at the web address.: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=202279#highlight=##

analysis conducted by the courts in resolving requests where they are called upon to balance a series of non-material personal rights.

Seeing the way in which the journalist acts, if he acts in good faith in order to achieve the goal of exercising the profession, i.e. correctly informing the public, he will win the case. However, we note that freedom of expression is not always exercised in accordance with the purpose for which this fundamental right was regulated.

When a subject is approached for purposes other than the accurate informing of the public, if the journalist fails to prove the good faith with which they acted, even if they could justify a minimal factual basis, they will be held liable for the infringements on the personality rights, which, as seen above, must be viewed in balance, as recognized by the courts called upon to weigh the rights invoked by the parties.

Conclusion

As it follows from the court rulings that I have referred to in this article, the courts analyze with particular attention the condition of good faith in the exercise of the fundamental right to free expression. At the same time, it is analyzed in the retention of the protection offered by the freedom of expression, which was the method of exposure of the subject by the journalist. Proof of good faith will not be possible if the journalist uses expressions that are likely to offend because correct information to the public requires presenting information with objectivity and impartiality.

From our point of view, the press must come to understand the role it has in Romanian society and behave as such. Seeking sensationalism by presenting information far from the truth will not attract the protection of free speech.

In this context, our opinion is that through the judgments issued by the courts, sufficient elements are drawn to create the premises for the exercise of freedom of expression in accordance with the legal provisions, with an exclusion of the violation of personal non-patrimonial rights of other legal subjects.

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DISCUSSIONS ON THE ROLE OF GOOD FAITH IN THE FIELD OF NON-NEGOTIATED TERMS IN CONTRACTS CONCLUDED BETWEEN PROFESSIONALS AND CONSUMERS

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Abstract

This study aims to highlight the specific, autonomous meaning of the notion of good faith in the perimeter of unfair terms and, above all, its essential role in establishing the unfair character of non-negotiated terms in contracts concluded between professionals and consumers, in spite of the existence of some inconsistencies in the normative level regarding the meaning and role of good faith in the analyzed field, from which, inevitably, different opinions at the doctrinal level arise.

Keywords*: good faith, non-negotiated terms, unfair terms, consumer, professional, significant contractual imbalance.*

1. Prologue

In the landscape of contemporary legal systems, both in the continental system and in the Anglo-Saxon system, consumer protection law has certainly gained its autonomy as a distinct branch of law, despite the existence over time of some doctrinal controversies regarding this subject. Especially considering the undeniable importance of the contractual component of this branch of law, it can be stated that consumer law is characterized, both by its exceptional character, derogating from civil law, and by the eclectic character of its legal norms, this branch combining, in a complex synthesis, without a clear line of demarcation, regulations belonging to both private and public law. Thus, even if it uses legal institutions of private law, it not only departs deeply from the fundamental principles of civil law, but also borrows and uses the main characteristics of public law: public order – particularized in the form of the concept of public order protection[1] and the imperative nature of legal norms. Moreover, the public order character of the legal norms of consumer law is constantly emphasized in the jurisprudence of the Court of Justice of the European Union. These specificities of consumer law are reflected in special legislation, aimed at restoring the equality of the special subjects of the legal relationship (the consumer and the professional) and especially at remedying the existing imbalance at the time of contract conclusion. This is achieved through the regulation of legal norms designed to counterbalance the dominant position of the professional, acting as leverage in favor of the consumer, who is in a position of economic, legal, and specialized knowledge inferiority.[2]

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[1] The public order of protection represents a specific concept within consumer law, subsumed under the generic concept of public order (see public order), which highlights a particularity of consumer law, namely that the establishment of the legal norms composing it goes beyond the protection of a particular, individual interest of each consumer, as these norms protect a general, public interest of the generic category of consumers. In this way, an efficient and optimal protection of consumers is achieved, considering their position as the vulnerable party in the legal relationship, in terms of economics, bargaining power, information asymmetry etc.

[2] The doctrine uses the term „leverage effect" to highlight the role and spirit of the special legislation in the field of consumer protection.

With regard to the legal contractual relations of the right of consumption, the derogatory, exceptional character is enshrined at the normative level in the provisions of Article 1177 of the Civil Code, in which the legislator provides that: *„the contract concluded with consumers is subject to special laws and, in addition, to the provisions of the present code"*. Therefore, the Civil Code represents common law in the matter of contracts concluded between professionals and consumers, and the principle of good faith that governs the negotiation, conclusion, execution and termination of contracts, enshrined in Article 1170 of the Civil Code[3], it is, of course, fully applicable to contracts concluded by professionals with consumers.[4]

2. **The essential role of good faith in establishing the unfair nature of non-negotiated terms in contracts concluded between professionals and consumers**

As we will show in the following, in the scope of non-negotiated terms in contracts concluded between professionals and consumers, good faith has a primary role in determining the unfair character of these terms.

The seat of the matter in the field of unfair terms inserted in contracts concluded between professionals and consumers is Law no. 193/2000, a law that transposes into domestic law Directive no.93/13 EEC[5] regarding unfair terms in contracts concluded with consumers. The normative definition of the notion of unfair terms was taken from the provisions of the Union directive and can be found in the provisions of Article 4 (1) of Law no. 193/2000. According to this provision, *contractual terms that were not negotiated directly with the consumer will be considered unfair if, by themselves or together with other provisions in the contract, they create, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of parties.*[6] From this definition, the following characteristic features of the unfair terms in the contracts concluded between professionals and consumers can be deduced[7]: a) the terms must not be negotiated with the consumer; b) the terms create a significant imbalance between the rights and obligations of the parties arising under the contract, to the detriment of the consumer; c) the terms were inserted in breach of good faith by the professional. Therefore, both at the Union and national level, good faith is an essential criterion in establishing the unfair nature of non-negotiated terms in contracts concluded between professionals and consumers. However, it should be noted that, both at the doctrinal and at the normative level, there are some inconsistencies regarding the consideration of the lack of good faith as a criterion for establishing the unfair nature of non-negotiated terms in contracts concluded with consumers.

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[3] Article 1170 of the Civil Code: *The parties must act in good faith both when negotiating and concluding the contract, as well as throughout its execution. They cannot remove or limit this obligation.*

[4] In the specialized literature, it is rightly stated that the general obligation of good faith has a greater weight in the relations between professionals and consumers.

[5] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993, L 95, p. 29, Special Edition, 15/vol. 2, p. 273). Directive 93/13/CEE achieved only a partial and minimal harmonization of national legislation on unfair terms, recognizing, at the same time, the possibility for member states to provide consumers with a higher level of protection than what it provides.

[6] According to Article 3 of Directive 93/13/EEC *„A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."*

[7] The phrase „unfair terms" is also found in the matter of contracts concluded between professionals, but with a different meaning.

First of all, it should be mentioned here that the issue of lack of good faith, as a criterion for assessing the unfair nature of non-negotiated terms in consumer contracts, is disputed in several legal systems of the member states of the European Union. Thus, Germany, Austria, Switzerland, Belgium and France are some of the states in which good faith, as a criterion for determining the unfair nature of non-negotiated terms in consumer contracts, has been contested or even rejected initially at the doctrinal level, and then legislatively consecrated. *Exempli gratia,* Belgium and France removed the criterion of good faith from the normative definition of unfair terms, keeping as the sole criterion for establishing the unfair character of terms in consumer contracts, the significant imbalance that the contractual terms, even the negotiated ones, create between rights and obligations of the parties arising under the contract.[8]

Secondly, the imprecise wording contained in the definition of the unfair terms led to controversial discussions in the specialized literature, regarding the consideration of good faith as a distinct condition for establishing the unfair character of the contractual terms. Thus, in a majority opinion, it is considered that good faith represents a distinct, autonomous condition, the fulfillment of which must be verified separately from the condition of the existence of a significant imbalance between the rights and obligations of the parties arising under the contract. In another opinion, the criterion of good faith must be analyzed together with that of the significant imbalance that the said non-negotiated terms creates between the rights and obligations of the parties arising under the contract, being in the presence of a single complex condition.[9] Thus, these authors appreciate that the terms that create a significant imbalance between the rights and obligations of the parties are in itself contrary to good faith. The latter opinion was also embraced by jurisprudence, the High Court of Cassation and Justice noting in some of its decisions that „*the lack of good faith is not a condition in itself for establishing the unfair nature of terms*"[10] or „*a significant imbalance must be interpreted as contrary to good faith, precisely because it avoids the use of this criterion as an escape route for professionals, thus reducing the level of consumer protection*.[11]"

We appreciate that the violation of good faith certainly represents a distinct criterion from that of significant imbalance, not being able to say that the legal text can be interpreted in the sense that a significant imbalance would include in itself the automatic violation of good faith. This results from the grammatical interpretation of Article 4 (2). The presence of the conjunction unequivocally attracts the distinct character of the criterion of breach of good faith, which must be verified separately from the criterion of the existence of a significant imbalance between the rights and obligations of the parties arising under the contract. Thus,

[8] Article 132-1 paragraph (1) of the French Consumer Code provides*: „In contracts concluded between professionals and non-professionals or consumers, are considered unfair those terms which have the effect of creating, to the detriment of the non-professional or consumer, a significant imbalance between the rights and obligations of the parties arising under the contract."* On the other hand, other countries such as Spain or Portugal remain faithful to the meaning proposed by the Union legislator, maintaining the criterion of lack of good faith. In the legal system of Spain, according to Article 82 of Royal Legislative Decree 1/2007, *„(1) any term that has not been individually negotiated and any unfair practice contrary to good faith, which causes a significant imbalance between the rights and obligations of the parties arising from the contract, to the detriment of the consumer and the user, shall be considered unfair."*

[9] Lucian Mihali – Viorescu, *Clauzele abuzive în contractele de credit*, Hamangiu Publishing House, Bucharest, 2017, pp. 166-167.

[10] HCCJ, Second Civil Chamber, Decision no. 302/2014.

[11] HCCJ, Second Civil Chamber, Decision no. 760/2014.

contractual terms that were not negotiated directly with the consumer will be considered unfair if... they ***create, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties arising under the contract.***

In judicial practice, the judge may consider, depending on the concrete factual situation, that the existence of a significant imbalance between the rights and obligations of the parties arising under the contract, to the detriment of the consumer is equivalent to a presumption of breach of good faith by the professional, in other words, a presumption of bad faith on the part of the professional. It is notable that this presumption overturns the fundamental principle of good faith in civil law, established in Article 14 of the Civil Code.[12] Of course, given the current form of the text of Article 4 of Law no. 193/2000 on unfair terms in contracts concluded with consumers, we emphasize that it can only be a simple, judicial presumption. This presumption of bad faith is based on the fact that the professional, in a dominant position towards the consumer, especially from the perspective of the level of specialized knowledge, abuses his position of power; by inserting unbalanced terms, terms that were not negotiated with the consumer, and this fact is considered the expression of his bad faith. In this situation, as an effect of the presumption of breach of good faith, the burden of proof will be reversed, the professional therefore having the burden of proving his good faith.

3. **The meaning and autonomy of the concept of *good faith* in the perimeter of unfair terms**

As a preliminary, we must mention the fact that the notion of good faith, although taken from civil law, has acquired new meanings in the matter of unfair terms, delineating its own, autonomous meaning.

From a historical perspective, as is known, *bona-fides* is a concept of Roman origin[13], which began to take shape in the legal field in the 3rd century BC, with Cicero being credited with the foundation of this notion. He defines *good faith* as: „faithfulness and sincerity in words and in commitments assumed." It is also known that in civil law the notion of good faith does not have a normative definition because, as, rightly, it was stated in the doctrine, it is an almost impossible notion to define, it being simpler to individualize in the legal texts, by way of example, manifestations contrary to the requirements of good faith. The doctrinal definitions of the notion of good faith in the matter of obligations retain the psychological, intentional element of the subject of individual law, manifested on a legal level – the fair, honest intention, diligence, legality and refraining from causing any damage in the execution of obligations, in general, and of contracts in particular.[14] With certainty, good faith represents a defining concept for the Roman-Germanic legal system, being incompatible with the

[12] According to Article 14 of the Civil Code, *(1) Natural persons and legal entities involved in civil legal relationships must exercise their rights and fulfill their obligations in good faith, in accordance with public order and good morals.* ***(2) Good faith is presumed until proven otherwise.***

[13] See Alina Monica Axente, *Curs de Drept privat roman,* Hamangiu Publishing House, Bucharest, 2022, p. 10;

See Alina Monica Axente, *The Static And Dinamic Aspects Of Roman Law As Portayed In The Sources of Law,* The International Conference of Law „Challanges of the Knowledge Society", Nicolae Titulescu University, Bucharest, 2015, p. 153.

[14] Regarding the legal consecration of the concept of good faith, see Mihaela Cristina Paul, *Rolul şi formarea voinţei juridice*, Universitară Publishing House, Bucharest, 2014, pp. 86-89.

Anglo-Saxon legal system that rejects the ideas of generalization and systematization, being faithful to concrete situations and facts.

In the field of consumer law, in the doctrine it is correctly appreciated that, regarding the professional, good faith represents the ability to be honest and not to take advantage of his position of superiority in relation to the consumer.[15] The Court of Justice of the European Union outlined a jurisprudence regarding both the meaning of the notion of good faith and its role in the field of unfair terms in contracts concluded with consumers. According to the constant jurisprudence of the Court of Justice of the European Union, in the perimeter of unfair terms, good faith represents an autonomous concept that must be interpreted in the context of Directive 93/13 EEC. The autonomous interpretation assumes that the notion of good faith will be identified and applied in accordance with the spirit of this directive, and not in accordance with the perspective that national legal systems attribute to it. However, the Luxembourg Court did not offer concrete criteria to establish the proper meaning of this concept, but only a rather generic orientation, highlighting two aspects that must be verified.

Thus, the Court ruled in the sense that, *to know if the imbalance is created in contradiction with good faith, it is important to check if the professional, acting fairly towards the consumer, could reasonably expect the latter to accept the terms in question following an individual negotiation. Good faith has the role of imposing that when evaluating the unfair nature of terms, all the relevant circumstances of the conclusion of the contract should be taken into account.* Also, in assessing the meaning of the notion of good faith in the matter of unfair terms, considerations from the preamble of the Unfair Terms Directive must also be taken into account, in which the idea is highlighted that when assessing good faith, special attention must be paid to the strength of the negotiating positions of the parties, to the fact of knowing whether the consumer was encouraged to give his consent to the potentially unfair term, and whether the goods or services were sold or provided at the express request of the consumer.

The Court of Justice of the European Union had the opportunity to rule on the issue of considering the lack of good faith as a criterion distinct from that of a significant imbalance between the rights and obligations of the parties arising under the contract, to the detriment of the consumer. We evoke here a relatively recent judgment of the Court of Luxembourg, pronounced in response, according to the procedure of preliminary referrals, in a case originating from our country. It is about the Lupean Case, in which the Court of Justice of the European Union ruled *that articles 3-5 of Directive 93/13 must be interpreted in the sense that* the terms of a credit agreement, such as the one at issue in the main litigation, under which the entire currency exchange risk is transferred to the borrower and which is not drafted transparently, so that the borrower cannot assess, on the basis of clear and understandable criteria, the economic consequences of concluding this contract, *is likely to be considered unfair by the national court, when it is found that, contrary to the requirement of good faith, it creates a significant imbalance between the rights and obligations of the parties arising under the contract, to the detriment of the consumer.* In this regard, it is for the referring court to assess, taking into account all the circumstances of the main case *and taking into account in particular the expertise and knowledge of the professional* with regard to possible variations in exchange rates and the risks inherent in contracting a loan in foreign currency, ***firstly, the***

[15] B. Moore, *Les terms abusive. Dix ans apres*, apud L. Mihali – Viorescu, *op. cit*., p. 175.

possible non-compliance with the requirement of good faith *and, secondly, the existence of a possible significant imbalance, within the meaning of Article 3(1) of Directive 93/13.*[16]

Legal doctrine has shown a constant interest in the effort to accurately determine the specific, autonomous meaning of the notion of good faith within the strict perimeter of unfair terms in contracts concluded with consumers. It was thus appreciated that good faith in the matter of unfair terms must be regarded as a **hybrid criterion**, located at the confluence between the objective criterion of economic or legal imbalance and the *subjective* criterion of the professional's intention to exploit his dominant position, to the detriment of the consumer.[17] So, good faith must refer to the conduct of the professional who must act correctly and fairly towards the consumer, that is, to be honest, not to take advantage of his position of power in relation to the consumer, to take into account the legitimate interests of consumers when pre-drafting the contractual terms; in other words, contractual terms must be compatible with fair and equitable market practices, which take into account the legitimate interests of the consumer. When analyzing the existence or breach of good faith by the professional, a comparison between the way in which the contractual terms were initially presented to the consumer and the way in which the professional subsequently used them must be taken into account. Therefore, the violation of good faith could also result from: the violation of the obligation of professionals to draft clearly and intelligibly the contractual terms, the way in which the contractual terms are presented, or the violation of the obligation of pre-contractual information. Regarding the way in which the contractual terms are presented, it is appreciated that aspects such as: clarity of visual presentation, including font size, if a contract is structured logically and if due weight is given to important provisions, without them being hidden among others, if the terms are included in a contract or in a context where they can reasonably be expected to be present, including in conjunction with other contractual terms.[18] For example, contract terms whose meaning and impact can only be understood when read together should not be presented in such a way that their collective impact is obscured by placing them in different parts of the contract.[19]

4. Conclusion

We note with the value of conclusions the following ideas that emerge at the end of this short analysis of the notion of *good faith* in the matter of non-negotiated terms in contracts concluded between professionals and consumers. First of all, carried over to the current form of the normative definition of unfair terms, we will note with certainty that good faith has an essential role, that of controlling the unfair nature of non-negotiated terms in contracts concluded with consumers. The criterion of breach of good faith by the professional represents, therefore, an independent criterion, distinct from that of significant contractual imbalance, according to which the unfair nature of non-negotiated terms in contracts concluded between professionals and consumers is determined; therefore, the existence or breach of good faith will be verified separately. We cannot fail to note, however, the close

[16] C -119/17, ordinance ECLI: EU: C:2018: 103.

[17] Juanita Goicovici, *Dreptul relaţiilor dintre profesionişti şi consumatori*, Hamangiu Publishing House, Bucharest, 2022, p. 176.

[18]Communication from the European Commission (published in the Official Journal of the European Union, 2019/C 323/04) Guidelines on the interpretation and application of Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, Brussels, 27.09.2019.

[19] Opinion of Advocate General Hogan delivered on 15 May 2019 in Case C-621/17 *Kiss*, paragraph 41.

connection, the interdependence between the two criteria for checking the unfair nature of non-negotiated terms in contracts concluded with consumers: the criterion of significant imbalance between the rights and obligations of the parties and the criterion of good faith of the professional. Therefore, we agree with the doctrinal opinion that states that good faith in the matter of unfair terms must be regarded as a **hybrid criterion**, located at the confluence between the *objective* criterion of economic or legal imbalance and the *subjective* criterion of the professional's intention to exploit his dominant position, at the expense of the consumer.

Secondly, we note that in the matter of unfair terms, the notion of good faith has its own, autonomous meaning, a fact that was highlighted by the jurisprudence of the CJEU, as a constant manifestation of it in the mission and desire to give the Union norms a uniform interpretation and application, in the well-known context of the existence of different legal systems of the member states, systems in which some legal concepts or institutions have different meanings or are even non-existent.

GOOD FAITH AND INFORMED CONSENT IN THE DOCTOR-PATIENT RELATIONSHIP

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Abstract

Good faith in obtaining the informed consent of the patient is a fundamental ethical principle in medical practice. It refers to respecting the patient's right to be clearly, completely, and adequately informed about their health status, diagnosis, treatment, and the risks involved so that they can make an informed decision regarding their own medical care. Good faith involves an ethical and moral approach in obtaining the informed consent of the patient. The doctor must be sincere and honest in communicating with the patient, avoid any manipulation or withholding of information, and provide all relevant data for the patient to fully understand their medical situation. In obtaining the informed consent of the patient, it is important for the doctor to respect the patient's autonomy and promote the principle of the prevalence of the interests and well-being of the human being. Omission of informing the patient about certain aspects that, if known, would have given the patient the opportunity to choose a certain solution, represents both a violation of a professional obligation that entails civil liability and an ethical fault by ignoring the dignity of the patient as a human being.

Keywords: *informed consent, medical malpractice, good faith*

The doctor-patient relationship is based on mutual trust, good faith, and transparency in the communication of medical information by both the doctor to the patient and the patient to the doctor during the medical history-taking. Mutual trust between the patient and the doctor is an important aspect that impacts to some extent the diagnosis and treatment outcomes. *The medical profession's main goal is to ensure health by preventing illness, promoting, maintaining, and recovering the health of individuals and the community. In order to achieve this goal, the doctor must demonstrate, throughout the exercise of the profession, availability, devotion, correctness, loyalty, and respect for the human being.*[1]

The law gives the patient the right to choose their doctor and medical service provider. The doctor-patient relationship is exclusively professional, built on respect for human dignity, understanding, and compassion for illness and suffering.[2] Medical decisions are based on the patient's interests and rights, respect for human dignity, the principles of medical ethics, and deontology. Care for the patient's health involves first and foremost respecting the principle of exercising the medical profession in good faith, devotion, and loyalty. The concept of good faith has its origins in Roman law and was later adopted by most legal systems in the Roman-Germanic family and implicitly by the Romanian legal system.[3] At the center of the doctor-patient relationship is obtaining the informed consent of the patient for undergoing preventative methods, diagnosis, and treatment with potential risks. This is a key aspect of patient autonomy and an obligation on the part of the doctor [4] and not complying with the legal regulations regarding obtaining informed consent can lead to civil liability for medical malpractice. The patient has the right to be informed about all relevant aspects of their health status and to be actively involved in the decision-making process regarding their treatment. This requires the doctor to provide clear and complete information, in good faith to answer

the patient's questions, and to take into account their preferences and values. The doctor is obligated to present the information to the patient at a scientifically reasonable level for their understanding, the diagnosis, nature, and purpose of the treatment, the risks and consequences of the proposed treatment, viable alternative treatments, their risks and consequences, the prognosis of the disease without treatment.[5]

Good faith in obtaining the informed consent of the patient is a fundamental ethical principle in medical practice. It refers to respecting the patient's right to be clearly, completely, and adequately informed about their health status, diagnosis, treatment, and the risks involved so that they can make an informed decision regarding their own medical care. Good faith involves an ethical and moral approach in obtaining the informed consent of the patient. The doctor must be sincere and honest in communicating with the patient, avoid any manipulation or withholding of information, and provide all relevant data for the patient to fully understand their medical situation. The informed consent form signed by the patient should target the diagnosis for which medical services are required, it should be a detailed document, personalized to the patient, intervention etc., and not a general consent. In jurisprudence, it has been held that a single consent for the entire period from admission to discharge has no legal basis because informed consent is required whenever the patient undergoes a medical procedure. Consent is valid only if given with direct reference to the specific treatment, medical procedure, or maneuver performed. The main purpose of informed consent is to allow the patient to consider and weigh the advantages and disadvantages of the proposed medical treatment so that they can make a rational choice between acceptance and refusal.[6] In a specific decision, the High Court of Cassation and Justice considered that, in the context where the patient is entitled to know their diagnosis, treatment options, the risks they are exposed to, the chances of recovery, or the dangers regarding the worsening of their health condition, the omission of informing them about certain aspects that, if known, would have given them the opportunity to choose a specific solution, represents both a violation of a professional obligation that entails civil liability and an ethical fault by ignoring the dignity of the patient as a human being.[7]

In obtaining the informed consent of the patient, it is important for the doctor to respect the patient's autonomy and promote the principle of the prevalence of the interests and well-being of the human being. This means that the doctor must allow the patient to make informed decisions and respect their choices, even if they are not in line with medical recommendations. The doctor can offer advice and guidance to help the patient make the best decision for them. In accordance with the principles set out in the Code of Medical Deontology of the Romanian College of Physicians, the obligation to inform the patient is recognized as an ethical obligation, and respecting the patient as a human being involves their correct and complete information. The patient's right to make an important decision about their life and health is correlated with the doctor's obligation to inform them fully and competently about their diagnosis, treatment, and/or intervention to be performed. Medical decision-making is based on communication between the patient and the doctor, transparent communication, based on loyalty and good faith.[8]

An important aspect of good faith in the doctor-patient relationship is the confidentiality of medical information. Medical information is protected and cannot be disclosed without the patient's consent, and the doctor will use medical information to provide medical care to the patient. All information regarding the patient's condition, investigation results, diagnosis, prognosis, treatment, personal data is confidential even after their death.[9] In accordance with

the provisions of Law no. 46/2003, the Constitutional Court has expressly ruled, through Decision no. 835/17.11.2020, that the patient's right to choose to keep their health status confidential is not transferable mortis causa, thus preserving the option expressed until the death of the right holder, and ensuring the confidentiality of information regarding the patient's condition, investigation results, diagnosis, prognosis, treatment, represents a way to protect the rights provided for in art. 26 of the Constitution, equally enshrined in art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[10] The doctor has the responsibility to show maximum diligence, to pursue the purpose of exercising their profession only in the patient's interest and their rights. This obligation of the doctor is analyzed both in terms of establishing the diagnosis, by performing appropriate and timely analyzes/investigations, and in terms of providing the patient with proper and good faith information.

Good faith implies that the doctor must protect the patient's confidential medical information and use it only for medical care purposes. The patient must feel safe and have confidence that their personal information will not be disclosed without their consent. Good faith and maintaining the confidentiality of medical information are essential for ethical and quality medical practice.

Judicial concern regarding good faith and obtaining the informed consent of the patient dates back to 1914 when in the United States in the case of *Schloendorff v. Society of New York Hospital in 1914*, the Court ruled that the patient has the right to give his informed consent and that the doctor has the obligation to provide complete and adequate information to the patient so that he can make an informed decision. The decision had a significant impact on patients' rights to be informed and to give their informed consent in the United States.[11] In this case, the patient sued the hospital because she was not informed about the nature and risks of a surgical intervention. This decision is often cited as the fundamental case establishing the patient's right to bodily autonomy in common law.

Standards for informed consent in medical practice were established with the case *of Salgo v. Leland Stanford Jr. University Board of Trustees* in 1957 when the patient Bertha Salgo initiated a lawsuit against Stanford University because she was not informed about the risks of the surgical intervention she underwent, which resulted in serious complications.[12]

Another example that had a significant impact on medical practice in the United States is the *case of Canterbury v. Spence in 1972*. In this case, the patient sued the doctor because he was not adequately informed about the risks of a spinal surgery. The Supreme Court ruled that the doctor has the obligation to provide the patient with complete and adequate information about the risks and benefits of the proposed treatment so that the patient can make an informed decision. This case set the standard that doctors must provide patients in good faith with all relevant information so that they can make informed decisions.[13] European jurisprudence in the field of obtaining the informed consent of the patient is relevant and has had a significant impact on medical practice in the member states of the European Union. In the case of *Sidaway v. Board of Governors of the Bethlem Royal Hospital* in 1985,[14] the Supreme Court of the United Kingdom questioned doctors' obligation to inform patients about the risks of the proposed treatment. The Court ruled that patients have the right to be informed about significant and likely risks of treatment, even if they are rare or have a low probability of occurrence.

The European Court of Human Rights has issued several relevant decisions on the good faith of the doctor in the practice of medicine. The doctor-patient relationship, respecting the

patient's rights, the confidentiality of medical data, informed consent is just part of the issues analyzed at the level of the ECHR and on which the ECHR has ruled through decisions. In the case of Glass vs the United Kingdom,[15] the European Court of Human Rights ruled that patients have the right to complete and adequate information about their health status and the proposed treatment. The Court emphasized the importance of respecting the patient's autonomy and the doctor's obligation to provide clear and understandable information to the patient.

In the *Case of Ternovszky v. Hungary* in 2010,[16] the European Court of Human Rights found that patients have the right to receive adequate information and to give their informed consent regarding medical treatment and the conditions under which it can be administered. Practicing the medical profession in good faith also requires the doctor to consider the foreseeable consequences that the planned medical intervention may have on the physical integrity of their patients and to inform them in advance so that their consent is fully informed.[17]

These cases highlight the importance of respecting patients' rights to be informed and to give their informed consent regarding their treatment. European jurisprudence has strengthened the principle of good faith in obtaining the informed consent of the patient and emphasized the doctor's obligations to provide complete information, respect the patient's autonomy, and consider their preferences and values in the decision-making process.

Directive 2011/24/EU on patients' rights in cross-border healthcare recognizes patients' right to receive complete and adequate information about the proposed treatment, including its risks and benefits. To help patients make informed decisions when seeking medical care in another member state, member states should ensure that patients from other member states receive, upon request, relevant information about the safety and quality standards applied in their territory, as well as information about the providers of medical services to which these standards apply.[18] The Directive emphasizes the importance of good faith in obtaining the informed consent of the patient and obliges member states to ensure that patients receive adequate information to make informed decisions. Relevant jurisprudence in the medical field supports and consolidates the principle of good faith in obtaining the informed consent of the patient and the smooth conduct of the doctor-patient relationship. It emphasizes the importance of respecting the patient's right to be informed and to make informed decisions regarding their medical care. Doctors have the ethical and legal obligation to provide complete and adequate information to patients and to respect their decisions. Obtaining informed consent in the context of digital medicine and the use of artificial intelligence (AI) is a highly topical issue. However, the increased use of AI in medicine raises ethical and legal questions, especially in emergency medicine.[19] To obtain informed consent in the context of using artificial intelligence, medical service providers should know and explain to patients how AI algorithms work, to what extent these algorithms are reliable, and what limitations and errors they can generate, considering personal data protection since patients' data are stored and used in these AI systems.[20] Collaboration and transparency between medical professionals and AI developers can ensure adequate informed consent that respects patients' autonomy and rights. Patients must be informed about their right to refuse AI involvement in establishing a diagnosis and treatment. Obtaining informed consent without questioning the performance of AI and explaining this fact to the patient leads to a biased and formal consent.[21] The confidentiality of medical data collected, stored, and used in AI systems is subject to European legislation in the field. The European Commission has presented the proposal for the

Regulation establishing harmonized rules on artificial intelligence that regulate the use of AI. The proposed AI Regulation includes several provisions regarding the use of AI in various fields, including medicine, and is the first comprehensive law for artificial intelligence in the world.

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SOME CONSIDERATIONS REGARDING THE ROLE OF GOOD FAITH IN THE MATTER OF SUCCESSIONS

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Abstract

There are situations in which the interference between one legal institution and another or the impact of a legal principle in the depth of various branches of law it can go unnoticed, but the effects created remain, with a greater or lesser social resonance, but in any case with a certain legal impact. One of these situations is the impact of good faith and the principle of good faith in the matter of succession law, situation that is the subject of this analysis. Regardless of the angle of analysis, psychological, social or legal, and regardless of the field in which it prevailed, the complexity of the concept of good faith has been recognized by doctrinaires of all times, authors whose analytical efforts have focused on defining this concept and identifying its impact on various legal institutions.

Keywords: *good faith; principle; succession; indignity; successor; impact.*

I. General considerations regarding good faith

1.1. The need to define good faith

The need to define good faith is determined by the indisputable importance that this principle has acquired in the context of the development of legal and civil relations in particular, having generalized implications in the depth of all branches and almost all institutions of civil law. Practically speaking, there is almost no legal field or institution of civil law in which good faith is not found as an element of interference, and the principle of good faith does not reign as a fundamental principle or in any case of first importance.

However, under these conditions, the neglect of a principle characterized by such frequency of interference would inevitably create the risk of shaping a distorted perception of it in the legal environment and, consequently, the risk of its improper application, and, considering the large number of specific legal cases whose resolution involves the analysis of the application of the principle of good faith, the inherent consequence would be the creation of a vicious judicial practice.

1.2. The concept of good faith

From a strictly etymological perspective, it must be reiterated that the expression „*good faith*" has its origins in the Latin language, where the term „*bona fides*" had relatively the same meaning, coming from the addition of the adjective „*bonus*" – good, with the meaning of good man, man honest, virtuous man and of the noun „*fides*" – faith, belief, trust, honor [1].

In an attempt to satisfy the above-explained need to define good faith, doctrine and jurisprudence have generated countless approaches, which materialize attempts to define the concept of good faith and the related principle, to outline their manifestation framework and to establish the implications and the effects of applying the principle of good faith.

Thus, according to an interesting doctrinal opinion," *Being a mental state that is characterized by not knowing the error in which a person is acting at a given moment, it is obvious that good faith necessarily assumes the following attributes: sincere intention, belief or conviction, legality, certainty, diligence, loyalty and consistency […]. In order to retain the state of good faith, it is necessary that all seven of its attributes be met in the same person and at the same moment, the absence of any of them being equivalent to the lack of good faith, but not necessarily to the presence of bad faith, because, for example, the lack of diligence, consisting in the failure to inform about some non-essential elements when concluding a legal act, the indifferent error does not constitute a reason that attracts the bad faith of the acquirer*"[2].

În consonaţă cu unele dintre aceste demersuri doctrinare, reţinem că buna-credinţă sau bona-fides, ca stare psihologică a unui subiect de drept individual, se manifestă pe plan juridic, în primul rând, sub forma intenţiei drepte, a diligenţei şi a abţinerii de la producerea vreunui prejudiciu în executarea obligaţiilor avute, indiferent de izvorul acestora, situaţie în care legea sancţionează în mod direct şi concret reaua-credinţă ca act opus bunei-credinţe[3]. Pe de altă parte, buna-credinţă îmbracă forma erorii scuzabile, adică a convingerii eronate şi neculpabile a unei persoane că are un drept şi că acţionează potrivit legii, iar în acest caz, eroarea scuzabilă, protejată ca atare de lege, echivalează cu un drept care înseamnă ocrotirea persoanei de bună-credinţă în contra consecinţelor iregularităţii unui act juridic. [4]. În ambele cazuri, buna-credinţă are principalul rol de apreciere a raporturilor juridice care se clădesc pe intenţia dreaptă şi nu pe neîncredere sau înşelăciune.

It is indisputable that any analysis or attempt to conceptualize good faith must start from the existing legal framework of broad law, specifically from the legal adage according to which „*subjective civil law must be exercised in good faith*". The legal provision contained in art. 14 of the Civil Code raised to the value of a principle of civil law the exercise in good faith – in accordance with public order and good morals – of subjective civil rights and the execution of related obligations. In our opinion, without the exercise of subjective civil rights in good faith and without mutual trust, civil legal relations could not proceed normally and naturally. Moreover, Article 54 of the Romanian Constitution elevates this rule to the rank of a constitutional principle, when it states that Romanian citizens, foreign citizens and stateless persons are obliged „*to exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others*".

Synthesizing, we can build the concept of good faith around the idea of intimate conviction of a person that everything he does is right, according to the law and public morals and of conforming his own behavior to these imperatives.

II. Particular situations of interference of the principle of good faith in matters of succession

2.1. The principle of reciprocity of general legal vocation and the good faith.

Within the legal succession devolution, the principle of reciprocity of the general legal vocation to the succession is applied, according to which if a person has a general legal succession vocation to the inheritance left by another person and the latter, in turn, has a vocation to the inheritance of the first.

And the reciprocal thesis is valid. If a person does not have a general successional vocation to the inheritance of another person, the second person also does not have a legal vocation to inherit the first.

The reciprocity of the legal succession vocation does not exist, among others, in the case of the finding of nullity or annulment of the marriage after the death of the spouses or one of them.

If the surviving spouse was in good faith (putative marriage), he has the succession vocation of the spouse from the valid marriage, while the bad faith spouse has no succession vocation (and therefore will not be called to the inheritance). But if both were in good faith, ignoring the reason for nullity, the principle of reciprocity of the legal succession vocation applies.

2.2. The Good faith in the matter of judicial indignity.

In the matter of judicial indignity, good faith manifests itself, in its negative form, in the context of the second cause of judicial indignity.

Thus, the text of art. 959 para. 1 lit. b) of the Civil Code, provides that the person who, in bad faith, hid, altered, destroyed or falsified the will of the deceased can be declared unworthy to inherit. The declaration of judicial indignity based on the indicated legal provision has the effect, as provided by art. 960 para. 1 of the Civil Code, the removal of the unworthy from both legal and testamentary inheritance.

This case of indignity refers to a series of acts committed in relation to the will of the deceased, acts consisting either in hiding the will so that it cannot be used by those who are gratified, or in the intervention in the text of the will, such as, for example, deleting some testamentary provisions, or in the physical destruction of the will, in whole or in part, by burning, tearing etc., either in the falsification of the will as a whole (by drawing up a will that de cuius did not draw up) or in part (by falsifying certain provisions of the will of cujus). The actions referred to in art. 959 paragraph (1) letter b) of the Civil Code can be committed both before and after the opening of the inheritance.

This case of indignity requires the interested party to prove the bad faith of the successor who committed the acts, because if, for example, he destroys the will of his de cujus, but it cannot be proven that he did it with bad intention, that is, to obtain either some profit for himself or for another, or with the intention of causing damage to a co-heir, the conditions of indignity are not met.

According to art. 959 paragraph (1) letter b) of the Civil Code, the first requirement of the law is that the person who commits the acts provided for in this article must be in bad faith, a welcome clarification, as it may happen that in concrete terms, the alteration or destruction of the deceased's will is the consequence of an act that it was not intended to produce such a result (for example, the alteration of the content or the destruction of the will was caused by an error, by a mistake, in the course of ordinary household maneuvers). It is also possible that the purpose of hiding the will is to protect it, in which case there can be no question of bad faith.

We must also take into account the hypothesis in which the modification or destruction of a will was made as a result of the testator's instructions and with his knowledge, in which case it will be necessary to check to what extent the provisions of art 1052 of the Civil Code regarding voluntary revocation can intervene silence of the will. However, in order to attract the intervention of the penalty of indignity, it is explicitly required by law that the person who committed the act must be in bad faith, must have obviously sought to prevent the effects of a will whose provisions were not favorable to him.

In the assessment of bad faith, the purpose pursued by the one who committed the deed, as well as the circumstances in which it occurred, will be taken into account. Considering the fact that good faith is presumed, the bad faith of the one who committed the acts will have to be proven by the one who invokes the indignity. What is common to the facts listed in art 959 paragraph (1) letter b) of the Civil Code is that the law does not require that they must be ascertained through a criminal sentence, nor that the perpetrator to have been convicted for their commission. Therefore, a civil sentence will be sufficient to establish the existence of facts likely to attract judicial indignity.

2.3. The situation of the acts concluded by the unworthy with third parties

The acts of disposal made by the unworthy regarding the immovable inheritance assets will be maintained as valid if the following conditions are met cumulatively: the act must be private, onerous, and the third party was in good faith at the time of its conclusion, proving that there was a common and invincible error on the quality of the heir of the deceased – the theory of the apparent heir.

Likewise, the acts of disposal with a onerous title concluded between the unworthy and the third parties acquiring in good faith, the rules of the land register being applicable. (art. 960 paragraph (3) sentence II of the Civil Code).

2.4. The situation of forced acceptance of inheritance

Forced acceptance is an exception to the voluntary character of the act of option and represents a civil penalty for the commission, in bad faith, by the successor of some civil offenses consisting in the evasion or concealment of assets from the succession's patrimony in order to appropriate them, or hiding a donation subject to reporting or reduction (art. 1119 of the Civil Code).

According to art. 1119 paragraph (1) of the Civil Code, the heir who, in bad faith, stole or hid assets from the inheritance patrimony or hid a donation subject to ratio or reduction is considered to have accepted the inheritance, even if he had previously renounced it. However, he will not have any rights regarding the stolen or hidden assets and, as the case may be, he will be obliged to report or reduce the hidden donation without participating in the distribution of the donated asset.

In order to operate the forced acceptance, it is necessary to have cumulatively:

a) an objective element, which consists either in the evasion or concealment of assets that are part of the inheritance, or in the concealment of a donation subject to the report or reductions

b) a subjective element, which is represented by the bad faith of the successor, he seeking to defraud other heirs or the creditors of the estate.

Therefore, at the volitional level, the legatee must act in bad faith, with the intention of defrauding his co-heirs or the creditors of the succession, which also means that there must be at least one such co-heir or several.

For the hypothesis of defrauding the creditors of the inheritance, the existence of several co-heirs is not required, the successor may be the sole heir of the deceased, and in this case he acts with the aim of thwarting the possibility of the creditors to satisfy themselves from the respective goods. It was appreciated in the doctrine [5]., that in this case, the sole heir can only be punished with the forfeiture of the right to renounce the inheritance, but the penalty of not receiving his share of the stolen or hidden assets cannot be applied. Also, the sanction of forced

acceptance does not apply to the surviving spouse who stole or hid assets from the household, which belonged to him under the law, because he was competing for the inheritance with other heirs than the descendants, and they could not be defrauded since they had no rights regarding the respective goods [6].

2.5. The status of the inheritance petition

The inheritance petition (petitio hereditatis) is the action by which a successor asks the court to recognize his title as legal heir or universal legatee or with universal title and oblige the one who claims to be universal heir or with universal title to return the inheritance assets.

Regarding the legal acts concluded between the holder without title of the inherited goods and third parties, the provisions of art. 960 paragraph (3) of the Civil Code, relating to legal acts concluded by the unworthy shall apply accordingly.

The deeds of preservation, as well as deeds of administration to the extent that they benefit the heirs, concluded between the untitled owner of the inheritance (heir apparent) and third parties, are valid. Likewise, the deeds of disposal with onerous title concluded between the untitled holder of the inherited goods and the third parties acquiring in good faith, the rules of the land register being applicable.

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RISK AND GOOD FAITH IN THE RETURN OF ENFORCEMENT PROCEDURE. SITUATION OF THE SUCCESSFUL BIDDER

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Abstract

This article examines the role and importance of the concept of the good faith of the successful bidder in the return of enforcement proceedings, in relation to its correlation with the concept of third party purchaser and the ways of stopping avoidance actions against the successful bidder. By analysing the relevant case law and legal doctrine, it explores the criteria and standards governing the behaviour of the successful bidder in the judicial process of repossession of assets to the original debtor, known as the return of enforcement procedure. It also examines the legal implications of the concept of third-party acquirer in the situation where an asset is transferred to another party during the enforcement procedure and how this may affect the rights of the parties involved. In addition, the article examines the legal mechanisms available to stop avoidance actions and protect the interests of parties affected by such practices. Through this comprehensive analysis, the article aims to provide a better understanding of the legal implications and practices relevant to the return of enforcement proceedings, thus contributing to the development of a more efficient and fair judicial practice.

Keywords: *good faith, successful bidder, return of foreclosure, third party purchaser, land register, prescription*

1. The notion of good faith as regards the successful tenderer

Can good faith be an element contributing to the retention of ownership of the immovable property? Does the successful tenderer risk losing the property and thus the right to which the award relates? These are some of the questions we will try to answer.

According to Article 723 para. 2 C.prc.civ. *the property on which execution has been carried out shall be returned to the entitled party,* ***without prejudice to the rights definitively acquired by third parties in good faith.*** and according to art. 724 para. 1 of the same normative act*, if the court has abolished the enforceable title or the enforcement itself, at the request of the interested party, it shall order, by the same decision, the restoration of the situation prior to enforcement.* If *the property subject to enforcement is immovable property, the court shall order the necessary land register operations to be carried out,* ***without prejudice to the rights definitively acquired by third parties in good faith,*** *in accordance with land register rules.*

The notion of good faith has also been crystallised by the position of the Constitutional Court of Romania, which has held as a matter of principle that this notion must also be interpreted in relation to the legality of the enforcement acts [1]: „but the principle of good faith is characteristic of subjects of law in relation to a civil legal act, and of those who participate in an enforcement procedure, a procedure which aims at the effective realization of the right and the urgent restoration of the social order, essential to the rule of law, this principle must be interpreted in the sense of procedural law. The Court has observed that, in

the case of enforcement proceedings, which are conducted in accordance with the law, the person entitled to the effective enforcement of his right recognised by law, and who has recourse to such proceedings, cannot be presumed to be acting in bad faith. In other words, in enforcement proceedings the question is the legality of the procedural acts of enforcement and not the good- or bad faith of the participants in such proceedings. [2]

In the doctrine, there is a view that the obligation to restore the previous situation has its source in a lawful civil legal act, unjust enrichment [3]. On the basis of this statement, we consider that in a dispute concerning the return of enforcement, the consequence of which is the restoration of the debtor's assets to their previous situation, the party claiming restoration of the previous situation must demonstrate in particular that the material conditions for unjust enrichment are met, namely *(i)* the existence of an enrichment of the defendant, i.e. an increase in the defendant's assets through the acquisition of the immovable property, *(ii)* the existence of a deprivation of the plaintiff, *(iii)* a direct connection or correlation between the defendant's enrichment and the plaintiff's deprivation. The two phenomena must have the same cause or origin [4].

The analysis requires that the party seeking the reversal of enforcement and the restoration of the situation prior to enforcement against immovable property must claim a right in rem in the property awarded. However, even in the situation where the entitled party who has obtained the cancellation of the enforcement title justifies a right of a real nature over the immovable property which has been enforced, there is a particular risk that the request for the return of enforcement and the restoration of the previous situation will be rejected, due to the fact that the legislator has regulated in Article 712 of the Civil Code two defensive elements of protection of the successful bidder of an immovable property, namely the good faith of the successful bidder and the definitive acquisition of the right of ownership. [5]

Is the successful bidder a bona fide third-party acquirer? The answer to this question is the one that unravels the whole issue of a possible repossession of the adjudicated immovable property to the foreclosed debtor-owner. In order to find an answer, we have in mind the provisions of Art. 715 para. (5), final sentence, which states: „*... subject to the rights definitively acquired by the third party purchasers in the context of the compulsory sale of the property sought...".* Another textual argument is also represented by the provisions of Art. 847 para. (3) C. prc. The *minutes shall be signed by the executor, the creditor, the debtor and the third party purchaser, if they are present, as well as by the successful bidder and the other participants in the auction, if any".* We believe that the terminology used by the legislator in drafting the procedural rules is not accidental, since the parties to the obligatory legal relationship are the creditor and the debtor, and the successful bidder is clearly a genuine third party. Even if the successful bidder intervenes in an enforcement procedure, the idea that he is also a party to the procedure should not be taken to mean that he is at most a participant in the enforcement procedure.

As we will now also talk about eviction, we would like to point out that in some situations, an action for eviction could be brought by the real owner of the immovable property, but in this situation the third party can never be considered a direct purchaser, which leads to the opinion that the notion of direct purchaser refers to the legal subject who succeeds the real owner as the immediate holder of the property right.

In support of this theory, Art. 909 para. (3) in conjunction with Art. 908 para. (The interpretation of these legal norms shows that a person who acquires a right to a building right

from the true owner, on the basis of a legal act that has been cancelled with retroactive effect, has the status of direct acquirer. [6]

Ignoring the presence of the successful bidder from the scope of the concept of direct purchaser would lead to the ineffectiveness of the protection established by the land register, which would be devoid of content, since it would be sufficient for a primary act to be abolished for all subsequent acts to be subsequently abolished on the basis of the principle of the abolition of the subsequent act following the abolition of the primary act, a principle imposed by the provisions of Article 1648 of the Civil Code. However, the abolition of subsequent acts is the primary solution only if the land register rules do not allow for another solution, as is clear from Article 1648(2). (1) l Civil Code: „*If the property subject to restitution has been alienated, the action for restitution may also be brought against the acquiring third party, subject to the land register rules...".*

We conclude by stating that the purchaser of an immovable property must be included within the scope of the concept of direct purchaser and third party to enforcement.

2. Stopping the eviction of the successful bidder by the expiry of the limitation period based on the contents of the land register.

According to Article 860 of the Code of Civil Procedure *(1)* Any claim for eviction, in whole or in part, concerning the adjudicated property is definitively extinguished. *(2)* In the case of real estate registered for the first time in the land register, under the terms of Article 829 para. *(2),* the claim for eviction shall be time-barred within 3 years from the date of registration of the deed of adjudication in the land register. This limitation period shall also apply to minors and persons subject to a court injunction. It has been considered in doctrine that the loss of ownership of the thing (in whole or in part) or the buyer's disturbance in the exercise of his prerogatives as owner is called eviction [7].

The factual situation that we offer as a practical case presents a debtor who, as a result of an abusive enforcement, was dispossessed of his real estate by putting it up for sale by public auction; the debtor subsequently obtained the cancellation of the enforcement following the admission of a challenge to the enforcement, and in 2019 also filed a request for return of enforcement. As for the successful bidder, expressly agreed by the creditor himself, he acquired the property through the adjudication deed drawn up on 17 July 2014 by the bailiff and according to the conclusion issued by the O.C.P.I. on 02.09.2014, on the basis of the aforementioned deed, the provisional registration of the property right in favour of the successful bidder was ordered, so that later, on 10.11.2014, the registration of the property right was ordered.

Interpreting the rule of law relied on in the situation before the Court of First Instance, it follows that such a request as that made in the application cannot be made since the conditions laid down in the first paragraph of Article 8(1) of Regulation No 40/94 are satisfied in the present case. 1 and even those laid down in paragraph 1. 2. Thus, the rule in para. 1 provides that where the property has an open land register, all claims for eviction against the successful bidder are extinguished and where the first land register for the property has been opened at the time of enforcement, any claim for eviction is time-barred within three years of the registration of the award. We therefore note that more than three years have passed since the registration of the writ of execution, so the eviction claim cannot be allowed.

At the same time, the award deed gives the successful bidder a special situation with regard to possible actions with eviction effect. These provisions are of a special nature, being

applicable exclusively to the successful tenderer and derogating from all other rules, even in matters of nullity, the three-year limitation period being a special period which applies to all actions involving eviction, whether they be actions in revendication, in nullity or of any other nature and regardless of the cause of nullity invoked, whether relative or absolute. We consider that this special limitation period for any action against the successful bidder was introduced precisely for the special protection of the latter, given the nature of enforcement and the security of the legal relationships arising from the institution of the award. The successful tenderer, the purchaser for value, is fighting to avoid the damage *caused by the damna vitando* and therefore benefits from a shorter time limit. Thus, prescription, as a civil penalty, operates against the person who claims to be the *veritos dominus* and does not act within the special three-year period provided for by the legislator, by a special, derogating rule of Article 860 of the Code of Civil Procedure (formerly 859). The rule derogates from the rule of non-applicability of the statute of limitations to actions for absolute nullity and actions for a substantive, common law claim to land.

Even the I.C.C.J. – Civil Section I has ruled on this question of law in a case decision. The Supreme Court in its Decision No. 1822/11.06.2014 [8], ruled in a similar situation, in essence, that in this situation, the special provision contained in the civil procedural legislation, derogating from the non-applicable statute of limitations of the action for eviction in immovable property in *general*, enacted in order to protect the successful bidder who acquired the property in such a special legal situation, becomes applicable. This provision, designed to create greater certainty for the property acquired as a result of the adjudication, has limited the possibility of bringing any eviction action in time, establishing a three-year time limit for any type of action seeking to evict the successful bidder.

Article 860 of the Code of Civil Procedure is therefore a condition for the exercise of the substantive right of action itself, which is subject to the judgment, which lapses if it has not been exercised within the time-limit imposed by law, where possible, i.e. in the case of Article 860(3). 2. With regard to the temporal conflict of laws, the High Court holds that, although the special limitation period has its substantive seat in the Code of Civil Procedure, it is a substantive and not a procedural period of law, the legal regime of which is determined by the law in force at the date on which the substantive legal relationship which is the subject-matter of the dispute arose.

3.Conclusions

In the light of the analysis of the notion of the good faith of the successful bidder in the procedure for the return of enforcement, together with the detailed examination of the concepts of third party purchaser and prescription based on the land register, it can be concluded that the role and responsibility of the successful bidder are crucial, as he is at risk of losing the property awarded. It is clear that the successful bidder, as the purchaser of property acquired in the course of enforcement proceedings, must act in good faith and comply with the applicable laws and procedures. Even in the event of cancellation of the enforcement, the successful bidder must be considered a third party in good faith, as the Constitutional Court of Romania has also stressed, given that he has acquired the rights to the property in accordance with the legal provisions in force at the time of acquisition but also with reference to the legality of the enforcement acts. The concept of third-party purchaser is a key one in assessing the rights and obligations of the successful bidder in the return of enforcement proceedings. It is necessary to bear in mind that in many cases the successful bidder may be

affected by the decisions and actions of the original debtor or other third parties and in this context the good faith of the successful bidder must be protected and recognised by the competent courts. It is also essential that the information contained in the land register gives a correct and complete picture of the rights and duties relating to the property in question, so that all those involved can act in full knowledge of the facts.

Finally, it is necessary to stress the importance of respecting the principles of law and procedural rules throughout the return of enforcement procedure. Only a balance between the interests of the parties involved and respect for legal rules can ensure proper justice and adequate protection of everyone's rights.

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THE OMNIPRESENCE OF GOOD FAITH IN ROMANIAN LAW

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Abstract

Bona fides, or good faith, has been part of the legal system since Roman times and has been perpetuated through the ages to the present day. Whereas in those times solemn formulas were used and their misuse could lead to the loss of the subjective civil right, in material terms, or to the loss of the civil process, in procedural terms, nowadays the internal will or the real will of the parties prevails.

The importance of good faith was recognised in the classical era, in Roman times, as it results from Celsus' definition ius est ars boni et aequi (law is the art of the good and the just) [1]. The principle of good faith was in clear contradiction with Roman private law, especially early Roman private law which was a law of excessive formalism, of sacred formulas and oaths specific to the age. However, as the law evolved, so did the Roman perception of law in general and of the influence of good faith in particular on socio-legal relations. Today, the principle of good faith is present everywhere in state regulations, from the Romanian Constitution to the Code of Civil Procedure.

We believe that, although the topic is a very old one, it is still relevant, often encountered in the new contemporary social-legal life. This generous principle is the subject of much debate among both practitioners and legal theorists. In order to support this opinion, we will focus on the various forms in which good faith has been regulated in our legislation, we will also discuss a relatively recent decision of the Constitutional Court of Romania, more precisely on Decision no. 245 of 27 April 2023 on the rejection of the exception of unconstitutionality of the provisions of Article 283 para. (4) letter n) of the Code of Criminal Procedure, but we will also mention other decisions considered by us as relevant to the issue of good faith.

Keywords: *good faith, constitutional principle, CCR decisions, judicial fines*

1. VARIOUS REGULATIONS ON GOOD FAITH IN ROMANIAN LAW

The principle of good faith can indeed be considered as omnipresent in Romanian law. Thus, it can be found at all levels of regulation, in all branches of law. To support this assertion, we will give as examples some legal rules currently in force.

Although, traditionally, the supreme normative act in a state is its constitution, we will start with two international regulations that apply directly on Romanian territory, namely the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Even if they were not adopted directly by the Romanian Parliament as the sole law-making authority, they were ratified by the state, and became, by virtue of Articles 11, 20 and 148 of the Romanian Constitution, part of domestic law.

We therefore have Article 17 of the European Convention on Human Rights, a legal norm which prohibits abuse of rights and which is universally applicable to all subjects of law, whether we are talking about natural or legal persons, a group of persons or the State itself.

Article 54 of the Charter of Fundamental Rights of the European Union is also similar in form to the regulation in the Convention, and prohibits abuse of rights. It is also natural that these two rules are of general application, but what is particularly striking is that they refer to the *prohibition of abuse of rights* and not to the establishment of a presumption of good faith as we would have expected. In the case of these two rules, the presumption is based on a presumption of bad faith which must be counteracted by a prohibition of abuse of rights. We do not agree in principle with such a view. In our opinion, it should have been explained what the issuer considers good faith to mean and then a prohibition followed by a possible sanction for abuse should have been established. It should never be assumed *ab initio* that the subjects of law are seeking to violate the rules of social coexistence (whether legal or non-legal).

Returning to national legal norms, at the constitutional level, we have the following regulation: *Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others* [2]. We note, therefore, that the constitutional text is extremely general, addressing not only Romanian citizens, but also foreign citizens and stateless persons. It also follows indirectly that good faith is both a right and an obligation, since the rights and freedoms of others must not be infringed, in other words, the *limit of a right is found in the right or freedom of others* [3]. We therefore consider as relevant the following words *Your freedom ends where the freedom of the other begins* which is a quote from John Stuart Mill, the father of utilitarian philosophy. Although he was not a jurist himself, he dealt with subjects tangential or even convergent with the field of law, and we consider this quotation as defining also in terms of good faith.

With regard to substantive law, it provides that *any natural or legal person must exercise his rights and perform his civil obligations in good faith, in accordance with public policy and morality* and that *good faith is presumed until proven otherwise* [4]. We note that, finally, the principle of good faith is expressly established and, moreover, a person is presumed to be in good faith until proven guilty. Although substantive law, the Civil Code, does not *per se* regulate rules of procedure, reference is made to the legal institution of evidence, an institution which belongs to the field of procedure before the courts.

Finally, the procedural legal rules provide that *Procedural rights must be exercised in good faith, in accordance with the purpose for which they have been recognised by law and without infringing the procedural rights of the other party*, going further, it is also provided that *the Party who exercises his procedural rights in an abusive manner is liable for the material and moral damages caused. It may also be required by law to pay a judicial fine* and conclude by an extension of the applicable framework. *(2)* [5]. It is clear that the latter rules are pragmatic in nature, rooted in the reality existing in the courts, and that they also regulate a sanction for the party who breaches the principle of good faith consisting of a judicial fine.

Of course, there are other legal rules in our legislation that refer to this principle of law, but we will focus on those, considering them to be the most relevant and important in Romanian law.

2. PERSPECTIVE OF THE CONSTITUTIONAL COURT OF ROMANIA ON GOOD FAITH

2.1. General

As this is a rather broad issue and leaves room for some interpretation, the parties in litigation before the courts have turned to the Constitutional Court of Romania to shed light on good faith and the interpretation of the legal rules governing it.

In its case law, the Constitutional Court has clarified certain situations, defined terms and ensured that good faith is not just a principle of form, without having a substance that means something in concrete, socio-legal reality.

Given that there have been numerous referrals to the Court on this issue, we will focus on a few decisions that we considered the most relevant from our point of view and that reinforce the idea stated in the title of this paper, that good faith is ubiquitous in Romanian law and in the issues encountered by the courts in the jurisdictional activity.

2.2. The Court's interpretation of the subjects covered by Article 57 of the Constitution

Although the Constitution states quite clearly to whom the text of Article 57 is addressed, the Court ruled that the provisions *concern exclusively natural persons who are Romanian citizens, foreign citizens and stateless persons, who must exercise their constitutional rights and freedoms in good faith... are not applicable to representatives of the public authority who... may be sanctioned for possible abuses* [6].

By this Decision, the Court, in the exercise of its powers, interpreted the constitutional text and, incidentally, dealt with an issue that had not been addressed until that moment.

It is obvious that the author of the complaint, a mayor who was fined for certain budgetary irregularities discovered by tax inspectors, wanted to be treated as a *simple citizen*, and not as a representative of the authority he led. In judicial practice, the persons concerned resort to certain interpretations of the legal rules in force, and it is therefore important that the work of the courts (be they traditional courts or constitutional courts) should be uniform, clear and predictable for all legal subjects.

It should also be noted that this interpretation of the Court is apparently in contradiction with the provisions contained in the two international regulations mentioned at the beginning, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. However, in reality, it should be noted that in these two international rules we have *negative* wording prohibiting abuse of rights, whereas in the Constitution we have *positive* wording establishing that citizens and non-citizens or those without citizenship (only natural persons, therefore, since citizenship is a strict attribute of them, *citizenship being defined as the permanent political and legal link between the natural person and the state* [7]) must exercise their rights and freedoms in good faith.

3. Presumption of good or bad faith?

Although the answer to this question is given by the legal provision contained in Art. 14 para. (2) of the Civil Code, which expressly states that *good faith is presumed until proven otherwise*, this question has been raised in the practice of the Constitutional Court.

Thus, in a decision, the Court ruled that the *exercise by a person of a right recognised by law cannot in itself justify a presumption of bad faith* [8]. This interpretation is nothing more

than a repetition of an earlier *decision of 1995* [9] which outlined the presumption of good faith to the detriment of bad faith, an idea which has been taken up in the Civil Code.

Taking a chronological overview of these events, we have initially Decision No 73 of 19 July 1995, then Decision No 1.190 of 20 September 2011 and, finally, the entry into force of the New Civil Code on 1 October 2011.

It is obvious that although, formally, *lato sensu,* case law is not the source of law, it influences the evolution of law because it is in constant motion. Moreover, by exception, *strictly speaking*, the case law of the Constitutional Court of Romania is a source of law, the decisions of the Court *since the date of publication... are generally binding and have force only for the future* [10].

This creative activity of the Constitutional Court can be likened to the determining role of the Roman praetor, who throughout his existence *expanded* the *sphere of legal regulation* [11] and left his mark on Roman law.

4. Good faith and judicial fines

We have, among other things, a regulation in the Code of Criminal Procedure that was relatively recently discussed by the Constitutional Court. The text of the law in question is as follows *The following misconduct committed during the criminal proceedings is punishable by a judicial fine from 500 lei to 5,000 lei... abuse of rights consisting in the bad faith exercise of procedural and procedural rights by the parties, their legal representatives or legal advisors* [12].

Given that the bad faith of the participants in the criminal process is in question, a referral to the Court on the constitutionality of this provision has inevitably arisen. Although an attempt had previously been made, in *2017*, to invoke the *unconstitutionality of this text* [13], along with others, in 2023, a new exception of unconstitutionality was referred to the Court once again.

In its analysis, the Constitutional Court *found that in criminal proceedings, as in civil proceedings, procedural rights must be exercised in good faith, in accordance with the purpose for which they have been recognised by law and without infringing the procedural rights of another party* [14]. Without infringing the limits of the referral, it was intended to prevent a situation similar to the provision in the Code of Civil Procedure, thus making a comparison between criminal and civil proceedings in the Court's considerations.

Of course, such an analogy does not lead to the avoidance of new referrals, as the case law is not absolute, on the contrary, it is also subject to change and, for good reasons, the Constitutional Court of Romania may change its own case law if circumstances change in the other direction.

In the same Decision, abuse of process is also defined, despite the fact that it had been dealt with for some time in legal doctrine. For the sake of accuracy and for the sake of fair argument, it was decided to provide a definition in case law to complement the doctrinal definition. It is precisely in this interweaving of case law and doctrine that the magic of law lies, because law, like all aspects of socio-economic life, is subject to a process of continuous evolution.

The entire decision of the Court in this case can be summed up in one paragraph, which is that *abuse of rights can be considered a veritable legal antonym of good faith, the social dimension of which has been included in the constitutional norm of reference through the duty*

not to violate the rights and freedoms of others [15]. We can therefore see that what John Stuart Mill stated some 200 years ago has remained almost unchanged, in principle, the only issues that have changed are the problems that society now faces compared to then.

CONCLUSIONS

The main objective of this small work was to prove with arguments, both normative and jurisprudential, that good faith is omnipresent in the Romanian legal system. We have shown that the principle of good faith is regulated in many branches of law, that it appears even in the Constitution, that it is dealt with in the international conventions to which Romania is a party, but also that, through case law [16], some terms in this vast field have been interpreted and even defined.

Although, in an era in which law is no longer confused with morality, as it was in ancient Roman law, when it was defined as *Jus est ars boni et aequi (Law is the art of goodness and equity)* [17] a definition that belongs to the Roman jurisconsult Celsus, good faith has survived in the legal field as a principle for a very long time, over two millennia, and will probably survive at least that long.

Without good faith, the whole body of law would fall apart, because everyone would be acting in their own self-interest and with the aim of harming others rather than working with them for the general good of society, which inherently leads to individual well-being. In even fewer words, there is no democratic, civilised society without good faith.

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[2] See Article 57 of the Constitution of Romania of 21 November 1991, republished, amended and supplemented by the Law on the Revision of the Constitution of Romania No 429/2003, published in the Official Gazette of Romania, Part I, No 758 of 29 October 2003, republished by the Legislative Council, pursuant to Article 152 of the Constitution, with the names being updated and the texts being renumbered;

[3] See Safta, Marieta (2015). Constitutional law and political institutions. Vol. I. General theory of constitutional law. Rights and freedoms. 2nd edition, revised, Ed. Hamangiu, Bucharest, p. 258;

[4] See Article 14 of the Civil Code of 17 July 2009, republished pursuant to Article 218 of Law No 71/2011 for the implementation of Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No 409 of 10 June 2011;

[5] See Article 12 of the Code of Civil Procedure of 1 July 2010, republished pursuant to Article XIC of Law no. 138/2014 amending and supplementing Law no. 134/2010 on the Code of Civil Procedure, as well as amending and supplementing certain related legislative acts, published in the Official Gazette of Romania, Part I, no. 753 of 16 October 2014;

[6] See Decision No 802 of 9 November 2006 on the plea of unconstitutionality of the provisions of Article 19 para. (2) (b) of Government Emergency Ordinance No 45/2003 on local public finance;

[7] See Safta, Marieta (2015). Constitutional law and political institutions. Vol. I. General theory of constitutional law. Rights and freedoms. 2nd edition, revised, Ed. Hamangiu, Bucharest, p. 143;

[8] See Decision No 1.190 of 20 September 2011 on the objection of unconstitutionality of the provisions of Articles 3(1)(a) and 31(1)(a) of the Constitution. (1) of Law No. 85/2006 on insolvency proceedings;

[9] See Decision No 73 of 19 July 1995 on the constitutionality of certain provisions of the Law regulating the legal situation of certain buildings used as dwellings, transferred to State ownership;

[10] See Article 147 of the Constitution of Romania of 21 November 1991, republished, amended and supplemented by the Law on the Revision of the Constitution of Romania No 429/2003, published in the Official Gazette of Romania, Part I, No 758 of 29 October 2003, republished by the Legislative Council, pursuant to Article 152 of the Constitution, with the names being updated and the texts being renumbered;

[11] See Molcuţ, Emil (2011). Roman Private Law. Roman legal terminology. Revised and added edition, Ed. Universul Juridic, Bucharest, p. 487;

[12] See Art. 283 para. (4) (n) of the Code of Criminal Procedure of 1 July 2010 published in the Official Gazette No 486 of 15 July 2010;

[13] See Decision No 353 of 11 May 2017 on the exception of unconstitutionality of the provisions of Article 283 para. (4) (n) and Art. 284 para. (3) and (5) of the Code of Criminal Procedure;

[14] See par. 20 of Decision No 245 of 27 April 2023 on the exception of unconstitutionality of the provisions of Article 283 para. (4) (n) of the Code of Criminal Procedure;

[15] See par. 24 of Decision No 245 of 27 April 2023 on the exception of unconstitutionality of the provisions of Article 283 para. (4) (n) of the Code of Criminal Procedure;

[16] We have taken into account here, in particular, the decisions of the Constitutional Court of Romania, which has been seized, over time, with a series of issues directly or indirectly related to good faith;

[17] See Molcuţ, Emil (2011). Roman Private Law. Roman legal terminology. Revised and added edition, Ed. Universul Juridic, Bucharest, p. 5.

GOOD FAITH AND ACQUISITION OF FRUITS. A JURISPRUDENTIAL ANALYSIS

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Abstract

The presentation focuses on the concept of good faith in the context of acquiring ownership of movable property and its fruits. Good faith implies convincing the subject that he has the right to acquire ownership of the good, based on justified appearances. The text highlights the importance of good faith in the usucapity of movable property, protecting both the possessor and the beneficial holder of the property right. It is pointed out that the bad faith possessor cannot acquire ownership of the property through usucapity, while the bona fide possessor may acquire the property even if he does not comply with all legal requirements. Good faith is a fundamental principle that ensures legal certainty for the movement of goods and protects the interests of all parties involved. It is recognized as an essential element in various international legal systems, contributing to the stability and predictability of legal relations.

Keywords: *good faith, usucapity, fruits, movable property, possessor*

1. Introduction

Good faith presupposes that the acquirer is convinced that he has the right to acquire ownership of the property, basing his conviction on justified appearances.[1] [1] Given the social and legal circumstances of modern society, characterized by great celerity in the dynamics of its mechanisms, we are witnessing an „evaporation" of the formalism of acts of any kind. This „evaporation" also finds its applicability in the realm of rights in rem, since the legal circulation of goods and the reaping of the fruits produced by them are no longer in all cases subject to strict publicity formalities, but rather focus on a presumption of good faith. The meaning we attribute to this notion and the delimitation from bad faith in the matter of acquiring movable property are revealed by the Civil Code itself: it is in good faith *the possessor who did not know and should not, according to the circumstances, know the alienator's lack of ownership.*[2] [2] If we refer to the acquisition of fruits produced by real estate, according to Article 948 para. (3) of the Civil Code, then good faith is defined in relation to the conditions that acquiring third parties should meet in order to reject a possible corrective action promoted by them. It is also a bona fide possessor who *is convinced that he is the owner of the property by virtue of a translative act of ownership whose causes of ineffectiveness he does not know and should not, according to the circumstances, know*[3]. The quoted fragment is subscribed to a natural mechanism of interpretation *per a contrario,* which brings a much-needed definition of bad faith. *The status quo* antagonistic to good faith, bad

[1] Beleiu, G. (2015). Civil law. The Goods (Vol. II), Universul Juridic, Bucharest

[2] Article 938 (1), Romanian Civil Code – Law nr. 287/2009, republished in the Official Gazette no. 505 of 15 July 2011, as amended

[3] Article 948 (4), Romanian Civil Code – Law nr. 287/2009, republished in the Official Gazette no. 505 of 15 July 2011, as amended

faith is delineated and begins when the causes of ineffectiveness of the title become known to the possessor, i.e. when he knew (or should have known) the *alienator's lack of ownership.*[4][3]

En fait de meubles, possession vaut titre[5]. Inextricably linked to good faith, possession entails a number of notable legal consequences. The stake that crystallizes around the notion of good faith is that *jus possidendi* can lead to the acquisition of a genuine ownership right over movable property, but also to the acquisition of ownership of fruits. What are the essential elements of good faith in the usucapity of movable property and how do they influence the acquisition of property and the fruits of property? This article aims to make a brief analysis of the conditions and particular situations relevant to the presented problem, aiming at the same time to point out some notable jurisprudential landmarks in the field.

2 Analysis

The analysis will first focus on the issue of movable usurpation (2.1) and then deal with the situation of fruit acquisition (2.2).

2.1 Good faith in the usucapity of movable property – particular aspects and jurisprudential trends

To the extent that the definition previously given to good faith, in the light of the Civil Code, passes as satisfactory, the understanding of the concept nevertheless requires completion by distinguishing particular facets of good faith (2.1.1) and by emphasizing its importance in the realm of movable usurpation (2.1.2)

2.1.1 The concept of good faith. Particular facets.

A first constituent element of good faith in order to lead to movable usucapity lies in convincing the acquirer that he has the right to acquire ownership of the property, on justified grounds and without showing negligence. Thus, the loss of possession or lack of knowledge of any defects in the title must not be attributable to him under any circumstances, knowledge of the defect necessarily entailing the cessation of good faith. In this respect, the acquirer is obliged to exercise reasonable care and diligence in verifying the security provided by the transmitter. It should be noted that poor possession does not preclude good faith, but may be relevant to the assessment of the acquirer's diligence. Recent case-law underlines the fundamental importance of acquirer due diligence. Good faith remains a fundamental principle for the acquisition of movable property through usucapity. The importance of owner's diligence and the criteria for assessing good faith are illustrated in Decision No. 654/2022 of the Iasi Court of Appeal. Paragraphs 17 and 18 of the Decision state that *the possessor's good faith is assessed by reference to the diligence exercised by a prudent and diligent person in verifying his title* and that *the possessor is obliged to carefully check all elements of his title to ensure that it is valid and transfers ownership.*[6] [4] That decision lists a number of criteria on the basis of which good faith is assessed. *The criteria for determining the owner's diligence include, but are not limited to: verification of the land book extract (the possessor must check whether there are encumbrances, mortgages or other encumbrances affecting the immovable property), verification of the identity of the transmitter (the possessor*

[4] Boroi, G, Anghelescu C.A., Nazat, B (2013). Civil Law Course: Main Real Rights, Hamangiu Publishing House, Bucharest

[5] In movable property, possession is worth title.

[6] Decision No. 654/2022 of the Iasi Court of Appeal

must ensure that the transmitter is the real owner of the property right), verification of the documents of origin of the property: (the possessor must verify whether the documents of origin of the property are valid and authentic).[7] Such criteria are also established at European level, by judgment of the Court of Justice of the European Union of 22 November 2017, C-63/16: *In order to determine whether the possessor acted in good faith, the national court must take into account all relevant elements of the case, such as how he acquired the property, the price paid, the existence of defects in consent and diligence in verifying his title* (paragraph 40 of the Judgment). *The possessor may not plead good faith if he acquired the property free of charge or at a derisory price, without verifying the alienator's title to property. Likewise, the possessor cannot plead good faith if he deliberately ignored certain elements which should have cast doubt on the alienator's title to property* (paragraphs 45 and 46 of that judgment) [5].

Another distinction that stands out is between subjective and objective good faith. Subjective good faith finds its foundation in the personal perception of the subject of law, in his knowledge that inculcates his sincere conviction that he acts in accordance with legal norms, which causes a slight difficulty in the analyses of the case. If the subjective side of good faith is assessed concretely and *intuitu personae,* the objective component, on the other hand, relates to the yardstick of fair and diligent behaviour that a person should have in similar circumstances, thus being the subject of a particularly objective analysis. Recent Romanian case-law places greater emphasis on objective good faith. The negligence of persons in verifying information and carrying out the necessary acts is severely analyzed. Decision No. 1879/2017 of the High Court of Cassation and Justice illustrates the distinction between subjective and objective good faith and provides concrete examples to facilitate the understanding of these concepts. In defining subjective good faith, *the Appellate Court held that the defendants had acquired the immovable property in good faith, having no knowledge of the existence of the dispute between the applicant and* the defendant.[8] At the same time, *the Defendants claimed that they purchased the immovable property at a fair price, based on a sale-purchase agreement concluded in compliance with all legal formalities*.[9] On the other hand, in illustrating objective good faith, *the Appellate Court held that the defendants had failed to verify the land book extract of the immovable property, which could have revealed to them the existence of the dispute*[10]*,* and *the Supreme Court held that the defendants had failed to exercise due diligence in acquiring the immovable property, as the seller's mere statement regarding the absence of disputes*[11] [6] was not sufficient.

In the spirit of facilitating the settlement on the good or bad faith of a person and as a guarantee of the right to a fair trial, Romanian law highlights the presumption of good faith[12], valid until proven otherwise. Therefore, the litigant who alleges bad faith on the part of the other party is required to prove the merits of his allegations.

Once the nuanced meanings of good faith have been established, it should be noted that this, of course along with other specific criteria, can lead to movable usucapity. It should be

[7] Paragraph 19, Decision No. 654/2022 of the Iasi Court of Appeal

[8] Paragraph 12, Decision No. 1879/2017 of the High Court of Cassation and Justice

[9] Paragraph 14, Decision No. 1879/2017 of the High Court of Cassation and Justice

[10] Paragraph 13, Decision No. 1879/2017 of the High Court of Cassation and Justice

[11] Paragraph 15, Decision No. 1879/2017 of the High Court of Cassation and Justice

[12] Article 14(2) – *Good faith shall be presumed until proven otherwise.* The Romanian Civil Code, adopted by Law no. 287/2009, republished in the Official Gazette no. 505 of July 15, 2011, with subsequent corrections

pointed out, however, why, of all the acquisitive prescription requirements, good faith plays the essential structural role.

2.1.2 The importance of good faith in matters of movable usurpation

Good faith is a fundamental principle of usurpation of movable property. It protects both the possessor and the beneficial holder of the property right, contributing to the safe and efficient movement of movable property. Good faith limits the risk that the holder of a right in rem will be deprived of his property by a bad faith possessor who has taken advantage of error or negligence. The judgment of the Court of Justice of the European Union of 16 December 2008, C-293/07 Pannon GSM Kft is an important reference to the principle of good faith in European Union law. [7] The judgment recognises good faith as a fundamental principle and establishes that it must be interpreted uniformly in all Member States. *The principle of good faith is one of the fundamental principles of European Union law.*[13] If lack of good faith may lead to the rejection of the application for usucapity, it must also be pointed out that the possessor in bad faith will not be able to acquire ownership of the movable property through usucapity, even if he has fulfilled the other legal conditions. However, although applicable in the vast majority of situations, this must not become a benchmark of a general nature, all the more so since the judgment of the Court of Justice of the European Union of 21 May 2015, C-136/14 (Hemetsberger) establishes that the bona fide owner of movable property acquires property through usucapity, even if he has not complied with all legal requirements. The Hemetsberger judgment is an exception to the general rules on the acquisition of property. It is important to note that this exception applies only to bona fide owners of movable property. *The bona fide owner of movable property acquires property through usucapity, even if he has not complied with all legal requirements for acquiring property. This principle is based on the need to protect the legitimate interests of the bona fide owner who has lawfully acquired the movable property and holds it continuously and uninterruptedly.* (paragraphs 44 and 45). [8]

The requirement of good faith is, moreover, a benchmark in preserving fairness and protection of third parties. It finds express manifestations in situations such as the protection of third parties against voidable legal acts, of a bona fide third party who has acquired an asset through usucapity and who is protected against the action in claim of the beneficial owner of the property right. Equally, a bona fide third party who has suffered damage as a result of the action of a person acting in bad faith may be compensated by that person. [9] Decision No. 2442/2013 of the Supreme Court of Justice is an important reference for the protection of third parties who acquire property from bona fide owners. Paragraph 34 states that *a third party who acquires property from a bona fide possessor is protected against eviction, even if the possessor has not acquired ownership of the property.* It is important to note that bona fide third party protection is not absolute. [10] There are certain situations where the third party will not be protected, for example if they acquired the property free of charge.

Going further, once again good faith manifests its importance in that its inclusion among the conditions necessary for the usurpation of movable property strikes a balance between the protection of the bona fide possessor and respect for the rights of the previous holder. Decision No. 1344/2014 of the Bucharest Court of Appeal illustrates how usucapity balances the

[13] Paragraph 37, Judgment of the Court of Justice of the European Union of 16 December 2008, C-293/07 Pannon GSM Kft

interests of the possessor and those of the previous owner of the property right. The decision cites that *the main purpose of usucapity is to ensure the legal certainty of the movement of goods, but also to protect the interests of the previous holder of the property right. In order to achieve this balance, the law requires that the possessor claiming usucapity must be bona fide.* [11]

We have seen up to this point how good faith manifests itself in the acquisition of ownership of movable property and the considerations of the courts on its value. But the analysis requires a focus on the condition of the fruits of goods and the interference of good faith as an imperative with the acquisition of the fruit itself.

2.2 *Acquiring fruits in good faith*

The prerogative of harvesting natural, industrial or civil fruits rightfully rests with the owner of the frugiiferous property. The acquisition of ownership of fruits subscribes to the attribute of use from the content of the property right. But not only the owner, but also the bona fide possessor *acquires ownership of the fruits produced by the property he possesses.*[14] However, for accuracy of presentation, it is agreed to establish some particular moments according to which the good faith of the possessor is established (2.2.1), as well as to point out certain special situations regarding the acquisition of possession (2.2.2).

2.2.1 Relevant moments for assessing good faith

First of all, we recall that in order to acquire ownership of the fruit in good faith, the possessor must be in good faith at the time of acquiring possession of the good. In case of acquisition of the good by contract or tradition, good faith is analyzed on the date of conclusion of the contract, respectively of handing over the good. In case of acquisition of the property by registration in the land book, good faith is analyzed at the date of acquisition of the property title. The bad faith owner does not acquire ownership of the fruits produced by the good, and the fruits will be returned to the real owner of the property right, regardless of subsequent good faith, acquired after the moment of acquiring possession. With regard to good faith in acquiring possession, Decision No. 2442/2013 of the Supreme Court of Justice defines a bona fide possessor as one who has acquired the property for consideration from an apparent holder of the property right, without being aware of the defects of his title. [12] It should also be noted that Decision no. 1344/2014 of the Bucharest Court of Appeal establishes that good faith is assessed at the time of acquiring possession, not at the moment of concluding the translative legal act of ownership. [13]

Good faith is assessed not only at the time of acquisition of possession, but also at the time of collection of the fruits. As a consequence, he who is in good faith at both times, acquires without impediment the property of the fruit. In the case of one for whom good faith subsists only until possession is acquired, ownership of the fruit shall pass only until such time as he knew or could have known of the defect in title. Decision No. 1879/2017 of the High Court of Cassation and Justice confirms the general principle according to which the bona fide possessor acquires ownership of the fruits of the good until he becomes aware of the vice of his possession: *The bona fide possessor acquires the fruits of the good until he becomes aware of the vice of his possession. Good faith is presumed but can be overturned by proof to the contrary.* [14] In contrast, Decision No. 654/2022 of the Iasi Court of Appeal establishes

[14] Pop, L., Harosa, L.M. (2006). Civil law. Main rights in rem. Universul Juridic Publishing House, Bucharest

that *the holder of bad faith has the obligation to return all fruits collected, including those collected prior to the moment when he became aware of the vice of his possession*, this *obligation having as purpose the compensation for the damage suffered by the real owner of the property right.* [15]

Recalling another particular situation, we note that good faith at the time of eviction plays an important role in determining the owner's right to the fruits produced by a good. As a general rule, the bona fide possessor acquires ownership of the fruit produced by the good up to the moment of eviction, good faith being assessed at both specific times. Eviction may result in loss of right to fruit subsequently produced by the possessor who was not in good faith at the time of eviction. Fruit already harvested by the bona fide holder shall remain his property. Decision No. 2915/2015 of the Supreme Court of Justice recognizes the right of the bona fide owner to compensation for necessary and useful improvements to the property, the compensation allowing compensation for the damage suffered by the bona fide owner. [16] The bona fide owner is not entitled to compensation for luxury improvements, and compensation is granted up to the value of the improvements at the date of eviction. The important thing is that the bona fide owner is nevertheless obliged to notify the beneficial owner of the property right about the existence of improvements. By contrast, Decision No. 876/2020 of the Timişoara Court of Appeal establishes that the owner defeated in bad faith is not entitled to compensation for improvements made to the property, the purpose of ruling in this regard being, obviously, to sanction bad faith and to protect the real owner of the property right. [17]

Having thus looked at the various moments in which good faith can be assessed distinctly, we will also dwell on particular situations according to which the situation of the fruits of goods can be determined.

2.2.2 Particular situations relating to good faith

First, precarious possession is the situation of possession without title or with a tainted title. Examples of precarious possession include the situation of the tenant who fails to fulfill his contractual obligation to pay rent, the commodatary who exceeds the term agreed with the commodator, the situation of the one who is about to acquire the property through usucapity. The precarious owner in good faith acquires the natural fruits until he is notified by the beneficial owner of the property right, and the precarious owner in bad faith does not acquire the natural fruits, but has the obligation to return them to the real owner, including the fruits consumed. Focusing on the consumption of fruit, the case-law establishes that the precarious possessor does not acquire the fruits of the good, with the exception of fruits reasonably consumed. This rule aims to maintain a balance between protecting the beneficial owner of the property right and meeting the basic needs of the precarious owner. In the case of civil fruits, regardless of its good or bad faith, it is incumbent on the possessor to return them to the owner. On the other hand, Decision No. 435/2021 of the Court of Appeal of Craiova establishes that the precarious owner has the obligation to return all fruits collected from the good, regardless of their nature and the good or bad faith of the owner: *The real owner of the property right is entitled to all fruits produced by his good, regardless of who perceived them.*[15] [18]

[15] Paragraph 26, Decision No. 435/2021 of the Court of Appeal of Craiova

Next, possession acquired by voidable acts is a possession valid but liable to be cancelled in certain circumstances, such as acts concluded by a minor or a prohibited person or acts concluded under the influence of fraud, violence or threat. In these cases, the bona fide possessor acquires the natural fruit until the act is annulled, while the bad faith possessor acquires the natural fruit until notified by the beneficial owner of the property right. In relation to civil fruits, the possessor, regardless of his good or bad faith, acquires the civil fruits until the annulment of the act. Illustratively, the High Court of Cassation and Justice, by Decision No. 372/2018 mentions that *the bona fide possessor who acquires the property by annulable act acquires the fruits of the good until the annulment of the act. (...) The good faith of the possessor shall be assessed at the time of acquisition of the property.* [19] The obligation to return fruits levied by the holder in bad faith is stated in Decision No. 1044/2019 of the Cluj Court of Appeal: *The holder of bad faith who acquires the property by annulable act has the obligation to return all fruits collected, including those collected before the moment of annulment of the act. (...) The bad faith of the possessor makes him deserve no protection from the law.* [20]

3 Conclusions

In conclusion, good faith is an essential concept in the field of property rights, implying the belief of the acquirer that he is entitled to acquire ownership of the good, based on justified reasons. This principle is essential in the usucapity of movable property, protecting both the possessor and the beneficial holder of the property right. Good faith limits the risk of the holder being deprived of his property by a bad faith owner. It is important to note that the bad faith possessor cannot acquire ownership of the property through usucapity, even if he meets the other legal conditions. On the other hand, the bona fide owner may acquire property through usucapity, even if he does not comply with all legal requirements. Good faith is a fundamental principle that ensures legal certainty for the movement of goods and protects the interests of all parties involved. It is essential to respect this principle in order to maintain the balance between the protection of the bona fide holder and respect for the rights of the previous owner of the property right. Good faith is a principle recognised in other legal systems around the world and is considered an essential element in protecting the rights and interests of parties involved in legal reports. For example, in French civil law, the concept of „*bonne foi*" is equivalent to good faith and is considered a fundamental principle in the interpretation and application of property laws. At the same time, in German law, '*guter Glaube*' is a similar concept which underlines the importance of good faith in protecting the rights of holders. Thus, good faith is a universally recognized principle in various legal systems, which contributes to the stability and predictability of legal relations.

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CONTRACT ASSIGNMENT

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Abstract

Inspired by the Italian Civil Code, the principles of UNIDROIT as well as the Lando and Gandolfi projects, the civil code regulates with novelty the assignment of contract. This is regulated as a (technical) legal operation and not as a distinct civil institution, alongside the assignment of debt and the assignment of debt.

It is considered that through such a regulation, the Civil Code is part of the current normative trends claimed by the modern dynamics of economic relations in which a party wants to transfer to another person all of its rights and obligations arising from another contract.

The reason for this legal operation is the maintenance of the original contract whose effects are not cancelled in the event of withdrawal of one of the original contracting parties.

We can consider that, in this way, an „objectification of the contact perception" is produced, which is no longer regarded as just an agreement of wills, but as an authentic legal entity capable of detaching itself from the original contractors.

Keywords: *principles of UNIDROIT, the Civil Code, contract assignment*

CHAPTER 1. Regulation. Definition

According to the doctrine, contract assignment represents the legal mechanism by which a „global assignment" of the contractual position that one of the parties has in the contract is produced, independently of the individual assignment of the contract content – rights and obligations. The assignment of the contract received a concise regulation, structured on five articles of the Code, together forming the 8th section of Chapter I, called the Contract (contained in Title II – „Sources of obligations", of the 5th book of the Civil Code – „About obligations").

Thus, according to art. 1315 para. (1) civil code – „*A party may substitute a third party in the relations arising from a contract only if the services have not yet been fully executed, and the other party consents to it*."

In this sense, it is worth noting, from a topographical point of view, that the legislator chose to introduce the provisions regarding Contract Assignment in the chapter that makes a general analysis of the contract, although it had the option of inserting them in Title VI of Book V, relating to „Transmission and transformation of obligations".

However, this regulation way is not accidental, the legislator wanting to reveal through the differentiation made, the distinct nature of Contract Assignment compared to similar notions.

Although it is used to provide definitions, in the case of contract assignment, the civil code does not present this notion *expressis verbis*, preferring to establish its legal regime in articles 1315-1320 of the civil code, thus leaving the doctrine the task of defining this legal operation.

Rendering a definition of the contract assignment notion, however, remains difficult to achieve considering that it should receive in its composition a synthesis of the legal characters for which there is no unanimous opinion expressed.

As we have shown above, a legal definition of contract assignment is provided by art. 1315 of the civil code, but the origin of the „contract assignment" must be sought in Roman law, where although this institution existed and produced effects for centuries, it was also the subject of doctrinal controversies[1].

Starting from the legal definition shown in art. 1315 paragraph (1), which states that a contracting party can substitute another foreign person from the original third-party contract, in the pre-existing relationships of a contract, under the condition that the services have not been fully executed, and the other party can consent to this.

Inspired by the French doctrinal disputes regarding the assignment of contract, there are two ways of looking at the conventional assignment of contract, the distinction between the two being inspired by the embraced concept regarding the legal nature of the obligatory legal relationship and therefore of the contract, as a concrete source of obligations.

In one pole of the discussion, it starts from the premise that the obligatory legal relationship is a strictly personal one, and any „transmission" of the contract will, in reality, be the birth of a new legal relationship, since the transmission of a personal relationship would not be conceivable, especially in its passive aspect.

On the other hand, the concept according to which the obligation relationship knows a patrimonialization, so that either all the prerogatives arising from a contract, or the contract itself, through a reification of it, will be able to be transmitted.[2]

Without pretending to solve such a deep problem in this study, we limit ourselves to observing the fact that a total reification of the contract, with the consequence of its free assignment, without the consent of the co-contractor, is not conceivable in the current Romanian legislation. We also consider that the Romanian legislator has indirectly resolved the issue of the legal nature of contract assignment, in favor of the opinion that it is possible to substitute a third person instead of a party to a contract, as will be shown below.

For a working definition, we limit ourselves to recalling that assignment of contract is that contract by which a party to another contract substitutes a third party in this contract, with the consent of the assigned co-contractor. This synthetic definition captures the essential features provided by the legislator:

(i) the assignment of the contract is itself a contract,

(ii) which has as its object the substitution of a third party in the contractual position of the assignor (with the consequence of the transmission of all rights and obligations related to this position),

(iii) with the consent of the assigned co-contractor.

1.1 The object of the contract assignment

As expressly provided by art. 1315 para. (1) civil code, the object of the contract assignment is the substitution of a third-party assignee in the contractual relations of the assignor, in other words, in its contractual position.

[1] Ioan Adam – Tratat de drept civil – Obligațiile -Vol. I- Contractul – Editura C. H. Beck 2017, p. 779 (Civil law treaty – Obligations – Vol. I- The contract – C. H. Beck Publishing House 2017, p. 779)

[2] For a brief retrospective on these concepts, refer to Ionuț Florin Popa, Assignment of Contract in the Regulation of the New Civil Code, RRDA no. 2/2013, pp. 85-87 and the sources cited therein.

The expression of the legislator is ambiguous, inviting various interpretations regarding the exact legal nature of this operation. At first sight, it could be said that we are in the presence of a contract patrimonialization, which itself becomes a derivative object of the contract assignment, being an asset within the meaning of the Civil Code and therefore transmissible.

On the other hand, it can be argued that this absolute reification of the contract is impossible, considering that any contract is a legal act, therefore a manifestation of will made with the intention of producing legal effects. We consider the latter point of view to be correct. Without claiming a definitive solution, the expression of the legislator is, first of all: „to substitute a third party in the relations born from a contract". Secondly, if the legislator wanted, as a novelty, the absolute reification of the contract, why did it not expressly provide for this fact in the articles dedicated to assets? Thirdly, if the reification of the contract had been desired, the binding agreement of the assigned co-contractor would no longer have been regulated, since it would be difficult to explain its *ad nutum* agreement regarding the assignment of the contract, if we were, indeed, in the presence of a contract patrimonialization[3].

Therefore, the contractual position is the one transferred in the contract assignment operation.

As I mentioned, the contract assignment must be understood as more than a global assignment of claims accompanied by a takeover of all debts arising from that contract. Since the contractual position itself is transferred, not only the claims related to that contract will be transferred, but also all the rights of power that the transferor can exercise in relation to that contract:

– the right to choose between the remedies available to it in case of non-performance,
– the right to execute the contract in the form of a certain alternative obligation and any other similar ones[4].

This transmission of the contractual position with all its prerogatives is, at the same time, the reason why the assignment of a contract in which the services were provided, but they were incompliant, must be admitted, since, in such a situation, the remaining prerogatives of the assignor from the respective contract will be transferred: the right to claim compliance, resolution or termination, any other remedies available to it.

Considering the principle of the effects relativity of the legal deed, in the absence of the contract assignment, this transfer of the optional right would be difficult without the

[3] One cannot explain the need for someone's consent to sell an asset in the absence of the respective person's prerogatives regarding that asset. However, how can one explain the prerogatives held by the other co-contractor over the contract itself, in the sense of the need for its consent for a full assignment, without resorting to co-ownership, which is, from this point of view, clearly improper? If each co-contractor is co-owner of the contract, it means that that contract will have a patrimonial value, separate from all claims arising from that contract. It is difficult to imagine this duplication of the contract, viewed as a patrimonial value, in the patrimony of the co-contractors, having an existence separate from the totality of the prerogatives born from that contract. However, the assignment of the contract does not transfer, *en gross*, all the contractual claims, but is a transmission of the contractual position, with all the related prerogatives, which is why we consider that the position, viewed as a legal abstraction, is what is transferred through the assignment of the contract, and not the contract itself, as a derivative object of the legal deed which is the assignment of the contract.

[4] For extensive considerations regarding potestative rights, see Marieta Avram,,Actul unilateral în dreptul privat, Ed. Hamangiu,București, 2006, p. 139 şi urm.; (The unilateral act in private law, Ed. Hamangiu, Bucharest, 2006, p. 139 et seq.;)

contractual position, which is why we consider admissible the assignment of a contract whose services were imperfectly provided.

As a consequence, we believe that, within the meaning of art. 1315 of the Civil Code, a party will be able to substitute a third person in a contractual relationship when the main services have been provided, but other adjacent services remain to be executed, and when all the contractual services have been provided, but there are certain contractual prerogatives of the position to be assigned. [5]

CHAPTER 2. Effects of contract assignment

2.1. Effectiveness conditions of contract assignment

A. Consent of the assigned co-contractor

Article 1315 of the Civil Code states that an assignment of a contract will not be effective unless the other party „consents to it". The legal nature of this consent and the way in which it affects that assignment is debatable.

From the regulation of article 1315 of the civil code, it results that this agreement of the assigned co-contractor can be given both before and after the conclusion of the assignment. As I have shown, the form that the agreement must take is that required by law for the contract whose assignment is being analyzed. Depending on when this consent is given, the consent of the assigned co-contractor can be before or after *cessionis*.

The prior consent can be given in the assigned contract itself, at the time of its conclusion, or it can be contained in another agreement of wills, separate and accessory to the assigned contract. In such a situation, the assignment of the contract will produce effects vis-à-vis the assigned co-contractor from the moment of assignment notification. In such a situation, the notification will be enforceable for the assigned co-contractor, who had already consented to a possible assignment[6]. As the legislator does not stipulate whether the notification must be made by the assignor or assignee, it results that any of them will be able to do it, but it is obvious that the transferee will have the interest, most of the time, to do it.

In the event that no prior consent was given, the consent of the assigned co-contractor is a genuine condition for the partial effectiveness of the assignment, since, until the moment of its acceptance, the assignment of the contract will not produce its full effects. In accordance with Art. 1318 para. (1) of the civil code, the assignor will not be released from its obligations towards the assigned co-contractor until the moment the assignment produces effects towards it (well, by notifying the *antefactum* accepted assignment or by accepting the assignment by the co-contractor). *Per a contrario*, the contract assignment will produce effects regarding the active side of the contractual prerogatives.

It was said that, in such a situation, we would be in the presence of a collective assignment of claims, which, in accordance with the provisions of art. 1578 of the Civil Code, will produce effects towards the assigned co-contractor at the time of its notification regarding the assignment. In reality, the assignment of the active side of the contract through the assignment of the contract not accepted by the assigned co-contractor is carried out on the basis of art.

[5] Goicovici Juanita, Cesiunea convențională a contractului, Dreptul nr. 1/2007 (Conventional assignment of the contract, Law no. 1/2007)

[6] 1-F. Popa, op cit, p. 96. This interpretation is also inferred from Article 1317, paragraph (1), which pertains to the notification of assignment, and separately, to the moment at which such assignment is accepted by the assigned party to the contract.

1318 of the civil code, interpreted *per a contrario*, not being explained by the debt assignment mechanism.

This is because a contract cannot be retroactively reclassified as a different contract based on a third party's preferences for that contract.

We believe that the transmission of the active side is explained by the fact that the consent of the assigned co-contractor is a condition for partial effectiveness, a fact that supports the legislator's perspective regarding the contract: that of giving the parties the freedom to substitute persons in the contractual position, but only with the consent of the co-contractor for the passive side of the legal relationship[7].

The advance agreement may be given for the substitution of one or more specific persons, in which case the assigned co-contractor may, at its discretion, refuse the assignment made in favor of persons other than those expressly named, or may give a generic agreement, allowing the assignor to replace any person. Of course, the given agreement may concern certain qualities that the assignee must have, in which case the refusal to replace such a co-contractor will be abusive, liable to be sanctioned by court.

Moreover, the agreement for the contract assignment can also result from certain „*by order*" clauses, which allow the free assignment of the contract, it being executed against the one who presents the ascertaining document, as a result of the contract assignment, a situation that brings very close the contracts that include such a clause to the broad category of payment instruments[8]. In this exceptional situation, the effects of the assignment will also be produced in relation to the assigned contractor from the moment the contract is signed, waiving the formality of the notification, which would slow down the circulation of contracts that include „to order" clauses.

Thus, it should be noted that an *intuitu – personae* contract will not necessarily be inalienable, as the assigned co-contractor may consider that the assignee is able to fulfill all the necessary conditions to be substituted. The only situation in which the assignment of any of the co-contractors will not be seen is that in which the contract will have *intuitu persoane* character in the person of both co-contractors, a situation in which the assignment will not be possible, from an objective point of view. In the same way, the assignee cannot be obliged to receive payment from the transferee in an *intuitu personae* contract, any performance of such an obligation by the transferee being equivalent to non-performance, viewed from the perspective of the contract transferred without the consent of the assignee.

In the situation where the assigned co-contractor[9] refuses to release the assignor, it will be possible to turn against it every time the assignee does not fulfill the obligations arising from the contract, in accordance with art. 1318 para. (2) of the Civil Code. This solution is in perfect accordance with the requirements of the *pacta sunt servanda* principle, because the assignment will produce full effects between the assignee and the assignor, considering the nature of the effectiveness cause of the assigned co-contractor's consent[10].

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[7] This is especially considering the regulation of debt assumption in the civil code, which provides for a similar solution. See, in this sense, Bogdan Dumitrache, Debt assumption, a novelty of the New Civil Code?, AUB Law Series, 2012-supplement;

[8] Cheque, bill of exchange, promissory note, regulated by Law 58/1934 and Law 59/1934;

[9] Also named as such for practical reasons, since, actually, it was only partially assigned. In the same sense l-F Popa, op. quote p. 94.

[10] And, also, with art. 1472 of the Civil Code, according to which the payment can be made by any person, even a third party of that legal relationship.

In such a situation, the assigned contractor will have two debtors on the passive side of the assigned contract, the assignor and the assignee. From the interpretation of art. 1318 civil code, it results, however, that the recourse against the assignor, in the event of non-performance by the assignee of the obligations arising from the assigned contract, is conditioned by the notification of the assignee's non-performance. In such a situation, only the right that the assignee has against the assignor is at risk, while against the assignee, the assigned will be able to make use of all common law contractual means to it he is entitled.

In any case, if nothing is stipulated regarding the transferability of a contract, the authorization of the assigned contractor regarding the release of the assignor is an act originating from a power of attorney, not susceptible to abusive exercise. Moreover, being part of the prerogative of the contractual position of assigned contractor, we consider that the right to accept or not a certain assignment is in turn assignable, so that it replaces the assigned contractor with a third person other than the assignor or the assignee.

In such a situation, the question arises whether the assignor or assignee will have the right to authorize this transfer. Considering that the analyzed hypothesis is that in which the assignment between the assignor and the assignee produces full effects in terms of the prerogatives related to the active part of the legal relations between the assignor and the transferred contractor, we consider that the assignee has the right to release or not the assignor contractor, and the second assignee will, in turn, acquire the discretionary right to release or not the original assignor.

After the moment of assignment acceptance, the assigned contractor can oppose to the assignee all the exceptions resulting from that contract, with the exception of defects of consent and other defenses or exceptions born from the relations with the assignor, which it did not expressly reserve at the time of consenting to the substitution, in accordance with art. 1319 Civil Code. Therefore, if it expressly reserves them, the assigned contractor will be able to oppose to the assignee even those strictly personal, quantifiable defenses against the assignor, such as compensations or defects of consent.

In such a situation, depending on how they arranged these matters, the assignee will have a right of recourse against the assignor, who transferred its position in an invalid or ineffective contract. Normally, as provided by art. 1320 para. (1) civil code., the assignor only guarantees the validity of the contract. It is natural, since in terms of non-execution of the contract by the assigned contractor, the assignee will have the specific common law defenses.

B. The services of the parties have not been fully executed

The legislator adds, within the art. 1315 para. (1), the fact that it is necessary that the services born from the contract have not been executed in full. Although expressly mentioned by the legislator, this condition of effectiveness[11] is a natural one: if the services in a certain contract were fully executed, there would no longer be an assignment of the contractual position, but a transmission (onerous or free, depending on the parties' intention) of the rights that were the object of the contract[12].

Although apparently simple, the condition of non-fulfilment of the services arising from that contract poses two specific problems: its extent (if it concerns only the characteristic

[11] Condition for the effectiveness of the legal operation of contract assignment, since the fact that the services have been provided does not prevent the transmission of the rights born and transmitted through that contract.

[12] And the obligations closely related to the asset, in accordance with art. 1282 para. (2).

services of that contract or all the services) and the content of the notion of execution (if it concerns only the exact executions or also the defective ones of the contractual services).

Regarding the first aspect, the doctrine following the entry into force of the civil code was limited to mentioning the fact that the requirement mentioned by the code is considered fulfilled „*if the characteristic services are not fully executed*"[13].

We believe that there are strong arguments for adopting the opposite interpretation, where the performance of all the services prevents the effectiveness of the contract assignment, and not the mere performance of the characteristic services.

First, the legal text makes no distinctions when it refers to contractual benefits. Moreover, the Civil Code does not distinguish between characteristic and adjacent benefits in this matter, so the interpreter must be reluctant to introduce distinctions where the legislator did not want them: *ubi lex non distinguit, nec nos distinguere debemus*.

Then, such an interpretation would lead to an unjustified restriction of the contract assignment scope, in the conditions where the legislator's intention to restrict it is not obvious.

In this way, in the matter of contractual freedom, everything that is not prohibited by law must be allowed, as provided by art. 1169 of the Civil Code.

At the same time, the practical advantages of such a permissive interpretation are obvious, as various situations can be imagined in which the interest to assign a contract exists, especially in the situation where the characteristic services have been performed, but the adjacent ones are to be performed[14].

The second aspect concerns the content of the notion of „full performance of the services", in the sense that the question arises as to whether a contract whose services have been fully performed, but defectively, can still be assigned. In other words, can the assignment of a contract whose services have been fully executed, but in non-compliance with the contractual or legal provisions, be conceived?

We believe that, in the absence of other indications, the answer to this question resides in the very main effects of the contract assignment, especially as regards the substitution of the third party in a particular contractual position. As it will be shown, the substitution involves the transfer of all contractual prerogatives, including the power rights.

As such, in the event of non-compliant execution of a contract, even if the services were, by hypothesis, provided, the practical interest of concluding a contract assignment will survive: putting the third party in a position to choose from the contractual remedies available to it.

Considering the principle of relativity of the civil legal deed effects, in the absence of the contract assignment, it would be difficult to transfer this optional right in the absence of the assignment of the contractual position itself, which is why we consider admissible the assignment of a contract whose services were imperfectly executed.

Consequently, we consider that, within the meaning of art. 1315 of the Civil Code, a party will be able to substitute a third person in a contractual relationship when the characteristic

[13] 1-F. Popa, *op. cit*., p. 92;

[14] For example, you can imagine a sales contract in which the property is transferred when the last instalment of the price is paid. However, the possibility of the buyer to request the resolution of the contract is provided if the asset does not keep certain qualities for a certain period of time. In such a situation, in order to simplify the contractual relations between the assignor and the assignee regarding the assets and their operation, a conventional contract assignment will be sufficient to guarantee the assignee the operation of the assets and to allow the assignor to substitute a third party in its position.

services have been executed, but other adjacent services remain to be provided, as well as when all the contractual services have been executed, but still there are certain contractual prerogatives related to the position that will be assigned[15].

2.2. The effects of contract assignment prior to the consent of the assigned co-contractor or in the absence thereof

The novelty of the express regulation of contract assignment in the Civil Code of 2009 should not lead to the thought that contract assignment did not know practical applications under the rule of Cuza Civil Code.

On the contrary, there were various applications of the legal assignment of contract, which remained, indisputably, valid under the empire of the New Civil Code: the assignment of the lease contract from the owner-seller to the buyer-acquirer for the leased asset (as the legal assignment of contract explains, at least in this situation, the difficult problem of obligations *scriptae in rem*, because not only the lessor's obligations will be transferred together with the leased property, but also his rights, arising from the assignment contract), the assignment of the insurance contract from the seller to the buyer, the assignment of the contracts ongoing at the level of a commercial company, in case of its absorption by another company and the like.

Undeniably, the great gain of the regulation of the civil code consists in the general regulation of the contract assignment, and not in all its applications, which were found, to the greatest extent, also under the empire of the previous civil code, even if they were sometimes explained by other legal mechanisms.

This general regulation is, first of all, an approach to modern civil codes and framework regulations in the matter[16].

Consecrating a legal figure that has an indisputable practical utility, the legislator of the Civil Code also invites those outside the Romanian legal system, who, finding a known legal figure, will rely on it with confidence, without the risk of concluding an unnamed contract. The imagination of the parties in the civil circuit will give the contract assignment a particular practical applicability, especially in the commercial field, the field of service provision (including, for example, sports law) and in the banking field.

Particular attention should be paid to the situation where the consent to the assignment of the contract is given prior to this assignment, especially when such consent takes the form of standard clauses that one party imposes on the other party. Depending on the freedom given to the other party to assign the contract, it may be incident art. 1203 of the Civil Code, regarding non-usual clauses in contracts.

If, for example, at the time of signing the contract, the potential assigned contractor is required to waive any personal exceptions, at the time of the contract assignment, such a clause will be unusual, and its express acceptance, in writing, is required. Likewise, the prohibition to assign the contract to a certain person will constitute a restriction of the freedom to contract, the imperative provisions of art. 1203 civil code. Considering the practical

[15] On the contrary, the authors limiting themselves to referring to the main benefits, l-F.Popa, idem; J. Goicovici, op cit. p. 59;

[16] By way of example, the assignment of the contract is regulated in art. 1406 – 1410 of the Italian Civil Code, art. 424-427 of the Portuguese Civil Code. Also, the assignment of the contract can be found in art. 9.3.1. of the Unidroit Principles and in III – 5:301 of the DCFR, § 2-210 of the Uniform Commercial Code.

importance that the assignment of a particular contract can have, contractors who agree to the free assignment of the contract will thus assume a very important risk.

2.3. The effects of contract assignment following the consent of the assigned co-contractor or in the absence thereof

Considering the legal form of contract assignment, the comparison with two other institutions is necessary, since, given the similarities, practitioners will often have to choose between contract assignment and: debt assignment and debt assumption. First of all, as I have shown, it was said about the assignment of the contract that it would be the sum of several assignments of debt, respectively debt takeovers.

This arithmetical way of looking at the assignment of contract ignores the qualitative difference between it and the two mentioned institutions: the assignment of contract does not have the direct effect of directly transferring the claims and, respectively, the debts to the patrimony of the assignee. On the contrary, what is transferred to his patrimony is the contractual position, to which these rights and obligations are intrinsically linked[17].

The assignment of receivables has as its object the transmission, by the assignor, to the assignee, of a claim against a third party, governed by the provisions of art. 1566 – 1592 Civil Code.

The legislator conceives the assignment of debt and the assignment of contract as two different legal figures: two special contracts, with distinct rules, which do not complement each other. Thus, although it is not expressly exempted in art. 1566 para. (2), the solution to the non-overlapping of legal regimes arises from the different object of the two contracts: the substitution of a third party in a contractual position versus the transfer of a claim. Moreover, not every contract assignment automatically entails the acquisition of a claim as a result of the substitution in the contractual position, in the case of unilateral contracts. The assignment of debt is a legal deed that is concluded, in principle, *solo consensu*, while the assignment of a contract can have *ad validitatem* formalities, like the assigned contract. There can exist, in accordance with art. 1571 civil code, partial assignments of debt, while a partial assignment of a contract is impossible to imagine, considering that the contractual position is a unitary legal abstraction. In practice, the choice between the two legal figures will not always be easy.

From this point of view, the assignment of debt retains its previous broad application (means of payment, means of guarantee etc.), but there will be situations in which the assignment of the contract will present real advantages: the status of contractor can be tempting, having in view the future performance of the contract, good offices or other contractual relationships already existing between the assignee and the assigned contractor (the example of a supplier taking the place of another, in a certain region, through a series of contract assignments).

As for the assumption of debt, it will, in most cases, be included in a larger contract, or it will be concluded on the basis of previous legal relationships, since, in their absence, the assumption of debt will be a genuine indirect donation made to the discharged debtor. The

[17] In a plastic expression, it was said that the assignment of the contract transfers the capacity of party itself: L. Retegan, op. quote, point 4.5. In this logic, the classification proposed in the doctrine acquires an important significance in order to differentiate between the various categories of persons who may, over time, be parties to a certain legal deed. Thus, the original parties and the parties accruing to a particular contract can be distinguished, according to whether the contractual position was acquired *ab initio*, through the conclusion of the contract, or it was acquired later, through an assignment.

two forms of debt assumption expressly regulated by the Civil Code both suppose the consent of the creditor of the transferred debt: either directly, through the debt assumption concluded with the new creditor, or indirectly, as a result of the acceptance of the debt assumption concluded between the *primus and secundus* debtor.

This agreement is an important similarity between assignment of contract and assumption of debt, meaning that in situations where the creditor in a particular contract is willing to assign the debt to the debtor, or is presumed to be willing to accept an assignment of contract, if it would be in the interest of all parties.

An important difference between the two institutions can be observed between the moment of concluding the assumption of the debt through a contract with a new debtor, respectively the moment of concluding the assignment of the contract and the moment when they are accepted by the co-contracting creditor. In the case of contract assignment, as I have shown, the assigned contractor will automatically acquire, as a result of the assignment, the right to ask the assignee to perform the contract, even if he declares that he does not accept the assignment in the sense of releasing the assignor, by losing the right to turn against him under the conditions shown. On the other hand, in the case of taking over the debt through a contract concluded with the original debtor, the contracting creditor will not acquire any rights against his potential debtor, as provided by art. 1608 civil code., except in the case where the debtor and the potential debtor stipulate otherwise in the assumption of debt, using the mechanism of the stipulation for another. From this point of view, the assignment of the contract will be preferable in most cases to the assumption of debt, at least in terms of freedom of option acquired by the assigned contractor.

CHAPTER 3. Legal assignment of contract.

The legal assignment of a contract is that way of transmitting a contract by operation of law.

The legal assignment does not have an express regulation in our legislation, however, in certain cases, the legislator has intervened to organize certain applications of the contract assignment, either by imposing the assignment or subjecting the will of the parties to transfer the contract to more or less restrictive conditions.

The French doctrine opted for the classification of legal assignments according to the conditions imposed by the legislator for their realization, and especially according to the requirement to obtain the consent of the assigned co-contractor.

Considering this criterion, four categories of legal assignments can be distinguished: they find their applicability in Romanian law as well, differentiated as the legislator wanted: (1) the prohibition of the contract assignment, even if there is the consent of the assignee; (2) the prohibition of assignment without the consent of the assignee; (3) allowing the assignment, even without the consent of the assigned co-contractor, but without imposing it; (4) the intervention of the contract assignment, as an accessory and imperative effect, imposed by law, on the occasion of the conclusion of certain contracts.

We specify that, in the situations mentioned in points (2) and (3), listed above, the assignment takes place by agreement of the parties, but under the conditions and with the limitations established by law. And these situations in which the law regulates the conditions under which the assignment of the contract can be carried out, but without imposing it, can also be included in the category of legal assignments, for the simple fact that certain conditions

required for the conclusion of the assignment contract are predetermined by the law, even if the appropriateness of its conclusion is left to the discretion of the parties.

Among the legal assignment of contracts, we mention:

a) the case of the lease contract opposable to the acquirer if the parties have not stipulated the sale of the asset as a cause for contract termination and the conditions provided by law for opposability have been met;

b) the case of the acquirer of an insured asset;

c) by exercising the right of pre-emption regulated by art. 1733 civil code.

Prohibition of assigning the contract, even if there is the consent of the assignee

The case of the lease contract

Lease means the contract concluded between the owner, usufructuary or other legal holder of agricultural goods, called the lessor, and the lessee, regarding the exploitation of the agricultural goods for a determined period and at a price set by the parties.

Law no. 16/1994 – the lease law expressly prohibits subletting and, as such, implicitly, the assignment of the contract. Art. 211 provides the solution, prohibiting, through *a per a contrario* interpretation, the assignment of the lease contract, unless: (1) there is written consent of the lessor; (2) the assignment of the contract is made to the lessee's spouse, co-participant in the exploitation of the agricultural assets, or to his/her descendants who have reached the adult age.

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PARTICULARITIES OF THE SUCCESORAL RESERVE FROM THE SECOND CLASS INHERITORS

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Abstract

The research aims to capture certain particularities of the II class of legal heirs, both in terms of it's mixed character (being a mixed class consisting of both privileged ascendants and privileged collaterals), and in terms of the modality imputation of liberalities made to a reserved legal heir of this class, or to any non-reserved heir. More precisely, the study takes into account the method of dividing the inheritance when the deceased grants either a reserved heir from the second class of legal heirs (art. 1099 paragraph (2) of the Civil Code), or when he grants an heir unreserved, and liberality is not subject to ratio. We consider the situation in which the request ordered by the decedent is excessive and its reduction is required to complete the inheritance reserve of the reserving heirs, as well as the one in which the bequest is less than the available quota and can be executed. There could be scenarios in which the effort to establish a system of fair division of the inheritance is dismantled by the violation of the inheritance reserve of those entitled. We will read in the content of the study what are the ways to remove these inadvertences of the succession reserve imperative.

Keywords: *privileged ascendants, privileged collaterals, inheritance reserve, gratification, imputation.*

In the matter of autochthonous succession law, we meet four classes of legal heirs, who can reap from the inheritance of the deceased. Art. 975 para. (1)[2] The Civil Code regulates the first class of legal heirs (descendants of the deceased). According to the principle of coming to the inheritance in the order of the classes of legal heirs[3], the first class of legal heirs removes the other classes from the inheritance.

The second class of legal heirs[4] is that of privileged ascendants (parents of the deceased) and privileged collaterals (brothers and sisters of the deceased)[5]. The 3rd class of legal heirs[6] is represented by the ordinary ascendants (grandparents of the deceased), and the 4th class of legal heirs[7] is that of the ordinary collaterals (uncles, cousins of the deceased and brothers or sisters of the grandparents of the deceased).

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[2] „The descendants are the children of the deceased and their descendants in a direct line indefinitely."

[3] In this regard, see article 975 paragraph (2), which states: „The descendants of the deceased exclude heirs from other classes and inherit in the order of proximity of the degree of relationship."

[4] For more details regarding the second class of legal heirs, see Genoiu I. (2013). The Right to Inheritance in the Civil Code, 2nd Edition, Ed. C.H. Beck, Bucharest, pp. 81-85; Cărpenaru, S.D. (1971). Intellectual Property Rights. Successions, Ed. Didactică și Pedagogică, Bucharest,, pp. 194.

[5] Article 976 of the Civil Code provides: „(1) Privileged ascendants are the father and mother of the deceased. (2) Privileged collateral relatives are the brothers and sisters of the deceased, as well as their descendants, up to the fourth degree inclusive with the deceased."

[6] Article 982 paragraph (1) of the Civil Code states: „(1) Ordinary ascendants are the relatives in the direct ascending line of the deceased, except for his/her parents."

[7] Article 983 paragraph (1) of the Civil Code states: „Ordinary collateral relatives are the collateral relatives of the deceased up to the fourth degree, excluding privileged collateral relatives."

We note that the second class of legal heirs is a mixed one, being composed of both privileged ascendants and privileged collaterals.

Legal inheritance takes into account the relationship between the relatives of the deceased and the latter, as well as the marital status of the deceased and the surviving spouse at the time of death. In this sense, the legislator established that the surviving spouse should collect a share established by law according to the class of legal heirs with whom he competes, regulated in art. 972 Civil Code[8], and in art. 978 of the Civil Code[9] established the method of dividing the inheritance between privileged ascendants and privileged collaterals, according to whether both of his parents or only one of them come to the succession of the deceased.[10]

In the following, we will present the particularities of the succession reserve within the II class of legal heirs, both in the case where a reserved heir is awarded, and in the case where the awarded is not a reserved heir.

The seat of the matter is found in art. 1099 para. (1)[11] and (2)[12] of the Civil Code, which establish the method of imputation of liberties.

Imputation of liberties within the II class of legal heirs in the hypothesis in which the gratified is a reserved heir (art. 1099 paragraph 2)

Let's assume that in the presence of reserved co-heirs, the deceased disposed of his entire fortune (through a universal bequest) in favor of a legal heir with a concrete vocation.

Specifically, when the deceased leaves behind the surviving husband, parents and a brother and arranges through a universal bequest that his mother be the sole heir of his fortune.

By establishing a universal legacy, the deceased indirectly disinherits the other legal heirs with concrete vocation. The parents and spouse of the deceased, although disinherited, have the right to the inheritance reserve provided by law. In order to determine the inheritance reserve of those in law, we will assume, according to the provisions of art. 1086 Civil Code[13]

[8] Article 972 of the Civil Code provides: „(1) The share of the surviving spouse is: a) one-fourth of the inheritance if in competition with the deceased's descendants; b) one-third of the inheritance if in competition with both privileged ascendants and privileged collateral relatives of the deceased; c) one-half of the inheritance if in competition either only with privileged ascendants or only with privileged collateral relatives of the deceased; d) three-fourths of the inheritance if in competition either with ordinary ascendants or with ordinary collateral relatives of the deceased. (2) The share of the surviving spouse in competition with legal heirs belonging to different classes is determined as if they were in competition only with the closest of them. (3) If, as a result of a putative marriage, two or more persons have the status of a surviving spouse, the share established according to paragraph (1) and (2) is divided equally among them."

[9] Article 978 of the Civil Code provides: „The inheritance or the part of the inheritance due to privileged ascendants and privileged collateral relatives is divided among them based on the number of privileged ascendants who inherit, as follows: a) if only one parent inherits, they will receive one-fourth, and privileged collateral relatives, regardless of their number, will receive three-fourths; b) if two parents inherit, they will together receive half, and privileged collateral relatives, regardless of their number, will receive the other half."

[10] Deak Fr., Popescu R. (2013). Treaty of Succession Law. Legal Inheritance, Vol. I, 3rd, Edition updated and completed, Ed. Universul Juridic, Bucharest, pp. 217-218.

[11] „If the beneficiary of the liberal gift is not a reserved heir, the received liberal gift is imputed to the disposable portion, and if it exceeds it, it is subject to reduction."

[12] „If the beneficiary is a reserved heir, and the liberal gift is not subject to collation, it is imputed to the disposable portion. If applicable, the surplus is imputed to the reserved share to which the beneficiary is entitled, and if it exceeds that, it is subject to reduction.„

[13] „Successional reserve is the portion of the inheritance assets to which reserved heirs are entitled by law, even against the will of the deceased, manifested through gifts or disinheritance."

that the deceased did not make liberalities. Thus, if he did not dispose of his wealth, the inheritance would have been divided as follows:[14]

- the surviving spouse competes with the second class of legal heirs[15], both with privileged ascendants and with privileged collaterals and according to art. 972 para. (1) lit. b of the Civil Code collects a third of the inheritance. The remaining 2/3 remaining after assigning the surviving spouse's share shall be divided among the privileged ascendants and privileged collaterals accordingly. Art. 978 lit. b of the Civil Code;
- the deceased's parents will receive half of the remaining 2/3, i.e. 1/3;
- the deceased's brother gets the other half of the remaining 2/3, i.e. 1/3.

After we have established how the inheritance would have been divided in the absence of liberalities, we will calculate the inheritance reserve of the reserving heirs, according to the rule established in art. 1088 of the Civil Code.[16]

a) the spouse's reserve is half of 1/3, i.e. 1/6.

b) total reserve of mother and father is half of 1/3 ie 1/6 and 1/12 each.

c) the total inheritance reserve of reserved heirs is 1/3 of the wealth (1/6 +1/12+1/12 = 1/3).

Knowing the total inheritance reserve, we can also calculate the available quota according to the formula C.D.[17] =M.S.[18] -Rt[19] and we get its value of 2/3 (1-1/3 = 2/3).

According to art. 1099 para. (2) of the Civil Code, we will impute the generosity made to the mother on the available quota (2/3) and then on the due reserve (1/12). This means that the mother accumulates the available share with the inheritance reserve and gets a share of 3/4 (2/3+1/12 = 9/12).

Since the liberality is excessive, i.e. it exceeds the sum of the available quota and the reserve of the beneficiary, it will be subject to reduction for the reintegration of the successional reserve of the other reserving heirs (husband and father of the deceased).

Thus, the mother will collect the share obtained by cumulating the available share with the reserve of 3/4, the surviving spouse will collect the reserve of 1/6, and the father the reserve of 1/12. Through the universal bequest made by the deceased in favor of the mother, the brother is indirectly and totally disinherited. Not being a reserved heir, he does not benefit from any share of the inheritance.

Imputation of liberalities within the II class of legal heirs in the hypothesis where the beneficiary is not a reserve heir and the liberality is not subject to the report (art. 1099 paragraph 1)

Suppose that in the presence of reserving heirs, the deceased disposes of a fraction of the wealth (through a bequest with universal title) in favor of a third party. In such a hypothesis, it is necessary to check whether or not the bequest violates the inheritance reserve. If the liberality is excessive, it will be subject to reduction to complete the inheritance reserve, and

[14] In the same vein, see Deak Fr., Popescu R. (2014). Treaty of Succession Law. Testamentary Inheritance, Vol. II, 3rd Edition updated and completed, Ed. Universul Juridic, Bucharest, pp. 268-269.

[15] For the scenario of the surviving spouse in competition with privileged ascendants and privileged collateral relatives, see Chirică D. (2017). Treaty of Civil Law. Successions and Gifts, 2nd Edition, Ed. Hamangiu, pp. 48.

[16] „The successional reserve of each reserved heir is half of the successional share that, in the absence of gifts or disinheritances, would have been due to them as legal heirs."

[17] Disposable portion

[18] Succession estate or Successional mass

[19] Total successional reserve

if the liberality is not excessive and falls within the available quota, the legacy will be executed from the entire inheritance mass, the difference between the inheritance mass and the legacy being divided, according to the rules of inheritance legal between the legal heirs with concrete vocation. All these situations will be exemplified and presented below with the consequences on the succession reserve of the heirs of the second class of legal heirs.

a) in the presence of the surviving spouse, parents and a brother, the deceased gratifies the third party X with a universal legacy of 8/9 of the wealth.

We will proceed as in the previous example to calculate the inheritance reserve, the available quota, to determine whether or not the legacy can be executed.[20]

We assume that the liberality was not done and the husband will collect the share of 1/3[21] of the wealth, the parents of the deceased will collect together 1/3[22], and the brother 1/3.[23]

We determine the succession reserve of the reserving heirs. Thus, the husband is entitled to 1/6 of the inheritance reserve, and to the parents together 1/6 of the reserve (1/12 each). The total inheritance reserve is 1/3 of the wealth. The non-reserving legal heir brother does not receive succession reservation. The available share is 2/3 of the inheritance (1-1/2=2/3).

To verify if the legacy can be executed from the succession estate, we compare the legacy with the disposable portion. If the legacy is larger, then it is reduced as excessive to fulfill the rightful successional reserve. Conversely, it is executed from the succession estate. In our example, the legacy is greater than the disposable portion (8/9, i.e., 24/27 is greater than 2/3, i.e., 18/27), and it will be reduced from 8/9 to 2/3 (the disposable portion). Therefore, third party X will receive 2/3 of the estate after the reduction; the surviving spouse will receive a successional reserve of 1/6, the parents together will receive a reserve of 1/6, and the non-reserved brother will not inherit from the deceased's estate.

b) in the same example, the deceased grants a universal legacy of 3/9 of the estate to third party X.[24]

We will go through the same steps, so in the absence of gifts, the spouse would receive a share of 1/3, the parents together would receive a share of 1/3, and the brother would receive a share of 1/3. In these conditions, the successional reserve of the surviving spouse is 1/6, the parents' reserve is 1/6 (1/12 each), and the brother has no successional reserve. The total successional reserve is 1/3, and the disposable portion is 2/3.

To determine whether the bequest is enforceable, we compare the available share with the universal title bequest and note that in this case the bequest is less than the available share (3/9, i.e. 9/27 is less than 2/3, i.e. 18/ 27) and consequently can be executed. The legacy will be executed from the entire estate[25] (1-3/9 = 6/9). This share obtained by 6/9 will be divided according to the rules of legal inheritance to the legal heirs (surviving spouse, parents and

[20] Ibidem note 13, p. 268-269.

[21] See art. 972 alin. 1 lit. b Civil Code.

[22] See art. 978, lit. b Civil Code.

[23] Ibidem.

[24] Ibidem note 13, p. 267-268.

[25] Formulation used by the legislator in Article 1099 paragraph (1) of the Civil Code, stating that the gift „is imputed" to the disposable portion, does not imply that the gift is executed from the disposable portion. Instead, it simply means that the gift is calculated (must fit) within this disposable portion. That is why, even though the law does not explicitly specify, we interpret that the only method of calculation in the scenario where a gift to a third party falls within the disposable portion is for it to be executed from the entire succession estate. This system aims to respect both the deceased's freedom of will and the equality/proportionality of the rights of the surviving spouse and the heirs in the second class of legal heirs.

brother of the deceased). Unlike the example from letter a), governed by art. 1099 para. (2), in the absence of liberalities, the shares of the legal heirs were imputed from the entire estate, in this example, governed by art. 1099 para. (1) of the Civil Code, the shares of the legal heirs will be imputed on the part of the inheritance remaining after the execution of the bequest (ie 6/9). Thus, the surviving spouse is entitled to a share of 2/9 (1/3 x 6/9 = 2/9), the parents are jointly entitled to a share of 2/9 (1/3 x 6/9 = 2/9), and the brother is entitled to a share of 2/9 (1/3 x 6/9 = 2/9). We note that unlike the first example, in which the brother does not collect anything as he is not a reserve, in this case it is natural that the brother receives a quota, since the deceased made the liberality by falling within the available quota.

Moreover, in this way the purpose pursued by the legislator is respected when he regulated the extent of succession rights for the situation of competition between the surviving spouse, privileged ascendants and privileged collaterals.

From the teleological interpretation of art. 972 para. (1) lit. b) with art. 978 lit. b of the Civil Code we note that the legislator wanted that for the hypothesis of this contest, the surviving spouse, the privileged ascendants and the privileged collaterals to receive equal shares of inheritance, equity also found in the calculation system shown above.

Important to remember, that the second class of legal heirs is a mixed class, consisting of both reserved heirs (the deceased's parents) and non-reserved heirs (the deceased's brothers, sisters and grandchildren).

Although we have established that we maintain the equity proposed by the legislator by respecting the equal quotas of the three categories of legal heirs (husband, parents and brother), it is still possible that through this calculation system the inheritance reserve of those entitled (husband and parents) will be reached.

Whether or not the reservation has been violated can be checked by comparing the succession reserve of the reserving heirs with the share received after imputing the share of the legal heirs from the remainder left after the execution of the bequest from the succession table.

Thus, by division, the husband receives 2/9, a greater share than the inheritance reserve of 1/6, and the father and mother of the deceased together receive 2/9, a greater share than their inheritance reserve of 1/6 of the estate.

Since the inheritance reserve has not been violated, the legal heirs (including the deceased's brother) will retain the shares resulting from the division.

c) in the same example, the deceased gratifies the third party X with a universal legacy of 5/9 of the wealth.[26]

In the absence of liberalities, the husband would collect a 1/3 share, the parents jointly a 1/3 share, and the brother a 1/3 share. Thus, the inheritance reserve of the surviving spouse is 1/6, the parents' reserve is 1/6 (1/12 each), and the brother has no inheritance reserve. The total inheritance reserve is 1/3, and the available share of 2/3.

Similar to the previous example, we will compare the available quota with the bequest to determine whether the latter is excessive or enforceable.

We note that the bond is less than the available quotient (5/9, i.e. 15/27 is less than 2/3, i.e. 18/27) and can be executed.

We execute the bequest from the entire inheritance table and get a remainder of 4/9 (1-5/9 = 4/9). This share obtained through the execution of the legacy will be divided between the

[26] Ibidem note 13, p 268.

legal heirs with concrete vocation (spouse, parents and brother). And in this case, we consider the quotas fixed from the systematic interpretation of art. 972 para. (1) lit. b and art. 978 letter b of the Civil Code, imputed on the share remaining after the execution of the bequest (4/9 share). Thus, the surviving spouse will reap 1/3 of 4/9, which is 4/27. The parents together reap 1/3 of 5/9, which is 4/27, and the brother reaps 1/3 of 5/9, which is 4/27. And in this case, the goal pursued by the legislator was respected, which enshrines the equality of succession rights between the three categories of legal heirs.

As we stated in the previous example (although it was not the case there), it is possible that with this division that maintains the equity mentioned above we violate the succession reserve of reserving heirs. To establish this fact, we will compare the inheritance reserve with the share obtained after the division, thus: by division, the husband would receive 4/27, a share lower than the reserve of 1/6, the parents would jointly receive the share of 4/27, also lower than the succession reserve of 1/6.

We note that in this case, through the division carried out, the succession reserve of the reserving heirs was affected. However, the rules governing the inheritance reserve are mandatory rules and, as a consequence, it cannot be lowered below this minimum established by law. In these situations, reserved heirs receive the inheritance reserve (the husband 1/6, and the parents together 1/6), and not the share obtained by division. The one who bears a diminution of the inheritance rights for the completion of the inheritance reserve of those entitled is the brother of the deceased,[27] he not being a reserve. Thus, from the share obtained after the execution of the legacy (4/9) we will subtract the inheritance reserves of the husband and parents and we will obtain the share due to the brother (4/9 – (1/6 +1/6)) = 4/9- 1/3 = 1/9.

Finally, the quotas granted are:

- the third party collects the bequest of 5/9;
- the surviving spouse collects the reserve of 1/6;
- parents collect together the reserve of 1/6;;
- the brother collects a share of 1/9;

In order to check if the calculation system is correct, we will sum up the shares mentioned above: 5/9 +1/6+1/6+1/9 = 18/18 = 1. We note that through this way of dividing the wealth, not the succession reserve of the reserving heirs is affected and we fit into the whole of the inheritance.

Conclusions

The study undertaken considers a situation for which the legislator does not offer a solution, obviously, it being necessary that through a systematic, logical and teleological interpretation of the legal texts, we offer a way of coherent division, which ensures the balance between the will of the testator, the extent of the conferred rights by law to the legal heirs and the inheritance reserve of those entitled to receive it.

In the silence of the law, we appreciate that the only method of calculation for the hypothesis in which the generosity made to a third party falls within the available quota, is for it to be executed from the entire estate. This system is intended to respect both the freedom of will of the deceased and the equality/proportionality of the rights of the surviving spouse and the heirs of the second class of legal heirs.

[27] For more details regarding the legal characteristics of the successional rights of privileged collateral heirs, see Dogaru I.(2003). Civil Law. Successions,published by All Beck Publishing, Bucharest, pp. 127.

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Section D

WITNESS TESTIMONY: BETWEEN GOOD FAITH AND BAD FAITH

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Abstract

The principle of good faith presupposes the existence of rapports between people based on sincerity, truth, honesty.

Good faith is a fundamental principle of civil law, which carries a series of practical implications even in other spheres of law, such as criminal law.

The existing link between good faith and criminal law emerges from the need to meet the requirements for holding people criminally liable, based on obtaining and using evidence properly, truthful witness statements, or timely administration of evidence, for the expeditious development of the case, these being some of the most important conditions established by the legislator in this regard.

In order to carry out this correlative examination, good faith appears as a principle of civil law that intervenes in criminal law to ensure that all activities specific to the criminal process are carried out in optimal conditions.

Keywords: *good faith, false testimony, sanction.*

1. Introduction

Etymologically, the expression „*good faith*" comes from the Latin language, where the term „*bona fides*" groups: the adjective „*bonus*" – good – with the meaning of good man, honest man, virtuous man and the noun „*fides*" – faith, belief, trust, honor. As a legal institution, good faith finds its origins in Roman law, appearing at the end of the Republic, together with the Praetorian property, when the development of trade, especially that of slaves, imposed the protection of buyers who were in good faith in the transactions that were completed, without having fulfilled the formalities and solemnities required by law in the case of res mancipi.[1]

From the preceding, we note that this rule of moral conduct has a millennial history, being consecrated almost two millennia ago. The connection between people is based primarily on mutual trust, which can be overturned once the contrary is proven.

The Civil Code includes the notion of good faith in Article 14 (1), where it is stated, among other things, that, *any natural or legal person must exercise their rights and perform their civil obligations in good faith,* in accordance with public order and principles of morality. Thus, it follows that the legislator, regardless of that fact that he mentions this notion in the Civil Code, makes reference to two notions that cover a wider sphere, the violation of which leads to the ordering of criminal measures in certain cases.

The protection of good faith is elevated to the rank of principle, the principle of the protection of good faith is encountered and recognized in several matters of civil law, and the

doctrine and jurisprudence currently support that good faith is presumed regardless of the matter in which its issue is raised. We appreciate that we are in the presence of a fundamental principle of civil law whose content is given by the fact that good faith is always presumed and protected in civil legal relations [2].

We believe that, in addition to what has been specified, the need to protect this principle derives above all from the trust that must exist in the execution of the act of justice in compliance with all ethical standards, respectively, to find out the truth. Thus, especially in the field of criminal law, where the execution of the act of justice sometimes involves the deprivation of liberty of persons for a period that is more than extended, disregarding such a rule, may lead to the provision of wrong solutions and the violation of the rights and freedoms of the persons under investigation.

It is beyond any discussion the finding that good faith is a mental state, which is characterized by the sincerity with which the person in error affirms that he had a correct representation (characterized by conviction, belief, certainty) about a state of fact or law existing at a given moment, a vision that allowed him to make a decision or have an attitude in a given circumstance, because man can distinguish between truth and lies, justice and injustice, good and bad, equity and injustice, lawful and unlawful. The state that we say is good faith arises at the level of the individual's psyche, because the expression of the agreement of will for the transmission, respectively for the acquisition of a right or for the exercise of the attributes that a right confers in the consideration of a certain quality requires a mental process of forming an attitude that allows him to act [3].

In order to establish the reality in a criminal trial, most of the time the mental state of a person is of special relevance, respectively it can have special consequences, since as it was stated before, the distortion of the truth can lead to erroneous solutions in cases with serious implications for those investigated.

Specialists in the field of criminal law have developed different methods and tactics to determine whether the person called to testify before the judicial bodies or the court is telling the truth. In this sense, it was taken into account that those called as witnesses must be neutral, since what they reported cannot be used in their own interest, but to ensure a general interest. The bad faith of a witness, even if it can be established by evidence, can sometimes go unnoticed and lead to the pronouncement of erroneous court decisions. In such cases, the object of the criminal investigation is the crime of false testimony.

The offense of false testimony is provided by the current Criminal Code at Article 273 where it is provided that:

The act of a witness who, in a criminal, civil or other proceeding in which witnesses are heard, gives false statements, or does not tell everything they know regarding the essential acts or circumstances in relation to which they are heard, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

The false testimony committed:

- by a witness whose identity is protected or who is included in the witness protection program;

- an investigator working undercover;

- a person who prepares an expert report or an interpreter;

- in relation to an offense for which the law provides life imprisonment or a term of imprisonment of 10 years or more

shall be punishable by no less than 1 and no more than 5 years of imprisonment.

The witness shall not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the commencement of the criminal action or in other cases before a decision or another solution is given, following the false testimony given.[4].''

The incrimination presented above ensures credibility in the administration of evidence with witnesses during a judicial proceeding. Thus, we appreciate that it would be difficult to imagine the existence of a system in which witness statements are lacking in credibility and, therefore, useless from the perspective of the fair resolution of the case in which witnesses are heard.

From a criminological point of view, a recrudescence of false testimony crimes can be observed, an aspect that is not reflected in sentencing solutions. For example, the principle of finding the truth that governs criminal procedure documents and the lack of a constraint for the judge to motivate a solution extremely rigorously determine that these violations of the law do not always have consequences for the truth of the case, the court using general statements, such as „this witness is not credible".

During this study, we tried to capture the most important characteristics of the principle of good faith and its connection with the field of criminal law, respectively with guaranteeing the conduct of the criminal process in optimal conditions and the resolution at its end.

Even if, at first sight, this rule, which is specific to the field of civil law, does not present elements likely to interfere with criminal law, the criminalization of the crime of false testimony guarantees, among other things, the certainty that the state tries to establish and guarantee the implementation of credible justice enforcement activities.

We will observe from what follows that there are numerous problems in the practical application of this rule, and although it can sometimes be confused with a simplistic activity, due to the complexity of the cases brought to the investigation or judgment, the opposite can be proven.

2. **Witness testimony between good faith and bad faith**

The criminal law criminalizes false testimony along with the other crimes that prevent the administration of justice, the actions or inactions that characterize the objective side of these crimes affect the truth necessary for the administration of justice. Under the subjective aspect, the actions or omissions are located at the psychological level of simulation in positive or negative forms (of hiding the truth by omission). Even though, the Criminal Code does not provide a definition, however, the concept of „*essential circumstances*" following that these circumstances should be established in relation to the object of each testimony and not in relation to the object of each case. The essential circumstances will be analyzed concretely, since the psychological element of the intention to declare a lie is related to an essential circumstance, on which depend the existence or non-existence of culpability, the existence or non-existence of causes that remove the criminal character of the deed etc. The feature of „essential circumstances" is given by their evidentiary effectiveness, by their relevance and conclusiveness in the investigation and resolution of the respective case [5].

The reasons that lead a person to declare untruths before the judicial bodies or the court are numerous. As a rule, the negative characteristics of that person such as selfishness, dishonesty do not present the ability to contribute to the credibility of the statement, to the shaping of a positive moral profile. The main task of the judicial body is to obtain as much

information as possible about the personality of the witness, who is to be heard, in order to later analyze the statement offered in a complex manner.

According to the rules of criminal procedural law, the witness is obliged to declare in which relationship he is with the suspect, the defendant or the injured person, relationships that can come from kinship, collegiality, subordination, from a feeling of hatred, envy, contempt. Therefore, these feelings can have consequences on the witness statement in a negative way. However, we cannot deny that it is possible for such feelings as sympathy or dislike to simply arise.

Also, there is the possibility that certain influencing actions sometimes appear as a result of pressure from external situations, however, the witness, out of interest, out of fear, will agree to submit a false testimony or to keep silent about certain circumstances that he became aware of as a result of direct or indirect participation in the event that is the subject of the investigation.

Witnesses can give false testimony, or insist on denying that they have knowledge of certain circumstances related to the subject of the case, in order not to be held criminally liable or to be drawn into compromising situations, or out of the desire to simply avoid repeated summons before the judicial bodies.

The reporting of aspects that provide clues to prove suspicions of bad faith resides including in the existence of specific knowledge of forensic psychology, an experience in carrying out the activity of a criminal investigation body or a magistrate, as well as an advanced degree of insight.

Of particular importance is also the continuous observation of the way in which the witness chooses to externalize himself, because the witness who chooses to lie consciously behaves in a state of emotion, of stress that he will try to hide, thus offering a possible evidence that his deposition is dishonest.

We appreciate that it is incumbent upon the judicial body to take the statement in such a way as to be able to surprise the suspect witness with key questions, to obtain as many details as possible, in order to increase the chances of possible contradictions, either between matters that come from one's own declaration, or from those declared by other people.

The activity of repeated listening of witnesses suspected of false testimony is indicated as well as the subjection to confrontation with other persons who have the capacity of witnesses in that case. At the same time, it must be taken into account that, in such a scenario, the witness may repeat the previously offered statement only out of the desire not to be considered a person of bad faith.

The feature of bad faith witnesses results from the fact that their statements are almost identical, since any inconsistency can betray their attitude [6]. In the event that the statements of two or more people are almost identical, the suspicion of the judicial body is justified. Therefore, such a hypothesis may lead to the existence of a prior agreement between the witnesses regarding what they will testify in that case.

The obligation of the judicial body is to insist on the details, even on those considered to be insignificant, because if there is a previous agreement between the witnesses, it will concern the main aspects of the criminal case and less the subsequent ones. Finding clear contradictions in the incidental circumstances can lead to drawing a conclusion on the bad faith of those being heard. The judicial body will also use the tactical methods at its disposal to find out things as thoroughly as possible. At the same time, the reasons that led the witness to make a false statement will be sought, and the witness will be prosecuted for the crime of

false testimony. The activity of verification and evaluation by the judicial authority of these depositions will be done according to the principle of free evaluation of the evidence [7].

After establishing the fact that the witness who gave a statement before the judicial body was not in bad faith and to the extent that his accounts lead to the important circumstances of the criminal case, the task of those who verify the statement is simplified.

Including in the case of the previously mentioned hypothesis, the judicial body is obliged to have knowledge about some general elements in relation to the person of the witness, as well as about specific circumstances that can affect the reproduction of details. In this sense, we believe that factors of a subjective nature and factors of an objective nature that can influence the degree of correspondence, of identity of the exposed, perceived data with those that happened in reality must be taken into account.

Even if the witness is concerned with exposing the known elements as clearly as possible, he acts independently of his own will. For the evaluation of a statement, matters such as: the time of discovery, the time of preservation and the time of sharing the information must be taken into account.

The testimony of good faith is appreciated as „*that testimony submitted under oath which is not false, does not arise from the bad faith of the witness and does not fall under the scope of the criminal law* [8]."

As in the case of bad-faith witnesses, certain procedures and listening tactics are used in this hypothesis to help the investigator in the process of fair perception and evaluation of the statements. The witness of good faith, by exposing the facts or circumstances perceived with the help of the senses as accurately as possible, contributes, through reproduction, to supporting the judicial bodies to give a correct final resolution to the case.

Between the person of the witness and that of the investigator there must be concordance relations, the existence of contradiction relations between these levels has consequences on the validity of the testimony in court, which will sanction this contradiction either by removing the testimony without sanctioning the witness, if he was in good faith, or by removing the testimony and sanctioning the witness if he was in bad faith.

In the assessment of the witness of good faith, four categories of possible errors (distortions) are taken into account:

- distortion by addition, by which the witness reports more than what he perceived, exaggerating or inventing imaginary facts, such distortions can be caused by incomplete, fragmented perceptions;
- distortion by omission, mainly due to the loss of certain circumstances from memory over time;
- distortion by substitution, by which the witness confuses certain qualities of some persons, objects, facts or substitutes them with others previously perceived as a result of the existing similarities between them;
- distortion through transformation, which is due to the dynamic and selective nature of preservation and reproduction, a process in which the stored data is subject to a process of reorganization and restructuring [9].

Such distortions present the ability to attract changes in the real sequence of events, changes in the place where they took place, in some elements of place and time.

We know that the legislator did not impose the existence of a minimum number of witnesses to prove a fact, so that the statement of a witness can prevail over those related by several people, if the latter create a feeling of doubt about what was exposed. We remind you

that, similarly to bad-faith witnesses, the witness who is supposed to have testified with honesty can be re-examined.

As a rule, the statement obtained immediately after the occurrence of the crime is imprecise due to the state of mental disorder, the administration of other evidence shows the need for new clarifications from the witness.

The judicial body has the freedom to decide on the evaluation of the probative value also due to the fact that the testimonies in the criminal trial are divisible. Thus, it is possible to retain only a part of the statement that it considers to be in accordance with the truth. However, it should not be overlooked that the activity of assessing testimonial evidence is considered difficult, complex due to the multitude of elements that must be evaluated very carefully.

The good faith witness is interested in obtaining the truth and bringing the guilty to justice, in this desire he may be in error, so that the testimony of good faith, but false from the point of view of the content, produces other effects than the intended ones.

The false witness has a purpose, an interest based on which he will act to obtain the desired result, without being influenced by the passion for justice, knowing or not knowing the truth about the commission of an act or presenting the facts in a distorted manner, having an attitude appropriate to the narrated facts and trying to convince the investigator of the truth of what he said, so that in his testimony the causes that alter the testimony of the witness in good faith will not be found.

Good faith testimony can be altered by various causes, including the „*angle of deviation*", the honest testimony representing a reflection of reality through the prism of the subjectivity of the witness, between the objective reality and its subjective reflection there is an angle of deviation. Regarding it, it is necessary to establish the content and the impact on the legal effects produced. Among the causes of deviation are the reduced capacity of human perception to receive all the surrounding information, the inability of the human brain to process all received information, the addition to the initial information, the existence of minimum and maximum reception thresholds etc. [10].

We note that there are various causes that can lead to the influence of the statements, their effect being reflected on the solutions pronounced by the courts. Their diversity resides above all in the multitude of practical situations in which we can find the statements of people to be useful for establishing the factual circumstances in which the facts forming the subject of the judgment were committed.

3. **Conclusion**

The testimony of the witness is considered to be essential in numerous cases for finding out the truth, but this is taken into account by the court only to the extent that it is corroborated with other means of evidence that are administered in parallel during the course of the criminal trial.

In order to ensure efficiency in the resolution of criminal cases, the above should be taken into account, in order to achieve all the proposed objectives and ensure the satisfaction of the interests of all those involved in that process.

However, due to the complexity of the events in which the people involved take part, it is necessary, as I have presented, a special preparation and a thorough research of all aspects to guarantee the certainty of what is reported.

The current procedural deficiencies in carrying out the specific activities of hearing witnesses can be corrected by adapting the norms that establish the specific ways of hearing to the new social realities and the changes that have occurred in the meantime.

From our point of view, it is even necessary to update the guidelines in this matter, since the national jurisprudence does not reveal the real crime figure in the matter of false testimony crimes, or at least a figure close to it.

However, as I have shown above, the practical efficiency of legal institutions should be considered first, so that later, if it is assessed that they are not able to provide an optimal answer for the judicial bodies, they can be revised and supplemented in order to achieve the purpose for which they were created.

The essential idea that emerges from the subject of this study is that between an attitude of good faith and bad faith, the difference most often consists of simple elements, which can change the general state of the interviewed person and which can later influence the course of a criminal trial and not only that. However, this principle of good faith by ensuring its recognition at the legislative, even constitutional level, devotes the special attention given to it by the legislator and finally the attention of the judicial bodies that, using its specific characteristics, manage to separate non-criminal acts from those that form the object of crimes.

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CONSIDERATIONS RELATING TO THE INSTITUTION OF THE PLEA AGREEMENT

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Abstract

According to the provisions of the Code of Criminal Procedure, the principle of „discovering the truth" is a fundamental principle of the criminal process, based on which the judicial bodies have the obligation to collect and administer evidence in order to prove the existence of the crime, in order to quickly identify the participants in the commission of the crime and in order to finally succeed in „criminal and civil liability – if necessary. This provision established in the content of art. 5 of the CPP pursues the responsibility of the criminal investigation bodies – during the criminal investigation phase and beyond – to collect and administer evidence, both in favor and against the suspect or defendant. Thus, the importance of the active involvement of the judicial authorities to ensure compliance with this principle is emphasized.[1]

The special procedure of the plea agreement was introduced into the Romanian criminal procedural legislation by Law 135/2010 on the Code of Criminal Procedure. In the statement of reasons, the special procedure appears as a significant change in the criminal system, bringing with it not only the reduction of the duration of trials and the simplification of judicial activity, but also economic advantages, by reducing the expenses of the criminal process, both for the state and for the defendant. The conclusion of the agreement gives the defendant the opportunity to benefit from a considerable reduction of the sentence, both in terms of the prison sentence and the fine (according to art. 396, para. 10 CPP)[2]*. The seat of the matter can be found in the Special Part of the Code of Criminal Procedure, within Title IV – Special Procedures, Chapter I. The implementation of the plea agreement was motivated by the need to deal with the problems of the judicial system, such as delays in resolving cases, the lack of of trust in justice, high social and human costs. These problems, such as the overloading of courts and prosecutors' offices, as well as the procrastination of trials, have led to multiple condemnations of Romania by the European Court of Human Rights. The plea agreement has a role in simplifying judicial procedures and reducing the duration of the criminal process, offering both the judicial bodies and the defendant a special way of resolving criminal cases, which deviates from the general rules and which requires the conclusion of an agreement between the prosecutor and the accused regarding the established punishment and the manner of its execution.*

Keywords: *plea agreement, judicial procedures, Code of Criminal Procedure, „discovering the truth"*

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I. THE SPECIAL PROCEDURE – WHAT ARE ITS ADVANTAGES AND DISADVANTAGES

1. Aspects that can represent advantages

The institution of the plea agreement brings many essential benefits. Among them is the reduction of the duration of the criminal process – an aspect that corresponds to the principle of speed or celerity even if it is no longer provided for expressis verbis, but followed by the entire judicial system[3].It also brings down costs related to the process, both for the courts and for the parties involved. Simplifying the work of judicial bodies is another important aspect, eliminating complex procedures in less dangerous cases. This also leads to the relief of the courts by the quick resolution of some cases and to the minimization of the legal expenses borne by the defendant. Respect for the rights of the accused, including the right to a fair trial, according to the jurisprudence of the European Court of Human Rights, is a fundamental principle of this agreement.

In the case of Blackledge vs. Alison of 1977, several advantages of concluding a recognition agreement were highlighted. These include avoiding prolonged pre-trial detention, thereby reducing the anxiety and uncertainty associated with a legal process. It also provides a speedy resolution of the case and the opportunity for the defendant to plead guilty, contributing to a positive start to the rehabilitation process. Judges and prosecutors save vital scarce resources and the public is protected from the risks associated with the release of the accused on bail pending the conclusion of their trial[4].

2. Disadvantages

As is known, with the introduction of the elements of negotiated justice, some negative aspects appeared that can affect the balance of the system. These include the application of punishments in a less transparent manner, and the solemnity of the process may be diminished. One can also discuss a possible injustice generated by inequalities before the law and obtaining reduced sentences, which may have negative consequences for society, although they may be considered advantageous for the defendant. „In other continental systems, the transactional elements in criminal matters consist in the establishment of non-jurisdictional procedures, through which the Public Ministry proposes to the alleged author of a crime that the criminal prosecution against him no longer be carried out, in exchange for the payment by the latter of a sums of money”[5]. „However, it is emphasized that, being an exception to the principle of the unavailability of public action, the transaction can only occur in the cases expressly provided by law.”[6]

[3] Conferintele Noului Cod de Procedura Penala, Consiliul Național al Magistraturii, Institutul Național al Magistraturii, București, Patru Ace, 2015

[4] Blackledge vs. Alison, 431 U.S. 63 (1977)

[5] H.D. Bosly, D. Vandermeersh, Droit de la procedure penale, 4 ed., Ed. La Charte, Bruges, 2005, p. 242

[6] Ibidem.

II. CONCLUSION OF THE AGREEMENT TO ACKNOWLEDGE GUILT – PROCEDURE ASPECTS

1. Holders of the plea agreement and preliminary issues in the plea agreement procedure

The conclusion of this special „plea of guilt" procedure can take place either at the initiative of the prosecutor leading the criminal investigation, or at the initiative of the defendant. If the initiative comes from the defendant, the prosecutor has the right to refuse the agreement but, in any case, certain sine qua non conditions must be met.

According to the legal provisions (art. 478 CPP) from the judicial bodies, the prosecutor who carries out or supervises the criminal investigation is the one who initiates the conclusion of the agreement. He has the obligation, before initiating the agreement, to make sure that the defendant acknowledges the act, that he agrees with the legal framework, with the solution ordered, the type, amount and form of execution of the punishment and to draw up the „record".

The prosecutor hierarchically superior to the one mentioned does not have the competence to propose or order the conclusion of such an agreement.

2. The opinion of the superior hierarchical prosecutor – art. 478 CPP

The method of requesting the opinion is not specifically regulated, so that in practice several procedures are encountered. One of these consists in drawing up a report proposing the procedure, which is transmitted hierarchically; in case of agreement, the opinion is received back in the form of a note on the document. Another way consists in the complete drafting of the agreement, sent for approval, followed by its conclusion and signing by the prosecutor, the defendant and the lawyer. It is the condition that the superior hierarchical prosecutor is informed, and he issues the opinion before the special procedure.

The opinion of the superior hierarchical prosecutor can be positive or negative regarding the content of the agreement. The opinion is only a condition for the conclusion of the plea agreement, and not an order given by the higher hierarchical body.

The Public Ministry operates according to the principle of hierarchical subordination, so, even if the case prosecutor is responsible for the procedure, he can conclude the agreement only „within the limits established by the prior and written opinion of the superior hierarchical prosecutor", according to art. 478 para. (4), respectively para. (2), which provides that „the effects of the agreement are subject to hierarchical approval".

Therefore, it was ruled that by this norm the case prosecutor cannot establish a harsher or much lighter punishment for the defendant, than within the limits imposed by the superior prosecutor. The doctrine also expressed the idea that the case prosecutor can exceed the minimum limits imposed by prior approval, we believe that this condition will be covered if the first prosecutor approves the entire agreement.[7]

The limits imposed by the chief prosecutor do not affect the essence of the institution that involves an element of negotiated justice and do not include the determination of the amount of the punishment or the manner of execution. Also, the defendant is not obliged to know the content of the prior notice. Through limits, the senior prosecutor only establishes the

[7] C. Voicu, A.S. Uzlău, G. Tudor, V. Vaduva, Noul Cod de Procedura Penala. Ghid de aplicare pentru practicieni, Ed. Hamangiu, București, p. 570-571

framework in which the understanding between the prosecutor and the defendant must take place.

It is possible for the senior prosecutor to suggest a certain type of punishment for the defendant to accept, a minimum amount of it or a certain form of execution, or to exclude certain types of punishment or ways of execution that could be considered at conclusion of the agreement.

Following these considerations, the case prosecutor having the freedom to decide on the type, amount and form of execution of the punishment[8].

The procedure cannot move forward without obtaining the prosecutor's subsequent opinion, which can be replaced by the case prosecutor's report, which, subsequently, must be approved. This stage is essential to ensure the regularity of the reporting act. The decisions of the first prosecutor can be either to admit, in which case the recognition agreement is later sent to the court, or to reject, for reasons of legality, or for reasons of expediency.

Reasons for legality refer to the conditions under which this procedure can be resorted to, such as the penalty for the crime not exceeding 15 years or the existence of sufficient evidence to indict the person. „Regarding guilt, we must emphasize that the term should not be interpreted strictly in the subjective sense of the crime, as defined in the special part of criminal law, but in a broader sense, including the commission of the act and the circumstances in which it took place, which can engage the criminal responsibility of the defendant".[9]

From the expression „sufficient data" we deduce that an exhaustive set of evidence is not necessary, as is required for the indictment according to article 327 of the Code of Criminal Procedure. Instead, it is essential that there is sufficient information to suggest that the defendant in question is guilty. This is due to the fact that the criminal procedure is also based on the recognition of the defendant's guilt regarding the commission of the crime and the acceptance of criminal responsibility, while the right to defense is ensured according to Article 480 paragraph (2) sentence II of the Code of Criminal Procedure.

The plea agreement is beneficial to those between whom it is entered into. Thus, the defendant can benefit from a reduction of one-third of the prison sentence or one-fourth of the limits of the fine, while society, through its representative, the prosecutor, is spared an unnecessary expense and also benefits from a quick settlement of the the cause.

3. Persons who cannot enter into a plea agreement

According to the criminal procedural provisions, only the defendant can be a party to the agreement, the suspect not having this possibility, because it is considered necessary to have some evidence from which guilt can result. According to the conditions for initiating the criminal action – art. 15 CPC criminal action is initiated by the prosecutor when there is evidence indicating that a person has committed a crime, since in our procedural system it is crucial to adapt the institution to the principle of finding the truth. In order to ensure that there

[8] Studiu privind Procedura de Incheiere a Acordului de Recunoastere a Vinovatiei, Ministerul Public, Parchetul de pe lângă Înalta Curte de Casație și Justiție, București, 2014, pg. 5

[9] Norwegian Financial Mechanism 2009-2014 Programul RO 24 „Întărirea capacităţii judiciare şi cooperare" Proiectul „Consolidarea capacităţii sistemului judiciar din România de a face faţă noilor provocări legislative şi instituţionale/Strengthening the capacity of the Romanian judicial system to face new legislative and institutional challenges" ȘCOALA DE VARĂ SINAIA: ACORDUL DE RECUNOAȘTERE A VINOVĂȚIEI, 2016

is relevant evidence of guilt, the consent must be confirmed by the court, which will verify the consent and establish the judicial truth.[10]

Regarding the legal person, the code does not make the distinction, which means that it can be done by both the natural person and the legal person, respecting the conditions of the special procedure.

III. ANALYSIS OF THE OPPORTUNITY OF THE DEFENDANT TO GET A PLEA AGREEMENT

The conclusion of a plea agreement in the criminal investigation phase, in addition to the previously mentioned advantages, also has the disadvantage of preventing judicial proceedings in the common procedure and automatically losing the exercise of certain rights. Considering these aspects, the defendant should proceed to conclude the agreement only in the situation where he obtains certain benefits.

The defendant must carefully consider and evaluate the appropriateness of entering into this agreement, given the evidence available in the record:

• to study in detail both the prosecutor's version of the circumstances of the case and the defense's version;

• take into account the existence, seriousness and extent of his criminal history;

• to evaluate both the quantity and the quality of the evidence that incriminates him or that favors him;

• to find out if the prosecutor has the means to prove his guilt. Often, on the day of the trial, it is determined whether all witnesses will be present or willing to testify, as well as whether there is other incriminating evidence;

• to find out if he can invoke certain legal arguments that could lead to the rejection of certain evidence[11].

Another controversial issue encountered in practice concerns the need for the defendant to know the limits established in the prior notice. Doctrinal opinions are divided on this point. There are opinions that argue that the defendant should not be informed of the content of the prior notice because negotiation is a process in itself and not a fixed outcome. In this situation, there is a risk that the accused person will request that limits be set, which could prevent the prosecutor from negotiating the agreement effectively[12].

On the other hand, there are opinions that argue that the defendant should be informed about the limits in which he can be „negotiated", so that he can decide if it is appropriate to initiate the recognition agreement procedure.

IV. INITIATIVE TO CONCLUDE THE AGREEMENT

According to art. 478 para. (3) CPP, the agreement „can be initiated by both the prosecutor and the defendant". The prosecutor can initiate the agreement and then request the opinion, in which case the defendant can accept or decline the proposal. On the other hand, the defendant may be the one to propose such a deal, and the prosecutor has the option to accept or reject the proposal.

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[10] C. Voicu, A.S. Uzlau, G. Tudor, V. Vaduva, Noul Cod de Procedura Penala. Ghid de aplicare pentru practicieni, Ed. Hamangiu, București, 2014, p. 569

[11] Institutul de perfectionare a avocatilor din Maryland a intocmit o lista mai elaborată

[12] N. Volonciu, A.S. Uzlau, R. Moroșanu, V. Văduva, D. Atasiei, C. Ghigheci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chriță, T. Manea, Codul de Procedură Penală-Comentat, Ed. Hamangiu, Bucuresti, 2017

Within the doctrine, the idea was highlighted that one of the situations in which the prosecutor initiates the special procedure is determined by the lack of sufficient evidence or the existence of inaccessible evidence.[13]

In other legal systems, the prosecutor is the sole initiator of the procedure, having the authority to initiate it and being the sole decider as to its appropriateness. The refusal to initiate the transaction procedure does not require a justification, since the initiation of the procedure is a unilateral action of the prosecutor.[14]

The question arises whether, in the situation where the defendant proposes to the prosecutor to end the procedure, the latter is obliged to accept or not? The doctrine is divided into two opinions, one which says that the agreement is triggered with the consent of both parties, from which it follows that the prosecutor is entitled to refuse, [15]and the second which says that the prosecutor cannot refuse to initiate the procedure.[16]

The latter opinion bases its claims on the grounds that the defendant has the right to initiate, „not the right to conclude an agreement". The defense originates from the interpretation of art. 108, paragraph (4) Criminal Procedure Code, according to which the judicial body is obliged to „inform the defendant of the possibility of concluding, during the criminal investigation, an agreement, as a result of the admission of guilt", therefore, he would be obliged to accept the defendant's initiative. The interpretation would have the justification that it would ensure the achievement of the purpose of the procedure, namely the efficiency of the judicial act.17

If the prosecutor does not agree with the procedure initiated by the defendant, he can reject it by means of an ordinance which can then be appealed to the superior hierarchical prosecutor.[18]

The outlined rule does not require the prosecutor to „conclude the agreement within the limits imposed by the defendant", regardless of opinion. The prosecutor has the freedom to make a discretionary decision regarding the amount and manner of execution of the penalty, as mentioned previously. This institution was created to facilitate the judicial process, relying on the agreement and will of the parties involved in the conclusion of the procedure. She brings up the concept of „negotiated justice" between the defense and the prosecution, in which the negotiation reflects the interest of each involved party.

"In our doctrine, it has been emphasized that when the trial prosecutor makes the decision to enter into a plea agreement, he may consider various elements. These include the defendant's willingness to cooperate with the prosecution or to provide information about others involved, his attitude toward his criminal activity and criminal history, the nature and

[13] M. Pascu, T. Manea, Acordul de recunoaștere a vinovăției, Ed. Universul Juridic, București, 2015, p. 28

[14] H.D. Bosly, D. Vandermeersh, Droit de la procedure penale, 4 ed., Ed. La Charte, Bruges, 2005, p. 244

[15] N. Volonciu, A.S. Uzlau, R. Moroșanu, V. Văduva, D. Atasiei, C. Ghigheci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chriță, T. Manea, Codul de Procedură Penală-Comentat, Ed. Hamangiu, Bucuresti,2018, p. 1377

[16] N. Volonciu, A.S. Uzlau, R. Moroșanu, V. Văduva, D. Atasiei, C. Ghigheci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chriță, T. Manea, Codul de Procedură Penală-Comentat, Ed. Hamangiu, Bucuresti,2018, p. 1377

[17] N. Volonciu, A.S. Uzlau, R. Moroșanu, V. Văduva, D. Atasiei, C. Ghigheci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chriță, T. Manea, Codul de Procedură Penală-Comentat, Ed. Hamangiu, Bucuresti,2018, p. 1377

[18] G. Bodoroncea, în M. Udroiu (COORD), op. Cit., p. 1907

seriousness of the charges, the chances of obtaining a conviction in that case, as well as and the public interest in obtaining a more expeditious and less costly judicial resolution'.

The injured person and the civil party have no involvement in concluding the agreement, according to the rules established by the Code of Criminal Procedure regarding the exercise of the criminal action. The interest of the injured person no longer prevails, as the state has an interest in obtaining an efficient and low-cost judicial solution.[19]

"If the criminal action concerns several defendants, a separate agreement can be drawn up for each one, as provided for in Article 478, paragraph (5) of the Code of Criminal Procedure. Each defendant will negotiate his own recognition agreement, without the involvement of the others, because each situation is unique and the circumstances differ, so the advantages and disadvantages for each may vary. In the situation where the plea agreement is recorded in a joint document, this is not a reason to reject the agreement, with provided that all other legal requirements are met.According to Article 478, paragraph 5 of the Code of Criminal Procedure, defendants for whom no agreement has been reached continue to benefit from the presumption of innocence.

If a plea agreement is reached with only part of the defendants, the other defendants are not affected, and their statements given as witnesses in the separate case cannot be used against them. The right of the witness not to incriminate himself is regulated by Article 118 of the Code of Criminal Procedure.

The possibility of concluding plea agreements with minor defendants was introduced into the criminal procedural legislation by amending article 478, paragraph 6 of the Code of Criminal Procedure, by adopting O.U.G. no. 18/2016. This change was made to protect the rights and legal interests of minors by giving them the opportunity to end the conflict of criminal law at the prosecution stage."[20]

Regarding the protection of victims in the plea agreement procedure, it is necessary to clarify the position of the Romanian criminal process in relation to the notions of restorative justice or retributive justice. The purpose of the trial in Romania is to restore the social order prior to the commission of the crime and to ensure the psychological, relational and material restoration of the relationship between the victim, the criminal and the community.

V. REFUSAL OF THE DEFENDANT TO CONCLUDE THE PLEA AGREEMENT

According to article 478, paragraph (3) of the Criminal Procedure Code, „the plea agreement can be initiated by both the prosecutor and the defendant". Thus, the defendant cannot be forced to conclude the agreement, nor is he obliged to initiate it. The possibility to refuse is a consequence of the legal character of the defendant, being an option and not an obligation. Also, this right is revocable, thus reflecting the nature of the institution which is built in favor of, and not against, the defendant.[21]

VI. CONDITIONS OF CONCLUSION OF THE AGREEMENT OF ACKNOWLEDGMENT OF GUILT

The initiation of the criminal action is the primary condition, as it is about the defendant's capacity.

[19] C. Voicu, A.S. Uzlau, G. Tudor, V. Vaduva, *op. cit*., p 570

[20] Idem.

[21] M. Pascu, T. Manea, Acordul de recunoaștere a vinovăției, Ed. Universul Juridic, București, 2015, p. 31

This condition was established because it was sought that, at the time of the conclusion of the agreement, there was sufficient evidence to show that the person committed the act for which the criminal action was ordered to be initiated, and also, none of the preventing causes provided for in art. 16 CPP.

In the doctrine22, it was argued that there is the possibility of concluding a single plea agreement involving several defendants, with the distinct mention of the object of the negotiation for each individual defendant. In this situation, it will be considered that an injury recognition agreement has been concluded with each individual defendant, depending on the limits of the individual negotiation, even if only one written document was concluded,23 taking into account that everyone's situation is distinct, and „the advantages" with which each of the negotiations is presented is different.[24]

The defendant entering into the agreement must be assisted by a lawyer, whether chosen by the defendant or appointed ex officio. This is necessary to ensure compliance with the principle of equality of arms and is one of the cases in which legal assistance is mandatory according to article 90 of the Code of Criminal Procedure and 480 CPC.

The nature of the punishment provided by law for the crime for which the criminal action was initiated – is another condition that must be met in order to be able to proceed with the conclusion of the agreement. This penalty can be either a fine or imprisonment, but cannot exceed the maximum penalty of 15 years.

Also, in assessing the fulfillment of this condition, the punishment prescribed by law for the crime committed, as established in article 187 of the Criminal Code, will be taken into account. This penalty is the one provided in the text of the law that criminalizes the act in its consummated form, without taking into account the circumstances that could reduce or increase the penalty. Therefore, circumstances such as attempt, mitigating or aggravating circumstances, continued crime, concurrence of crimes, recidivism, intermediate plurality or criminal participation will not be taken into account.

In the situation where there are aggravated or mitigated variants of the crime, the punishment provided by law for these variants will be taken into account. For example, in the case of domestic violence related to murder, the penalty limits are increased by a fourth, and in the case of bribery committed by an individual, the penalty limits are reduced by a third.

Another condition refers to the need for the existence of sufficient evidence, from which the existence of the fact for which the criminal action was initiated and regarding the guilt of the defendant can result – aspects that are the subject of the criminal investigation.

In the doctrine[25], it was argued that the standard of proof to be taken into account by the prosecutor is that of „sufficient evidence to show that the defendant committed the crime he is accused of", and not that of proof beyond a reasonable doubt that will be taken into account by the court, even if the defendant unconditionally admits the act for which the criminal action was initiated, a condition that refers to the need to obtain a prior and written opinion from the superior hierarchical prosecutor, whereby he agrees with the limits of the agreement. It is well

[22] M. Udroiu (coord.) – Codul de procedură penală. Comentarii pe articole. ediția a 2-a, ed. C.H. Beck, București, 20I7, p. 533

[23] M. Udroiu (coord.(, *op. cit*., p.I907

[24] N. Volonciu, A.S. Uzlău (coord.) – Codul de procedură penală comentat, ediția a 3-a, ed. Hamangiu, București, 20I7, p. 1379

[25] M. Udroiu, *op. cit*., p. 534

known that there must be a consensus between the prosecutor and the defendant regarding the object of the agreement, this representing another condition.

Given that the purpose of introducing this institution into the criminal process system was to simplify judicial procedures and reduce the burden on the bodies involved in restoring the legal order, I believe that the structure of the plea agreement should strictly and limitedly include the essential elements for the understanding both by the defendant and by the court, of the accusation formulated, of the correctness of reporting the factual situation to the applicable legal norm, as well as of the justification of the amount and form of execution of the penalty on which an agreement was reached.

In conclusion, I believe that the structure of the convention that establishes the understanding between the prosecution and the defense should include the following elements: the name of the prosecution unit of which the case prosecutor is a part; the identification data of the signatories (surname, surname, capacity) – prosecutor, defendant and the lawyer elected or appointed ex officio; a brief presentation of the defendant's personality, criminal history, coverage or reduction of the damage caused by the commission of the criminal act; a brief description of the act and its legal status; listing the means of evidence on which the indictment is based; the type, amount and method of execution of the punishment, as well as other ways of individualizing the execution of the criminal sanction; the manner of settlement of the civil action; the signatures of the persons involved in the procedure.

Practically, the emphasis must be placed on the method of solving the criminal law report before the judicial bodies.

CRIME IN ROMANIA ONE YEAR AFTER THE LIFTING OF THE COOPERATION AND VERIFICATION MECHANISM AND TEN YEARS AFTER THE ENTRY INTO FORCE OF THE NEW CRIMINAL LEGISLATION

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1. Abstract

On 1 January 2024 it was one year since the European Commission lifted the Cooperation and Verification Mechanism established with Romania's admission to the European Union in 2007.

On 1 February 2024 it was 10 years since the entry into force of the Criminal Code and the Criminal Procedure Code. These two events provide a good opportunity to analyse criminality in Romania, its trends and the directions in which it is evolving.

Keywords: *Criminal Code and the Criminal Procedure Code, criminality, trends and the directions*

2. Introductory considerations.

Criminality is the totality of crimes committed in a certain territory in a given period of time. Criminality is an objective social phenomenon, omnipresent in contemporary society, which nation states strive to control.

Criminology currently uses several concepts: **actual criminality**, which includes all crimes actually committed in a certain territory, in a given period, regardless of their nature and seriousness and the number of perpetrators; **discovered or apparent criminality**, which includes all crimes that have come to the attention of the judicial authorities and in respect of which they are carrying out activities aimed at holding the perpetrators criminally liable; **legal or judicial criminality**, which includes all crimes in respect of which final court decisions have been handed down. The difference between actual criminality and discovered crime is the 'crime black numbers, the total number of crimes that remain undetected and which each country is striving to reduce as much as possible[1].

Emile Durkheim (1858-1917) considered crime a normal social phenomenon and insisted on the need to understand and analyse criminality not by itself, but always in relation to a culture determined in time and space[2]. Continuing this idea, R. K. Merton wrote that the frequency of deviant behaviour varies with social structures and that deviance does not take the same form in all societies[3]. For Romania and the European Union, the warning issued by Jean Pinnatel in 1971 is more topical than ever: „Almost everywhere in the world, crime has crossed the threshold from which it ceases to be a residual phenomenon to become a political phenomenon... a phenomenon characteristic of our society, in transformation, which must henceforth be the object of attention equal to that given to other social phenomena[4].”

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[1] G. Antoniu, C. Bulai, Dicționar de drept penal și procedură penală, Ed. Hamangiu, București, 2011, p. 225.
[2] R. Gassin, Criminologie, Ed. Dalloz, 2003, p. 261.
[3] D. Szabo, Deviance et criminalite, Textes, A. Colin, 1970, p. 133.
[4] J. Pinatel, La societe criminogene, Calmann-Levy, 1971, p. 10-11.

The one-year anniversary of the lifting by the European Commission of the Cooperation and Verification Mechanism (CVM), imposed on Romania with its admission to the European Union in 2007, marks the end of the transitional period for the judiciary field. It has therefore been considered necessary for 15 years for the principles that form the basis of the European area of security and justice to be generalised in legislation, practice and doctrine. Between 2009 and 2014, the new codes were adopted and entered into force: civil and civil procedure, criminal and criminal procedure. February 1, 2024 marked 10 years since the entry into force of the new criminal legislation. This is therefore a good opportunity to examine the state, structure and dynamics of criminality in Romania.

3. Used method

An analysis with a very broad spectrum, such as criminality in a society such as the Romanian one, can only be made based on statistical data, following the well-known model of criminologists Andre-Michel Guerry (1802-1866) and Adolphe Quetelet (1796-1874)[5].

Criminological research usually uses data from court statistics based on final court decisions. However, these have the disadvantage that they are too far removed from the time when the crime was committed. Prosecution lasts on average 18 months, while trial and appeal take between 36 and 48 months. The police statistics are the closest to the time of the crime, but they are imprecise because they do not indicate the correct outcome, which is to be determined by the prosecution and ultimately by the courts. The best result, based on these two characteristics, proximity to the time of the offence and the correctness of the solution, is provided by the statistics of the Public Prosecutor's Office.

In what follows we will analyse the statistical data provided by the Public Ministry and we will try to understand the structure and dynamics of crime in Romania in 2024.

4. Apparent criminality

In 2023, 619,737 cases were registered and 545,600 were resolved, of which 48,338 were resolved by indictments and plea agreements, with 59,620 natural persons and 272 legal persons being sentenced. The average number of defendants prosecuted per 100,000 inhabitants was 313, down from 327 in 2022. The structure of crimes committed in 2023 was as follows:

- against public safety – 40.7%
- against property – 20,4
- against the person – 19.2%
- offences under special laws – 10.8%
- other crimes – 8.9%

4.1. The category of **offences provided for in special laws** includes:

- illicit drug trafficking and consumption, as well as precursor offences – 4.86%, of – total number of natural persons indicted
- tax evasion offences – 1.02%
- offences under the Forestry Code – 0.95%.
- corruption offences – 0.9%.
- smuggling offences – 0.28%.

[5] R. Gassin, *op. cit*., p. 25.

- offences against intellectual property rights – 0.20%.
- money laundering offences – 0.11%.
- environmental offences – 0.01%.
- other offences – 8.9%.

4.2. Offences against the person had the following structure:

- 6.1% – homicide
- 7.1% – manslaughter
- 50.1% – assault or other violence
- 7,6% – sexual act with a minor
- 4,4 % – culpable injury
- 2.9% – threat
- 2.5% – imprisonment
- 2.1% – sexual assault
- 1.8% – blackmail
- 1.7% – procuring
- 1.6% – bodily harm
- 1.3% – human trafficking
- 1.2% – child trafficking
- 1,1% – home invasion
- 0.5% – assault and battery causing death
- 1.3% – other crimes against the person

4.3. In terms of **domestic violence**, 1,321 defendants were prosecuted. Of these, 262 were spouses, 124 parents and 278 children.

4.4. Property offences accounted for 20.4% of all defendants prosecuted and had the following structure:

- 65,7% – theft
- 15.8% – robbery
- 9.1% – destruction
- 7.7% – cheating

4.5. Offences affecting social relations, with a total of 1,552 defendants, accounted for 2.6% of the total number of natural persons defendants brought to trial and had the following structure:

- 19 % – child pornography
- 14.8% – family abandonment
- 11.9% – setting up an organised criminal group
- 1.9% – failure to comply with custody arrangements

4.6. For **corruption offences** 945 defendants were indicted, of which 509 by the National Anticorruption Directorate.

5. Quality of prosecution acts.

5.1. The number of cases **to be resolved** in 2023 has decreased by 98,000 cases compared to 2014 and the number of cases resolved in 2023 has decreased by 128,582. The number of cases resolved by sending them to court increased in 2023 by 11,734.

5.2. The number of cases resolved by non-prosecution decreased by 140,316 compared to 2014. The number of cases remaining unsolved at the end of the year increased from 511,215 in 2014 to 701,125 in 2023. Practically, the backlog at the end of each year is higher than the prosecutors' offices' capacity for one year, with the Public Prosecutor's Office handling 545,600 cases in 2023.

5.3. The number of unsolved cases with **unknown perpetrators** decreased by 191,958 cases. The number of defendants in resolved cases decreased by 68,477 compared to 2014, as did the number of suspects and defendants not brought to trial, which decreased to 77,755 suspects and defendants.

5.4. The number of cases resolved more than 1 year after referral increased by 31,447 cases and the number of cases resolved after the expiry of the limitation period decreased by 8,931 cases.

5.5. The number of defendants prosecuted in indictments and plea agreements is approximately equal: 7,040 in 2014 and 7,324 in 2023. The number of suspects and defendants who were remanded in custody and not prosecuted increased considerably from 107 in 2007 to 452 in 2023.

5.6. The number of cases returned by the pre-trial chamber and the courts to the prosecutor has seen a modest increase from 161 cases in 2014 to 191 in 2023. The value of the damage caused by defendants decreased from 4,638,110,154 lei in 2014 to 1,319,830,997 lei in 2023.

6. Directions of crime development

6.1. Offences against the person saw a moderate increase from 9,462 in 2014, representing 18.8% of the overall total of defendants, to 11,455 defendants in 2023, representing 19.2% of the overall total of defendants. Note that defendants indicted for murder decreased from 445 to 401 in 2023. There were decreases for assault or battery causing death (from 78 to 57), trafficking in human beings (from 183 to 153), trafficking in minors (from 350 to 142). Procuring (from 137 to 196) and rape (from 469 to 522) increased.

6.2. Property offences saw significant decreases: theft from 9,069 to 7,997, robbery from 2,369 to 1,802, fraud from 2,109 to 938. Destruction increased from 537 to 1,108.

6.3. Offences relating to authority and state border remain at a constant level in terms of assault (425 in 2014, 437 in 2023) and fraudulent border crossing (49 in 2014, 35 in 2023), but see significant increases in migrant smuggling, which rises from 105 in 2014 to 467 in 2023.

6.4. Corruption offences increased for bribery (from 127 to 154) and buying influence (from 37 to 80), but decreased for taking bribes (from 291 to 107) and remained constant for influence peddling (from 65 to 70).

6.5. Drug trafficking and illicit drug use offences have seen a significant increase, with 2,897 defendants prosecuted in 2023, more than doubling from 1,241 in 2014. It is one of the few categories of crime where a red flag needs to be raised to intensify preventive activities in secondary schools, high schools, universities.

6.6. Tax evasion offences have seen a significant decrease, with 1,803 defendants in 2014 compared to 607 defendants in 2023. There is no explanation for this decrease, given that the tax collection rate is below 30%, other than that the work of National Agency Fiscal Administration inspectors is not firm enough in discovering tax evasion offences.

6.7. Money laundering offences have also seen significant decreases: only 63 defendants prosecuted in 2023, compared to 299 in 2014. A thorough analysis should be carried out by the prosecution authorities specialising in this area of activity together with the Money Laundering Office.

6.8. Environmental offences are almost non-existent: after one defendant in 2014 and one in 2015 were sent to court, 2 defendants in 2017 and 6 defendants in 2023 for environmental offences. This is despite numerous revelations by journalists about waste imports and burning in localities near the capital.

6.9. Smuggling offences have seen a worrying and unjustified decrease, whereas in 2014 416 defendants were prosecuted and 1,263 in 2015, in 2023 only 169 were prosecuted.

6.10. The number of juvenile defendants brought to trial has seen an insignificant increase, 3,194 in 2023 compared to 2,966 in 2014, so we can speak of a certain stability of juvenile delinquency, which can be accepted from a criminological point of view, since the number of juvenile offenders is relatively stable.

7. Conclusions

7.1. The crime situation in Romania in the period 2014-2023 is stable with slightly decreasing trends. High-violence crime is under the strict control of the authorities, with homicide accounting for 6.1% of crimes against the person, rape 4.6%, manslaughter 7.1%. Domestic violence is also low, accounting for 2.2% of those prosecuted. Offences against property, accounting for 20.4% of the total number of defendants against individuals brought to trial, shows a downward trend of about 5% compared to 2014.

The fact that the crime situation has remained stable over a period of a decade shows that the judicial system is functioning properly and has overcome the period of adjustment to the new legislation and to the requirements of a democratic European society.

7.2. The work of the prosecution authorities is well organised and results-oriented. However, there is a large backlog of cases and insufficient activity in areas such as combating drug trafficking and illegal drug use, tax evasion, money laundering and environmental crime. These are areas that require special attention, high levels of specialist training and a working methodology on a par with Western countries. Preventive activities are left to civil society, with the judiciary having no involvement whatsoever, which we consider to be an inadequate way of working.

With regard to cases with unknown perpetrators, new methods need to be introduced to facilitate the reduction of the backlog of 467,061 files.

The overall conclusion is that the lifting of the Cooperation and Verification Mechanism was the result of continued and sustained progress by the Romanian judicial system, which has proven that it applies new legislation fairly, at the level of other European countries, and that it is able to keep the crime situation under control.

THE BAD FAITH USE OF COMPANY ASSETS OR CREDIT

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Abstract

The Romanian Civil Code regulates the concept of good faith in Article 14 (1), where it is stated that any natural or legal person must exercise their rights and perform their obligations in good faith, in accordance with public order and good morals. Even our Constitution provides in Article 57 that Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of others. We also remind you that, according to Article 14 (2) of the Civil Code, good faith is presumed until proven otherwise.

We thus observe that good faith is a fundamental principle of civil law, the protection of good faith being elevated to the rank of principle. Considering the importance that our legislator gives to good faith, it was rightly considered that in the case of illegal acts, by which certain particularly important social values are damaged, the measures to protect good faith, specific to civil liability or contraventional liability, are not sufficient and it is necessary for criminal liability to become incident.

Such a situation, in which our legislator understood to grant criminal protection to the good faith that must govern the performance of duties by persons occupying important positions within a company with legal personality, we meet in the case of Article 272 (1) b) of the Companies Law no. 31/1990, which criminalizes the use, in bad faith, of the assets or credit enjoyed by the company, for a purpose contrary to its interests or for the perpetrator's own benefit or to favor another company in which he has direct or indirect interests. In this article, we have proposed an analysis of how the bad faith use of assets or credit enjoyed by the company with legal personality is criminalized.

Keywords: *good faith, the company with legal personality, the use of goods, the legal representative, the credit of the company*

1 Introductory considerations regarding the principle of good faith

Conform Article 14 (1) of the Civil Code, *any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals,* and paragraph (2) of the same article states that *good faith is presumed until proven otherwise.*

Article 57 of the Constitution provides that *Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith,* without violating the rights and freedoms of others.

But the question arises: what is good faith? As rightly shown in the doctrine[1], „*good faith is a principle that must be the basis of both legal relations and the exercise of civil rights"*. In the French specialized literature it was said that *good faith is the driving force of legal relations* and it was emphasized that „*all the motives that justify any kind of legal act can be summed up in this general notion that we call good faith, a notion in which these motives melt until they lose their individuality"*[2].

At the moment it is formed, good faith takes on the aspect of a psychological fact that conforms to moral norms. Psychological facts make up human consciousness, representing an important aspect of our conscious life[3].

Cicero defined good faith as representing sincerity in words (veritas) and *faithfulness in commitments (constantia)*[4]. From this definition, a first conclusion can be drawn that the psychological facts that generate good faith create, on the one hand, a state of conformity between what a person thinks and what he affirms, which can be translated into *sincerity,* and on the other hand, a state of conformity between what a person affirms and the acts that a person undertakes, which translates into *faithfulness*.

However, in order to complete the definition of good faith, the *intended purpose pursued* by a person must also be taken into account[5]. In turn, the intended purpose will be revealed by *the intention*. Thus, Cicero said that „*true good faith is based on intention and not on words (Semper autem in fide, quid senseris non quid dixeris cogitanum)"*[6].

Therefore, in defining good faith, we must bear in mind that both sincerity in words and fidelity in commitments always presuppose the existence of a correct intention, in accordance with the rules of conduct that the law or custom of the place imposes, without prejudice to the rights or legitimate interests of other persons or contractual obligations.

The moral foundation of good faith is *honesty*, which consists in the conformity of a person's actions or inactions with moral norms, and is conditioned by moral conscience. Thus, in the specialized literature it was stated that honesty, as a form of manifestation of conscience within the framework of moral norms, is included in the composition of good faith, *so that it ends up being confused with it*[7]. *The moral values of honesty are considered to be loyalty (*or probity*), prudence, order and temperance*[8]. These values of honesty will be legally translated into the following elements of good faith: i) the existence of a correct intention, ii) diligence in the actions undertaken, iii) the performance of lawful acts and iv) refraining from harming the rights or legitimate interests of a person[9].

In the explanatory dictionary of the Romanian language[10] good faith is defined as „*a person's belief that he is acting within a right and in accordance with the law or what is proper*". Good faith implies sincerity, honesty, a person of good faith is sincere, honest.

2 Criminal protection of good faith

As we saw earlier, good faith includes in its content several moral values that form honesty, as an element that must govern human conduct. When these moral values enter the sphere of legal relations, we will be in the presence of an interpenetration of moral norms with legal norms, in which case the principle of good faith becomes incident.[11]

Good faith is an important aspect of human behavior, but unfortunately in everyday life there are many situations where the principle of good faith is not respected in the legal relationships that arise. The antithesis of good faith is bad faith. A person in bad faith is incorrect, dishonest, malicious, does not fulfill his moral, social or legal duties related to a certain circumstance [12]. A human conduct that is grafted on bad faith can materialize in an illegal act that affects some social values of a natural or legal person.

In cases of illicit acts based on bad faith behavior, resulting in the infringement of certain exceptionally important social values, measures to protect good faith, specific to civil or contraventional liability, are not sufficient, and it is necessary for criminal liability to intervene. Thus, both in the Criminal Code and in some special criminal laws or in non-criminal laws containing criminal provisions, we encounter numerous norms that

criminalize behaviors violating the principle of good faith, which should underlie legal relationships.

Such a situation is represented by the legislator's intention to grant criminal protection to good faith, which should govern the relationships between individuals holding important positions within a legal entity and the society they represent. This concerns Article 272 (1) b) of Law no. 31/1990 on companies, *which criminalizes the use, in bad faith, of the assets or credit enjoyed by the company, for a purpose contrary to its interests or for the personal benefit of the perpetrator, or to favor another company in which the perpetrator has direct or indirect interests.*

3 Bad faith use of company assets or credit

The special legal object of this crime consists in the social relations regarding the activity of companies with legal personality, whose normal existence, development and evolution depend on the good faith with which the management factors in the structure of these companies must fulfill their duties. We note that the social value protected by this criminalization norm is the good faith with which the persons with management duties within the companies with legal personality must fulfill their duties. We are in the presence of a violation of this social value when the persons with management duties in the structure of the company act for a purpose contrary to its interests or for their own benefit or to favor another company in which they have direct or indirect interests.

The material object of this crime is represented by goods, money or values used for purposes contrary to the interests of society. Regarding „*company credit*", this expression has given rise to different interpretations in specialized literature and in judicial practice. In a first opinion[13], it was shown that by the phrase „company credit" we must consider only the economic aspect, while in another opinion[14] it was reasoned that this phrase has a much broader meaning, because it also takes into account the consideration, authority or fame enjoyed by the company with legal personality. For example, the director of a company, who enjoys a very good appreciation in the business circles, if he intervenes at a bank to obtain a loan in favor of another company where he is a partner; and the latter company does not pay its debts, it damages the image of the company in which the defendant was a director [15].

The active subject is qualified. This offense can only be committed by the founder, manager, director, executive director or legal representative of the company. Criminal participation is possible in all its forms.

The passive subject of this crime is the company whose activity can be disrupted by the activity of the perpetrator. Indirectly, the passive subjects of the crime we are analyzing are the associates of the company who are victims of the criminal activity.

The objective side. The material element of the objective side of the crime consists in the action of using the company's assets or credit. Thus, we find ourselves in the presence of two alternative normative ways of the material element of the objective side. Of course, in order to complete the material element, it is necessary that the action of use is carried out for a purpose contrary to the company's interests or for the perpetrator's own benefit, or to favor another company in which the perpetrator has direct or indirect interests. The notion of using the company's credit must be understood not only in the sense of using goods or monetary values, received as a loan, for a purpose contrary to the company's interests, but also in the sense that the postponement of the maturities of some of the company's obligations granted by the social creditors is used in the personal interest or of third parties [16].

The expression *credit enjoyed by the company* has both a patrimonial meaning and a non-patrimonial meaning, of a moral nature, which refers to the trust, prestige, image enjoyed by the company in relations between professionals [17]. In the non-patrimonial sense, by the expression *the use of the credit enjoyed by the company,* we understand those situations in which the perpetrator speculates, in his own interest or that of a third party, the good image enjoyed by the company [18].

Regarding the notion of goods, the provisions of Article 535 of the Civil Code must be taken into account, according to which things, tangible or intangible, which constitute the object of a patrimonial right are goods, as well as the provisions of Article 31 of the Civil Code; which provides that any natural or legal person is the owner of a property that includes all the rights and liabilities that can be valued in money and belong to it[19].

In the case law [20], this offense was recognized when the economic director of a limited liability company withdrew from the company's treasury, as an advance, sums of money that were necessary for the procurement of some materials, but which were used in personal interest, or when the manager of a company used the company's machinery and its employed workers to carry out work at another company where he was directly interested. In jurisprudence, this offense was also recognized when the administrator of a company used the bank credit granted to the company for the performance of a commercial contract, for the purpose of paying some personal debts and some debts of the company to another company managed by him, thus making the company that contracted the bank loan unable to honor its assumed contractual obligations [21].

Conversely, also in the case law[22] it was shown that the act of the administrator who purchased a bus with which to transport passengers in the name of the company and with its money does not meet the conditions of this crime due to the fact that this activity was included in the object of the company's activity, or the act of the administrator of a company who took from the cash register, based on supporting documents, a sum of money used to carry out a trip abroad, in order to conclude commercial contracts, because the respective amounts were used in the interest of the company.

The immediate consequence consists in the creation of a state of danger for the social value protected by the norm of criminalization, the consummation of the crime not being conditioned by the occurrence of damage to the company's property. Of course, it is possible that in certain situations certain concrete consequences may occur, consisting in harming society, but the occurrence of such harm is not a condition for the commission of this crime. Especially since there may be situations in which the occurrence of any damage is very difficult to prove or quantify, such as situations in which the material element consists in the use of the good reputation enjoyed by the company, for a purpose contrary to its interests.

The causal link results *ex re*, being in the presence of a crime of danger.

The subjective side. From the subjective point of view, the incriminated act constitutes a crime only if it is committed with direct intention, qualified by purpose. More specifically, it is about the situation where the author pursues a goal contrary to the interests of the company or his own benefit or when he considers the favoring of another company in which he has direct or indirect interests [23].

In a case[24] resolved by the Prosecutor's Office attached to the Prahova Court, it was held that the director of a company ordered the collection of a number of bottles of wine, cognac and various quantities of meat products from two other companies, expenses that were recorded in the accounting under the heading „expenses", exceeding the legal quota of 3% for

such expenses from the company's annual profit. From the way the action was carried out, it was found that the director did not act with the direct intention of harming the company, as he had to organize festive meals in the interest of the company, more often than originally planned. Since it was not the intention to cause damage to the company, but, on the contrary, the director aimed for it to develop, it was correctly ordered to remove him from criminal prosecution [25].

Preparatory acts and the attempt, although possible, are not criminalized.

The consummation of the crime takes place when the material element is realized, in one of the ways provided in the incrimination norm.

According to Article 272 (2) of Law no. 31/1990, the act does not constitute a crime if it was committed by the administrator, the director, the member of the directorate or the legal representative of the company in treasury operations between the company and other companies controlled by it or that control it, directly or indirectly.

Regarding the relationship between the crime of bad faith use of the company's assets or credit provided by Article 272 (1) b) of the Companies Law no. 31/1990 and the crime of embezzlement provided by Article 295 Criminal Code, we remind you that the crime provided by Article 272 (1) b) of Law no. 31/1990 represents a specific crime of the crime of embezzlement in the Criminal Code. Due to certain similarities between the two offenses, there may be situations in practice where issues arise regarding a concurrence of qualifications between the two incrimination norms, with an act committed in objective reality potentially falling within the pattern of both incrimination norms.

In such situations, although the criminal provisions of Law no. 31/1990 have the legal nature of special criminal norms which, in concurrence with the provisions of the general law in the Penal Code, should be applied with priority, Article 281 of Law no. 31/1990 provides quite clearly that the acts incriminated in Law no. 31/1990, if, according to the Penal Code or special laws, constitute more serious offenses, are sanctioned with the penalties provided by them. However, the punishment limits in the case of the crime of bad faith use of the company's assets or credit are between 6 months and 3 years, while for the crime of embezzlement the punishment limits are between 2 and 7 years. Therefore, in case of a concurrence of qualifications between the provisions of Article 272 (1) b) of Law no. 31/1990 and the provisions of Article 294 of the Criminal Code, the provisions criminalizing the crime of embezzlement, provided for by Article 295 of the Criminal Code, will be applied, considering that the punishment limits are higher in the case of committing the crime of embezzlement, making the provisions of Article 281 applicable from Companies Law no. 31/1990.

4 Instead of conclusions

We consider that by criminalizing the facts provided for in Article 272 (1) b) of the Companies Law no. 31/1990, the legislator specifically pursued the criminal protection of the good faith that persons with management duties must demonstrate within companies with legal personality, when they use the assets or credit of these companies. At the same time, as shown in Decision no. 72/200 pronounced by the Constitutional Court, this incrimination rule aims to protect the property of companies with legal personality, as well as to prevent unfair competition materialized by the employee offering the services of a professional to another professional or accepting such an offer or by diverting the client of a professional [26].

In another decision issued by the Constitutional Court, it was shown that the phrase bad faith used in the incrimination norm from Article 272 (1) b) of the Companies Law no. 31/1990 *has the meaning of incorrect, dishonest attitude and good faith includes the obligation of fair behavior that the parties must respect when concluding and executing agreements, the conviction of a person that he is acting on the basis of a right and in accordance with the law or what is proper*. *Good faith means sincerity, honesty, honor. It is concluded that bad faith is a form of guilt, the expression of malice, fraud and grave fault, which has as its common denominator cunning, deception and obviously intentional omission.* Thus, the Constitutional Court concluded that *bad faith can be qualified as that attitude of a person who commits a fact or act contrary to the law or other norms of social coexistence, fully aware of the illicit nature of his conduct* [27].

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BRIEF CONSIDERATIONS REGARDING DECISION NO. 457/2023 OF THE CCR REGARDING THE WITHDRAWAL OF FALSE TESTIMONY

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Abstract

The statement given by the witness is of particular relevance because most of the time the end of a judicial procedure can be decisively influenced by the information provided by a person who has such a quality.

False testimony is a crime against the administration of justice, through which both social relationships that concern trust in the conduct of the justice act, as well as those that refer to interpersonal trust, are endangered.

However, the legislator is strict in sanctioning the facts of a distorted account of the events in which the witnesses take part, there are cases in which they can be left unsanctioned if a series of requirements provided by law are met, regarding the possibility of non-punishment cases.

The moment up to which these causes of non-punishment can produce effects is very important, since the legislator did not establish it by chance, taking into account a series of well-determined criteria.

The legislator has established a distinction regarding the non-sanctioning of false testimony committed under certain conditions specific to civil law, as well as in a certain criminal framework, the distinction being the moment when the statement of false testimony is withdrawn.

Keywords: *false testimony, sanction, CCR Decision.*

1. Introduction

The offense of false testimony is provided by the current Criminal Code at Article 273 where it is provided that:

The act of a witness who, in a criminal, civil or other proceeding in which witnesses are heard, gives false statements, or does not tell everything they know regarding the essential acts or circumstances in relation to which they are heard, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

The false testimony committed:

a) by a witness whose identity is protected or who is included in the witness protection program;

b) an investigator working undercover;

c) a person who prepares an expert report or an interpreter;

d) in relation to an offense for which the law provides life imprisonment or a term of imprisonment of 10 years or more shall be punishable by no less than 1 and no more than 5 years of imprisonment.

The witness shall not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the commencement of the criminal action or in other cases before a decision or another solution is given, following the false testimony given. [1].''

The criminalization of false testimony presents the ability to ensure credibility in the administration of witness evidence in a criminal or civil trial. Therefore, we consider that it is very difficult to imagine that there could be a system in which witness statements lack credibility and thus, they are not useful for the correct resolution of the case brought to trial.

For example, the principle of finding the truth that governs the matter of the criminal procedure and the lack of a constraint for the court to motivate the sentence in a rigorous manner lead to the fact that these disregards of the legal provisions do not always have consequences for the truth of the case brought to trial since the court uses general statements, the witness may not be credible.

Regarding the reference during the procedure to the divinity as a form of oath ensures the solemnity of a witness's statement and in addition presents a strong guarantee of the veracity of what was declared by the person being heard. Even though, the religious connotation of the oath has lost its meaning in a society that is becoming more and more secular, and the only mechanism that would ensure pressure on the witness who would be tempted to declare a lie remains this text of incrimination.

The active subject is a qualified one, namely the witness, namely the person called to testify. The person who has a procedural legal relationship once with his consent to be a witness [2]. Therefore, once this procedural legal relationship is created, the person in question has the legal duty to report only the truth about what he has knowledge of.

The act is not punishable if, in criminal cases before the defendant's arrest, and in the case of the other cases, before a decision has been pronounced or another solution has been given as a result of the false testimony, the witness withdraws his testimony. In this case, the withdrawal must be made before any solution or arrest of the defendant.

The determination of this cause of non-punishment helped to create contrary opinions regarding the correctness of its insertion by the legislator, as it can lead to the creation of unfair situations.

As a result, of what was previously stated, the Constitutional Court of Romania was referred to rule on the correction of these situations and to allow the disposition of fair solutions both in criminal cases and in civil cases, regardless of the time of the withdrawal of the false testimony.

However, the arguments presented by the court that notified the Constitutional Court are able to support the view that there is a lack of equitability, the constitutional court by Decision no. 457/2023 [3] rejected the exception as unconstitutional with unanimity of votes.

In what follows, we will detail in depth all the aspects that were the basis of the pronouncement of such a decision and its implications in the cases brought to trial.

2. **CCR Decision no. 457/2023**

The exception of unconstitutionality to which we refer in the present study was raised in a case whose object was to establish the guilt of the authors of the exception under the aspect of committing the crime of false testimony.

In order to motivate this exception of unconstitutionality, the court showed, among other things, that in essence, the legal provisions subject to criticism can create discriminatory situations between witnesses who were summoned and heard for the first time during the trial phase, before the first court or in appeals, and the persons who were summoned and heard as witnesses during the criminal investigation, on the one hand, and, on the other hand, between all those mentioned and witnesses heard in civil or other cases. At the same time, it is shown that, if the witnesses heard in the civil processes benefit from the possibility of being able to withdraw the false statements until the date of the pronouncement of a solution in that file benefiting from the non-penalty clause. Whereas witnesses heard before the criminal courts, in the trial phase or in the appeals phase, cannot benefit from this chance, their right being censured, in an unjustified manner, the scope of subjects benefiting from the non-penalty clause being established by the criticized text.

Therefore, the object of the exception of unconstitutionality is the provisions of Article 273 (3) first sentence of the Criminal Code: „The witness shall not be punishable if they withdraw their testimony, in criminal cases, before the defendant's detention or arrest, or before the commencement of the criminal action or in other cases before a decision or another solution is given, following the false testimony given."

In the context of the reasoning, following the examination of the exception of unconstitutionality, the Court showed, among other things, that the previously mentioned legal provisions were also the subject of a constitutionality review by reference to similar critical aspects, the Constitutional Court pronouncing, in this sense, Decision no. 133/2022 [4], by which they rejected, as unfounded, the exception of unconstitutionality that was raised at that time.

Thus, by Decision no. 133 of March 15, 2022, the Constitutional Court showed that the provisions of Article 273 (3) of the Criminal Code regulate a cause of non-punishment of a personal nature, applicable to the person who has the capacity of a witness and who proceeds to withdraw the false testimony.

In such a hypothesis, the provisions of Article 273 (3) of the Criminal Code divide the cases in which the withdrawal of false testimony can take place into two categories, referring, on the one hand, to criminal cases, in which the cause of non-punishment thus regulated is applicable if the false testimony is withdrawn before apprehension, arrest or initiation of criminal proceedings. And, on the other hand, in all other cases, in which false testimony must be withdrawn before a Decision has been pronounced or another solution has been given, as a result of false testimony, in order for the analyzed non-penalty clause to be applicable.

At the same time, the constitutional court showed that the author of the exception presents reservations regarding the provisions provided for in Article 273 (3) sentence one of the Criminal Code, in the case of the withdrawal of false testimony, emphasizing that they discriminate against people who commit acts of false testimony in criminal cases and understand to withdraw their statements after the procedural moments listed in the criticized text (apprehension, arrest or initiation of the criminal action), although prior to the pronouncement of a criminal decision, in relation to those that fall within the requirements provided by the criticized text.

Regarding the crime of false testimony, the Court showed that it provides criminal protection to the credibility of evidence with witnesses in a judicial procedure, since it is certain that the statements of witnesses or including those assimilated to them (interpreter, expert) and represents one of the most important means of evidence by which the truth can be found these helping, in a special way, to draw a correspondence as safe as possible between the legal and the material truth. From this perspective, it was normal for the legislator to criminalize disregarding the witness' obligation to contribute to establishing the judicial truth, because a behavior of this kind can damage, in an important way, the realization of the act of justice.

In the continuation of the reasoning, the Court showed that the crime examined, provided for in Article 273 of the Criminal Code, in its basic form, includes the deed of the witness who, in a criminal, civil case or in any other procedure in which witnesses are heard, makes false statements or does not say everything he knows about the important facts or circumstances about which he is questioned, and, in its aggravated form, which we find in paragraph (2), it criminalizes false testimony committed by a witness with a protected identity or who is in the witness protection program, by an undercover investigator, by a person who prepares an expert report or by an interpreter, in connection with a deed for which the law provides for the penalty of life imprisonment or imprisonment of 10 years or more.

Regarding the procedural moments mentioned in the content of the criticized legal text, detention, as provided for in Article 209 of the Code of Criminal Procedure, represents the preventive measure depriving of liberty that can be ordered during the criminal investigation phase against the suspect or defendant, by the criminal investigation body or by the prosecutor, for a maximum duration of 24 hours. Such a measure implies resorting to coercion and the loss of the freedom of the targeted person from whom it is taken, which is why it represents a clear restriction of individual freedom, the suspect or defendant being in a state of social isolation.

Similar to those mentioned, the measure of preventive arrest, provided for in Article 223 of the Code of Criminal Procedure, constitutes the harshest preventive measure by which the judge of rights and liberties, the judge of the preliminary chamber or the court orders the arrest of the defendant for the duration and under the conditions established by law.

Regarding the initiation of the criminal action, the Constitutional Court showed that this represents the implementation of the procedural act provided by the law by which the accusation against a person is formulated and the stage of bringing him to criminal responsibility begins. Through this intermediary, the procedural relationship between the state and the person under investigation begins, and the suspect will become a defendant, in order to apply the penalty provided by the criminal law if it is established that he has committed the crime for which he is being investigated.

Considering these aspects to operate the non-penalty clause from Article 273 (3) Criminal Code; the withdrawal of false testimony must occur before that person becomes a party to the criminal process, by exercising the criminal action, and before he is apprehended.

In this sense, related to the content of the detention measure, which involves the deprivation of liberty of the perpetrator, as well as the initiation of the criminal action; which involves the formulation of an accusation against the suspect and his acquisition of the procedural quality of the defendant; the legislator established some time limits until which the witness is obliged to withdraw his false testimony in order to benefit from the clause of non-penalty.

Therefore, the reason for establishing the cause of non-punishment provided for in Article 273 (3) of the Criminal Code, in the case of the withdrawal of the false testimony given in a criminal trial, has in mind the reporting of the active subject of the crime of false testimony to the acts carried out by the criminal prosecution bodies, respectively to determine the witness so that after the performance of the specific activities by the judicial bodies in relation to false situations or circumstances, which do not include the ability to lead to finding out the truth, according to what was declared by the lying witness, he can withdraw his previous testimony so that it produces more serious or even irreversible consequences for the suspect or the defendant, and at the same time the judicial bodies channel their attention to the possible real perpetrator.

Therefore, the witness who commits an act from those provided for in Article 273 (1) and (2) of the Criminal Code, but who retracts his testimony prior to the apprehension of the perpetrator or the initiation of the criminal action, is in a distinct situation from that of the witness who, having committed one of the previously mentioned acts, withdraws his testimony at a procedural moment after the apprehension or initiation of the criminal action, with the consequence of producing legal effects of considerable gravity regarding the suspect or the defendant and of determining the judicial bodies to act according to data inconsistent with the objective truth, likely to determine the establishment of an erroneous judicial truth.

That being the case, the different legal regime regulated by the legislator regarding the incidence of non-punishment provided for in Article 273 (3) of the Criminal Code, in the case of the two categories of witnesses who commit acts of false testimony among those provided for in Article 273 (1) and (2) from the Criminal Code, is based on an objective and reasonable criterion, capable of justifying the criminal liability of witnesses who do not retract their statements given under the conditions regulated in Article 273 (3) first sentence of the Criminal Code, respectively before the arrest or initiation of the criminal action.

For the preceding, the Court held that the provisions of Article 273 (3) of the Criminal Code do not create discrimination between the authors of the facts of false testimony who retract their statements inconsistent with reality before the arrest of the perpetrator, or the initiation of the criminal action and the authors of false testimony who do not meet the conditions provided by the criticized text and withdraw their false testimony in the trial phase previously given in the case.

We observe, therefore, that the decision of the Constitutional Court left no room for interpretation, even the constitutional court establishing at the end of the reasoning that this subject was the subject of a previous notification, and as long as the national jurisprudence, that is, the reasons behind the pronouncement of that decision have not changed, a revision of this solution was not necessary.

Even if the topic under analysis has a particular complexity, we appreciate that the solution, respectively, the reasoning is fair considering the special nature of criminal cases compared to civil cases, especially in the context of the administration of false evidence that can lead to the restriction of a person's freedom for a very long period of time.

The existence of different optics characterized by the desire to further promote distinct solutions by the courts consists in allowing the possibility to apply similar solutions in criminal cases, with civil ones, respectively to widen the framework of non-penalty of those found guilty of committing the crime of false testimony.

As expected, many defendants who had files either in the criminal investigation phase or before the courts raised the issue of not being penalized, hoping for favorable solutions, but the decision of the Constitutional Court definitively resolved these interpretations.

3. **Conclusion**

The Decision that is the subject of this scientific study represents the result of a laborious analysis of an intensely debated subject within judicial practice, as well as within the doctrine, there is a doctrinal trend that has been outlined in favor of admitting the solution of finding the unconstitutionality of Article 273 (3) of the Penal Code.

From our point of view, the current legislative configuration fully corresponds to the practical requirements, and cannot leave room for possible interpretations considering the arguments presented at length in the motivation of the Decision that is the subject of this analysis, as well as the previous one.

We cannot put under the sign of equality the consequences that may fall upon a civil suit as a result of a false testimony, with the consequences we have in a criminal case following the administration of evidence with false testimony, since the rights and freedoms that are fenced off, restricted in the criminal case are much more important, respectively they are much more damaging than in the case of civil litigation.

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REFLECTIONS REGARDING ASSET FREEZING DURING THE PRELIMINARY CHAMBER PHASE

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Abstract

As a novelty in the matter of asset freezing, through the provisions of article 250[2] of the Criminal procedure code, a procedure was established to verify them throughout the criminal process. In this sense, the Romanian legislator has regulated a new legal mechanism, so that periodic checks are carried out regarding the reasons that can be the basis for maintaining the asset freezing. In this regard, it was established the obligation of the competent judicial body, depending on the procedural phase in which the case is found.

The regulation of the obligation of the criminal judicial bodies to periodically and effectively check the procedural measures, in compliance with certain deadlines established in limine litis, appears as an important guarantee of the fundamental right to property. However, the provisions of article 250[2] are not immune to criticism. In this sens, major deficiencies can be identified, including during the pre-trial chamber phase.

Keywords: *asset freezing, preliminary chamber, verifying the procedural measures*

1. General information on asset freezing

As a preliminary matter, it should be noted that asset freezing are procedural measures of a real nature which consist in the non-disposal during the criminal process of the movable or immovable assets of the suspect, the defendant and, in certain situations, of the party with civil liability or of other persons for the purpose of ordering special confiscation, extended confiscation, execution of the fine or legal expenses or covering civil damages [1].

We note, as a novelty, the development of premise situations that call for the taking of these procedural measures; thus, we note the possibility of ordering asset freezing including for the purpose of executing the extended confiscation, respectively in order to guarantee the execution of judicial expenses.

As can be seen from the provisions of article 249 para. (1) of the Criminal procedure code, what materially substantiates the disposition of the asset freezing concerns the need to avoid the hiding, destruction, alienation or, as the case may be, the evasion of certain assets. In this regard, we are of the opinion that for asset freezing (as in the case of other procedural measures), the necessity does not automatically derive from the initiation of the criminal process, this being justified only by the existence of the risk (current or, as the case may be, future).

As it was shown in the jurisprudence of the Constitutional Court [2], the entire regulation regarding the asset freezing is intended to give effectiveness to the right to a fair trial, the accused person benefiting from all the specific procedural guarantees. In this situation, the principle of the presumption of innocence is not violated, taking into account that the establishment of precautionary measures does not equate to a ruling on the guilt of the suspect or defendant.

In the specialized literature from our country, it has been shown, in a well-founded way, that the functionality of these procedural measures is only assuring, not reparative [3]; thus, if

the asset freezing is taken in order to repair the damage, the court must oblige, through a criminal decision, the defendant or the party with civil liability to cover the damage.

According to article 252-254 of the Criminal procedure code, the legislator has regulated three different categories [4] of asset freezing, as follows: the distraint, foreclosure registration or recording and the garnishment, the last two procedural measures being considered special forms of the distraint.

We emphasize, at the same time, that the respective goods are unavailable. These assets cannot be alienated or encumbered with charges, their theft or the destruction of a legal seal being applied being considered a crime. Thus, the good does not become inalienable, nor imperceptible, nor does it come out of the person's patrimony.

Without losing sight of the purpose of asset freezing, in the criminal procedural regulations currently in force, the legislator has distinctly established the taking of these measures in order to guarantee the enforcement of a penalty by fine, special confiscation or extended confiscation, repair of the damage or to guarantee the execution of court costs.

In this regard, according to the article 249 para. (3) of the Criminal procedure code, asset freezing guaranteeing the enforcement of a penalty by fine may be ordered only against a suspect's or defendant's assets, up to the special maximum of the fine provided by the criminal law.

In other words, the criminal judicial bodies cannot order the taking the procedural measure, in order to guarantee the penalty of the fine, on the assets of other participants in the criminal process or on the assets belonging to persons not related to the criminal case, since the ordering of this measure involves the principle of personality of criminal responsibility [5]. Thus, only the goods of persons who can be sanctioned with a criminal fine are unavailable.

Also, according to article 249 para. (4) of the Criminal procedure code, asset freezing for special confiscation or extended confiscation can be taken on the assets of the suspect or the defendant or of other persons in whose ownership or possession the assets to be confiscated are located.

Last but not least, according to article 249 para. (5) of the Criminal procedure code, asset freezing in order to repair the damage caused by the crime and to guarantee the execution of legal expenses can be taken on the assets of the suspect or the defendant and the civilly responsible party, up to the concurrence of the probable value of the damage caused and the expenses incurred of the criminal process.

Regarding the effects of the asset freezing, we emphasize that they have an *erga omnes* character, not only in relation to the subjects of criminal procedural legal relations. We also emphasize that these real procedural measures ordered during the criminal trial have absolute priority. In this regard, asset freezing tend to block any measure initiated by third parties in respect of the same goods, regardless of the fact that this would be prior to the time of taking the asset freezing.

2. The legal nature of the terms provided by article 250^2 of the Criminal procedure code in which asset freezing are periodically checked

As a novelty in the matter of asset freezing, through the provisions of article 250^2 of the Criminal procedure code, a procedure was established to verify them throughout the criminal process.

Deficitly, however, the legislator did not proceed to regulate certain transitional norms for the application in time of the provisions of article 250^2 of the Criminal procedure code, an aspect likely to raise real difficulties [6] in the pending processes in which the judicial bodies took these procedural measures before the entry into force of the legislative changes.

According to the provisions of article 250^2 of the Criminal procedure code, *throughout the criminal process, the prosecutor, the preliminary chamber judge or, as the case may be, the court periodically checks, but not later than 6 months during the criminal investigation, respectively one year during the judgment, if the grounds that determined the taking or maintenance of the preventive measure still exists, ordering, as the case may be, the maintaining, the restriction or extension of the ordered measure, respectively the revocation of the measure, the provisions of article 250 and 250^1 being applicable accordingly.*

The regulation of the obligation of the criminal judicial bodies to periodically check the procedural measures, in compliance with certain deadlines established *in limine litis*, appears as an important guarantee of the fundamental right to property. Under this aspect, we emphasize that, in a case, the European Court of Human Rights emphasized that the unavailability of the shares of a commercial company for a period that exceeded 12 years, during an investigation that had as its object certain economic crimes, is not tend to ensure a fair balance between the defense of the general interest and the protection of the individual interests of the respective company [7].

Regarding the legal nature of the terms provided in article 250^2 of the Criminal procedure code, in jurisprudence [8] it was considered that these are recommendation terms. Thus, it was emphasized that *„(...) exceeding this deadline, without a verification of the measures according to article 250^2 of the Criminal procedure code does not determine the lawfully cease of the measures."*

As far as we are concerned, this view of the court is erroneous. We first show the fact that, in the light of the Criminal procedure code currently in force, according to the model of the previous procedural law, in relation to the protected interest and the purpose for which they were regulated by the legislator, the terms are divided into two large categories: substantial terms and procedural terms.

As for the substantive terms, in the relevant doctrine it has been consistently shown [9] these are established for the purpose of protecting certain rights, prerogatives or extra-procedural interests, being necessary especially for the limitation and discipline of procedural measures depriving liberty or restricting rights. On the contrary, the procedural terms take into account interests of a purely procedural nature and find their necessity in the systematization and discipline of procedural activities, in order to ensure the timely and just achievement of the purpose of the process.

However, it is obvious that in this context the terms regulated in article 250^2 of the Criminal procedure code appear as genuine substantive terms. These terms were established in order to discipline in time the asset freezing, through which the criminal judicial bodies can proceed to restrict the constitutional right to property.

In other words, the purpose of regulating the previously mentioned terms is given by the imperative to protect the extra-procedural fundamental right to property. In the same sense, a part of the specialized literature [10] was also pronounced, which emphasized that the terms of 6 months and one year provided as maximum temporary limits for the purpose of verifying the precautionary measures are substantial and peremptory terms; this qualification derives, on the one hand, from the fact that the terms analyzed protect a fundamental extra-procedural

right, being derived from the imperative to limit the restriction of this right, and on the other hand, from the reason for establishing this regulation.

Consequently, we are of the opinion that, in relation to the nature of the terms provided for in article 250^2 of the Criminal procedure code, in the situation where the preliminary chamber judge violates the one-year term, the lawfully cease of the measures will apply.

In this regard, we note that the legal termination of the procedural measure intervenes *ope legis* at the time of the fulfillment of the term provided by law, so that no distinction can be made by referring to the nature of the procedural measures.

Thus, article 268 para. (2) of the Criminal procedure code provides in clear terms the following: *when a procedural step can only be taken for certain duration of time, expiry of that duration shall lawfully entail a cessation of that step's effect*. Therefore, the consequences of non-compliance with the substantive terms become a legal obstacle to the very existence of the measure.

3. Critical observations regarding the procedure of verifying the asset freezing in the preliminary chamber phase

As can be seen in relation to the provisions of article 250^2 of the Criminal procedure code, the romanian legislator regulated a new legal mechanism with the help of which periodic checks can be carried out regarding the reasons that can be the basis for maintaining the asset freezing. In this sense, the obligation of such an analysis was established for the competent judicial body, depending on the procedural phase in which the criminal case is found.

The judge, in the preliminary chamber, proceeds to verify the procedural measures, as a rule, *ex officio*. In this regard, we consider that the verification can also be carried out as a result of the request of the prosecutor, the parties and the interested persons, according to the law. Under this aspect, any verification carried out by the preliminary chamber judge will trigger the running of a new term.

We emphasize, at the same time, the defectiveness of the provisions of article 250^2 of the Criminal procedure code, bearing in mind that the legislator did not expressly regulate the one-year term also regarding the preliminary chamber phase, but seems to circumscribe it exclusively to the trial phase [11]. In our opinion, the term of one year is, without a doubt, also applicable in the procedure of the preliminary chamber, at the jurisprudential level being frequent the situations in which this phase of the criminal process exceeds one year from the moment the indictment is brought to the court.

We also note that the law does not specify the way in which the one-year period must be calculated in the situation where the procedural measure was maintained by the prosecutor during the criminal investigation, and the referral to court was made before the 6-month period for verifying the measure established for this procedural phase. From this perspective, we believe that the provisions of article 333 of the Criminal procedure code, according to which the indictment may include, among other things, the proposal to take, maintain, revoke or replace the asset freezing. In other words, an important change made by the legislator following the entry into force of the current Criminal procedure code concerns the procedure regarding asset freezing at the end of the criminal investigation phase.

We affirm this because, according to article 267 par. (4) of the previous Criminal procedure code, the prosecutor had the obligation, in the content of the indictment, to order the maintenance or revocation of asset freezing. In a different way, *de lege lata*, at the time of ordering the referral to court by indictment, the prosecutor is no longer obliged to order the

asset freezing, having only the possibility to formulate, through this act, reasoned proposals addressed to the preliminary chamber judge.

In this procedural context, we are of the opinion that, after the registration of the case at court, the preliminary chamber judge has the obligation to proceed immediately to the verification of the asset freezing taken during the criminal investigation.

Obviously, the procedure in force is deficient, considering that article 250^2 of the Criminal procedure code does not establish a regulation similar to that provided for in article 207 para. (3) of the Criminal procedure code, which establishes the duty of the preliminary chamber judge to verify *ex officio* the legality and validity of the preventive measure, respecting a term of no more than 3 days from the registration of the case at the court.

From another perspective, we critically highlight the fact that the legislator was not concerned with establishing certain procedural norms in relation to which to proceed with the verification of the procedural measures (asset freezing), by taking into account the specifics of each procedural phase. In this laconic legislative framework, the contradictory nature of the procedure in the preliminary chamber must be taken into account, so that the verification by the judge of the procedural measures is carried out in the council chamber, with the summons of the defendant, the other parties and all interested persons, the participation of the prosecutor being mandatory.

We consider that the obligation of the criminal judicial bodies to proceed regularly to verify the asset freezing within the terms provided by the criminal procedural law constitutes an important guarantee of the right to property. In the key of these remarks, we underline the need for the procedure for verifying asset freezing in the criminal process, including during the procedure in the preliminary chamber, to be not formal, but effective, this presupposing the verification of all conditions of legality and opportunity provided by the provisions of article 249 para. (1) of the Criminal procedure code.

From this perspective, we emphasize that, *de lege lata*, asset freezing can be ordered to the extent that the following legal requirements are met: (*i*) they are necessary to avoid the concealment, destruction, alienation or evasion of assets; (*ii*) the assets on which the measure is ordered may be subject to special confiscation or extended confiscation or may be used to guarantee the execution of the fine or legal expenses or the repair of the damage caused by the crime.

In this regard, the necessity of the procedural measure must be based on concrete actions depending on the goal pursued, respectively the risk that can justify it. We believe that the incidence of such a risk must be ascertained not only at the time of taking the procedural measure, but also on the occasion of each verification thereof, throughout the criminal process, as long as the asset freezing is in place.

The condition specified above can be considered fulfilled only in the situation where there is an objective danger of such actions being carried out by the defendant, the party with civil liability or another person in whose ownership or possession the respective goods are. Considering that the criminal procedural law does not make any clarification, it is necessary that these risks result from the evidence.

Thus, the lack of an express provision in the criminal procedural law in this sense cannot lead to the conclusion that the judicial body that takes/maintains the procedural measure should not prove the preparation of such actions with reference to the goods in question. Of course, to the extent that it would be appreciated otherwise, it would be admitted that the asset

freezing are taken and maintained automatically, in all situations, without the existence of any right of appreciation on the part of the judicial bodies.

On the other hand, in relation to the provisions of art. 53 para. (2) of the Romanian Constitution, the restriction of some fundamental rights (such as the right to property) can only be ordered if it is necessary in a democratic society, and the measure must be proportional to the situation that determined it, to be applied in a non-discriminatory way and without prejudice to the existence of the right or freedom.

From this perspective, we believe that the requirement of proportionality must be analyzed not only at the time of taking the asset freezing, but also on the occasion of each verification undertaken in accordance with the provisions of article 250^2 of the Criminal procedure code, therefore including during the preliminary chamber procedure.

Also, despite the fact that article 250^2 of the Criminal procedure code seems to limit the object of the verification procedure to the analysis of the existence of the grounds that generated the taking or maintenance of the procedural measure, we consider that the preliminary chamber judge cannot omit, on the occasion of each verification carried out in the council chamber, the other elements and new circumstances resulting from the dynamics of the process, likely to affect the measure from the perspective of legality or grounds.

Following the completion of the verification procedure, the preliminary chamber judge will be able to pronounce any of the solutions referred to in article 250^2 of the Criminal procedure code: maintaining, restricting or expanding, respectively revocation the procedural measure.

Regarding the appeal, we emphasize that the decision by which the judge of the preliminary chamber proceeds to verify the procedural measure is subject to appeal. Regarding the holders and the introduction term, the appeal can be formulated by the prosecutor, the defendant or any other interested person within 48 hours of the pronouncement or, as the case may be, of the communication.

It also can form the object of the appeal the way to fulfill the provisions given that were given during the verification of the measure in the preliminary chamber phase. The regulation in force is also vulnerable from this perspective, taking into account that the deadline for formulating the right of appeal does not run from the moment of communication of the procedural document drawn up on the occasion of the fulfillment of the provisions given with reference to the precautionary measures, but within 3 days from the date implementing the measure.

The appeal is submitted to the preliminary chamber judge who issued the contested conclusion and is submitted, together with the case file, to the preliminary chamber judge of the hierarchically superior court within 48 hours of registration.

According to the provisions of article 250^1 para. (3) of the Criminal procedure code, the appeal is not suspensive of execution and is resolved within 5 days from the registration, in a public meeting, with the mandatory participation of the prosecutor and with the summons of the defendant and the interested parties. Under this aspect, we underline in critical terms the fact that the criminal procedural law does not distinguish between the phase of the preliminary chamber and the trial phase, bearing in mind that the provisions mentioned above erroneously provide for the rule of publicity including for the resolution of the appeal against the conclusion of the judge of the preliminary chamber.

Regarding the solutions that can be ordered in the context of the appeal, they are expressly provided in article 425^1 para. (7) of the Criminal procedure code. Under this aspect, we

emphasize the flawed nature of the provisions that refer to the solution of sending the case for retrial to the preliminary chamber judge of the first instance.

Thus, article 425^1 para. (7) point 2 letter b) of the Criminal procedure code only refers about the situation in which the provisions regarding the citation were disregarded, so the legislator failed to provide that the same solution is necessary to intervene in the cases where the incidence of a case of absolute nullity is found [12], similarly to the regulation contained in the subject matter of the appeal [article 421 para. (1) point 2 letter b) of the Criminal procedure code].

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GOOD FAITH IN CRIME SCENE INVESTIGATION: THE CENTRAL PILLAR OF FAIR

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Abstract

This study examines the fundamental role of good faith in crime scene investigation and demonstrates how this ethical principle directly affects the fairness and integrity of criminal justice. The ethical, moral, legal, and even psychological underpinnings are reflected in the operating procedures used in a field investigation. By analyzing these specific rules of crime scene investigation – from securing the crime scene to documenting the scene to collecting and preserving evidence – we highlight the inherent challenges and the importance of applying the principle of good faith throughout this process in order to achieve a just resolution. By addressing these aspects, we highlight the importance of good faith not only for the accuracy of investigations, but also for enhancing public confidence in the justice system, thereby contributing to fair and transparent justice.

Keywords: *good faith, crime scene investigation, fair justice, confirmation bias, controversial circumstances.*

1. Introduction

The principle of good faith plays an essential role in ensuring the impartiality and objectivity of criminal investigations. In the context of crime scene investigation, good faith is reflected in the honest and impartial approach of the judicial authorities to resolve the case fairly and justly, without being influenced by personal biases, external pressures or other interests. Regardless of the initial tableau that presents itself at the scene, the field investigation should not begin with preconceived notions, nor should it be based on versions that have not been verified and confirmed by the results of the activities conducted by the judicial authority.

The investigation of the crime scene or crime scene investigation, as it is called in Western legislation [1, 2], constitutes a procedural and forensic-tactical activity aimed at the direct perception of the crime scene, with the aim of discovering, highlighting, collecting and utilizing all material evidence that serves to outline the circumstances and the way in which the crime was committed, the means used by the perpetrator and to identify the perpetrator and all persons present. In other words, the main purpose is to establish guidelines and definitions for the crime committed [3].

The investigation of a crime scene is particularly complex and crucial, as it is an arduous task that takes time and requires „*accuracy, calm, perseverance, prudence, physical and intellectual effort, and sometimes sacrifice, demanding intense attention from those who carry it out*" [4], on which the design of the procedural framework largely depends.

Considering that field investigations are among the procedural activities that are essential to achieving the purpose of the criminal proceedings and establishing the truth, thus contributing to the fair resolution of the case, good faith complements these objectives by ensuring the integrity and objectivity of the criminal investigation. This guarantees that all

evidence is collected, analyzed and presented correctly and transparently, without bias or unjustified assumptions being able to influence the course of the criminal investigation in any way.

2. Crime Scene Investigation: Stages and Challenges

The actual crime scene investigation is a complex activity of utmost importance that must follow certain general tactical rules that give it a unique character and distinguish it from other similar procedural activities. These tactical elements must be applied throughout the investigation process in order to achieve the desired goal.

Good faith, on the other hand, is an element that enhances and guides the application of the tactical rules in the investigation of the crime scene to ensure that this activity is carried out efficiently. Essentially, the doctrine states the following conditions: The crime scene investigation must be conducted with the utmost urgency, as it is an immediate activity, carried out in a complete and detailed manner, coordinated by an investigation team working together at all levels and led by a leader who is responsible for the entire activity carried out, and finally, arranging for the comprehensive and objective recording of the results of the investigation activities through a crime scene investigation report, which must be completed immediately after the completion of the crime scene activity [5, 6, 7].

In relation to the first condition, in which the crime scene investigation must be carried out with extreme urgency, it is necessary to distinguish between the urgency imposed by the investigation in the field, which manifests itself in the work capacity of the investigation team, and the haste of the judicial authorities to carry out the crime scene investigation, which can lead to serious legal errors; with harmful consequences for the further course of the forensic investigation. Any delay can lead to a change in the crime scene and its surroundings for objective or subjective reasons. The urgency lies in the fact that there is a risk that some traces will be compromised or destroyed if the investigation of the crime scene is not carried out immediately, whether due to weather conditions or the perishability of some biological traces, or due to the actions of the perpetrator seeking to remove the traces of his actions or other persons interested in restoring order to the crime scene.

We would like to point out that the principle of good faith, in the context of the requirement to carry out a crime scene investigation with extreme urgency, becomes an essential pillar that balances the need for speed with the risk of miscarriages of justice. At this stage, good faith requires a balanced assessment between the speed of action and the rigor of the investigative methods to ensure that the decisions taken in the research activity are guided by the desire to uncover the truth and not by a haste that could alter the results of the investigation.

Apart from the fact that the research activity must be carried out expeditiously, it is necessary that it be carried out with meticulousness and objectivity, recording all aspects and particularities regardless of their importance and the version that the judicial body tries to attribute to the case. In practice, for example, numerous cases of homicide disguised as suicide have been reported. It is important that the investigation team does not limit itself to recording elements that could confirm a version of suicide. In this context, we bring into conversation the terminology of „negative/controversial circumstances", i.e. those discrepancies that arise between the way traces are formed and eliminated [5] or between the alterations made at the crime scene and the means that would normally have caused them [8]. In other words, the research team must determine whether the alteration of the crime scene configuration is a

consequence of a crime committed or is due to a deliberate act attempting to misdirect the criminal investigation.

In this context, the term „confirmation bias" also appears, which in our opinion could be translated as „confirmation error". This refers to the cognitive tendency in which people tend to pay selective attention to information that is consistent with their prior beliefs [9], or have a tendency to remember information in a way that confirms their pre-existing biases and beliefs, while ignoring or minimizing data that contradicts them. Investigators who are influenced by the seemingly clear crime scene and the desire to solve the case quickly may fall victim to confirmation bias by focusing exclusively on evidence that supports the suicide theory and ignoring any details that might suggest otherwise.

From the cases examined so far, for example, the case of a 27-year-old man found dead in his bathtub with a suicide note next to him becomes relevant. This is a classic example of how confirmation bias can influence the interpretation of a murder case disguised as a suicide. At first glance, the evidence points to a suicide, as the suicide note is present and the body shows no signs of a struggle. In this situation, the justice system, influenced by the seemingly clear crime scene and the desire to solve the case quickly, may fall prey to „confirmation bias" reasoning by focusing exclusively on evidence that supports the theory of suicide and ignoring any details that might suggest otherwise.

They might, for example, attach no significance to the fact that the suicide note appears to be written by a different hand, or that the object with which the suicide was allegedly committed is not found at the scene, or that there are no other traces of hesitation around the traumatic lesion, the cut. Furthermore, during the investigation, it was proven that the victim had or did not have mental/psychiatric problems. Similarly, certain reddish-brown marks at the crime scene, depending on their placement and angle of origin, may indicate the mechanism by which they were created, the position of the victim and the assailant at those critical moments.

In this context, confirmation bias and good faith intersect in a way that can influence judicial decisions in cases where the crime scene investigation is of paramount importance. Confirmation bias can undermine good faith by influencing the process of evaluating and interpreting information, leading to a narrow view that favors evidence that supports existing biases. On the other hand, good faith presupposes a sincere approach to criminal investigation that leads to the idea of a suspicious death. This means that equal attention is given to evidence that both supports and refutes the investigators' hypotheses until concrete and scientific evidence is gathered that leads to a correct, fair and balanced conclusion.

Third, the efficient management and organization of the crime scene investigation constitutes a specific essential rule in the investigative process, which involves the systematic coordination and implementation of all necessary measures to discover, highlight, collect and exploit all material evidence that serves to outline the facts of the case and identify the perpetrator.

This rule is closely linked to the principle of good faith, as it leads to a fair and impartial approach to the investigation and thus avoids bias. The efficient management and organization of investigative activities under the auspices of good faith implies clear communication between team members and other stakeholders as well as detailed documentation of the investigation process. This ensures that the investigation is conducted not only with professionalism and efficiency, but also with a firm commitment to ethical principles and

fairness, ensuring that the investigation results are as close to reality as possible and uninfluenced by subjective internal or external factors.

Regarding the last tactical rule, namely the comprehensive and objective recording of the results of the investigative activity, we show that it is a fundamental rule that ensures that all information and evidence gathered during the investigation is accurately and completely recorded in a crime scene investigation report. This document is „the principal procedural means of recording what has been observed by the judicial authority" [6]. It must contain a detailed, concise, objective and clear description of a crime scene. Assumptions/opinions or conclusions made by the criminal investigation body in the margins of what was observed will not be accepted in the content of the report, as this aspect constitutes a serious error (e.g. traces of the victim were found at the crime scene or traces were left on the instrument used by the perpetrator to commit the crime etc.). In no case will the report be finalized at a place other than the place where the investigation was conducted and at a later date.

The practical link between this rule and the principle of good faith is manifested in the obligation to approach every aspect of the investigation with honesty, impartiality and responsibility. Good faith in this context means an unwavering commitment to truth and justice, guiding investigators to treat every piece of evidence and information with the same degree of seriousness and attention and to avoid any form of negligence or bias that could distort the results of the investigation.

Thus, the disclosure and objective recording of investigative findings directly contributes to the integrity and credibility of the entire investigative process and facilitates fair and evidence-based justice.

3. Conclusions and Recommendations

The crime scene investigation is a critical phase in the investigative process and, in our view, the most important. It requires the strict application of a set of rules throughout the investigation activity in order to achieve the proposed objective. The interplay of the rules guiding investigative activity with the principle of good faith provides a bridge between them and their commitment to ethical and procedural standards, which provide a solid foundation for avoiding miscarriages of justice and ensuring fair and proper justice.

The principle of good faith as an ethical principle embraces this methodical approach and ensures that every step of the investigation is guided by honesty, integrity and a deep commitment to finding the truth. To promote fair and impartial justice, it is essential to avoid bias and partiality in the interpretation of evidence. It is extremely important to eliminate bias in the criminal investigation process, as the tendency to favor information that confirms investigators' initial assumptions can lead to serious miscarriages of justice.

We believe that ensuring a good faith investigation of the crime scene and minimizing the impact of confirmation bias involves continuous training of judicial authorities involved in criminal investigations on the latest techniques and practices, as well as the development of critical thinking skills. In addition, it is important to include experienced individuals with different specializations on the investigative team to ensure a balanced approach and multidisciplinary assessment of the evidence.

By following these principles and recommendations, crime scene investigations can be conducted in a manner that fulfills the high responsibility of contributing to the establishment of truth and the administration of justice, reducing the risk of errors and increasing confidence in the justice system.

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BONA FIDES IN THE REGULATIONS OF THE CRIMINAL CODE AND IN THE REGULATIONS OF THE CODE OF CRIMINAL PROCEDURE. GENERAL CONSIDERATIONS

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Abstract

In the legal literature, the expression „good faith", the Romanian equivalent of the much better known Latin expression „bona fides", is one of the terms that have been the subject of much research and reflection. What is even more interesting is that the expression „good faith" is often used by the Romanian legislator, as many normative acts in force have provisions in their content whose meaning or authority is given precisely by the presence or specification of the sentence mentioned. For example, in the Civil Code, article 14 regulates „good faith", which is defined as „the exercise of rights and the performance of civil obligations in accordance with public order and morality".

With regard to the Criminal Code and the Code of Criminal Procedure in force, the presence of the concept of „good faith" is characterized by an interesting choice by the legislator, namely the use and frequency of the antithetical expression „bad faith" which, unlike „good faith", confers greater authority and punitive character on the criminal rules.

Keywords: *good faith, judicial life, judicial equity, virtue, rights and obligations.*

1. Brief terminological clarifications

In the current legal language, the Latin collocation *bona fides* finds its correspondent in the collocation *good faith*. Both concepts have found and often find their place within the scope of intellectual preoccupations, inclusively within the judicial space, where theorists of law have tried to define, to clarify, to contextualise, to frame and even to regulate this collocation. [1]

At its origins, *bona fides* was born and has developed in the legalist context of the Roman society. Although there is the temptation to relate the term *faith* to the manifestations of religious life, for the Roman people from the Antiquity the fides etymon was used to indicate more readily a moral content or, more precisely, a moral quality, a superior human value which ennobles the human being and which stands at the basis of any good action, inclusively at the basis of those acts which enter the scope of judicial relationships.

The specialists in Roman law have remarked the fact that, in what concerns the Roman jurisconsults, 'they made a confusion between the religious principles, namely *fas*, and the moral principles, namely *honestum*, and the principles of the law, namely *ius*. This confusion reflected itself inclusively in the definitions given to the concept of law' [2]. Not a long time ago, the clarification given by Ulpian is enshrined, in the contents of which the principles of law are enumerated: „iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribure". It can be observed that, for Ulpian and for those contemporary to him, 'to live an honest life and to do no harm to anyone are the principles of the morality, not of the law. On the other hand, to give to each person what he or she is entitled to is a principle of the law. Thus, an association and even a confusion between the principles is made, an aspect which, in the ulterior evolution of the law, has come to fruition by means of a process of transferring

of as many social rules from the scope of morality to the scope of law in order to be in this manner sanctioned by the latter' [3].

I, nevertheless, consider that the indication of a simple association or confusion among the principles put forth by Ulpian, as if the Roman jurisconsults wouldn't have known to make a distinction between these principles, is not a satisfactory indication in order to fully understand the role of good faith in the scope of judicial relations. Reality is much more complex. In truth, for the people from the Roman Antiquity, morality and religiousness have had a fundamental role in the deployment of social relations. Until the onset of the first form of legislation, the social relationships between people were regulated by moral and religious norms, which were oriented towards developing the individual's capacity to understand equity and justice. Not only the Roman people have undergone a process like this. In the Old Testament, the social and judicial norms of the Jewish people are eminently of a religious character, moreover since these norms are given by the Deity itself. For the Egyptian people and other peoples of the Antiquity, the leaders were either associated or observed in relation to the gods, a fact which conferred divine authority to the imperial orders and laws.

Consequently, I consider that it is not wrong if it is averred the fact that the law and the judicial relations in particular have been formed and have developed themselves on the instep of life and on the instep of the moral and religious consciousness of individuals, as a consequence of the more and more fierce desire to codify a series of rules innate to human beings or acquired naturally which came to the forefront by means of their normality and reality per se. The adoptions of some terms, such as *bona fides*, within the judicial texts, constitutes the unquestionable testimony of the complexity and variety of human existence, but also of the fact that the human being is not only a judicial and legal person, but the human being is also a moral person and a religious person all at once.

2. Bona fides between moral virtue and judicial requirement

The concept of *bona fides* indicates the honesty and the sincerity of a person, but also the correctness which stands at the basis of judicial relationships in which the respective individual is a part of. In the ablative case, *bona fide* is translated by means of the collocation *in good faith*. A person of good faith, *bona fide*, is a trustworthy person, a reliable person, who assumes the rights and obligations comprised in an agreement, the rights and obligations comprised in a contract, and who takes all the necessary due diligence in order to achieve the purpose of the judicial relationship. The moral quality of the respective person, and not the rule of the sanction settled by the legal norm, bears witness to the afore-mentioned considerations. A person of good faith can be an ordinary citizen who, from a judicial standpoint, complies with the laws of the country, but also a dignitary who defends the best interests of the community or a magistrate who applies sanctions in good faith, namely without bias.

Within this context, *bona fides* transmits eminently towards a moral verticality of the individual who confirms and warrants the judicial correctness. The lawmaker uses good faith as an unbroken foundation for the entire judicial edifice. Subsequently, it is neither wrong nor exaggerated to denominate good faith as a virtue, both a moral and judicial virtue. In the ordinary life of the Latin Antiquity, bona fides was quite frequently used. Bona fides indicated the good faith in achieving something, the good intention, in stark contrast to shrewdness or in contrast to the bad intention.

In the specialised literature, there are numerous opinions, according to which, the origin of the law, with all the realities which it entails, must be sought after in the infinite moral and religious horizon of the human being.

One fact is certain, the law is the consequence of the need for socialising of the individual. We encounter in the writings of Aristotel (384-322 î.Hr.) an entire discourse about *zoon politikon* or the human being as an individual within the society [4]. Aristoteles, known as the inhabitant of Stagira, his hometown in ancient Greece, shares the belief that, by means of the nature of human beings, 'there is in all of us the urge towards a community'. Moreover, all those human beings who are outside of the society, who live in isolation, should be denominated, in Aristoteles's vision, as being unjust, 'for in the same manner, in the likeness of a complete element, the human being is the best of all beings, in the same way, in the likeness of an element isolated from law and justice, the human being is the most despicable of all beings, [...] the human being is without nation, without law and without home' [5].

If the human being participates with all his being at the social reality, then the human being uses all resources that he disposes of, inclusively his moral resources, in the relationship with the other human beings in his surroundings. In the Russian philosophy, it has been averred that 'the moral life is not only the the life of the person, but it is in equal measure the life of society. Despite all these considerations, the social aspect could be neither the supreme value, nor the final purpose of human life' [6]. Moreover, it has been shown that 'all human communities have attributed to their notion of good (whatever that notion may be) the significance of *norm and ideal*' [7]. In this context, the idea of good takes the form of duty, 'the supreme good of the community becoming superior to the good of the part of the community, even for the part itself. There is, subsequently, a connection between the law and the commmon good which determines a fundamental attribute of the law, that of being the product of the community'[8]. Such a perspective determines us to go back to the realities of the Latin antiquity.

For the Latin people, the fact of law was expressed in the most comprehensive way by means of the well-known term *jus*, which was understood in close connection to *Jupiter*, the master and the greatest commander from whom came all the civil and religious laws' [9]. The word derived from *jussum*, the supine form of the verb *jubeo*, which, in translation, meant *I command, I order*. The old form of *jus* was *jus, jusis* and not *jus, juris*. In the conception of the Roman people, *jussum* simbolized what is *being commanded, namely something which has been commanded and which remains a command*' [10]. It was not however the matter about a simple command, but it was about a command which emanated from the deity, hence the authority of the command. 'For the Roman people, it was well and lively represented the belief that *jus* stems from *Jupiter*, that *jus* springs from *Jupiter* and it represents *Jupiter*, jus illustrating *Jupiter* in the shape of the law or in the shape of a commanding power which gives birth to laws and imposes laws' [11]. The respect which jus imposed was a form of religious respect or a form of respect with a religious horizon.

With the passing of time, the Latin vocabulary developed and, together with jus, other terms imposed themselves as having incidence in the domain of interpersonal relationships. Jus was reduced to the judicial scope. By means of fas, the Romans have related themselves to situations which had a connection to moral order. In *jus*, it is comprised aequum as the first constitutive element. *Jus* cannot be *iniquum*. *Aequum* represents the nucleus of Jus, the very substance of jus, [...] by means of *aequum*, the being of jus also appears itself as having a moral nature, [...] the presence of *aequum* in *ju*s transforms *jus* into a moral value and

introduces jus in line with the other moral values. By means of *aequum*, *jus* is connected to the moral order and it enters among the moral criteria as a moral value. By way of conclusion, for the Latin people, *jus* is a command, *jus* emanates from the deity, *jus* has a moral character and *jus* constitutes even a moral value and is subordinated to the moral order per se, being part of the moral order, but only as a value subordinated to the other values of the moral order '[12].

Although from a semantic point of view *jus* was specialised on the judicial reality, jus has not lost its moral valences. And this fact may be well observed from the numerous references to correctness, to equity, to order – which are moral values – that we encounter upon in the contents of the law and which the legislation cultivates. The jurisconsult Mircea Djuvara observed that: 'the judicial relationship exists from the moment in which it is ascertained that the intention of a person has been externalized[...] but it is still as obvious as the fact that the judicial reality, this external activity, is of a person who passed a judgement, who made a reasoning, who had a conscious intention, [...] the intention, as an element of the soul, far from being eliminated from the law, is the first condition of studying the judicial reality' [13]. In another formulation, any judicial act is founded upon a desire, on an intention of the subject, on an internal reality which the individual wishes to externalize. This internal reality pertains to the scope of morality, but for its concretization the person appeals to rules of the law in order to enforce it. Here is why, between morality and law must be seen neither a separation nor an opposition, but, on the contrary, these two realities are complementary and interdependent.

In this context, it is easily noticeable that bona fides is at the same time a moral virtue as well a judicial requirement or a judicial norm. Until its effective externalization and its transposition into deeds, good faith acts in the moral plane of the individual; subsequently, good faith imposes itself as a judicial requirement, being regulated by the law and, even more, its absence being sanctioned by the law.

The specialized literature offers an impressive baggage of theories and opinions with a view to the interference of the law to the morality and, implicitly, with a view to the tradition of some terms, such as bona fides, which have authority both in the moral space, as well in the criminal space. For the sociologist Petre Andrei *the law* is, at the same time, a domain of the spirit and of the society, whereas the 'social phenomena, as relationships between individuals, are based on psychological facts, even if these facts appear with an external and constrictive character' [14]. In practice, the circumstances in which the human being interacts with the law are very different. Some individuals elaborate the law, other individuals apply the law, some individuals theorize the law, whereas other individuals sanction and complete the law, some have the responsibility of applying and monitoring the law, whereas others must comply with the law or bear the judicial sanctions in case of misconduct. 'Nevertheless, every time, actions concerning the law have, in the likeness of all other actions that we undertake, a psychological substratum, a moral substratum, these actions stand in close connection to an ideal, an interest, a purpose, even if this purpose is of compliance. There is no human being, no matter how low he may be on the moral scale, who does not have his own morality; it is quoted, as even criminals have their own morality and they try to justify their actions in some manner among themselves' [15]. The complete history and evolution of the law indicates this deployment and this development of the law in close connection to the moral experience of the human being, regarded as an active and spirited agent.

3. Bona fides and mala fides within the text of the criminal law and within the recent jurisprudence of the Constitutional Court of Romania

In some form or another, bona fides or good faith is present in the text of many normative acts in force in Romania, bearing witness for the clarifications made in the above mentioned paragraphs. For example, Article 57 of the *Romanian Constitution* states that „Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights and freedoms in good faith, without infringing upon the rights and freedoms of others". In the text of the actual *Civil Code* we encounter upon an entire article dedicated to good faith: „(1) Any natural person or judicial person must exercise their rights and execute their civil obligations in good faith, in accordance with public order and good morality. (2) Good faith is presumed until proven otherwise" (Art. 14). Even the jurisprudence of the last years abounds in clarifications with a view to good faith [16].

It is very interesting, however, how the Romanian lawmaker understood and chose to state good faith in the two main legislative texts of the Romanian Criminal Law, namely the Criminal Code and the Code of Criminal Procedure. By comparison with other normative acts, within the text of the two afore-mentioned Codes, which, together, comprise no less than 1049 Articles, we find but only once the collocation in good faith, in the text of Article 10 (Paragraph 6) of the Code of Criminal Procedure: „The right to self-defence must be exercised in good faith, in accordance with the purpose for which it was acknowledged by the law". On the other part, within the text of these afore-mentioned Codes, we encounter upon 31 references to the concept of bad faith, more precisely 12 references in the Criminal Code and 19 references in the Code of Criminal Procedure. It is at least curious the fact that the Romanian lawmaker has preferred that instead of the concept of good faith to use in the legislative text the antithetical form of this term, namely the concept of bad faith or mala fides. And what is even more curious, although the concept of bad faith has paved a 'career' in the two criminal code texts, both the criminal doctrine and the criminal jusrisprudence highlight good faith as a determining reality in the application of the criminal law. By way of paradox, it could be averred that the lawmaker makes use himself of the antithesis between the two concepts in order to highlight one of these concepts precisely by specifying the other concept in a repeated manner. This is an artifice on which the specialized literature does not pronounce itself directly – at least until the time of current presentation of the article, I have not encountered upon any explanation in this regard – but with a view to this artifice I shall try to highlight a few ideas formulated in the recent jurisprudence.

By means of *Decision No. 245/2023 with reference to the exception of unconstitutionality of the provisions of Article 283 (Paragraph 4) (n) of the Code of Criminal Procedure* (The Official Gazette No. 713 of 3 August), the Constitutional Court of Romania has ascertained the following: „With regard to the judicial misconduct consisting in the exercise in bad faith of procedural rights and of judicial process rights, in the due course of the criminal proceedings, as in the due course of the civil proceedings, the judicial process rights must be exercised in good faith, in accordance with the purpose for which they were acknowledged by the law and without infringing upon the judicial process rights of the other party in the judicial process. From this perspective, the exercise in bad faith of a procedural right or of a judicial process right may have negative consequences by disrupting the proper deployment of the judicial process proceedings, by prejudicing a procedural right of another party or in some other manner. Frequent situations in the judicial practice, in which the judicial process rights are exercised in bad faith are, for example, those situations with regard to the

formulation of identical legal claims repeated in a short period of time after the rejection of a previous legal claim or the rescission of the legal assistance contract at different judicial process moments, where the party has an interest in postponing the judicial process by any judicial means – such as obstructing the course of justice by preventing the Court from judging a judicial proposal of extending the measure of arrestable offence" (Paragraph 20). Subsequently, after formulating a few clarifications with regard to the amercement by means of which bad faith is sanctioned, the Constitutional Court of Romania also reminds us that: „even if the judicial misconduct (the bad faith) does not refer in an explicit manner to a punctual non-fulfilment of a judicial obligation, it nevertheless consists of a general obligation with regard to the part in the process forging on abusing a right. As such, the criticism of unconstitutionality according to which the contested judicial provisions take a toll on the constitutional provisions of Article 1 (Paragraph 5) cannot be received, (5), since the normative content is sufficiently clear, precise and predictable in such a manner that the addressee of these provisions is able to adapt his judicial conduct to the exigencies imposed by the lawmaker" (Paragraph 23). Whereas in Paragraph 24, the Constitutional Court of Romania ascertains the following: 'those provisions do not represent otherwise than a reflection of the constitutional exigencies with reference to the obligation to exercise rights and liberties in good faith, which is presumed by the very fact that, by indicating a course of judicial conduct to be followed, all other alternatives are excluded. For that matter, the abuse of the law can be considered a veritable judicial antonym of good faith, whose social dimension has been included in the content of the constitutional norm of reference by means of the duty not to infringe upon the rights and liberties of other human beings'.

The reasoning and the formulation of the Constitutional Court of Romania are to a greater extent clear and concise, whereas from the above mentioned facts we understand that the criminal law itself, by means of the regulations it comprises and by means of the purpose it aims to, namely that the obstruction of deeds which are an enhanced peril to society, identifies itself as a measure for the cultivation of good faith in the relationships between individuals. By matter of principle, bona fides is to be found in each regulation of the Criminal Code and in each regulation of the Code of Criminal Procedure, it being presumed from the very judicial conduct required by the criminal law. In other words, the individual viewed as a subject of the law has no choice whether to comply with the law or not, but he has only one option, namely that of proceeding in good faith. By way of comparison, each failure to comply with normality means judicial failure to comply with the law and it is put into the judicial frame of bad faith, which is sanctioned. The Criminal Code and the Code of Criminal Procedure have got also a textual construction of such manner that the legislative discourse is formulated on sanctioning, punitive and incriminating note. It is very difficult that in such a syntactic horizon, in which failures, sanctions and other forms of punishment predominate, to insert a principle so comprehensive as bona fides. It is not difficult, however, to make statements about mala fides and to let understand that all situations incriminated by the criminal law for bad faith and not only would not have been incriminated if the subjects of the law gave proof of bona fides.

Another ascertainment of the Constitutional Court of Romania, at least as interesting as the previous ascertainment, we encounter upon in the in *Decision no. 675/2018 on the exception of unconstitutionality of the provisions of Art. 283 paragraph (4) letter n) and art. 284 of the Code of Criminal Procedure* (Official Gazette no. 1116 of 29 December 2018), in the content of which are also averred the following aspects: the lawmaker has regulated the abuse of the law in close connection with the notion of good faith (bona fides). As opposed to

the provisions of Article 15 of the Civil Code and Article 12 of the Civil Procedure Code, the person who exercises a subjective right in an excessive and unreasonable manner contrary to good faith commits an abuse of the law. In this case, the lawmaker himself of the Civil Code made reference to good faith, with the provision that any natural person or any legal person must exercise his rights and must execute his civil obligations in good faith, in conformity with the public order and with the good morality (Article 14 of the Civil Code). The existence of good faith will constitute an important element of evaluation with regard to having committed an abuse of the law also in other matters (such as the criminal matters), to the extent to which the laws which regulate these matters do not comprise opposing provisions – please consult Article 2 (Paragraph 2) of the Code of Civil Procedure. In other words, where there is good faith there can be no abuse of the law, whereas to the extent to which the law is exercised in bad faith, by means of the misappropriation of the law from the economic and social purpose with a view to which it was acknowledged and, respectively, by means of infringement upon the rights of another person, it cannot benefit from judicial protection (Paragraph 24). Equally relevant is also the following ascertainment of the Constitutional Court of Romania from the content of the same decision of the Court: „With regard to the judicial misconduct consisting in the exercise in bad faith of procedural rights and of judicial process rights, in the due course of the criminal proceedings, as in the due course of the civil proceedings, the judicial process rights must be exercised in good faith, in accordance with the purpose for which they were acknowledged by the law and without infringing upon the judicial process rights of the other party in the judicial process. From this perspective, the exercise in bad faith of a procedural right or of a judicial process right may have negative consequences by disrupting the proper deployment of the judicial process proceedings, by prejudicing a procedural right of another party or in some other manner. Frequent situations in the judicial practice, in which the judicial process rights are exercised in bad faith are, for example, those situations with regard to the formulation of identical legal claims repeated in a short period of time after the rejection of a previous legal claim or the rescission of the legal assistance contract at different judicial process moments, where the party has an interest in postponing the judicial process by any judicial means – such as obstructing the course of justice by preventing the Court from judging a judicial proposal of extending the measure of arrestable offence" (Paragraph 20).

The explanations of the Constitutional Court of Romania, in the present case, do not differ from the explanations from the previous decision, a significant difference being that that this time the Court observes good faith as a general principle of the law, which operates without differences both in the scope of civil judicial relationships as well as in the scope of judicial criminal relationships. Such a clarification is as useful as it can be, due to the fact that, in some manner or another, the definition conferred by Article 14 of the Civil Code has the role to supplement the absence as well as also the understanding of the concept of bona fides in the light of the text of the criminal law / laws. In other words, regarded under the light of unity and of uniformity, of complementarity and of continuity, the civil regulations shed light upon the presence of bona fides within the criminal law text, statuating the fact that good faith imposes itself to exist regardless of the fact if the law specifies it in a direct manner or not.

In the context of the above mentioned clarifications, with regard to the unitary character of the principles of law, regardless of the branch or of the specialization of law matters, I hereby consider to be also of reference the *Decision No 29/2023 on the exception of unconstitutionality of the provisions of Article 187(1) of the EC Treaty to be of* reference. (*1),*

point 1(a) of the Code of Civil Procedure (Official Gazette No 358 of 27 April 2023). More to the point, in the above mentioned judicial case, the Constitutional Court of Romania has been sollicited upon the exception of unconstitutionality of the afore mentioned text of the law, on the grounds that: 'the criticised judicial provisions are unconstitutional also under the aspect of using the collocations of bad faith and manifestly unfounded which are notions that generic, uncertain and which may have diverse interpretations, given the fact that the respective collocations are not defined. The criticised judicial provisions are unconstitutional also with regard to the collocation which shows and settles the fact that the court of general jurisdiction will be able to sanction, a collocation which allows for the amercement to be applied or not to be applied, without the existence of a criterion and a threshold which are objective and controllable. Subsequently, this text of the law could be applied in a discretionary manner, even more in a procedure of reexamination of the judicial stamp duty which is decided without summoning the parties at the judicial process. Moreover, it may lead to the levying of unlawful sums of money and to the restriction of certain civil rights. Consequently, in conformity with the authors of the exception of unconstitutionality, the criminal law texts which were criticised do not comprise concrete criteria upon which the court of general jurisdiction may apply the amercement, leaving at the discretion of the court the settlement of the value of the amercement, a value which cannot be verified by the control court with a view to the gravity of the judicial misconduct which was committed'.

In truth, the concepts of good faith (bona fides) and bad faith (mala fides) have a generic character, due to the fact that they also have the quality of principles of the law. Nevertheless, when these concepts are related to concrete situations, both collocations become specialized, they become proper to the situation, even though their horizon is diverse. With regard to the exception of unconstitutionality mentioned in the above paragraph, the Constitutional Court of Romania has retained the fact that the execution of obligations and the exercise of civil rights is founded upon the good faith, The Civil Code, by means of Articles 11 and 14, imposing to any natural person or to any judicial person the compliance with the public order and with the good morals, as well as imposing the good faith in the execution and the exercise of civil obligations and civil rights. Article 14 (Paragraph 2) from the Civil Code enshrines the concept of good faith as a relative judicial presumption which has a judicial value until proven otherwise. In the same sense it is also presented Article 12 of the Code of Civil Procedure, in accordance to which the judicial process rights must be exerted in good faith in conformity with the judicial purpose for which these rights have been regulated and with the compliance with the rights of other parties in the judicial process, the abusive exertion entailing the judicial liability of the party in the process for the moral and material prejudices caused to the party and at the same time entailing the imposition of a judiciary amercement. (Paragraph 21).

What is even more important, the Constitutional Court of Romania offers also a clarification of the concept of good faith, namely the following: the assessment of the abusive exertion of the judicial process rights is a matter for the court of general jurisdiction which determines the cases in which a participant at the judicial process takes action contrary to the good faith, which must wear the garment form of the good intention, of diligence and of abstention from producing any sort of prejudice to the other parties in the judicial process, in accordance with the compliance with public order and with the good morality which characterize the social relationships. (Paragraph 22).

For a request similar to the previously mentioned one, the Constitutional Court of Romania also pronounced itself on the *Decision No 141/2021 on the exception of unconstitutionality of Article 187 para. (1), points 1 (a) and (b) and Article 190 of the Code of Civil Procedure* (Official Gazette no. 532 of 24 May 2021). On this occasion, the author of the exception of unconstitutionality was of the opinion that 'the criticised criminal law texts are unconstitutional, due to the fact that these texts leave at the assessment of the judge to impose amercements after his own will, without any legal grounds. The judicial process good faith is not defined and there is neither any rule for the formulation of the judicial claim / of the defences in court. [...] At the assessment of the judge are also left the lack of legal grounds or the submission in bad faith of a claim. A judicial amercement cannot be imposed without the elements of guilt and damage being met. The judicial case must be decided by an impartial and independent court of law'.

In the light of this interpretation, the Constitutional Court of Romania has ascertained, inter alia, that „the exertion of the civil obligations and the exercise of civil rights are based on the good faith, the Civil Code, by means of Articles 11 and 14, imposing upon any natural person or upon any legal person to comply with public order and with the good morality as well as imposing the good faith in the execution and in the exertion of civil obligations and of civil rights. Article 14 paragraph (2) of the Civil Code enshrines the concept of „good faith" as a relative judicial presumption which has a judicial value until proven otherwise. In the same sense, Article 12 of the Code of Civil Procedure, in accordance to which judicial process rights must be exerted in good faith in conformity with the judicial purpose for which they were regulated and with compliance with the rights of the other parties in the judicial process, whereas the abusive exertion entails the judicial liability for the moral and material prejudices caused, and at the same time the abusive exertion entails the imposition of a judicial amercement' (Paragraph 26). On the same occasion, the Constitutional Court of Romania has pointed out that, „as regards the criticism in accordance to which the judicial provisions do not settle the judicial criteria for the grading of the amercement, it is for the court of general jurisdiction to assess the abusive exertion of judicial process rights and to determine the judicial cases in which a participant in the proceedings takes action contrary to the good faith, which must wear the garment form of good intention, diligence and the refraining from causing any prejudice to the other parties in the judicial process, in accordance with the compliance with the public order and the good morality which characterize social relationships. Therefore, taking into consideration that the judge is the one who presides over the proceedings, following upon the compliance with the procedural equality of the participants in a litigation, the judge will also be the one who, on the basis of the circumstances of the judicial case and in the case of the breach of the presumption of good faith, will assess with a view to the guilt of the party in the judicial process and with a view to the violation of the judicial order of the law and who will impose the judicial amercement, disposing of sufficient criteria of individualization of the judicial amercement, such as the situations and limits settled by the law or the concept of good faith, while showing the judicial reasons which have led to this measure. The judicial conclusion by means of which the court of general jurisdiction obliges to the payment of the judicial amercement or to the payment of the compensation is subject to judicial review by means of the possibility of the formulation of an application for a review under the conditions of Article 191 of the Code of Civil Procedure, on which occasion, if it is considered that the measure ordered is too forceful, the application

for a review will be admitted and the amount of the judicial amercement or the amount of the compensation will be reduced".

Conclusions

The considerations exposed in the above paragraphs can be summarised in the following few general conclusions:

1. Bona fides or, in the Romanian language, good faith is a quasi-known collocation and a comprehensive notion that has a flourishing tradition in the history of mankind, having been formed initially in the moral-religious scope of the antiquity and gradually becoming an important collocation in the area of judicial relationships, without, however, losing its original moral value.

2. In the scope of the law, bona fides reclaims the judicial correctness, more precisely the capacity of the individual to honour the rights and obligations arising from the judicial relationship in which the individual participates, regardless of the type of judicial relationship: civil, criminal, administrative etc. As Cicero points out, good faith is the foundation of justice. A person of good faith or acting in good faith is a correct person, not only from a judicial stanpoint but also from a moral standpoint.

3. In the matters of the criminal law and the criminal procedure legislation, the Romanian lawmaker has opted for a specific way of indicating or shedding light upon the good faith, namely by using an antithetical collocation, more precisely male fides or bad faith. When taking into consideration the good faith of the subject of the law, the entire criminal law legislation mentions the incrimination of bad faith, an aspect from which it entails that, in particular, within the judicial relationships regulated by the criminal law, good faith is a *must have*. Important clarifications in this regard are provided by the criminal law jurisprudence.

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I, the undersigned, Raluca PETRE, in my capacity of sworn translator and interpreter for the English language, on the basis of the authorisation No. 26158 dated June 04 th 2009, issued by the Ministry of Justice from Romania, hereby certify the exactness of the translation carried out from the Romanian language into the English language and I do hereby attest that the text presented before me has been translated in totality, without any omissions, and that by means of my translation, I have not altered the meaning and the contents of this statement.

SWORN TRANSLATOR AND INTERPRETER,
RALUCA PETRE

CRIME SCENE INVESTIGATION IN THE CASE OF CRIMES AGAINST THE NATIONAL CULTURAL HERITAGE PROTECTION REGIME

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Abstract

Crime scene investigation in the case of offences against the national cultural heritage protection regime, even if it presents general characteristics of crime scene investigation, there are also specific characteristics derived from the regime of cultural heritage goods. We present those elements that converge towards the correct resolution of cultural heritage cases referred to justice.

Keywords: *cultural heritage, investigation, crime scene investigation, on-the-spot investigation.*

Introduction, conceptual aspects

The crime scene investigation -Article 192 (1) of the Romanian Criminal Procedure Code [1]- is the evidentiary procedure carried out in the early phase of the criminal proceedings, as it „implies immediate, direct and complete knowledge of the place where the criminal act was committed"[2]. It enables the criminal investigation body to obtain direct knowledge of the scene of the crime. This activity provides the judicial authorities with information on the crime committed, the modus operandi, the perpetrator(s), the instruments used, the objects stolen, destroyed etc.

With regard to offences against the cultural heritage protection regime, a crime scene investigation is imperative for several reasons: in addition to finding out the truth and holding the perpetrators accountable, there are also considerations relating to the recovery of cultural property, knowledge and protection of national identity, national security [3] etc.

Let us briefly define *national cultural heritage* in order to be clear what we are reffering to when we talk about crime scene investigation in case of such crimes. We will limit ourselves to two definitions. „National cultural heritage comprises all the assets identified as such, irrespective of their ownership, which are a testimony to and an expression of values, beliefs, knowledge and traditions in continuous evolution; it comprises all the elements resulting from the interaction, over time, between human and natural factors".[4]

According to another definition „Romania's national cultural heritage – the totality of cultural values consisting of the vestiges of history and civilizations created over the millennia on the territory of Romania, of literary, artistic, scientific and technical creations of established value over time and of values belonging to the universal cultural treasury existing on the territory of Romania".[5]

It is also essential to clarify expressions such as: *crime scene, the place of the crime, the place where the crime was committed, on-the-spot*. These expressions are somewhat synonymous. The Romanian Criminal Procedure Code states this relatively briefly and generally in Article 41(2):" The place where the offence was committed means the place where the criminal activity took place, in whole or in part, or the place where its consequence

occurred." Thus the expressions *crime scene* or the *place of the crime*, must be understood in a dynamic, case-by-case manner depending on the act committed. Sometimes in the course of research it may be concluded that the place of the crime is wider than initially thought.

The actual place of the crime is important. Which is that? For example, if the item being auctioned at a foreign auction house is described as Eastern European, or as a Thracian relic? Or if the archaeological site from which the goods have been taken covers several hectares, for example in the mountains? All of these elements make research substantially more difficult and extend the time it takes to resolve a case. The location or perimeter of the crime is the place where the criminal activities took place. It can be extremely wide. Account must also be taken of the place where the criminal activity was prepared or the places that are relevant in terms of the actions taken after the commission of a particular crime. In this case, a distinction is made between the main scene and the secondary scene of the crime. Each place is important because it may contain valuable information as any contact leaves traces.

As regards offences against the protection of cultural heritage, we can say that the place of the crime can be the site, the museum, the church etc., the access routes, i.e. the routes by which the perpetrators withdrew from the crime scene, the place where the property was hidden etc. and other places that are relevant depending on the way the crime was committed, its preparation, the removal of traces, the activities after the crime was committed.

The place and the time of the crime are also important for other reasons such as the framing of the crime, the formation of the circle of suspects etc.

Qualitative investigation

The version depend on the quality and quantity of the forensic information obtained, and thus on whether or not the truthful one is captured or even lost.

"Approaching any poached archaeological context is a unique, unrepeatable experiment, which is why, in reconstructing the „puzzle picture", its characteristics and its evolution over time (pre- and post-poaching), a meticulous description and analysis of the information gathered on site is necessary, each detail, however insignificant at first glance, proving to be particularly important in the final reconstruction of the whole." [6]

Equally important is the establishment of negative traces, thus preventing the investigation from going in inappropriate directions, and the loss of valuable time, the consequence of which may be the definitive loss of the property resulting from the crime.

We also stress the importance of using non-invasive methods. Destructive methods should be avoided in the context of cultural heritage. Depending on the need for expertise, this is not always possible.

Taking into account the issues listed in the previous paragraphs, it is not unimportant who takes these samples (e.g. investigating officers), how the sampling takes place, the quality of the samples taken, their traceability etc.[7]

The research itself is carried out in two main phases: the static phase and the dynamic phase, each of which plays an indispensable role in the process of finding the truth. In the investigation of cultural heritage crime, the static phase is extremely important because it captures what is possible from the original context. Some information is irreversibly lost anyway, which is why it is necessary to be very careful about what has escaped the destructive hand of the criminals.

Crime scene investigation is carried out with caution and with a logical approach. The design, the actual crime scene, the crime committed and other elements may lead to the conclusion that a particular search pattern is the most effective in the given situation.

The difficulty of investigating some of the offences against the cultural heritage protection regime is amplified by a number of aspects such as those we show by way of example. In the case of goods stolen from archaeological sites, they are often discovered years later at foreign auction houses, without any link to the site (sometimes not even to the country from which they originated), and it is often difficult to prove even the criminal origin, given that in such cases there is no database in which the goods in question appear etc. [8]

The time elapsed since the crime was committed is also relevant, as traces can be altered or even disappear due to weather factors, human or animal actions etc. In the case of crimes against cultural heritage, any loss of time can lead to the irreversible loss of artefacts or movable property in general, as they are often removed from the country. At the same time, fragments of information about the past are lost forever.

A prompt search of the crime scene increases the likelihood of finding archaeological objects, apparently worthless in material terms, but in reality valuable in terms of cultural, historical and archaeological information: The objects of interest to the perpetrators are mainly monetary hoards, jewellery, funerary objects etc., and the consequence of their extraction is often the destruction of the archaeological context represented by the objects of little pecuniary value (e.g. vases, household objects etc.) recovered by specialists on the spot.[9]

In many cases of offences committed at archaeological sites, the early phase of the criminal process in which this activity takes place is far in time from the time of the offence. Weather phenomena and the actions of other people intervening in the meantime alter the traces, making it difficult or even impossible to find out the truth.

The imperative of urgency and operability is also expressed in the following quote: „with the passage of time, traces are erased from people's memories and from the object, people and objects disappear."[10]

Often the scene of the crime is also attended by the curious, who run a much greater risk of contaminating the scene. „Ensuring the intangibility of the crime scene and taking all measures not to change the position of the objects is particularly important, especially as it reduces the possibility of changing the original appearance left by the perpetrator after he has completed the criminal activity. Touching objects or changing the position of others is totally contraindicated and should not be accepted by the authorities first on the scene, except in extreme cases, when the situation makes it necessary for the rescue of victims, or to limit the effects of a crime, which may constitute a serious danger to the life, health or physical integrity of other persons." [11] In the absence of such situations, the crime field must be protected both against factors external to human will (meteorological factors) and against the voluntary actions of the perpetrator or other persons.[12]

The fact that some archaeological sites are located in remote, inaccessible locations can also be beneficial, as the chances of contaminating the site are substantially reduced.

Adequate preparation, sensitivity and good faith

On the tactical aspects of the preparation of the on-site investigation, we refer primarily to the preparation of the crime scene investigation team. We would like to emphasise the need for the actual preparation of the team. In the context of the investigation of crimes against cultural heritage, the team must also be made up of members with training in the field of

cultural heritage (archaeology, historical monuments etc., depending on the location and the material object of the crime committed), otherwise there is a good chance that valuable traces will not be found in the search for the truth. At this point we would stress the importance of training specialists in the various areas of cultural heritage (archaeology, movable cultural property, church objects, historical monuments etc.). Good faith cannot replace knowledge in the field. The prosecution, even with the best of intentions, fairness and a desire to resolve cases correctly, will not succeed without proper training. On the other hand, proper training in the field and cooperation between specialists (expert opinions etc.) underpins their good faith and counteracts false accusations by criminals that files are fabricated.

The quality of the investigation influences not only the amount of effort subsequently put into the criminal process, but also the direction in which it goes. Training in the field goes hand in hand with sensitivity towards these objects (obviously people without training in the field of cultural heritage can also be sensitive to everything that heritage means from a spiritual, identity and cultural point of view), otherwise there is a greater chance that research will be carried out more mechanically. In this regard, we quote from an article on the Troesmis events: „The Judicial Police were immediately notified, a specialized officer went to the scene, drew up an investigation report, carried out an investigation and it turned out that one of the suspects in question had used a metal detector, picked up several items and that some of them had been handed over to the Tulcea Museum. That's pretty much what came out. And nothing more." [13]

On the other hand, in the case of the incident of the discovery and breaking with an excavator of the 1700 years old Roman sarcophagus with the face of Medusa in the cemetery of Alba Iulia, it was reported by a citizen, who had no training in areas related to cultural heritage, but showed sensitivity to the destruction of an archaeological artifact. Good faith and acting accordingly must be a prerogative of all citizens for an effective protection of cultural heritage.

All evidence collected must be inventoried and properly preserved to prevent alteration and loss. The literature emphasises the importance of acquiring the skills (especially through practical experience superimposed on theoretical knowledge) to recognise and preserve potential evidence, otherwise even the most sophisticated equipment is superfluous. [14]

Technical-scientific means

Regarding the technical-scientific means to be used, in addition to the general forensic kit, the photo kit, the specialized forensic kits, other specific means may be necessary, such as those specific to archaeological research: metal detectors, invisible radiation detectors, drones etc.

The use of drones in forensic investigations is expected to be useful, for example, when archaeological sites are the target of poaching. Often sites are destroyed as a result of excavations that have been carried out in an inappropriate manner and without the use of specific techniques. Poachers want to extract valuable artefacts as quickly as possible, regardless of the archaeological context or the possibility of irreversible loss of information. We therefore believe that it is necessary to capture the image of the crime scene even before the judicial authorities enter the perimeter to be searched.

Especially in mountainous areas, access is difficult. In such situations drones can be extremely useful. But they are also useful in tactical situations where a technical-scientific finding needs to be made in an emergency.

In extreme situations, when we are under an emergency imperative, drones can make a difference. The non-contamination of traces is also a requirement in terms of identification.

A search on crime scene requires the actual physical presence of a human being, but an initial establishment of the crime scene without physically entering the area to be searched is not superfluous. Drones also help to identify traces and objects.

The use of drones in the on-site search prevents contamination or alteration of traces, and importantly, provides the opportunity to re-examine the crime scene as it was before the search team entered the area.

Drones have the ability to capture images, which cannot be made from the ground, and these frames help to form a clearer picture of the crime scene, where the criminal activity took place, and can be used to delineate the area to be searched. Integrated into the initial act of criminal prosecution, it facilitates „immediate, direct and complete knowledge of the place where the criminal act was committed". [15]

The results of the on-the-spot investigation are to be corroborated with other evidence: hearing of witnesses, reconstruction etc.

Conlusions

The crime scene investigation in the case of crimes against the national cultural heritage protection regime presents specific characteristics in addition to the general ones, which are characteristic of the investigation in general. The specific characteristics derive from the regime governing these assets, from their cultural component. In order to carry out proper research, and to capture elements that are or may be relevant, specialist training is required, i.e. the presence of specialists in various fields, together with the use of equipment and technology without which important evidence would be lost. Neither the good faith of those involved in the research nor their sensitivity to these assets should be ignored.

Every intervention must be operational, but unfortunately, for many reasons, such as the isolated nature of the crime scene, the fact that a crime has been committed being known after a long period of time, the perishable nature of the traces, the internationalisation of the criminal phenomenon, the process of finding the truth is lengthy and sometimes remains a desideratum. The multitude of undesirable offences involving cultural heritage, the wide range of crime scenes and other similar factors mean that investigation methods must be adapted and the investigation team adapted under appropriate guidance, in strict compliance with the principle of legality and good faith.

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CLASSIC AND MODERN TRENDS IN HEARING INDIVIDUALS FROM THE PERSPECTIVE OF FORENSIC PSYCHOLOGY AND GOOD FAITH

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Abstract

The article aims to address the theme of the interrogation and interviewing people involved in the criminal investigation phase of the criminal process from the perspective of classic and modern trends. In this regard, certain aspects of criminalistic tactics will be presented, as general rules governing the hearing of individuals in Romania, as well as some elements of modernity introduced through legislative changes, and through various adoptions from interrogation and interviewing techniques used in other countries.

Additionally, a brief parallel will be drawn between the criminalistic tactical rules in Romania and certain segments from the interrogation and interviewing techniques of other states, with the aim of identifying similarities and differences in the approach to a hearing, focusing on the attitude of the judicial body, as an element of judicial psychology, but also on the issue of the good faith exception in the act of criminal investigation.

Keywords: *hearing, interview, investigation, interrogation, forensic psychology, good faith*

1 Introduction

As a component of the Romano-Germanic system, Romanian law incorporates the concept of criminalistic tactics, a branch of the criminalistics system that extends over all procedural acts carried out by the judicial body, including the hearing of individuals. In relation to the concept of interrogation and interviewing tactics, within the Anglo-Saxon legal system, particularly in countries such as the USA and Great Britain, terms like criminal interrogation or techniques for the crime investigator, including police interviewing, are found. The first manual for police interrogations in the USA was written in 1940 by W.R. Kidd, a reformer who helped move law enforcement away from the coercive behavior that still characterized their practices at that time [1]. Considered by the illustrious Augustin Vollmer[1] as a landmark contribution to police literature, the book [2] contains detailed information about the conduct rules that the investigator must follow and the various interrogation methods.

From the presentation of these aspects, we find a primary difference between the two systems, in terms of the individual approach to the topic of hearings by Anglo-Saxon literature and the focus on the judicial body, especially on the criminal prosecution body. Tactical approaches are made without violating the norms of criminal procedural law, yet it is not the criminal procedural rule that contains the set of tactical rules, as is often found in the Romanian Code of Criminal Procedure.

[1] August Vollmer was the chief of police in Berkeley, California, and one of the central figures in policing in the early 20th century in the USA, being the first to develop and introduce the polygraph into police work.

2 Tactical Rules Applied in Hearing Individuals

2. 1 The Internal Framework

For over half a century, specialized literature in Romania has approached the hearing of individuals from a somewhat unified and consistent perspective, a process also determined by legislative stability. Although it has undergone multiple changes, the Code of Criminal Procedure of 1968 was only repealed at the beginning of 2014, and the amendments introduced by the law regarding the New Code of Criminal Procedure [3] have allowed for the maintenance of the main tactical rules. In the explanatory memorandum of the New Code of Criminal Procedure, it is mentioned that the main novelties in the matter of hearing of individuals consist of notifying the individuals of their status and rights from the beginning of the first hearing, and the recording of the hearing of the suspect or accused in audio or audiovisual format, with the purpose being the creation of a unified framework in the matter of jurisprudence and the compliance with international standards, especially the regulations of the ECHR [4]. If in the matter of recording hearings, judicial practice still has reservations and fails to fully comply, significant changes have occurred in the attitude of the judicial body towards the person interviewed, regarding the notification of their status and rights.

Conventionally, the criminalistic tactic of hearing persons begins by presenting the legal framework and the psychological laws involved in the hearing process, with aspects of judicial psychology addressing both the participants and their relationship.

Subsequently, tactical rules are applied throughout two main phases, each composed of several stages. In the phase of preparatory activities, we encounter the stages of studying the case file, establishing and getting to know the person to be interrogated, drafting the hearing plan, as well as a stage for additional activities. Within other preparatory activities, the other individuals who may legally participate in the hearing are determined, logistical equipment is ensured, space and time benchmarks are set, and other details deemed necessary by the judicial body are established.

Before conducting a hearing, getting to know the person is achieved on multiple levels, however, identifying the psychological components of the personality is considered a mandatory condition for uncovering the truth in a criminal case [5]. Through direct and indirect investigative activities, the temperament, character, and abilities are understood as attributes of the personality. This type of psychological knowledge aims ultimately at choosing the most appropriate techniques of hearing.

2. 2 The Internal and International Framework

During the period of police reform in the USA[2], knowledge of the individuals to be interrogated by the investigator was deemed necessary. However, it was mandatory for the investigator to begin by first knowing themselves, a characteristic defined as the only constant during the interrogation [6]. In the specialized literature and judicial practice in Romania, the knowledge of the individual being interrogated seems more important than the knowledge the judicial body has about itself, which could extend to vulnerabilities, strengths, relational capabilities, or managing immediate reactions etc. Also in our country, the second phase of the interrogation, the actual listening, contains three main stages realized through the activities

[2] The Reform Era – The period between 1930 and 1969, as the final stage in the evolution of police in the USA starting from the American Revolution. See in this regard, W. D. Woody, K. D. Forrest. (2020) *op. cit*. p. 28.

of verifying the person's identity, free listening, and question asking. Typically, there is also a fourth stage, aimed at the processes of recording, verifying, and evaluating the statements, a stage that also encompasses remarks regarding the recording by audio or audiovisual technical means.

Based on the PACE (Police and Criminal Evidence Act) project, since 1985, the recording of suspect interrogations in Great Britain has been mandatory, an activity that provides greater objectivity to the justice process and benefits research in the field [7].

Although considered useful and well-received by law enforcement, in the USA, there were reservations about this practice, with the FBI prohibiting the recording of interrogations [8]. Stopping abusive behavior by the investigator, as well as providing better protection against unfounded complaints and a higher fidelity of reports, were presumed advantages of recording interrogations. In a study mentioned within the same cited work, police forces not only positioned themselves favorably in relation to the recording measure but also cited multiple benefits. Thus, since the investigator no longer needs to take notes, attention can be maintained on the person being interrogated, and the degree of responsibility for the statements made by the interrogated seems to be higher. At the same time, the level of presence of the investigator was deemed higher, which allows for timely responses.

Returning to criminalistic elements in Romania, after the case file has been studied and as much information as possible has been obtained about the person to be interviewed, the construction of questions begins within the preparation of the hearing plan. Whether prepared in advance or constructed ad-hoc during the questioning phase, criminalistic tactics have established several rules regarding the formulation of questions, as well as the form they should take. Subsequently, the manner in which questions are used and posed forms the basis of tactical rules that will be employed during the actual hearing.

As a general rule, questions must be clear, concise, compel a complete response, not be suggestive or put the person in difficulty, and depending on the intended purpose, questions can be thematic, problem-based, and detailed, with the last category branching into questions of clarification, supplementation, and control [9].

The FAINT (Forensic Assessment Interview Technique) technique, developed in the USA and based on the types of questions used in a polygraph examination, positions itself as a non-instrumental and less intrusive technique, designed to allow the interviewer to identify psychophysiological changes by asking different types of questions [10]. As a result of interpreting the verbal and non-verbal language of a person who is asked relevant, irrelevant, comparison, and projective questions, the cited authors assert that this technique can uncover lies. Inspired by the polygraph technique, relevant questions are short, concise, and require YES or NO answers, similar to detail questions, but the novelty is represented by projective questions. This questioning mode is designed to trigger certain involuntary verbal clues based on their content that projects the person into a context carefully planned beforehand [10].

The procedures of criminalistic tactics involved in listening to individuals include the methods of progressive or frontal interrogation, as ways of presenting evidence of guilt to the interviewed person, which, by using well-documented data, should lead to evident contradictions between the aspects declared up to that point [11].

Considered the most influential manual with the highest authority in the field, widely used in police and military investigations, Inbau and Reid's interrogation manual[3] begins the

[3] Based on the manual by Fred. I. Inbau and John E. Reid from 1962, through the continuation of their work by Joseph P. Buckley and Brian C. Jayne, the book has reached its 5th edition.

nine steps of the technique by applying direct confrontation [12]. Similar to frontal interrogation, the procedure is abrupt, with the person being interrogated directly accused of guilt. Although the manual [13] specifies that the naming of someone as guilty is merely a label and does not seek to violate the presumption of innocence, providing the investigator with behavioral assistance in further identifying a truthful person, we opine that the technique is at least controversial.

To a lesser extent, but carefully placed according to the stages and phases of the hearing, there are several rules of criminalistic tactics that underlie the conduct of the judicial body in Romania. Before the contact with the person, the judicial body has the task of creating an atmosphere conducive to this type of activity and a sober setting dominated by seriousness, the civilized manner of reception continuing throughout the hearing, in a climate of calm and support [14]. During free narration, the conduct of the judicial body is dominated by the same calm and seriousness, energetic reactions are avoided, and the attitude is firm and tactful, especially in situations where it is necessary to bring the person back to the topic of discussion or even to provide objective help in case of a real intellectual impasse [11].

Although open and honest communication is encouraged, the rules outlined still raise questions regarding the attitude during the hearing process, especially when in contact with suspects or accused individuals. In the work of judicial bodies, the idea of status inequality is still perpetuated, based on which the investigator holds a privileged position during the interrogation [15], primarily due to their access to the data of the case and control over the psychological capacities of the person being interrogated [16].

An alternative and quite different perspective is found in the IIE technique (The Improving Interpersonal Evaluations for Law Enforcement and National Security technique), developed in the USA and based on the scientific analysis of behavior, which concluded that the best police interviewers are also the best communicators, and to detect lies, they are also keen observers of verbal and non-verbal language [8]. To create a connection with the interviewee, as a fundamental trait of this technique, the interviewer must listen more than speak, learn to ask open-ended questions, use paraphrasing to reactivate memory, and under no circumstances use suggestive questions [8]. Based on the main task of facilitating communication, certain traits of the interviewer emerge related to empathy, curiosity, patience, voluntary and conscious presence, and last but not least, being a good observer.

3 Good Faith in the Hearing of Individuals

The notion of good faith is tied to the principle of legality and the loyalty of evidence, principles that reflect the idea of sincerity and honesty of the judicial body, in our case the investigators, when administering evidence, especially during the conduct of evidentiary procedures such as the hearing.

Article 101 of the Code of Criminal Procedure is dedicated to the principle of loyalty, setting precise limits for the collection of evidence, with the first paragraph being as clear as possible in prohibiting violence, threats, coercion, promises, or inducements to obtain them. The second paragraph refers to interrogation methods and techniques that can influence the awareness and voluntary nature of testimonies, even with the person's consent, while the third paragraph condemns any form of incitement or provocation to commit crimes.

From the examination of the content of the provisions presented, it results that the legality of a procedure does not necessarily imply its loyalty. The concept of loyalty finds its roots in the right to a fair trial and assumes a procedural ethics on the part of judicial authorities. In

the search for truth, there should be no compromise between procedural fidelity and the efficiency or productivity of the methods of proof [17]. Judicial practice must take these principles into account, both when signing a statement in the terms preferred by investigators and when the hearing occurs under conditions of fear or neuropsychic exhaustion.

The exclusion of unlawful evidence is achieved through the mechanism of nullity, but in Romanian law, there remains an uncovered issue, namely, the exclusion of evidence based on the fault of the judicial bodies, in this case, the good faith of the criminal investigation bodies in administering the evidentiary procedure of the hearing can be discussed. In American law, from which we also have some of the hearing techniques presented in this article, evidence obtained through an illegal evidentiary procedure remains valid if administered in good faith.

The „good faith exception" theory, as used in the jurisprudence of the United States, was comparatively addressed in a relatively recent article [18], where we find, on this topic, American, European, and national judicial practice. The author notes that judicial practice in our country is divided, in the sense that certain courts have decided annulment only in situations where it was demonstrated that the court had the possibility of being informed about a certain condition, while others have ruled that annulment is justified based on strictly objective criteria (the presence of a fact that triggers the applicability of a legal rule), regardless of the judicial body's attitude towards that fact (whether it was unaware of the existence of the fact, although it could have been, or knowing the fact, ignored it) or the fact that it acted with „good faith" (did not have the possibility to know the respective situation). The conclusion of the cited article places the problem of nullity and good faith towards the will of the legislator and represents more a matter of choice about what should prevail in Romanian law, the two options being represented by the unlimited protection of fundamental rights and the understanding that judicial bodies are also humans, and their work should not be erased just because at some point they were not aware of a certain situation.

4 Conclusions

Derived from judicial psychology, we find in the criminalistic literature of Romania classifications of different types of investigators, such as the temperate, amiable, authoritative, pretentious, and even the creative type. Towards the end of the article, we revisit the idea that in Romanian criminalistic tactics, the knowledge of personality is directed towards the person under hearing and very little towards the one conducting the hearing.

From the standpoint of hearing tactics, we could observe that there are similarities with approaches in other countries, but there are also many differences, especially regarding the perspective of the judicial body. By far, the most significant difference is the lack of a specific interviewing and interrogation technique, scientifically documented and validated on the Romanian population.

Comparing with the profile of individuals from the USA, at the psychological depth profile level of the Romanian population, there are no significant differences between the basic attributes of personality. However, the surface profile reveals certain differences indicating possible behaviors of inflexibility to change and a higher degree of suspicion among the Romanian population, all against a backdrop of increased indiscipline.

The study is general and refers to the psychological attributes of Romanians, not just the judicial bodies, but it can help us understand more easily why there is still a certain difference in perspective between judicial bodies in Romania and those in other countries. Starting from the idea that there are no major fundamental differences, perhaps that lack of discipline that is

notable at the surface level of the psychological profile could be compensated for by creating specific interrogation tools, with national applicability and tailored to the realities of Romanian society, without being mere copies of techniques from other countries.

The same can be said about applying the principle of the good faith exception in the conduct of tactical procedures such as hearings. Importing a principle from Anglo-Saxon law is likely to pave the way for interpretations regarding the intention to violate the rights of the person under hearing and the flawed implementation of the hearing tactics. The Code of Criminal Procedure contains sufficient guarantees regarding the rights of the person being under hearing and the limits of the judicial body in obtaining evidence. However, adhering to the principle of loyalty also requires much more clearly defined tactical benchmarks.

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Section E

EARLY WARNING TOOLS AND THE ROLE OF THE MENTOR IN PRE-INSOLVENCY PROCEEDINGS

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Abstract

Directive (EU) 2019/1023 concerning restructuring and insolvency[1], also known as „Second Chance Directive", aims to harmonize the legislation of the member states in the field of restructuring, and aims to facilitate access to restructuring measures, even from the first signs of difficulty.

The measures, proposed to be adopted by the member states by Directive (EU) 2019/1023, supplement Regulation (EU) 2015/848 on insolvency procedures, and apply in all member states of the European Union, with the exception of the rules on electronic communications, starting with July 17, 2021.

The directive does not require member states to select a single pre-insolvency procedure, so Romania has regulated two procedures, the restructuring agreement procedure and the preventive composition procedure.

The transposition of the Directive into national legislation resulted in the amendment and completion of Law no. 85/2014[2], and the provisions that regulate preventive procedures. Thus, provisions regarding early warning were introduced, the ad hoc mandate was replaced by the restructuring agreement, and the preventive composition procedure was adapted to the new requirements, to become a faster and easily accessible procedure.

Keywords: *Directive (EU) 2019/1023, financial difficulty, early warning, mentor, pre-insolvency procedure consultant, restructuring agreement, preventive composition, insolvency.*

1. Early warning tools regulated by law no. 85/2014

The transposition of the Directive (EU) 1023/2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (*Directive on restructuring and insolvency)*, in the national legislation, determined the reformation of pre-insolvency procedures, into early warning tools created to support small and medium-sized companies, and having the role of warning and informing.

The directive stipulates the need to implement early warning tools that signal to debtors the need to act quickly, and take the necessary measures, to avoid becoming insolvent, and all the consequences arising from this state.

The implementation of Directive (EU) 2019/1023 in national legislation, by amending the provisions of Law no. 85/2014, put in a new light the concept of prevention, as well as that of restructuring.

Currently, pre-insolvency and insolvency procedures are regulated in national legislation, in Law no. 85/2014, which includes both the two insolvency prevention procedures: the restructuring agreement and the preventive composition procedure, as well as the insolvency procedures, as a result of the opening of the procedure by the syndic judge.

Law no. 216/2022 for the amendment and completion of Law no. 85/2014 on insolvency and insolvency prevention procedures and other normative acts[3], substantially modified the previous regulation, by adopting new provisions regarding the early warning procedure, the modification of pre-insolvency procedures, and the adoption of new institutions, such as that of „mentorship".

According to the provisions of Article 5 (51) of Law no. 85/2014, article introduced by Law no. 216/2022, early warning represents „*alerting to the existence of circumstances that could give rise to the debtor's state of difficulty or insolvency and which may signal to him the need to act without delay, and/or providing, free of charge, information on recovery solutions*".

And, the difficulty is defined in Law no. 85/2014, in Article 5 (26^2) as „*the condition generated by any circumstance that determines a temporary impairment of the activity that gives rise to a real and serious threat to the debtor's future ability to pay debts when due, if appropriate measures are not taken; the distressed debtor is able to perform the necessary obligations as they become due*".

In the current form of Law no. 85/2014, the legislator uses the phrase „*state of difficulty*", and opts for the expansion of the sphere of difficulties that a debtor can go through in order to be able to access the restructuring mechanisms, which are no longer exclusively of a financial nature.

The directive establishes in Article 1 rules regarding the preventive restructuring frameworks, to which debtors in „*financial difficulty*" can resort, when there is a probability of insolvency, în view of preventing it, and in order to be able to continue operating[4].

The current pre-insolvency procedures are conditioned by the state of difficulty of the company, which is incompatible with the state of insolvency, the first being circumscribed to a probability of implied insolvency, the other being insolvency itself as a state of the estate.

Through the instruments made available, companies in difficulty have an extra chance to restore economic viability, through restructuring procedures. But for the success of these procedures, it is necessary to involve some collective restructuring efforts, which are intended to reduce the losses that creditors inevitably bear, the dismissal of employees, and the economic losses, in general.

According to the regulations in Chapter III *Early Warning*, from Law no. 85/2014, the management of the warning procedure is divided between the **Ministry of Public Finance, through the National Fiscal Administration Agency (N.A.F.A.)**, which implements the alerts regarding the non-execution of obligations and the free provision of information for a possible recovery[5], and the **Ministry of Economy, Entrepreneurship and Tourism (M.E.A.T.)**, which makes available to the public, on its website, in a section dedicated to information in the field of early warning, a series of information aimed at preventing insolvency.

The early warning tools adopted in the domestic legislation in Romania are:

✓ The creation, on the internet pages of N.A.F.A. and M.E.A.T. of a section dedicated to information and guidance on the recovery solutions provided for by law where extensive

information in the field of early warning, insolvency prevention and insolvency procedures can be accessed free of charge.

✓ Transmission by N.A.F.A. of automatic and electronic payment notifications through the private virtual space (S.P.V.) in relation to non-execution of obligations to the state budget, to the state social insurance budget or to the unemployment insurance budget; regarding the obligations highlighted in the alert notification, the guidance and assistance services offered to taxpayers by N.A.F.A can also be accessed.[6].

✓ Implementation by M.E.A.T. of an early warning helpline for a general assessment of the business with a view to accessing recovery solutions[7];

In addition, the legislator established that the Ministry of Economy, Entrepreneurship and Tourism will make available to the public on its website, in a section dedicated to information and guidance in the field of early warning, detailed information on early warning, a series of indicators for the general assessment of the financial situation, in order to diagnose the state of difficulty or insolvency, systematized information on recovery solutions, including insolvency prevention and insolvency proceedings, the list of insolvency practitioners, and the authorities and bodies exercising their supervision, information on programs and other support facilities[8].

✓ Developing, over time, a specialized support component by involving consultants with experience in crisis management and/or mentors to provide initial diagnosis services; and/or business counselling[9].

Thus, Law no. 85/2014 also mentions the possibility of establishing a network of consultants and/or mentors, by the Ministry of Entrepreneurship and Tourism, possibly with the involvement of the business environment.

As a result, early warning tools can also be developed by private entities, not only by state institutions[10].

Regarding the stage of implementation of early warning mechanisms, we note that the Ministry of Economy, Entrepreneurship and Tourism has created a section on its website (https://prevenire.gov.ro/semnal-avertizare/)[11], in which general information is presented regarding insolvency prevention and insolvency procedures.

2. The institution of the mentor regulated by law no. 85/2014

The role of a mentor in the insolvency prevention procedures is to offer advice and possible solutions to the company that is facing financial difficulties, and that could be exposed to the risk of opening the insolvency procedure.

This stage requires a close collaboration of the mentor with the management of the company in difficulty, in order to analyze the financial situation, to identify the areas that created the state of financial difficulty, and to develop some strategies to overcome the impasse in which the debtor company is.

As a result, the role of a mentor can vary depending on the needs of the struggling company and the experience and expertise the mentor possesses.

Among the specific responsibilities that could be established by an assistance agreement with the company in difficulty, the following may be included:

- Consulting, regarding financial restructuring: a mentor can provide consulting to the management of the company, in difficulty, in order to facilitate the renegotiation of debts, or in order to identify some cost reduction measures;

- Facilitating communication: the mentor can facilitate communication between representatives of the struggling business and stakeholders such as creditors, employees, investors etc.

- Assistance in negotiations: a mentor can assist the company in difficulty and in negotiations with creditors, in order to obtain more favorable conditions, establish payment installments, and reduce late penalties.

- Sensing the need to call for a coherent recovery plan: the mentor can support the debtor in order to identify realistic and profitable measures that the company in difficulty can adopt in order to improve its financial situation and avoid insolvency;

- Supporting insolvency prevention procedures: The mentor can work closely with insolvency practitioners to support insolvency prevention mechanisms.

The main objective of the mentor is to provide punctual support to the debtor in difficulty or the insolvency practitioner, through a professional collaboration, based on the accumulated experience and expertise, in order to identify favorable solutions, depending on the specific case and the situation of the respective company.

The experience brought by a mentor in areas such as: financial restructuring strategies, identifying business opportunities, or analyzing financial risks, can be edifying for the company in financial difficulty.

The institution of the mentor is not defined by law, and mentors and mentoring-specific activities in the public system are regulated, for example, in GEO no. 92/2008 regarding the civil servant status[12] and in the Methodological Norm for the application of the ordinance mentioned above[13]. Article 38 (3) of the Methodological Norm states that: „*During the period provided for in clause (2), the mentors have the role of promoting within the authorities or public institutions where the training programs are included, the duties of public managers and the specifics of the public function of public manager. In fulfilling the mentioned role, mentors can collaborate with the Agency, with the Central Unit for Public Administration Reform or, as the case may be, with the departments responsible for human resources management, at their request and within the limits provided by law*".

Conclusion

In conclusion, early warning signals can give a company the opportunity to take action before insolvency becomes inevitable, which can help protect the business and its long-term prospects.

The application of pre-insolvency procedures and the implementation of early warning solutions will contribute to avoiding the risk of insolvency, preventing the loss of jobs, and limiting the negative impact on the economy in general.

According to the regulations contained in Directive (EU) 1023/2019, transposed into domestic legislation, companies in financial difficulty must have quick access to effective national preventive restructuring mechanisms, and to early warning tools, with the help of which to avoid the state of insolvency, with all the consequences arising from it.

It remains for the future to decide to what extent these insolvency prevention measures proved useful in Romania, and whether they produced the expected effects in the business environment.

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[5] According to the provisions of Article 5^1 of Law no. 85/2014:

„*Professionals, with the exceptions provided for in Article 3 (1), (4) and (5), are alerted by the fiscal body regarding the non-execution of certain obligations and information is made available to them free of charge regarding the recovery solutions provided by law through a website*".

[6] According to the provisions of Article 5^2 of Law no. 85/2014:

„(1) Professionals, with the exceptions provided for in Article 3 (1), (4) and (5), are alerted by means of an alert notification sent automatically through the electronic communication system by electronic means of remote transmission developed by the Ministry of Finance/Agency National Fiscal Administration (N.A.F.A.) in relation to non-execution of obligations to the state budget, to the state social insurance budget or to the unemployment insurance budget.

(2) The procedure for communicating alert notifications, including the amount of outstanding obligations that trigger the issuance of the alert message, by categories of debtors established according to fiscal legislation, the date of issuance of the first alert message, and, if applicable, the frequency of the alert message and its format, is approved under the provisions of Law no. 207/2015 regarding the Fiscal Procedure Code, with subsequent amendments and additions".

[7] According to the provisions of Article 5^4 of Law no. 85/2014:

„(1) The Ministry of Entrepreneurship and Tourism provides a telephone line for guidance and assistance in the field of early warning, for a general assessment of the business in order to access recovery solutions.

(2) The procedure for granting guidance and assistance is established by order of the Minister of Entrepreneurship and Tourism".

[8] According to the provisions of Article 5^3 of Law no. 85/2014:

"(1) The Ministry of Entrepreneurship and Tourism makes available to the public on its website, in a section dedicated to information and guidance in the field of early warning:

a) detailed information regarding the early warning and its role to signal the debtor the need to act without delay;

b) indicators for a general assessment of the financial situation, in order to diagnose the state of difficulty or insolvency, using available diagnostic programs;

c) information systematized and presented in an easy-to-use format regarding recovery solutions, including insolvency prevention and insolvency procedures, having the effect of discharging obligations;

d) the list of insolvency practitioners and the authorities and bodies exercising their supervision;

e) information on programs and other support facilities.

(2) Regarding the obligations highlighted in the alert notification, the guidance and assistance services offered to taxpayers, under the law, by N.A.F.A. can also be accessed. At the same time, the alerted natural or legal persons can notify the fiscal body of the intention to mediate; attaching to the notification documents and information supporting its economic and financial situation, Article 2301 (2)-(4) and (8) of Law no. 207/2015, with subsequent amendments and additions, to be applied accordingly, or they can access the fiscal facilities in force".

[9] Law no. 85/2014, introduced by Article 5^5, the instruction for the Ministry of Entrepreneurship and Tourism to establish a network of consultants that can be selected including from the private sector.

According to the provisions of Article 5^5 of Law no. 85/2014: „*The Ministry of Entrepreneurship and Tourism can establish a network of consultants, which can also be from the private sector, and/or initiate, with the involvement of representative associations of the business environment, the formation of a network of mentors in the field of early warning*".

[10] According to the provisions of Article 5^6 of Law no. 85/2014:

„Early warning tools can also be developed by private entities".

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GOOD FAITH IN TAX LAW

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Abstract
The tax field is perhaps the most dynamic in Romanian law, the legal rules often change, creating an unsafe framework for the taxpayer, in which abuses and lack of coherence intertwine with sometimes excessive tax burdens. For these reasons, the taxpayer is often reluctant to cooperate with the tax authorities, which they consider to be in bad faith. Likewise, the fiscal bodies act in conditions of skepticism in certain of its procedures, contesting the good faith of the taxpayer.
Keywords: *good faith, bad faith, treatment imbalance, fiscal inspection.*

1. The notions of „good faith" and „bad faith"

The Constitution of Romania [1] describes good faith as the obligation of legal subjects to respect the material and legal limits of their rights, so that an abusive exercise of rights is prevented. [2]

Good faith, at a general level, we find it in the disp. Art. 14 of the Civil Code, with the marginal name „Good faith". According to paragraph (1) of this legal text, any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals.

A doctrinal opinion [3] from common law, to which we also agree, shows that good faith is an objective standard of appreciation, of evaluating an honest, loyal and correct conduct, in the exercise of civil rights, but also in the execution of obligations.

Although the notion of „good faith" is defined both in common law and in special legal provisions, the notion of „bad faith" is not defined in the legislation, so we consider it appropriate for the legislator to consider this notion as well, proceeding to include the definition both in common law and in special legal provisions.

Bad faith, this moral and legal concept is defined, as a rule, in specialized dictionaries, as being synonymous with an incorrect and malicious attitude in relation to the principles of good, honor, correctness. [4]

However, in tax law, being one of the areas with the most legislative changes, with multiple operations and obligations on the part of the taxpayer, we consider that the definition offered by the doctrine of bad faith is on the one hand non-comprehensive, and on the other hand it is capable of unilateral, sometimes abusive or subjective interpretation.

A particular case in which we consider it necessary to define the notion of „bad faith" results from the legal regulation contained in the provisions of art. 25 Fiscal Procedure Code, establishing a special form of liability, derogating from the insolvency regulations,

considering the nature of the obligation that is sought to be capitalized in the case, namely budgetary claims. In the text of the law, the condition of establishing bad faith can be found for incurring joint and several liability with the debtor, the facts being materialized through actions enumerated exhaustively by the legislator. However, as long as the legislator does not include the definition of the notion, the interpreter must analyze it in the attestation in good faith.

The legal text (art. 25 Fiscal Procedure Code) imposes as a form of guilt bad faith both with regard to the statutory administrators and with regard to the third persons de facto administrators who, in the framework of their activity of administration of the legal entity, determined the non-declaration and/or non-payment upon maturity of fiscal obligations.

Numerous decisions of the fiscal body have been subject to the control of the courts, the object of which is to verify the legality and validity of the decision to attract joint and several liability with the debtor of the administrators, the practice of the fiscal body being to issue the decision, without verifying the existence of bad faith on the part of the concerned persons.

Since the legal provisions regulate separately from the condition of committing the illegal act, that of committing it in bad faith, the High Court of Cassation and Justice held that, in the absence of additional elements that demonstrate bad faith and the purpose of evading the payment of fiscal obligations outstanding, the bad faith of the administrator cannot be inferred from the non-submission of tax declarations, nor the purpose of evading the payment of obligations towards the general consolidated budget of the state, and the non-existence of the sums of money necessary to pay the tax obligations is not an indication of the fulfillment of the condition bad faith of the administrator.

For example, in the hypothesis provided for in letter d) of art. 25 Fiscal Procedure Code, bad faith presupposes a volitional attitude of the guilty person in relation to the fulfillment by the company of its legal obligations in relations with the fiscal body, an attitude consisting in determining, in bad faith, the non-declaration and/or non-payment at the maturity of the fiscal obligations and in the representation of the negative result and the pursuit of this purpose through their actions and inactions, an attitude not proven in the present case. The simple fact that the company's liabilities are greater than its assets are not of a nature to automatically attract its patrimonial liability, in the context where good faith is presumed. [5]

The unilateral interpretation has brought before the administrative and fiscal litigation courts numerous cases in which the fiscal body (the fiscal body being defined in art. 1 point 30 of the Fiscal Procedure Code as the central fiscal body, the local fiscal body, as well as other public institutions that administers tax claims) ordered sanctioning measures against the taxpayer, without analyzing the concept of „bad faith".

For example, the High Court of Cassation and Justice [4] that in the contested decision no reference is made to fulfilling the bad faith condition of the plaintiff. Thus, the content of the contested act does not indicate what the material elements of the non-declaration or non-payment of fiscal obligations in bad faith consisted of, respectively the characterized guilt of the plaintiff, the fiscal body starting from the premise that bad faith is presumed. However, bad faith is not presumed, it must be concretely proven by the fiscal body.

2. Subjects of the fiscal legal report

Given that the principle of good faith in the fiscal legal report must be analyzed from the perspective of all parties involved, we consider it appropriate to briefly present the subjects of the fiscal legal report, respectively:

– the active subject, this being the state, represented by the Ministry of Public Finance, through the National Fiscal Administration Agency and the administrative-territorial units (counties, municipalities, cities and communes);[6]

– the passive subject, this being the taxpayer (natural or legal person), bearer/payer of tax levies. According to art. 1 point 4 of the Fiscal Procedure Code, the taxpayer is any natural, legal person or any other entity without legal personality that owes, according to the law, taxes, fees and social contributions; and according to point 35 of the same article, the payer is the person who, on behalf of the taxpayer, according to the law, has the obligation to pay or withhold and pay or to collect and pay, as the case may be, taxes, fees and social contributions. It is a payer and the secondary office is obliged, according to the law, to register fiscally as a payer of salaries and incomes assimilated to salaries;

This classification is offered even by the legislator in the content of art. 17 para. (1) of the Fiscal Procedure Code, which states that the subjects of the fiscal legal report are the state, the administrative-territorial units or, as the case may be, the administrative-territorial subdivisions of the municipalities, the taxpayer/payer, as well as other persons who acquire rights and obligations in within this report.

3. The imbalance between the parties involved in the fiscal report

Returning to good faith and its legal regulation, in the special fiscal legislation, good faith can be found in the disp. Art. 12 of the Fiscal Procedure Code, which shows in para. (1) that the relations between the taxpayer/payer and the fiscal body must be based on good faith. Next, art. 12 of the Code. fiscal procedure. establishes obligations both for the taxpayer and for the fiscal body. Thus, in the content of para. (2) the legislator indicates that he, respectively the taxpayer/payer must fulfill his obligations and exercise his rights according to the purpose for which they were recognized by law and correctly declare the data and information regarding the tax obligations due.

It is important to emphasize that the good faith of the taxpayers is presumed until the fiscal body proves the contrary (par. 4 of art. 12 Fiscal Procedure Code), this legal provision being in agreement with par. (2) of art. 14 of the Civil Code and this legal text showing that good faith is presumed until the contrary is proven. In this sense, see also Decision no. 4862/2022, dated October 25, 2022, pronounced by the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section, by which the supreme court stated: The principle of presumption of good faith, enshrined in art. 14 of the Civil Code, having as a corollary the fact that the one who wants to overturn this legal and relative presumption has the burden of proving bad faith, is also applicable in fiscal matters, being consecrated including by special rule of art. 12 of the Fiscal Procedure Code, so that the good faith of the taxpayer is presumed until the fiscal body proves otherwise. Therefore, bad faith must not only be asserted, but also proven

Although both normative acts (the Civil Code and the Fiscal Procedure Code) show that good faith is presumed until the contrary is proven, we notice an omission by the legislator. Thus, if in the Civil Code, the legislator shows the presumption of good faith applicable at a general level, so to any subject of law, in the Fiscal Procedure Code, the legislator establishes the presumption only in favor of the taxpayer.

Or, in this situation, can the reader interpret that the presumption does not apply to the fiscal body, that it is considered to be in bad faith?

This apparent imbalance of treatment does not mean that the tax body does not benefit from the presumption of good faith in its relationship with the taxpayer, but only that the duty of good faith of the tax body derives from its nature as an administration body. Having the capacity of „representative" of the state, the fiscal body cannot be presumed to be in bad faith, as it has the obligation that all its activities are carried out in the service of the citizen.

Although in jurisprudence we have not found court decisions in which the fiscal body is declared to be in bad faith, the omission of the fiscal body to perform certain acts or provide information, the manner in which it issued certain acts or resolved the taxpayer's requests creates a rich jurisprudence, the national courts finding many times that the disputed acts are contrary to the principle of good faith. As an example, we show Decision no. 3200/2011 of the High Court of Cassation and Justice, which annulled the acts issued by the fiscal bodies, motivated by the lack of exercise of the active role: the issuance of the disputed fiscal administrative acts was carried out in violation of the active role of the authority, enshrined in art. 7 of the Fiscal Procedure Code, a role that required him to respond to the repeated requests of the plaintiff regarding the state of fiscal obligations to the budget, before issuing the disputed administrative-fiscal acts, being in violation of the principle of good faith, a principle enshrined in art. 12 Fiscal Procedure Code and which must be the basis of relations between taxpayers and fiscal bodies.

But, as far as the taxpayer is concerned, the jurisprudence is rich in establishing his bad faith, especially regarding the crime of establishing in bad faith the taxes to be reimbursed provided by art. 8 para. (2) from Law no. 241/2005. For example, the Galati Court of Appeal – Criminal Section and for cases involving minors, by Decision no. 944/2023, dated 28.08.2023, showed that the immediate follow-up of the crime of establishing in bad faith the fees to be reimbursed provided by art. 8 para. (2) from Law no. 241/2005 consists in the damage caused to the state budget through the illegal refund of the tax.

The notion of „bad faith" was also subject to debate before the constitutional judges, in its jurisprudence, the Court appreciating that it can be qualified as that attitude of a person who commits a fact or an act contrary to the law or other norms of social coexistence, on fully aware of the illicit character of his conduct. Conversely, the exercise by a person of a right recognized by law cannot justify, by itself, a presumption of bad faith.[7]

Returning to the imbalance between the parties involved in the tax report, it also appears in the way of ascertaining or contesting the good faith of the two parties, namely the taxpayer and the tax body. Thus, if by virtue of the rights conferred by the legislator, the fiscal body can directly ascertain the bad faith of the taxpayer, ordering the necessary measures to sanction him, as far as the fiscal body is concerned, in order to ascertain and sanction his bad faith, the taxpayer must appeal to the court court or at other state institutions.

Although the fiscal body is in a position of superiority in the relationship with the taxpayer, art. 12 of the Fiscal Procedure Code, imposes obligations on the fiscal body as well, showing in the content of para. (3) that he must respect the rights of the taxpayer/payer in every tax debt administration procedure in progress.

Strictly analyzing the provisions of art. 12 of the Fiscal Procedure Code, the general opinion is that the parties to the legal relationship, in this case, the fiscal body and the taxpayer, are in balance, having the same obligations to behave in good faith in the relationship between them. However, in an extended analysis of the rights and obligations of the parties involved in the fiscal legal relationship, we note that the good faith of the fiscal body is questionable, for example, in the fiscal inspection procedure.

4. Fiscal inspection

According to art. 113 para. (1) Fiscal Procedure Code, the fiscal inspection represents the activity whose object is to verify the legality and compliance of fiscal declarations, the correctness and accuracy of the fulfillment of obligations in relation to the establishment of fiscal obligations by the taxpayer/payer, compliance with the provisions of fiscal and accounting legislation, the verification or establishing, as the case may be, the tax bases and related factual situations, establishing differences in main fiscal obligations.

The fiscal inspection represents the specialized activity carried out by the competent fiscal bodies to verify the fulfillment by the passive subjects of fiscal procedural law reports, other than the fiscal bodies, of the obligations incumbent upon them within these reports[8].

The purpose of the fiscal inspection is to ensure that taxpayers comply with the law in fulfilling their obligations under the fiscal procedural law report. A different approach, closer to the letter of the law, namely in consideration of art. 113 Fiscal Procedure Code, would question compliance with the principle of good faith expressly provided for by fiscal legislation. And yet, trying to go beyond the letter of the law, its spirit leads us to the conclusion of the unnatural violation of the above-mentioned principle. Related to the express consecration of the tax inspection's powers to investigate the taxpayer's activity in order to discover new elements relevant to the application of the tax law, it cannot be claimed that the tax inspection bodies proceed from the consideration that the taxpayer has fulfilled his obligations towards the state budget but, on the contrary, they presume the violation of the law, leaving only the task of discovering this violation following the conduct of the fiscal inspection.[9]

According to art. 118 para. (3) Fiscal procedure code, the fiscal inspection is performed only once for each type of fiscal debt and for each taxable period, art. 128 para. (1) Procedure code. fiscal providing for an exception to this principle, the legislator showing that by exception to the provisions of art. 118 para. (3), the head of the tax inspection body can decide to reverify some types of tax obligations for a certain taxable period, upon the proposal of the tax inspection body appointed to carry out the inspection or at the request of the taxpayer, if the following cumulative conditions are met:

a) after the conclusion of the fiscal inspection, additional data appear [10] that were unknown to the fiscal inspection body or, as the case may be, to the taxpayer, at the date of the fiscal inspection;

b) the additional data influence the results of the completed fiscal inspection.

This paragraph has an open content that allows the authorities to proceed with the reverification of a taxpayer when they have additional data obtained in any other way by the tax inspection bodies than those already listed in this paragraph. We believe that there are no other legal means of procuring additional data other than those mentioned expressis verbis in para. (2) of art. 128. In the same sense, the High Court of Cassation and Justice ruled in Decision no. 1359/2014, showing that „from the interpretation of the highlighted legal norms, it unequivocally follows the need to base the decision to re-verify a certain period subject to taxation on the existence of additional data that may result, among other things, from requests by the criminal investigation bodies or other bodies or institutions entitled by law. Therefore, the existence of a request/notification of a body or institutions entitled according to the law is necessary, but not sufficient to start the verification procedure, in the absence of the identification of additional data or calculation errors likely to influence the results of the previous fiscal inspection „[11]. Also, by Decision no. 299/2012 of the High Court of

Cassation and Justice, it was confirmed that the right to fiscal security is one of the fundamental rights of the taxpayer in the framework of the fiscal inspection and, as a consequence, it was affirmed that to the extent that the factual elements were accessible to the bodies of the tax inspection within the previous tax control, the failure to analyze some relevant operations regarding the verified tax (due to negligence or incompetence) does not constitute a reason for resuming the tax inspection[12]. Also, by Decision no. 299/2012 of the High Court of Cassation and Justice, it was confirmed that the right to fiscal security is one of the fundamental rights of the taxpayer in the framework of the fiscal inspection and, as a consequence, it was affirmed that to the extent that the factual elements were accessible to the bodies of the tax inspection within the previous tax control, the failure to analyze some relevant operations regarding the verified tax (due to negligence or incompetence) does not constitute a reason for resuming the tax inspection[9]

5. Conclusions

Considering that the jurisprudence has emphasized on numerous occasions the violation of the presumption of good faith of the taxpayer or the obligation to act in good faith, we consider it appropriate for the legislator to proceed with the improvement of the existing legislative framework in fiscal matters, its main purpose being to strengthen the protection offered to taxpayers in front of the tax authorities, which can often act with excess power, fulfilling their duties in an excessive and unreasonable manner.

Therefore, we consider it appropriate for the legislator to adopt a legal framework suitable both for respecting the rights of taxpayers, for their education, but also for the recovery of debts, given that the bad faith of the taxpayer is sometimes transposed into the criminal field, tax evasion being a large phenomenon, an answer of the citizen to the coercion of the state.

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• (2) The State is represented by the Ministry of Public Finance, through A.N.A.F. and its subordinate units, unless the law establishes another authority in this regard.

• (3) The administrative-territorial units or, as the case may be, the administrative-territorial subdivisions of the municipalities, are represented by the local public administration authorities, as well as by their specialized departments, within the limits of the powers delegated by the respective authorities.

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ETHICAL FOUNDATION OF THE THEORY OF NATIONAL INTEREST: THE ESSENTIAL ROLE OF GOOD FAITH IN ITS APPLICATION

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Abstract

The article addresses the crucial role of good faith in the application of the theory of national interest within the field of private international law. The theory of national interest represents an exception to the application of the competent personal law and is essential for assessing the capacity of an individual within a given legal context. Focusing on international relations, this article analyzes how the concept of good faith serves as an ethical foundation in the application of the theory of national interest. It highlights the importance of adhering to moral standards and ethical principles in making decisions regarding conflicts of laws in the field of individual rights. Additionally, it examines how the integration of good faith in the application of the theory of national interest contributes to promoting equity in international relations, ensuring a balance between the interests of states and fundamental ethical values.

Keywords: *good faith, national law, incapacity to act of natural persons, legal representative of the natural person, national interest, contract concluded in person, lex fori, displacement of the normal competent national law.*

1. INTRODUCTORY ASPECTS REGARDING THE DEVELOPMENT OF THE THEORY OF NATIONAL INTEREST

Recognized as an exception to the application of the normally competent personal law regarding the capacity of natural persons in private international law, the theory of national interest was initially developed in the jurisprudence of French courts, based on the considerations of the French Court of Cassation in the Lizardi Case resolved in 1861 [1]. In this case, a Mexican citizen named Lizardi, residing in Paris, purchased valuable jewelry from a French jeweler and undertook to pay for it through promissory notes issued at the time of the sale contract. When the promissory notes were presented for payment, the Mexican citizen, through his legal guardian, invoked the nullity of the sale contract on the grounds of incapacity, arguing that although Lizardi was 21 years old at the time of assuming the obligation and was considered capable under French law, under Mexican law he was not considered capable until the age of 25. Under the French conflict of laws rule, which in matters of capacity of natural persons refers to national law, the applicable law would have been Mexican law. However, the French courts validated the jewelry sale contract, arguing that when the incapacity of a foreign person, according to their national law, prejudices a French citizen *acting in good faith*, the national law of the foreign person can be replaced by local law, which considers the foreign person as fully capable. In this respect, the decision stated: „if the personal status, the effects of which are ensured by French civil law for French citizens residing in foreign countries, can, by reciprocity, be invoked by residents in France, it is appropriate to impose restrictions and measures on the application of foreign status without which there would be a permanent risk of error or surprise or prejudice to French citizens.” In

this case, the cancellation of the jewelry sale contract would have led to the prejudice of the French seller, as the jewelry could no longer be returned, having been meanwhile alienated by the Mexican buyer.

The solution adopted by the French court, aimed at protecting the good faith of the French citizen within their national territory, has been subsequently adopted in the legal systems of other countries worldwide.

2. THE THEORY OF NATIONAL INTEREST IN THE ROMANIAN LEGAL SYSTEM

In Romanian private international law, the theory of national interest is currently regulated under article 2579 paragraph (1) of the Civil Code [2], according to which, a person who, according to their national law, is considered to be lacking capacity or has restricted capacity, cannot invoke this ground for invalidity against a person who, acting in good faith, at the time of concluding the act and in accordance with the law of the place where the act was concluded, considered them to be fully capable.

The application of the theory of national interest therefore involves the cumulative fulfillment of the following conditions:

- The person must „lack legal capacity or have restricted legal capacity according to their national law" [article 2579 paragraph (1) of the Civil Code].
- The person must have the capacity to conclude the legal act according to the law of the place where the act is concluded (lex loci actus), which is also the law of the competent court (lex fori).
- The contract must be concluded between persons in the same country. The condition implicitly imposed in the Civil Code [3] excludes the application of the rule regarding the protection of good faith in the case of contracts concluded between persons in different countries („absentees"). In the current context, where international trade requires speed and efficiency, and modern means of distance communication (telephone, fax, internet) are increasingly used, contracts concluded between persons from different states are becoming more frequent. This is particularly common in the field of e-commerce, which operates in a virtual world without spatial limits, where identifying a „place" of conclusion of the contract can be practically impossible.
- The co-contractor, as a citizen of the forum country, *must act in good faith at the time of concluding the contract*. This means that they must not know or have reason to know of the foreign person's incapacity to conclude the legal act. Some clarifications have been made in doctrine regarding this requirement, establishing that the national citizen must have concluded a routine act within their profession, which does not require special verifications. In Lizardi's case, it was considered that the French jeweler met this condition. However, the French courts considered that the same condition of good faith was not met by the bank from which Lizardi borrowed a large sum of money during the same period, as the banker had an obligation to carefully verify the full capacity of their client [4].
- The good faith of the co-contractor must exist at the time of concluding the legal act, without the subsequent knowledge of the nullity cause being relevant.
- The annulment of the act must unjustifiably prejudice the co-contractor, a citizen of the forum state, who acted in good faith. This condition is not expressly provided for in article 2579 paragraph (1) of the Civil Code, but is deduced from the wording of the law.

The cumulative fulfillment of all the requirements listed leads to the application of the law of the place where the legal act was concluded (lex loci actus), instead of the normally competent law to apply to the capacity of the natural person.

The rule established by article 2579 paragraph (1) of the Civil Code does not apply to legal acts concerning: family matters; inheritance; and real rights over immovables located in a state other than that of the place of conclusion of the act.

The rationale for excluding legal acts concerning family and inheritance from the scope of the norm is based on the consideration that the interests of individuals are deemed to have greater importance than the theory of national interest. Therefore, the law applicable to these acts is designed to protect the interests of the individuals concerned, interests considered by the legislator to be stronger than those of third parties.

Regarding real rights over immovables located in a state other than that of the forum, it is considered that the law of the state where the immovable is located (lex rei sitae) is the most appropriate to regulate the rights and obligations related to real property. Thus, the aim is to protect the national interest of the state where the immovable is located in order to maintain stability and legal security concerning immovables situated within its territory.

Article 2579 paragraph (2) of the Civil Code extends the applicability of the theory of national interest even in the case of concluding a legal act by a representative, when the third party involved has acted in good faith in trusting this representation. In this regard, the legal provision states that: „*Moreover, the lack of quality as a representative, established according to the law applicable to the protection of the natural person, cannot be opposed to the third party who has relied in good faith on this quality, according to the law of the place where the act was drawn up, if the act was concluded between present parties and within the territory of the same state*".

The rule provided in article 2579 paragraph (2) of the Civil Code applies if the following conditions are met:

- The legal act was concluded by a person who does not have the status of a representative according to the law applicable to the protection of the natural person, but who has this status according to the law of the place where the act was concluded;
- The third party relied in good faith on this status, according to the law of the place where the act was drawn up;
- The contract must be concluded between persons who are in the same country. This condition is implicitly imposed in the Civil Code. The requirement for the parties to be in the same country excludes the possibility for the rule to apply to contracts between „absentees".

3. GOOD FAITH IN CONTRACTUAL MATTERS IN EUROPEAN PRIVATE INTERNATIONAL LAW LEGISLATION

Good faith in contractual matters is also regulated within the conflict rules of the European Union, particularly under Regulation (EC) no 593/2008 on the law applicable to contractual obligations (Rome I).

Article 13 of Regulation Rome I provides that „*in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence*".

From the analysis of the norm, it follows that it allows for the removal of the application of the normal personal law competent in matters of legal capacity if the following conditions are cumulatively met: the contract was concluded between persons in the same country; at least one of the parties is a natural person; the person in question has the legal capacity to conclude the contract according to the law of the place of conclusion (lex loci contractus) but is considered incapacitated according to their personal law (lex patriae); the co-contractor acted in good faith „at the time of conclusion of the contract", meaning that they did not know and could not reasonably have known (without negligence) the cause of invalidity of the contract consisting of the incapacity of the foreign party according to their personal law.

The cumulative fulfillment of these conditions allows the law of the place where the contract was concluded to prevail over the personal law of the incapacitated party, in certain specific situations where the national interest may justify this.

The provisions of article 13 of the Regulation are designed to minimize as much as possible the risk that a contract will be declared invalid due to the incapacity of one of the contracting parties, which must always be a natural person. The intervention of the European legislator in the field of incapacity reflects its traditional concern for the safety and stability of transnational civil relations. This is because there could be a threat to these relations if a natural person, who is considered incapacitated according to their personal law (which may be national law, domicile law, or habitual residence law, depending on the case), could exploit their own incapacity and the invalidity of the contract to harm their contractual partner. Article 13 thus supports the stability and confidence in international relations by ensuring that a contract is not automatically invalidated due to the incapacity of one party, provided that certain conditions regarding the place of conclusion of the contract and the good faith of the contractual partner are met.

The content of article 13 of Regulation Rome I is similar to that of article 11 of the Rome Convention of 1968. The Giuliano-Lagarde Report highlights that the objective is to protect those who, in good faith, have entered into a contract with an incapacitated person, to prevent the risk that the contract will be invalidated under a law different from that applicable in the place where it was concluded. This concern is observed in legal systems that subordinate the capacity of natural persons to national law, as well as in those that subordinate it to domicile law (e.g., the English legal system). The report also emphasizes that this provision applies only in the case of a contract that can be assimilated to one of the types of contracts regulated by the Convention.

The good faith of the co-contractor is assessed in relation to the „date of conclusion of the contract"[13] and it is irrelevant whether, after this moment, they become aware of the incapacity of their contractual partner, a natural person.

One of the cumulative conditions is that the contracting parties must be in the same country at the time of concluding the contract, even though it is not necessarily required for them to be in the same place. The Regulation did not eliminate the protection afforded to an incapacitated person by their national law when entering into a distance contract with a person from another country, even if the law applicable to the contract, determined based on the criteria in articles 3 and 4 of the regulation, should lead to the contract being considered as concluded in the state where the other capable party is located. In such situations, it is considered reasonable for the person entering into a distance contract with a natural person from another country to exercise caution and diligence in verifying the condition regarding the capacity of the other party.

A natural person who is a party to a contract may invoke their incapacity derived from the law of another country (lex patriae or lex domicilii) only when the private international law rule of the forum state indicates a different law from that of the state in which the contract was concluded as the law applicable to the capacity of the incapacitated person. In other words, to invoke their incapacity according to the law of another country, they must rely on the law indicated as the applicable law to capacity in the contract, which is different from the law of the state where the contract was concluded. In practice, this means, for example, that the Romanian court can apply the mentioned provision only when the contract was not concluded in the state of citizenship of the incapacitated co-contractor.

For Article 13 of Regulation Rome I to be applicable, the contracting party invoking their own incapacity must be considered capable according to the law of the state where they are at the time of concluding the contract. However, if the law of the state where the contract was concluded itself considers the person as incapacitated, then there is no utility in invoking article 13.

For the incapacitated person to be able to invoke their incapacity against the co-contractor, they must meet a further condition, namely to demonstrate that at the time of concluding the contract, their co-contractor had knowledge of the incapacity or did not know it due to their negligence. Therefore, the provisions of article 13 do not apply in situations where the party was aware, at the time of concluding the contract, of the incapacity of their co-contractor or, even if they did not know, this is due to their negligence. In such cases, the burden of proof lies with the party invoking their own incapacity, who will have to demonstrate that the incapacity was known to the other party or that it should have been known if the other party had acted diligently.

Article 13 of Regulation Rome I applies exclusively to natural persons. During the preparatory work for the adoption of the regulation, there were proposals to extend the provisions of the regulation regarding the incapacity of legal persons. However, the proposal was rejected, and one of the formulated arguments was the complexity of issues related to the incapacity of legal persons. The activities carried out by commercial companies indeed raise several problems of capacity recognition, yet the decision to regulate these aspects was left to the discretion of each member state, which can regulate them in accordance with its rules of private international law. Thus, the application of a rule similar to that in article 13, but concerning the capacity of a legal person, depends exclusively on the choice of each member state and how it regulates these aspects in its domestic law.

Conclusion

In conclusion, both national and European norms regarding the theory of national interest are grounded on the principle of good faith in contractual matters and operate as exceptions to the law applicable in matters of conflicts of laws. They impose a restriction on the normal law competent to regulate the capacity of natural persons, in line with the principle accepted in most legal systems, which allows the voluntary assumption of an obligation only by capable persons. This rule ensures a balance between the principle of *favor negotii* (or *favor validitatis*) and the security of transnational relations, on one hand, and the need to provide adequate protection to persons lacking capacity, on the other hand.

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[6] D. Sitaru, op. cit, p. 156.

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[8] The notion of „persons who are in the same country" shall be interpreted to mean individuals who are located within the territory of the same state.

[9] Article 11 of the Report on the Convention on the Law Applicable to Contractual Obligations by Giuliano M., Professor, University of Milan, and Lagarde P., Professor, University of Paris I, (1980) Official Journal C 282, 31/10/1980, pp. 0001-0050.

[10] In Lagarde's Report, it is stated: „In principle, these three conditions are sufficient to prevent the incapable person from invoking their incapacity against the other contracting party. However, this will not be the case 'if the other party to the contract knew of his incapacity at the time of the conclusion of the contract or did not know it as a result of negligence.' This formulation assumes that the burden of proof falls on the incapable person. It is up to them to establish that the other party knew of their incapacity or should have known about it" [para. 34].

[11] For further exploration of the issue, it is recommended to refer to the proposal of the Spanish delegation found in Council Document 13035/06 ADD 18 (17 October 2006), as well as the proposals of several other delegations from the meeting of the Rome I Commission on 5-6 September 2006: Council Document 12635/06 (12 October 2006). Concerning objections to the proposals of the delegations regarding the extension of the content of Article 13 of the regulation, it was emphasized that it would raise two issues: first, it would not be possible to draw a parallel between the incapacity of a natural person and that of a legal person, and second, aspects related to corporate law (especially regarding legal capacity issues) were expressly excluded from the application of the regulation [Council Document 13835/06 JUSTCIV224 CODEC 1085 (12 October 2006)].

On February 6, 2007, Germany also presented a proposal to amend Article 12(2) (now Article 13) with a new paragraph, with the following content:

(2) In case a contract is concluded with a company or other legal person and if the management body of the company or other corporate body and the other party to the contract are in the same country at the time of conclusion of the contract, paragraph 1 shall apply mutatis mutandis [to the capacity of the company or other corporate body as well as to the management body with power of representation]. [Council Document 6087/07 (6 February 2007)].

Germany suggested that if this amendment were adopted, the provisions regarding the exclusion of aspects related to corporate law etc., should be modified by adding the words

„subject to Article 13". The German proposal was discussed at the Rome I Committee Meeting on February 13, 2007, but there were serious reservations from most delegations, considering the issue too complicated and requiring further reflection for the future.

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ROMAN LAW – EMBODIMENT OF GOOD FAITH IN LAW

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Abstract

Among all nations, the Roman is the one that will always wear the medal of honor of being called a nation of jurists. The immortality of Roman law is not only due to mankind's timeless fascination with power, a chapter in which Roman society also excelled, but especially to the creative triad of a stable legal system that would withstand the test of time. The very essence of this legal system resides at the intersection between the conservative character, the pragmatic character and the desire of Roman jurists to assimilate the concepts of equity and good faith in the elaboration of the norms of Roman law. The appeal to good faith is not only a characteristic element of Roman jurists, but even one of the main configuration factors of Roman private law.

This article aims to reveal exactly how good faith influenced and reformed the development of Roman private law.

Keywords: *good faith, dynamics of law, praetors, praetorian law.*

1 INTRODUCTION

Roman law is by definition a law of good faith, legal doctrine affirming that good faith has its sources precisely in Roman law[1].

Although the adages *„Juris prudentia est... iusti atque iniusti scientia"* (Justinian), *„juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere"* (Ulpian) and *„Jus est ars boni et aequi"* (Celsus) are imprinted in the memory of any jurist, they only confirm the interdependence that the Romans recognized, since very ancient times, between legal and moral norms [2]. The role that good faith played in the development and consolidation of Roman private law, however, goes beyond the theoretical sphere and is reflected in a completely separate branch of law, namely praetorian law; because Roman law did not evolve through legislation, but through judicial practice.

A people of practitioners, the Romans attached great importance to synchronizing the law with the demands of the ever-evolving society. Through the way in which the activity of the jurisconsults complemented the efforts of the praetors in adapting the law to the requirements of practice, Roman law crystallized as a system of good faith.

Although the creative activity of the praetors is the expression of the application of good faith in law, it must be stated that this freedom of judicial magistrates was not specific to the very ancient era.

In the beginning, the manifestation of law had a deeply sacred character, the only ones able to know and interpret the legal norms (which expressed the will of the gods) being the pontiffs. These priests had every reason to maintain the confusion between law, religion and morality, preserving their power in the community. As a result, the few legal relations known to the Romans in an era in which the exchange economy had not yet developed (the Romans were still at the level of shepherds and farmers) were limited to the recitation of complicated solemn oaths.

In judicial matters, the ascendancy that religion had over law materialized in the *legis actiones* procedure. The first system of the Romanian civil procedure, the *legis actiones* procedure is characterized by an excessive formalism. More precisely, the parties, under the penalty of losing the trial, were obliged to perfectly pronounce the solemn formulas specific to their legal action; and there were only five *legis actiones (sacramentum, iudicis arbitrive postulation, condictio, manus iniectio and pignoris capio*)[3]. Thus, the two individuals who intended to go to trial were obliged to check whether any of these five *legis actiones* corresponds to their *de facto* situation. If the subjective right claimed to be violated was entitled to one of these *legis actiones*, the parties followed the procedure specific to their legal action.

The great legal void, however, reflected the hypothesis that no legal action corresponded to their *de facto* situation. The non-existence of legislation does not translate into the non-existence of a legitimate claim, but only through the impossibility of resolving the conflict by procedural means. And the remedy for this legal blockage was the formulary system of procedure.

The development of the exchange economy imposed a paradigm shift in the way Romans related to the legal system. The rigid and formalistic procedure of *legis actiones* could no longer keep up with a society that was evolving at an accelerated pace and in which day-to-day legal relations were becoming more and more diversified.

If up to this point in Roman history, every subjective right corresponded to a legal action, the transition to the classical era exposes the imbalanced relationship between the legitimate claims of the plaintiffs and the limited number of legal actions they could resort to. Since the perpetuation of this state of affairs would have easily led to a restriction of access to justice, the Roman state intervened, consecrating a new system of civil procedure, namely the formulary procedure.

The beauty of the formula procedure derives precisely from the judiciary's alignment with the principles of equity and good faith, expressed through the freedom of judicial magistrates to create legal actions even in the absence of statutory text. Specifically, whenever the praetor deemed that the plaintiff had a legitimate claim even though the law did not provide for any legal action, relying on good faith, they granted a formula/legal action tailored to the factual situation presented [4]. Through this creative freedom of the praetors, it is observed that not the text of the law, but the very legitimate claim itself becomes, according to good faith, the basis of the legal action.

2 The role of good faith in shaping Roman legal institutions

2.1. About the promotors of good faith in Roman law

As mentioned, the greatest proponents of aligning law with good faith were the praetors. The activity of these essential judicial magistrates is outlined on two axes. On the one hand, they are the authors of the most important edicts of the magistrates in legal matters, and on the other hand, their main competence was to organize Roman civil trials.

Until the era of Emperor Hadrian, these judicial magistrates enjoyed an almost unlimited freedom to regulate procedural rules through their edicts to correspond to social realities. The edicts of the praetors consisted of two parts: an old part (*pars translaticia, edictum vetus*) – containing provisions taken from previous praetors, and a new part (*pars nova*) – in which

praetors could introduce new procedural rules in accordance with the requirements of judicial practice[5].

Two equally important aspects emerge from the very structure of the praetor's edict, in accordance with the characteristic features of the Roman people; first of all, taking over the provisions still useful to society from the previous edicts denotes the conservative nature of the Romans, who did not easily abandon the institutions, concepts, principles that had proven their effectiveness; secondly, their pragmatic spirit, specific to legal practitioners, is reflected by the praetors' ability to constantly adapt procedural rules to the pulse and dynamics of society.

Until the imperial era, the creative freedom of the praetors proved its utility, through their edicts they succeeded in going beyond the normative sphere and taking the law to the realm of good faith. By the order that the emperor Hadrian gives to the jurisconsult Salvius Iulianus, to codify the edicts of the praetors in the final form called Edictum Perpetuum, the creative freedom of the praetor sets [2]. Of course, the arguments underlying the codification have undergone numerous interpretations; from a legal perspective, the Edictum Perpetuum could be seen as a recognition of the merits of the praetors, who through their perpetual work brought these edicts to their peak; from a political perspective, this codification clearly meant a narrowing of the competencies of the judicial magistrates, leaving room for imperial will as the only real source of law. It is certain that with the publication of the codification, the praetors could no longer create new legal actions based on the legitimate claim of the plaintiff, in accordance with good faith.

Returning, however, to the most favorable era of integrating good faith into Roman law, it was mentioned that the judicial magistrates used their competencies to create new legal actions, beyond those already provided in legal texts. These legal actions, called *honorarii* (or praetorian), were of three types: *in factum, fictitious, and the formula with transposition.*

In factum actions were original creations of the praetors, elaborated in situations where the conflict between parties arose from legal relationships so new that they did not benefit from models of legal actions. As the name suggests, *in factum* actions involved referencing the factual situation presented by the plaintiff before the court. Describing the factual situation served as the *intentio* of the formula, that is, the plaintiff's claim.

Fictitious actions represented the extension of the scope of application of pre-existing civil actions to similar (but not identical) cases, by the introduction of a fiction by the praetor. Unlike *in factum* actions, fictitious actions ensured parties in the process a greater chance of asserting subjective rights, yet they were composed of sufficient legal grounds, not factual ones. In recognition of these legal grounds, the absence of a single element from the constitutive conditions of the pre-existing civil action could be covered by introducing a fiction. Even the emergence of this type of legal action originates in good faith, as the praetors rightly considered that neglecting all constitutive elements of the civil action and granting an *in factum* action instead of a fictitious one would mean depriving the plaintiff of their procedural rights. Of course, an *in factum* action is an opportunity for parties when there are no clear elements of the legal situation (*de jure* grounds), the possibility of submitting the settlement of the conflict to a judge being an unexpected advantage in asserting rights. But when there are legal grounds to constitute the action, but one element is missing, depriving the parties of the possibility of submitting these legal grounds to a judge and granting them only an *in factum* action where the plaintiff is limited to describing the factual situation would

mean completely ignoring precisely the role of the judicial system, or the principle of good faith also governs the exercise of procedural rights in positive law [7].

The formula with transposition is another novelty in judicial matters that has had important effects, even in contractual terms. For a long time, the idea of representation in contracts was foreign to the Roman people. In conditions where only *sui iuris* persons had the capacity to conclude legal acts in their own name, and *alieni iuris* persons did not, the development of small business seemed to be a distant dream. The reality was that numerically, *sui iuris* persons were much fewer than *alieni iuris* persons. The latter were those who, from a legal perspective, were under the authority of a *pater familias*, regardless of age, which meant they did not have the right to conclude legal acts in their own name and therefore could not be owners of property.

From an objective perspective, regardless of how numerous a family was, the only one capable of concluding legal acts for the benefit of the entire family was precisely the head of the family (pater familias). However, this situation hindered both the development of exchange economy and the chance of prosperity for family businesses. Trade can only flourish through representatives. But no one trusted to conclude, not even in fact, trade agreements with the sons of the family, as, in case of prejudice, they had no possibility of asserting their right to a claim through legal means.

Turning against the son who caused the harm was useless, as even in the hypothesis of obtaining a conviction, the status of the defendant as an *alieni iuris* person meant that there was no property in their name that could be executed upon.

Turning against the father was inadmissible, as he was not a party to the detrimental contract, and this would entirely contradict the principle of the relative effects of contracts (*res inter alios acta aliis neque nocere neque prodesse potest* – a contract concluded between some does not harm, nor benefit others) [4].

Through the formula with transposition, the praetors offer the injured party the opportunity to turn, in such a situation, against both. Thus, in the *intentio* of the formula, the praetor notes the name of the son/person who concluded the allegedly detrimental act on behalf of the father, and in the c*ondemnatio*, he will enter the name of the father (who, in case the defendant from the *intentio* proves to have caused the plaintiff such harm, will be condemned to financially compensate for the damage caused by the son). With such a guarantee of the possibility of recovering any damage, the Romans began to be open to concluding legal acts through intermediaries, and thus, procedurally and indirectly, the idea of representation in contractual matters was admitted.

A very interesting thesis expressed in doctrine analyzes how, currently, in corporate matters, the third party acting in good faith must be protected in the relationships it enters into with the private legal entity and its representative [8].

Furthermore, the protection of third parties acting in good faith is a topic of interest in the field of matrimonial regimes. In the absence of constant reference to good faith, from the matrimonial convention (whether through the separation of property regime, or through the conventional community regime), to the liquidation of the matrimonial regime and asymmetric partition, to the creation of fictitious non-patrimonial relationships (the fictitiousness of marriage), all can be detrimental instruments to the rights of third-party creditors [9].

These current topics only confirm once again the reception of good faith in modern law.

Also, with the help of these supporters of good faith in law, the praetors, actions of good faith were created as a separate category of legal actions. Based on the role of the judge in resolving the dispute, a clear distinction will be made between **strict law actions** and **good faith actions.**

A strict law action was one in which the judge was obliged to literally interpret the clauses of the contract which was the subject of the dispute. In contrast, in a good faith action, the judge had the freedom to interpret the allegedly detrimental act according to the will of the parties at the time of its conclusion. In *bonae fidei actions*, the praetor informed the judge in the *intentio* of the formula, through the words *ex fide bona*, that they were allowed to interpret the allegedly detrimental act according to good faith, that is, according to the will of the parties [2].

Good faith actions played a direct role in the evolution of Roman private law, as, with their help, the subjective element of human will became the factor according to which the interpretation of legal acts, including contracts, was realized.

This tendency was taken up and developed in positive law, finding applications in the most diverse fields, with good faith even becoming a criterion for determining the abusive nature of clauses in consumer contracts [10].

Moreover, the doctrinal conceptualization of the notion of good faith, as well as the national evolution of the legislative concept of good faith, are the subject of relevant doctrinal studies [11].

2.2. Applications of good faith in various areas of Roman law

2.2.1. Actio iudicia arbitraria

Not only did praetorian actions (honorarii) result from good faith. Another significant example in this regard is the arbitrariness actions (*actio iudicia arbitraria*).

For centuries in Roman civil proceedings, the sentence of condemnation had an exclusively pecuniary character. This was due to the effects of *litis contestatio*. Specifically, according to the extinguishing effect of *litis contestatio*, with the delivery of the copy of the formula (the last act performed by the judicial magistrate in the phase *in iure*, before commencing the *in iudicio* phase of the trial), the real right asserted by the claimant before the court was extinguished.

The creative effect of *litis contestatio* assumes that instead of the extinguished real right, a right of claim will arise, namely the claimant's right to receive from the defendant, in case of obtaining a sentence of condemnation against the latter, the equivalent value of the prejudice. Therefore, the claimant could not obtain the return of the good that was the subject of the trial, but only compensation for the suffered prejudice. Such an outcome deeply dissatisfied the Romans, as often no amount of money could cover the sentimental value of the property from which they had been deprived. Unfortunately, until the creation of arbitrary actions, the recovery of these goods through legal proceedings was impossible.

Precisely to protect the principles of equity and good faith, the arbitrary actions were created, through which claimants had the chance to obtain, through arbitration, the goods to which they were entitled. The mechanism was as follows: before the praetor, the interested party requested that the judgment be made through the arbitration procedure. In this procedure, in a first phase, the judge acted as an **arbitrator**. The parties presented their arguments before the arbitrator-judge just as in any other civil trial. At the end of the debates,

if the arbitrator decided in favor of the plaintiff, he ordered the defendant to return the disputed goods. Only to the extent that the decision did not take the form of a judicial decision, but of an order, could it consist of the material return of a good, since the judicial decision, due to the extinguishing and creative effects of *litis contestatio*, had an exclusively pecuniary character. Of course, the defendant could refuse to comply with the arbitrator's order, in which case the latter was obliged to assume the role of a judge empowered to pronounce a judicial decision. In such a situation, obviously, the decision would be to condemn the defendant to pay compensation.

In an ingenious manner, the Romans inserted the principle of good faith even in this matter, since, faced with the defendant's insistence on being condemned to pay a sum of money just to compensate the claimant for the valued property, the claimant was granted the prerogative of assessing the suffered prejudice. Consequently, the claimant could establish a net prejudice value higher than the market price of the property. The arbitrator informed the defendant that if he persisted in obtaining a judicial decision, the amount he would be condemned to pay would be determined exclusively by the claimant and that he would not be able to subsequently evade the enforcement of the sentence. Thus, indirectly, the civil procedure system obliged the Romans to act in good faith and return the goods to the claimants, under the penalty of possibly enormous compensations.

2.2.2. Good faith in matter of ownership

The evolution of forms of property was directly influenced by the intervention of the praetors in adapting legal norms to the requirements of good faith.

If in the gentile era the idea of private property was not even conceivable, the only manifestations of property having a collective character (either in the form of the collective property of the gentiles, or under that of the family property), in the ancient era the first form of private property crystallized and namely the **quiritarian property.**

The specificity of quiritarian property was that only Roman citizens could hold such title of property, it only covered Roman things, it was transferred only through acts of civil law, and it could only be claimed in court through civil actions [2]. The rigid and primitive way in which quiritarian property was regulated fully reflected an era in which all legal institutions were conceived as expressions of power, as Gaius affirmed, during this period there were only two possibilities: either to have quiritarian property, or not to have property at all [3].

Towards the end of the ancient era, however, the right of ownership acquired an abstract content, in the sense that its existence was no longer conditioned by physical possession. In this stage of evolution, ownership granted the holder the possibility to exercise certain attributes, even if the object was not in their physical possession. Also towards the end of the ancient era and in the classical era, a period in which the creative freedom of the praetors reached its peak, other forms of property appeared.

The first was the **praetorian property**, known by the Romans as property *in bonis*. The first case of praetorian property was the transmission of a *res mancipi* through *traditio*. However, since for a long time *mancipi things* could not be transmitted through *traditio*, if the *tradens* acted in bad faith, the *accipiens* could summon them to court and win the case, depriving them of the object, even though the *accipiens* had acted in good faith and paid the price. Such a relationship was in profound conflict with the legal spirit of the time, which promoted ideas of equity and good faith. Acting in this spirit, the praetor provided the *accipiens* with two procedural means: the Publician action and the exception of the object sold

and transmitted. Thus, regardless of the procedural quality it had, since it acted in good faith, the *accipiens* always won the process, remaining in possession of the object [6].

The Publician action was also a fictitious action because to assist the *accipiens* acting in good faith, the praetor introduced a fiction. Through this action, the acquirer in good faith sought to retain possession of the thing based on *usucapione*, and the fiction was that the usucapion term had expired. However, to initiate the Publician action, the *accipiens* had to fulfill the other conditions of usucapion (*res habilis, possessio, iusta causa, bona fides*). In the iudicio phase, the judge verified the fulfillment of all the conditions of usucapion and ruled in favor of the claimant [3].

This solution shows us again that in evolved Roman law, good faith, which is a mere subjective attitude, had priority over other legal titles.

Provincial property and **peregrine property** were also created through the use of procedural means [3].

Through a special *in rem action* through which possession could be regained, inhabitants of provinces were allowed to own conquered lands, thus creating provincial property. Peregrines, the main trading partners of the Romans and direct participants in the development of the exchange economy, were allowed to own properties on Roman state territory in the form of peregrine property. This was made possible also with the help of the praetors, who created an action for recovery with a fiction through which they could claim such immovable properties.

If praetorian property appeared as a response to the old civil law, the emergence of provincial property and peregrine property was a reaction against exclusivity. By their physiognomy, the new forms of property marked the transition to an evolved legal regulation, in which property was accessible to all persons and configured as an expression of human will, in the spirit of the idea of good faith [6].

2.2.3. Good faith in inheritance matters

In matters of inheritance, the application of good faith in reforming the provisions of the law proved to be a priority both for praetors and emperors. The applications of these efforts are reflected both in legal and testamentary succession, as well as in direct or indirect disinheritance (through legacies).

Regarding **legal succession (*ab intestat*)**, it is known that the provisions of the Twelve Tables Law were profoundly unfair to *cognates* (blood relatives of the deceased), as the sole basis of succession was agnation – civil kinship, based on the authority of the pater familias [12]. As a result of the law's provisions, essential persons of the family nucleus, such as emancipated sons or the mother and her children resulting from marriage without manus, did not have succession rights, while adopted persons, adrogates, distant cousins, or members of the gens could inherit under favorable conditions.

To protect these disadvantaged categories, the praetors created legal actions through which they could claim certain succession rights. However, since the praetors did not have legislative competencies, but only in organizing Roman civil proceedings, their reforms had a procedural character. Also, by referring to good faith, these judicial magistrates, without intervening on the delimitation of types of kinship, built these legal actions on the basis of *good faith possession*. Therefore, not in their capacity as civil relatives, but as possessors in good faith of the patrimony subject to succession, these categories of persons could claim, through legal proceedings, certain succession rights. As the winning of these processes

became generalized, four new categories of heirs were configured, known as praetorian heirs. These were: *bonorum possessio unde liberi, bonorum possessio unde legitimi, bonorum possessio unde cognati*, and *bonorum possessio unde vir et uxor* [13].

Bonorum possessio unde liberi were emancipated sons who could, under some conditions, inherit from the pater familias on an equal footing with the first category of legal heirs provided by the Twelve Tables Law, namely *sui heredes*.

Bonorum possessio unde legitimi represents a formal artifice that involves joining the gentiles with collateral agnates, which will produce an important substantive effect, namely the inclusion of cognates in the categories of heirs. The mechanism was simple: by not allocating a distinct category to members of the gens in the order of succession, that category would become accessible to mothers and children resulting from marriage without manus (*bonorum possessio unde cognati*). On this occasion, without having priority, in the event of the repudiation of the inheritance by a collateral agnate, the inheritance no longer became vacant but was transmitted to these cognates.

Last but not least, to spouses married without manus (*bonorum possessio unde vir et uxor*), who from a legal perspective were strangers, reciprocal succession rights were recognized, in the absence of other heirs, since granting succession rights to the state while married without manus spouses could not inherit the property they cared for throughout their joint life contradicted the very essence of the efforts of the praetors to harmonize the law with the dynamics of society.

As the competence of the praetors had a purely judicial character, their efforts to protect blood relatives could produce limited effects. However, in post-classical law, the emperors adopted the ideas of the praetors and enshrined them normatively. Thus, through the Tertullian and Orfitian senatusconsults, blood relatives gained ground over civil relatives, and the wife married without manus could no longer be excluded from succession by agnates but inherited from the same position as them, and the children resulting from without manus marriage acquired the same succession rights enjoyed by those in the first category of legal heirs[14]. The final step in perfecting these reforms was taken by Emperor Justinian, who created a new order of succession, abolishing the old system based on civil kinship and making cognation the sole basis of succession. The categories of legal heirs created by Emperor Justinian are: *descendants, ascendants/siblings and their legitimate brothers and sisters and their children, consanguineous or uterine siblings and their children, other collaterals*.

In testamentary matters, a good example of adherence to the principles of equity and good faith is the evolution of the *per aes et libram* testament. The first form of testament accessible to all Roman citizens involved the merging of two distinct legal operations: *mancipatio* and fiduciary pacts.

The first version of *per aes et libram (mancipatio familiae)* exposed heirs enormously, as the testamentary executor (*emptor familiae*) could act in bad faith, violate the promise made to the testator, and keep the estate for himself. Since by the act of *mancipatio* (sale) he became the owner, in case of non-performance of fiduciary pacts, the appointed heirs had no legal recourse against him[4]. To eliminate such unjust and detrimental effects, the testament was adapted to be in public form, in the presence of at least seven witnesses. As the fictitious nature of mancipatio was known, the *emptor familiae* did not become the owner but a mere holder (detentor), and any attempt by him to defraud the appointed heirs could be immediately countered through legal action.

Unfortunately, while the public nature of this version protected heirs from possible bad faith on the part of the testamentary executor, it terribly exposed the testator to the danger of hastened death for the purpose of accelerating the assumption of his estate through succession [15]. Fortunately, a legal remedy was found also for the bad faith of some appointed rushed heirs; thus, the *per aes et libram* will was adapted into a secret form.

Although still executed in the presence of witnesses, their role was only to attest to the authenticity of the testament and the free expression of the testator's will, with the content of the testament known, under seals, only by the testator himself.

Regarding **disinheritance**, to family members who considered themselves unfairly disinherited, the praetors created a legal action through which they could challenge the will. This action was called *Querela inofficiosi testamenti* and aimed to annul the allegedly detrimental will due to the lack of discernment of the testator. The name derives from *officium*, which designated the legal obligation to love one's close family. By contrast, an inofficious testament is one drawn up in violation of this legal obligation, in case family members have not given valid reasons for their express exclusion from succession. Now, the author of an inofficious testament can only be a person lacking discernment.

In addition to this legal action available to disinherited individuals directly, through the disinheritance clause, a special importance is given to indirect disinheritances, achieved through legacies.

As legatees acquired priority only in succession rights, not obligations, the situation of the appointed heirs could be precarious, as they were obliged to bear perhaps even the effects of the deceased's insolvency, without benefiting from the fullness of the estate.

To counteract indirect disinheritances, also in the promotion of good faith in law, the legal institution of legacies was reformed, this time through normative means. Specifically, by the Lex Furia testamentaria, it was provided that the individually determined property transmitted by legacy could not exceed the value of 1000 asses; by the Lex Voconia, it was established that the legatee cannot receive more than the appointed heir, and by the Lex Falcidia, a successional reserve of one quarter of the appointed heir's share was created [4]. Consequently, under the penalty of the reduction of excessive gifts, it was regulated that regardless of the number and value of legacies, the appointed heir could not be deprived of their successional reserve[2].

3 Conclusions

Although in its entirety, Roman law is defined as a law of good faith, the catalyst for the promotion of the principles of equity and good faith in law is owed to the praetors. By granting new subjective rights through procedural means whenever, by reference to good faith, they found that the plaintiff had a legitimate claim, the praetors established a new branch of law, namely *praetorian law*. This branch of law, created not by normative means but purely procedural, influenced the trajectory of Roman civil law (expressed through laws) through three ways: aiding (*adiuvandi iuris civilis gratia*), supplementing (*supplendi iuris civilis gratia*), and correcting (*corrigendi iuris civilis gratia*) it [4]. As such, the application of rigid and convoluted legal provisions was facilitated through original procedural methods, the scope of application of certain legal texts was expanded to similar cases (through fictitious actions), and anachronistic legal texts were corrected through praetorian means.

The creative efforts of the praetors were later assimilated and enshrined by the Roman emperors, who through legislative reforms in the field of private law ensured Roman law a

prominent place among all legal systems, ancient or contemporary, regarding the alignment of legal norms with good faith.

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THE DUTY TO NEGOTIATE IN GOOD FAITH IN ENVIRONMENTAL RELATIONS IN INTERNAL AND INTERNATIONAL LAW

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Abstract

All parties involved, including states among themselves, have a duty to negotiate in good faith to achieve their common environmental cooperation goals, to jointly use and protect environmental resources. The purpose of this obligation is to make the parties involved become stronger in their efforts to protect the environment, when rights to use resources compete with rights or obligations to protect the environment.

In the era of increasing depletion of natural resources and the persistence of the obligation in international law, it is timely to re-examine the nature and specific requirements of the duty to negotiate in good faith.

Keywords: *negotiation, good faith, negotiation agreement, pre-contractual information*

The concept of good faith has been and will be a defining element in the identification and resolution of legal issues. If bad faith does not intervene, good faith entitles the acquirer to the good. Good faith governs the formation of the legal act, being necessary for it to exist throughout the execution of the act in question. The difficulties regarding the establishment of the good faith of the acquirer appear against the background of the impossibility of accurately determining some psychological factors, the judge having to show perseverance, to identify the real legal will of the acquirer of the good.

By good faith in environmental contracts, we mean the obligation of the parties to act with sincerity, loyalty, with the intention of respecting the provisions of the contract. This principle, in environmental reports, includes commitments regarding environmental protection, sustainable management of resources and compliance with ecological standards.

Environmental contracts concluded through a negotiation in good faith contribute to a better promotion of responsible and sustainable practices in the field of environmental protection.

1. The role of good faith in domestic legislation

Etymologically, the expression „good faith" comes from the Latin language, where the term „bona fides" includes the adjective bonus, which means good, and the noun fides, which means faith.

In legal matters, good faith originates from Roman law, appearing at the end of the Republic, together with Praetorian property, when the development of trade required the protection of buyers who were in good faith in transactions completed. Referring to equity and good faith [1], the praetors created formulas (true legal actions) adapted to the factual situation between the two parties.[1]

Good faith is a complex concept, exclusively legal, with a moral foundation. To give a definition to this concept, we must consider all its legal aspects, the consequences it produces in different areas of law, as well as its moral foundation.

Starting from the provisions of art. 1899 of the old Civil Code, which enshrines the presumption of good faith in the matter of acquisitive prescription, judicial doctrine and practice recognized the applicability of the presumption for the entire field of civil obligations.[2]

Article 1170 of the new Civil Code confirms the fact that the general obligation to act in good faith during the negotiation and execution of the contract is regulated in the domestic legislation.

Good faith[3] is based on an undeniable moral foundation [4], it is a psychological state [5], an internal experience that can be detected through its external manifestations and especially through attitude and behaviour.[6]

The weight in determining good faith lies primarily in weighing the degree of sincerity, conviction, faith, loyalty, with which someone claims to have acted or is acting while in such a state.

In environmental legal relations, good faith is expressed through a loyal [7], honest behaviour, when concluding legal acts and in the execution of obligations, to avoid actions that could harm the environment.

The principle of good faith is necessary for building relationships, based on fair intention and mutual trust[2] according to article 1169 of the Civil Code, the parties are free to conclude any contracts and determine their content, but only within the limits imposed by law, public order, and good morals.

Therefore, good faith is a legal [8] and public order obligation.

The legal tendency is to move away from the concept of good faith from the classical concept, according to which the contract is based on the autonomy parties will, the new mechanisms aiming at achieving contractual justice, centred on the idea of good faith, on the loyal cooperation of the parties, on the protection of the trust and the interest of the other, placing the contract on a fair basis.

By adopting an attitude of good faith environmental protection is promoted, and sustainable development is contributed to.

In Romania, the specific legislation on good faith negotiations in the environmental field can also be found in other normative and regulatory acts.

Among the relevant internal documents, we mention: Law 195/2005 on the protection of the environment, a law that includes provisions on the protection and management of the environment as a whole, including aspects related to negotiations in this field; Law 137/2010 on responsibility in the field of the environment, a normative act that establishes principles and measures for the prevention and remediation of environmental damage; Romania's National Environmental Strategy may contain guidelines and objectives related to negotiations in the environmental field.

2. Good faith and the obligation of pre-contractual negotiation in domestic and international jurisprudence

The contract, domestically, is concluded following a negotiation between the parties or by accepting an offer to contract. Following the increase in the complexity of the contract, the intensity of the negotiations prior to its conclusion also increases. The limits of pre-contractual freedom are given by the existence of certain legal or conventional obligations, including the obligation of good faith.

In the pre-contractual phase, special provisions regarding good faith in negotiations can be found in art. 1183 of the Civil Code, according to which:"(1) The parties have the freedom to initiate, conduct and terminate negotiations and cannot be held responsible for their failure. (2) The party that engages in a negotiation is required to comply with the requirements of good faith. The parties cannot agree to limit or exclude this obligation. (3) It is contrary to the requirements of good faith, among others, the conduct of the party that initiates or continues the negotiation without the intention to conclude the contract. (4) The party that initiates, continues, or breaks off negotiations contrary to good faith is responsible for the damage caused to the other party. To determine this damage, account will be taken of the expenses incurred for the purpose of negotiations, of the other party's renunciation of other offers and any similar circumstances."

Legislation on environmental good faith bargaining varies by country and region. Legal instruments such as the Convention on Biological Diversity and the Kyoto Protocol can influence negotiations in this area.

Under the Convention on Biological Diversity (CBD), negotiation in good faith is addressed by promoting open and transparent collaboration between States Parties. The Convention encourages the active and conscious participation of all parties involved to achieve the set goals for biodiversity conservation. The core principles of good faith negotiation emphasize respect for national sovereignty, shared rights and obligations, and the consideration of indigenous and local knowledge in decision-making.

The Kyoto Protocol is an international agreement that focuses on reducing greenhouse gas emissions. In the negotiations, the Protocol promotes principles such as common but differentiated responsibility, considering the differences between developed and developing states. Negotiations under the Kyoto Protocol require signatory countries to commit to specific emission reduction targets. By engaging in such negotiations, States Parties must act in good faith, cooperating with each other, to meet the established goals and contribute to global efforts to combat climate change.

According to art. 38 (1) letter c) of the Statute of the ICJ, the Court „applies the general principles of law recognized by civilized nations." When treaties or customary law cannot provide an answer, the general principles of law are resorted to, of which good faith is perhaps the most important principle, as it is the basis of many international legal norms, including those in the field of environmental law.

Even though the interests of states and individuals differ in the application of good faith, international jurisprudence has borrowed the methodology of municipal legal systems. The non-definition of the term good faith led to certain realizations [9] of the abstract notion of principle. This is necessary, as the principle of good faith has limited practical application, unless a court is able to examine and evaluate the conduct of the State concerned, applying the principle accordingly.

The duty to negotiate in good faith constantly requires that states/parties make considerable efforts to reconcile each other's rights and obligations to use and protect natural resources.

In environmental law, in the context of international dispute resolution, the legal basis of the obligation to negotiate in good faith is rooted in the competing rights and obligations that disputing states may have in relation to a natural resource that is jointly owned or not. In this case, the obligation to negotiate in good faith entails the reconciliation between the rights of shared use of resources, on the one hand, and the rights or obligations of protection, on the

other. In principle, the right to use the resource will be promoted by one state (the source state), while the protection rights or obligations rest with the other state (the affected state).[10]

Another characteristic of the obligation to negotiate between states in good faith is that the source of these rights and obligations is generally pre-existing. Since the source of these rights and obligations is expressed in broad terms, the content and relationship between the rights and obligations remains undetermined. For example, a relevant decision [11] in the matter was that of September 25, 1977, following the referral to the Court regarding the implementation and termination of the Budapest Treaty regarding the construction and operation of the Gabcikovo-Nagymaros dam system [12].

The Court stated that Hungary was not entitled to suspend and later abandon work on the Nagymaros project, for which it was responsible, and that Czechoslovakia was entitled to move in 1991 to the provisional solution as described by the terms of the Special Agreement. The Court also stated that Czechoslovakia was not entitled to operate, from October 1992, the dam system in question and that Slovakia, as the successor of Czechoslovakia, had become a party to the Treaty of 16 September 1977, from 1 January 1993. The Court decided that Hungary and Slovakia must negotiate in good faith in the given situation and must take all necessary measures to ensure the achievement of the objectives of the treaty, in accordance with the modalities they may agree. Hungary had to compensate Slovakia for the damage suffered by Czechoslovakia and Slovakia due to Hungary's suspension and abandonment of the works for which it was responsible, while Slovakia had to compensate Hungary for the damage it had suffered due to the commissioning of the dam to Czechoslovakia and its maintenance by Slovakia.

Negotiating in good faith is very similar to the duty to consult in good faith, a similarity that causes confusion in the doctrine of international environmental law.

Returning to the matter of domestic law, the obligation to negotiate in good faith in environmental relations was prescribed in situations where states, unable to reach an agreement, resorted to unilateral measures to protect or promote their interest in the environment. [13]

In the doctrine, it was highlighted, on the one hand, the existence of a pre-contractual obligation to inform, and on the other hand, the existence of an obligation to inform arising from an already formed contract.[14]

A form of manifestation of good faith in the pre-contractual phase is confidentiality in negotiations. In the doctrine, the opinion was expressed that confidentiality is not of public order, it can be removed or limited conventionally by the parties.[15]

3. Content of the duty to negotiate in good faith. Negotiation Agreement.

If the negotiation will be long and complex [16], the parties determine through a treaty convention the rules of their conduct during the negotiation. Each party undertakes through documents bearing different names (agreement protocols, agreement in principle, negotiation agreement, letter of intent) to negotiate in good faith the conclusion of a contract in the future, the elements of which have not yet been determined or are only slightly outlined.[17]

Negotiation means assuming the obligation to negotiate, not to enter the contract. The purpose of negotiation is to satisfy interests. Negotiation is a way to resolve a conflict or divergence of interests through communication. To reach a mutually beneficial agreement, cooperation in good faith between the parties is the only way. If the negotiation is done in

good faith, negotiators tend to make concessions, provide information about their own preferences and priorities. Negotiation starts from the fact that each of the parties has needs and interests that they seek to satisfy.[20]

We are talking about a negotiation in good faith in environmental law, when two companies collaborate to responsibly manage natural resources. They can negotiate an agreement to exploit a particular resource in a sustainable way, considering the impact on the environment, such as deforestation or pollution. Through negotiations in good faith, clear limits could be established for the exploitation of resources, for the implementation of environmentally friendly technologies and the development of action plans in case of the emergence of ecological problems. The parties thus aim to improve sustainability while protecting the environment and maintaining long-term relationships.

The negotiation agreement is defined in French arbitration practice as a contract by which the parties undertake to make an offer, which allows the continuation of negotiations in progress, with the aim of concluding a contract whose object has only been partially determined and, in a way, insufficient for that contract to be considered formed.[18]

The negotiation agreement outlines the behaviour of the parties, from the moment an agreement of wills is made. When the obligation to negotiate results from the agreement of the parties, the contractual liability of the participant guilty of breaking the negotiations is incurred.

Bargaining agreements resemble the synallagmatic promise to contract in that both are prior to the intended contract and give rise to reciprocal obligations.

The duty to negotiate in good faith includes the following rules: correctly informing the partner about the pertinent evaluation elements of the projected contract, the obligation to inform the partner, refraining from any unacceptable proposals that could lead to the termination of the negotiations, the prompt announcement of the decision to end the negotiations, the collaboration of the parties so that the negotiation does not exceed a reasonable duration, not engaging in parallel negotiations and keeping the transmitted information confidential[].

Regarding the content of the obligation to negotiate in good faith, several definitions have been proposed: „The purpose of this obligation is for the parties to find a constructive solution in reaching an agreement; by its positive action, the parties express their desire to have a serious discussion; due to this positive behaviour, if an insurmountable disagreement definitively prevents the conclusion of the contract, no responsibility can be attributed" or good faith that dominates the conclusion of the contract will lead to putting personal interest in the background, if the other party is not in measure to face the commitments assumed."[19]

The obligation to negotiate in good faith can only have content a posteriori, after the decision has been made, and its limits can only be observed in concrete cases.

The obligation to negotiate in good faith can be supplemented with a number of ancillary duties, such as: exclusivity of negotiations with a certain partner during a certain period of time, a frankness clause to fix the degree of transparency of the negotiation or confidentiality in order to shelter the creditor from the negotiation obligation, in the face of the surprise of seeing himself abandoned in favor of third parties with whom his co-contractor negotiated in secret.[17]

4. Conclusions

The duty to negotiate in good faith on the environment is an important component of global efforts to conserve biodiversity and combat climate change. This requires the involvement and collaboration of all stakeholders.

Negotiations in good faith in environmental law are fundamental for a common and effective approach to issues related to the conservation of natural resources and environmental protection.

There is a need for robust national and international legislation to regulate and facilitate good faith environmental negotiations, providing a clear framework for actions and responsibilities.

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SOME CONSIDERATIONS ABOUT GOOD FAITH AS A FOUNDATION OF ETHICS IN THE USE OF ARTIFICIAL INTELLIGENCE

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"Good faith is not only a moral principle but also an essential tool for protecting fairness in any legal system."
Lon L. Fuller

Abstract
The ethics of the 21st century face an extremely delicate problem due to the expansion of computer technology and the way in which private personal information is accessed by companies, government institutions or hacked. The intrusion of technology into people's lives has increased as the digital environment has improved. Thus, problems have arisen regarding the invasive nature of technology in people's lives and the right to protect privacy, another delicate situation from an ethical point of view is the replacement of human work with industrial robots and probably, in the future, the total replacement of human presence with humanoid robots. That is why good faith, as the foundation of ethics in the use of Artificial Intelligence, establishes a norm of behaviour likely to limit the exercise of rights, to create additional obligations so that the inhuman technologization of life is less harmful.
Keywords*: justice, good faith, ethics, artificial intelligence, digital economy*

1. Argument – warning

Instead of an argument, as a preliminary and then, if necessary, as a general orientation, we must ask ourselves the question: do the new conceptual perspectives of law based on good faith and ethics still correspond when we use artificial intelligence? Knowing that law is a defining element of any culture, as well as of civilization, understood as a normative system that sheds light on the values and principles that underpin it, its force to create order in the community, to shape the behavior of people and the relationships between them in according to these values and principles, the adherence to law is strengthened by the refinement and subtlety of the reasonings that discern the meanings of the legal texts and discover their internal coherence. Legal logic orders law as a normative system, so that it can then shape the actions of community members in most areas of life. Without a deep internal logic, law cannot fulfil its practical function. The order of the community reflects, to a good extent, the logic of the legal system, and the values and principles of this system must be consubstantial with the values and principles of the community, so that the order created by the law is one of freedom and security [1].

The passion for law springs not only from the ethical foundations of the normative system, but also from the ordering force of its logic. The axiological and logical dimensions

of law make up the matrix of its beauty. Those who love law and devote their entire lives to its study and practical application know that this feeling also has an aesthetic root. The fascination of law is complete when the values and principles that underpin it and the subtle logic that gives it coherence are revealed in an aesthetic garment. The beauty of the form, built in the language and the technique of drafting legal texts, adds to the beauty of the background now, when the information society represents a new stage of human civilization, a new way of life that involves the intensive use of information in all spheres and the new means of communication influences society.

Including myself, I confess that I have a Facebook account, but I do not allow myself to be enslaved by it, although this kind of communication is everyday. Trouble is, I don't have time for Facebook. I barely respond to emails, which are more and more demanding. One cannot live without these means of communication and the world sometimes judges me too harshly because I draw attention to the abuses in the field, to the danger of forming generations of human robots, to the need to cultivate one's own memory and thinking. Let's be clear: I am not against digitization or the Internet, on the contrary, but I am against man's uncensored dependence on them. Any exaggeration, in any field, is not desirable, and social media used in excess can affect our human condition and turn us into tools. We run the risk of no longer communicating humanly and directly, but exclusively through other tools, it being obvious that in the last two decades, society has been subjected to an extremely dense flow of information, especially through digitization, which stands out for its alert nature, but also through his avatars.

Complicating matters further is a revolution in technology even greater than the industrial revolution or the dawn of the nuclear age. From microchips to artificial intelligence to quantum computing, emerging technologies are transforming the world, and in many ways, these developments are making our lives harder than ever: confusing, evading and spying on us. It is a universal force, where cultural frames of reference change at a rapid pace, and generations remain stuck in the same lack of mutual understanding, with far too different agendas. The economic, social and cultural changes that until yesterday represented the hope of continued progress for a better world have become uncertain. Today we talk about progress in different terms, it no longer means improving things, but avoiding making them worse. Progress now is about avoiding excessive consumption of resources, avoiding soil and air pollution, avoiding destroying our planet due to the social and ecological mutations we are going through.

The international scene has darkened dramatically in recent years. More bluntly, what US President Franklin Roosevelt in 1937 called a „world epidemic of iniquity" is spreading rapidly. „This historical moment is very bizarre, a moment of mental slippage of the elites, a kind of vacuum that calls for nihilism, which in turn brings even more vacuum. The ruling classes flee to war, it's nothing new in history, it's been like this since the beginning of time. It is much easier to make war than to solve problems, and we agree that the legal environment is going through, together with Romanian society and the whole world, a period that was impossible to predict just a few months before, a period that only a strong solidarity national, guild and, why not, international can help us overcome it. Of course, none of us can predict the evolution of this crisis situation in the next period, but I believe that each of us can contribute to ameliorate it, by sending signals of solidarity, help and support to the members of the community and, in the end, for our nation. I think it is, perhaps, a unique moment in our activity and in our lives, where signals of normality, which we wish were as present as

possible every day, can alleviate the feelings of fear and panic that gripped families, companies and the people our. Can we be strong in this period? Certainly yes and we will be, not only individually, but especially together. It is an unprecedented situation worldwide and probably unique in the life of each of us. Aware of all this, we believe that issuing some signals of normality can contribute, even if to a very small extent, to the extraction from the everyday that has has become so turbulent and in which each of us sees our dreams, expectations and aspirations that we had for this period or for the next period shattered.

In this context, I would like to convey to you that, given the situation we are in, namely the recently recommended preparation for war, to prevent an attack against Romania, it may sound alarmist. But, these days, connecting to online platforms I appreciate is not important and useful, it cannot ensure us a state of normality. I think it's important to be able to allocate some of our time online to the area we're working in or training for. Let's talk openly about the bankruptcy of law in the contemporary period. A jurist must tell things by name, through interventions in the public space. What is the basis of courage in stating your own opinions? I don't know if it's about courage, but the need to be coherent with certain rigors. One of the first tasks of a lawyer is to think critically and to be as consistent as possible with these principles of critical thinking. It may be brave or not, it is certain that a jurist must call things as they are. Law should help us make a better life. I love the law, I like being a lawyer and I believe that I can derive professional satisfaction from being a lawyer and from the law. I lament, and here we are talking about the critical spirit, the deterioration and vitiation of the law as a whole in recent times, and I am obliged to do so. We can discern a parallel between today's justice and interwar justice, between interwar jurisprudence and the current one. It is certain, however, that both as a military man and as a jurist, I had fascinating contacts with the doctrine and jurisprudence before the Second World War, and I believe that the fame of that period is not undeserved. On the contrary, I think that if a young lawyer really wants to look for nuanced, refined, subtle, thorough analysis, he must go to the pandect's, and I think he will find a source of inspiration in his training as a lawyer. These thoughts and reflections were mainly prompted by the feeling that we are in an age increasingly reminiscent of Orwell's „1984", the „ministry of truth" dictating what is good and what is bad. The surprise is justified. No one could be certain in these dramatic days. Events follow one another with lightning speed in a booming digital economy, the characteristics of which we try to analyse further.

2. Digital economy – the new paradigm of the 21st Century

2.1. Introductory matters

The notion of „digital economy" refers to the current transformations of economic activities as a result of the use of digital technologies, which ensure the access, processing and storage of information in a cheaper and easier way. The new economy is characterized by the intensification of the inclusion of knowledge in new products and services, the increasing importance of learning and innovation, globalization and sustainable development [2]. The enormous volume of information changes the way markets function, making possible the restructuring of enterprises and the emergence of new opportunities for value creation by exploiting the available information. In the new economy, innovation through knowledge is the most important; it underlies many aspects of the economy. In the global knowledge-based economy, the advantage will result not from a nation's natural resources or cheap labor, but from its ability to capitalize on its intellectual capital. „Mind" and not „muscles" matter for

sustained economic growth. The explosive growth of the service sector has radically changed the world economic landscape. The introduction of the personal computer, software technologies, as well as the rapid development of data transmission networks and Internet-based services have produced major changes on a global scale. Currently, the world is making a rapid transition from an industry-based economy to a knowledge-based one.

In permanent development, Information and Communication Technologies (ICT), as an integral part of the new economy, have fundamentally changed the nature of global relations, the sources of competitive advantages as well as the opportunities for economic and social development. Today's technologies have led to the creation of a global network in which people, companies, schools and governments communicate and interact through a variety of channels. ICTs can create new economies, but they have a huge potential to create a new global society offering unprecedented opportunities for world development. However, the construction of the new economic model also raises major socio-political problems – both on a national and international scale – to mitigate the „digital divide" phenomenon (exclusion from the benefits of new technologies of some social categories and some regions/geographic areas) and social cohesion, preservation and promotion of the specific culture of each nation and local community, protection of the citizen. Solving these problems can only be achieved through a broad dialogue between government authorities, representatives of the business environment, the academic environment and civil society.

2.2. The characteristics of the digital economy

The main characteristic of this economy is the fact that intangible goods become more important than tangible ones, the economy being also called the digital economy because it is the result of the influence of communications and modern technologies on the existing economy. It presents specific features that differentiate it from the traditional economy. In the digital economy, the domains of the traditional economy have been transformed, thanks to mobile communications and especially thanks to the Internet, into electronic fields of activity. For example, we talk more and more about e-commerce, e-banking, ebusiness. Another feature of the new economy is the possibility of involving consumers in the creation of products and services, the ease of communication and access to information making it possible to express consumers' needs more clearly and directly. Access to information and communication is done with minimal costs thanks to the Internet, e-mail and mobile communications.

In this context, it is appreciated that both consumers and producers can actively contribute to the development of products and services, which ultimately results in economic development. The interaction between producers and consumers on the one hand, as well as the internal interactions within producer groups and consumer groups on the other, facilitated by easy access to information, determines another feature of the new economy: the obligation to strengthen cooperation between producers in the same industry. Those who hold the information, the knowledge, in the new economy will also hold the power, and the producers of goods and service providers will transform into entities that will satisfy all the customers' requirements. This is beginning to take shape through mergers taking place in various fields – automotive, financial, telecommunications – mergers that create true giants operating on a global scale. Another feature of the digital economy is the flexibility and increased innovation possibilities, this requiring a highly qualified workforce, capable of producing greater added value for the various economic activities. In the field of human resources, companies must

have a policy oriented towards the discovery and maintenance of employees who are able to add value to the organization based on the acquired knowledge. The employees of the new economy will differ from those who work in the traditional economy by the fact that they undergo a continuous process of learning and professional development where the Internet plays a special role.

2.3. The role of the Internet in the digital age

Currently, the biggest source of information is the Internet. Through access to information, the Internet offers unprecedented opportunities. The new economy is an economy of businesses, including all types of businesses built around the Internet in connection with other large-scale and impactful processes such as innovation, globalization and sustainable development. The extraordinary impact of new, revolutionary technologies, so everything that is or becomes, leaves its mark on the entire economic, social, cultural life of mankind and governs practically the entire modern world [3]. Recent years have seen an explosion in the use of the Internet, becoming a channel for global commerce that facilitates the sale of virtual and tangible goods by businesses or individuals from developing countries or economies in transition that participate to some degree in electronic commerce. Everywhere in the world, the Internet is growing exponentially. In order to be able to support this increasing traffic load, the flows must be permanently increased and the infrastructure strengthened.

The limiting factor in the development of the Internet will be linked more and more to knowledge, to the human ability to assimilate and develop technologies, to use them in new fields of activity, for new products and services. The revolution in the world of computers and communications due to the emergence of the Internet, the information dissemination mechanism and an environment of collaboration and interactivity between individuals and computers, without geographical limits, are the main factors supporting the idea of globalization. The emergence of the Internet has transformed the global economy, integrated regions and countries, created a dynamic paradigm in which citizens, regardless of where they live, have unprecedented possibilities in terms of information, communication, influence, participation, consumption, professional life and spirit entrepreneurial. Online services (government, health, education or procurement) can become complete and strengthen the cohesion process only if they are fully available to citizens.

Today we are witnessing a reversal of values as it has become a valid general truth that information and knowledge mean power. In this context, the phenomenon of globalization appears as the long-term reception and approach to major contemporary problems, determined by the interaction of multiple economic, technical, political, social, cultural processes and phenomena and the prediction of their solution in a broad perspective by society, in its entirety. The interaction between means of communication was called by Alvin Toffler „media fusion", a term that defines society's dependence on faxes, computers, word processors, electronic libraries, digital images, electronic networks, satellites and other interconnected technologies [4]. It is the interactivity of data that transforms individual means into a system. Combined with globalization, the system reduces the influence of a single medium, channel, publication or technology compared to all others, but instead endows the system, as a whole of mass media, with a developed power that affects the entire planet. In the current context, where we are bombarded with information every day, each individual perceives reality differently. However, reality is nothing more than a storehouse of visual, auditory and tactile

images, perceptions and the connections between them, which each individual creates, constituting his own vision of the world. But not without a moral foundation based on good faith.

3. Good faith – foundation of ethics

3.1. Introductory questions about the nature of the concept

The majority conception of good faith is that it represents a concept with a strong inclination towards morality, psychology and ethics. The acceptances of good faith in the legal systems of the EU member countries have a common denominator, namely that it is regarded as an eminently legal concept, due to the functions it serves. Thus, considering the variety of institutions with which it interacts, a distinction must be made between good faith in contractual matters, in matters of property and in matters of obligations, but at the same time it is necessary the identification of those common components are the basis of this notion. In all cases, the tendency of the doctrine was in the sense of attributing some psychological features to good faith, Good faith as a legal institution highlights the person's conscience and the way in which it conforms to the imperatives of order and morality. Thus, it should not be confused with good faith as the foundation of an erroneous belief [5]. We can claim that good faith has tangents with ethics and morality, but being an independent institution we consider it necessary to delimit good faith from these social values that do not have a very pronounced practical character [6]. Regarding the meaning of good faith, a series of theories have been accepted by the doctrine as the most relevant for the understanding of this concept.

A. The theory of the derogatory legal regime from „strict law". According to the author Reinhard Zimmerman, bona fides had its origin in Roman law, more precisely its appearance being associated with the institution „iudicia stricti iuris", a procedure that had to be followed according to strict law, where good faith could be found in the content of a standard clause known as exceptio doli. The wording of this clause was „si in ea re nihil dolo malo Auli Agerii factum sit neque fiat" which concretely protected the defendant in case the plaintiff could be accused of bad faith behavior likely to create an unfair situation for the defendant in relationship with it. In the given hypothesis, the first form of solving a case was created, taking into account good faith and reasonableness [7]. Therefore, according to the theory of strict law, common law represents „strict law", and in the absence of an express regulation, good faith constituted the exception. In a synthetic way, this theory was presented by Andre Breton according to which „the law must be applied primarily, and the effects of good faith and bad faith should constitute a list of derogations from the common law" [8].

B. The Bipartite Theory. This theory distinguishes between objective and subjective good faith, the criterion for this distinction being given by the nature of the factors that make up good faith. Therefore, subjective good faith represents the psychological state of the subject related to the knowledge or not of the existence of a fact (bona fides acquistion), this form being important in the matter of real rights [9].

Objective good faith represents an abstract state that establishes a norm of behavior likely to limit the exercise of rights and create additional obligations, in several legal systems this is the primary function of good faith. In order to distinguish objective good faith from the subjective one, the objective form has been individualized within foreign legal systems by assigning a specific name, namely *Treu und Glaube* in German law, *correttezza* in Italian law, and *raumökheid en billijkheid* in Dutch law [10].

The bipartite classification has been criticized on the grounds that the argument that supports it is likely to limit the scope of good faith, and its foundation does not take into account the internal psychological state of the individual and that it would practically deny the connection between good faith and morality. The doctrine pointed out the fact that good faith, regardless of the form it takes, in the matter of deception, fraud, error, loyalty, always has a subjective character, being based on psychological factors. Although this criticism was correctly based on the nature of the factors that go into establishing the objective or subjective character of good faith, the usefulness of the classification is given by the distinction it makes between contractual good faith and good faith that is present in other fields such as law civil procedure, labour law, judicial organization [11].

3.2. The theory of good faith in the current Civil Code

In the current legislation, the regulation chosen by the legislator presents elements specific to the bipartite theory of good faith, in the sense that good faith relates both to the state of the individual, the subjective form, and to general abstract standards in the meaning of the level of understanding of an ordinary person, objective form. However, as far as we are concerned, we consider that, at least formally, good faith in the new code embodies the theory of good faith as a general norm. In this sense, good faith does not have a limited application except in special cases where the Civil Code or laws provide for its incidence. This represents a recognition of all civil rights, a fact that also incorporates the obligation to adopt a certain temperate conduct, this being likely to allow the good faith vocation to be applicable in other fields as well. It is preferable for good faith to enjoy a unitary character that at the same time is complex, in the sense of encompassing individual will, conscientious faith and complying with legal requirements. Thus, good faith is indisputably a legal principle, based, among other things, on its generally applicable character, on the social values that it transposes into practice. The principled character of good faith recognizes its possibility to supplement and supplement the law and the will of the parties where appropriate, and before the court it takes the form of an instrument for the interpretation of legal acts [12].

3.3. Doctrinal approaches to good faith

In the context of the previous Civil Code, the doctrine had the task of outlining and developing the meaning and role of the concept of good faith. Thus, the doctrine sought various solutions for the foundation of good faith. In this sense, the authors Petre Anca and Maria Ioana Eremia promoted the thesis that, in the absence of an express text, the so-called legal basis for the application of good faith was represented by art. 1 of Decree no. 31/1954 according to which „civil rights are recognized according to the law and the rules of socialist coexistence" [13]. This last expression was based on the idea that the rules of socialist coexistence are called to determine the situations in which good faith is to be applied regarding the recognition of socialist rights. In essence, this text together with the interpretation of the authors represents at most a consecration, not necessarily, an indirect consecration that allowed a possible application of the principle of good faith within the limits determined by the rules of socialist coexistence.

In a practical way, the structuring of the argumentation was pursued in such a way that good faith is seen, at least for the beginning, as an open rule that facilitates the application of general rules of law to particular situations. Anticipating that the future legislation will recognize the evolution of the importance of this concept, the authors defended the possible

consecration of this principle arguing that it is not incompatible with the previous special provisions nor with the subsequent special provisions. An express regulation would have been welcome to remove the uncertainty associated with the application of this principle as a result of the very wide margin of appreciation offered to the court, under the previous legislation [14]. Therefore, the opinion of these authors being one of reference, it was clearly proven that good faith was a concept, although known, rather newly encountered in relation to its importance in practice. Synthesizing the whole debate of its origin and content, the authors defined good faith as „the mistaken belief that a person has regarding the validity of the right he invokes or exercises and which the law takes into account, in order to recognize either his right itself, whether only other legal effects, an activity of the individual or a purely intellectual attitude of ignorance or error that can be ethically appreciated and on the basis of which, starting from a rule of law, legal effects can be triggered" [15].

Later legal doctrine offered us a synthetic definition of good faith, as stated by Constantin Oprişan according to which, „Good faith can be conceived as a psychological state of a subject of law considered individually, a state that involves a certain activity of the individual or a purely intellectual attitude of ignorance or error that can be ethically assessed and on the basis of which starting from a norm by law, to be able to trigger legal effects [15]. Over time, one of the most respected and often cited opinions was the one stated by Dimitre Gherasim in the work „Good faith in civil legal relations" [16], a work in which the author maintained his reservations in defining synthetically good faith and proceeded to illustrate the sides and functions of the concept, thus claiming that „through this analytical way we can find common points of the application of good faith, not only in the various applications in civil law, but also in other legal systems where good- faith is based on other theories". In a paper that deals with the changes that occurred when the current Civil Code came into force, Marilena Uliescu describes good faith as „a complex notion, whose component elements, which are not always present in its various applications, are mainly: the right intention, diligence, legality and refraining from causing damage, which manifests itself in legal relations in the form of honest, loyal and total mutual trust activity when concluding legal acts in general and erroneous and excusable faith protected as such by law" [17].

Regarding the development of legal relations under civil law, the most important regulation inserted in the Civil Code is good faith. „Any natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and good morals. Good faith is presumed until the contrary is proven" (art. 14). The parties are free to conclude any contracts and determine their content, within the limits imposed by the law, public order and good morals" (art. 1.169), „The parties have the freedom to initiate, conduct and terminate negotiations and cannot be held responsible for their failure. The party that engages in a negotiation is required to comply with the requirements of good faith. The parties cannot agree on the limitation or exclusion of this obligation. It is contrary to the requirements of good faith, among others, the conduct of the party that initiates or continues negotiations without the intention of concluding the contract. The party that initiates, continues or breaks the negotiations contrary to good faith is responsible for the damage caused to the other party. In order to determine this damage, account will be taken of the expenses incurred in order to negotiate, of the rejection by the other party of other offers and of any similar circumstances" (art. 1.183).

Good faith is not only a civil obligation, but also a principle of civil law, along with those regarding freedom of trade, fair competition, legal equality of parties and freedom of

conventions enshrined in specialized literature [18], a principle also found in the Organization's debates World Trade Organization and the United Nations Commission on International Trade Law, which emphasized the importance it has in completing exchanges of goods and services under mutually beneficial conditions. During the debates, two statements were made that aroused interest. The first referred to the „unprecedented insistence on good faith, its increasing frequency in elaborated texts and its invocation in the practice of commercial relations, which does not demonstrate that the degree to which it is respected has increased, but, on the contrary, that it is increasingly little respected and, not infrequently, brutally violated, which is why it was considered necessary not only to stipulate it in texts, but, especially, to adopt practical enforcement measures. And in the Romanian specialized literature, the principle of good faith has been given and is given wide spaces, drawing attention to its not only moral, but also juridical valences, emphasizing that „the desire to get rich can be understood, but that evil faith in contracts must be discouraged and eliminated, the law having to guarantee the development of legal relations, based on the rules of law, justice and equity" [19], otherwise the liability for bad faith intervenes.

3.4. Liability for bad faith

As we have seen, good faith is at the same time an obligation and a general principle that guides both the process of drafting civil law rules and that of their application. In the Romanian Civil Code, the responsibilities for bad faith actions are stipulated, which obliges the participants in commercial exchanges to have a correct conduct. In some norms – without qualifying the acts or deeds committed – it follows from their description that they are in bad faith, stipulating concrete responsibilities for them. International regulations define acts of bad faith and stipulate responsibilities for committing them. For example, the Lisbon Conference of 1958 introduced into the Paris Convention on Unfair Competition a text that defines acts and acts of bad faith: „indications and statements the use of which, in the exercise of commerce, is likely to induce the public in error, regarding the nature, manufacturing method, characteristics, fitness for use or quality of the goods" [20]. It is understood that such behaviours, which show the bad faith of their authors „were detected from the experience of international trade legal relations. Sanctioning them has proven to be necessary to deter bad faith and guarantee the correct execution of the contracts of the professionals.

The principle of good faith is considered to be so important in commercial relations because it highlights the moral values of the behavior of the participants in these relations, adding them to the legal responsibilities stipulated in its application by the competent bodies for the creation and application of law. The conduct of commercial activity under normal conditions imposes the obligation for each merchant to act to attract customers, within the limits of a lawful competition, in compliance with the law. Also, we have in mind the obligation related to the regulation of the matrimonial regime of the spouses – the dowry regime, the separation of patrimony – which in the Civil Code, takes over, in old ways, the economic and social realities of today. For each person, dignity, honor, courage, sincerity, honor, justice are not only moral imperatives to choose, but obligations whose violation is sanctioned. Thus, these previously moral norms at this moment have become norms of law with a legal character. Even if the deontological norms specific to business people are not contained synthetically in a deontological code, they are recorded in various internal normative acts and another part of them are preserved and transmitted in a customary form from generation to generation. The main rules of conduct in business were customarily

promoted by the older generation, its specific type, sometimes creating situations of moral conflict. Many moral requirements have been written into codes in the form of general/imprecise imperatives that can be given various meanings. But most of these moral norms are not codified, still operating in the field of business, customs, a mixture of old and new, a surface „moral code in sight", the real one being „behind". All have led to the need for clarifications of the term's ethics and morals.

4. On ethics and morality in other terms

4.1. Preliminary matters

From the beginning, we feel the need to say that we will not give an exhaustive lecture on ethics like at the Faculty of Moral Philosophy of the University of Bucharest, walking the students through the world of ancient or contemporary philosophers – a rather cumbersome mission -, we will only try to put the emphasis on the formation of the student as a human being. At the same time, through this pluri and transdisciplinary approach, we want to give those interested, a more flexible human profile, which can go from philosophy to business administration, a person sensitive to values, not training specialists, but people capable of specialize. Having said that, we cannot proceed to approach the fundamental notions of ethics without a mandatory reference to Aristotle. It's like starting your studies math without the multiplication table. According to Aristotle, every art and every doctrine, every action and every decision seems to go towards the good, seems to pursue only the good. But there is also a difference in goals. As there are many activities, fields, arts, sciences, there are also many purposes. The goal of medical art is health, that of shipbuilding, the ship, that of strategy, victory, that of economic art, wealth. The philosopher believes that the science that pursues the good of all is politics, and the other sciences, including economics, are encompassed by it. A man can be satisfied when he helps a single man to achieve well-being, but it is more beautiful and divine when he can achieve this good for an entire people. Beautiful and righteous deeds, however, often show inconsistencies and instability. Many perished because of wealth, others because of bravery. So what is ethics but morality?

The terms morality and ethics, in ordinary language, are often used as synonyms, although in reality things are different. Morality represents a real phenomenon, which concerns everyday behavior, while ethics is a science that aims to investigate this phenomenon. This can be defined as a set of norms regulating behavior, based on the values of good/bad, moral/immoral, honor and fairness, sincerity, responsibility, widespread within a community, norms characterized by a high degree of internalization and imposed both by one's own conscience and by the pressure of the attitudes of others. Morality consists of values, norms and exemplary models that aim to regulate interpersonal relationships, thus representing a considerable part of our lives. It appears to us as an ideal, in the normative sense of this term. The ideal to which each of us must strive. We cannot only be performers, climb not only the social and professional ladder, but also that of moral values. And if the individual aims to climb the social and professional hierarchy by defying moral perceptions, his destiny will not be fulfilled. Unlike morality, ethics is the theory or science that investigates this phenomenon, the theory of morality [21]. Thus, we find that morality includes rules of human behavior, while ethics aims to investigate these rules. Ethics tries to answer the question „how should the individual act in relation to himself, his peers and those around him" [22]. Ethics means a coherent, systematic conception, related to the norms of

moral life, so to speak, of what is appropriate and what is not. The word comes from Greek, where it means moral, habit, character, the term deriving from the Greek ethos which means customs, morals, customs. The main mission of ethics is to prescribe rules both for individual conduct and for the social organization of moral life. From this perspective, ethics can be defined, in a broad sense, as „the discipline that deals with what is valuable in life, what is worth wanting and with the rules that should govern human behavior" [23], in a dynamic space in continuous transformation.

4.2. The dynamic space of ethics

The classical definition of ethics from Ancient Greece would be the concern for a good life, with the meanings arising from the alternation of good and evil. That is why many critics believe that ethics has taken on a philosophical dimension without reflecting on the tension between good and evil in different possible contexts [24]. The thread of philosophical thought concerned with ethics starts from Ancient Greece, crosses Germany in the 18th century and starts towards England in the 19th century. Twentieth century ethics discusses its roots despite the general opinion that claims that ethics in this century has not brought significant changes, there are researchers and critics who do not share this opinion and propose a re-evaluation of what has been written, the diversity of research directions is found in the complexity social life. Ethics and morality find space for dialogue in many scientific and social fields although it has a philosophical and normatively religious structure and texture. Different points of view approach the ethical problem bringing with it new meanings and ways of understanding business ethics. Different points of view – utilitarian, deontological or value ethics speak of the same realities and truths but from different philosophical positions. Levinas says that ethics does not only ask questions about how you represent yourself, but goes deep into how everyone looks at and questions themselves. Derrida believes that ethics involves a kind of impasse through the inability to know what to do and how to act at the right time. Agamben believes that ethics cannot offer stable and repeatable solutions, but is an endless series of variables. It can be said that ethics does not want to offer solutions and methods for solving ethical and moral dilemmas, but, rather, ethics must be understood as a set of problems [25].

And yet, ethics is not only limited to the descriptive norm, but looks at more than ethical codes, it is concerned with the values of judgment and the way in which these value judgments interact in the social environment and with the institutions. These value judgments are consistent with the moment in time in which they were produced. Thus, the study of judgment values focuses on the historical, social and cultural relationship of those who produced them and the evolution of these values over time. These values do not have a monolithic consistency that makes them eternal, but, rather, they have a volatile nature and depend on multiple cultural factors. That is why it is often difficult to connect to the collective mind of people from past centuries, because, whether we like it or not, we are the people of our time [26]. For centuries, philosophers and theologians have been concerned with finding a constant that crosses the ethical vein and finding a norm that unifies points of view. What determines that certain values are considered positive and others negative? Why are courage, honor, honesty, trust considered positive values? While selfishness, hatred, fear are considered as negative values? Why is it ethical to campaign against abortion crime and not death row crime? Where is the ethical line? Who determines it? With what authority? What does the word „ethics" really mean? [27]. Of course, the answers to the questions do not coincide, and norms considered to be positive can be debatable. The critical dialogue regarding these ethical values

implicitly also leads to the relativization of ethical norms, nothing is really good, true and honest just because a society considers them to represent positive values. Many people are tempted to associate ethics and feelings, probably thinking of some kind of empathic vibration towards our neighbor. But ethics is not necessarily related to certain affective states. They are changeable, capricious and not fully subject to reason, so that very often it is precisely the feelings that prompt us to deviate from ethical norms.

Ethics is also in a necessary relationship with religion, most religions uphold high ethical standards. But if ethics were only a prerogative of religion, then it would only be valid for religious people. However, ethics is equally addressed to atheists and saints, so that it cannot in any case be confused with religion or fully subordinated to it. At the same time, behaving ethically is not the same as obeying the law – an idea that we will support with different arguments in what follows. Not infrequently the law incorporates certain moral convictions, which are shared by many citizens of a state. But the law, like feelings, can deviate from what is ethical. Finally, being ethical is not the same as fully conforming to socially accepted patterns of behavior. In many cases, most people do cultivate ethically correct patterns of behavior, but not always. Sometimes these social patterns of behavior may conflict with ethical principles. It can happen that an entire society is morally corrupt; existed and exist unfortunately examples of this. On the other hand, if behaving ethically were the same as imitating socially accepted models, then in order to know what is ethically correct, the individual would have to find out what is considered acceptable in the society of which he is a part. In addition, the lack of a full social consensus makes it impossible to identify ethics with what is considered acceptable in a given society.

Leaving aside the current opinions about the meaning of ethics and the semantic peculiarities of the English term ethos [28], we must ask ourselves what is currently understood by the word „ethics" in Romanian, in order to make certain clarifying distinctions. In our country, the term ethics has at least three different meanings. First of all, ethics refers to the so-called morals, customs and traditional customs specific to different cultures. Such traditional customs also exist in the economic field. In the West, prices displayed in stores are usually not negotiable; In the East, haggling between the seller and the buyer is almost mandatory. The Western world places great value on punctuality, while in Latin America or Africa it is considered that a man is more important and more worthy of respect the longer he allows himself to be late. Today, the commissions granted, more or less „under the table", to officials who are asked for a contract or certain fiscal or commercial facilities are considered deeply immoral; the same can be said about developing countries, where bribing public officials is a common practice, often in plain sight. To avoid possible terminological confusions, we will call this set of traditional customs and habits ethos, which, as I will show below, is of more interest to cultural anthropology than ethics itself. Secondly, by the term „ethics" is understood the set of values and norms that define, in a certain society, the man of character and the rules of just, worthy and respectable behavior, the violation of which is reprehensible and worthy of contempt [29].

In this sense, ethics promotes certain values, such as honor, justice, courage, sincerity, magnanimity, altruism etc., trying to enforce norms like: „Don't lie!", „Don't steal!" And so on In the Romanian language, the set of these rules of „good behavior" is called morality, and the condition of the person who aspires to live according to the highest ideals and principles is called morality. In its proper sense, ethics or moral philosophy is a theoretical interpretation of ethos and moral phenomena. Ethical reflection aims to clarify with theoretical tools a series

of problems, such as: Can we be moral? Why be moral? How to be moral? What are good and bad, pleasure and duty, justice, dignity or magnanimity? What does happiness consist of and how can it be achieved and preserved? What kinds of rational arguments can consistently support a particular moral commitment or decision? How strong is the influence of irrational factors in our moral attitudes? And so on. Ethics does not attempt to answer these questions from the specific perspective of any particular category of people, but strives to find answers of universal value. „What should a man do in order to realize his desires, goals and ideals, so that he can reach the maximum fulfilment of his being, without doing unnecessary harm to others, but leaving everyone to seek his own personal fulfilment and even contributing to the progress of society as a whole?" – this is the fundamental question, which lies at the heart of ethical investigations. Applied ethics also ask exactly the same question, but they do it from the perspective of a particular social category. Our question is: how should a good man of action act to fulfil his vocation? what are the moral responsibilities and duties that the businessman must fulfil in order to do his job as well as possible? At the level of common sense, this question has been asked for a long time, since Antiquity, but only recently it is at the centre of a new academic discipline – business ethics. Why? What are the social and economic changes that have made common sense views of what economic agents should or should not do in today's capitalist society seem outdated and inadequate, calling for a theoretical inquiry into the rational ethical standards that should regulate business in the contemporary world?

Aristotle emphasizes virtue as a quality of the soul and not of the body. For this reason those who study the behaviours of virtue must be familiar to some degree with the theory of the soul. As the healer of the eyes must know their appropriation, so the teacher of these concepts must know the noble and divine characteristics of the soul as well as its vulnerabilities. Of course, we live in devitalizing times in which the soul barely breathes from materialism and consumerism. We live in times in the business world of the deification of goods and marketing policies and the forgetting and percolation of culture. In fact, we too become commodities and instruments of marketing policy, we become human resources, labour force, strictly economic and legal quantities and qualities in general. According to the dictionary, virtue represents a positive moral attribute of man; character acquisition that constantly pursues the ethical ideal, the good; moral integrity or a particular steady inclination towards a certain kind of pursuits or good actions. „By playing the guitar one becomes a good guitarist as well as a bad one and in the same way with regard to the architect and any craftsman or artist. Whoever builds well becomes a good architect, and whoever builds badly, a bad architect. If it were not so, there would be no need for a teacher and everyone would be born a master or a rag. The same is true with the virtues. By our conduct in commercial relations, we become just or unjust. By behaving in dangers and by the habit of fearing them or resisting them we become brave or cowardly. And it is the same with occasions of lust or anger: some become temperate and calm; others fearless and furious, as one behaves in such cases one way or another, and therefore it is not a little important if we get used to one way or another immediately from youth; on the contrary, it means a lot or rather everything" [30].

4.3. The concept of ethical value

The most difficult problems raised by ethical norms are related to the authority that institutes them: the ethical conscience, more precisely the autonomous will of the individual, guided by reason capable of issuing universal normative statements. How this inner authority

is constituted, how it functions and how it imposes itself, able to demand in the name of the individual, driven by his appetites, desires, interests and contingent goals, and to legislate in the name of humanity in general, is a rather enigmatic question, at which has not yet been satisfactorily answered. Ethical values appear as attributes of people, ideas, facts, institutions or things that are important, worthy of respect and appreciation, which people believe deserve the effort to fulfill them as fully as possible. In short, ethical value is something important and worthy of respect. To behave ethically means to apply certain rules of behavior or norms. Ethical norms can be defined by characteristics, such as: they are autonomous, without being imposed by an external authority, but are dictated by the inner voice of the ethical conscience; they are universal, being valid for anyone, regardless of accidental and imperative circumstances, as they demand behavior unconditionally, without taking into account the interests of individuals;

Ethics tells us what we must do and the fact that knowledge of good can be learned. Reviewing recent research on ethical development, the obtained results can be summarized as follows: between the ages of 20 and 30, young people go through spectacular changes in the strategies by which they seek to solve their ethical problems, and the changes are related to changes in social perception and by the social roles that individuals assume, and the extent of these changes is associated with the duration and the level of schooling, the educational attempts to increase the acuity of reporting ethical problems and the maturity of judgment having measurable results. As results from the conducted studies, a person's behavior is influenced by his perception and ethical judgment. I refer most of these conclusions to the studies of Lawrence Kohlberg, one of the first researchers who tried to seriously answer the question of whether a person's ability to solve ethical problems can develop throughout life and whether education can influence this evolutionary process. Kohlberg found that a person's ability to solve ethical problems is not acquired all at once but follows certain stages in the development of ethical competence: pre-conventional, conventional, post-conventional.

The first level, pre-conventional, involves obedience to authority, normal in the case of children and pre-adolescents who listen to what their parents tell them, enjoying the reward for good behavior and fearing the due punishment for bad behavior. Any parent can check it. Unfortunately, for them, but especially for society, quite a few individuals remain at the infantile stage all their lives, unable to repress their antisocial tendencies unless tempted by a reward or by the fear of harsh sanctions. In the next stage, conventional, specific to the adolescent, the individuals rebel against the prohibitions imposed by the mature ones, challenge the values they believe in, but put in their place the normative canon of the entourage of the same age, assumed quite uncritically, out of the desire to be accepted by the others, to identify as much as possible with a certain community, of the same condition. The years pass and many of the antics of adolescence are abandoned, but a large number of individuals remain fixated on this level of uncritical conformity. They continue for the rest of their lives to live in accordance with what is done, said and believed in their circle of acquaintances, attentive to what the „mouth of the world" will say, eager to be fashionable and terrified of the idea that they might be considered marginal or eccentric, if out of step with the world.These people define good and bad by reference only to popular opinion or legal prescriptions.

A significant number of people reach adulthood, for their own good and, above all, for society's good, for the autonomy of the internalized authority. As they become aware of the naivety and superficiality of the rules adopted in adolescence, they critically reconsider their

value judgments and the corresponding norms. Thus, as the models they refer to, the education and experience they accumulate make them understand the legitimacy of the rules accepted in childhood under the pressure of maternal and paternal authority. It is at this stage that people begin to be truly ethical, insofar as they obey ethical norms. They understand their rationality and foundation, but not fully ethically, since they still obey an authority alien to their own being, even if it is now internalized. Something inside tells them what is good and what is bad in what they do or in what others do, but it is still a foreign voice, an abstract and sovereign judge, with whom they agree in principle, right for which they I obey. When they don't, they accept his verdict and punish themselves with shame, remorse and regret. Few individuals reach the autonomy of their own consciousness as a rational will capable of self-legislation with a vocation of universality. Exemplary models for others, these rare people are able to judge and act guided by their own conscience. Many factors can stimulate the development of ethical consciousness until reaching higher stages of evolution. Kohlberg discovered that one of the crucial factors is education. He found that the subjects of the experiments who attended ethics courses tended to rise rapidly to higher levels of ethical competence.

Ethics as universal and objective self-legislation is not always present and evident in everyone's behavior, because not all people reach the same level of ethical competence. Reaching the highest level is not the result of gifts born, but the result of one's own efforts of invitation, education and exercise. We often think well but behave badly. We know what we have to do, but we don't listen to reason and let ourselves be led by feelings, desires or instincts. Ethical behavior requires reason to control the will, which is not acquired through teaching, but through practice, through exercise. Action interferes with feelings, desires and interests, which leads many to the idea that the foundations of ethical consciousness must be sought not in the clarity and rigor of reason, but in different psychological factors. This way of looking at consciousness as reason gives rise to another problem, related to the consistency of our ethical universe guided by some ethical principles. Ethical principles are those norms of maximum generality that aim to integrate and coordinate in a coherent system the different ethical rules, at the same time offering a universal criterion for a fair decision in the greatest possible variety of situations. They refer to current conduct, to people's habits and attitudes regarding the general concepts of good and bad, truth and lies, fairness and discrimination, freedom and coercion etc. Ethics represents a system of moral principles and methods for their application, providing the tools for developing moral judgment [31]. In this sense, a series of ethical principles that characterize current conduct must be taken into account: what we must do, how we must do it; of people's habits and attitudes regarding the general concepts of good and bad, truth and lies, equity and discrimination, freedom and coercion etc. The principles of business ethics must be developed and applied in all spheres of activity. In this view [32], the promotion of appropriate ethical behavior is of paramount importance, with a decisive impact on the final results of the entire society, even if ethics also has its limits.

5. The limits of ethics in the digital economy

5.1. Specific matters

In fact, the digital economy presupposes an accentuated dynamic in the business sector, which determines the engagement of companies and people in the competition on the market and satisfying the needs of customers in a development similar to the laws of evolution. Companies that are not able to maintain themselves in the competition disappear making way

for other companies. Consequently, only the able and skilled remain in the competition, and those who cannot keep up lose. A common sense question would be that – where is the moral and ethical grade in this competition? Christian morality suggests helping the weak, even ethics has the principle of charity and non-harm to others. How can these principles of harmony be reconciled with the brutal mode of competitive warfare? Having known social consequences through the rise in society based on merit, the so-called tyranny of meritocracy, the traditional Attitude, the reflex that we normally have when hearing the word ethics is the moral component, and implicitly religious morality. The way in which every human society over time understood to negotiate the ethical issue within its community. Over time, the traditional attitude of religion regarding the ethical norm changed as society began to reject the old moral codes and ethical norms imposed by religion. They were gradually altered to adapt to the new historical and social realities. Marking figures from the religious, political or economic world have drawn new ethical boundaries through their charismatic presence and personal way of relating to ethics and morals. In the space of religion, the problem of ethics is constantly raised because in many cultures business, working with money, is considered to be outside religious precepts. Jesus drove the merchants out of the temple saying that it is not a work pleasing to God. Usury, the taking of interest, is forbidden in Islam and blasphemed in Christianity. Buddhists believe that doing dishonest business and harming others turns against you in the future through bad karma [33]. Religion is not the only source that casts doubt on morality and ethical verticality companies that are often portrayed as greedy for money, power and are corrupt. Newspapers abound in information and articles about scandals, corrupt people and influence peddling. Countless books and films have as their subject the poor ethics in companies, dubious characters who are at the head of corporations whose morality and ethical sense is corrupted by power and money. Although we do not want to believe that they could influence public opinion, sociologists draw attention to the long-term negative effects on this type of representation of the corporation and the businessman. These reception stereotypes are visible during scandals and sensational revelations when rumours and negative information are believed to be true in a much higher proportion than positive information. That is why in many cases the recovery of a company or branches of activity is difficult to achieve after negative information has appeared publicly. The financial and logistical effort is huge and in some cases the companies fail to overcome this impasse and declare themselves defeated in the media battle.

The ethics of the 20th and 21st centuries are facing an extremely delicate problem due to the expansion of computer technology and the way in which private personal information is accessed by companies, government institutions or hacked. The intrusion of technology into people's lives has increased as the computing environment has improved. Thus, problems have arisen regarding the invasive nature of technology in people's lives and the right to protect privacy, another delicate situation from an ethical point of view is the replacement of human work with industrial robots and probably, in the future, the total replacement of human presence with humanoid robots [34]. Medical technologies and the access of all people to these services is another long-discussed ethical issue. Not all people can access these services due to the way in which the health system in each country understands to protect its population and to find resources and strategies so that disadvantaged people can benefit from the medical act. Another problem of the development of the technologies of the medical act is the way in which the needs due to the extension of the life expectancy of the population and the bioethical social problems must be balanced between the young people who are active and produce and

the elderly who are no longer active [35]. In addition to these ethical dilemmas, there are also the new genetic technologies that have led to a series of ethical questions regarding the future and how they must represent new fields of research and the impact they will have on society. These ethical questions are typical for the century we live in and would have been unimaginable for people of past centuries. Strongly industrialized countries are aware of social inequality, that's why they try to tip the economic balance through global measures, considering that the help they offer is a moral duty. It is true that there is a current of opinion worldwide that tries to discourage companies that use the labour force of children, emigrants, their employment without a contract and social insurance, stopping the phenomenon of migration etc. The ethical problem is not to offer them food or medical assistance, but rather to help these people to find a way to produce goods and services on their own, recovering economically. These social problems are becoming more acute as the gap between the rich and the poor grows.

Business ethics goes beyond the philosophical dimension of the topic and refers to how the codes, rules and principles once violated can attract unpleasant consequences: from the loss of credibility in front of others to serious consequences – exclusion from the professional group and even imprisonment. Consequently, business ethics is not only the guardian of professional deontological codes with a philosophical and moral role, but also has a punitive role. That is why certain researchers believe that business ethics is not a concern just ethics, but has a personal agenda. „Ethics in business promises ethics, but, in fact, it talks about justice" [36], and the concerns of researchers in all the sciences that have nature and society as their object have as their purpose the general good of man, the researches not being done only for the desire to he was investigating himself for the sake of investigation. In this idea, we affirm that ethics also has as its final goal precisely this human good, but also by revealing the social specificity, of life in common. The immediate goal of ethics is to establish how society and social processes influence human behavior in order to know how to act socially. Regarding ethics, the immediate goal is the analysis of reality, since the moral socialization of the individual is carried out according to the social values that they receive from the family, from the school and from the community, and the existence of society cannot be conceived without the forms that regulate relationships between people. Ethics represents a human experience, a state of mind, a natural experience without behavioural efforts. Ethics is not learned from treatises or specialized codes, for ethics there should be no rules that you have to follow ad litteram. You either have ethics or you don't. If a man, structurally, has a natural and good conduct that draws its essence from divine gifts, he does not need ethics treatises except to cultivate his nobility and soulful and intellectual finesse. If another man, structurally, has a non-positive conduct in his relations with other people, all the philosophies and treatises in the world cannot help him overcome his condition. In life you can be a good economist but have atrophied human qualities and you can be an ennobled man of beauty and clarity in the activity of coordinating or applying some decisions, without much schooling. Man must first have knowledge and this must be vitaminized through knowledge throughout his life, because the human brain has three components: one common including reptiles, one more evolved, instinctual, at the level of mammals and one specific to the human being. In recent times, the instinctual side is exploited the most, but neuroscience combines the anatomical knowledge of the brain with the understanding of more abstract concepts, bordering on philosophy: thought, language and, of course, consciousness. In addition, on almost all fronts the pace of change has become more and more frenetic and the central problems of the people more and

more pressing. Let's think about the pace of challenges in technology but also the fact that human intelligence is profoundly and uniquely creative. Or, if ever AI will reshape the principles of ethics, then we can bitterly say that the human species, led by inhuman machines, will disappear.

Let's not forget, however, that in the beginning religion was the mother of ethics and technology. Above all, religion was a stream springing from hidden depths, ethics a life-bearing river and technology, with the help of art, carried water from this river through all the arteries of human life. God announced to man the law of faith, the law of behavior and the knowledge of technology. With God's guidance, we raised a ship that made one of the longest voyages in the history of navigation. By the breath of God Betaleel was filled with wisdom in understanding, in knowledge, in all work, to make artistic plans for working in gold, in silver, and in bronze and in cutting stones for mounts and in carving wood so that he could work in all kinds of crafts. Likewise, Solomon's temple, one of the greatest architectural wonders of the ancient world, was built by men taught by the Spirit of God and led by the hand of the Lord. Thus the Holy Scriptures testify.

God was the reason for true faith, good behavior and technological knowledge among people. When men constantly felt God above them, in front of them and around them, in the same way as they felt air and light, they attributed and gave all their technological works and manual labour to Him, their Lord and Builder. When the feeling of the presence of God was attenuated and the sight the spiritual became dark, then pride entered into the craftsmen and technologists, and they began to give only themselves the glory, for their buildings, for the work of their hands and minds, and began to misuse their work – then the shadow of perdition began to fall on technology. Many complain about technology. Many blame modern technology for all the evils in the world. Is the technology really to blame, or those who create the technology and use it? Is a wooden cross to be condemned if someone crucify someone else on it? Is a hammer to be condemned if a neighbor breaks his neighbor's head with it? Technology does not feel good or bad: The same pipes can be used for drinking water or sewage. Evil does not come from dead, unfeeling technology, but from the dead hearts of men. Fully aware of the presence of God and without pride, Noah built an amazing ship, for his salvation and the new humanity that was to be born [37].

In a darkened consciousness of God's presence, proud men agreed with one another. Let's make ourselves a city and a tower whose top will reach the sky and make us famous before we scatter over the face of the whole earth! This was the building of the tower of Babel. When King Solomon finished the building of the great Temple of the Lord, he raised his hands to the heavens and humbly cried: „Heaven and the heaven of heavens cannot contain You, much less this temple I have built for Your name." This wonderful temple has lasted for 11 generations. It was reduced to dust when the godless descendants of Solomon changed it from a „house of prayer to a house of commerce." It was not because of technology that the Temple remained standing for centuries, nor did it disappear from the face of the earth because of technology. Technology is deaf, dumb and unresponsive. It is completely dependent on ethics, as is the ethics of faith.

The biblical story of King Nebuchadnezzar is well known. He built the city of Babylon with palaces, and hanging towers, with such technological skill and beauty as the world had never seen before. The king looked at the city he had built, standing on the roof of his palace, and spoke proudly: „Is not this Babylon the great, which I have built in the strength of my power and for the honor of my splendor, as the residence of to the emperor?" While he was

speaking these confident words, God struck him with madness and he lost his mind, and in madness he lived for seven years like a beast among the beasts of the forest. The city of Babylon the great has become a heap of ruins and a place of mockery, it has become a desert without inhabitants, just as the prophet Jeremiah prophesied. When the fear of God disappears and God's moral law is broken, the mountain of human technology crumbles to the dust of which it was made. Thus, the towers of technology and human architectures will fall into the formless dust, if the pride of man, even that of Christians, fights defiantly against God and overcomes all the measures of pride and sinfulness, and succeeds in ending the long patience of God.

Why are there so many great civilizations buried deep in the ground and on top of the plow ploughing without the slightest idea that their towers and bones lie under the plowed ground? How is it that of all the great marble constructions of the Greeks, nothing is left but the Acropolis? How dare the earth hide from the face of the sun and from the eyes of men the titanic temples of Baalbek and Egypt, as well as the great cities of Egbata, Persepolis, Tyre, Sidon and Troy, so that now the cows graze quietly above them, and the pigs below, and shepherds to build from scattered marble? As well as the kingdoms of the Incas and Peruvians so cultured? What merciless hand rolled mountains of rough mud over all these human constructions, which by their strength, form and beauty, could compete with the best modern constructions? Why are there breaks and no continuity in human civilization? Because none of these she was not pleasing to One Holy God. None of these buried civilizations were destroyed by time or by the lack of a solid technological construction, but by the sin against holy faith and holy ethics. Ethical and technological instability buried them in deep darkness. „And you, Capernaum: Were you not lifted up to heaven? You will go down to hell." This prophecy of Christ, in the days when Capernaum was full of glory, like a fairy-tale city by the lake, was fulfilled. It was so terrible that when a traveller finds himself among thorns and snakes, on the place where once stood the rich and proud city of Capernaum, he wonders with an earthquake: „Is it possible that this disgusting place was once a place where did the people live?" We answer with a brief stage conclusion: ethics is imperishable and unchanging, while technology is always changing. Ethics is like a lady, and technology is like her maid. For this reason, ethics must control technology. Eternal values are the domain of ethics, not technology. It is destructive for an entire nation to make technology the goal of its life, and to sacrifice all its work and sweat to its technological advance, dragging ethics behind them, and it is easy to choose between honor and skill. An honest man, even without skill, is more respected in our time than a skilled but dishonest man, especially when technology changes man's relationship with nature, but also with professional deontology.

5.2. Professional ethics and deontology in the digital age

The issue of professional ethics, perhaps now more than ever, is a hot topic due to social and climate changes that are the direct result of social dynamics, globalization and the accelerated pace of innovation. The delicate situation in which human society finds itself due to massive industrialization and the negative consequences that have led to the deterioration of the sensitive balance of the entire ecosystem, are now an ethical priority of visionary organizations, but also a current of public opinion worldwide [38]. The social discrepancies that draw boundaries between rich nations and poor nations, between poor and rich people, have an impact at governmental, national and international levels that create a series of institutional demands. The ethical problem arises when we discuss corporate responsibility,

the way in which the trade balance is disturbed by evading taxes, by using tax havens, exploiting minors, emigrants; And so on Corruption is a problem of poor countries as well as rich countries at different social levels, with multiple negative consequences that affect society in the medium and long term. Companies and people are all affected by the effects of actions for which they are not responsible and which they had no way of foreseeing. Legal actions can only be taken after the crisis has occurred and those guilty of illegal actions and inconsistency with ethical norms have been discovered. In this context, there are criticisms and dissensions against the system and ethical codes which are considered too lax and which do not offer increased protection to people of good faith. A wave of mistrust affects the entire system involving everyone equally. With the appearance of each crisis, society looks at itself in the mirror to carefully analyze itself in the desire that such tense situations will no longer convulse its future. Basically, what is ethics and why is it needed? Is ethics more than everyone's common sense, the permanent balance between good and bad? If we were to listen only to fatalistic statements, we would say that in the end good people will do good things and bad people will do bad things. How can ethics stop the negative tide in the world? Does ethics have this power? The answer can be positive, only that, in order to give him this ability, it is useful to address the issue of professional deontology.

The dictionary „Le Petit Larousse" defines deontology as „the set of rules that regulate a profession, the conduct of those who exercise it, the relationships between them, the relationships between them and their clients, between them and the public". In a broad sense, the term evokes the part of ethics that deals with the study of moral duty, its origin, nature and forms, as a basic component of moral consciousness. In a strict sense, the concept signifies a code of morals, principles and specific norms that involve the exercise of a profession. Such a code can take a written form or it can be made up of a set of customs transmitted orally and accepted by all members of a community. Lately, there is a tendency to adopt codes of conduct in written form for more and more professions or categories of people. Deontology is thus defined as „being the set of rules by which an organization, professional institution, profession or part of it is guided, through the professional organizations that become courts for the elaboration, application and supervision of the application of these rules" [39]. Deontology can also be defined as representing the set of rules that outline a certain type of professional behavior. Some of these norms are legally enshrined, so they can be imposed through the intervention of the coercive force of the state, others are sanctioned only by public opinion, falling under the category of moral norms. Deontology thus refers to the rules specific to a profession whose exercise it governs. We will find a deontology of the doctor, the magistrate, the journalist, the policeman, and starting from the common norms established by this, a specific of the professional trader. We can attach to the term deontology the meaning of professional morality in the overall sense of duties, principles and norms inherent in the exercise of a professional activity and we consider that every professional activity, regardless of its complexity, the hierarchy in the nomenclature of functions or the hierarchy of the entity where it is exercised, must to be based on certain moral values, which bring identity to the respective function and to those who exercise it.

Understood as a set of rules that specify the duties of a profession, deontology includes both the existing relationships within a profession, between those who practice it, and the relationships with third parties, who are either the beneficiaries of the exercise of the profession, or simply, people from outside who take knowledge in a way of it. The formal legal organization of a society represents the reflection of important moral values for the

members of the respective society responsible for creating the legal instruments that ensure state intervention when the order established by the legal norms is violated. Although it is preceded by ethics, law may or may not reflect the dominant moral values of a society in a certain period of time. Related to the exercise of a profession, legal norms represent a set of rules that describe the obligations, prohibitions and permissions of all subjects in a certain field of activity, that part of the moral rules supported by deontology considered by the legislator as mandatory for that professional category. Originally having the scientific significance of morality [40], the evolution of the concept of deontology took place especially in the sphere of sciences and humanistic activities, as they had more and more modes of action, so that the problem of delimiting what is allowed from what is what is not allowed required the drawing of moral boundaries. Thus, deontology exceeds the legal normative sphere, representing that part of ethics that deals with the study of the norms and obligations specific to a professional activity, regulated or not by legal norms. While the observance of the legal norm, as a rule of conduct, is ensured, if necessary, by the coercive force of the state, the moral norm is based on the intimate compulsion and personal conscience of each individual, its violation being sanctioned only by, possibly, the reaction of public opinion or subjects active in the same field. From the set of moral rules, deontology has assimilated those related to the exercise of the profession towards the desired level of performance. Thus, it can be said that deontology represents that part of ethics that deals with the study of duty morals, of the origin, nature and forms of responsibility incumbent upon the exercise of the profession. In the case of businesses, the purpose of deontology is to achieve their efficiency and satisfy the needs of the consumer. Efficiency is not only the result of good organization and management of an activity. Achieving maximum efficiency also depends on the degree of conscientiousness towards the professional obligations of the entrepreneur. Therefore, the moral obligations that must be respected derive from the purpose of exercising the activity, namely profit maximization but also the assumption of responsibility towards society and citizens, and wealth and poverty cannot be stigmatized in the ethical approach.

5.3. Ethics in the space of professional culture

In general, ethics is considered to be part of philosophy whose object of study investigates how people should live, those principles that guide human behavior in social dynamics. Ethics is concerned with moral values and their ranking according to standards of morality, delimiting which of these standards of morality are worthy of following. The adherence to certain ethical codes and the creation of professional norms are specific to the ethics applied in the professional practice of each job. These codes of ethics guide how it is moral to practice the profession, but this is not enough without the moral commitment of professionals. These codes of professional ethics describe the minimum necessary moral standards that must be met. But it should be noted that in order to achieve excellence, these minimum standards are not enough. Observing these rules in everyday life can be a real challenge primarily due to the fact that life is complex and surprising and cannot be regimented in rules and codes. People have the duty to always balance the obligations they face as a profession, employer and society and to manage the dilemma in an ethical manner. Because, basically, „being ethical is a continuous process, and not a correct answer to a question" [41]. It is difficult to claim people to be ethical and fair-minded when there are various perspectives of resolution and they themselves are driven by personal interests, weaknesses and the desire to absolve themselves of any blame. Knowing all this and knowing the mobility of human feelings, can we still talk

about ethical principles and moral codes as a necessity, especially knowing their relativity? To answer this question, it is good to imagine a world without ethics and morality, to eliminate justice, truth, honor, kindness, sincerity and forget them. Let's imagine a world in which favouritism, selfishness, favouritism, indifference would be the norm.

A bad dream! That's why with all its imperfections, ethics, morality, the idea of justice must exist in the spirit of society. Being a good professional, but at the same time a moral and ethical person requires discipline, work and vision. Ethics requires from everyone, apart from the observance of universally valid principles, a continuous inclination towards reflection, towards understanding reality and a permanent connection with it. Socrates said, referring to ethics in Plato's Republic „We are not discussing small things, but about how we should lead our lives". In the absence of ethics and moral norms, society sinks into an anarchic space ruled by unproductive emotions dominated by anguish, anger, dishonesty, revenge. On such a surface it is difficult to build something that will last. Let's not be fooled, half-measures and inconsistency are just as counterproductive. Professionals with career experience are supposed to have high ethical standards because of the position they hold and yet they fail. Why? Because an ethical and moral conduct is not built easily, it is the result of constant work throughout a lifetime. But it must be stated that this ethical reputation has a delicate, extremely fragile construction, that's why what was built in years can be destroyed by a single ethical mistake [41]. If this ethical reputation is so fragile and after hard and constant work everything can collapse, it deserves such an investment. True professionals choose the affirmative answer, they know that the long-term benefits that ethical conduct can bring are worth the effort. A professional with integrity is a professional respected by society. He knows how to manage the interests of others without touching them morally or financially, protecting their interests, confidentiality and vulnerability. Professionals with integrity admit when they are wrong and have an attitude towards them.

The vision of the professional with integrity about ethics involves respecting ethical principles, one's own values and being honest with one's own person, no matter how unpleasant this action may be [42]. The life led by these principles seems within reach, but it is only a reflex of the habit of hearing about them. Sincerity, honesty and constancy in actions are hard to achieve. All this requires will, effort and exercise. The ethical principles generally valid for every human being belong, to the same extent, to moral and religious precepts: not to harm anyone, to respect others, to be generous and charitable, to be prudent, to care about others, to be honest, to promote the independence of others, to be loyal, to try to overcome oneself, to do what is ethical and correct [43]. Moral relativism is also manifested due to the fragmentation of human life, the continuous alternation of social roles that each person plays, roles that are subject to different moral norms. That is why it is difficult to alternate roles and at the same time manage minor and major ethical choices and it is precisely this permanent tension that is the basis of human morality. The distance between ideal morality and real morality represents a permanent inner conflict that strains the ego. The solution lies in the permanent connection with reality and, above all, honesty with oneself during the deliberative process without renouncing one's own values. David Boileau believes that from the point of view of moral relativism, modernity can be seen as being supported by three fundamental elements: the identification with certainty of the truth; the conception that the world is a closed, sufficient system, which is defined by theoretical knowledge; religious scepticism understood as a pendulum between magic and mythology. Universal ethics can be condensed into three generally valid principles: the principle of autonomy, the principle of charity, the

principle of mutual respect. These three formal principles bring with them a kind of understanding of reality in which moral judgments become an end in themselves and ultimately become more important than content. Value judgments remain depersonalized through the ossification of thought reflexes caught in the narrow space of procedural ethics unable to react to the complexity of reality and decisions [44].

In the space of professional culture, ethics represents the norm of moral verticality, the way in which people and institutions act in a morally predictable way. Ethics is not an aspiration of society or an absolute given, but it is a way of life that the business environment must acquire and obey its principles. It offers predictability and stability to the business environment, the security of a profitable long-term relationship. The ethical issue in the area of professional culture represents a current issue in the general context of human society which has gradually become a „global village" and whose ethical and moral norms require reanalysis and recalibration to cover the diversity of dilemmas. Ethics belongs to the field of philosophy and apparently the problems it manages seem to belong to the eternal human – good and evil, justice and injustice, truth and lies etc. However, in the light of new environments, these norms have undergone changes and people feel unable to react to these new problems in front of which the norms are very lax. The social environment is starting to react to these repeated violations of private space by companies, governments and media pirates. The business environment was among the first bodies whose professional culture reacted by mentioning the danger and trying to protect customers, but also himself. Ethics has developed thanks to the multiple disciplines that converge towards this philosophy of life. Many of the basic problems of ethics are also the dilemmas faced by all societies since ancient times. However, contemporary society faces new ethical problems that past societies were unable to predict. These changes involve changes at the social, cultural, economic level and so on that change the social geometry and, implicitly, the way they relate to each other. Changes of this type attract new ethical and moral norms that must find a landmark in society and rebuild the balance between good and bad. This constant and perpetual recalibration of ethical norms is necessary to fill the ethical vacuum in the interhuman space where the stigmas of wealth and poverty coexist. An ethical approach to this apparent dichotomy seems doomed to failure. And yet we will try.

5.4. The stigmas of wealth and poverty in the ethical approach

In our life on earth, it would be good to be rich both spiritually and materially. It is not good to be poor, poverty in the contemporary world causes human decay and widespread crisis. Economic wealth must represent the affirmation of a man's native and professional ability and talents. Unfortunately, material wealth atrophies spiritual wealth to the point of devitalization, poverty has the same symptoms. St. John Chrysostom, one of the greatest orators of Christianity, says that „wealth usually does not make a man wiser, more decent, better or a lover of people. Wealth cannot plant any virtue in our souls. On the contrary, if he finds some virtues there, he uproots them, in order to plant in us the corresponding vices". Father Arsenie Boca shows us that the perception we have towards one or another of the material conditions can change our economic and life behavior. Thus, „poverty does not save you, nor wealth condemns you; just as wealth does not save you, nor poverty condemns you, but as you have your soul in relation to both wealth and poverty. You are poor and hungry for wealth, but your poverty does not save you. You are rich, but your heart is open to your wealth,

behold, your wealth does not endanger you. How you stand with your soul and towards one and the other, your salvation or condemnation depends on this".

We can exemplify in our daily reality, both as businessmen and as employees on executive functions. A businessman who is aware that profit is not an end in itself will adopt a profit reinvestment policy to ensure the continuity of the business, will understand to consistently pay employees, and from the surplus will understand to help in one way or another those who they need help, he must understand that he needs harmony and communion in society. In the locality where he operates, his well-paid employees will ensure the well-being of children and their families and the entire locality. He will understand that the generalized poverty in his locality can infect him at some point and it is good to unconditionally help people who for one reason or another are unable to help themselves. Of course, they must be aware of their hard earned money, not waste it anyway and really help those in need. Help implies a conscious deed to save or improve the quality of a person's life, a deed that is done without the media and tears of advertising. A businessman, through his positioning and his human and professional ability, can raise the performance of a locality as a whole. A locality can last in good condition for all people. For example, the distribution companies in that locality can have performance if they have well-paid customers at the exemplified company. The infrastructure and public units can be restored and well managed. Cultural and educational actions can be revitalized. Man sanctifies the place, says a proverb that beats many philosophical treatises with its clarity and reality. Another businessman who tries through unethical, illegal tools and non-taxable to obtain profit will not understand the finesse of private initiative, managerial skill and continuity [45]. What will happen when AI will work instead of the two people, where will justice be? We will meditate on the concluding statements that follow.

6. Instead of conclusions, when AI is right, justice has no power

It should be noted that Artificial Intelligence was the most searched topic of 2023 on the online encyclopedia Wikipedia and the technology considered to have the greatest potential to transform and take most industries to another level of development. At the same time, however, AI is also expected to reshape competitive dynamics in markets and generate new forms of anti-competitive behaviour, prompting regulators to increasingly investigate this sector. So, regarding the fundamental problem of the regime of artificial intelligence and especially the development of artificial intelligence, life will relatively soon reveal to us sophisticated and rapid possibilities of large-scale prediction and correlation, but even if the necessary level is reached, the political models will not transfer perhaps in this century such power to computers, beyond other risks and implications. In a society increasingly dependent on the processing of large volumes of data in the development of new technologies, online social networks, surveillance or artificial intelligence, the need to know and counter potential risks to the fundamental rights of the person is particularly acute. Sufficiently detailed from the perspective of ensuring abstract character and existence over time, but insufficiently understood and explained to regulate concrete situations, the legal norms in the field of AI use often represent a great challenge for operators.

I do not trade in the market of prophecies, but the future worries in harsh terms. What we know for sure is that taxes and death are inevitable and a war is creeping ever closer to us, given the suspicions, plans and hatreds of the blocs involved. In a world flooded with irrelevant information, clarity is power. Theoretically, anyone can get involved in the debate

about the future of humanity, but it is difficult to maintain a clear vision. Often, we don't even notice that a debate is taking place or what the key issues are. Billions of people don't have the luxury of investigating because we have more pressing things to do: we have to go to work, take care of children or take care of elderly parents. Unfortunately, history does not back down. If the future of mankind is decided in your absence because you are too busy feeding and clothing your children, you and they will not be spared the consequences. It is very unfair; but who said history is fair? As a historian, I can't give people food or clothes – but I can try to give them some clarity, thereby helping to level the global playing field. And if it helps even a few more people join the debate about the future of our species, I've done my job.

In this sense, the present approach aimed to evaluate the actuality of the incidence of ethics on the AI space. Without pretending to be an exhaustive study, not being a strictly specialized one, but an approach that reflects only the author's point of view, the article summarizes itself in presenting, with critical accents, despite some visible progress, the still far too great distance between the expectations of people, as beneficiaries of the services provided by AI and the reality, obviously still insufficient and unsatisfactory of their benefits, on the coordinates of a necessary and urgent transformation that must occur in the heart of human society, essentially, of the philosophy of life thanks to IT tools. In this case, plausibility thus represents how good faith, as a matrix of ethics and morality, expresses a greater degree of doubt about certain types of inventions. If there is more doubt that an invention will work, then the AI needs to provide more evidence and information about the invention in order to use it. Therefore, plausibility is not a new or additional requirement of patenting, but only a recognition of the technical challenges and complexity of certain categories of inventions, starting from the Kantian categorical imperative, „act so that the maxim of your actions may be imposed as a universal law of nature".

In other words, good faith represents a fundamental concept in law and is recognized in all areas of the legal world, being able to claim that good faith represents an essential pillar within the legal system, promoting ethical conduct and strengthening trust in legal relationships. Aspects related to good faith are found in contract law, the principle influencing their interpretation and execution, as well as in family law, the principle of good faith can play an important role in various situations, such as the exercise of parental authority or the sharing of common property, the parties being encouraged to act in the best interest of the children and cooperate in resolving disputes, but also in the area of good faith exercise of procedural obligations in civil or criminal procedural law. And everything should start with school and university education, essential to face the new challenges. A man can become an accomplished doctor after studying the medical sciences very well, as can an engineer or a lawyer. But a man can have an extraordinary economic or managerial ability before obtaining a specialized diploma, the school helps him to know first the alphabet in the field, then the details and the mechanism of the system. The digital economy has a dynamic and sensitivity that often finds its explanation in books after the event is over. Ethics under such conditions must represent that conduct of well-being. When man becomes aware of the fundamental values of life, true beauty approaches pure science with a prophylactic, therapeutic and vitaminized effect for the mind and soul.

Father Arsenie Boca shows us that „just as we pursue a harmony between the faculties of the soul, we must also pursue a harmony between knowledge from several fields as well as a synthesis of them with life. A lot of science brings man closer to God, a little science takes

him away from both science and God. And man values the closeness to God that he has gained in himself. God has given him great value, but he must also earn it." [46]. Thus we must ennoble the values given by God through science, but often we atrophy them and science can no longer help a devitalized man. We also have the discernment to choose between good and evil. There can also be scientific or cultural approaches that harm us. If a man has that principle of decency alive, he will be happy, wise and rich. It would be good if all people understood each other and were all rich spiritually, culturally and economically. Father Arsenie Boca also says that „neither poverty saves you nor wealth condemns you". We only have to see the perception we have of life and the means by which we achieve our goals. Unfortunately, today many means have become ends, they represent the carved face we worship in a misunderstood and applied ritual.

Man's competition with himself and intraspecific selection can lead to negative situations. Although through science and technology humans have conquered the earth and subdued nature to the needs of life, humans know very little about themselves. „Home hominid lupus", man is wolf to man. In the economic game and in the game of life, man is not harmless. Many times, the competition of man with man devitalizes divine values, the purpose of this competition being represented by commercial considerations. For most people today, human value is competitive, commercial and financial. For a man, his fellow man is not valuable by his qualities, by his talents. Man is valuable today through his function, his wealth, through the expensive goods purchased that are often confused with identity. You are valuable because you have millions of euros in your account, not because of your life with all its ups and downs. The priceless man as a value in all the work of humanity has a price today, it is sold and bought. Talking to „human AI" about ethics, it means madness. Even now when the competition between people has become purely commercial and no longer represents the affirmation of that form of overcoming and cultivating one's own knowledge and the knowledge acquired in school or through free education. The economic means of satisfaction and ensuring the decency of life have become ends. Money is originally a means, but how many of us still see money as a means? They do not represent a value in themselves. However, we have an economic life, we no longer have a normal, healthy life with all its attributes. Our life is economy both at home and at work. Unfortunately today everything in life has a financial component. As in accounting when any good or service has its counterpart in money, so it is in life, any activity translates into money, income and expenses.

Konrad Lorenz in the book „The Eight Sins of Civilized Mankind", explains the challenges of today's humanity that bring great soul damage: blinding greed for money and exhausting haste. Also, in addition to the greed to own goods or a superior hierarchical position, or to own both, an essential role is also played by fear: the fear of being left behind in the race, the fear of poverty, the fear of making decisions wrong [47]. Fear in all its forms is the factor undermining the health of modern people. Until a few years ago, I didn't even know the terminology of the word stress. The causes and effects were unknown. People suffer from nervous and soul demands, demands determined by a race and competition to nowhere. The man classified as labor force, human capital or human resource, apart from the treatment and the work rhythm, also faces, of his own volition, the manipulation and exaggerated advertising of the way to satisfy the ever-increasing needs. Marketing specialists speculate on this aspect, and their approach cannot be about ethics alone. Unfortunately, consumers show a certain naivety and do not revolt, for example, because they often pay a considerable amount

for the packaging as expensive as the goods or just for the perception they form from the advertisement.

Indeed, science and technology have evolved, but the essence of research is the same in all eras of history, only the approach in science and the use of tools in technology differ. And yet, with all the advantages of science and technology, people are conquered by their own creation. Saint Nicolae Velimirovici expresses very beautifully the importance of ethics and technology in the life of man and nations, emphasizing the correlation between religion, ethics and technology [48]. I consider the writings of the great saint, with doctorates in philosophy and theology in the great universities of the world, to be current and important for the understanding of ethics in economic life. In conclusion, let us pray to God to help us to be normal people, to contribute, each according to strength, skill and zeal, to the restoration of a normal Romanian society. But over the past two decades, the world's occult leaders have built a high-tech surveillance system of seemingly extraordinary sophistication. Facial recognition software, Internet monitoring and ubiquitous video cameras give the impression that the New World Order has finally fulfilled the dictator's dream of building a surveillance state like the one imagined in George Orwell's 1984. A high-tech surveillance network now covers all of humanity, and the potency of this system was on full display in China in November 2022, when nationwide protests against China's COVID-19 lockdown shocked the party, although protesters were careful to -hide their faces with masks.

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[48] N. Velimirovici, op. cit., p. 40.

BRIEF VIEW OVER PRINCIPLE OF GOOD FAITH IN THE COURT OF ARBITRATION FOR SPORT'S JURISPRUDENCE

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Abstract

It is well known that transnational contracts, involving parties from multiple jurisdictions, have a higher degree of complexity, due to the overlapping of jurisdictions and applicable law. Contracts regarding professional football are no exception, even when it comes to establishing the governing law and basic principles, such as bona fide.

Keywords: *good faith, performance of contracts, conclusion of contracts, court of arbitration for sport*

1. Introduction

Professional football is a global marked governed by one giant confederation, the Fédération internationale de football association, or FIFA. While having just one governing body at the very top of the pyramid has brought some clarity and consistency in the regulatory framework (FIFA imposes regulations on international player transfers, mandatory ethics and statutory provisions for national associations etc.), the parties still have a large freedom in choosing the governing law of their contracts, based on their particular interests.

However, having just one, final, governing body has created a flow of unified jurisprudence. According to article 56 of the FIFA Statutes, FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents. This means that, despite the original various governing laws of the contracts, the interpretation of the various clauses and obligations contained within remains unitary. This unity is given not by the same one last instance body, but also from the fact that the CAS interprets the contracts in accordance with (mainly) the rules and regulations of FIFA, as well as Swiss law (the Swiss code of obligations), subsidiarily.

The present paper wishes to briefly analyse how the principle of good faith has been applied and/or interpreted by the CAS in various recent awards concerning contractual disputes.

2. Relevant case law

2.1 Good faith in interpreting the real will of the parties [1, 2]

Article 18 of the Swiss Code of Obligations seeks first and foremost to establish the intent of the parties and – in case the latter cannot be determined – falls back on an objective interpretation of the contract: „when assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement". This is not materially different from Art. 1266 of the Romanian Civil Code.

According to Swiss law, there are two alternatives to close a so-called „Vertragslücke" (contractual lacuna): the first one is the so-called „*subjective amending"*, i.e. amending the agreement by relying on the hypothetical intention of the parties, the second alternative would be to close the gap by referring to any legal disposition or regulation (the „*complementary contractual interpretation"*).

Under Article 18 of the Swiss Code of Obligations, the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention. This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them. The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation. By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith, based on its wording, the context and the concrete circumstances in which it was expressed. Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract: it is of the responsibility of the author of the contract to choose its formulation with adequate precision (*in dubio contra stipulatorem*). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law, under which the accrued protection of the weakest party.

The principle of „complementary contractual interpretation" or „ergänzende Vertragsauslegung" applies whenever the parties unintentionally did not consider an issue that later materialized. In that case, it must be examined what the parties reasonably and in good faith would have agreed, if they actually had considered the issue they unintentionally omitted to regulate. The complementary contractual interpretation of the contract must result as a compelling, self-evident consequence from the entire context of what was agreed, so that without the supplement made the result would be in obvious contradiction with what was actually agreed according to the content of the contract. The threshold for the application of „complementary contractual interpretation" is relatively high. While the concept is not vested in any statutory provisions in German or Swiss law, it is recognised and applied equally under German and Swiss law.

In these two cases, the CAS established that, while not a party to the employment agreement between Club A and the (transferred) Player, Club B should have understood and foreseen that the buy-out clause in the Player's contract is net value of any other duties levied by applicable laws/regulations, such as the solidarity mechanism. Thus, triggering the buy-out clause in good faith implied, in the CAS' opinion, that Club B accepted the burden of paying the taxes and solidarity contributions.

2.2 Good faith in contract termination under force majeure[3]

According to the Bureau of the FIFA Council, whether or not a force majeure situation (or its equivalent) exists in the country or territory of a member association is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement. By contrast, the regulations of the Romanian Football Federation state that an Executive Committee decision is necessary in order for a general event (such as the COVID-19 outbreak) to be considered force majeure.

Therefore, FIFA does not consider that the COVID-19 outbreak is a force majeure situation in any specific country or territory or that any particular employment or transfer agreement is affected by the concept of force majeure. FIFA only encourages the football's stakeholders to reach any possible agreement to ensure the mutual maintenance of their financial resources but states that COVID-19's effects should be assessed considering the national Law of the employment agreement and taking into account all the relevant circumstances.

According to Indian law, an „agreement" is a contract if it is made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and is not expressly declared to be void. Acceptance is thus, the second stage of completing a contract. An acceptance is the act of manifestation by the offeree of his assent to the terms of the offer. It signifies the offeree's willingness to be bound by the terms of the proposal communicated to him. To be valid an acceptance must correspond exactly with the terms of the offer, it must be unconditional and absolute and it must be communicated to the offeror.

In this case, the CAS concluded that the termination of a player's contract cannot be considered to be done in good faith on the grounds of qualifying the COVID-19 outbreak as a force majeure. A more rational and consistent with a good faith attitude legal remedy to force majeure in employment contract is, at least in the beginning of the event, suspending the contract. Therefore, a player whose contract has been unilaterally terminated by a club in the beginning of the COVID-19 outbreak is entitled to compensation for this premature termination. However, the appropriate compensation is set at the amount of the expected salaries until the said player reaches an agreement with a new club and not of the expected salaries for the entire duration of the contract.

2.3 Good faith in contract negotiations [4]

Following article 1 para. 1 of the Swiss Code of Obligations, in order for a contract to be concluded, the mutual expression of intent by the parties is required. Such intent can be deduced from the wording of the document in question but this wording has to be put into context. In any case, in order for an employment contract to be concluded, the parties have to agree on the *essentialia negotii*. Article 1182 of the Romanian Civil Code sets out the same basic principle, that a contract may be concluded by the acceptance of an offer, and that a contract may be concluded even if the parties to not completely agree on all of the contract provisions, as long as they agree on the essential terms, the same *essentialia negotii* from the Swiss doctrine.

The *essentialia negotii* of an employment contract are the date, the parties' names, the subject of the contract, the duration of the relationship, the player's remuneration, both parties' signatures and the obligation of the parties to each other. If only secondary terms are still being negotiated between the parties a contract is deemed as having been concluded.

Under Swiss law *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of *culpa in contrahendo* requires the existence of contractual negotiations, trust that deserves protection, a breach of a duty, harm, a causal connection, and fault. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, consideration, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner.

A similar principle is found in the Romanian Civil Code, under Art. 1183, which impose to the parties the duty to carry on negotiations in good faith and only with the serious intention of concluding a contract. This duty cannot be excluded or limited and the party that leaves the negotiations in bad faith is liable for any damages incurred to the other party.

In this case, the CAS ruled that the mere intention of a club to offer a player an employment contract, even if this intention is materialized by sending draft agreements/contract, is not enough to lead to the conclusion that the parties are in agreement on the essential elements of the contract. Such a conduct from the club implies only the fact that the club and player are negotiating. Furthermore, it is at the discretion of the parties to withdraw from such negotiations. Following this train of thought, a club cannot be held liable for ceasing negotiations with a player at a stage where the said negotiations were not finalised with either the acceptance of a formal and final offer or with the conclusion of a term sheet.

The line between a simple breakthrough in the negotiations or a step forward towards reaching an agreement and reaching an agreement is sometimes very thin. Therefore, it is the author's opinion that this aspect has to be carefully analysed on a case by case basis, as no clear threshold or test can be applied.

3. Conclusions

Similar to the approach of the courts of chancery from the common law system, the Court of Arbitration for Sport views the good faith of the aggrieved party as an essential element in upholding a claim concerning the conduct of the other party. A party acting in bad faith itself cannot base its claim on the lack of good faith of the opposing party.

When it comes to fixing contractual ambiguity, the parties usually end up seeking the remedy towards a third party, mediation or dispute resolution. The trigger of this is, obviously, the disagreement itself in the performance of the contract. There is no need for an intermediary ruling on the ambiguity of the contract, as the parties agree on it by the simple fact that they have divergent opinions. A court informing the parties that it finds the contract unclear does push them any closer to an amicable resolution.

Lack of good faith, on the other hand, is a totally different matter. The parties will never see eye to eye on this, as almost no one will voluntarily agree that he acted in bad faith. Before even considering a remedy, bad faith has to be established and this isn't an easy task, as it has to be done on a case by case basis. However, the existence of this intermediary step may prove useful in resolving the merits of the dispute. Once an independent authority, be it state courts, arbitrator or even a mediator, establish the level of good faith given by the parties, they may choose to resume negotiation and agree amicably on the remedy.

As good faith is seen different in various legal systems, the parties should carefully analyse how good faith is applied to their situation in the legal system of the governing law of the agreement.

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RELEVANCE OF ACCESS TO ENVIRONMENTAL INFORMATION FOR COMPANIES SUBJECTED TO INSOLVENCY LAW

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Abstract

In the field of environmental protection, access to information is a fundamental element for taking appropriate measures both in terms of greening and carrying out economic activity in optimal conditions. It is an expression of transparency and good faith in an area of vital interest for future generations.

The paper will analyze the importance of access to information of public interest in environmental issues, especially in the case of insolvent companies.

It will also discuss relevant aspects of the Aarhus Convention on Access to Environmental Information and its counterpart national legal provisions.

Equally, the role of national public authorities in managing environmental information will be considered, but also the way of communicating it upon request.

Keywords: *Aarhus Convention, insolvency proceedings, precautionary principle in environmental decision-making, principle of preventive action in environmental law, access to environmental information.*

1. Introduction

When a company no longer has assets to cover its liabilities, we will consider it in a state of insolvency. If it has no chance of recovery, it will go bankrupt, culminating in deregistration. But when human society no longer has resources for survival, can we say it is bankrupt? If we pursue a reorganization, we will not get a second chance, because we will be directly opposed to a bill: unpaid environmental obligations. Their satisfaction must be done as a priority, completely and without delay. The bankruptcy of nature is not an option, deregistration is not possible, and the existence of the Earth is not conditioned by our existence. The roles are reversed and the once abstract ideea that Earth has life becomes legally relevant. Environmental obligations take on an existence, but they lack substance as long as they are ignored.

There is no definition of environmental obligations in the legislation. The phrase itself is the creation of doctrine, starting from the fundamental right to a healthy environment. Art. 35 of the Romanian Constitution provides that: „(1) The State recognizes the right of every person to a healthy and ecologically balanced environment. (2) The State shall provide the legislative framework for the exercise of this right. (3) Natural and legal persons have the duty to protect and improve the environment".

Given that Romania is only part of a superior structure, the European Union, we would expect this fundamental right to be regulated in the European Convention on Human Rights, but its text does not contain any express mention. However, case-law has held that the right

to a healthy environment is in the spirit of the Convention, beyond its letter[1], being detached by ricochet from the right to life, to respect for private and family life.

The evolution of technology over the past two centuries has widened the gap between „natural cyclical processes of the ecosphere and linear processes of technological advance", generating an ecological crisis[2]. Thus, the growing need for protective measures regarding environmental integrity and sustainability has led to an important concern of the states both in the international sphere and at national level. For the most part, commercial companies are those that use technologies to develop the production of various materials necessary for humans in the XXI century, so they are also the ones that cause the most damage to the environment.

To prevent environmental damage, access to environmental information, especially in the case of companies subjected to insolvency law, is not only necessary but often vital. The principles of environmental law, enshrined in national and international law, are essential to access the information necessary to prevent any ecological damage, especially to companies in financial difficulty or even insolvency. We believe that the principles of environmental law important in accessing information in the case of companies subject to insolvency law are that of caution in decision-making, preventive action, and the principle of access to justice in environmental matters.

To obtain access to environmental information, applicable in national legislation are both Law no. 544/2001 on free access to information of public interest[3] and the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters[4]. Equally, for certain categories of information, the provisions of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, but, as stated in legal literature[5], it is applicable where environmental information is requested from a European body.

2. Application of the precautionary principle in decision-making to insolvent economic operators

The 1998 Aarhus Convention is the main international benchmark on access to environmental information. The preamble to the Aarhus Convention states that applying the principle of accountability and transparency in decision-making and ensuring increased public support for environmental decisions, access to information is very important in ensuring transparency of decision-making at national and international level. The Aarhus Convention started as a necessity for citizens to have access to information, to actively participate in environmental decision-making and to be able to access justice in any kind of environmental dispute. In the field of environment, access to information as well as citizen participation in

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[5] S. Al. Vernea – *The Romanian Legal Regime of Access to information in Environmental Matters*, Fiat Justitia, nr.1/2022, pg.123

making any decision regarding the environment, quality and implementation of decisions provide the opportunity for public authorities to make decisions as well supported and documented as possible. Citizens, non-governmental organizations, and the private sector play an important role in the field of environmental protection, provided that the legal provisions on their access to information are observed.

Romanian law no. 85/2014 on insolvency prevention and insolvency procedures has as main purpose the protection of creditors by covering the debtor's liabilities. The insolvency procedure involves subjecting the debtor to actions for its recovery and paying the debts accumulated under the supervision of an insolvency practitioner and a syndic judge.

Starting from the problem that environmental obligations are generally obligations to do a certain act, that are not always quantified pecuniarily and thus are not recorded in the debtor's creditors' estate, the application of the precautionary principle in environmental decision-making is of particular importance, especially about the access of any person to information on compliance with environmental protection by the debtor company. This principle „complements and amplifies its meanings with another fundamental principle, that of prevention of ecological risks and damage, prevention implying but not being reduced to precaution".[6]

At European level, the precautionary principle in decision-making was enacted, for the first time, in the Treaty on European Union, which in Article 191, paragraph 2 provided: „Community policy on the environment shall aim at a high level of protection, taking into account the diversity of situations in various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay.' The latter can try to repair the damage, but only *post-factum*, provided that the damage is not irreversible. Effective regulation for this purpose does not yet exist at international level[7]. For this reason, some scholars considered[8] that the principle legitimizes a different mechanism for attracting civil liability. The precautionary principle in environmental decision-making was also integrated into national legislation, for the first time by Law no. 137/1995 on environmental protection. Starting from environmental risk, this precautionary principle in decision-making establishes the obligation for interested parties to document sufficiently for the granting of an environmental permit or agreement necessary to carry out a legal activity, and the data collected must be sufficient to demonstrate that there is no environmental risk if the act is issued.

The principle is intended to overturn the burden of proof in the sense that the economic operator to be authorized from an environmental point of view must demonstrate that the activity to be carried out is only one and does not adversely affect environmental health. Obviously, this principle of environmental law, enshrined in legislation, aims to prevent any irreversible decisions that could be taken and that could have negative effects on the environment. Under these circumstances, taking any potentially polluting measure is based on correct information of both the economic operator and the public, which is an important factor in collectively ensuring environmental protection.

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[6] M. Duțu – *Dreptul mediului. Tratat*, vol. I, Economic Publishing House, Bucharest, 1998 pg. 66

[7] C. Jura – *General views on environment protection* în volume *International Multidisciplinary Scientific GeoConference* – vol.5 Surveying Geology & Mining Ecology Management (SGEM), Sofia, 2012, pg.431

[8] S. Al. Stănescu – *Regimul juridic al răspunderii civile pentru daune cauzate prin poluare în context international*, Universul Juridic Publishing House, Bucharest, 2013, pg.76

The company subjected to the provisions of the Insolvency Law can access new opportunities for financial recovery, opportunities that would involve broadening the scope of activity. For this, the company, whether it is in insolvency proceedings or not, must be authorized from an environmental point of view if the activity to be carried out requires such a rule. The widely used technique for precaution in environmental decision-making is to subject future activity to a prior permit granting procedure. One of these prior procedures is the assessment of the impact that future activity could have on the environment. The assessment involves obtaining values of the environmental impact that the activity to be carried out will have. The doctrine defined an impact assessment as „the need to identify and determine the impact on the environment and on human well-being and health of legislative proposals, policies, programs, projects and operational procedures and to interpret and communicate information on impacts".[9]

The precautionary principle in decision-making obliges the evaluation to include the use of various alternative studies for the realization of the future project, considering the technology to be used, as well as the place where the activity is to be carried out. Obviously, access to information is necessary both for the preparation of the assessment prior to the authorization of the activity and after the activity is carried out, to verify the conditions initially considered.

Law no. 544/2001 is the main national regulation under which environmental information may be requested from institutions that may hold it. Art. 2 of Law no. 544/2001 defines the public authorities or institutions that are obliged to provide any information of public interest[10]. Under this legal provision, any information relating to the activity carried out by an authority or institution referred to in art. 2 of Law nr. Regulation (EC) No 544/2001 has the character of information of public interest.

In doctrine[11] it was shown that any communication of information of public interest, under Law nr. Regulation (EC) No 544/2001 is premised on the possession of that information by the institution to which the request has been addressed. Any information of public interest may be communicated by authorities or institutions, both *ex officio* and at the request of any person.

After collecting and processing all the information resulting from the assessment, they are then verified and analyzed by the competent environmental protection authorities, that will decide on the possible authorization of the new activity to be carried out by the company subject to the provisions of the Insolvency Law. To ensure a proper permit decision, the competent authority may, in addition to the assessment, ask any establishment, or even natural persons, for information or opinions on the possible impact on the environment, of the activity

[9] R.E.Munn – *Environmental impact assessment: priciples and procedures*, John Wiley Publishing, New York, 1979, pg.42

[10] Art. 2 of Law nr. 544/2001 provides: „public authority or institution means any public authority or institution that uses or manages public financial resources, any autonomous company, company regulated by Companies Law no. 31/1990, republished, with subsequent amendments and completions, under the authority or, as the case may be, under the coordination or subordination of a central or local public authority and in which the Romanian State or an administrative-territorial unit is the sole shareholder or majority, as well as any regional operator or operator, as defined in the Community Public Utilities Services Act No. 51/2006, republished, as amended. Also, political parties, sports federations and non-governmental organizations of public utility, which benefit from financing from public money, are subject to the provisions of this law."

[11] S.Al.Vernea- *Dreptul comunicării*, Hamangiu Publishing House, Bucharest, 2021, pg.86

to be carried out. In case of suspicion of environmental damage caused by the new activity to be carried out, the competent authority may reject the application for environmental permit.

In the case of economic operators subjected to the Insolvency Law, the precautionary principle in decision-making obliges decision-makers to pay attention in granting an environmental permit, also considering the financial difficulties they are going through. Particular attention is needed, given that any environmental obligation involves an expensive activity, and an insolvent company may neglect such indebtedness, given that it mainly aspires to financial recovery. Environmental obligations not treated in time can lead to real environmental disasters, damage that can be irreversible.

About caution in decision-making on the granting of environmental permits, the doctrine[12] states that „the acts giving rise to liability include either unlawful conduct causing environmental damage and reprehensible by its wrongdoing, or a number of current, normal, licit activities *per se,* but which may sometimes constitute causes of environmental damage". Another author[13] points out that, in environmental law, „(...) Illicit acts can be causes of environmental damage", so that the environmental risk assessment of the future activity, especially if it will be carried out by a company in financial difficulty, must be well documented and substantiated.

Therefore, access to information to make an environmental decision is particularly important, especially when the subject is a legal person in insolvency proceedings, a procedure whose main purpose is to cover the debtor's liabilities, and which does not aim in any way to comply with outstanding environmental obligations.

3. Application of the principle of preventive action to insolvent economic operators

The principle of preventive action in the case of economic operators subject to the Insolvency Law is of particular importance, given that prevention is much easier than remedy.

In the Declaration of the United Nations Conference on the Environment signed in 1972, the principle of prevention was first stipulated and later adopted in the Rio Declaration of 1992. Article 2 of the Rio Declaration states that 'States shall ensure that activities carried out under their jurisdiction or control do not cause any damage to the environment of other States or to the environment of territories outside any national jurisdiction'.

The principle of preventive action was taken over, at European Union level, in the Treaty on European Union, and then by all Member States in their national legislation. In Romania, the provisions of the principle of preventive action are found in the Government Emergency Ordinance no. 195/2005 on environmental protection at art. 3 letter „c".

Preventive action in environmental law is a complex principle that applies to both environmental risks and environmental damage. Environmental risk refers to the situation when a hypothetical context of environmental damage is analyzed and by applying this principle possible harmful consequences due to pollution can be avoided. Environmental damage refers to situations where the polluting result has already occurred, and in this context the principle of prevention in environmental law has the important role of minimizing the effects that pollution produces. By successfully applying preventive action, pollution can be limited or even eliminated altogether.

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[12] D.Marinescu, M.C.Petre – *op. cit*., pg.708

[13] A.I.Duscă – *Dreptul mediului,* 2nd ed., Universul Juridic Publishing House, Bucharest, 2014, pg.241

This principle of preventive action must be applied to economic operators in financial difficulty or subject to the Insolvency Law. In the event of environmental damage, the persons responsible, by applying the principle of preventive action, must take all necessary measures to limit and neutralize possible adverse effects on the environment.

The provisions of the Government Emergency Ordinance no. 68/2007 on environmental liability provide in art. 26 paragraph 1 that all costs of preventive and remedial action necessary to avoid and repair environmental pollution shall be borne by the economic operators concerned. The same normative act also shows that part or even all the costs necessary to prevent or repair environmental damage can be borne by the local environmental protection agency. To guarantee the recovery of advanced costs by the local environmental protection agency, it will be able to establish mortgages on the real estate of the economic operator or insurance garnishments.

In case the necessary costs to prevent the extension of environmental damages are advanced, the environment agency needs information on the company's activity but also on any assets on which it could put mortgages to guarantee the recovery of the amounts paid. In the case of insolvency proceedings, there are certain peculiarities related to the possible recovery of costs advanced by local environmental protection agencies.

First, to advance an amount, even necessary to prevent collateral damage to the environment, the approval of creditors involved in insolvency proceedings is required. The approval of creditors for a possible advance of amounts is necessary since these amounts emerged during the procedure, according to the provisions of art. 106 paragraph 2 of Law no. 85/2014, on insolvency prevention and insolvency procedures, have priority in being recovered by the creditor, and in this case, creditors registered with the debtor's creditors have lower chances of recovery.

Access to information is more important for the local environmental agency as the economic operator is undergoing insolvency proceedings, given all the particularities of such a procedure. Even if the activity of the insolvent company continues, after the opening of proceedings, it is limited and supervised by an insolvency practitioner and a syndic judge. Creditors in insolvency proceedings have an important role to play in making all important decisions in the proceedings, more so as environmental obligations need to be fulfilled.

We believe that the successful application to the Aarhus Convention and the provisions of Law no. 544/2001 on free access to information of public interest, with subsequent completions and amendments, contributes beneficially to the application of the principle of preventive action to operators subjected to Insolvency Law.

4. Considerations on the principle of access to justice in environmental matters

The principle of access to justice in environmental matters was first enshrined in the Stockholm Declaration of 1972. The Aarhus Convention obliges signatory States to ensure that the required information is made available to the public concerned without the need to declare any interest[14]. The Aarhus Convention on Access to Information, Public Participation

[14] By judgment of 26 June 2003, Commission v France (C-233/00, EU:C:2003:371) the member state was penalized for failure to correctly transpose Articles 2 and 3 of Directive 90/313/EEC relating to public access to environmental information. The Commission brought an action under Article 226 EC for a declaration that, by failing correctly to transpose Articles 2(a) and 3(2), (3) and (4) of Directive 90/313/EEC, the French Republic had failed to fulfil its obligations under that directive and the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 288 TFEU).

in Decision-Making and Access to Justice in Environmental Matters was ratified by Romania through Law 86/2000.

The application of this principle is carried out according to the regulations of the Romanian Constitution[15], of GEO no. 195/2005 on environmental protection[16], Government Decision no. 878/2005 on public access to environmental information,[17] but also of Law no. 292/2018 on the assessment of the impact of certain public and private projects on the environment[18]. Government Decision nr. 878/2005 on public access to environmental information ensures the right of any person to access environmental information, establishing at the same time the conditions, terms, and modalities of exercising this right.

Regarding access to justice in environmental matters, any applicant dissatisfied with the resolution of his/her request for the provision of environmental information may address with a prior complaint to the head of the public authority requesting reconsideration of the response act. If, after receiving the answer to the prior complaint or refusal of the settlement authority, the applicant considers that his/her right has been violated, he/she may request the administrative courts to examine the acts or omissions of the competent public authorities. Both the preliminary complaint and the legal action will have as national regulation, the provisions of Law nr. 554/2004 on administrative litigation[19].

We consider that the right to be informed has, also in this situation, the nature of a fundamental right[20], recognized by Article 31 of the Romanian Constitution, which justifies the access of the interested person to use it judicially.

Environmental information can be any written, visual, audio, or electronic information about the state of environmental elements such as air, water, atmosphere, soil, landscape, biological diversity, genetically modified organs etc. Environmental information may also concern data on the substances used, the noise produced, the radiation produced, but also on possible plans and programs that may affect environmental elements. Environmental

[15] The Constitution of Romania, published in Official Gazette nr. 767 of 31 October 2003, which in art. 135 para. 2 lit. d „the obligation that the state has in exploiting the natural resources of the country, but in accordance with national interests". From Article 135 para. 3 lit. d) of the Romanian Constitution we can conclude that „no human activity can be carried out without respecting the environmental protection norms, being, therefore, a general obligation incumbent on all public, central and local authorities, as well as natural and legal persons".

[16] O.U.G. nr. 195/2005 on environmental protection contains several provisions in this regard: Article 4, letter p) contains provisions for education and public awareness in the field of environmental protection and public participation in decision-making regarding environmental issues; Article 74, letter n) grants the right to a representative of non-governmental organizations from a particular region to be a member of the Regional Committee on Environmental Protection, organized at the level of each regional environmental protection agency; Article 75, letter n) establishes that central public authorities ensure the implementation and elaboration of programs and development of educational publications on environmental protection; Article 85 provides for the central public authority for education and research the following: Adaptation of educational plans and programs at all levels, in order to assimilate notions and principles of environmental protection (letter a); Promoting studies and research programs corresponding to the priorities established by the central authority for environmental protection (letter b); Elaboration of educational programs aimed at forming a responsible behavior from the point of view of environmental protection (letter c);

[17] According to art. 16, paragraph 2 of G.D. nr. 878/2005 regarding public access to environmental information published in Official Gazette No. 760 of 22 August 2005

[18] Law nr. 292/2018 on the assessment of the impact of certain public and private projects on the environment published in Official Gazette No. 1043 of 10 December 2018

[19] Published in the Official Gazette nr. 1154/07.12.2004

[20] S. Al. Vernea – *The legal nature of the right to information under Romanian regulations*, în Challenges of the Knowledge Society (CKS 2021), Nicolae Titulescu University Publishing House, Bucureşti, 2021, pg.688

information may also cover the state of human health and safety, human living conditions, cultural areas, and buildings, and how they are or may be affected by the state of environmental elements.

Access to environmental information shall be granted to any natural or legal person, including associations, organizations or groups, entities without legal personality. Requests for environmental information may be made without the need to justify an interest.

Persons holding environmental information are public authorities, such as: government, natural or legal persons performing public administrative functions under national legislation or having public responsibilities or functions providing public services related to environmental protection or potentially polluting activities.

Generally, environmental information made available by public authorities should be provided in the form requested by the person concerned. This form can be on paper, electronically, video, audio recordings etc.

The public authority which does not have the information requested by the party concerned shall have the possibility to reply that it does not possess the information requested or shall have the possibility of transferring the request to the authority which possesses the elements necessary to provide an effective reply. The public authority with which a request for environmental information has been registered and which does not have the requested information is not obliged to guarantee its provision by another public authority that could respond.

The response of the public authorities must reach the applicant within a maximum period of 30 days from the date of registration of the application, and its issuance must be free of charge. The public authority may refuse the request for environmental information if it does not have that information, if the request is unreasonable or formulated in a far too general manner, but also if the request concerns documents under preparation or concerns the internal communications system of the public authority.

Interested persons shall have access to the competent courts which may assist them in obtaining the information requested. According to the legislation in force, the administrative court is competent to solve such requests, in accordance with the provisions of Law nr. 554/2004 on administrative litigation.

5. Conclusions

Increased public access to environmental information contributes to greater environmental awareness, free exchange of information and opinions and more effective public participation in environmental decision-making with the aim of improving ecological balance. The Aarhus Convention as well as national legislation on free access to environmental information has initiated a process of change in the way public authorities approach the issue of openness and transparency.

The right of access to environmental information held by any public authority should be granted to any natural or legal person, without the need to justify any particular interest. Public authorities are obliged both to make environmental information available upon request and to disseminate environmental information that may be of interest to the people affected.

The current legal provisions guarantee the right of access to environmental information held by public authorities, so that any request must be solved, and in case of dissatisfaction, the applicant can act in administrative litigation against the authority, the right of access to justice being granted by law.

About insolvency proceedings, certain environmental information held by public authorities may lead to the prevention of environmental damage. Access to information can be vital in preventing irreversible damage for operators subject to insolvency law, but it can also lead to limitation or elimination of pollution.

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FREEDOM AND RESPONSIBILITY IN THE PUBLIC EXERCISE OF RELIGIOUS FAITH. THE GOOD FAITH OF THE LADY JUDGE OF ADVENTIST DENOMINATION

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Abstract

Some time ago, the civil society was informed of the exclusion from the magistracy of a female trainee judge, due to her failure to appear at the capacity exam on Saturday. Prior to the exam date, the magistrate submitted a request to the CSM, requesting „to set the exam date on a day other than Saturday, because the doctrine of the religious denomination does not allow appearing for an exam on Saturday.". As a support, the judge invoked the disposition of rrt. 29 of the Romanian Constitution, art. 9 of the European Convention on Human Rights and the Judgment of the European Court of Human Rights, pronounced in the case of Bayatyan a. Armenia. By Decision no. 182/2021 the plenary session of the CSM rejected the judge's request, approving as the examination period the interval 26.11.2021 – 07.04.2022. Within the limits of this approach, we will highlight and analyze those aspects that prove the good faith of the judge in the exercise of her religious faith, but also the elements that determine a correct reference to this fundamental right. Finally, it should be mentioned that this article appears with the financial support of the University of Bucharest.

Keywords: *religious freedom, good faith, csm, judge, magistracy.*

RELIGIOUS FREEDOM AT THE LEVEL OF THE COEOD, ROMANIAN CONSTITUTION AND OF THE LAW NO. 489/2006

The European Convention on Human Rights states in art. 9 par. 1, that: „Every person has *the right to freedom of […] religion*; this right includes [...] *the freedom to manifest one's religion* [...] individually or collectively, in public or in private, through *religion*, *education*, *practices and the fulfillment of rituals*.".

Paragraph 2 of the same article states that: „*Freedom to manifest one's religion [...] may not be subject to restrictions other than those prescribed by law* which, in a democratic society, constitute *necessary measures for public safety*, *for the protection of public order*, *health*, *public morals or the rights and freedoms of others*.".

As we can easily see, the way in which freedom of religion is configured in Article 9 of the CoEDO reflects a *logical flow*, with the first sentence laying down *the rule governing the exercise of the right to freedom of religion*, the second sentence setting out *its content*, and finally, para. 2, which, *as an exception*, *refers to the conditions under which the freedom to manifest religion may be restricted.*

Commenting on Article 9, Professor Corneliu Bîrsan specified that it: „enumerates the various forms that the manifestation of a religion can take [...] namely worship, education, practices or the performance of certain rites."[1], but that: „*the text does not protect any act motivated or inspired by a certain religion or belief.*"[2].

In relation to this last aspect, it has been emphasized through jurisprudence that: „in exercising the freedom to manifest his religion, *an individual may have to objectively evaluate his own specific situation*."[3].

Therefore, CuEDO refers to *the responsible exercise of religious freedom*, with the person taking into account *their own situation*, *a situation that can generate*, *in relation to religious freedom*, *some obligations*, *incompatibilities or conflicts*.

For example, an *adventist doctor* must accept that, by virtue of the assumed profession, *he will have to perform the on-call schedule on Saturday*, *or a military practitioner of Buddhism* must accept that he will, *at some point*, *be in the situation of using violence with the aim of suppressing a riot* [4].

Exceptionally, the Convention provides that the restriction of the exercise of religious freedom must be *prescribed by law*[5], and on this point „the European Court has consistently held that the expression 'prescribed by law', which appears in Articles 8, 9, 10 and 11 of the Convention requires *not only the mere existence of regulations*, but concerns *the very quality of the law in question*, which *must be sufficiently accessible and foreseeable*, that is to say, it *must be stated with sufficient precision*, so that any individual, even by having recourse to the knowledge of a specialist expert, is able to order his social conduct. In order to meet these requirements, *the internal rule must provide protection against arbitrary interference by public authorities with the rights and freedoms guaranteed by the Convention, by defining the limits and the manner in which the prerogative of restricting the exercise of those rights and freedoms may be exercised*"[6].

On the other hand: „The Court has recognised that the level of precision of national legislation, *which cannot in any event provide for all hypotheses*, *depends to a large extent on its content*, *the field to which it applies* and *the number and status of those to whom it is addressed*."[7].

However, the Convention and its related case law *do not specify to which category the law providing for the restriction must belong* [8] and the „silence" is justified since the countries parties *define religious freedom differently and give it different protection*.

The Constitution of Romania[9] provides, in turn, in art. 29 para. (1), as a *principle*, that: „Freedom of religious beliefs *cannot be restricted in any way*.". For this reason, the State and third parties have a *negative obligation* [obligation *in abstinendo*][10] not to initiate actions having the effect of *restricting the evoked freedom*.

By way of exception, the exercise of religious freedom can be restricted, respecting the conditions stipulated in art. 53 para. (1) and (2) and with the mention that *the restriction operation does not target religious freedom itself*, *but its exercise*, an aspect that calls for the respect and protection of religious freedom, as a value enshrined at the constitutional level.

Also, in the same view, it is necessary to dissociate the term „restriction", used by the Constitution, from the term „prohibition", on the grounds that *the restriction allows the* reduced exercise of religious freedom even in exceptional situations, while the prohibition does not. Therefore, the latter term *is not compatible with the constitutional* requirements and it is regrettable to use art. 5 para. (3) lit. a) from Law no. 55/2020[11].

Concerning exceptional situations, the Constitution of Romania, states in art. 53 para. (1) the condition that the restriction of the exercise of certain rights and freedoms be carried out by law[12], *in the case of the rights and freedoms included in Chapter II of Title II*, *it is the*

law as a formal act of Parliament[13]. Therefore, we deduce that there are rights and freedoms that are not fundamental and that can be restricted by acts inferior to the law, from a formal point of view. Religious freedom, being included in Chapter II of Title II of the Constitution, benefits from the high-level protection regime, in the sense of its restriction by law, as a formal act of the Parliament.

Moreover, if *the general regime of cults is regulated by organic law* [cf. Art. 73 para. (3) lit. s)], being *a domain reserved for it*, *the more the restriction must be made through it*.

Therefore, any restriction operated by acts inferior to the organic law [e.g. ordinary law, emergency or simple ordinance, government decision, ministerial order etc.] must be excluded *de plano and sanctioned through constitutional or administrative litigation*, as the case may be.

The Law no. 489/2006[14] configures religious freedom in a similar manner to the Convention, ruling in art. 1 paragraph (1) *respect and guarantee by the State of the fundamental right to religious freedom*, art. 2 para. (1) enshrining *the rule of its exercise*, with the exposition of the *content*, and para. (2) referring to the assumption of *restriction*, *by way of exception.*

The specificity of art. 1 paragraph (1) is given by the fact that, at the legal level, the State, through the three powers, legislative, executive and *judicial*, not only must respect religious freedom in the sense of refraining from actions with prohibitive effect, *but is also positively obliged even to guarantee its exercise*, *in the sense of facilitating*, *supporting*.

On the other hand, since religious freedom is included in Chapter II of Title II of the Constitution, chapter entitled *Fundamental rights and freedoms*, the restriction of its exercise can be achieved *by law*, *stricto sensu*, *the evocation at the level of the law of the conditions of restriction appears as useless*.

Any acts subsequent to the law, restrictive *per se*, will be subject to *legality control* even through direct reference to the relevant conventional and constitutional provisions. In fact, para. (2) of art. 2 of the law of cults represents an almost *faithful copy of art. 9 para. (2) of the CoEDO*.

Issues regarding the status of judges and their interference with religious freedom

Art. 5 para. (1) from *Law no. 303/2004* on the status of judges and prosecutors[15] qualifies as *incompatible the position of judge with any public or private position.*

Art. 6 regulates *the obligation to declare and verify whether or not the judge belongs to the security bodies*, *as an agent or collaborator*, and art. 7 establishes *the prohibition of the judge to be an operative*, *including undercover*, *informer or collaborator of any intelligence service*. And in this last case, the judge has *the obligation to declare*.

Other prohibitions that target the judge are those related to: *commercial activities, arbitration activities in civil*, *commercial or other disputes*; *the capacity of associate or member in the management*, *administration or control bodies of companies*, *credit or financial institutions*, *insurance/ reinsurance companies*, *national companies or autonomous governments*; *membership of an economic interest group*, *political parties or formations*; *political activities and opinions*; *defamatory manifestation or expression*, *in any way*, *to the other powers of the state – legislative and executive*; *public expression of opinion regarding ongoing processes or cases that have been referred to the prosecutor's office*; *written or verbal consultations in litigious matters and participation in audiovisual shows of a political nature.*

Observing *these obligations*, *incompatibilities and prohibitions*, we can conclude that *they do not even remotely target religious freedom*, the legislator not considering that this could in any way harm the status or activity of the judge.

How justified is the reason for the exercise of religious freedom to be absent from the magistracy capacity exam?

Art. 25 para. (2) from Law no. 303/2004 provides, *as a principle*, that: „*Unjustified absence* from the capacity examination […] *entails the loss of the quality of trainee judge*...".

By way of exception, para. (3) of the same states that: „The person who, *for justified reasons*, *did not appear for the capacity exam* can take this exam if no more than 2 years have passed from the end of the internship to the date set for the exam, the stipulations of para. (2) are applied accordingly".

The law *does not mention*, however, *which are the justified reasons that can cover the absence from the exam*, being *extremely difficult*, in this case, *an objective assessment on the part of the addressees of the rule*, *namely the trainee judges and the Plenary of the CSM*.

It is certain that *the justified reasons appear as an exception* and it would be necessary to treat it *in a strict and limiting way*, but, due to the lack of regulation, the margin of appreciation of the recipients is very wide and acquires *valences of impermissibly high subjectivity*. This being so, it is very difficult to clearly assess the justified character or not of the exercise of religious freedom, as a reason for absence from the magistracy capacity exam.

On the other hand, art. 11 of the Statute of the Seventh-day Adventist Church in Romania[16] imposes: „According to the fourth commandment of the Decalogue, Seventh-day Adventist believers *observe Saturday*, *starting from Friday at sunset until Saturday at sunset, as a day of rest and religious holiday [...] and does not do any work on this day for material purposes or temporal interest, even when it comes to work*...".

How legal and thorough is the solution of the CSM Plenary to reject the request formulated with good faith, and can it limit religious freedom?

According to art. 36 para. (1) lit. c) from Law no. 317/2004[17]: „*The Plenary of the Superior Council of the Magistracy* has the following attributions regarding the examinations of judges and prosecutors – *organizes* and validates, according to the law and the Regulation, *the capacity examination of judges and prosecutors*...".

In its turn, the applicable Regulation[18] mentions in art. 6 para. (4), that: „The Superior Council of the Magistracy, for good reasons, *at the request of the trainee judge* or the trainee prosecutor, *with the approval of the head of the court* or the prosecutor's office where he works, *can approve the postponement of the capacity examination only once*.".

In this case, the contentious issue *was the contradictory view* of the parties involved in the conflict, namely the trainee judge and the CSM Plenary, on the justified character or not of the reason for the exercise of religious freedom.

From a legal point of view, the CSM Plenary was empowered to approve the requested postponement to the judge, but the collegial body considered the groundless reason, citing, among other things, that: „*religious situations may cause some candidates to request a change in the exam calendar*. „.

Personally, I consider that *the statement is very serious*, because, in essence, an *a priori reference is made to the idea that the very exercise of religious freedom can disrupt the conduct of the competency examination in the magistracy*.

Secondly, the CSM Plenary substantiates the rejection of the request with *purely hypothetical situations*, such as: „if the requests were admitted [...] it would lead to..." and „the organization and development would be seriously disrupted...", and in order to give indisputable validity to what was presented, the Plenary invokes the final hypothetical argument, that: „*it could end up* that every day of the week candidates who share religious beliefs invoke the impossibility of supporting the evidence [...] which would lead to a real deadlock."

In another note, the manner of presenting the arguments also suggests *the bad faith that trainee judges could show in the exercise of religious freedom*, *around the magistracy capacity exam*.

It is true that around important exams we all become closer to the holy things, but to suggest bad faith *a priori*, without the slightest proof of this, is equivalent *to a pre-condemnation*.

In conclusion, the request was *rejected on the consideration that the possibility of the occurrence of situations which*, *until now*, *have not materialized*.

As for *the prohibitive character of the solution to reject the request, with reference to religious freedom*, *some detailed clarifications* are required.

Primo, the Plenary of the CSM has the obligation not to adopt acts with prohibitive effects for religious freedom, because they would be disregarded the provision of the Art. 53 para. (1) of the Constitution and art. 2 para. (2) from Law no. 489/2006.

Secundo, the solution given by the CSM Plenary *does not aim to prohibit the exercise of religious freedom*, but, in a similar situation, *it could have an interdictive effect to the extent that a trainee judge*, *for fear of being excluded from the magistracy for lack of on the aptitude test*, *he would choose not to exercise his religious freedom on the day of the test*, although according to his faith he should attend the Assembly.

Obviously, in this case *the choice would not be a free one*, but *made under the rule of fear of exclusion from the profession*. In the case of the lady judge, *the rejection solution did not have an interdictive effect*, because, independently of it, *she chose to exercise religious freedom*.

Criteria for the correct resolution of such requests

Ab initio, it is necessary to specify that what is said here represents a *personal opinion*, which may *suffer corrections* from those who possess much more practical experience. Solving such requests is far from easy, those called to analyze them being obliged to consider and evaluate *several aspects*, as follows:

1. Religious freedom is fundamental, being enshrined in the CoEDO and in the Constitution, it cannot be subject to other restrictions than those provided by law;

2. Romanian Constitution confers *a high level of protection on religious freedom, which can only be restricted by law as a formal act of the Parliament*. Therefore, *the religious freedom cannot be restricted or prohibited by acts inferior to the law*;

3. The Constitution of Romania establishes *the competence of the CSM in sanctioning judges*, *under the conditions of the organic law* [art. 125 para. (2)] and *the incompatibility of the position of judge with any other public or private position* [art. 125 para. (3)];

4. According to art. 57 of the fundamental law: „The romanian citizens [...] must exercise their constitutional rights and freedoms *in good faith*, *without violating the rights and freedoms of others*.". Considering that *good faith is presumed* and, correlative to this, *that bad*

faith must be proven [art. 14 para. (2) Civil Code [19], it must be observed that *the CSM Plenum* did not prove bad faith on the part of the trainee lady judge, nor that by exercising religious freedom she violated a specific right or freedom. And, despite these gaps, by formulating the appeal, she was put in a position to prove her good faith before the High Court, in the exercise of religious freedom. It should also be noted that *the judge made only one request regarding the change of the exam date*, as far as she is concerned, and there are no indications that she would have requested such exceptional exemptions in the past or that she would not have followed the schedule of permanence on Saturday;

5. By the act committed, the lady judge did not violate the provisions regarding obligations, incompatibilities and prohibitions, which is why *she cannot suffer any sanction*. From this perspective, *the exclusion from the magistracy constituted a genuine sanction*;

6. Law no. 303/2004 *does not define what are the justified reasons that can cover the absence from the magistracy capacity exam* and, practically, the CSM *benefits from a wide margin of appreciation* regarding the justified character of the reason for the exercise of religious freedom, being able to assess in a *arbitrary, subjective or abusive manner*. Thus, from the perspective of the CuEDO's[20] jurisprudence, the law *is not sufficiently clear and does not offer effective* protection against the phenomena shown above;

7. On the other hand, the CSM has *the faculty to approve a request of this kind, not the obligation*, *but, to the extent that religious freedom is exercised in good faith and no right or freedom is harmed*, *why could it not be approved?*

8. The status of a judge is *freely assumed*, also involving some privations[21] except that, in the present case, *the religious freedom is not subject to any obligation*, *incompatibility or prohibitions*, in the sense of Law no. 303/2004;

9. *In essence*, the merits of the request were not analyzed objectively, being *purely hypothetical situations*, *not materialized until the present moment*. Moreover, the trainee judge was indirectly accused of disrupting the magistracy capacity exam and creating a blockage regarding it, because *if such requests were admitted*, *it would lead to this result*. Also, her request was not approved and in order not to leave *the possibility* of creating such a precedent;

10. Those called to analyze such requests have the obligation to balance *the presumption of exercising religious freedom in good faith*, *the disapproval of the request to change the date of the exam for this reason*, *the obligation to appear at the judicial capacity exam, as well as the consequences related* and to offer a solution in the spirit of the law.

Open conclusions

Based on the above, it was obvious that the balance tilted in favor of the trainee judge, which is why an appropriate solution was imposed. Religious freedom *should not be treated like a Cinderella of fundamental rights and freedoms, only on the grounds of the separation of religion from the state and its neutrality in relation to religious beliefs*. Unfortunately, however, freedom is marginalized and analyzed very little at the present time precisely because it *addresses the spirit*, in the context of a society strongly affected by materialism and irrational consumption, and *the spiritual disappointment*, caused, in part, by the moral shortcomings of some or others, causes manifestations of indifference, disregard or even hostility. But, beyond these, the case of the trainee judge is a chance for the state authorities to relate correctly to religious freedom, especially since it contributes, to a large extent, to the social good.

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- Potrivit doctrinei budiste, *Silā* este educaţia cea mai morală, stilul de viaţă ascetic, simplist, abţinerea de la comiterea faptelor nepotrivite, unul din cele trei izvoare ale acesteia fiind trăirea în mod corect, aspect ce implică *interdicţia producerii vreunei suferinţe sau vătămări*;
- Adică de legislaţia naţională. BÎRSAN, Corneliu, *op. cit.*, p. 718;
- „La Cour rappelle sa jurisprudence constante selon laquelle l'expression « prévues par la loi » figurant aux articles 8 à 11 de la Convention non seulement exige que la mesure incriminée ait une base en droit interne, mais vise aussi la qualité de la loi en cause: ainsi, celle-ci doit être suffisamment accessible et prévisible, c'est-à-dire énoncée avec assez de précision pour permettre à l'individu – en s'entourant au besoin de conseils éclairés – de régler sa conduit [arrêts *Sunday Times c. Royaume-Uni* (n°. 1), du 26 avril 1979, série A, n°. 30, p. 31, § 49, *Larissis et autres c. Grèce*, du 24 février 1998, *Recueil* 1998-I, p. 378, § 40, *Hashman et Harrup c. Royaume-Uni* (GC), n°. 25594/94, § 31, CEDH 1999 -VIII, *Rotaru c. Roumanie* (GC), n°. 28341/95, § 52, CEDH 2000-V].". Vezi şi par. 84 din *cauza Hassan şi Tchaouch c. Bulgariei*;
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- „Această sintagmă poate fi interpretată într-un sens larg şi într-un sens restrâns. În teoria dreptului, precum şi în practica parlamentară şi în cea executivă, se consideră că termenul de lege poate fi folosit nu numai pentru forma de exprimare a voinţei legislative a Parlamentului, ci şi pentru ordonanţele adoptate de Guvern, fie în baza unei legi de abilitare, fie în temeiul delegării constituţionale [ordonanţele de urgenţă]. În sens restrâns, termenul de lege utilizat

de Adunarea Constituantă în art. 53 alin. (1), se referă la actul normativ adoptat de Parlament potrivit procedurii constituţionale şi legale şi promulgat de Preşedintele României.". IONESCU, Cristian şi DUMITRESCU, Corina Adriana [coord.], *Constituţia României. Comentarii şi explicaţii*, Ed. Ch. Beck, Bucureşti, 2017, p. 627; „Potrivit textului menţionat, restrângerea se poate înfăptui numai prin lege. Chiar legea poate face acest lucru numai dacă se impune, după caz, pentru: apărarea siguranţei naţionale, a ordinii publice, a sănătăţii ori a moralei publice, a drepturilor şi libertăţilor cetăţenilor, desfăşurarea instrucţiei penale; prevenirea unei calamităţi naturale ori a unui sinistru deosebit de grav.". UGLEAN, Gheorghe, *Drept constituţional şi instituţii politice*, *vol*. I, ediţia a IV-a revizuită şi adăugită, Ed. Fundaţiei România de Mâine, Bucureşti, 2007, p. 217;

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LA SUCCESSION EN CAS DE DISSOLUTION DE L'UNITÉ DE CULTE OU DE L'ÉGLISE FONDATRICE ET LA VOCATION DU DIOCÈSE OU DU MONASTÈRE SUR LES BIENS SUCCESSORAUX – UNE APPROCHE JURIDICO-CANONIQUE[1]

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Résumé

Incontestablement, la personne morale „vit" et exerce ses droits en matière de succession. D'autre part, bien que sa „mort", en tant que phénomène spécifique, se produise au sein de l'institution qui prêche la vie éternelle, l'Église orthodoxe roumaine a choisi de réglementer les questions relatives à la succession de manière à ce que les biens restants de la personne physique décédée ou de l'unité cultuelle ou de l'église fondatrice „décédée" soient légalement recueillis par une autre personne morale. Toutefois, pour une approche très correcte, il est nécessaire de partir de la liberté religieuse et du droit à l'héritage, tout en utilisant les dispositions légales et canoniques nécessaires. L'objectif de cette demarche est donc de traiter le sujet de manière interdisciplinaire, en espérant qu'il apportera une valeur ajoutée à la manifestation scientifique de cette année et à la science juridique en général.

Mots-clés*: Liberté religieuse, succession, Eglise Orthodoxe Roumaine, statut, canons.*

La liberté religieuse

La manière dont l'Eglise orthodoxe roumaine a choisi de régler les questions relatives à la succession, qui est une expression de la liberté religieuse, demande une référence nécessaire à celle-ci et, la liberté religieuse ayant fait l'objet d'analyses antérieures, celles-ci seront bien entendu prises en compte dans la mesure de leur pertinence.

La *Constitution Roumaine*[1] prévoit à l'Art. 29 para. (3): „Les cultes religieux sont libres et s'organisent selon leurs propres statuts, dans les conditions prévues par la loi". Comme on peut le constater, la Constitution consacre la liberté des cultes religieux comme un principe général, le droit de s'organiser par des statuts, dans les conditions de la loi, étant une expression concrète de la liberté dont les cultes religieux doivent jouir dans un Etat démocratique[2]: „Le statut représente l'acte juridique d'organisation et, en même temps, de liaison du culte religieux à l'Etat"[3] et aux tiers. Quant à l'Eglise orthodoxe roumaine, elle a une tradition de près d'un siècle d'organisation statutaire, ce type d'acte étant une création du Métropolite Andrei Saguna[4]. Il convient également de souligner que la liberté religieuse n'est pas absolue et qu'elle peut impliquer l'application du principe de l'État de droit, dans le cas où certaines dispositions statutaires contreviennent à d'autres de nature juridique. Cette conclusion peut facilement être acceptée si l'on observe l'intention du législateur constituant de consacrer l'obligation de respecter la loi à l'article 1(1). (Enfin, l'art. 29 para. (En vertu de cette

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autonomie, les cultes religieux peuvent s'organiser et élaborer des règles spécifiques sur la base desquelles ils peuvent fonctionner[7]. Se référant au principe d'autonomie, la Cour constitutionnelle de Roumanie a jugé dans une décision d'espèce que: „il ne serait plus respecté si les tribunaux de droit commun exerçaient un contrôle sur les décisions prises par les tribunaux disciplinaires et ecclésiastiques en matière doctrinale, morale, canonique et disciplinaire"[8]. Par conséquent, le principe visé n'est pas de nature purement formelle, mais a une consistance constitutionnelle, dans le sens suivant: „les dispositions de la loi qui portent atteinte à certaines dispositions des statuts d'organisation et de fonctionnement des cultes religieux ne doivent pas y déroger, le principe d'autonomie des cultes religieux par rapport à l'Etat étant de rang constitutionnel". D'autre part, il convient également de trouver un équilibre entre le principe du respect de la loi [article 1er, paragraphe (5)] et le principe de l'autonomie des cultes religieux par rapport à l'Etat (article 29, paragraphe 4), équilibre que la Cour devra également maintenir par sa jurisprudence"[9].

La *Loi n° 489/2006*[10] contient certaines dispositions relatives à l'organisation des cultes religieux, c'est pourquoi elles doivent être invoquées. Ainsi, l'art. 8 para. (1) stipule que les cultes religieux „s'organisent et fonctionnent sur la base des dispositions constitutionnelles et de la présente loi, de manière autonome, selon leurs propres statuts ou codes canoniques". A titre liminaire, meme si la loi fondamentale utilise le terme de statut, l'Eglise romano-catholique, compte tenu de son mode d'organisation spécifique, n'assimile pas un tel concept, utilisant des codes canoniques[11], à savoir le Code de droit canonique[12] et le Code des canons des Eglises orientales[13]. Ces deux codes ont été reconnus par l'exécutif par la décision H.G. n° 1.218/2008[14], mais l'exposé des motifs de la décision n'a pas invoqué l'article 29, paragraphe 3, de la Constitution, comme l'a fait la Cour européenne des droits de l'homme. (3) de la Constitution, comme dans le cas de la H.G. n° 53/2008[15] par la quelle on a reconnu le Statut d'organisation et de fonctionnement de l'Église orthodoxe roumaine.

Ces problèmes factuels et juridiques conduisent à deux questions: dans quelle mesure l'expression juridique „codes canoniques" est-elle constitutionnelle? et est-il possible d'interpréter le terme constitutionnel „loi" de manière à permettre à l'exécutif de reconnaître également les codes canoniques? Mais, en conclusion, l'art. 8 para. (1) circonscrit l'organisation et le fonctionnement des cultes religieux à la pyramide normative de la liberté religieuse, à savoir: la constitution, la loi et le statut/code canonique. Concrètement, les dispositions constitutionnelles et légales constituent la base de l'organisation et du fonctionnement des cultes religieux, et leur autonomie est justifiée tant que les dispositions statutaires ne contreviennent pas à la constitution ou à la loi. Pour parler de situation conflictuelle, il faut que la constitution et la loi, d'une part, et le statut d'un culte religieux, d'autre part, réglementent un domaine spécifique comme, par exemple, l'héritage. Il faut également que les hypothèses prévues par cette loi diffèrent substantiellement de celles prévues par la constitution et la loi, auquel cas le principe de l'autonomie des cultes religieux par rapport à l'Etat ne peut être invoqué. Il n'y a cependant pas de conflit entre les dispositions constitutionnelles et légales d'une part et les dispositions légales d'autre part si la constitution et la loi „se taisent" [16] en ce qui concerne une matière réglementée par la loi.

Le droit des confessions religieuses et des unités de culte subséquentes à l'héritage en vertu de la loi de l'État

La *Constitution de la Roumanie* a consacré à l'héritage l'un de ses textes les plus courts, l'article 46 stipulant: „Le droit à l'héritage est garanti". Ce droit découle du droit de

propriété[17] et implique „l'exercice continu du droit de propriété d'un bien, même après la disparition physique du titulaire, par d'autres personnes"[18] En essence, le droit d'héritage a une double composante. D'une part, une personne, en tant que disposant du bien, a le droit de déterminer à qui revient sa succession ou un ou plusieurs de ses biens seront dévolus après qu'elle aura cessé d'exister, et d'autre part, la personne qui acquiert la succession ou le ou les biens de cette personne en tant qu'héritier a le droit de faire reconnaître et respecter ce mode d'acquisition. Autrement dit, l'article 73, paragraphe (3) m) exige que le régime général des successions soit régi par une loi organique. Par conséquent, les différentes dispositions relatives à la succession ne peuvent pas être considérées comme dérogatoires [speciales] au régime général si elles ne respectent pas la condition mentionnée ci-dessus, puisque la Cour constitutionnelle de Roumanie a montré la distinction à faire entre le régime général de réglementation et les réglementations spécifiques. Les aspects qui relèvent du régime réglementaire général, et qui sont strictement du ressort de la loi organique, sont ceux qui ont une importance sociale significative, tandis que les règles spécifiques sont celles qui ont une moindre importance sociale [19]. Concrètement, par les règles spécifiques de moindre importance sociale on fait l'application du régime réglementaire général, dans les limites fixées par ce dernier. Les règles spécifiques de moindre importance sociale ne peuvent pas non plus être considérées comme dérogeant au régime réglementaire général [de grande importance sociale], précisément en raison de leur importance minimale, de sorte qu'elles ne peuvent pas interférer avec le domaine réservé à la loi organique.

La *loi n° 489/2006*, quant à elle, contient des références qui ne semblent pas déroger au régime général applicable au droit d'héritage. D'une manière générique, l'art. 27 al. (1) prévoit la possibilité pour les confessions religieuses et les établissements religieux qui leur succèdent d'acquérir des biens mobiliers et immobiliers dont ils peuvent disposer conformément à leurs statuts. Ainsi, selon le texte légal, d'une part, on reconnait aux cultes et leurs successeurs la capacité juridique générale de participer au circuit civil en enrichissant leur propre patrimoine et, d'autre part, ils se voient reconnaître la prérogative d'exercer le droit de disposition sur les biens acquis, conformément aux dispositions statutaires. En même temps, l'art. 31 al. (1) prévoit *expressis verbis* la possibilité pour les personnes morales susmentionnées d'acquérir par succession les biens en question, qui ne peuvent faire l'objet de revendications ultérieures[20], s'ils sont entrés légalement dans le patrimoine des cultes religieux et des unités cultuelles subséquentes. Pratiquement, l'irrecevabilité d'une réclamation surviendra dans la mesure où la partie ne prouvera pas l'illégalité de l'acquisition du bien et, d'un point de vue procédural, je considère que la résolution correcte de l'exception exige qu'elle soit jointe au fond.

Le *Code civil*[21], quant à lui, regorge de dispositions de nature successorale, mais celles qui nous intéressent dans le cadre de la présente analyse sont celles relatives à la personne morale. L'article 953 du Code civil dispose que: „La succession est la transmission du patrimoine d'une personne physique décédée à une ou plusieurs personnes vivantes". Comme on peut le constater, cet article exclut la possibilité de transmettre le patrimoine d'une personne morale par voie successorale, et la doctrine précise: „les règles du droit successoral ne peuvent être appliquées [...] en cas de cessation de l'existence d'une personne morale; même si, en cas de cessation de l'existence des personnes morales, il y a transmission universelle ou à titre universel, la cessation de l'existence des personnes morales (et ses effets) est réglée par des actes normatifs spéciaux (par exemple, art. 244 et suivants du code civil, loi sur les sociétés n° 31)". Code civil, loi sur les sociétés n° 31/1990, loi n° 85/2006 sur les procédures

d'insolvabilité)"[22]. Toutefois, la question que l'on peut se poser à propos de l'expression juridique „personnes décédées" est la suivante: dans quelle mesure est-elle constitutionnelle, étant donné que la loi fondamentale garantit, sans distinction, le droit à l'héritage? En outre, l'obligation de garantir le droit à l'héritage est-elle remplie par l'État si la personne morale ne peut hériter que par testament? En contre-argumentation, on peut affirmer que: la Constitution elle-même habilite le législateur à réglementer le régime général des successions [cf. article 73(3)(m)], et le mode de réglementation est strictement une question d'opportunité, raison pour laquelle la Cour constitutionnelle de Roumanie ne pourrait pas se prononcer. Il convient également de préciser que la législation civile ne prévoit pas expressément la possibilité pour une personne morale d'accéder à une succession testamentaire[23], mais elle résulte implicitement de l'article 1037 du code civil, selon lequel: „Toute personne qui réclame un droit fondé sur un testament doit en prouver l'existence et le contenu dans l'une des formes prévues par la loi".

La succession en cas de dissolution de l'unité de culte ou de l'église fondatrice et la vocation du diocèse ou du monastère sur les biens de succession conformément au statut d'organisation et de fonctionnement de l'Église orthodoxe roumaine.

Le *Statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine*[24] contient des dispositions de type „successoral" applicables à la personne morale, face à laquelle on doit avoir l'approche adéquat. Toutefois, il convient de noter ab initio que la dynamique de la vie religieuse en Roumanie entraîne naturellement l'établissement[25] et la dissolution d'unités cultuelles ou d'églises de fondation. Ces deux réalités sont causées par plusieurs facteurs tels que, par exemple, l'opportunité, le degré d'implication des fidèles dans le soutien de l'unité cultuelle, le niveau de soutien accordé par les autorités de l'Etat etc [26]. Au niveau du statut, l'art. 175 énonce: „En cas de dissolution d'une unité cultuelle ou d'une église de fondation, la propriété de tout son patrimoine est transférée à l'unité cultuelle hiérarchiquement supérieure qui en disposera comme propriétaire du patrimoine ecclésiastique respectif „. En corroborant cet article avec l'art. 44 et l'art. 101 du statut, nous pouvons définir la dissolution de l'unité cultuelle ou de l'église fondatrice comme: la mesure approuvée par la Permanence du Conseil Eparchial, basée sur les exigences missionnaires et pastorales locales, la localisation des paroisses et des branches dans une zone géographique, ainsi que sur les possibilités économiques de fonctionnement. Les termes „unité cultuelle" et „église fondatrice" ont des significations différentes et requièrent donc des rapports différents. L'Art. 14 para. (2) de la loi n° 489/2006 définit les unités cultuelles comme les structures avec ou sans personnalité juridique, établies et organisées par le culte religieux, conformément à son propre statut, règlement ou code canonique [27]. Il n'existe pas de définition statutaire de l'unité de culte, mais on peut en déduire que l'expression comprend à la fois les lieux où sont célébrés les services religieux et les structures éminemment administratives appartenant à l'Église orthodoxe roumaine [la métropolie, l'archidiocèse, la paroisse] [28]. Ensuite, la notion d'église fondatrice désigne l'entité fondée sur la base de l'acte de fondation, qui est gouvernée en vertu de celui-ci par le hiérarque ou son délégué[29]. Cette catégorie comprend strictement les lieux de culte dans lesquels des services religieux sont célébrés et qui sont organisés en monastères, églises paroissiales ou églises de paroisse, chapelles etc. Dans le cas d'un lieu de culte, il s'agira toujours d'un acte inter vivos, alors que l'acte constitutif de l'église de fondation peut également être un act mortis causa [par exemple le testament]. Revenant à l'article 175 du Statut, il mentionne le transfert de propriété de l'ensemble du patrimoine de l'unité

cultuelle/église de fondation abolie à l'unité cultuelle hiérarchiquement supérieure. La vérification de la supériorité hiérarchique de l'unité cultuelle implique essentiellement la vérification de sa capacité statutaire à „ recueillir „ ledit patrimoine[30] et l'évaluation de son statut par rapport à l'entité supprimée, avec l'application, entre autres, des dispositions de l'art. 110 para. (1)[31], de l'art. 84 para. (1)[32], de l'art. 69 para. (1)[33], et 47 par. (1)[34] et (2)[35] du Statut. Concrètement, une métropole aura la capacité statutaire de „collecter" le patrimoine d'un évêché, d'un prieuré, d'une paroisse, d'un monastère ou d'une chapelle subordonnés. Il en va de même pour un évêché par rapport à son diocèse, sa paroisse, son monastère ou sa chapelle subordonnés. Toutefois, une paroisse de catégorie supérieure ne pourra pas „recueillir" le patrimoine d'une paroisse de catégorie inférieure „décédée", car il n'existe pas de lien de subordination entre elles. D'autre part, même si l'on admettait qu'une paroisse est hiérarchiquement supérieure à sa fille[36], cette dernière n'ayant pas de personnalité juridique, elle ne peut être propriétaire d'un patrimoine[37]. La vocation du diocèse ou du monastère sur les biens de la succession ressort à son tour des dispositions des articles 195 et 196 du Statut. Ainsi, l'article 195 dispose: „Les éparchies ont vocation sur tous les biens successoraux de leurs hiérarques". Comme on peut le constater, la vocation est d'ordre général et concerne les biens successoraux acquis par le défunt en considération de sa qualité de hiérarque. A contrario, les biens acquis de cujus avant l'acquisition de ladite qualité dépassent la vocation du diocèse, et la preuve de l'existence de la qualité de hiérarque et du lien de causalité entre cette qualité et le mode d'acquisition des biens est de nature à écarter toute prétention de nature successorale de la part de tiers. Enfin, l'article 196 proclame la vocation générale du monastère sur les biens de la succession, comme suit: „Les biens des moines et des moniales, apportés avec eux ou donnés au monastère lors de leur entrée dans le monachisme, ainsi que ceux acquis de quelque manière que ce soit pendant leur vie dans le monastère, restent entièrement au monastère auquel ils appartiennent et ne peuvent faire l'objet de réclamations ultérieures".

Participation de la personne morale ecclésiastique à la succession selon le 40ème canon apostolique

L'organisation de l'Église dans son aspect visible ou institutionnel[38] a révélé la nécessité de créer des entités pour distribuer les biens acquis à des fins philanthropiques. Ainsi, diverses institutions d'aide sociale [par exemple, hôpitaux – Νοσοκομεῖα; asiles de veuves – Χηροκομεῖα; orphelinats – Ὀρφανοτροφεῖα etc.][39] ont été créées dès l'origine pour répondre aux besoins de diverses catégories de personnes vulnérables. De même, des structures administratives ecclésiastiques[40] ont été organisées, dont relevaient ces institutions d'aide sociale. Le droit romain ne leur a attribué la personnalité juridique qu'après le triomphe du christianisme[41] et le temps a montré que le patrimoine et la personnalité juridique sont des conditions essentielles pour que l'Église puisse accomplir sa mission sociale à travers les différentes entités. Les canons[42] n'indiquent pas expresis verbis la possibilité pour les entités susmentionnées de participer à la succession, mais il ressort clairement de ce qui précède qu'une telle prérogative est valable.

Canon apostolique 40 – „Que les biens personnels de l'évêque, s'il en a, soient connus, et qu'ils soient connus (aussi) ceux du Seigneur, afin que l'évêque soit libre, à sa mort, de laisser ses biens comme il le veut et à qui il veut, et que, non pas à cause des choses ecclésiastiques, ses biens puissent être perdus lorsqu'il a une femme et des enfants", ou des parents ou des serviteurs, qu'il est juste „aux yeux de Dieu et des hommes", que ni l'Église ne subisse une perte du fait de ne pas connaître les choses de l'évêque, ni l'évêque ou ses parents du fait de

l'Église ne soient volés ou que les partageurs de ses biens ne parviennent à un accord, et que sa mort soit couverte d'opprobre." Comme on l'a dit plus haut, à l'origine, les Églises locales ne jouissaient pas de la personnalité juridique romaine pour avoir droit au patrimoine, mais l'absence de personnalité juridique n'a pas empêché l'autorité ecclésiastique de formuler le présent canon de manière à évoquer une telle possibilité.

Cela montre que les règles de l'Église sont édictées au nom de l'Église et portent le sceau de la déclaration divine. Pour cette raison, elles dépassent les critères formels du droit mondain sur lequel elles se fondent [par exemple, l'étude d'impact, l'exposé des motifs, entrée ou sortie du droit etc.] Pratiquement, les règles de l'Église, c'est-à-dire les canons ou les saints canons, ont une application spécifique dans le temps, qui se fonde sur le mode d'organisation et de fonctionnement propre à l'Église, orienté vers l'éternité. Revenant au canon 40 apostolique, il rappelle la nécessité de l'existence de cette situation de séparation des biens[44], sans laquelle les litiges seraient inévitables. En même temps, le canon préserve le droit d'héritage de l'évêque en ce qui concerne les biens acquis personnellement, de telle sorte que son épouse[45], ses enfants et les autres personnes mentionnées y ont droit selon le statut juridique. Enfin, en ce qui concerne les biens non acquis à titre personnel, l'Église à laquelle appartient l'évêque aura une vocation canonique sur ces biens.

Conclusions

Ce qui précède révèle incontestablement l'interférence de deux systèmes de droit, dont les principes sous-jacents diffèrent fondamentalement. Cependant, le système de droit ecclésiastique, qui est également façonné par référence aux réalités sociales et pas seulement ecclésiastiques, a dû être circonscrit, dans une certaine mesure, par le système de droit étatique. Et, comme résultat de ce processus, si au début les structures administratives ecclésiastiques n'avaient pas de personnalité juridique ni de patrimoine propre, plus tard elles ont bénéficié de ces éléments d'une extrême importance pour la mission philanthropique. Dans la première partie de cet article, j'ai fait référence à la liberté religieuse, car la manière dont l'Église orthodoxe roumaine réglemente les successions en est l' expression. Nous avons donc vu que les règles ecclésiastiques spécifiques qui s'appliquent au domaine de la succession sont soumises à la volonté de respecter la constitution et la loi, en vertu du fait que, d'une part, l'héritage bénéficie du niveau de protection le plus élevé et, d'autre part, parce que la loi sur les cultes elle-même contient des dispositions claires à cet égard. Les dispositions légales ont été analysées de la manière la plus détaillée, en clarifiant, entre autres, les aspects problématiques qui peuvent entraver le processus d'attribution de biens ecclésiastiques à une unité religieuse à la suite de la dissolution d'une autre église ou d'une église de fondation. Enfin, la clarification du 40ème canon apostolique a mis en lumière la thèse selon laquelle la capacité de succession des Églises locales a été attribuée par l'autorité ecclésiastique compétente, au nom de l'Église et avant l'octroi de la personnalité juridique par le pouvoir d'État.

J'espère que cette approche enrichira le patrimoine doctrinaire et pratique sur la succession, en attirant l'attention sur un sujet peu débattu dans la sphère juridique laïque mais qui, s'il n'est pas analysé de manière adéquate, risque de devenir une „tentation" de l'actuelle société de consommation.

References bibliographiques

[1] Modifiée et complétée par la loi sur la révision de la Constitution de la Roumanie n° 429/2003, publiée au Journal officiel de la Roumanie, partie I, n° 758 du 29 octobre 2003, republiée par le Conseil législatif, sur la base de l'article 152 de la Constitution, avec mise à jour des noms et renumérotation des textes (l'article 152 est devenu l'article 156 dans la forme republiée). La loi sur la révision de la Constitution de la Roumanie n° 429/2003 a été approuvée par référendum national les 18 et 19 octobre 2003 et est entrée en vigueur le 29 octobre 2003, date de la publication au Journal officiel de la Roumanie, partie I, n° 758 du 29 octobre 2003 de la décision de la Cour constitutionnelle du 29 octobre 2003. 429/2003 a été approuvée par le référendum national les 18 et 19 octobre 2003 et est entrée en vigueur le 29 octobre 2003, date de la publication au Journal officiel de la Roumanie, partie I, n° 758 du 29 octobre 2003 de la décision de la Cour constitutionnelle n° 3 du 22 octobre 2003 confirmant le résultat du référendum national des 18 et 19 octobre 2003 sur la loi relative à la révision de la Constitution roumaine. La Constitution de la Roumanie, dans sa forme originale, a été adoptée lors de la réunion de l'Assemblée constituante du 21 novembre 1991, a été publiée au Journal officiel de la Roumanie, partie I, n° 233 du 21 novembre 1991 et est entrée en vigueur après son approbation par référendum national le 8 décembre 1991;

[2] „L'art. 29 al. (3) contient deux phrases: „les cultes sont libres" et „les cultes s'organisent conformément à leurs propres statuts, dans les conditions fixées par la loi"". Cr. IONESCU et C. A. DUMITRESCU (coord.), *La Constitution de la Roumanie. Commentaires et explications*, Ed. Ch. Beck, Bucureşti, 2017, p. 398;

[3] R. ZIDARU, „ La restriction de l'exercice de la liberté religieuse autour des fêtes de Pâques – une analyse critique „, in: *Revista Universul Juridic*, année 2020, n° 6, p. 111;

[4] Dans le but d'unifier administrativement et de point de vue ecclésiastique toutes les communautés religieuses orthodoxes roumaines, situées sur un territoire qui, de manière arbitraire, appartenait à une puissance hostile à l'élément roumain, Andrei Saguna a élaboré le Statut organique du Métropolitat orthodoxe de Transylvanie. Ce statut a constitué la base de l'organisation statutaire ultérieure de l'Église orthodoxe roumaine en tant que patriarchie, et a été repris au niveau constitutionnel et appliqué aux autres religions reconnues par les lois en vigueur. Pour plus de détails sur ce statut, voir: P. BRUSANOWSKI, „Statutul canonic al Mitropoliei ortodoxe a Transilvaniei între 1864-1925", în: *Revista Teologică*, an 2018, nr. 3, p. 41-63;

[5] „Enfin, il convient de souligner le caractère directif de la loi, qui fixe les conditions dans lesquelles les cultes peuvent s'organiser. Elle fixe les conditions dans lesquelles les cultes religieux peuvent s'organiser et les dispositions réglementaires ne peuvent être contraires à la loi, le respect de la loi étant une obligation de rang constitutionnel [cf. article 1er, paragraphe 5]. Il s'agit donc d'une limitation à l'organisation interne des cultes religieux, limitation qui est posée par la Constitution in abstracto et qui devient in concreto lorsque la loi la prévoit expressément.". R. ZIDARU, *op. cit.* pp. 111-112;

[6] Il convient de noter que le principe de l'autonomie des cultes religieux par rapport à l'Etat et le principe de l'autonomie de l'Eglise par rapport à l'Etat ne sont pas exactement identiques, car le premier principe doit être compris dans la lumière des règles internes et internationales applicables et du fait qu'il se réfère à l'ensemble des 19 cultes religieux reconnus par la loi, alors que le second principe se réfère strictement à l'Eglise en tant qu'institution divino-humaine, qui n'est soumise à aucune limitation d'ordre mondain. En ce

qui concerne le principe de l'autonomie des cultes religieux par rapport à l'État, une décision de jurisprudence a mentionné: „Le concept d'autonomie des cultes religieux est né de la séparation entre l'État et l'Église, chacune de ces institutions ayant des compétences spécifiques qui ne s'interposent pas. La Cour européenne des droits de l'homme, dans son arrêt n° 3 de novembre 2009 dans l'affaire Lautsi c. Italie, a réaffirmé l'obligation de neutralité de l'État dans l'exercice de la puissance publique, notamment dans le domaine de l'éducation, en n'exposant pas de symboles religieux appartenant à une religion particulière dans les salles de classe. Dans le cas des confessions religieuses, le terme d'autonomie se réfère à la capacité de légiférer et de se conduire selon leurs propres statuts. Dans sa jurisprudence, la Cour européenne des droits de l'homme a jugé que l'existence autonome des communautés religieuses est indispensable dans une société démocratique et constitue un élément essentiel de la protection de la liberté religieuse garantie par l'article 9 de la Convention de sauvegarde des droits et libertés fondamentaux – Arrêt du 26 octobre 2000 dans l'affaire Hasan et Chaush c. à la Bulgarie". [v. Décision de la Cour constitutionnelle de Roumanie n° 448 du 7 avril 2011, publiée au Journal officiel de la Roumanie, partie I, n° 424 du 17 juin 2011];

[7] Dans la littérature spécialisée, l'autonomie des cultes religieux était définie comme suit: « la capacité des cultes de légiférer et de se conduire selon leurs propres statuts » [M. SAFTA, *Drept constituţional şi instituţii politice*. *Teoria generală a dreptului constituţional*. *Drepturi şi libertăţi*, vol. I, Ed. Hamangiu, Bucureşti, 2014, p. 232]; « le droit de l'Église d'établir unilatéralement les normes doctrinales, cléricales et judiciaires propres à sa nature et de se gouverner par elles, indépendamment de l'État » [Pr. I. G. CORDUNEANU, *Église et État: deux études*, Ed. Evloghia, Târguşorul Vechi, 2006, pp. 52-82] ou « la liberté de chaque culte d'organiser sa forme de rituel, l'éducation, les relations avec les adeptes de la secte, les relations avec l'État „ [M. ANDREESCU, „Libertatea conştiinţei. Implicaţii juridice şi religioase", în: *Management Intercultural*, an 2015, nr. 2 (34), p. 308];

[8] La décision de la Cour Constitutionnelle de Roumanie no. 448/2011 concernant l'exception d'non-constitutionnalité du disp. Art. 26 de la loi no. 489/2006 concernant la liberté religieuse et le régime général des cultes, publié au Journal Officiel de Roumanie, Partie I, no. 424 du 17 juin 2011;

[9] R. ZIDARU, *op*. *cit*., p. 113;

[10] Loi no. 489/2006 sur la liberté religieuse et le régime général des cultes a été republiée conformément à l'art. 248 de la loi no. 187/2012 pour l'application de la loi no. 286/2009 concernant le Code pénal, publié au Journal Officiel de Roumanie, Partie I, no. 757 du 12 novembre 2012, avec modifications ultérieures, donnant aux textes une nouvelle numérotation, initialement publié au Journal Officiel de Roumanie, Partie I, no. 11 du 8 janvier 2007 et a été modifié par la loi no. 76/2012 pour l'application de la loi no. 134/2010 concernant le Code de procédure civile, publié au Journal officiel de Roumanie, partie I, no. 365 du 30 mai 2012, avec modifications ultérieures;

[11] « D'un point de vue historique, l'expression « code canonique » n'est née qu'au début du siècle. au XIXe siècle, lorsque l'Église catholique promulgue son premier *Codex Iuris Canonici* [cf. *Codex Iuris Canonici Pio X Pontificis Maximi iussu digestu Benedicti Papae XV auctoritate promulgatus* (Praefatione, fontium annotatione et indice analytico-alphabetico ab Emo Petro Card. Gasparri auctus)], Romae, 1917.". G. GRIGORITA, „Legea nr. 489/2006 şi Biserica Ortodoxă Română", în: *Studii Teologice*, seria a III-a, anul III (2007), nr. 2, p. 198;

[12] Ou Codex Iuris Canonici, approuvé par la Constitutio Apostolica Ioannis Pauli P.P. II „Sacrae disciplinae leges" – 25 janvier 1983;

[13] « Le Codex Canonum Ecclesiarum Orientalium, le premier codex rédigé pour les Églises catholiques orientales, a été promulgué par le pape Jean-Paul II le 18 octobre 1990, par le biais de la constitution apostolique Sacri Canones. Son texte original a été publié dans Acta Apostolicae Sedis 82 (1990), pp. 1061-1363." G. GRIGORITA, „Legea nr. 489/2006 şi Biserica Ortodoxă Română", în: *Studii Teologice*, seria a III-a, anul III (2007), nr. 2, p. 199 – nota de subsol nr. 122;

[14] Publié dans le Moniteur Officiel de Roumanie, Partie I, no. 798 du 27 novembre 2008;

[15] Concernant la reconnaissance du Statut pour l'organisation et le fonctionnement de l'Église orthodoxe roumaine, publié au Moniteur Officiel de Roumanie, Partie I, no. 50 du 22 janvier 2008;

[16] Il s'agit du « silence » bien connu de la loi, une situation qui permet à la loi de prévoir différentes hypothèses;

[17] I. MURARU et E. S. TĂNĂSESCU, *Drept constituţional şi instituţii politice*, ediţia a XV-a, vol. I, Ed. Ch. Beck, Bucureşti, 2016, p. 176; M. ANDREESCU M. ANDREESCU et A. PURAN, *Drept constituţional. Teoria generală şi instituţii constituţionale. Jurisprudenţă constituţională*, ediţia a IV-a, Ed. Ch. Beck, Bucureşti, 2020, p. 322;

[18] M. ANDREESCU et A. PURAN, *op. cit.*, p. 322;

[19] « La Cour Constitutionnelle a montré la distinction entre les aspects qui relèvent du régime juridique général de la propriété et ceux qui relèvent strictement de la loi organique, conformément à l'art. 73 par. (3) alinéa. m) de la Constitution, et les autres éléments à travers lesquels le législateur configure le contenu et les limites du droit de propriété et qui peuvent également se situer au niveau du droit commun. La Cour a établi, en principe, que le régime de la propriété et des droits de propriété, et toujours à un niveau général, représente une réalité juridique qui régit des relations juridiques d'une grande valeur sociale, qui appelle une régulation par une loi organique, tandis que les règles spécifiques pour l'exercice des attributs du droit de propriété représentent une autre réalité juridique, de moindre importance, qui peut être fixée par des lois ordinaires ou, le cas échéant, par des ordonnances (Décision n° 5 du 14 juillet 1992, publiée (Journal Officiel de Roumanie, Partie I, n° 173 du 22 juillet 1992). [v. Décision de la Cour Constitutionnelle n°. 432 du 5 octobre 2022 relative à l'exception d'inconstitutionnalité de la loi modifiant et complétant la loi no. 17/2014 concernant certaines mesures visant à réglementer la vente de terres agricoles situées en dehors de la ville et à modifier la loi no. 268/2001 concernant la privatisation des entreprises qui gèrent les terres publiques et privées de l'État à des fins agricoles et la création de l'Agence des Domaines de l'État, publiée au Journal Officiel de Roumanie, Partie I, no. 1047 du 28.10.2022]";

[20] La disposition elle-même s'écarte des dispositions de l'art. 563 du Code Civil, selon lequel: « (1) Le propriétaire d'un bien a le droit de le réclamer au possesseur ou à une autre personne qui le détient sans droit. Il a également droit à des dommages-intérêts, le cas échéant; (2) Le droit de réclamation n'est pas prescrit, sauf dans les cas où la loi en dispose autrement; (3) Le droit de propriété acquis de bonne foi, conformément à la loi, est pleinement reconnu; (4) La décision judiciaire par laquelle l'action en réclamation a été admise est opposable et peut être exécutée également contre le tiers acquéreur, selon les termes du Code de procédure civile.". Il serait intéressant d'observer si, lors d'un examen de constitutionnalité, la disposition dérogatoire du droit des cultes resterait valable, compte tenu des dispositions de l'art. 21, selon lequel: « (1) Toute personne peut se tourner vers la justice pour la défense de ses droits, libertés et intérêts légitimes; (2) Aucune loi ne peut limiter l'exercice de ce droit.";

[21] Loi no. 287/2009 a été republié conformément à l'art. 218 de la loi no. 71/2011 pour l'application de la loi no. 287/2009 concernant le Code civil, publié au Journal officiel de Roumanie, partie I, no. 409 du 10 juin 2011, initialement publié au Journal Officiel de Roumanie, Partie I, no. 511 du 24 juillet 2009, modifié par la loi no. 71/2011 et rectifié au Journal Officiel de Roumanie, Partie I, no. 427 du 17 juin 2011 et au Journal Officiel de Roumanie, Partie I, no. 489 du 8 juillet 2011;

[22] Frère. DEAK et R. POPESCU, *Tratat de drept succesoral*. *Moştenirea legală,* vol. I, ediţia a III-a actualizată şi completată, Ed. Universul Juridic, Bucureşti, 2013, p. 31; I. URS, *Drept succesoral*. *Curs universitar*, Ed. Universul Juridic, Bucureşti, 2017, p. 18;

[23] «... les règles qui régissent la transmission successorale sont, en principe, également applicables aux personnes morales, aux unités administratives territoriales (communes, villes, communes) ou à l'État, dans les cas et dans la mesure où elles se présentent comme acquéreurs du patrimoine ou de certains biens du patrimoine de la personne physique décédée.". Le P. DEAK et R. POPESCU, *Tratat de drept succesoral. Moştenirea legală*, vol. I, ediţia a IV-a actualizată şi completată, Ed. Universul Juridic, Bucureşti, 2019, p. 31;

[24] Le Statut d'organisation et de fonctionnement de l'Église orthodoxe roumaine a été republié au Journal Officiel de Roumanie, Partie I, no. 97 du 10 février 2020, conformément à l'art. II de l'Ordre du Secrétaire d'État du Secrétariat d'État aux Cultes n°. 116/2019, publié au Journal officiel de Roumanie, partie I, no. 13 et 13 bis du 10 janvier 2020. Le Statut d'organisation et de fonctionnement de l'Église orthodoxe roumaine a été reconnu par la Décision gouvernementale no. 53/2008, publié au Journal Officiel de Roumanie, Partie I, no. 50 du 22 janvier 2008, et a été rectifiée au Journal Officiel de Roumanie, Partie I, no. 132 du 20 février 2008;

[25] Loi no. 489/2006, concernant la création d'unités sectaires, stipule ce qui suit: « art. 14 – (2) Les unités sectaires, y compris leurs filiales sans personnalité juridique, sont créées et organisées par les sectes selon leurs propres statuts, règlements et codes canoniques; (3) La création de l'unité sectaire doit être communiquée, pour enregistrement, au Secrétariat d'État aux cultes [le 26/05/2014, par. (3) de l'art. 14 a été modifié par la rectification no. 489 du 28 décembre 2006, publié au Journal Officiel de Roumanie, Partie I, no. 387 du 26 mai 2014.]; (4) Les unités religieuses nouvellement créées en tant que personnes morales peuvent demander et recevoir un soutien financier, dans les conditions prévues par la loi.";

[26] Selon les objections formulées par le Secrétariat d'État aux Cultes concernant le soutien financier accordé aux unités religieuses pour la construction/réparation de lieux de culte ou pour d'autres activités réalisées par elles, l'Église orthodoxe roumaine a enregistré en 2021 un diminution drastique de 114 585 480 lei. Concrètement, en 2020, elle a reçu un soutien financier de 214 198 000 lei et en 2021 de 99 612 520 lei. Pour plus d'informations, consultez l'adresse: http://culte.gov.ro/?page_id=474. Lien consulté le 14 avril 2023, 14h28 [heure roumaine]. Il est évident que l'impossibilité de maintenir un lieu de culte détermine l'autorité compétente pour le supprimer;

[27] Loi no. 489/2006 stipule ce qui suit: « art. 14 – (2) Les unités sectaires, y compris leurs filiales sans personnalité juridique, sont créées et organisées par les sectes selon leurs propres statuts, règlements et codes canoniques; (3) La création de l'unité sectaire doit être communiquée, pour enregistrement, au Secrétariat d'État aux cultes [le 26/05/2014, par. (3) de l'art. 14 a été modifié par la rectification no. 489 du 28 décembre 2006, publié au Journal Officiel de Roumanie, I ère Partie, no. 387 du 26 mai 2014.]; (4) Les unités religieuses nouvellement créées en tant que personnes morales peuvent demander et recevoir un soutien

financier, dans les conditions prévues par la loi.". Il convient de noter que l'obligation de notifier au Secrétariat d'État aux Cultes la création d'une nouvelle paroisse ne constitue pas nécessairement une condition *ad validitatem* dont le manquement placerait l'unité religieuse nouvellement créée dans un régime d'illégalité; de son côté, la législation fiscale définit le terme « unité locale de culte » de la manière suivante: « – unité dotée de la personnalité juridique, élément constitutif de la structure organisationnelle locale d'un culte religieux, conformément à la loi et à ses propres statuts canoniques/ codes, qui obtient des revenus, conformément à la loi d'organisation et de fonctionnement, et tient une comptabilité en partie unique conformément à la réglementation comptable applicable. [le 04-04-2020, l'article 7 du chapitre III, titre I a été complété par le point 1, article II de la loi n°1. 32 du 31 mars 2020, publié au Journal Officiel de Roumanie, Ière Partie, no. 271 du 1er avril 2020]. Voir: Loi no. 227 du 8 septembre 2015 concernant le Code Fiscal, publié au Journal Officiel de Roumanie, Partie I, no. 688 du 10 septembre 2015;

[28] Comme on peut le constater, l'expression légale unité de culte n'est pas synonyme de l'expression statutaire unité de culte, la première ayant un sens large, eo ipso elle inclura également l'église fondatrice;

[29] Conformément à l'article 180 allumé. c) extrait du Statut: « Les Églises sont fondatrices. ». L'article 183 mentionne, quant à lui: « (1) Les églises de fondation, établies sur la base des actes constitutifs, sont régies d'après ces documents par le locataire ou son délégué. Elles sont sous la juridiction et le contrôle de l'autorité de l'archidiocèse et de l'épiscopat du point de vue religieux, administratif-patrimonial et de gestion comme les églises paroissiales, se soumettant aux mêmes droits et obligations envers le diocèse; (2) Les actes constitutifs de ces églises seront toujours mis en accord avec les dispositions de ce statut par les autorités ecclésiales. Au contraire, l'église, avec tous ses biens meubles et immeubles, passe dans l'administration du diocèse.";

[30] Même si certains spécialistes du domaine successoral font une distinction fondamentale entre le décès de la personne morale et la dissolution de la personne morale, il faut admettre que les deux phénomènes sont quelque peu similaires puisqu'ils conduisent à la cessation définitive de la vie de la personne. activité. C'est pour cette raison que je considère que, lato sensu, on peut aussi parler d'une capacité statutaire de « successeur » de l'unité cultuelle supérieure à « récolter » le patrimoine de l'unité cultuelle/église fondatrice « décédée », dans la mesure où la capacité de successeur est admise., au sens strict. Stricto sensu: la capacité successorale représente « la capacité d'une personne à se soumettre aux droits et obligations qu'implique la qualité d'héritier ». L. STĂNCIULESCU, *Curs de drept civil. Succesiuni*, Ed. Hamangiu, Bucureşti, 2012, p. 27. Dans une autre définition: « la capacité d'hériter peut être définie comme la capacité de la personne à avoir des droits et des obligations découlant de la qualité d'héritier ». D. NEGRILĂ, *Moştenirea în Noul cod civil. Sinteze teoretice şi practice*, ediţia a II-a revăzută şi adăugită, Ed. Universul Juridic, Bucureşti, 2015, pp. 77-78;

[31] « Sous la relation canonique et administrative, les évêchés et archevêchés sont regroupés en métropolities. »;

[32] « Les diocèses sont des unités ecclésiales composées d'un certain nombre de paroisses, regroupées en doyennés, ainsi que de monastères situés sur un certain territoire. Les institutions éducatives théologiques et confessionnelles, socio-philanthropiques etc. peuvent fonctionner au sein des diocèses.";

[33] « Le doyenné (protoieria) est une unité administrative ecclésiastique qui comprend plusieurs paroisses d'arrondissement sur le territoire d'un même diocèse. »;

[34] « Dans les diocèses de l'Église orthodoxe roumaine, compte tenu des conditions missionnaires-pastorales et du nombre de fidèles, des possibilités matérielles, ainsi que de leur localisation dans le milieu urbain ou rural, les paroisses sont de 3 catégories, sur la base de critères établis par les conseils diocésains.";

[35] « Le classement des paroisses par catégorie est approuvé par la Permanente du Conseil diocésain, sur la base du rapport contenant les données statistiques officielles (nombre de fidèles, conditions matérielles, zone géographique, âge moyen etc.). »;

[36] Du point de vue de l'organisation territoriale de l'Église, filia était, à l'origine, une église indépendante située dans une petite communauté (village). L'unification au fil du temps de plusieurs de ces communautés en une grande communauté, a déterminé l'autorité ecclésiastique à désigner une église paroissiale parmi les églises du territoire des anciennes petites communautés, les autres lieux acquérant le statut de filiales et étant placés dans un régime de dépendance à l'égard de l'église paroissiale;

[37] L'une des conditions nécessaires que doit remplir une entité pour pouvoir avoir la personnalité juridique est qu'elle soit propriétaire d'un patrimoine. En ce sens, l'art. 187 du Code civil stipule: « Toute personne morale doit disposer d'une organisation indépendante et de son propre patrimoine, affectée par la réalisation d'un certain objectif licite et moral, conformément à l'intérêt général. ». Voir également P. TRUSCĂ et A. M. TRUSCĂ, *Drept civil. Persoanele*, ediţia a II-a revăzută şi adăugită, Ed. Universul Juridic, Bucureşti, 2015, pp. 213-214; E. CHELARU, *Drept civil. Persoanele*, ediţia a IV-a revizuită şi adăugită, Ed. Universul Juridic, Bucureşti, 2016, pp. 194-195. Les dispositions contenues dans le règlement intérieur de l'Église orthodoxe roumaine ne dérogent pas à la règle énoncée ci-dessus, à savoir que les branches n'ont pas de personnalité juridique parce qu'elles ne possèdent pas de patrimoine. Ces structures ecclésiastiques ressemblent aux succursales de sociétés commerciales;

[38] Le terme Église vient du grec Ελληνικά, traduit littéralement par la Maison de l'Empereur. Gh. IOANIDŬ, *Dikţionarŭ Elino – Româneskŭ tradusŭ dupe a luĭ Skarlatŭ D. Bizantie*, Ed. Tipografia Statuluĭ, Bukureştĭ, 1864, p. 709. L'Église se manifeste aussi visiblement ou institutionnellement, conférant des droits et établissant des obligations, sans être une organisation éminemment spirituelle. réalité. En ce sens, la littérature spécialisée a montré: « En se manifestant dans la société, l'Église est obligée de porter un vêtement mondain et institutionnel. Le caractère institutionnel de l'Église est un moyen nécessaire dans le monde, mais il ne doit pas devenir une fin en soi. L'Église porte le vêtement de l'institution, mais il faut que la lumière de la grâce brille à travers ce vêtement. Le Christ a assumé la nature humaine comme Son image. L'Église assume également le caractère institutionnel qui lui est propre, mais cela ne doit pas contraindre l'identité eschatologique, mais faciliter la communication et aider l'Église à se faire comprendre par ce monde dominé par la mentalité institutionnelle. En même temps, l'organisation ecclésiale doit être marquée par une dominante ecclésiologique, les principes de l'organisation canonique prenant leur source dans les fondements que le Christ a posés pour la communion de ceux qui le suivent". Père P. VLAICU, *Biserca. Realitate eshatologică şi prezenţă instituţională*, in: *Tabor*, an 2007, nr. 2, p. 46; voir aussi: P. I. BRIA, *Dicţionar de Teologie Ortodoxă*, Editura Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române, Bucureşti, 1990, p. 56; „la Chiesa è visible parce que visible i rite, la doctrina, la predicazione, il culto, i mezzi, il capo". G. DIBLASI, *Compendio*

di Dritto Canonico, à la demande de l'éditeur, Naples, 1852, p. 6. Compte tenu de ce qui précède, nous pouvons également dire que: « la Chiesa e una società d'hommes». Le père MERCANTI, *Compendio di Dritto Canonico con Illustrazioni*, edizione treza, t. I, part. I, Ranieri Guasti [éd.], Prato, 1843, p. 6;

[39] Pour plus de détails, consulter le père. L. STAN, « Instituţiile de asistenţă socială în biserica veche (I)", în: *Ortodoxia*, an 1957, nr. 1, pp. 94-118 şi *idem*, „Instituţiile de asistenţă socială în biserica veche (II)", în: *Ortodoxia*, an 1957, nr. 2, pp. 259-278;

[40] Par structures administratives ecclésiastiques, il faut comprendre, dans le cas présent, les diocèses, archiprêtres, paroisses, monastères etc., qui commandent l'activité des institutions d'assistance sociale mentionnées ci-dessus;

[41] « L'Église et ses institutions religieuses et caritatives n'étaient connues dans le droit romain comme personnes morales, au même titre que le Sénat, les collèges ou les corporations, qu'après le triomphe du christianisme, à commencer par l'édit de Milan et ensuite avec l'approbation favorable. mesures prises par Constantin le Grand et les empereurs suivants. » I. IVAN, *Bunurile Bisericii în primele şase secole. Situaţia lor juridică şi canonică*, în coll. Studia Canonica, Ed. Basilica, Bucureşti, 2014, p. 66;

[42] Le terme canon était expliqué ainsi: « Le mot Κανών onvient du grec et signifie règle; on s'en est servi dans l'Église pour les décisions qui règlent la foi et la conduite des fidèles.". Cf. avec: Mgr ANDRÉ et de L'Abbé CONDIS, *Dictionnaire de Droit Canonique et de Sciences en relation avec le Droit Canon*, reviz. par J. Wagner, 3e édition, t. I, Hipolyte Walzer Libraire – Éditeur, Paris, 1901, p. 280; aussi pour le sens régulier du mot canon, voir aussi: R. NAZ, *Dictionnaire de droit canonique*, tome II, Paris, 1937, p. 1283; Il convient également de prendre en compte les définitions suivantes, figurant dans divers dictionnaires généraux: « CANON [du grec kanôn, règle] – en Théologie et en Liturgie, ce mot a plusieurs acceptations fort différentes. Les Canons de l'Église sont les lois et les règles de la discipline ecclésiastique.". Voir: M. N. BOULLIET, *Dictionnaire Universel des sciences*, *des Lettres et des Arts*, 4e édition révisée, Librairie de L. Hachette et Clé, Paris, 1859, p. 253; « DROIT CANON – le terme « canon » est un mot grec qui vient de l'hébreu et signifie « roseau ou tige droite », utilisé pour mesurer un « étalon »; „CANON – esta palabra, que viene de un término griego que designa una regla de medir, se aplica en la Iglesia en general.". Cf. cu: L. BOUIER, *Dictionario de Teología*, Ed. Herder, Barcelona, 1973, p. 131; „CANON – signifie règle, loi [...] IV. CANONS DES CONCILES – se dit des lois, des décrets ou décisions prescrits par les conciles sur la foi, la discipline ou les moeurs.". Voir en ce sens: L'Abbe J. B. GLAIRE, *Dictionnaire universel des sciences ecclésiastiques*, t. I, Ed. Libraire Poussielgue Frères, Paris, 1868, p. 386; trebuie avută în vedere şi sintagma: „CANON LAW – in a broad sense, is the totality of legal regulations concerning church life. In its narrow [formal] sense, it is the totality ofthe rules that derive from church authorities.". A. P. KAZHDAN, *The Oxford Dictionary of Byzantium*, Oxford University Press, New York, 1991, p. 372; „CANON – c'est-à-dire norme et règle concernant l'éthique chrétienne, le culte, la discipline du clergé, le monachisme, l'organisation et la juridiction de l'Église, promulguées par les synodes œcuméniques ou locaux, ou recommandées par les Pères de l'Église. En général, les canons représentent la législation ecclésiale, qui constitue l'objet du droit ecclésial. D'après: le P. I. BRIA, *op*. *cit*., p. 78;

[43] Pr. I. MIHĂLCESU [*et alii*], *Scrierile Părinţilor Apostolici dimpreună cu Aşezămintele şi Canoanele Apostolice*, Editura Facultăţii de Teologie din Chişinău, Chişinău, 1928, p. 274; dans une traduction sensiblement différente, le père archidiacre Ioan FLOCA

rend le canon 40 sous la forme suivante: « Que les propres biens (choses) de l'évêque soient montrés (clairement connus) (au cas où il aurait aussi ses propres biens) et qu'ils soient montrés (clairement connus) et les princiers (les biens du Seigneur, de l'Église), afin que l'évêque ait le pouvoir, à sa mort, de laisser ses biens à qui il veut et comme il veut; et que les biens de l'évêque ne devaient pas être perdus sous la parole qu'ils seraient des biens ecclésiastiques, lorsqu'il aurait une femme et des enfants ou des parents ou des membres de sa maison. Car il est juste devant Dieu et devant les hommes que l'Église ne subisse aucun dommage en raison de l'ignorance des biens de l'évêque, et que ni l'évêque ni ses proches ne dilapident ses (biens) pour le bien de l'Église ou ne tombent dans des querelles. (épreuves) de lui, et que sa mort soit couverte de reproches." Arhid. I. N. FLOCA, *Canoanele Bisericii Ortodoxe*. *Note şi comentarii*, Editura Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române, Bucureşti, 1992, p. 30;

[44] Cette situation s'apparente à celle de la separatio bonorum en droit romain, résultant de l'exercice d'une action ayant pour tel objet, de distinguer les biens de l'héritier de ceux du défunt et de connaître la limite de satisfaction du les créanciers du défunt de la succession. Pour plus de détails, voir: E. MOLCUŢ, *Drept privat roman*, ediţie revăzută şi adăugită, Ed. Universul Juridic, Bucureşti, 2011, p. 162;

[45] En ce qui concerne la possibilité pour l'évêque, au début, de se marier et l'interdiction ultérieure pour lui d'avoir une épouse, il a été démontré dans la littérature spécialisée que: « Le Synode de Nicée [325] a montré qu'il Il n'y a pas de contradiction entre le sacerdoce et le mariage, c'est pourquoi il a autorisé l'ordination des personnes mariées. Au lieu de cela, l'Église orthodoxe impose le vote monastique aux candidats à l'épiscopat [hiérarchie – s.n.]. De même, l'Église n'autorise pas le mariage après l'ordination, ni le remariage des prêtres. Depuis le XIIe siècle [Concile du Latran, 1139], l'Église catholique romaine a imposé le célibat aux prêtres, étant entendu que le célibat appartiendrait à la nature du sacerdoce et signifierait une disponibilité au service de l'Église. Luther s'oppose avec véhémence au célibat des prêtres catholiques. Les pasteurs, comme les laïcs, sont libres de se marier ou non. Le pape Jean-Paul II, dans sa lettre Mulieris Dignitatem [Dignité de la femme] de septembre 1988, rejette l'ordination des femmes. L'argument: Jésus était un homme. Les apôtres étaient des hommes, l'Église n'ordonnait pas de femmes. Les orthodoxes utilisent les mêmes arguments contre l'ordination des femmes comme prêtres et évêques, mais pas comme diaconesses. Les protestants acceptent les femmes dans le ministère." Pr. I. BRIA, *Tratat de teologie dogmatică şi ecumenică*, Atelierele Tipografice Metropol, Bucureşti, 1999, p. 182. Le Père Gheoghe Soare, conformément à la tradition de l'Église, indique également l'ordination comme un obstacle au mariage: « Ordination. L'Église, selon les dispositions canoniques, interdit le mariage, après avoir reçu l'ordination aux échelons hiérarchiques de: diacre, prêtre et hiérarque. Les canons qui empêchent cela sont d'autorité œcuménique et l'Église ne peut en aucun cas surmonter cet obstacle. »; Pr. Gh. SOARE, *Les obstacles au mariage*, dans la rev. „Église orthodoxe roumaine",l'an LXI, nr. 4-6, luna aprilie – iunie, Bucureşti, p. 237. Vezi şi: ". Γ. Α. ῬΑΛΛΗ και Μ. ΠΟΤΛΗ, *ΣΙΝΤΑΓΜΑ ΤΩΝ ΘΕΙΩΝ ΚΑΙ ΙΕΡΩ ΚΑΝΟΝΩΝ ΤΩΝ ΤΕ ΑΓΙΩΝ ΚΑΙ ΠΑΝΕΥΦΗΜΩΝ ΑΠΟΣΤΟΛΩΝ ΚΑΙ ΤΩΝ ΙΕΡΩ ΟΙΚΟΥΜΕΝΙΚΩΝ ΚΑΙ ΤΟΠΙΚΩΝ*, *t.* δ, ΕΚ ΤΗΣ ΤΥΠΟΓΡΑΦΙΑΣ Γ. ΗΑΡΤΟΦΙΛΑΚΟΣ, ΑΘΗΝΗΣΙΝ, 1852, p. 33.

Section F

GOOD FAITH IN CONTRACT MATTERS/ IN THEIR FORMATION AND EXECUTATION

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Abstract

This paper aims to analyze one of the most controversial issues of civil law – good faith – the fundamental notion in the evolution of the Romanian legal system. It will investigate the role and importance of good faith in the matter of contracts, focusing on three specific areas: sale as a random legal report, loan with interest and its simulations, incidents in the matter of tenancy. This analysis explores the evolution of the concept of good faith in civil law, its underlying principles and its impact on the formation, execution and interpretation of contracts.

Inspired by the words of Marcus Tullius Cicero, „Here good faith, beyond cunning", the work attempts to establish the differences between the approach based on good faith and that based on such cunning practices in the context of contractual relations. Through the detailed analysis of these aspects, the paper proposes a deeper understanding of how good faith influences contractual dynamics and contributes to the balance and stability of legal relations.

Keywords: *equity, good faith, contracts, evolution, concept, foundation, research.*

Introducere

Throughout the history of law, the concept of good faith has been a constant presence, evolving and adapting according to social, economic and legal changes. In a fascinating journey through time, we can observe how this essential principle has found its place in the hearts and minds of legislator and has become a cornerstone of contractual relationships worldwide.

To truly understand the concept of good faith, we must start from the moment of its appearance.

We find that the history of the concept of good faith can be traced back to the Roman period. The Romans developed the concept of „*bona fides"* as a fundamental virtue in interpersonal and commercial relationships. During the Roman Empire, good faith was recognized and applied in various areas of law, including contracts and binding relationships.

During the medieval period, religious and philosophical influences continued to shape understanding and application of the principle of good faith. The increasing power of the Catholic Church has brought with it an emphasis on moral values and Christian ethics in human relationships and daily life. Christian moral principles such as honesty, fairness, and mercy were integrated into medieval legal thought. Canon law and feudal laws of the time promoted the idea that respect and good faith were the cornerstones of interpersonal and legal relationships.

During the reign of Napoleon Bonaparte, centuries of legal development were synthesized and unified into the famous Civil Code of Napoleon, also known as the Napoleonic Code. This code, adopted in France in 1804, had a significant impact not only in the country where it was adopted, but also in other parts of Europe, such as Germany and

other territories under French influence. The Napoleonic Civil Code introduced and consolidated the concept of good faith in the European legal system. The principle of good faith has been recognized as a central element of legal and commercial relations, being integrated into various aspects of civil law. One of the distinctive aspects of the Napoleonic Code was its emphasis on equity and justice in contractual relationships. It enshrined the principle that parties must act honestly and loyally in all aspects of their contracts and afhere to moral and ethical principles in their relationships.

With the development of modern law, the concept of good faith has undergone significant evolution and diversification. Within contemporary legal systems, good faith is recognized as a fundamental principle governing contractual and civil relationships. It is considered an essential norm of conduct that imposes on parties the obligation to act with honestly, loyally and with integrity in all aspects of their legal relationships.

Today, the concept of good faith is present in a variety of legal areas, including civil law, commercial law, and consumer law. It serves as a moral and legal standard for the behavior of parties in negotiations, the conclusion and execution of contracts, contributing to maintaining trust and stability in legal relationships.

One of the main issues is precisely defining good faith and establishing its boundaries in various contractual or legal contexts. Sometimes the extensive or narrow interpretation of the concept can lead to uncertainty or inconsistency in its application.

Theories developed in the legal literature for defining good faith

In the legal literature, attempts have been made to define good faith with the help of theories, which have become the subject of extensive and continuous debate. Through these theories, legal researchers and practitioners have sought to provide a deeper understanding of how good faith influences the interpretation and application of law in various legal fields.

Theory of the regime derogating from strict law

According to the theory of the regime derogating from strict law, good faith is perceived as an exception to the rigorous application of the rules of the common law. Thus, this theory asserts that, fundamentally, strict law must be applied, and good faith and bad faith are considered only special cases or derogations from this general principle. In essence, this approach emphasises the importance of strict law and places good faith within a framework of limited adaptation and flexibility, only in specific and well-defined circumstances.

Tripartite theory

It discusses three essential aspects for defining the concept of good faith:

-good faith is associated with equity, suggesting the idea of fair and loyal behavior in contractual relationships, which is fundamental to it;

-the foundation of good faith is the general idea of loyalty in contractual relationships. It opposes fraud and violence in contract formation and includes the common intention of the parties related to the purpose they had at the time of contract formation;

-good faith derives from an erroneous belief in which a person finds himself due to a defect in subjective law or an objective rule of law. This perspective emphasizes that good faith can be influenced by misinterpretations or gaps in a person's legal knowledge.

Bipartite theory

Bipartite theory reveals two fundamental aspects of good faith:

- **objective good faith**, which is equivalent to objectively assessed loyalty and is essential when concluding agreements. Its presence is crucial both at the time of conclusion and at the execution of agreements, contrary to fraud or fraud. As R. Vouin pointed out, through this form of good faith, „*the judge interprets the convention to soften its rigor or to make new circumstances applicable to it."* [1]

- **subjective good faith**: is erroneous belief, sincerity, the antithesis of concealment and lying. This aspect is based, in a considerable number of cases, on appearances, which form what is known in civil law as the „theory of appearance". As R. Vouin stated in „*La bonne foi"*, *„this belief is nevertheless objectively assessed by comparison with <<bonus vir>>, thus having a creative character."*

Unity theory of the concept of good faith

It has been pointed out in the doctrine that „*the notion of good faith is at once complex and unique",* being at the same time „*a comprehensive and living notion that deeply links law to psychology and especially to morality"*. Thus, good faith encompasses „*psychological concepts of intention and faith",* „*being passed from the realm of morality to that of law, taking on the character of a legal principle."*[2]

The theory of good faith as a concept with effects in the field of responsibility and nullity of legal acts

This thesis belongs to Robert Vouin and considers that „*it is important to portray good faith from the point of view of effects in various parts of its field of application, namely: in the field of civil liability and nullity of acts."* Thus, it proposes a bifurcated analysis: firstly, it investigates to what extent good faith can mitigate or eliminate responsibility, and secondly, it examines to what extent good faith can cover, totally or partially, the irregularity of a legal act. If so, he argues that this should be reflected in the form of ignorance or error, thus providing a framework for interpreting and applying good faith in the legal context.[3]

German legal literature theory on good faith

German authors noted that the Latin term „fides" was based on two Greek words: „pisis", meaning fidelity, and „pistis", meaning trust. Therefore, they proposed for good faith two terms Treu Und Glauben, which means loyalty and trust necessary in legal acts and especially in conventions, and gutter Glaube, which means erroneous and excusable faith, protected as such, equivalent to a right. The leading proponents of this theory were Wachter and Karl Georg Bruns.

[1] Robert Vouin, *La bonne foi*, p. 34; The bipartite theory was developed especially by the author Morel*, Cours de droit civil approfondi*, 1937, chapter: *La bonne foi dans les actes juridiques*.

[2] Francois Gorphe, *Le principe de la bonne foi*, p. 14-15.

[3] Robert Vouin, *op. cit*. p. 46.

2.1. Defining the concept of good faith

Although there is ample debate in legal doctrine and jurisprudence, the legislator has been content to limit the concept of good faith. Thus, the old Civil Code defined this concept by article 1898 para. (1), as: „*the owner's belief that the person from whom he acquired the property had all the qualities required by law to be able to convey to him the property."*

We can appreciate that the aforementioned statement is somewhat imprecise and unclear, since the legislator leaves room for a subjective interpretation of the concept of possessor's belief, which may vary according to the circumstances and individual interpretations of each person and professional in the field. The article also does not specify certain criteria or standards by which the owner's belief should be determined, which may lead to uncertainties in the application of the law and various interpretations in practice. The wording of this article can be considered ambiguous, and a very important aspect that the legislator chooses to touch on is that of limited relevance. In the context of arguing the vagueness and vagueness of the definition of this concept, the legislator prefers to present only a narrow aspect of real estate and does not seek to cover the full range of contractual or legal relations.

In the current Civil Code, the legislator makes efforts and tries to adapt the concept of good faith by defining it in three articles, namely: „*Any natural or legal person must exercise its rights and perform its civil obligations in good faith, in accordance with public order and good morals"*[4], „*The parties must act in good faith both when negotiating and concluding the contract, as well as throughout its execution. They may not waive or limit this obligation"*[5] and „*The party engaging in a negotiation shall be bound by the requirements of good faith."*[6]

In the case of the first mentioned article – article 14 Civil Code., in turn, can be considered vague and general, the legislator leaves it to the discretion of courts and legal practitioners to interpret and apply this principle, by not trying to provide a clear definition of what constitutes good faith and objective criteria for assessing conduct in accordance with this principle, which may create uncertainties in practice.

In contractual matters, art. 1170 New Civil Code (NCC) contains a legal rule imperative to act in good faith at both the pre-contractual and post-contractual stages, but the legislator fails to present in this case the meaning of the term good faith, as well as the failure to specify clear sanctions for breach of the obligation to act in good faith. Also in this category we will include art. 1272 NCC, which enshrines the function of supplementing good faith, according to which the contract is supplemented by the usual clauses, and in art. 1271 NCC is the regulation of the adaptive function, the legislature enshrining the hardship theory.[7]

The appearance of the third definition, mentioned above and found in art. 1183 Civil Code, does not clarify the problems encountered over the years, but reflects the attempt of the legislature to provide a general guide for the conduct of the parties in negotiations.

We will define good faith as a moral and legal principle, according to which parties involved in a legal relationship are obliged to act with honesty, loyalty and mutual trust. This involves behaving fairly and consistently with the reasonable expectations of the other parties, respecting the obligations assumed and avoiding any conduct that could unfairly prejudice the

[4] *Art. 14, New Civil Code.*

[5] *Art. 1170, New Civil Code.*

[6] *Art. 1183, New Civil Code.*

[7] Marius Ioan Floare, *Considerations of comparative law regarding the twin concepts of „good faith" and „bad faith" in contractual matters*, article published in Romanian Journal of Private Law nr. 2/2014.

interests of other contractors. Good faith is essentially a norm of conduct that helps maintain balance and trust in social relationships.

Despite everything I have presented above, it must be considered to respect this concept, which has come to have the rank of principle and which presents a solid basis for the development and interpretation of relevant jurisprudence in the field of good faith.

Good faith as a fundamental principle

It is interesting to note how the principle of good faith is addressed in different Civil Codes and jurisprudence from different countries. Although the formulation and extension of this principle may vary, it is clear that good faith occupies a significant place in the legal system of many states.

In the context of Romania, article 14 of the Civ. C. establishes that „*the obligation for all natural and legal persons to exercise their rights and fulfill their obligations in good faith, in accordance with the law, contract, public order and morality."*

Comparing with other Civil Codes, we can see that good faith is considered a fundamental principle in some jurisprudence.

The principle of good faith can be found in the French Civil Code, but also in the German Civil Code. Thus, the last sentence of art. 1134 of the French Civil Code provides that the agreement is to be executed in good faith, and article 242 of the BGB (German Civil Code) provides that the debtor is obliged to perform the obligation in good faith, taking into account normal practices. Likewise, art. 157 of the BGB provides that contracts must be interpreted in good faith, taking into account normal practice. In this regard, we can see that the wording of those articles of the French Civil Code and the BGB does not require the conclusion that we are in the presence of a principle of civil law called the principle of good faith. Art. 1134 of the French Civil Code and art. 242 of the BGB respectively refer to the application of good faith in contractual relations. However, it should be noted that the case-law in these countries has gone much further, making it possible to apply good faith in other civil law institutions as well.

Also, on March 1, 2019, in the Civil Code of the Republic of Moldova, the phrase „*protection of good faith"* is added in article 1. Article 3 of the Civil Code of Ukraine lists among the principles the principle of good faith. Article 1 para. (3) of the Civil Code of the Russian Federation states that when establishing, exercising and protecting civil rights and performing civil obligations, participants in civil relations must act in good faith. Art. 8 para. (4) of the Civil Code of Kazakhstan stipulates that citizens and legal entities must act in good faith in exercising their rights, reasonably and correctly observing the requirements contained in the legislation, moral principles of society. Both the Civil Code of the Netherlands (articles 11-13) and the Civil Code of Georgia (articles 8 and 361) contain references to the principle of good faith.[8]

The importance and role of good faith in contractual relations

Good faith plays a crucial role in contractual relationships, as revealed by the definition presented earlier, having significant importance in ensuring equitable interactions and promoting mutual trust between the parties. The old Civil Code, from 1864, highlighted the

[8] Sergiu Băieșu, *Good faith. Fundamental principle of civil law.*

definition of the contract in article 942, as follows: „*A contract is the agreement between two or more persons to establish or extinguish a legal relationship between them."*

After the appearance of the current Civil Code, the legislator makes an amendment to the aforementioned article: „*The contract is the agreement of will between two or more persons with the intention of establishing, modifying, transmitting or extinguishing a legal relationship"* (art. 1166). Representing a legal instrument that fulfills multiple essential functions in society, the contract is the main source of binding legal relationships.[9]

As a regulation, we notice an improvement in the definition existing in the current Civil Code, compared to the provisions of the old Civil Code, in the sense that the current regulation provides that through the agreement of wills, the parties may establish, modify or extinguish a legal relationship, while in the previous regulation the parties could, by virtue of the legal regulation, only constitute or extinguish the existing legal relations between them.

We will present some key aspects of the importance and role of good faith in contractual relations.

4.1. Formation and negotiation of contracts

The new Civil Code regulates for the first time the principle of contractual freedom, as well as that of good faith. Contractual freedom translates into the possibility of choosing contractual partners, by the possibility to negotiate and establish the content of contractual clauses, implicitly of the effects of the contract.

This contractual freedom is limited only by law, public order and morality, according to art. 11 Civ. C., which imposes in a general manner the obligation to respect public policy and morality, without being able to derogate, through particular wills, from the laws concerning this area, the freedom not being absolute, but conditioned on these two imperatives, *being „a more direct manifestation of the social voluntarism which constitutes the theoretical basis of the contract".*[10]

In the formation phase of contracts, good faith imposes a standard of honest and loyal behavior between the parties. This denotes that the parties must provide accurate and complete information, not hide or distort relevant facts and act transparently and openly in the negotiation process.

An important aspect at this stage is the mechanism by means of which the agreement of wills of the parties is formed, specifying that all those conditions of validity of contracts, on which the valid birth of a contract depends, must be respected. Under section 1179 Civ. C., in order for a contract to be valid, the following conditions must be met:

1. ability to contract;
2. the consent of the parties;
3. a determinated and lawful object;
4. a lawful and moral cause.

Therefore, as regards the essential conditions for the validity of the contract, I shall consider both the substantive and the formal conditions. It is not necessary to confuse the conditions of formation and existence of the contract, which are essential, since the contract

[9] A.A. Moses, in FI. A Baias, E. Chelaru, R. Constantinovici, I. Macovei (ed.), *The New Civil Code. Commentary on articles*, Ed. C.H. Beck, Bucharest, 2012, p. 1219-1220.

[10] Trofin Hristache, *The effects of the contract in the conception of the New Civil Code.*

is null and void and cannot come into being without them (existence of consent, a specific object, a lawful cause), with the conditions of validity of the contract, which are not essential, without which the contract could „survive" – it could exist, but would no longer produce normal legal effects, being affected by relative nullity (capacity to contract, consent and vices, object in question).

In light of the formation and stability of contracts, it is clear that good faith plays an essential role, especially in the context of defects in consent, with particular attention paid to aspects of violence and fraud.

In the case of violence, good faith implies the obligation to act with integrity and respect towards the other party during negotiations and in the process of forming the contract. When a party resorts to threats or the exercise of physical or psychological force to induce the signing of a contract, the principle of good faith is violated. In such situations, the law may intervene to cancel the contract and protect the vulnerable party against the negative consequences of the violence exercised.

The same situation arises in the case of fraud, in violation of the principle of good faith, where one party intentionally conceals or distorts information relevant to the other party in order to obtain an unfair advantage or to cause the contract to be signed. In such situations, like violence, the law can intervene to cancel the contract, but also to ensure that the affected party receives the compensation due according to the damage suffered.

As far as contract negotiation is concerned, it is an art in itself, involving the formation of consensus between the parties involved on its essential elements. There are two ways in which a contract can be concluded. The first way is the negotiations between the parties on the contract to be concluded in the future, and the second is the unreserved acceptance of an offer to contract. Most authors[11] consider that the two modalities regulated in Article 1182 para. (1) C. civ. concerns the manner or stages of formation of the agreement of wills, and not the moment of conclusion of the contract, which is the same in both ways of forming the agreement of wills. The negotiation does not exclude the possibility that certain less important elements may be left aside, to be established later or delegated to another person, the parties agreeing on the essential elements of the contract, according to art. 1182, para. (2). In the event that no subsequent agreement can be reached on the secondary clauses or the person designated by the parties does not establish these terms, then, at the request of either party, the court shall order the completion of the contract, taking into account, according to the circumstances, the nature of the contract and the intention of the parties.

Article 1183 Civil Code sheds light on what matters most in negotiating the contract, namely that the parties must act with sincerity, loyalty and mutual fairness, thus reaching an agreement on at least the key issues. Crucially, this article encourages transparency and progress in negotiation, contributing to strengthening people-to-people and commercial relations.

According to art. 1183 para. (2) Civil Code., in negotiations conducted by the parties, they are bound by the requirements of good faith. The obligation imposed by the legal provision is imperative, the parties cannot limit or exclude this obligation from the burden of any of them. Moreover, the provisions of art. 1183 para. (3) Civil Code. give an example of

[11] For further information, see A.A. Moise, in FI. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (ed.), *The New Civil Code. Commentary on articles*, p. 1236 and Iosif Robi Urs, Petruța-Elena Ispas*, Civil Law. The Theory of Obligations*, Hamangiu Publishing House, 2015, p. 50.

conduct exercised contrary to good faith, i.e. if, although it does not intend to conclude a contract, a party initiates or continues negotiations already begun. If it is proved that the failure of one party to have caused damage to the other party(s), the party initiating, continuing or breaking negotiations contrary to good faith shall be obliged to compensate for the damage caused to the other party.

Article 1183 para. (4) contains certain criteria for assessing the amount of damage caused by lack of good faith in negotiations, specifying that in determining the damage, account shall be taken of the expenses incurred for negotiations, the waiver by the other party of other bids and any other similar circumstances.[12]

4.2. Performance of contracts

The phrase „*performance of the contract*" is synonymous with the performance due, according to the agreement of the parties. The execution of the contract carried out voluntarily is called in legal language, payment, regardless of the object of the obligations to which the contract gives rise: transmission of a right in rem, execution of a work, provision of a service, remittance of a sum of money or fulfillment of other conditions stipulated in the contract.

The execution of obligations can be achieved in two main ways: voluntary execution or payment (which is a direct execution or voluntary nature) – Article 1469 of the Civil Code, and forced execution (or „forced payment" which can be a direct execution in kind or indirect, i.e. equivalent) – Article 1527, Article 1530 of the Civil Code.

Direct or in-kind performance of obligations often takes place voluntarily, i.e. by payment. However, if the debtor has voluntarily refused enforcement, the creditor may request and obtain enforcement in kind by means of public coercion. Therefore, direct or in-kind performance of obligations may take place by payment, voluntarily made by the debtor, or by forced execution of the service, against the debtor's will, by coercion.

Indirect performance occurs when, for some reason, direct or in-kind performance is no longer possible or no longer of interest to the creditor. Please note that it is not a fortuitous impossibility of execution (in which case the obligation is extinguished as a result of the fortuitous event). Therefore, in this case, the creditor may claim from the debtor the payment of damages or damages in order to compensate for the damage he has suffered as a result of culpable non-performance or improper performance of the obligation.

The law and judicial practice enshrine the principle of real performance of obligations, i.e. performance in kind specific to its object. Performance of the contract must be done in good faith, the parties being bound to fulfill not only the obligations stipulated but also those resulting from the law of the contract, from local custom, equity or commercial usage. In all cases, each Party shall endeavour to prevent or mitigate any damage to either Contracting Party.

During the performance of contracts, good faith obliges the parties to comply with correctly established terms and conditions and to cooperate in achieving contractual goals. This means that each party must fulfil its obligations adequately and in a timely manner, avoid abusive or obstructive behaviour and provide collaboration and mutual assistance where necessary.

[12] Iosif Robi Urs, Petruța-Elena Ispas, *Civil Law. Theory of Obligations*, 2015, p. 51.

4.3. Interpretation and application of contracts; Preventing abuse and misconduct

It is true that the parties may stipulate in precise terms the extent of contractual rights and obligations, but there is also the possibility of an agreement of wills that leaves room for interpretation, the parties using general or improper legal terms or those capable of several meanings, as there is a possibility of a contradiction between the express manifestation of will and the internal will of the parties. In any of these situations, the rules of contract interpretation established by the Civil Code become incidental. These rules are intended to be useful both to the parties, when they interpret a previously concluded contract, and to the courts, when they are vested with the settlement of a dispute in which the rules of interpretation of contracts must be applied.

Thus, good faith is essential in the interpretation and application of contracts, providing a frame of reference for assessing the real intentions of the parties and the reasonable meaning of the contractual terms. This can help resolve any ambiguities or contradictions in the contract and identify fair and just solutions to disputes or disputes.

As far as legal regulation is concerned, article 1266 of the Civil Code stipulates that the interpretation of any contract must start from the concurring will of the parties, even if there are differences between the will and the literal meaning of the terms used. The contract must be interpreted reasonably, having regard to the real will of the parties and the principle of good faith. In addition to article 1266 Civ. C., the rules for interpreting the contract will also be found in article 1267 Civ. C. (*regulation of systematic interpretation, in doctrine – postulate of contract interpretation*[13] *– rule of coordinated interpretation of the contract*[14], in article 1268 Civ. C. (doubtful clauses), article 1269 Civ. C. (subsidiary rules of interpretation of the contract – provision interpreted in favour of the debtor).

Good faith functions as a barrier against abuse and misconduct in contractual relationships. The principle of good faith discourages fraudulent, misleading or abusive practices and protects more vulnerable parties from potential non-ethnic or unfair behaviour.

The Romanian Civil Code and other relevant laws provide protection against abuse and misconduct in contractual relationships. For example, article 1359 of the Civil Code provides that unfair terms in contracts are void. Also, Law nr. Regulation (EC) No 193/2000 on unfair terms in contracts concluded between traders and consumers also prohibits the use of unfair commercial practices and imposes penalties for infringements of these provisions.

In essence, good faith is the backbone of contractual relations, ensuring not only compliance with agreed terms and conditions, but also promoting a culture of integrity and mutual respect. By promoting transparency and loyalty between the parties, this principle helps to create a solid foundation for trust and sustainable collaboration in business and other aspects of legal life.

Good faith in case of sale as a random legal report

In Roman law, the sale was not translative of property, as in modern law, but only generating bonds that were to be executed after the conclusion of the contract, by subsequent and distinct acts. The effects of the sale consist of the bilateral and bona fide obligations of the parties.[15]

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[13] L. Pop, *Treatise on Civil Law. Obligations*, vol. II, p. 549.

[14] C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 9th ed., Hamangiu Publishing House, 2008, p. 57.

[15] Alina-Monica Axente, *Romanian Private Law Fiches*, Hamangiu Publishing House, 2023, p. 202.

In our time, according to art. 1.650, para. 1 Civ. C. – „*Sale is the contract by which the seller transmits or, as the case may be, undertakes to convey to the buyer the ownership of a good in exchange for a price that the buyer undertakes to pay."*

A random contract is „a contract which, by its nature or by the will of the parties, offers at least one of the parties the chance of gain and also exposes it to the risk of loss, which depend on a future and uncertain event, according to art. 1173 para. (2) of the New Civil Code. In other words, „the contract is random if the existence or extent of the parties' services or only one of them depends on an uncertain event" – paragraph (3). The advantages they will obtain are unknown, because the parties have bound themselves to each other according to a future event and uncertain as to its realization or at least the timing of its realization.

Extrapolating, randomness is not absolute, so there is nothing to prevent the parties from agreeing on elements which give the contract of sale such character. For example, the sale of inheritance rights, the sale of disputed rights, the sale of a future asset etc.[16]

5.1. Sale of inheritance rights

The contract for the sale of inheritance rights will be aleatory in nature, meaning that at the time of sale, it is not known whether the assets of the inheritance exceed the liabilities or vice versa. Additionally, the sale of inheritance rights could be aleatory when a person decides to sell their rights to an inheritance under the condition that the beneficiary survives for a certain period of time or under the condition of the outcome of an unresolved legal proceeding. In the presented cases, the fulfillment of the obligation by the buyer would depend on the realization of the uncertain event, making the transaction aleatory in nature.

5.2. The sale of contentious rights

The sale of litigious rights can be aleatory when there is uncertainty about the outcome of the litigation or the validity of the rights in question. This can occur in situations where there is an ongoing legal proceeding or a dispute being resolved, and the buyer acquires the rights with the associated risk of the litigation's outcome or the validity of the rights themselves. For example, suppose a person is in a dispute with another party regarding ownership rights to a piece of land. During the process, that person decides to sell their rights to the land to a third party. The transaction could be considered aleatory because the buyer assumes the risk of losing in the litigation or gaining ownership rights to the land if the outcome of the process is favorable to the seller. Therefore, the aleatory nature of the transaction is determined by the uncertainty of the litigation's outcome and the risk associated with acquiring litigious rights.

5.3 The sale of a future property

In general, the sale of a future asset can involve a degree of risk and uncertainty, which can render the transaction aleatory in nature. It's important for the parties involved to be aware of this aspect and properly assume the associated risks at the time of contract formation. For instance, let's assume a person sells the production rights of agricultural land subject to unpredictable weather conditions. In this case, the fulfillment of the contract and the value of the asset sold depend on uncertain external factors, such as the weather. Therefore, the

[16] Manuela Tăbăraş, *Special Contracts*, C.H. Beck Publishing House, Bucharest, 2013.

transaction becomes aleatory because there's no guarantee that the future asset will exist or have the same agreed-upon value at the time of contract formation.

We consider that, in certain cases, both the sale-purchase contract with a maintenance clause and the sale-purchase contract with a life annuity clause will be aleatory in nature.

5.4. The sale-purchase contract with a maintenance clause

The sale-purchase contract with a maintenance clause is nothing more than a special type of contract regulated by Romanian legislation. Essentially, this variation of the sale constitutes the maintenance contract itself, which the Civil Code analyzes as a distinct contract benefiting from its own regulation, within the provisions of articles 2,254 – 2,263.

In practice, a sale-purchase contract with a maintenance clause involves the transfer of ownership rights over a property, usually real estate, from the beneficiary of maintenance to the maintainer, but not in exchange for a price, but in consideration of assuming an obligation to maintain the acquired property for the „seller". Therefore, a sale-purchase contract with a maintenance clause entails not only the transfer of ownership but also the commitment of the „buyer" to provide maintenance to the „seller," usually for the remainder of the seller's life. Maintenance may include, for example, ensuring the basic needs of the beneficiary, such as food, clothing, cleanliness, medical care, material support etc.

In other words, the creditor of the maintenance obligation undertakes to provide maintenance according to the terms established in the contract, being a correlative obligation to the transfer of ownership of a property, at the time of contract formation. Therefore, since the commitment assumed through the maintenance contract remains in force even after the transfer of ownership, without either party knowing for how long, i.e., the extent of this maintenance obligation, this contract is aleatory. Additionally, if the buyer fails to fulfill the maintenance obligations, the seller may have legal remedies to cancel the sale-purchase contract with a maintenance clause.

5.5. The sale-purchase contract with a life annuity clause

The sale-purchase contract with a life annuity clause is a specific form of contract regulated in Romanian civil law, which involves an agreement where the „seller" (creditor) transfers ownership of a property, usually real estate, to a buyer (debtor), but not in exchange for a price, rather for a life annuity. This means that the seller receives a periodic sum of money (e.g., monthly or annually) throughout their lifetime. Specifically, the contract with a life annuity clause is indeed a special type of contract regulated by articles 2,242 – 2,253 of the Civil Code.

In a life annuity contract, the transfer of ownership rights occurs immediately, but the seller benefits from a life annuity, which is a periodic payment of a sum of money continuing throughout the seller's entire life. This type of contract is often used for real estate properties, where the seller, in exchange for the transfer of ownership, receives financial security for the remainder of their life. The contract must clearly specify the terms of the life annuity, including the amount, frequency of payments, and specific conditions under which they are required to be made. Thus, it is important for both parties to understand the long-term nature of the commitments assumed and the potential financial implications. For the seller, a major advantage is obtaining a stable and consistent income, which can be particularly beneficial for elderly individuals who have no other sources of income. For the buyer, the contract offers

the probable chance to acquire the property at an overall lower price, but with the commitment of long-term and indefinite payments at the time of contract formation. Therefore, the life annuity contract is also an aleatory contract because neither party can know or anticipate if the cumulative value of the annuity will exceed the value of the acquired property, as it strictly depends on the longevity of the seller.[17]

Essentially, the sale as an aleatory legal relationship represents a case where good faith plays a crucial role in ensuring the integrity and fairness of the transaction. This entails that the parties involved in the transaction act honestly, sincerely, and loyally, adhering to fundamental ethical and legal principles.

A key factor influencing good faith in an aleatory sale is honesty in representation, where the seller and buyer are obligated to provide correct, complete, and accurate information about the property and all relevant aspects of the transaction. This includes disclosing all important information related to the aleatory nature of the transaction, as well as any risks or uncertainties associated with the property or future event conditioning contract performance.

To demonstrate good faith, it is necessary for the parties to strictly adhere to the contractual terms and conditions established in the sale contract. This involves fulfilling all contractual obligations in accordance with the parties' understanding and ensuring that neither party abuses its position to the detriment of the other. Additionally, the parties must cooperate to manage and minimize the risks associated with the aleatory nature of the transaction. This may include identifying and assessing potential risks, taking appropriate measures to manage them, and collaborating to find solutions in case of unexpected problems or uncertainties.

Good faith also highlights the idea of transparency and open communication. Thus, the parties are obligated to communicate openly and transparently throughout the entire sales process, providing relevant information and updates regarding the situation's evolution and any significant changes that may affect the transaction.

A final factor indicating successful representation of good faith is avoiding abuse of position. Good faith prohibits any form of abuse or exploitation of the contractual position to the detriment of the other party. This includes avoiding any manipulative or fraudulent tactics that could unfairly affect the interests or rights of the other party.

Good faith in interest-bearing loans and their simulations

Interest-bearing loans are applicable in the case of consumer loans for consideration, where the parties agree to a performance consisting of the payment of a sum of money or other benefits as the equivalent of the use of the borrowed capital.

Regarding the temporal aspect of interest, the borrowed sum becomes interest-bearing from the day it is disbursed to the borrower. As for the amount of interest, the provisions of Emergency Ordinance No. 13/2011 regarding the remunerative and penalizing legal interest for monetary obligations, as well as Law No. 216/2011 regarding usury, must be taken into account.

Civil law norms establish that the prepayment of interest can be made within a maximum period of six months, and the interest thus collected cannot be refunded, regardless of subsequent fluctuations. Interest is calculated based on the borrowed sum, and compound remunerative interests may generate additional interests themselves. These aspects are

[17] *https://blaj-law.ro/blog/contract-de-vanzare-cumparare/*

important in understanding the mechanism and rules governing interest-bearing loans, ensuring transparency and fairness between the parties.[18]

In the context of interest-bearing loans, adherence to the principle of good faith is essential for efficient collaboration between the lender and borrower. Both parties are responsible for openly and accurately communicating all information related to the terms and conditions of the loan, thereby facilitating a clear and comprehensive understanding of the financial situation. Emphasis will be placed on ensuring a loyal and honest dialogue between the parties, creating an environment of trust that allows for the efficient management of risks and finding adequate solutions in case of difficulties.

Therefore, this approach promotes a strong partnership and responsible financial practice, benefiting fully from both parties involved.

In the category of simulations of this type of contract, we will include simulations of interest rates, income growth, additional payments, and refinancing.

We will briefly outline these categories. The first category outlines the projection of how interest rates may vary in the future, and this may affect the monthly or total payments of the loan. In this case, it may include simulations of scenarios of increasing, decreasing, or stagnant interest rates and evaluating the impact on the total cost of the loan.

The simulation of income growth is used to observe how income growth or decrease in other expenses could influence the loan repayment capacity. In this case, it aims to evaluate the impact of income growth on the ability to make additional payments or repay the loan faster.

In the case of simulations of additional payments, the aim is to assess the impact of additional payments on the loan repayment period, and in the case of the last simulation mentioned earlier, the aim is to evaluate the impact of refinancing at a lower interest rate or with other more favorable conditions.

In all the situations mentioned above, we appreciate that good faith exists when there is a climate of trust and collaboration between the parties, where both protect their interests and rights, as well as those of the other party. They also act with sincerity and provide each other with clear and accurate information.

Conclusions

In the light of our research and the various aspects of good faith in contract law, we recall the wise words of Immanuel Kant, who said*: 'Justice is the most important of all goods, but we cannot always do justice. However, we can always be honest."*[19] This quote underscores the importance of our commitment to integrity, honesty, and fairness in all our interactions, including contractual relationships.

The importance given to honesty and, therefore, good faith is unequivocally reflected in the famous definition of Ulpian: *'Juris praecepta sunt haec: honeste in vivere, alterum non laedere, suum cuique tribuere' ('The precepts of law are these: to live honestly, to not harm others, and to give each their due')*. [20]

Thus, by respecting the principle of good faith, we contribute to creating a world where honesty and loyalty are fundamental values, and contractual and commercial relationships are

[18] Manuela Tăbăraș, *Special Contracts*, C.H. Beck Publishing House, Bucharest, 2013.

[19] Immanuel Kant, *Critique of Practical Reason*.

[20] Emil Molcuț, Dan Oancea (1993). *Roman Law*. Publishing House and Press „Chance" and Ștefan Cocoș (1998). *Roman Law*. Lumina Lex.

grounded on mutual trust and respect. In this way, we move towards a future where justice and fairness are promoted in all aspects of our social and business lives.

Throughout this scientific work, we have explored and analyzed multiple aspects and applications of good faith in contracts.

From a theoretical perspective, we have found that good faith represents a legal principle that requires parties involved in a contract to act with loyalty, integrity, and fairness towards each other. This principle is not merely a formality but constitutes an essential basis for ensuring fairness and efficiency in the execution and interpretation of contracts.

In practice, applying good faith in contract matters can be complex and varied, as it must be adapted to the specific circumstances of each contract and the dynamics of the parties' relationships. However, good faith serves as a guide and standard of conduct for interpreting and executing contracts, contributing to maintaining a balance between the parties' interests and preventing disputes and litigation.

Additionally, in this scientific work, we have explored the concept of good faith in certain contractual contexts, including the sale as a random legal relationship and interest-bearing loans and their simulations. We have highlighted that good faith plays a crucial role in establishing and interpreting these types of contracts, contributing to ensuring fairness and integrity in commercial and contractual relationships.

In the case of the sale as a random legal relationship, good faith is essential for balancing the parties' interests and ensuring the contractual obligations are respected in a fair and transparent manner. The principle of good faith can help prevent abuses and protect the rights and interests of the parties involved in such a transaction.

Regarding interest-bearing loans and their simulations, respecting good faith is crucial to ensure that parties act with transparency and honesty regarding the contract's terms and conditions. The principle of good faith can help avoid abusive or unfair practices in these financial transactions and promote a relationship of trust between the lender and borrower.

Therefore, concluding and executing these contracts while respecting the principle of good faith is essential for maintaining stability and integrity in commercial and contractual relationships, contributing to the development of an ethical and responsible business environment.

In conclusion, it is evident that good faith in contract matters is more than just a legal formality; it is a fundamental principle that underscores the importance of trusting and cooperative relationships between parties. In a world of constant change and complexity, respecting good faith remains essential for maintaining integrity and trust in commercial and contractual relationships."

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THE ROLE OF GOOD FAITH IN THE CONFIGURATION OF ROMAN INHERITANCE SYSTEMS

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Abstract

In the Roman Empire, the concept of good faith known as „bona fides" was considered one of the main virtues of Roman society. This foundation managed to establish aspects in accordance with ethics, morality, as well as the maintenance of equitable legal relations between its individuals. The remarkable bona fides had a significant role in consecrating Roman law. As we know, Roman law is the law of good faith, which brings legitimacy within the framework of highlighting the importance of trust, integrity, fairness in legal relations. In the content of this paper, we will analyse the effects of the contribution of bona fides in the succession systems, both testamentary and intestate.

Regarding the intestate succession, this occurred in the event that a person died either without a will, or had a will concluded, but it was invalid. In this case, bona fides was important in the fair distribution of the property. Due to bona fides, we will observe major changes in the categories of heirs, from the Laws of Twelve Tables, which was based on the criterion of agnation (civil kinship), leading to the intervention of the praetors through their reforms, and stopping in this case, at the imperial reforms, which highlighted the importance of cognation (blood kinship) as the main basis of inheritance. In addition, in the case of testamentary succession, that designates the person named testator, who concludes the solemn act by which he establishes the persons who will execute his last will, regarding the property. Due to bona fides, we will observe major changes in this case as well.

Thus, one of the cases is the testamentary executor, who has the duty to execute the last will of the testator. If he deviates from this obligation, he will bear the legal consequences.

We will be able to analyse, all the effects of the contribution of bona fides, within the Roman succession systems: intestate and testamentary.

Keywords: *bona fides, inheritance systems, praetors, heirs, integrity, morality*

1. General considerations

Inheritance represents the totality of the legal norms that regulate the transmission of the decedent's patrimony to one or more persons. Looking from a historical perspective, we can say that the matter of inheritance arose with the foundation of Rome.

In the beginning, the romans did not admit the transfer of patrimony either through acts *inter vivos* (between the living) or *mortis causa* (for the cause of death). This factor was strictly determined by the romans view of property, considered at that time a source of power and influence. Starting from the principle that there is no patrimony without a holder, the ancient Romans considered that a person's patrimony disappears with his death [1]. Consequently, the ancient Romans, through the transmission of patrimony, conceived the transmission of the power of de cujus (comes from the latin expression „Is de cujus successione agitur" – the one whose inheritance is debated) by his heirs. Therefore, the inheritance is established, initially, not on the transmission of a patrimony, but on the control acquired by the heirs over the assets of the deceased [2]. Based on this consideration, the romans placed great emphasis on

preserving the heritage within the family and on its transmission from one generation to another. As a result, the transmission of the patrimony through *inter vivos* acts was not encouraged, because in the end, it would have led to the fragmentation of the patrimony. On the other hand, the romans attached much greater importance to the transmission of patrimony through acts *mortis causa*, a fact that led to the consecration of the two great inheritance systems: **testamentary inheritance** and **legal inheritance.**

Legal inheritance is the oldest form of inheritance. We can say this referring to the social strata of the primitive era, namely that of the matriarchy. The role of the woman in the tribe, established the concept of matriarchy in the sense that, the descent was drawn up through the female path. In this way, the first non-juridical norms established the concept of collective property, later the inheritance was distributed to all members of the tribe. Recalling the era of patriarchy, in which the role of the man in the family was essential, dominant, the acquisition of assets was done through the male line. According to the legal inheritance, the basis of the inheritance vocation was civil kinship.

At the same time, within the testamentary inheritance at the beginning, the testator's right to test was limited by the norms of tribe. In this sense, his will was verified by the community members, in order not to violate the norms of co-ownership. The benefit of the emergence of patriarchal families led to the birth of testamentary inheritance. In this case, we are talking about a civilized society, in which the power of the man, as the head of the family (pater familias), was unlimited over the assets and persons under his control, so he could dispose of them.

Analyzing both inheritance systems, we can deduce that they have a common element at their core: the transmission of patrimony. However, the difference between these two inheritance systems is very well highlighted by the attribute of execution of the will. The legal inheritance operated in the absence of a will or in the case of the nullity of the existing will. As a result, in the absence of a valid will of the testator, the will of the law operate.

This antithetical relationship between the will of man versus the will of the law emphasizes the idea that through testamentary inheritance de cujus could determine how the estate would be divided after his death, while through legal succession the law did not distinguish between heirs of the same category. At the same time, to these 2 inheritance systems is added the third one, known as inheritance transferred against the will. However, since this system regulated the conditions of disinheritance, and not the acquisition of inheritance rights, we refrain from calling it a system of transmission of patrimony mortis causa [3].

Within the general evolution of Roman inheritance law, two main trends can be identified: the decay of formalism and the protection of blood kinship, kinship that tends to take the place of agnation as the foundation of inheritance [1]. Thus, if at the beginning the acts of transmission of the patrimony took on a mandatory, solemn form, gradually they are carried out through ordinary language. The protection of blood kinship was the culminating point in the development of inheritance materials, a fact that we will observe in the praetorian interventions, until the imperial reforms, good faith being the indissoluble attribute that contributed to the consecration of the great inheritance systems.

2. The role of good faith in the survival of the legal inheritance

Legal inheritance, known as Ab intestate (intestate inheritance), evolved under the empire of good faith, in three distinct stages: through the provisions of the Law of the XII Tables (civil law), the Praetorian Reforms (praetorian law) and the Imperial Reforms (imperial law).

2.1. Categories of legal heirs provided for in the Law of the XII Tables

Through the provisions of the Law of the XII Tables, we note that the only basis of the inheritance vocation is agnation (civil kinship). Thus, people who were under the power of pater familias (head of the family) will inherit. In the case of cognates (blood relatives of the deceased), it must be specified that if they were not first agnates, they could not inherit. So, we identify 3 hierarchically classified inheritance classes: **sui heredes, adgnatus proximus, gentiles** [4].

The category of sui heredes was represented by all persons who were under the power of the pater familias and who, through his death, became *sui iuris* (independent) persons. The fund of this category was constituted by all the agnates of the de cujus: sons, daughters, the wife married with manus, grandchildren from sons, the adopted and the adrogate. In the case of the wife married with manus, she will come to the inheritance legally as a daughter and sister with her own children, since she was under the power of her husband who was her pater familias. Grandsons from sons will inherit by representation, if their father died before the grandfather. These, being under his de cujus power, will collect what would have been due to their father.

As we know, both adoption and adrogation are acts establishing parental power, thus we deduce that the adopted and the adrogate will reach the inheritance of de cujus as agnates of the first degree, since legally they were under the power of pater familias just as natural sons. Due to the provisions of the Law of the XII Tables, we can observe the view of the romans regarding the hierarchical importance of the categories of heirs in order to acquire the inheritance. In other words, in the absence of heirs from the first category, the inheritance passes on to the next.

Known as the closest collaterals of de cujus, the **adgnatus proximus** come to inheritance in the absence of heirs in the first category. The name must be understood, not in the sense of being very close to de cujus, but in the sense that there are no other people closer to him than them, even though they may be distant [3]. Thus, this category includes the collateral relatives of *de cujus*, brothers, cousins, uncles. It should be noted that the Law of the XII Tables did not admit representation in collateral lines, their children not being able to inherit their deceased father. At the same time, if a collateral agnate repudiates the inheritance, it will no longer pass on, it will eventually become vacant [4].

Gentiles constituted the third class of legal heirs. This was represented by the members of the tribe of which the de cujus was a part. All of them will inherit the patrimony of de cujus if he did not have even one heir from the first two categories.

According to the regulations brought by the Law of the XII Tables, the Romans considered that agnation is the most suitable legal ground for the inheritance vocation. Thus, we will observe how good faith will work as a remedy in the case of inequities found in the Law of Tables XII, through the reforms of the praetors. Making a brief comparison between the old regulations of the civil code and the New Civil Code, we notice how they try to maintain the same goal over time. Thus, while Article 680 provided that „in the absence of legal or testamentary heirs, the assets left by the deceased become the property of the state”,

in art 963, paragraph (3) of the New Civil Code, we see how „in the absence of legal or testamentary heirs, the patrimony of the deceased is transmitted to the village, city or, as the case may be, the municipality in whose territorial radius the assets were located on the date of the opening of the inheritance".

2.2. Categories of heirs according to Praetorian law

Praetorian inheritance is closely related to the aspect of good faith, the latter intervening as a remedy in case of inequities encountered in inheritance regulations, according to the Law of the XII Tables [5]. The existence of these inequities was discovered when people who were not civil relatives of the de cujus were excluded from inheritance in an abusive way. In this case, we will observe the remedy brought by good faith especially in the case of emancipated sons, as well as in the case of husbands married without manus. The praetors considered it unfair for the unentitled individuals to not have inheritance rights, so they created formulas to allow them to claim certain inheritance rights before the judge.

As the injured party needed a legal ground for opening such an action before the judge, the praetors found as the main legal ground „bonorum possessio" (possession in good faith). The intervention of the praetors in this inheritance system has a special meaning, thus, by introducing the basis of possession in good faith, the plaintiffs began to acquire inheritance rights, through lawsuits. Thus, due to this achievement, the praetors outlined 4 categories of heirs created hierarchically, based on the criterion of good faith: **bonorum possessio unde liberi, bonorum possessio unde legitimi, bonorum possessio unde cognati, bonorum possessio unde vir et uxor** [6].

The first category includes the sui heredes, to which are also added the persons who became sui iuris during the life of the pater familias, more precisely the emancipated sons. In other words, emancipated sons will have priority in the inheritance, even if they were not under the power of the pater familias at the time of his death. It is considered equitable to place the emancipated sons on the same position as the agnated sons of the deceased, as they will maintain equity in the case of inheritance. Therefore, the emancipated sons came to the inheritance table with the goods acquired by them, from the moment of their emancipation until the opening of the inheritance. The emancipated sons, becoming persons sui iuris, all the assets acquired by them entered their own patrimony, while the assets acquired by a person alieni iuris, were acquired in the name of the head of the family, so they were not rightful owners.

Within the category **bonorum possessio unde legitimi** the praetors introduced both *adgnatus proximus* and *gentiles.* Placing two distinct categories of heirs in the same position creates major effects under this inheritance system. As a result, if an agnate repudiates the inheritance, it will no longer become vacant, but will go to the next category of heirs, namely **bonorum possessio unde cognati.**

By configuring the category of **bonorum possessio unde cognati** it leaves its mark on the protection of cognates (blood relatives), who were not agnates at the same time. According to this category, we find the recognition of the inheritance vocation for relatives on the maternal line, more precisely the mother and children resulting from the marriage without manus acquire mutual inheritance vocation. However, the existence of a single agnate, regardless of rank, could remove the latter ones.

By **bonorum possessio unde vir et uxor** both the man and the woman married without manus acquire mutual inheritance vocation [4]. From the perspective of civil law, they were

neither cognates nor agnates, so they had no chance to acquire mutual inheritance vocation. The intervention of praetorian law states that it is just to acquire mutual inheritance vocation, since they cohabited together, being therefore bona fide possessors of the same patrimony, and it would be inequitable for this inheritance to become vacant.

This is how, guided by the principle of good faith, the praetors reformed the system of legal inheritance in such a way that blood relatives also acquired the vocation of inheritance.

2.3. Imperial reforms

Imperial law continued the reforms penciled by Praetorian law. Thus, the reforms of the praetors were taken over by the emperors, giving them the power of law. The first two reforms take the form of the Tertullian senatusconsult and the Orfitian senatusconsult, and finally the legal succession is definitively harmonized by the Emperor Justinian [5].

Voted during the time of the emperor Hadrian, the senatusconsult Tertullian, establishes that mothers will inherit their children from marriage without manus, as legitimate relatives, not cognates. This change gives them the chance to move up from 3rd to 2nd, and collaterals can no longer remove them from inheritance.

Voted during the time of Emperor Marcus Aurelius, the Orfitian senatusconsult provides the priority inheritance vocation of children resulting from marriage without manus, to the inheritance of their mothers.

Emperor Justinian puts an end to the ground of inheritance vocation based on agnation (civil kinship), thus blood kinship taking its place entirely. This fact is well evidenced by the Novels 118 and 127 of the Emperor Justinian. It thereby establishes 4 hierarchical categories of heirs based on the criterion of blood relationship, namely: Descendants, Ascendants/brothers and sisters and their children, Consanguineous or uterine brothers and sisters and their children, the rest of collaterals. We can state that Emperor Justinian's legislation fully fulfilled its role of fixing the problems in social reality, later reflected in legal matters. We observe how good faith plays a significant role, in terms of adaptations regarding the matter of legal inheritance, leading to its maintenance over a long period of time.

3. The values of good faith in the protection of testamentary succession

The concept of testamentary inheritance derives from the idea of transferring the patrimony by means of an act of last will, known as a will. From here we understand that the will is the solemn act by which a person, called the testator, establishes one or more heirs, who will execute his last will regarding the patrimony. The evolution of the will forms in the ancient Roman law was influenced by good faith.

The will callatis comitis takes the form of a law in the sense that, the one who wanted to pass on his patrimony by means of a will was forced to make a solemn declaration before the Curiate Assembly known as Comitia Curiata [7]. We point out that this process is similar to the adoption of a law, as a result the assembly expresses its will to adopt or not, the will. We remind you that, ancient Roman society did not understand the concept of private property, still polarizing over the roots of co-ownership. In other words, Comitia checked whether the wishes of the testator expressed in the will violated the principles of joint ownership. Consequently, after a long period of time, this form of will ceases to produce legal effects due to two major drawbacks. One of these was that the right to test was recognized only to patricians, therefore only half of the population got to draw up their wills, and last but not

least, Comitia met only twice a year, namely on March 24 and May 24, so not even half of the population, resulting from the patricians, had time to draw up their will.

The will in proncinctu was also accessible to plebeians. We say that it is also accessible to the plebeians, because the Roman army was not made up only of Roman citizens, because it was wanted to preserve the numerical value of the ingenui Romans in the heart of the empire, as a result it was also made up of the plebeians. At the same time, this form of will was not accessible to all Roman citizens, but only to active soldiers between the ages of 17 and 46. Since it was not considered fair, as a part of the population of the Roman Empire did not have access to this form of inheritance mortis causa, a third form of will was created.

The will by scales and brass (per aes et libram) is the first form of will that was accessible to all Roman citizens. This also represented the most advanced form of will from the ancient era, being an application of fiduciary mancipation [1]. We derive this phenomenon from the merging of two distinct legal operations, namely: a mancipation and fiduciary covenants. As we know, mancipation is the legal operation by which valuable assets are transferred that is, a sale, and fiduciary covenants are promises of good faith. In this case, through the intervention of good faith, this form of will will evolve in 3 distinct stages, namely: **mancipatio familiae, per aes et libram public** and **per aes et libram secret.**

Mancipatio familiae denotes the operation between the testator and a trusted person known as emptor familiae (will executor), it denotes a fictitious mancipation in respect of the entire patrimony [4]. To this legal operation is added another one, namely fiduciary covenants, represented by the executor's good faith promises regarding the execution of the testator's last wish. The ultimate disadvantage of this will form was that the distribution of the patrimony to the established heirs depended entirely on the good faith of the emptor. We say this because, only the mancipation had binding legal force inter partes (between the parties), by which the emptor became the owner of the acquired patrimony, while the breach of fiduciary covenants could not be sanctioned by legal action. The emptor, becoming the owner of the acquired patrimony, benefits from all the prerogatives of the right of ownership, more precisely: *ius utendi* (right of use), *ius fruendi* (the right to harvest the fruits of that asset), and last but not least *ius abutendi* (the right to dispose of the asset as its owner deems appropriate). Consequently, the emptor becoming the owner, can dispose of his patrimony as he wishes, and the established heirs had no legal action against him. Good faith will also serve as a guide in remedying the presented inequities, by creating the other forms of per aes et libram.

Per aes et libram public succeeds in removing the previously presented inequities. The form of a fictitious mancipation between the testator and the emptor is preserved, which will be done orally in front of at least 7 witnesses and a libripens, but in order to protect the heirs established by the testator, the role of the emptor as owner is transformed into a simple holder, more precisely a custodian of the asset until the request of its owner [4]. If the holder shows a repressive attitude, wanting to keep the patrimony for himself, the established heirs can force him to return it, through legal actions. However, the public form through which the testator expressed his last will, this factor will put him in danger because the heirs established by him knew that they would get rich from the will, therefore they had every reason to hasten his death.

Per aes et libram secret it will protect the testators from the possible ill-will of the established heirs. In carrying out this adaptation, it was argued that it is correct for the heirs not to know the content of the will, until the death of de cujus. The procedure for drawing it up was as follows: the testator expressed in writing, personally, his last wish regarding the

distribution of the patrimony, being at the same time a document sealed by the seals of at least 7 witnesses [8]. It was thought equitable that the witnesses should affix their seal and be present when it was drawn up, to attest that the testator had personally and willingly written his will. Therefore, the bond of good faith in the protection of the testamentary inheritance produces remedies for the inequities encountered as we have seen, in the case of the bad faith of the executor, whose quality is reduced from that of the owner to that of a simple holder, giving them to the established heirs the possibility of opening legal actions against his bad faith, as well as in the case of endangering the testator, giving him the prerogative to make the his will in a private way, thus protecting him from possible dangers.

3.1. Testamenti factio

Testamenti factio, known as testamentary capacity, denotes the capacity of a person to leave a will, to come as a witness to the drawing up of another person's will, as well as the capacity of a person to be established as an heir, or to acquire goods individually determined by legatee.

Good faith will operate in the two types of testamentary capacity encountered by the Romans, namely: **testamenti factio activa** and **testamenti factio pasiva.**

Testamenti factio activa represents the capacity of a person to leave a will or to present himself as a witness to the drawing up of someone else's will [3]. As follows, the factually incapacitated and the legally incapacitated could not be included in this category. Consequently, from this principle there are also exceptions based on equity, such as: the family son soldier could dispose by will of peculium castrense that is, of the money earned from the army. It was considered fair that the soldier son should dispose of his own money, since he had risked his life for them. Idem and in the case of the sons who were part of the clergy of the church, they were lawyers, part of the imperial court, they could dispose of his peculium, known in this case as peculium quasi-castrense. Due to good faith, public slaves are also given the chance to dispose of half of the agonized peculium by will, because they came to serve the interest of the state. To be noted in the case of women who have either auctoritatis tutoris (authorization from the person who has it under his power), as well as the women who had acquired ius liberorum (women released from guardianship).

Testamenti factio pasiva it represents a person's capacity to be established as an heir. The condition of the person's capacity is also maintained in this case, in this category could not fit the factually incapacitated, the legally incapacitated and the uncertain persons. It is worth noting that women had a testamenti factio pasiva limited, in the sense that, through the adoption of the Voconia law from 169 BC. it was established that intestate women were prohibited from inheriting more than 100,000 aces [7]. It should also be noted that in the case of the slave, he could be established as an heir in the will of de cujus. Such a solution was considered equitable contrary to the social condition of the slave, res, (that of property of their masters), because through this de cujus who owned a patrimony with a liability greater than the asset, could institute this as an heir to defend the future of the family.

3.2. Establishment and substitution of heirs

The establishment designates the clause establishing the heirs, representing the fundamental clause of the will, which in its absence attracts the nullity of the act. Under penalty of nullity, this clause must meet both formal and substantive conditions. Based on the form conditions, we mention that it was important that the establishment had to be done in a

solemn and imperative form, positioned at the head of the will, being the main pillar of the will.

Substantive conditions took the form of principles*" semel heres sempel heres"* (once an heir, forever an heir) and*" nemo pro parte testatus pro parte intestatus decedere potesi"* (no one can die partly with a will and partly without a will) [1]. From these conditions it follows on the one hand, that no time limit can be placed on the quality of the heir and that the establishment must be universal – in the sense that, the romans did not allow a part of the patrimony to be transmitted by will and another part by opening the legal inheritance. Referring to our days, this old principle no longer applies, because in the New Civil Code, art. 955, paragraph (2) provides that:" a part of the deceased's patrimony can be transmitted by testamentary inheritance, and the other part by legal inheritance".

Substitution designates a second-degree establishment, a conditional establishment as we note from the testator's capacity to expressly designate in the will, the person who will replace the established heir, in case he could not or does not want to accept the inheritance.

4. The just opposition of good faith in the case of disinheritance

Known also under the term of disinheritance, the procedure for achieving it did not require the conclusion of a separate legal act, as a result, it was carried out through clauses included in the will. Remembering that, the object of the will is not limited to the transmission of property by drawing it up, because through it, the testator could operate as follows: the disenslavement of slaves, the establishment of guardians and the disinheritance of persons.

In order to produce legal effects, the disinheritance clauses had to meet certain conditions, as the disinherited was a son, or another herdes sui (daughters, grandchildren). Knowing that sons, from a civil point of view, represent the most important category of heirs, their disinheritance had to be carried out in compliance with the conditions of the establishment. Thus, if the testator wanted to disinherit a son, he had to do it in a solemn, imperative and nominal form. Failure to comply with this condition results in the nullity of the will. Also, the omission of a family son attracted the same sanction, the nullity of the act.

As for the other categories of heirs, such as: daughters, grandchildren etc., their disinheritance could be done for all through the same clause, without mentioning each one separately, as an example we mention:" ceteri omnes exheredes sunto" (all others are disinherited) [4]. In the case of the latter, their omission did not cause the nullity of the will, but only a rectification under which those excluded will be able to acquire a fraction of the inheritance, through the legal form [4].

As at that time it has become an unfounded habit of disinheritance, it was created **the will inoficios. The will inoficios** designates that will draw up in violation of *officium* (legal obligation to love your family). Considering that, the one who disinherited his close relatives without grounds, clearly violates the legal obligation to love his family, as a result, the disinherited were allowed a legal action to annul the will, known as *querella inofficiosi testamenti.* Before the court of centumvirs, the heirs attacked the testator's capacity to conclude legal acts as it follows: they tried to prove their attitude to the testator, claiming that they had not given the testator any reason to disinherit them. Having no ground for the wrongful disinheritance, it is found that the testator lacked discernment, as only a madman could disinherit his family without reason.

As we stated, good faith justly opposes the inequities produced in the case of inheritance transferred against the will, thus protecting the rightful heirs.

5. The paradox clarified by good faith regarding the matter of legacies

The legacy designates the testamentary clause by which the testator, encumbering the established heir, favors another person, called the legatee, rewarding it by granting individually determined assets [3]. Being a testamentary clause, it had to meet conditions of form and substance.

In the case of substantive conditions, we note that it must be expressed in solemn and imperative terms. For the substantive conditions, the legatee must have testamenti factio passive, thus the individual designated with the duty of executing the bequest is only the established heir, as well as the Catonian rule, being a condition by which a future asset cannot be transmitted through a bequest, which the testator does not own at the time he writes the will [3]. So, in the case of Romans, we will indicate 4 types of legacies: ***per vindicationem, per damnationem, per praeceptionem*** and ***sinendi modo.***

The legacy **per vindicationem** represented the clause by which the legatee was designated directly, without involving the established heir. Although he does not participate in the legal relationship between the two, he bears the effects of this bequest, reducing his inheritance asset [4].

The legacy **per damnationem** represented the clause by which the testator obliges the established heir to transmit a determined individual asset to a legatee. There is a direct legal relationship between the heir and the legatee, in case of non-compliance with the obligation to hand over the asset, the legatee obtains legal action to claim the asset.

The legacy **per praeceptionem** represented the clause by which the testator, if he wished, could favor some heirs, of the same degree. Thus, in addition to being established as heirs, they also received additional assets.

The legacy **sinendi modo** represented the clause by which the testator obliges the established heir not to prevent the legatee from taking possession of the transferred assets.

In order to block indirect disinheritance, good faith is also used in the reformation of legacies, a fact that will apparently generate a paradox. We say paradox because the testator had the freedom to dispose of his assets, but through the adoption of the Furia testamentaria, Voconia and Falcidia laws this freedom will know limitations.

The Lex Furia testamentaria stipulated that the determined individual asset transmitted by legacy could not exceed the value of 1000 aces [4].

Lex Voconia stated that the legatee cannot receive more than the established heir and **Lex Falcidia** was adopted as an effect of the circumventions encountered in the 2 previous laws. As a result, the heir will have an inheritance reserve of a quarter of what would have been owed to him, according to the law, which reserve will be respected regardless of the number of legacies. If the testator violates this condition, the legacies will be reduced by law. Since numerous injustices have been produced towards rightful heirs, we can see how good faith has even influenced the initiative to adopt laws limiting the testator's freedoms, in order to stop this phenomenon. From the basis of this principle, we observe how the same trends are still maintained, regulated in the present Civil Code, in art. 1088: „the inheritance reserve of each reserved heir is half of the inheritance share that, in the absence of liberalities or disinheritances, would have been due to him as a legal heir". Thus, by this new regulation, we understand that the legislator defends these reserved heirs, against the donations and legacies made by the de cujus, ensuring they receive at least a fraction of what would have been legally due to them.

6. Conclusion

The fact that the Romans understood the importance of the ability to adapt to social reality under the rule of good faith, led to the changes encountered in legal matters. The prestige of good faith is recognized in the protection of inequities present in the matter of inheritance. This not only managed to keep alive the oldest inheritance system, but managed to prove within the legal inheritance that the impossible becomes possible, by tilting the balance in favor of blood relatives. The art of equity plays a crucial role, presenting prerogatives of extension and restriction, with respect to the scope of testamentary inheritance. We note that in cases of extension, the first forms of will lead to a fundamental form, which gave the testator freedom to test, it also applies to the executor of the will, who obtains the possibility of being established as an heir. According to testamentary capacity, good faith operates in the extension of testamentary paths for the injured party, and according to the establishment, it gives the testator the possibility to act in case of repudiation. On the other hand, the scope of restriction clearly establishes the limits of the tester to test, which are recognized by means of the legacies. At the same time, the activity of the testamentary executor is restricted, thus, from an owner he becomes a simple holder. In addition to these 2 inheritance systems, the equitable is opposed to the abusive disinheritances, predisposed in the inheritance deferred against the will, offering to the injured parties' legal action to acquire legal inheritance rights. As the jurisconsult Celsus defined law as" Ius est ars boni et aequi" (The law is the art of goodness and equity), so it is undeniable the fact that, the good faith is the cornerstone of Roman law, clearly and justly contributing to the configuration of roman inheritance systems.

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PERSPECTIVES ON DOPING IN SPORTS WITHIN THE FRAMEWORK OF GOOD FAITH IN SPORTS SUPPORT CONTRACTS

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Abstract

In recent years, there has been a consistent lack of interest from authorities in the sports sector in Romania. We believe this disinterest is a significant factor contributing to the existence of substantial legal gaps that can significantly impact athletes' lives. A notable instance in recent times is a widely publicized doping case in tennis, where an initial 4-year suspension was reduced to 9 months following an appeal, with the final decision being made after over 1 year and 4 months of provisional suspension. The repercussions of this scandal on the athlete's life are undeniable, potentially even career-defining for the individual involved. This paper aims to underscore the crucial role of the legal framework in sports activities. Athletes rely heavily on the technical staff surrounding them to enhance and sustain their athletic performance. Unfortunately, experiences shared by various athletes reveal instances where they do not receive fair, ethical, or legal treatment from their technical support teams. As a result, athletes often bear the brunt of the consequences alone. Therefore, we emphasize the significance of the contractual agreements athletes enter into, ensuring they provide assurances of acting in good faith and are legally binding, thus ensuring that the consequences of actions are distributed fairly among all stakeholders in the sports process.

Keywords: *Sport, doping, contracts, good faith.*

1. Brief history of sports collaboration contracts

1.1 Ancient Age

Throughout history, physical exertion has been inherent to humanity [1]. Furthermore, sports represent an activity with profound social and cultural significance [2]. Whether the organization of physical effort stemmed from necessity in prehistoric life (such as hunting or survival) or evolved into organized competitions since they were already sports competitions is difficult to ascertain [3], [4]. While uncertainties surround the prehistoric era, Ancient Rome undeniably placed great emphasis on sporting events. The enormity of the sporting phenomenon is evident from the large numbers of spectators (reaching approximately 40,000 daily attendees at the Olympic Games in the 2nd century AD) [5], and the size of arenas, such as one discovered in London with 6,000 seats relative to its population of 20,000 [6].

With regard to gladiatorial combat, Junkelmann [7] shows that athletes could belong to different social categories: slaves, volunteers, convicts or even emperors. Like today's athletes, these fighters were obviously not alone and did not carry out this activity independently.

Historical records document over 100 gladiator schools across the Roman Empire [8]. Each gladiator entered a contract upon joining such a school, outlining the number and types of fights per year and their relationship with their master. These contracts also included special clauses pertaining to fights, with potential consequences for non-compliance, including the master's authority to decree the gladiator's death [8].

Fundamentally, these contracts relied on the good faith of those in higher social positions. As gladiators were enslaved, they had no recourse or means of seeking justice if their rights were violated. This is exemplified in Spartacus's Rebellion or the War of the Gladiators (73-71 BC). Plutarch documents the details of the uprising in his work „Life of Crassus" [9]. Realizing that their trust was being betrayed, living conditions were deteriorating, and their rights were being ignored, about 200 gladiators decided to take matters into their own hands and escape from Capua. Out of these, only 78 successfully carried out the plan and initiated the uprising. This sparked a series of clashes over two years, during which the „gladiator army" swelled to 120,000 individuals, encompassing women and children (source: https://www.livius.org/sources/content/plutarch/plutarchs-crassus/plutarch-on-spartacus/). Unfortunately, despite sustaining the uprising for two years, it ended tragically for Spartacus and his followers. Appian recounts the final battle [10], during which the majority of fighters were killed, and around 6,000 survivors were crucified along the road from Rome to Capua.

1.2 Contracts on sporting activity today

To gain a clearer understanding of these types of contracts, we will reference the New Civil Code, Law 69/2000 (the Law on Physical Education and Sport), and Law 227/2015 on the Fiscal Code.

We will start by conceptually distinguishing **two types of contracts** commonly encountered in sports activities. First, there are „**sports activity contracts**" as defined in Law 69/2000. This law governs, per Article 1, „the organization and operation of the national system of physical education and sport in Romania." Article 14(1) specifies: „*In accordance with the law and in compliance with the provisions in the statutes and regulations of national and international sports federations,* ***elite athletes*** *may be: a) amateurs; b) professionals*." Additionally, Article 67 notes that: „*(1) Participants in sports activities may include: a) athletes; b) coaches; c) doctors, medical assistants, masseurs, physiotherapists, researchers; d) referees, observers, video operators, auxiliary personnel e) other individuals contributing to the execution of sports activities, as per the regulations and statutes of national sports federations,"* and the annex defines at point f) the sports activity contract – „*the agreement made for a specified period between sports organizations and participants in sports activities as provided for in Article 67(1)."*

As evident from the legislative text, it lacks clarity concerning situations commonly encountered in practice. Article 67 confines the parties to the sports activity contract: *between sports organizations and participants in sports activities.* Therefore, a „sports activity contract" cannot be signed by two participants in sports activity, such as athlete – personal coach, athlete – doctor, coach – nutritionist etc. Consequently, the only recourse for an athlete to have a direct contract with another individual involved in their physical activity is to

conclude a contract in accordance with Article 1166 of the New Civil Code: „*The contract is the agreement between two or more persons, with the intention to establish, modify, or terminate a legal relationship."*

Indeed, in an idealistic scenario, the athlete is affiliated (licensed) with a sports organization, with whom they hold a sports activity contract (or employment agreement). Under this arrangement, all other individuals involved in the athlete's preparation have distinct contracts (coaches, physical trainers, doctors, psychotherapists, nutritionists etc.), and each *fulfills their duties in good faith*. Unfortunately, in reality, this scenario is seldom encountered. Often, due to financial constraints (or other undisclosed factors), sports organizations in Romania fail to establish contracts with the supporting personnel of athletes, or, due to inadequate knowledge of the law, leave legal gaps unaddressed.

While there are numerous instances of this, since they are not the primary focus of this study, we will only cite one specific yet relevant example: that of the Romanian Athletics Federation (RAF) concerning the coordination of participation in targeted competitions in 2024. Through documents [11], [12], [13], [14], [15], the RAF organized the participation in the European Throwing Cup, Balkan Indoor U20 Championships, Senior Indoor Championships, March Championships, and Indoor World Championships. According to the documents, the supporting personnel included: 3 coaches and 1 doctor (for 7 athletes, European Throwing Cup), 4 coaches, 1 physiotherapist, 1 delegation leader (for 16 athletes, Senior Balkan Indoor Championships), 3 coaches, 1 physiotherapist, 1 team leader (for 14 athletes, U20 Balkan Indoor Championships), 4 coaches, 1 masseur, 1 team leader (for 7 athletes, Indoor World Championships), 3 coaches (for 5 athletes, Balkan March Championships). It is evident that these figures are insufficient for the number of participating athletes, particularly given the scale of the competitions. Although precise data cannot be determined, it challenges the notion of performance that during a world championship, none of the 7 athletes (with 4 coaches! – although each athlete collaborates with another coach) required assistance solely from one masseur, without the involvement of a doctor, psychotherapist, nutritionist, physical trainer etc.

This situation places the athlete in an exceedingly challenging contractual position. Officially, only the specifically designated individuals partake in the mentioned sports activity, with contractual ties established with them. In the nearly obvious scenario where an athlete requires any other form of support, they must independently seek it, and potentially enter into a separate contract. As we will further show, this gives rise to several deficiencies regarding doping.

2. Anti – doping legislation

The movement towards doping-free competitions emerged primarily in the 20th century, notwithstanding documented instances of doping dating back to Ancient Greece and Rome, where athletes employed illicit methods to gain competitive advantages [16], [17]. Notably, strychnine, despite its role as a potent pesticide, exhibited performance-enhancing properties in small doses. Both the aspect of „doping" and the use of pesticides were recognized in Ancient Rome [16]. Thus, even in antiquity, questions surrounding the *good faith* of those aiding athletes in their competitive endeavors surfaced. During the 19th century, the use of substances began to gain social acceptance and was occasionally regarded positively as agents combating fatigue [18].

However, controversies emerged in the 1900s concerning the use of various substances to enhance performance due to growing concerns about unregulated consumption. Consequently, legal restrictions were imposed as governments became increasingly aware of the grave risks athletes faced from consuming these stimulants. In 1928, the International Association of Athletics Federations became the first governing body to prohibit the consumption of performance-enhancing substances [18].

Tragically, the use of amphetamines resulted in the death of Knut Enemark Jensen during the 1960 Rome Olympics, following the cycling qualifications [19]. In response, France and Belgium began enacting laws to outlaw doping, while the International Olympic Committee established a medical commission tasked with compiling and releasing the inaugural list of banned substances in 1967. These actions swiftly prompted the introduction of scientific anti-doping tests, which debuted at the 1968 Winter Olympics in Grenoble and the subsequent Summer Olympics in Mexico.

Doping scandals remained prominent in the headlines during the 1970s and 1980s, spurred by the introduction of a steroid test in 1974 and revelations from East Germany about a government-backed program to use anabolic steroids [20]. The issue of doping had become so significant that even The New York Times documented it, noting that „Steroid pills were no longer adequate to ensure the dominance [of Russian athletes] at the Olympic Games. The team had to inject its top athletes with three additional types of anabolic steroids. Officials provided detailed measurements and schedules for doping regimens, stating that they had ample supplies of banned substances at the Research Institute of Physical Culture and Sports in Moscow, a branch of the government's sports committee. „

In 1989, the Council of Europe enacted the Anti-Doping Convention, aimed at aligning the legislation of the member states. However, the scandal surrounding the 1998 Tour de France, later referred to as the „Tour of Shame," where a significant quantity of banned substances was discovered by police in a team's vehicle, prompted a strengthening of anti-doping measures and testing as the primary method of combating doping. Moreover, the IOC determined that international consensus was imperative, leading to the convening of the first World Conference on Doping in Sport in Lausanne in February 1999, and the establishment of the World Anti-Doping Agency (WADA) to further bolster international cooperation.

2.1 Legislation in international context

Following a sluggish start, the effort to combat doping in sports persisted into the early 1970s under the guidance of the IOC and the International Association of Athletics Federations. Despite encountering a lack of understanding and weak support, even within the sports community, various initiatives were undertaken during the 1970s and 1980s that continue to serve as the foundation of today's anti-doping strategy. In addition to educational campaigns, notable advancements include the implementation of procedural protocols for anti-doping measures, the creation and oversight of a catalog of banned substances and techniques, the accreditation of anti-doping laboratories, the initiation of both in-competition and out-of-competition testing, regulations regarding therapeutic use exemptions, and the introduction of blood sampling. By the 1990s, the anti-doping movement gained momentum both within and beyond the sports realm. To address the diverse array of regulations established by sports organizations and at the international level, as well as to promote anti-doping initiatives, the World Anti-Doping Agency (WADA) was collaboratively

established by the Olympic movement and governmental bodies in 1999. WADA continues its ongoing efforts, supported by the universally accepted WADA Code and an international anti-doping convention under UNESCO. [21]

The WADA Anti-Doping Code was initially adopted in 2003, taking effect in 2004. Since then, it has undergone periodic significant revisions (2009, 2015, 2018, 2019, 2021), while the list of prohibited methods and substances is updated annually. [22]

From the perspective of our paper, we emphasize that the greatest responsibility (if not the entirety) for any act of doping lies with the athlete. Article 2.1.1. *Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample* states: „*It is the Athletes' personal duty to ensure that no Prohibited Substance enters their bodies. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.7* „

2.2 Legislation in national context

In 1998, Law No. 171 of October 2, 1998, ratified the Convention against Doping, which had been adopted within the Council of Europe in Strasbourg on November 16, 1989. The Convention against Doping was ratified through a single article. The Senate adopted this law on April 21, 1998, in accordance with the provisions of Article 74(2) of the Romanian Constitution. Subsequently, it was also adopted by the Chamber of Deputies on September 3, 1998, adhering to the same constitutional provisions.

The law stipulated that (3) *Only sports courts have jurisdiction in examining the facts and legal aspects of cases involving violations of anti-doping regulations, with the Court of Arbitration for Sport in Lausanne serving as the court of final appeal*.

Subsequently, Law No 104 of 9 May 2008 on preventing and combating the illicit production and trafficking of high-risk doping substances was adopted, republished under Article IV of Law No 10/2011 amending and supplementing Law No 104/2008 on preventing and combating illicit trafficking of substances on the „prohibited list", published in the Official Journal of Romania, Part I, No 180 of 15 March 2011, with a new numbering system.

Currently, the legal framework is established by Law No. 1,331 of December 23, 2021, concerning the prevention and combating of doping in sports, and is enforced by the National Anti-Doping Agency. Notably, national legislation does not significantly amend the World Anti-Doping Code. As such, Article 2 (1) states: (1) „Doping in sport is one or more anti-doping rule violations. (2) *The following shall constitute anti-doping rule violations: a) the presence of a prohibited substance or its metabolites or markers in a sample from an athlete. It is* the ***duty of athletes*** *to ensure that no prohibited substance enters their body.* ***Athletes are responsible*** *for the presence of any Prohibited Substance or its Metabolites or Markers detected in their Samples. Accordingly, it is not necessary to prove intent, fault, negligence or knowing use by the athlete to establish an anti-doping violation*." This provision closely mirrors Article 2.1.1 of the WADA Code.

3 Relevant case studies

In the concluding section of our paper, we will provide several examples that demonstrate the relationship between *good faith* in sports support contracts, doping-related penalties, and their enforcement mechanisms.

One such example pertains to athlete TME (2010). At the time, she was a minor who underwent an anti-doping test following a national athletics competition (as opposed to an international one, which is significant for the discussion that follows). The substance detected and confirmed was 18-nor-17alpha-methyl-17beta-hydroxymethyl-androst-1,4,13-trien-3-one, a metabolite of metandienone, listed in section S1.1.a of the prohibited substances list. In her statements dated July 9, 2010, the minor **claimed to have no knowledge** of the reasons for the positive test results and asserted that **all her supplements were provided/administered by Mr. BX**, her coach at the P club. Upon interrogation, coach BX admitted to administering 6 tablets of Naposim to the athlete without her knowledge or that of any other staff member.

After reviewing the evidence in the case file, the National Anti-Doping Agency (NADA) decided, through decision No. 25/12/08/2010, **not to suspend the athlete** from competition, citing Article 46(2) of Law No. 227/2006. They argued that the athlete did not suspect or have knowledge of the administered substances. However, **coach BX received a lifelong suspension.**

The World Anti-Doping Agency (WADA) appealed NADA's decision, seeking a two-year suspension for the athlete and the maintenance of the suspension for the coach. Following deliberations on the evidence presented in the case file, including factors such as the athlete's minor status, absence from international competitions, lack of prior testing, and coach BX's admission of substance administration without informing other staff or family members, the appeals committee **upheld WADA's appeal**. Consequently, through the decision dated December 9, 2010 [23], the **athlete was suspended for one year**, and she was disqualified from competitions she participated in from the date of testing until the decision was rendered, while the lifelong sanction for the coach was upheld.

It is apparent that the appeals panel partially disregarded the athlete's defense, which solely attributed blame to the coach. Even during her minority, she was held accountable for doping. We believe that a **comprehensive contract** between the athlete and coach could provide a path to resolving the case in her favor. Inclusion of clauses favoring her, alongside specific mentions regarding substance administration, could have potentially reduced her culpability or even absolved her of wrongdoing.

Another similar case [24] involves athlete CEM, trained by coach BL. At 16 years old (in 2014), she tested positive for methadienone (17β-HYDROXYMETHYL-17α–METHYL-18 NORANDROSTA-1,4,13-TRIEN-3ONE), also a prohibited substance under the WADA Code, section 1.1. Consequently, the athlete initially received a two-year suspension, later reduced to one year (NADA decision 16/28.10.2014), while her coach received a lifetime ban. Despite facing identical penalties to those in the TME case, BL's defense focused on the vulnerabilities or gaps in contracts.

In his appeal, BL argues that despite graduating from the University of Physical Education and Sport in the Republic of Moldova, he lacks any diploma recognized by Romanian authorities. Consequently, he contends that the provisions outlined in Article 3(1) of Law No. 227/2006, which define „support personnel," do not apply to him. Additionally, he asserts that athlete CEM trained with him independently and privately, placing the responsibility on her legal guardians to monitor her substance intake, rather than on him, as they were merely „*playing some balls*" together. Despite admitting to providing the athlete with two halves of Danabol 50mg (containing methadienone) on consecutive days, BL maintains his stance.

Coroborating his statements with witness GVL's testimony (the minor athlete's mother), it is observed that BL functioned essentially as a coach – *actively training a group of 10-12 children, accompanying them to training camps, and being present on the field*.

Consequently, the Appeals Committee, in line with Law No. 227/2006, determines that **anyone** who trains or assists an athlete in preparing for sports competitions qualifies as the athlete's support personnel. Thus, since CEM was preparing for competitions with BL, he falls under the definition of support personnel as per Law No. 227/2006. Thus, the categorization of a person as „support personnel" is not contingent upon a contractual agreement between the parties or the coach's affiliation with the club.

Taking all these factors into consideration, BL's appeal was dismissed, and his lifelong suspension was upheld.

Although the *attempted deception of good faith by support personnel was thwarted* in the cases, there are instances with contrasting outcomes. We briefly highlight the case [25] of three senior-level football players from Romania who received suspensions ranging from 1 year to 8 months for intravenously administering over 100 ml of substance. Although it did not contain substances declared as banned, the procedure itself of administering more than 100ml of an infusible substance in less than 12 hours is banned by WADA. The action followed a self-request by NADA following the publication on the *Instagram* page of a private clinic of images with the three athletes undergoing treatment in the private clinic.

Despite the absence of published documents analyzing the exact statements of those accused of violating anti-doping legislation, we observe the sanctions imposed in this case. Their appeals were rejected, and the initial decision was upheld. Thus, it appears that **only the athletes were sanctioned**, despite evidence suggesting they did not administer the intravenous substances independently, with video evidence supporting this claim. Additionally, throughout the hearings, they argued that they resorted to this method either as a marketing strategy for the clinic or as over-immunization against the CoVid-19 crisis. Consequently, although this no longer concerns a case where an individual denies their role or qualification, they were not penalized (whether referring to the individual administering the substance or the clinic itself).

Another notable case is that of athlete HS, initially suspended for 4 years for doping, which was later reduced to a 9-month penalty. The athlete underwent constant testing in accordance with regulations since 2013. The first positive test occurred in Miami on August 29, 2022, following the loss of her first match in the tournament. The Doping Control Laboratory in Montreal, accredited by WADA, identified traces of Roxadustat (also known as FG-4592) in the samples provided, a substance prohibited by the WADA code [26], resulting in a provisional suspension for 4 years starting October 7, 2022.

Prior to the appeal hearing, PM, the athlete's coach at the time, publicly declared on November 15, 2023 [27]: „*She was never doped! She is a victim"; „I am confident about the future, after the appeal made to TAS, because it is an independent tribunal. We have been able to establish where the contamination came from. So, we proposed her to take collagen, and we bought it from a company. It happened that this collagen was contaminated. I had no way of knowing, but I take responsibility for what happened because it concerns my team and me. We bought her this collagen*." However, it is important to note that this statement, where the coach practically acknowledges guilt, was made publicly, and currently, there is no comprehensive decision published that records his testimony.

Although it is clear that an athlete of her caliber does not independently procure the substances she uses as performance enhancers, no other individual was sanctioned in this case either: *Lausanne, March 5, 2024 – The Court of Arbitration for Sport (CAS) issued its decision in the arbitration proceedings on appeal CAS 2023/A/10025 HS v. International Tennis Integrity Agency (ITIA) and CAS 2023/A/10227 International Tennis Integrity Agency (ITIA) v. HS: The arbitration appeal procedure before CAS (...) took place from February 7-9, 2024, in Lausanne, Switzerland. The CAS panel unanimously determined that the four-year suspension imposed by the Independent Tribunal of the International Tennis Federation would be reduced to a nine (9) month suspension starting from October 7, 2022, which expired on July 6, 2023.* [28]

4 Conclusions

While the presumption of good faith is standard in contract law, as outlined in Article 1171 of the New Civil Code, which mandates that „*parties must act in good faith during contract negotiation, execution, and conclusion, without exception or limitation,*" this principle is not always upheld in sports practice. Athletes often face a dilemma due to their lack of familiarity with the law and the presence of various loopholes within it.

Surprisingly, it is sometimes the support staff who neglect contractual duties, despite acknowledging actions that promote doping. In certain instances, contractual obligations are exploited in bad faith, even to the detriment of the athlete, particularly when they are subjected to a doping suspension and their support team attempts to absolve themselves of responsibility.

To prevent situations where good faith is compromised and safeguard their interests, athletes can opt for comprehensive contracts that explicitly address doping scenarios. Looking ahead, another legislative avenue to safeguard athletes' rights could involve the implementation of a standardized contractual framework, enabling athletes to enter into agreements with any collaborating party.

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THE PRINCIPLE OF GOOD FAITH IN FULFILMENT OF INTERNATIONAL OBLIGATIONS - FUNDAMENTAL PRINCIPLE IN INTERNATIONAL LAW

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Abstract

The principle of good faith performance of international obligations, also known as Pacta Sunt Servanda, is a fundamental doctrine in international law, which represents the essence of treaty obligations. This Latin phrase, which translates as „agreements must be kept," embodies the principle that treaties and agreements are legally binding and should be observed in good faith by the parties involved. The principle of fulfilling international obligations in good faith is the oldest principle of international law, a principle that applies to all sources of international law, being the classic example of an initial principle of the branch that has become over time a fundamental principle of international law. The essential condition that we have found for this principle is that the obligations must be performed in good faith, be legal and in accordance with the provisions of the signed treaties. In this article, we aim to explore the origin and significance of this essential principle in the field of international law.

Keywords: *treaties, obligations, good faith, duties, jurisprudence, international law*

1. Preliminary aspects concerning the principle pacta sunt servanda

1.1 Emergence and evolution

For several centuries, Roman law was perceived as the foundation of private law in continental Europe and had significant historical and developmental implications not only on contemporary civil law but also on international law. The initial contemporary ideas of international law were based primarily on Roman private law, the civic ideals of contemporary nations always being modelled according to Roman set of values.

Among the oldest recognized rules of international law is the Principle of Good Faith, also known as „Pacta sunt servanda", an ancient principle found in Rome and Greece[1]. „Both we and the barons swear that all these shall be fulfilled in good faith and without dishonesty," said King John in Magna Carta Libertatum (1215). The International Court of Justice stated in the Nuclear Tests Case that „the binding nature of an international obligation is based on good faith, as is the very rule of *Pacta Sunt Servanda* in treaty law".

Therefore, the concerned states have the right to demand that the obligation thus formed be maintained and may choose to recognize and rely on unilateral pronouncements. Respect for treaties goes hand in hand with the principle of good faith, a principle that many arbitral

[1] Originally, this principle was closely related to religion. The conclusion of international pacts had an important religious component, being accompanied, most often, by various rituals. Parallel to the religious aspect, elements of an embryonic legal conception will develop and appear.

tribunals refuse to see as an autonomous source of legal obligations, even though it is a basic component of the process of treaty interpretation[2].

The principle of fulfilling international obligations in good faith has its origin and legal force in international law, without it international law would no longer have the quality of law. The principle originated as the principle of respect for international treaties and was known by this name for a long time. It was enshrined in the preamble of the Covenant of the League of Nations, to be later reaffirmed in: the preamble of the Charter of the United Nations[3], in the 1969, in 1986 Vienna Conventions regarding the law of treaties, in the 1970 Declaration on the Principles of International Law, in the 1975 Helsinki Final Act, in the OAS (Organization of American States) Statute, the OAU (Organization of African Unity) Charter etc.

The 1969 Vienna Convention states that the principles of free consent and good faith as a rule are universally recognized[4]. It is established thus, from the preamble, that the rule of good faith is unanimously recognized and accepted, along with two other fundamental rules: free consent and compliance with treaties. It is noted that this fundamental document for the edifice of international relations stipulates in Article 26, entitled „Pacta Sunt Servanda", the obligation to observe treaties in good faith.

The content of the principle is also set out in the Declaration of Principles from 1970, which specifies the importance of this principle in maintaining international peace and security, as well as in achieving other UN goals, the hierarchy of international obligations is emphasized, and in this way, the norms from which they result, on the top being the UN Charter. This principle is also included in the Paris Agreement on Climate Change (COP21) signed by 195 states and the European Union at the United Nations Climate Change Conference (COP21) in 2015 which proposes to reduce greenhouse gas emissions and to limit the increase in global temperature. The principle of good faith is implicitly recognized throughout the agreement, especially with regard to the commitments assumed by the states parties and their cooperation to achieve the established objectives.

After the obligations assumed according to the charter, follow the obligations arising from the generally recognized principles and rules of international law, then those assumed [5] through international agreements in accordance with these principles and rules.

The Helsinki Final Act of 1975 contains the same provisions as the Declaration of 1970; especially, this act specifies that states „in the exercise of their sovereign rights, including the right to establish their laws and regulations, must comply with the obligations legal rights due to them by virtue of international law...". The principle applies to all international obligations, regardless of their source, i.e. those arising from international treaties, from customary norms, as well as from binding decisions of international bodies and organizations. As an object of

[2] According to Art. 31 para.1 of the 1969 Vienna Convention on the Law of Treaties: „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"*

[3] The preamble of the UN Charter emphasizes the determination of UN members to create the necessary conditions and maintain justice, as well as respect the obligations arising from treaties and other sources of international law – see article 2 point 2 of the United Nations Charter: „All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.", https://www.un.org/en/about-us/un-charter/chapter-1

[4] Preamble to the Vienna Convention: „*The States Parties to the present Convention ... Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized."*

[5] The Convention on the Law of Treaties (1969) states that a treaty creates neither rights nor obligations for a third state without its consent.

protection are the relations between states and other subjects of international law that refer to the creation, application and termination of the action of international treaties and international custom.

The fulfilment of international obligations in good faith is based on the idea of reciprocity, in essence the one who violates a rule of international law cannot issue claims even to the rights arising from it.

The principle includes concrete rules such as the inadmissibility of unilateral and arbitrary refusal from assumed obligations, legal liability in violation of international obligations, the inadmissibility of invoking domestic law as a justification for non-execution of external obligations, the duty to bring national legislation into line with assumed international obligations, the inadmissibility of contracting certain obligations contrary to those in force in relations with third countries.

It is not only a legal norm, but also one of international morality: states must fulfil their obligations to which they have freely consented[6]. This principle was initially applied to treaties and common laws, later being incorporated into most sources of international law, respecting the essential condition that obligations to be executed in good faith must be in accordance with international law. The fundamental nature of this principle, as it is enshrined in international law, emerges from the above[7].

1.2 Compliance with the principle of good faith

Good faith *(*in Latin *bona fide*[8]) is a legal concept that has been substantiated since antiquity by the Roman jurist Marcus Tullius Cicero who posed in *De Officiis 3.92* the question whether agreements and promises must always be kept (*pacta et promissa semperne servanda sunt*), but it is not explicitly included in the Roman law; this principle is defined in various ways in modern legal doctrines and is constantly under critical analysis. It can be difficult to identify the precise meaning of good faith and how it manifests itself. At the same time, it ensures the prevention of abuse of authority and provides correct answers in legal interactions between sovereigns and private actors. It is a principle that speaks of honesty, loyalty and rationality.

The principle of good faith is a key component of most historical and modern law systems and is considered a general principle of international law. The principle requires the parties to „*behave honestly and fairly with each other* (…) *and refrain from taking unfair advantage*"[9]. The condition of good faith is both a universal legal principle and a principle of international law, which continues to be of major importance despite its varied manifestations and realizations in the application of the principle of good faith performance of international obligations. Good faith between nations is a major international mechanism, with particular importance, because it fuels the conduct of foreign policy and is the basis of the success or

[6] See Gemănu Gr., Contemporary International Law, Didactic and Pedagogical Publishing House, Bucharest, 1965, page 280 (in Romanian)

[7] Article 26 of the 1969 Vienna Convention on the Law of Treaties provides that *„Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"

[8] According to the Latin definition, the concept of good faith denotes sincere, honest intention or belief, regardless of the result of an action; in law, *bona fides* denote the mental and moral states of honesty and conviction regarding the truth or falsity of a proposition or body of opinion

[9] See Gherasim D., Good faith in civil legal relations, Academy Publishing House, Bucharest, 1981, pp. 34-35 (in Romanian)

failure of all negotiations, being the responsibility of all nations to promote and respect good faith, according to the UN Charter which suggests the need to promote good faith.

Thus, the U.N. Charter provides that: „all members of the organization shall fulfil in good faith their assumed obligations, according to this Charter". This means the inviolability and sanctity of legal international treaties, inviolability that must be respected by all states and peoples. The principle is therefore based on the idea of good faith, namely the obligation to respect one's word. Good faith here means faithfulness to the commitments assumed by states and other subjects of international law, in international relations; in conclusion, all treaties include obligations that must be fulfilled in good faith.

In international law, as well as in investment arbitration, the principle of good faith applies to state conduct, interstate relations, but also to those seeking to assert a claim under an international treaty[10]. As such, it regulates the legal relations of the parties in all their aspects, including the negotiation of the instruments that give rise to an investment. The Vienna Convention of 1969 implicitly stipulates the close correlation between free consent – compliance with treaties – good faith. Free consent, in turn, is closely related to the concept of sovereignty, which implies the right of the rule of law to accede to a set of international treaties (for example, Sweden's NATO accession through the domestic decision to renounce its neutrality status) or to denounce the participation of the state in the previously ratified international treaty (for example the exit of the European Union by Great Britain). Thus, it is considered that the principle of good faith fulfilment of international treaties does not exclude the free sovereign consent of the state to decide to withdraw from the treaty. This can be seen quite prominently in the United States of America (USA), President Trump has ended US participation in a number of international treaties without prior consultation with Congress. He was well within his rights to do so, as the US constitution grants the president such authority.

The constraints that states face when upholding the principle of good faith govern how well they fulfil their rights and responsibilities in international relations. In addition to the express obligations of good faith included, acts based on good faith are subject to legal ramifications under universal international law. The function of good faith will expand and will generate further variations of this restriction as international law becomes more dispersed and fragmented under stand-alone rules, since, in essence, good faith functions to give legal weight to which states grant to other states. Although good faith can sometimes be difficult to define in an abstract sense, it is essential for instructing states on how to operate in accordance with international law. The good faith has global relevance and makes it easier to navigate the legal system because it is an enduring moral ideal that has become a binding legal norm. The concept of good faith is relevant in several legal contexts and jurisdictions. Its universality unifies and highlights the commonalities of many legal systems, acting as a bridge between them.

The International Court of Justice (ICJ) has established the fundamental idea of international law regarding the bona fide creation and fulfilment of one's international obligations. As Grotius stated, the basis of any pact between sovereigns is good faith, whether

[10]For example, in the case of treaties, they must be legal, because history gives us countless examples of violations of this principle by states based on exploitation in an illegal form; for example the statement of German Chancellor Bethmann Hollweg who, on the eve of the First World War, cynically stated that the treaties are not worth „even the piece of paper they were written on", a fact that denotes the attitude towards international obligations.

it is stated explicitly or implicitly. The phrase „pacta sunt servanda" describes how commitments made are legally enforceable. Derived primarily from Roman civil law, the notion of good faith is undoubtedly one of the civic values of contemporary governments. However, the good faith standard has informed international law to some extent that it is an inherent value built into international agreements, primarily international treaty law. In the field of international law, it is essential to establish a code of conduct that emphasizes respect for treaties, proportionality and the prohibition of abuse of power for different parties. According to the Kelsenian perspective[11], good faith is more of a precautionary guideline than a legal one.

In general, the principle of good faith is reflected in the conduct of states in interpreting and fulfilling their international obligations, including in relation to international treaties and other diplomatic commitments. The principle of good faith is an important aspect of international law and is considered essential for maintaining order and cooperation among member states of the international community, so most countries apply the principle of good faith in fulfilling their international obligations.

According to the Helsinki Final Act (adopted in 1975), concerning on the good faith fulfilment of obligations under international law, participating states agreed to fulfil responsibly their obligations under international law. These obligations include both those deriving from the generally recognized principles and norms of international law, as well as those resulting from treaties or other international agreements to which they are parties. In the exercise of their sovereign rights, including the right to make their own laws and regulations, participating States undertake to comply with their legal obligations under international law. They must also take due account of the provisions of the Final Act of the Conference on Security and Cooperation in Europe and implement them. Participating States confirm that in the event of a conflict between their obligations under the Charter of the United Nations and their obligations under any treaty or other international agreement, their obligations under the Charter of the United Nations shall prevail[12]. This wording emphasizes the importance of respecting and applying the principles and norms of international law in a fair and responsible manner, as well as the need to resolve potential conflicts between different international obligations consistently with the provisions of the United Nations Charter.

It is noted that the main function of good faith includes the protection of the legitimate expectations of legal subjects, but also the search for legal stability, security and predictability, as well as the protection of the objective and purpose of legal proceedings against unilateral excess, an action that endangers the proceedings and the common interest. In addition, the principle prohibits abusive and arbitrary actions, especially the use of legal rights for other purposes. As international law becomes increasingly fragmented and dispersed into 'autonomous' regimes, the role of good faith will expand and create more permutations of this limitation, as good faith in principle acts to give legal value to expectations that states have in the actions of other states. Although good faith is not easy to define in abstract terms, we note

[11] H. KELSEN, Das Problem der Souveränität und die Theorie des Völkerrechtes, Ed. J.C.B. Mohr, 1920, pp. 1-320; H. KELSEN, Pure Theory of Law, *op. cit*., pp. 320-324; F. RIGAUX, Hans Kelsen on International Law, în European Journal of International Law vol. 9 (1998), pp. 325-343.

[12]. According to Article 103 of the United Nations Charter: „ In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." https://www.un.org/en/about-us/un-charter/chapter-16

that it is indispensable, both to international law and to domestic law. Therefore, the principle of good faith performance of international obligations and that of good faith are interconnected and complement each other within international law, contributing to establishing a robust legal framework and promoting international relations based on mutual respect, trust and cooperation.

2. Transposition of the principle into domestic law

The principle of good faith performance of international obligations known as *Pacta sunt servanda* is recognized in the domestic law of many countries under various forms and names, detailed below.

In Romania, the principle „pacta sunt servanda"[13] with a more pronounced applicability in civil law, known as the „Principle of the binding force of the contract", introduced in the New Civil Code at art. 1270[14], has been a fundamental part of the legal system for many years, incorporated into Romanian law through various legal instruments and has been supported by the courts as a basic principle of contract law, because a contract is binding on the parties and non-optional, with the force of law, but subordinate to laws. But as for the exact date when the principle became officially recognized in Romanian law, it would probably coincide with the development of Romanian legal institutions and the codification of laws. Romania's legal system has evolved over time, drawing on influences from Romanian law, as well as from other legal traditions. The Pacta sunt servanda principle has been transposed into legislation and is recognized as a fundamental part of civil law. This principle is reflected in the Civil Code of Romania and is applied in the interpretation and implementation of contracts. This wording represents a way of transposing the international principle Pacta sunt servanda into Romanian civil law and is applied as part of contract law, also known as the „Principle of Mandatory Force". It is an essential element that ensures certainty and compliance with commitments in contractual relations, contributing to the stability and predictability of the business environment and civil relations, which implies the execution of the contract in good faith, with the parties returning the obligation of loyalty and cooperation.

In France, this principle is included in the French Civil Code (article 1134) in the form „les conventions légalement formées tiennent lieu de loi entre parties" ("legally formed agreements take the place of law between parts").

In German law, the principle is known as „Pacta sunt servanda" and is an integral part of the German legal system, included in jurisprudence and doctrines.

The United States introduced this recognized principle in the form of „contracts are to be enforced as agreed" and is part of the general principles of contract law, which are applied in American jurisprudence.

The UK has transposed the principle and it is recognized as „sanctity of contracts" and is an important part of common law and contract law.

In Canadian law, this principle is embodied in provincial and federal legislation, in different forms, but with a similar essence as in the rest of the Western world.

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[13] Rule of Law Checklist, adopted at the 106th Plenary Session, Venice, 11-12 March 2016, CDL-AD(2016)007, para. 47,48

[14] According to art. 1270 para. (1) Civil Code: „The valid concluded contract has the force of law between the contracting parties. (2) The contract is modified or terminated only by agreement of the parties or for reasons authorized by law."

In Italian law, this principle is enunciated in the Italian Civil Code as „Il contratto ha forza di legge tra le parti" (Article 1372), which means that the contract has the force of law between the parties.

In Spain, the principle is recognized as „La ley es la ley" (the law is the law), expressing the idea that the contract must be respected according to the law.

In Brazilian law, the Pacta sunt servanda principle is included in the Brazilian Civil Code in the form „Os contratos devem ser cumpridos" (Article 421), which means „contracts must be fulfilled". In Argentine law, the Pacta sunt servanda principle is recognized as „Los contratos son ley entre las partes" which translates as contracts are law between the parties.

In China, this principle is expressed in the form „合同当事人应当遵守诚实信用原则" (Hétóng dāngshì rén yīngdāng zūnshǒu chéngshí xìnyòng yuánzé), which translates as „the parties to the contract must respect the principle of good faith".

In Japanese law, this principle is known as „契約の遵守" (Keiyaku no junshu), which means „respecting contracts", and is an important part of the Japanese legal system. In Korean law, this principle is expressed by the term „계약의 집행" (gyeyak-ui jiphaeng), which means „execution of the contract", highlighting the importance of keeping commitments.

In Russian law, this principle is expressed in the form „Договор есть закон для сторон" (Dogovor yest' zakon dlya storon), which means „the contract is the law for the parties", form similar to the one in Romanian law.

In India, this principle is known as „संविदा का पालन किया जाना चाहिए" (Samvidā kā pālan kiyā jānā cāhie), which means „the contract must be respected".

In Australian law, this principle is implicitly recognized as part of the common law and contract law jurisprudence.

In South Africa, this principle is integrated into the legal system and is applied in the interpretation and enforcement of contracts, and in Egypt, this principle is known as „العقود واجب أداؤها" (Al-uqūd wājib adā'uhā), which means „contracts must be executed". In the Maghreb countries, such as Morocco, Algeria and Tunisia, this principle is integrated into their legal systems and is applied in the interpretation and implementation of contracts.

In Turkish law, this principle is known as „Sözleşmelerin Bağlayınılığı" and is a fundamental element of Turkish contract law.

In Swedish law, this principle is expressed as „Avtal ska holdas" translated by contracts must be respected, it is a fundamental principle of Swedish contract law.

In Norway, Greece and Ukraine, this principle is recognized and applied in the interpretation and implementation of contracts, contributing to the stability and certainty of contractual relations.

These are some examples that add more diversity and confirm the applicability of Pacta sunt servanda in a variety of legal systems around the world. It is obvious that this principle is universal and is a pillar of trust and stability in contractual relations. We note once again the universality and importance of the Pacta sunt servanda principle in international and national law, showing that it is a fundamental element in legal systems around the world, but also how it is similarly recognized and applied in most countries around the world, in different forms and under different wording.

However, it has been incorporated into treaties in various forms since the 1950s, the principle that requires the fulfilment of international obligations in good faith is transposed

into domestic law with applicability towards civil contractual law, and in international law it is a fundamental principle, which currently is a popular feature in modern bilateral investment treaties. This clause was originally incorporated primarily to deter unilateral termination of investment treaties and unfair expropriation by states, which refers to the obligation of states to fulfil their international obligations fairly, honestly and in accordance with the spirit and letter treaties and international agreements to which they are party. Thus we observe how the condition that governs the creation and fulfilment of legal obligations is good faith, which is essential both in applying the principle in international and domestic law. Pacta sunt servanda in treaty law is based on good faith, as is the binding nature of an international obligation[15].

3. International jurisprudence

Over time many jurists and experts have constantly emphasized the importance of Pacta Sunt Servanda. Thus, the renowned international law expert Sir Hersch Lauterpacht once said: „Pacta Sunt Servanda is the basic principle of treaty law. It ensures that the obligations assumed by treaties and agreements are respected",

For example, Sir Robert Jennings, former British lawyer and judge, president of the International Court of Justice (ICJ) and an expert in international law, emphasized the importance of respecting the principle „pacta sunt servanda" in the context of the application of international treaties and the international legal order[16]; he gives an example from American jurisprudence where some lawyers used this principle „pacta sunt servanda", in propagating simplistic views on the unqualified binding nature of the contract, which would otherwise not be encountered, outside of relatively primitive societies, and presenting them as part of international law.

Martti Koskenniemi is known as a Finnish jurist and professor of international law at the University of Helsinki. Koskenniemi has written extensively on the „pacta sunt servanda" principle and its importance in contemporary international law. James Crawford was another jurist and international law expert who served as a judge and president of the International Court of Justice; he emphasized the essential role of the „pacta sunt servanda" principle in maintaining order and predictability in international relations[17]. More recently, Jiang Zhifeng conducts an extensive critical analysis of the principle of good faith in historical perspective in *Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom*, of how this principle shaped, organized and reconfigured the world order, and how the invocation and application of this concept underwent changes as a result of world development and theoretical contestation.

These are just some of the jurists and experts who have constantly emphasized the importance of the principle „pacta sunt servanda". Through their works and their contributions to international law, these experts have promoted and supported the observance of this principle as the foundation of international law.

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[15] See Nuclear Tests Case ICJ Reports, page 253 para. 46

[16] See Jennings, R. Y., What is International Law and How Do We Tell It When We See It?, Schw.Jb.Int.R. 1981, p. 59

[17] See Crawford J., Brownlie's Principles of Public International Law, 9th ed., Oxford University Press, 2019, p. 45

On May 9, 1973, Australia[18] and New Zealand have each initiated proceedings and – submitted an application to the International Court of Justice[19] against France regarding the nuclear weapons tests that France proposed to conduct in the atmosphere of the South Pacific region, claiming that conducting atmospheric nuclear tests in the South Pacific area is contrary to international law. France stated that it considered the Court to be manifestly without jurisdiction and refrained from appearing at public hearings or making statements. By two orders of 22 June 1973, the Court, at the request of Australia and New Zealand, indicated provisional measures to the effect, inter alia, that, pending the judgment, France should refrain from nuclear tests causing radioactive emissions on Australian or New Zealand territory. In two decisions delivered on 20 December 1974, the Court found that the applications of Australia and New Zealand no longer had any substance and that it was therefore not called upon to give any decision in this regard. With these in mind, the Court noted that it also had to take into account the further development of the situation in the South Pacific. Thus, the Court pointed to the communication of the President of the French Republic to New Zealand, in which he stipulated that the nuclear tests would soon be ended. Other statements were made in the same spirit by the French foreign minister before the UN General Assembly. Similar elements were also contained in an interview by the French Minister of Defence, as well as in a letter from the French Prime Minister to his New Zealand counterpart. In doing so, the Court relied on the conclusion that Australia and New Zealand's objective had been achieved to the extent that France, in various public statements, had announced its intention to cease atmospheric nuclear tests upon completion of the 1974 series.

It is well known that unilateral declarations concerning elements of fact can have the effect of creating international obligations, and in the specific case of the French nuclear tests in the South Pacific, New Zealand invoked the breach of the principle of good faith in the fulfilment of international obligations and argued that France was violating this principle by carrying out nuclear tests, which threatened not only the environment, but also the health and security of the population in the region.

The principle of good faith in the fulfilment of international obligations requires states to act with sincerity, loyalty and in accordance with the spirit of international treaties and norms. New Zealand argued that France, by continuing nuclear tests, was not complying with this obligation and was not acting in good faith in the context of international norms relating to the prohibition of nuclear tests. Finally, the International Court of Justice recognized New Zealand's arguments and ruled in its favour in 1974, determining that France should cease nuclear testing in the South Pacific region. The ICJ decision emphasized the importance of respecting the principle of good faith in the fulfilment of international obligations and contributed to the strengthening of international norms against atmospheric nuclear testing. However, New Zealand argued that the possibility of continuing to carry out the tests remains open and it has no other guarantee than the good faith of France, New Zealand considering this aspect insufficient.

The Court held that through its statements, France sent a message to the entire international community regarding its intention to cease nuclear testing. It is true that France does not admit that it is bound by an international rule to stop the tests, but this aspect does

[18] A similar, but not identical, application was made by Australia and heard at the same time, but in separate proceedings, by the International Court of Justice. See Nuclear Tests (Australia v. France), Judgment of 20.12.1974, ICJ Reports 1974, 253; the Court's reasoning in both cases remains, in all relevant respects, the same.

[19] See Nuclear Tests (New Zealand v. France), Judgment of 20.12.1974, ICJ Reports 1974, p. 457

not affect the consequences of the declaration, since it was not made with the reservation of being able to revert to it arbitrarily. Therefore, the Court is faced with the situation in which the effect desired by New Zealand has been achieved[20], as France has assumed that it will not conduct any more nuclear tests.

In the specific context of the French nuclear tests and the trial between New Zealand and France, this principle has been invoked in relation to several relevant treaties and international norms, for example:

- The Nuclear Non-Proliferation Treaty (NPT) of 1968 is one of the main pillars of the international nuclear non-proliferation regime. Through the NPT, states commit not to develop, test, or use nuclear weapons. France, as a party to this treaty, was criticized for carrying out nuclear tests that contravened the spirit of non-proliferation and reduction of the nuclear arsenal.
- The 1963 Partial Nuclear Test Ban Treaty (PTBT) banned atmospheric, underwater and outer space nuclear tests. Although France did not initially sign this treaty, and the cessation of atmospheric testing did not occur until 1974, the PTBT reflected international norms that opposed nuclear testing on security and environmental grounds.

We note how in the case at the International Court of Justice (ICJ) between New Zealand and France, New Zealand argued that France was violating this principle by continuing nuclear tests, which contravened the spirit and international norms of non-proliferation and nuclear test bans. The 1974 ICJ decision, which ruled in favour of New Zealand, emphasized the importance of upholding this principle and international obligations more generally.

The principle of good faith performance of international obligations underlines the importance of respecting international commitments assumed by treaties. Under nuclear test ban treaties, states are required to fulfil their obligations not to conduct nuclear tests and to contribute to the overall goals of nuclear non-proliferation and disarmament. By observing the principle, it is necessary to ban nuclear tests for reasons of global security and environmental protection. States that have acceded to treaties or agreements banning nuclear tests undertake to respect this consensus and to act in a spirit of cooperation and transparency. The nuclear test ban is part of broader efforts for nuclear disarmament and non-proliferation. The principle emphasizes the need for states to assume serious responsibilities in this regard and to act in accordance with the objectives set by the international community.

In conclusion, the principle of good faith fulfilment of international obligations is an essential factor influencing states' approaches to nuclear tests, supporting their ban and promoting commitment to peace, security and the protection of the global environment.

Another relevant example in international jurisprudence, which strengthened the principle of fulfilling obligations

In good faith, is the „Gabcikovo-Nagymaros Project" case between Hungary and Slovakia, which was judged by the International Court of Justice (ICJ). In this case, Hungary and Slovakia were involved in a dispute related to the construction of a joint hydropower system between the two countries, known as the Gabcikovo-Nagymaros Project. Both countries signed an agreement in 1977 to develop this project, but later conflicts arose over

[20] The Court emphasized that the dispute must exist at the time of the judgment. At the time the case was settled, the Court was faced with a commitment by France to stop conducting nuclear tests, and this commitment produces effects in international law. Its effect is to bind France in accordance with those stipulated. As such, from the point of view of the International Court of Justice, there is no longer a dispute because there is no longer a conflict between the parties.

the environmental impact and the use of water resources. Hungary halted construction of the Nagymaros works in 1989, citing environmental and other concerns. Slovakia continued with the construction of the Gabcikovo works. This led to a dispute between the two countries, and Hungary asked the International Court of Justice to settle the dispute. In its 1997 decision, the International Court of Justice reiterated the principle of good faith performance of international obligations. The ICJ stated that Hungary had the right to express its concerns regarding the environment and other issues, but determined that Hungary had not fulfilled its obligations in the original agreement in good faith. The Court held that Hungary was at fault for violating the treaty and requested both parties to cooperate to find a just solution. This decision of the International Court of Justice reaffirmed the importance of the principle of good faith performance of obligations in international law and strengthened the role of the ICJ in resolving disputes between states by applying this fundamental principle.

Another relevant example is the decision of the European Court of Human Rights (ECHR) in the case of „Golder v. United Kingdom" in 1975. This case reinforced the principle of the good faith performance of the state's obligations in criminal proceedings and defined the standards for the right to a due process, including access to legal aid. In the case of „Golder v. United Kingdom", the plaintiff, Ian Golder, was arrested and charged with theft, he requested legal aid to support his case during the criminal trial. However, his request for legal aid was refused by the authorities. Golder claimed that this lack of adequate legal aid violated his right to a fair trial as set out in Article 6 of the European Convention on Human Rights (ECHR). The European Court of Human Rights found that the authorities' refusal to give Golder access to adequate legal aid violated his right to a fair trial under Article 6 of the ECHR. The Court emphasized that the state has an obligation to provide legal assistance in criminal situations in order to ensure a fair trial and that its unjustified refusal is a violation of the principle of the good faith performance of the state's obligations under the convention. This decision of the ECHR helped to strengthen the principle of the good faith performance of the state's obligations in criminal trials and confirmed the importance of ensuring a fair trial for all accused, including through access to adequate legal aid.

An example of domestic jurisprudence is the uncertainty about the correct procedures in terminating international treaties that led to the 2017 Supreme Court decision in the Miller Case, which was highly relevant to the Brexit negotiations. Thus, the court clarified that the authority to cancel international obligations rests only with the relevant minister, if the cancellation action does not result from the amendment of an internal law. The minister is obliged to request a parliamentary decision to achieve the cancellation. In other jurisprudence, such as that of the United States, this principle is included in the common interpretation of contracts and contract law, being fundamental in their application.

Conclusions

The principle of good faith performance of obligations is considered fundamental in international law because it has provided stability and confidence in international relations, promoting trust between states, and when states fulfil their obligations in accordance with this principle, it creates an environment in which all parties can have trust that others will act predictably and responsibly. By complying with the principle of performance in good faith, states demonstrate their respect for the commitments assumed in international treaties and agreements.

This is essential for the maintenance of order and stability in the international community, as well as for the promotion of peace and security which contributes to the prevention of conflicts. When states fulfil their obligations responsibly and cooperatively, the risk of escalation of tensions and conflicts is reduced.

The principle of performance in good faith is fundamental to the integrity and effectiveness of the international legal system, it is one of the pillars that support the observance and application of international law and contributes to the consolidation of a fair and predictable global legal system. This connection with good faith means that states that fulfil their obligations in good faith gain a reputation of trust and credibility in the international community.

This facilitates further cooperation and collaboration between states and can strengthen their position on the international stage. Overall, the principle of good faith performance of obligations has been enshrined as a fundamental principle in international law through its recognition and application in a variety of contexts and situations throughout history, and several factors have contributed to enshrining this principle through the provisions explicit in treaties and conventions because it is often recognized and regulated in international treaties and conventions.

For example, we recall that the Vienna Convention on the Law of Treaties (1969) establishes that states must fulfil their obligations in accordance with the principle of good faith. States and international organizations have consistently applied the principle of fulfilling their obligations in good faith in their international relations, which is evident in the interpretation and application of treaties, in the settlement of disputes and in various other aspects of international relations, and the decisions of international tribunals and other international legal bodies. They recognized and strengthened the principle of fulfilling obligations in good faith.

The principle of good faith performance of obligations plays a prominent role in international relations in general, but also in international economic relations in particular. It represents a fundamental principle that emphasizes the importance of fair and cooperative behaviour between states in international relations and must be understood by the fact that states are obliged to fulfil in good faith and in full the international treaties concluded lawfully, thus, through their clauses, respect international law. This principle applies only to treaties that are not contrary to the fundamental principles of international law, principles having an imperative and lawful character.

Both this principle and the aforementioned norms have the same purpose, to ensure strict compliance with contemporary international legality.

Pacta Sunt Servanda, with its meaning deeply rooted in the Latin phrase „agreements must be kept", is a fundamental principle in international law and contract law as we noted in the previous section. It emphasizes the binding nature of agreements, the importance of good faith and the reliability of contractual relationships. Its meaning extends to commercial transactions, international diplomacy, legal predictability and the protection of human rights, but also protection against attacks or assassinations. As a cornerstone of legal systems around the world, Pacta Sunt Servanda serves as a pillar of stability and integrity in the field of agreements and treaties, it has been argued that the entire law of international liability is but a manifestation of the principle of good faith taken as an expression *a pacta are servanda* and *obligatio est servanda*.

We have observed that this principle is an essential factor influencing states' approaches to nuclear tests, supporting their ban and promoting commitment to peace, security and the protection of the global environment. The actions of states in this field are evaluated in relation to this fundamental principle of international law and international relations, in essence it establishes a norm of conduct for states in their international relations, based on mutual respect, good faith, trust and cooperation.

In the conditions of the contemporary world and in the presence of the complex international relations between states, as well as the serious consequences that non-compliance with international obligations or failure to fulfil them in good faith can have for the peace and security of mankind, the principle „pacta sunt servanda" is intended to contribute to the development the normal course of international life, to its orientation towards an international cooperation beneficial to states.

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GOOD FAITH AND FREEDOM OF SPEECH

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Abstract

This paper proposes a reflective perspective on the relationship between exercising the right of free expression and good faith. An analysis of the law and doctrine on this matter brings forth the foundation needed for the examination of a recent case concerning freedom of artistic expression, intended to highlight the difficulty of identifying the limits of freedom of expression in such a specific field. The question raised by the study is whether, in evaluating the limits of artistic expression, good faith is a factor to be taken into account, and to what extent it influences the establishment of those limits. The conclusion sheds light on the necesity to limit expressions perceived as offensive and the difficulty to appreciate the extent to which an expression is or isn't offensive and therefore deemed necessary to be subjected to limitation.

Keywords: *feedom of speech, good faith, CNCD, artistic expression*

1. INTRODUCTION

The present study explores the part of good faith in exercising the right of free expression, with reference to a recent case of the National Council Against Discrimination (C.N.C.D), having as its object the endeavor of a Romanian contemporary artist, P.B., to showcase a series of paintings and creations featuring biblical characters.

In the following analysis, general aspects regarding freedom of expression will be presented, based on Romanian law, the Constitution and the application guidelines of the European Convention for Human Rights. Since any freedom granted by the Constitution must be exercised in good faith, notions and points of view based on the tenets about this concept, ubiquitous in all branches of law, will be presented as well.

As we are talking about a case where works of art are being analyzed, elements of plastic language which can generate controversy following various interpretations by the public, or, as it's the case here, by a state authority, will be highlighted as well. Last but not least, the relationship between the respective works and other famous works that most likely served as inspiration will be up for discussion.

2. CONCEPTUAL FRAMEWORK

2.1. General aspects on freedom of speech

Article 30 of the Romanian Constitution establishes the possibility for citizens to express themselves regardless of the way in which their ideas or opinions are presented, and prohibits „censorship of any kind". Within the same article, however, limitations of this right are defined as well – prohibition of incitement to defamation, conflict, or any type of hatred based on considerations of race, class or religious affiliation.

The author Dominika Bychawska-Siniarska, notes in a guide to the application of freedom of expression the close relationship between the establishment of a state of law, and the prerogative of the individual to express his or hers ideas without feeling constrained by norms or institutions [1]. The European Convention on Human Rights establishes in article

10 „freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities". It is essential to mention the intervention of public authorities because in most cases of censorship or restriction of expression the coercive force of the state was employed. Members of society can generate a judgment that appeals to the ethics of the individual, but only the state is able to enact concrete actions.

According to the sociologist Max Weber, only the state has access to legitimate means to use violence for the protection of its subjects, which is why one can deduce the reasons why the regulation of the relationship between the state and the citizen is so important in the matter of essential liberties.

The respect owed to others acts as a boundary in the matter of freedom of expression: article 29 of the Romanian Constitution, par. 2, states the obligation of citizens to demonstrate their freedom of conscience „in a spirit of tolerance and mutual respect". The perpetual exchange of ideas which allows society to progress generates potential juxtapositions of diametrically opposed perspectives that must coexist under the tutelage of the state. This guardianship must bring a balance and issue solutions for situations where people consider that by exercising a right, their conscience has been harmed, but in relation to dignity and freedom of conscience, situations where the excess of protection provided by the state are not isolated, it turns into censorship. Artists are all the more prone not only to external censorship but especially self-censorship, being susceptible to the ideological oscillations of the state.

. In her essay, „The Censor Within" [2], Svetlana Mintcheva points the self-censorship as the most favourite of ways to impede the freedom of artists. Especially in relation with religious groups, as she points out, the choice is to restrain trough awareness of the marginalization that the artists who exhibit provocative works of art are subjected, thus opting not to bring to life their works in the manner they originally conceived, to still be able to access the funds and facilities offered by institutions. From a normative point of view, the impossibility of forbidding self-censorship is obvious, as long as it's about the option of the individual, not directly influenced by external factors but, as concerning the norms and decisions adopted by the lawmaker, am individual aware of the penalty for proposing a certain theme, they will obviously self impose its avoidance, leading to a flagrant restriction of the freedom of expression.

2.2. General aspects on good faith

The author F. S. Cotea appreciates good faith as „being a mental state characterized by not knowing the error in which a person finds himself at a given moment" [3]. This definition emphasizes the limited capacity of individuals to anticipate the totality of potential effects or to decipher the totality of the elements of the context in which they operate. The variety of contemporary sensibilities makes it impossible to grasp all the situations that will offend a potential interlocutor. For this reason, norms can be noted to emphasize personal freedoms based on good faith.

In the Romanian Constitution, Article 57 states that „citizens […] must exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others." We can see the importance of this article to prevent potential abuses of law and to give competent bodies the possibility to sanction cases in which ideas objectively harmful to society are being expressed. In correlation with the topic of this study, it is also worth remembering the decision 220/2011 of the National Audiovisual Council, which establishes in the 32 article that: „no right conferred by law can be exercised in an excessive and

unreasonable manner contrary to good faith, for the purpose of harming or damaging another…".

The assessment of the violation of a law or a right is made according to the case facts related to the presumption of innocence or – in the case to be presented – related to the presumption of good faith and the factor of unpredictability of the interpretation of the expressed message. There are very few cases where an artist, through his expression, intended to harm an individual or a group. Directors Leni Riefenstahl and D. W. Griffith are among the few examples of artists whose work actively contributed to the dissemination of hatred toward minorities and whose intent, form, and purpose entirely reflected bad faith on the part of their creators. An artist's conduct is generally based on a lack of intent to adversely affect the people who acquire or interact with his creation.

3. FREEDOM OF EXPRESSION AND GOOD FAITH IN ARTISTIC EXPRESSION

3.1. CASE P.B. – case facts

In order to relate to a concrete situation: the relevance of good faith with reference to freedom of expression (a fundamental right protected by the Constitution), I chose a recent case, the case of the artist P.B. He received a warning from the National Council Against Discrimination for exhibiting offensive works in his „Nymphs and Zombies" exhibition, which offended some visitors. The mentioned works are a series of paintings and installations consisting in objects and sculptures depicting biblical characters imagined in a grotesque key. Some of them being made on a natural scale and containing elements of contemporary culture, they propose a reinterpretation of religious paintings and icons: the scene of the crucifixion of Jesus is being depicted, and another painting illustrates a skeletal figure that replaces the Virgin Mary in a pose that evokes the Orthodox icon in which she holds Jesus in her arms.

Several persons, together with the Romanian Orthodox Church, after visiting the exhibition, addressed the National Council Against Discrimination through petitions, most likely feeling that their right to dignity and right to faith were violated. It's easy to see, even not looking at it in depth, that a viewer will inevitably have an involuntary reaction to these works. The presence of skeletons and the representation of death in all its poses creates discomfort, whether it is a photograph, a written work or a sculpture. The hyper-realistic style enhances the visceral nature of the reactions, as it is possible to consider them real characters and not their representations. It is noticeable that in the artist's practice, this forcing of the barrier between the real and the imaginary was present in other of his works as well, it being an intrinsic element of his practice and not an isolated approach for that exhibition. The artist has also attracted attention in the past for works that provoked strong reactions due to the realism that prevented viewers from distinguishing between a real body and a sculpture.

Since, at the time of writing this article, the National Council for Combating Discrimination has not made public the decision, in the following analysis information will be extracted from a debate that took place on February 5, 2024, organized by the Juridice.ro website [5]. Regarding the case facts, the points of view of Professor Cristian Jura, member of the Board of Directors of the National Council for Combating Discrimination, expressed in the aforementioned debate are relevant. One of the key points highlighted was that all sanctions, both to the artist and curator of the exhibition and to the institution where the event

was held, were granted for the exhibition of the respective works, not for their creation. Thus, it can be concluded that it is not the freedom of thought – since anyone is free to think and hold their own opinions – but the freedom of expression, or in the present case the exhibition of the works, that is being discussed.

3.2. Statutory limits of freedom of speech

Article 13 of Law no. 489/2006 on religious freedom and the general system of cults provides that „any forms, means, acts or actions of defamation and religious enmity are prohibited." Another example of a governmental decree that restricts freedom of expression is Law 75/1994 regarding the hoisting of the Romanian flag, which prohibits through the Article 20 demonstrations that offend the anthem or the flag. Article 4 of the Government's Emergency Decree no. 31/2002 regarding the prohibition of organizations and symbols of a fascist nature may also be mentioned, which prohibits „the distribution, sale or manufacture of fascist, racist or xenophobic symbols". But within the same article it is found the 3rd paragraph: „The act provided for in paragraphs (1) and (2) does not constitute a crime if it is carried out in the interest of art or science, research or education." Foreshadowing certain settings that may unintentionally breach the norm, the lawmaker has clearly defined the instances in which even the reproduction of these symbols can be, if not beneficial, at least in good faith, since it does not aim to promote but only expose them for debate. From this it can be deduced that exhibitions are already considered by law to be contexts in which protection is needed against potential sanctions aimed at limiting the subjects and themes that artists address.

The particular attention given to situations in which ideas belonging to extreme right-wing ideologies were exposed is also reflected in the case book of the European Court of Human Rights. Siniarska, in her work, mentions that: „The only content-based restriction applied by the Court dealt with the dissemination of ideas promoting racism and Nazi ideology, Holocaust denial and incitement to racial hatred and discrimination" [6]. Thus, the instances where the ideologies are analyzed are not mentioned, but only those of glorification of these ideas.

Due to social pressure, there are not a few instances where institutions have had to reevaluate the presence of extremist symbols in works of art. Several museums and galleries in the US and UK have canceled or delayed exhibitions containing paintings by the artist Philip Gouston because the artworks featured members of the American extremist organization Ku Klux Klan [7], although anyone can infer from viewing the works that the aim was not to promote but rather to ridicule that organization.

3.3. Law case landmarks regarding freedom of expression in visual arts

In CNCD case book it can be remarked the similarity between P.B.'s case and the case regarding the theater play „Eu sunt! Şi?" In the play, actors dressed in modified versions of priestly robes eat food from an icon used as a prop. It is stated in point 49 of the decision that „the fact analyzed represents discrimination, as it created a difference based on the benchmark of religion and belief that had the effect of restricting the exercise of the right to dignity under equal conditions." [8]

In the case of the show, the use of objects that have an inherent spiritual value, the clothes and the icon, obviously have critical connotations towards religion. However, the creative dimension of the two works is different: the play uses an already made object that has a unique

purpose – worship by the faithful. The sculptures and paintings made by PB, however, are independent creations that do not have this purpose, neither being exhibited in a place of worship, nor having the spiritual value that an icon, made by artisans using techniques in compliance with specific and recognizable formal canons, presents to the world. Thus, two instances are discussed, which, although dealing with a common subject – religion – do so in different ways and with different intentions.

Furthermore, in the analogy with other objects of art mentioned by Cristian Jura during the conference, a discrepancy is noticeable between the intentions and methods of approach of other artists and the works of P.B. The works of the artist Josef Felix Müller are mentioned among the works „Piss Christ" by Andrea Serano and „La nona ora" by Maurizio Cattelan. In the case of Müller v. Switzerland, case no. 10737/84, 1998, heard at the European Court of Human Rights, paintings that depict as well biblical scenes but also contain characters in explicit sexual poses and performing acts of zoophilia are brought into question. Serano in his photograph immortalized a statue depicting Jesus crucified immersed in a basin filled with the artist's urine and Cattelan depicts in his sculpture Pope John Paul II hit by a meteorite, recalling the event that led to the extinction of the dinosaurs. None of these works can be created in good faith because by the nature of their fundamental elements they bring intentional offense to people who adhere to Christian religions. It is undeniable that these are examples of intentionally provocative expressions, which use sexual paraphilias, bodily fluids, or suggest events of a violent nature that are contrary to a theistic worldview.

The formal aspects that caused outrage are most likely the presence of horns on the head of Jesus, the presence of a figure hanging from the cross and one of the paintings that represents the Virgin Mary in the form of a skeleton. The presence of the horns is easy to challenge as blasphemy, given that elements that can be confused with demonic characteristics are present in many other art works: for example, the statue of Moses made by Michelangelo for the tomb of Pope Julius II. The sculpture shows the prophet with two protrusions on his forehead, also present in earlier renderings of the character by artists of the pre-Renaissance period, which can easily be seen as „horns". These, however, represent a way of portraying the prophet's communication with the divinity. Another detail is the fact that deer antlers were used. Although horns are associated in Christianity with demons, they are in most of these cases goat horns. This seemingly irrelevant difference shows the artist's mastery of the visual canons relevant to the work he created. The presence of death is also an element of Christian iconography. Martyrs are generally depicted in works at the moment of their death, most of the time violent, and in terms of the relationship with the bones, there are numerous ossuaries that have become chapels that attract believers and that do not provoke any reaction from the public.

In our opinion, in his approach, the artist showed good faith in the conceptualization and realization of the works by quoting elements specific to Christian aesthetics. It is not his duty to anticipate public consternation as long as each of these elements separately provokes no reaction, much less likely to be sanctioned when brought together.

Art has always passed through society's filter, and not rarely the very works that scandalized later turned out to be among those with the greatest historical value. Édouard Manet, Gustave Courbet and many other French artists had works rejected by the great salons of their time and which are still vandalized or censored today for the elements that outrage by their sexual nature. In 2018, a French court ruled that a Facebook user's rights were violated

when a photo of Gustave Courbet's „Origin of the World" painting led to the closure of their account [9]. In the case of Manet's painting, *Le Déjeuner sur l'herbe*, it was rejected by art experts at the time of its exhibition due to it being considered vulgar and is now among the most famous works of art from its period.

4. Conclusion

For the good functioning of society, the presence of legal standards and institutions that prevent the dissemination of hate/offensive messages is essential. The National Council for Combating Discrimination has a key role in maintaining social balance and facilitating access to justice for discriminated persons regardless of the nature or manner in which their rights were breached. However, there are also instances where the evaluation of an offense is difficult in relation to the way in which the idea was conveyed. A series of objective benchmarks and the implementation of standards are needed to allow people to guide themselves in order to express creatively. The arts, through the variety of subjects and techniques, can test the limits in which a citizen exercises their right of freedom of speech, being deliberately provocative or presenting themselves in an ambiguous manner, difficult to analyze and frame from a legal point of view. The most efficient way to avoid an erroneous interpretation in the future would be to consult experts in the fields related to the medium used in question, whether we are talking about historians or critics of arts, literature or film.

Marking a limit in the exercise of a right will never produce universally accepted effects, particularly in terms of artistic expression. Throughout history, many famous works of art have faced sanctions, whether in their exposure on social media or within institutions. Only time can determine which works will or will not influence the evolution of our society and to what extent limitations on artistic expression were necessary. Essentially, it is impossible to impose restrictions on artistic expression that will satisfy everyone. The desire to raise barriers in artistic expression is, however, a phenomenon observed throughout the history of arts in the modern period. The Sistine Chapel, which houses the frescoes made by Michalengelor Buonarotti, is home to some of the most famous and reproduced images in the history of art, but also probably the first case of limiting an artist's expression. Initially the plurality of human figures had no cover, the artist wanting to reproduce the human body in its primordial condition. Later, being considered vulgar for a prayer space, they were covered, altering the artist's vision and depriving us of a work that could have not only a different form but also a different meaning.

Thus, we consider that good faith in artistic expression should be considered as a parameter through which state institutions can evaluate potential limitations of freedom of expression. In this way, the balance would have been maintained between the artists' responsibility to carefully select their subjects and means of expression and the state's responsibility to allow them to carry out their cultural activities without exposing themselves to the risk of sanctions.

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GOOD FAITH IN INTERNATIONAL RELATIONS BETWEEN STATES

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Abstract

Good faith is a fundamental principle of public international law that establishes a moral standard of honesty, loyalty, and rationality in the social relations of states on the global stage. Rooted initially in classical Roman law under the name of bona fides, it represented a commitment to one's own words, fidelity, and honesty, symbolizing an internal virtue of loyalty. Evolving from a universal moral value to a mandatory legal principle, good faith has a transnational significance and serves as a bridge between diverse legal traditions. Its universality unifies legal systems and underscores their similarities. The principle of good faith protects its historical importance, requiring that each case be treated on its merits and balancing various interests on the international stage. Being the ethical foundation of international law, good faith is one of the life vest we can use when navigating the legal world.

Keywords: *good faith, international relations, pacta sunt servanda, states, interpretation*

1.General considerations

1.1. Defining the notion of good faith

Etymologically, the expression „good faith" comes from Latin, where the term „bona fides" finds its meaning as follows: the adjective „bonus" – good – meaning good person, honest person, virtuous person and the noun „fides" – faith, belief, trust, honesty.[1]

Good faith was described by *Cicero* as sincerity in words (veritas) and fidelity (constantia) in commitments [2]. Starting from this definition, we can say that the psychological aspects that generate good faith create two states of concordance or conformity. On the one hand, there is a concordance between what a person thinks and what he says (sincerity in words), and on the other hand, there is a concordance between words and actions (fidelity in commitments).

The root of the principle of good faith is the notion of fides, which has emphasized the virtue of fidelity since ancient times. „Fides" began to encompass a person's honest behavior in social relations and later adopted a legal meaning such as honoring the promise, properly fulfilling consensual obligations, and protecting trust. In the classical period, the principle of „bona fides" had both a subjective and an objective meaning, since the term fides meant not only faith and protection of trust in the objective sense, but also the subjective intention of subjects in contractual life.[3] Good faith in its objective sense requires subjects of a legal system to adopt a fair and honest standard of behavior in exercising their rights and fulfilling their obligations, aimed at protecting reasonable expectations and the interests of other parties that deserve to be protected.[4]

1.2.Origin

As an institution of law, good faith finds its origins in Roman law, beginning at the end of the Republic, with Praetorian ownership, when the development of the trade, especially

that of slaves, imposed the protection of buyers who were in good faith in transactions that were completed, without fulfilling the formalities and solemnities required by law in the case of mancipi things. At the end of the Roman classical period, „bona fides" lost its importance to the concept of „boni mores" (good morals), being even absorbed into a broader notion of „aequitas", which included respect for the given word, derived from mutual trust, and the standard of behavior in the performance of contractual obligations. Later, in the crisis era of the Roman Empire and in the post-classical period, vulgar law, based on customary rules created by practitioners, became more relevant, and the concepts of „fides", „bona fides" and „aequitas" lost their applicability and were diluted. In the middle medieval era, the concept of good faith experienced a revitalization due to glossaries' interest in Roman law and was influenced by the emergence of canon law. According to this right, a simple pact was executable, starting from the theological nature of breaking a promise, considered a sin. The association of a breach of faith (fidei laesio) at the time of conclusion of a contract even affected its validity for fraud or incident fraud (i.e. injury) and brought jurisdiction to ecclesiastical courts in case of litigation. Thus, the first ideas were launched that contributed to the further development of the principle of consensualism and binding force of contracts.

In terms of tacit or natural obligations, good faith meant that the debtor had to perform everything that was expected of an honest person engaged in that type of transaction, as a consequence of good faith, fairness and international law. The modern era marks the continuity and relevance of good faith in law and legal practice, so French Civil Law between the eighteenth and nineteenth centuries, French civil codes, such as Napoleon's Civil Code, had a significant influence in defining and regulating the concept of good faith. which included the concept of good faith.[5]

Good faith was recognized as a general principle of law during the drafting of the Statute of the Permanent Court of International Justice. This principle is described as „the foundation of all law, or a fundamental principle of law." O'Connor suggests that good faith derives from „the need for minimal human cooperation and tolerance for group coexistence to emerge and survive."[6]

At the same time, references to good faith can also be found in the Declaration on the Principles of International Law on Friendship and Cooperation Relations between States, which contains several aspects about good faith, such as the duty of each state to fulfill in good faith its obligations according to the generally recognized principles and rules of international law, as well as the duty to fulfill in good faith its obligations under the agreements; international valid according to generally recognized principles and rules of international law. [7]

1.3. Evolution

As the international community has evolved, the principle of good faith has become increasingly relevant in the evolution of contemporary international law. This moral and legal principle has been integrated into numerous international treaties and conventions, becoming an important foundation for relations between states.

In its case-law, the International Court of Justice (ICJ) has regularly recognised and applied the principle of good faith. For example, in interpreting treaties and settling disputes between states, the ICJ considers good faith as an essential element in assessing the conduct of the parties involved. Once the principle of good faith has become known to international jurists, its scope is certainly not limited to the application of treaty law. The principle is also

important in other contexts, such as creating or waiving rights and obligations by tacit acceptance or unilateral declaration. It also explains, as is commonly assumed, how obligations can arise from the mere signing of a treaty or the exchange of instruments constituting a treaty, or from the expression of consent to be bound by a treaty, already before the treaty enters into force.

Good faith finds application in the case of Preah Vihear, thus the principle of good faith was invoked in the context of negotiations and diplomatic dialogue between Cambodia and Thailand regarding the divergences between the borders established by the map and the true line of delimitation on water around the temple of Preah Vihear. Both sides stated that they pursue their interests sincerely and wish to resolve the dispute in a peaceful and reasonable manner. The principle of good faith has been used to argue that neither side should seek illegitimate advantage or act in ways that would undermine the conflict resolution process. In 1962, the International Court of Justice ruled that the temple belonged to Cambodia, but did not determine the precise boundaries. Since then, the two countries have had conflicts and tensions over this territory. The principle of good faith was invoked in diplomatic negotiations to resolve the dispute, but tensions persisted. The dispute continues today and a peaceful settlement remains a priority for both sides. [8]

Good faith is also found and applied progressively at international level in international trade relations and investments, more specifically in the dispute between the South American State of Argentina and foreign investors in the context of the sovereign debt crisis in Argentina.

In 2001, Argentina declared the largest sovereign bankruptcy in history, causing significant losses for foreign investors holding bonds issued by the Argentine state. This situation has led to numerous disputes and lawsuits between Argentina and its international creditors, and the principle of good faith has been an important consideration in resolving these disputes.

Foreign investors who held bonds issued by Argentina claimed that Argentina did not comply with its payment obligations and adopted unilateral measures that affected their rights under these bonds. On the other hand, Argentina argued that the serious economic and financial situation it encountered was an exceptional circumstance and that it had taken the necessary measures to protect its economic and social interests. In settling these disputes, international tribunals and international dispute settlement mechanisms, such as the International Court of Justice or international arbitration, took into account the principle of good faith in the interpretation and application of international treaties and agreements to which Argentina was a party. This involved analysing how Argentina acted in its relationship with foreign investors and whether or not it had met standards of good faith and fair play in resolving the sovereign debt crisis. [9]

This example therefore illustrates how the principle of good faith can be applied internationally in trade and investment relations, having a significant impact on how international disputes are resolved and the rights and obligations of the parties involved are respected.

2. The relevance of good faith in international relations

2.1. Relevant principles and norms of good faith in international law

The rule of good faith in international law has two correlated functions. First of all, it manifests itself as pacta sunt servanda, „agreements must be respected", as a reflection of

honesty and loyalty. Second, it functions as a rule of interpretation.*Pacta sunt servanda* is known as one of the oldest principles of international law.

The preamble to the Covenant of the League of Nations states that, in order to promote international cooperation and achieve international peace and security, strict respect for all treaty obligations is required. The UN Charter formulates this principle, prevailing that „all members of the organization, in order to secure to all the rights and benefits arising from their membership, must fulfill in good faith the obligations assumed hereunder (art. 2. Section 2). This article is one of the basic provisions of international treaty law because good faith is not only the principle that holds all governments together, but is the cornerstone by which the wider society of nations is united. Its destruction, says Aristotle, leads to the destruction of interaction between people.[10]

Strengthened by the old Article 5 of the EEC Treaty, now Article 10 of the Treaty on European Union: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the accomplishment of the Community's tasks. They shall refrain from any measure which could jeopardise the attainment of the objectives of this Treaty.[11]

According to Article 26 of the 1969 Vienna Convention on the Law of Treaties: „Every treaty in force binds the parties involved and must be performed by them in good faith." In the absence of supranational authority, states have nothing to rely on for the proper performance of international obligations except to trust in the good faith of other parties. As King John proclaimed in Magna Carta, „Both we and the barons swore that all this would be observed in good faith and without deceit." Several provisions laid down in the Vienna Convention, namely Articles 31 to 33, give precise form to the principle of good faith. They express the idea that when states and international organizations enter into a treaty-type relationship, they implicitly commit themselves to carrying out certain states or situations – the objective and purpose of the treaty. Obvious examples include prohibiting reservations that are incompatible with the objective and purpose of a treaty; the obligation to reconcile the various authenticated texts of the multilingual treaties by adopting the meaning which best contributes to achieving their objective and purpose; the provision excluding any amendment of a Treaty incompatible with the effective implementation of its main objective and aim; a prohibition on suspending the application of a Treaty by agreement between some of its Parties when the suspension is incompatible with the objective and purpose of the Treaty; and the requirement that a breach of a treaty may be used as an excuse merely for its conclusion or suspension of its application where it consists in a breach of a provision essential to the attainment of the objective and purpose of the treaty.

In the case of nuclear tests, the ICJ ruled that: „Just as the pacta sunt servanda rule itself in treaty law is based on good faith, so is the binding nature of an international obligation. In this way, the States concerned can take cognizance of and trust unilateral declarations and have the right to demand compliance with the obligation thus created.' Pacta sunt servanda refers to the binding nature of promises. It is a demonstration that good faith dominates the fulfillment and interpretation of international treaties, being a fundamental legal principle derived from natural equity. On 9 May 1973, New Zealand filed an application with the International Court of Justice initiating proceedings against France. As requested by the applicant, the Court should judge and declare that the nuclear tests carried out by the French Government in the South Pacific region constitute a breach of New Zealand's international

obligations and that they would continue to do so as long as the French Government insisted on carrying them out. However, the Court found that this application was inadmissible. Following the closure of the oral part of the proceedings, the President of France made a series of public statements announcing France's intention to conclude atmospheric nuclear tests. While the applicant's initial and ultimate objective had always been to obtain an end to France's atmospheric nuclear tests in the South Pacific region, as the Court inferred, the dispute with France thus disappeared and no longer existed.

This conclusion is based on the assumption that France, through statements made by the President of the Republic, has undertaken to conclude atmospheric nuclear tests as a matter of international law. What should be particularly noted is how the Court explained this assumption. In a first step, he stated that in international law, a unilateral declaration can have the effect of creating legal obligations, depending on the intention of the person making the statement.[12]

The Helsinki Final Act of 1975 specifies the content of the principle pacta sunt servanda and provides a series of legal guarantees for the practical realization of this principle, such as abstention from any act constituting a threat of force or a direct or indirect use of force against another state, abstention from any act of economic coercion towards another state, achieving the general disarmament of States, creating a climate of trust and respect among peoples and States, and respecting the principle that all international disputes must be settled only by peaceful mercy.'[13]

2.2. Application of the principle of good faith

At the international level, good faith is particularly significant and plays an essential role in substantiating and maintaining a legal and moral framework in international interactions, The principle of good faith is essential in concluding and interpreting international treaties. States are obliged to act sincerely and loyally during negotiations and to respect the terms and conditions of the agreements they have signed.

In the process of settling disputes between states, the principle of good faith is often used to assess the conduct of the parties involved. States are expected to approach disputes openly and try to reach solutions based on fair and loyal arguments. At the initial stage of settling an international dispute, the parties involved engage in honest and constructive negotiations. The principle of good faith is the foundation of this process, requiring the parties to approach negotiations with sincerity and openness towards finding a mutually acceptable solution. Open and transparent communication is essential, and actively listening to each side's positions and concerns helps build mutual understanding. In this regard, the Parties shall explore all possible options for resolving the conflict, taking into account their respective interests, but also the benefits of a peaceful and equitable resolution. [14] If direct negotiations do not lead to an agreement, the parties may decide to resort to mediation or arbitration. In these situations, the intervention of a neutral mediator or arbitral tribunal is extremely important to facilitate dialogue and find a just and equitable solution. During the mediation or arbitration process, the principle of good faith continues to play a central role. Parties are encouraged to engage constructively and cooperate with the mediator or arbitrator, following their recommendations and being open to reasonable compromises to reach a mutually acceptable settlement.[15]

At all stages of the international dispute settlement process, compliance with international treaties and norms is essential. The parties involved must fulfil their obligations under the

treaties and agreements to which they have acceded. Moreover, it must avoid unilateral actions that could undermine the integrity of the dispute settlement process or violate principles of international law. Compliance with these rules and treaties strengthens mutual trust between the parties and creates a solid framework for the peaceful resolution of conflicts. Within the framework of diplomatic relations, states are expected to act with honesty and openness. Maintaining good faith contributes to the development of a climate of trust between states.[16]

In ICJ jurisprudence, the principle of good faith is often invoked and applied in interpreting treaties and settling disputes between states. [17] The principle of good faith also serves to prevent abuse of rights in international relations. States are encouraged to act sensibly and avoid using their rights in ways that could harm other states.

Good faith is an essential pillar in establishing a framework of mutual respect and developing an international order based on common ethical and legal values. It is an important tool for maintaining peace, security and cooperation between states.

The Canevaro case is a relevant example in international jurisprudence examining the application of the principle of good faith under international law. This case concerns a dispute between two parties, and the principle of good faith has been central to the analysis and resolution of this dispute. In essence, the Canevaro case demonstrated the importance of this principle in international relations and how it is applied in the interpretation and application of treaties and other international agreements.[18]

2.3. Exceptions to the principle of Pacta sunt servanda

The principle of pacta sunt servanda, being the essential pillar of treaty law and international relations, is enshrined in Article 26 of the Vienna Convention, which affirms the obligation to respect the treaties in force and the need to enforce them in good faith. Good faith, as a legal principle, is intrinsically linked to this fundamental principle. However, despite this rule, there are exceptional circumstances that allow a State to disengage from the obligations of an international treaty. [19] Treaties can naturally end their existence by the fulfillment of the term, the performance of established benefits, or by the consent of the parties to terminate contractual obligations. The extinction of a treaty may also occur naturally in the event of the emergence of a subsequent treaty governing the same matter, following the adoption of a new mandatory rule of general international law, or if the number of parties to a treaty falls below the limit necessary for its entry into force, as long as the treaty contains such a provision. [20]

There are also special situations in which flagrant violation of the provisions of a treaty may lead to the request for its suspension or termination by the innocent party. Furthermore, in circumstances which impede the implementation of the Treaty, such as the disappearance or destruction of elements indispensable to it, the affected Party may request its suspension or withdrawal from the Treaty, provided that the impossibility is not due to its own fault. [21]

The rebus sic stantibus clause constitutes a controversial circumstance linked to the termination of the effects of a treaty. Through the analysis of international practice, it is found that in case of fundamental changes in circumstances, states have resorted either to unilateral denunciation of the treaty, generating protests from other parties, or to unilateral suspension or conventional readaptation, respecting the legal channels.

According to Article 62 of the Vienna Convention, a 'fundamental change of circumstances' to be taken into account must be essential in nature, not originally foreseen by the parties and constitute an essential basis for consent to be bound by the Treaty. This change

must have the effect of radically transforming the nature of obligations. Moreover, that article prohibits invoking the rebus sic stantibus clause in border treaties or where the fundamental change results from fault on the part of the party invoking it. [22]

In view of these considerations, although the principle of pacta sunt servanda is a foundation of international law, there are exceptional and well-defined circumstances in which States may disengage from the web of obligations of an international treaty, either by extinguishing it naturally or by significant changes in circumstances affecting the nature of treaty obligations.

3. Case study and applicability analysis of good faith

3.1. Case study presentation

An illustrative case study of good faith in international relations can be a presentation of Iran's foreign policy during the terms of three presidents, during which Iran's nuclear program became a concern for the entire international system. For a better understanding of the entire chain of events, the international context of the moment is also presented, in a comparative analysis with the regional dynamics of the Middle East. This section includes theoretical assessments of the Islamic Republic's foreign policy behavior and a timeline of Iran's nuclear program. This section also refers to the applicability of neorealism and constructivism in analyzing Tehran's external behavior, while highlighting the correlation between the two theories and how they compensate each other. From 1992 to 2002 Iran advanced towards the completion of the nuclear cycle, and nuclear activity was carried out in secret, against the provisions of the NPT. Furthermore, Iran began building another underground facility near Natanz, and AEOI „also began secretly building a heavy water production facility and a 40 MW research reactor near Arak" 6. During a press conference held on August 14, 2002, Alireza Jafarzadeh attracted worldwide attention by revealing that the Islamic Republic of Iran was developing a secret nuclear site in Natanz and a deuterium oxide facility in Arak. A new IAEA report published in February 2010, presented details of Iran's potential to produce a nuclear weapon, thus confirming hypotheses about a second uranium enrichment facility close to the „holy city of Qom" 7. Between 2010 and 2011, any discussion among officials in Tehran about its nuclear program was dominated by the idea of foreign interference. Until 2013, Tehran was almost completely isolated from the international market and financial infrastructure. That year, presidential candidates' campaigns focused almost exclusively on improving the economy. Hassan Rouhani won the elections and one hundred days after taking office signed the Joint Action Plan (JPOA). All parties signed the final agreement, the JCPOA, on July 14, 2015.[23]

3.2. Analysis of the presented situation

An analytical assessment of the JCPOA and presents a set of constraints and criticisms directed against Iranian foreign policy behavior and the nuclear deal. For all its purposes, the agreement was successful, at least until May 8, 2018, when former President Donald J. Trump decided to unilaterally withdraw the US from the agreement. The JCPOA was a wise foreign policy move because it worked and Iran limited its nuclear program. An often overlooked but key component to sustaining and understanding the success of the JCPOA is taking it at face value. As Robert Einhorn stated, „[The agreement] is transactional, not transformative... The agreement addressed a specific issue and, in these narrow terms, can be considered a relative

success. The value of that relative success should not be underestimated. It is an imperfect document, but it fills in some gaps and establishes a certain lull. It was precisely the rejection of a zero-sum game and the acceptance of possible flaws that allowed the two sides to reach the signing of the JCPOA.[24]

3.3. Impact of good faith and conclusions

The JCPOA set a precedent for constructive engagement and first-generation conflict management and led to a consensus among states divided along ideological lines and whose geopolitical ambitions are totally different. The Iran nuclear deal is a unique example of effective multilateralism and has the capacity to set a precedent for any future nuclear negotiations and nonproliferation efforts. Moreover, the JCPOA reiterated and restored to some extent the importance and authority of international institutions and treaties, such as the UNSC, IAEA or NPT. From a theoretical perspective, the JCPOA demonstrated that cooperation between competitive states in an anarchic system can be reached and thus the borders that delineate theories of international relations become thinner, allowing the researcher to explore new paths. Thus, the purpose of presenting the diplomatic process, both in a bilateral and multilateral format, was to demonstrate that cooperation between states with different ideologies, strategies and perspectives is possible and that theories of international relations are juxtaposed when the final objective is instrumental for all actors involved in that diplomatic process. Beyond the obstacles encountered along the way, and despite concerns and constraints, the nuclear negotiations process has placed the international system on the path to multilateralism, while addressing very sensitive concerns about Iranian nuclear ambitions. After the adoption of the JCPOA, Iran had the chance to begin reintegration into the global system and by limiting its stockpiles of nuclear materials, and the Middle East region became safer. At the time of completion of this research, nuclear negotiations in Vienna are ongoing. At the conclusion of the sixth round, diplomatic teams returned to their countries to clarify the final policy details needed to revive the JCPOA.

Conclusion

As a consequence, good faith in international relations between states is a fundamental principle that contributes to maintaining peace and cooperation at global level. In essence, this requires states to act with integrity, transparency and mutual respect in their international relations. The conclusion is that respecting good faith in state interactions strengthens mutual trust, facilitating dialogue and peaceful settlement of disputes. In the absence of good faith, the risk of conflict and escalation of tensions increases, undermining global stability and progress. Therefore, promoting and maintaining good faith in international relations remains essential for building a sustainable and harmonious international community.

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THE COLOR OF GOOD FAITH IN ELECTORAL COMPETITION

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Abstract

Good faith, portrayed by transparency and ethical conduct is crucial for an active democracy. In electoral campaigns, it fosters trust between voters and candidates encouraging informed participation. It outlines theories of constitutional trust, emphasizing how campaign practices could influence public perceptions on the electoral process. The erosion of good faith denounces public trust in public authorities, perhaps leading to challenges on the legitimacy of elected officials.

In summary, an important barrier to constitutional governance is the lack of integrity in political campaigns. Legislative frameworks are insufficient to provide a moral demeanor; political institutions should foster an integrity-based culture. Restoring public trust and preserving the equity of democratic processes requires an intended effort to close the breach between legal principles and political activities in order to uphold constitutional norms.

Keywords: *electoral campaign, constitutional trust, good faith, moral demeanor, constitutional norms*

I. Introduction

The present scientific research analyzes, starting from the relevant legal provisions that configure the legal regime of good faith, the application of this principle in the electoral campaign in Romania. The research question on which the scientific endeavor focuses concerns the manner in which citizens, the main beneficiaries of the act expressing support or preference for a candidate, perceive the exercise of rights and obligations by electoral competitors with good faith. Such an endeavor is useful as electoral participation and voting intentions are largely influenced by this perception. Considering that a democratic regime, which also characterizes Romania, is based on an electoral system for the selection of individuals who influence the lives of millions, the question arises whether the process through which they are elected is governed by the principle of good faith and whether the respective candidates – possible future politicians – engage in the electoral campaign ethically, morally, and in good faith.

The study largely relies on the analysis of responses obtained as a result of applying a questionnaire to a sample we deemed relevant for the purpose of this work, which constitutes only an introduction to such a broad and complex subject. The formulated conclusions both launch a reflective perspective on the importance of the principle of good faith in the electoral campaign and address the need for adaptation, including normative aspects, to raise awareness of and strengthen this principle.

II. Guidelines of the regulation of good faith

The concept of „good faith" from a legal perspective is difficult to define, as it is subject to certain subjective and complex circumstances. Its intersection with other legal principles, such as fairness and equity, further complicates the possibility of achieving a unified conceptualization of this principle. Additionally, the principle of „good faith" has evolved over time alongside political, social, and cultural developments over thousands of years and has experienced significant dynamics in the last 200 years.

The principle of „good faith" is established both in the Constitution of Romania (Art. 10 and Art. 57) and in infra-constitutional regulations such as the Civil Code (through Article 14, para. 1 and 2), and the Penal Code (Art. 61, para. 1, Art. 88, para. 1, Art. 96, para. 1, Art. 104, para. 1, Art. 123, para. 1, Art. 322, para. 1 etc.), delineating the conduct of individuals in society within various legal relationships arising in practice. Thus, good faith in civil law represents an important premise of commercial and civil transactions; in commercial law, it is often associated with the standard of proper behavior between contracting parties and can affect aspects such as the interpretation of contractual clauses, contract termination, or liability for damages; in family and succession law, it may be relevant in cases of estate division or administration of common property, where the involved parties must act with integrity and honesty towards other heirs or family members; in labor law, where good faith influences the employer-employee relationship or in procedural law where, in judicial proceedings, parties are expected to act in good faith and provide correct and relevant information to the court reaching fair and equitable decisions. Violating the principle of good faith can be punished depending on the relevant field, whether we are talking about civil law where individuals acting in bad faith may be liable to pay damages, or in criminal law, where individuals who do not respect the principles of good faith may even face imprisonment, depending on the severity of the offense. This indicates a concern of the Romanian legal system to identify and accordingly punish any activity between parties characterized by the principle of bad faith. Thus, all state structures often govern under the premise of good faith in day-to-day activities and ensure, at the same time, that individuals conduct themselves properly and adhere to this principle.

Given the flexibility in understanding good faith both historically and presently, there is a need for a unified conceptualization to better grasp this principle, crucial for contemporary democratic societies. Thus, a general definition of good faith is „***the inner conviction of a certain person that what they do is in accordance with the law and is right***" (Cozma, 2016).[1] Another approach characterizes good faith as „***the obligation of behavior in accordance with the rules of coexistence, which falls upon the parties at the conclusion and execution of an agreement***" (Bercea, 2009).[2] The Civil Code, through Article 14, defines good faith as a ***presumption*** – every person is presumed to act in good faith until proven otherwise – and a ***principle*** – every person must exercise and fulfill their civil obligations in good faith. In a personal approach, we define good faith as a psychological, moral, and legal concept whereby a person commits to being honest, sincere, and loyal to another person or an indeterminate group of people.

Thus, we emphasize that the psychological aspect is the one that directly influences individuals through conscience. A person who is aware of causing moral, material, or

[1] Cozma, D. (2016). Buna-credinţă în activitatea judecătorului. Supremația Dreptului, (3), 90-94.

[2] Bercea, R. (2009). Despre buna-credinţă procesuală şi caracterul rezonabil al apărărilor Guvernului României în faţa Curţii Europene a Drepturilor Omului. *Noua Revistă de Drepturile Omului*, *5*(4), 22-34.

pecuniary harm to another person will sooner or later experience feelings of guilt (Lungu, 2012).[3] These feelings, the earlier they appear and the stronger their impact on the guilty person's subconscious, the more they pressure them to adopt a moral and sincere conduct towards the other person (Ştefan, 2017[4]; Tăvală, 2014[5]). It is difficult to analyze, quantify, and establish legal effects when the psychological aspect intersects with the assessment of a person holding a public office.

So far, we have not identified relevant national studies in this regard that examine the moral conduct of the political class in the context of electoral campaigns from a legal perspective, and even less so, there has been no discussion on the perception of „good faith" of the candidates during electoral races. Both civil society, political scientists, opinion leaders, and sociological researchers seem to have a reactive rather than proactive attitude towards good faith or its absence in electoral campaigns.

III. The incidence of the good faith principle in the electoral domain

While economic entities have profit maximization as their primary and sole goal, non-governmental organizations aim to maximize the welfare in the world, and political parties seek to maximize their votes to gain as much state power as possible. To attain power and hold a sufficient level of authority within the state, each party competes for the trust of the citizens. Thus, political parties, whether right-wing, left-wing, centrist, or nationalist, theoretically strive to earn the trust and respect of the citizens and convince them that they should assume power in the state because they have the most comprehensive, complex, and effective political agenda.

In practice, the struggle is waged for the seizure of power, often disregarding the immediate and pressing needs of the electorate. This can be attributed to several factors, but the most significant may be the development of technology and the individual's freedom to gather information from multiple sources. If in the last century people obtained political information from printed newspapers (when available), today there is greater freedom, and the population can inquire about a party or candidate from numerous sources, both in favor and against the individual or party, just a click away, in a matter of seconds. This means that the political group or potential candidate no longer focuses on the 'potential candidate – voter' relationship and appeals to the human side of the relationship between the two, but rather turns to various technologies that can shape or change a voter's opinion about the potential candidate or opponent in a manner that cannot be considered governed by the principle of good faith.

Given the importance of elections as a tool of democracy, both nationally and internationally, there are concerns about regulation and defining the framework for their conduct in accordance with the rigors of the rule of law. A relevant document for shaping standards in this regard has been developed by the Venice Commission in the form of a framework code of good practices[6] in electoral matters. The main purpose of this framework code is not to tell states how to organize their electoral campaigns, but rather how to organize

[3] Lungu, V. (2012). Aspecte ale comportamentului etic din perspectivă neurologică.

[4] Ştefan, E. E. (2017). Legalitate şi moralitate în activitatea autorităţilor publice. *Revista de Drept Public*, (04), 95-105.

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[6] Codul bunelor practici în materie electorală al Comisiei de la Veneția. Link: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-rom, accesat la 21.03.2024

their elections in terms of procedural guarantees. Thus, in Chapter 3, point 3.1, para. 68 specifies the three variables that must be respected to have an efficient and democratic electoral process: transparency, impartiality, and independence from any political manipulation. Therefore, procedural guarantees concern how state bodies, regardless of the political color in power, should organize elections. Ultimately, the conduct of elections is crucial, as it is definitive for the nation's future. Thus, we can underline that all electoral competition consists of two parts: the electoral campaign and election day. Since it is necessary to analyze good faith in the electoral campaign, this work will focus exclusively on the electoral campaign.

"Homo Politicus" (Abun et al., 2022)[7], in a literal expression, or the political man, knows that he is dealing with a population divided into three categories: his own voters, the voters of the opposing candidate, and the undecided. The political man knows that he enjoys the trust of a number of people he can rely on (his own voters), but whom he must also satisfy in order not to lose them. He also knows that he must, by any means, attract voters from the other two remaining categories. Initially, he will focus on the undecided, as they can be more easily persuaded. Politicians address this category using technology, in the sense that technology serves as an auxiliary role in gathering data and information, processing them, and providing directions for action. It is also technology that, based on the proposed courses of action, often devises campaign strategies aimed at attracting undecided voters. The problem is that technology does not distinguish between right and wrong, between moral and immoral, between ethical and unethical, and especially between good and bad faith.

Additionally, the politician also targets the opponent's electorate and tries to attract them. Seeing that this is not possible through classic tactics such as face-to-face discussions, they again resort to technology. The major difference is that this time they use technology to denigrate the opponent, to identify certain vulnerabilities, and to expose them to public disgrace. This is achieved through the use of Fake News[8] and DeepFake[9].

On numerous occasions, the entire world has witnessed such techniques which, if not discovered in time, could destroy the careers and reputations of honest individuals. Furthermore, such techniques have often been used to convince people that a certain candidate for public office lacks discernment, and their actions could cause significant losses and even generate conflict situations on a global scale. Thus, we can assert without doubt that, through the two immoral, illicit, and bad faith activities – Fake News and DeepFake – the course of electoral campaigns has changed at the last minute, and individuals who had no chance of holding public office have enjoyed real success.

In the Code of Good Practices in Electoral Matters, the Venice Commission defines misinformation as a „verifiable falsehood," which cumulatively meets 2 elements: it is created, presented, and disseminated for economic gain or to intentionally deceive public opinion (1) and can cause public harm to democratic politics and policy-making processes (2). Additionally, at the European Union level, the provisions of the EU Charter of

[7] Abun, D., Libertine, G., Macaspac, R., (2022). The effect of organizational politics on the individual work performance, Journal of Research in Business and Social Science (2147- 4478), 2022, Volume 11, Number 2, Page 157

[8] Fake News – știri false, lansate în spațiul public de diverse părți, pentru a schimba părerea unui grup de oameni și de a-l convinge că un eveniment s-a petrecut în alt mod decât s-a întâmplat de fapt.

[9] DeepFake – medii sintetice manipulate digital pentru a înlocui asemănarea și comportamentul unei persoane, în mod convingător, pentru a-l denigra și a atrage oprobiul opiniei publice – n.a.

Fundamental Rights, Directive 2000/31/EC (Articles 12-15), Regulation (EU) 2016/679, Directive 2006/114/EC on misleading and comparative advertising etc., apply in this regard.

In political warfare, unfortunately, ethics, morality, and good faith are no longer considered. There are countless examples indicating this, but the situation is not new. There is ample evidence in various written sources (for example, but not limited to newspapers) that this modus operandi has existed since the interwar period when, driven by the burning desire to win the electorate, politicians resorted to various acts that were less than moral or ethical to portray themselves in a favorable light and denigrate their opponents, aiming to win the favor of the electorate who were undecided. Unfortunately, this tactic is not novel but has been „improved" over time. In antiquity, in Macedonia, those aspiring to leadership chose to divide the electorate, convince them peacefully that they represented the only possible option, and then resort to a plot to eliminate competition. The politician from antiquity differs very little from the politician of today because both saw and see the same thing – power (Sprincean, 2018)[10].

The question also arises in this case, how far can present-day politicians go, using the available tools, to attract votes. Specialized practice proves that the politician – who, first and foremost, is a human being – can go very far with creativity when it comes to achieving their objectives. Sometimes, these techniques for attracting the electorate are based on the principle of good faith, while other times they are not. Over time, various practices of political parties have been reported in the mass media, both during electoral campaigns and outside of them, ranging from electoral bribery to various forms of electoral tourism. In addition to these, as mentioned earlier, electoral campaigns witness many activities related to Fake News, DeepFake, and other methods through which certain candidates attempt to gain an advantage. Generally, all the aforementioned, without evidence, fall under the realm of defaming a person and are subject to laws regarding slander, defamation, or disparagement of a person.

Even so, sometimes there appears a rather interesting phenomenon, that of the satisfied voter during the electoral campaign and dissatisfied during the rest of the time. Often, despite their dissatisfaction, people continue to vote for the same person, especially in local elections. On the opposite end, that of respect and appreciation towards a candidate, an interesting case garnered media attention at one point in Romania, when the citizens of a local administrative unit voted for a deceased individual who was on the ballots because they considered him to be a good administrator. Furthermore, he won with an overwhelming majority of over 63%, against the other two candidates who, together, garnered 37%.[11]

Considering the few landmarks mentioned, we cannot help but reflect on the principle of „good faith" and consider its value and incidence in the exercise of electoral rights, subject, like any other rights, to the obligation of exercising them in good faith imposed by the fundamental law. From a sociological, philosophical, and moral perspective, it can be argued[12] that parties no longer act ethically and governed by the principle of good faith because they exploit people's vulnerabilities, engage in electoral bribery, spread fake news (Condur,

[10] Sprincean, S. (2018). Aspecte etice în procesele electorale în perspectiva eficientizării instituțiilor puterii de stat. In *Impactul sistemului electoral asupra capacităţii de funcţionalitate a instituţiilor puterii de stat din Republica Moldova* (pp. 118-130).

11 Validare primar, link: http://www.primariadeveselu.judetulolt.ro/portal-administratie-publica/deveselu/ultimele-anunturi/incheierea-nr-40-din-08.07.2021---validare-mandat-primar-dobre-nicolae, accesat la 21.03.2022

[12] Tuluș, A. V. (2011). Perspectiva etică în abordarea regimurilor totalitare. In honorem Ion Șișcanu (pp. 367-378).

2011[13]), resort to threats, intimidation, and lies (Bunduchi et al., 2012[14]) to achieve their goals and increase their electorate in a non-organic manner. Even if their electoral program is achievable and beneficial to society, the label of being a „people's party" can be easily nullified by these acts of bad faith. The way people perceive political parties is directly proportional to voter turnout. The lack of integrity of political parties only diminishes the idea of a possible positive change over time.

This has an overwhelming impact on the democratic system, leading to a negative perception among citizens regarding its effectiveness, labeling it as corrupt. The more parties lack good faith towards the electorate and public actions, the lower the number of voters, as evidenced by statistical data.

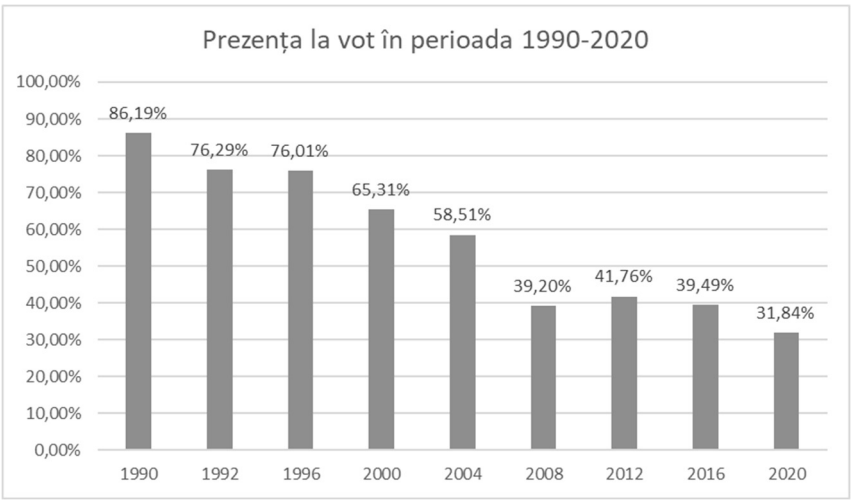

Figure 1: Voter Turnout at the National Level in Each Electoral Year, 1990-2020
Source: Compiled by the authors based on Roaep.ro reporting.

Thus, a decrease in trust towards political parties is observed annually until the electoral year 2008, followed by a slight increase in 2012, and finally a continuous downward trend to the lowest recorded value ever – 31.84% – in 2020. The situation in 2012 can be explained by the desire and need of citizens to vote for a party that would lead the country out of the economic crisis Romania was facing at the time. Accordingly, according to Table 1 presented below, the situation indicates an average decrease of 6.79% of voters during the analyzed period. Moreover, voter turnout is directly proportional to the decreasing number of Romanians residing in the country. In other words, Romanians emigrate annually due to lack of confidence in the political class. Consequently, as more people leave, voter turnout decreases. Political loss is closely linked to citizens' trust in the electoral system.

Additionally, a new perspective on electoral integrity emerges. Citizens who voted for the losing side in elections are more predisposed to perceive the electoral process as unfair to

[13] Condur, G. (2011). Aspecte etice ale publicării sondajelor de opinie. Sfera Politicii, (155), 29-34.

[14] Bunduchi, I.E., Ribca, E., Boev, B. (2012). Reglementarea conduitei mass-media în campania electorală. Link: http://old.media-azi.md/sites/default/files/Reglementarea%20conduitei%20mass-media%20%C3%AEn%20campania%20electoral%C4%83.pdf, accesat la 12.03.2024.

them. This may seem highly plausible, yet there are numerous variables that need to be analyzed to make this assertion, such as: educational attainment level, levels of literacy (both traditional and functional), standard of living, monthly income, and so forth. Taken all together, these elements justify why people may struggle to accept an electoral defeat of their favored candidate and why they consistently feel aggrieved, even when there is absolutely no evidence to support this perception.

An de referință	Participare la vot	Delta n - (n-1)	Populația României	Absență la vot	
1990	86,19%		23.200.000	3.203.920	
1992	76,29%	9,90%	22.790.000	5.403.509	
1996	76,01%	0,28%	22.620.000	5.426.538	
2000	65,31%	10,70%	22.440.000	7.784.436	6,79%
2004	58,51%	6,80%	21.570.000	8.949.393	
2008	39,20%	19,31%	20.540.000	12.488.320	
2012	41,76%	-2,56%	20.060.000	11.682.944	
2016	39,49%	2,27%	19.700.000	11.920.470	
2020	31,84%	7,65%	19.270.000	13.134.432	

Table 1: Analysis of voter turnout in the period 1990-2020
Source: Compiled by the authors, based on reports from Roaep.ro

As a decrease in trust in political parties can be attributed to perceptions of lacking morality, good faith, and integrity, we deemed that evaluating this perception could provide conclusive data for our research. We thus applied the questionnaire method to a sample of 865 individuals from all regions of Romania. In the following sections, we will present the data resulting from the questionnaire application.

IV. The perception of Good Faith in Electoral Campaings

The questionnaire administered (available at https://forms.gle/Tzv5DsFx2CehDcna7) comprises a total of 18 questions to a sample size of 865 citizens. The questionnaire was conducted using the Google Forms platform and distributed to respondents through social media networks, personal accounts, and certain groups with political profiles. Out of the total questions, 17 were closed-ended, while one was open-ended, allowing the representative sample to express themselves freely.

From the consolidation of the first four questions, which provide information about the gender (A[15]), age (B[16]), historical region (C[17]), and highest educational attainment (D[18]) of the sample, we observe that it is predominantly composed of female individuals (586 persons), aged between 18-30 years old (395 persons), with completed higher education (760 persons), from all regions of the country. An interesting aspect is that the distribution of the sample is almost equal across each historical region of the country.

[15] Întrebare – Care este genul dumneavoastră? – n.a.
[16] Întrebare – Care este intervalul de vârstă în care vă situați? – n.a.
[17] Întrebare – Din ce regiune istorică a țării faceți parte? -n.a.
[18] Întrebare – Care sunt ultimele studii absolvite? – n.a.

Next, variables characterizing good faith in electoral campaigns were tested through a set of four questions assessing the level of transparency of parties (A[19]), the objectives of a political program with direct and immediate impact on voters (B[20]), sudden changes in behavior that may characterize politicians in the electoral campaign as acting in bad faith (C[21]), and the level of insistence and aggressiveness of politicians in the campaign to achieve their objectives (D[22]). From the centralized responses, a lack of transparency is noted regarding the political offer promoted by parties during the electoral campaign (586 respondents stated that political marketing is not transparent). However, a fairly high level of transparency in promoting the governance program is observed. Thus, it is noted that what a candidate will do is more important than the candidate himself. This can be attributed to the fact that, in the eyes of the voters, the political offer may not be attractive, but the promised activities are. On the other hand, a significant number of respondents perceive a change in behavior during the campaign compared to the period outside the campaign (830 people). This change may raise questions regarding the principle of good faith, especially since the change in their behavior is perceived as „positive" during the campaign and „negative" outside the campaign.

The next set of questions tested good faith in electoral campaigns and outside of them. Thus, the sample had to characterize the level of transparency during the electoral campaign (A[23]), the basic characteristic of the current political class (B[24]), and the willingness of the political class to resort to immoral practices to achieve its electoral goals (C[25]). Thus, from the responses provided by the sample, it is observed that the electoral process is not perceived as transparent, given that a overwhelming number – 578 people – stated that the process is not transparent at all. Furthermore, 794 individuals from the sample stated that the current political class is not as ethical and moral as one might hope for. All of these, combined with the fact that 860 people – the entire sample – agree, regardless of political affiliation, that the current political class resorts to immorality to win votes, we can confidently assert that the current political class lacks ethics in electoral campaigns, an essential condition and basic characteristic of good faith.

A final set of questions brought the questionnaire sample face to face with the source of the problem. These last questions test the good faith with which parties act in the electoral campaign and how it is perceived by voters (A[26]), verify the effectiveness of electoral campaigns in promoting political offers (B[27]), identify the sample's perception of the principle of good faith in the political spectrum (C[28]), and identify the level of good faith in the electoral

[19] Întrebare – În timpul campaniei electorale, partidele politice își prezintă transparent, complet și complex oferta politică (oamenii de pe listă)? – n.a.

[20] Întrebare – În timpul campaniei electorale, partidele politice își promovează programul politic? – n.a.

[21] Întrebare – Observați o schimbare de comportament a partidelor politice în perioada campaniei comparativ cu perioada din afara campaniei? – n.a.

[22] Întrebare – În timpul campaniei electorale, cât de mult vă simțiți agasat/ă de către oamenii de partid care promovează oferta politică? – n.a.

[23] Întrebare – Credeți că procesul electoral este unul transparent? – n.a.

[24] Întrebare – Cum caracterizați clasa politică românească? – n.a.

[25] Întrebare – Considerați că partidele politice apelează la practici imorale (minciună, amenințare, mită, fake-news) pentru a-și atrage electorat în campanie? -n.a.

[26] Întrebare – Credeți că există bună-credință în campaniile electorale? -n.a.

[27] Întrebare – Mai este campania un mijloc de promovare a ofertei politice? -n.a.

[28] Întrebare – Credeți că există bună-credință în politică? – n.a.

campaign (D[29]). Thus, it is noted that people do not agree with the statement that politicians act in accordance with the principle of good faith (295 individuals). Additionally, they assert that the purpose and effectiveness of electoral campaigns have been lost, and the latter are no longer means of promoting political offers (759 individuals). The last two questions (C and D), although they seem identical, are fundamentally different, but both help shape a single idea – the lack of good faith in the electoral campaign. It is observed that an equal number of people (721) declare that there is no good faith in politics and nor in the electoral campaign.

V. Conclusions

Following the questionnaire analysis, a series of conclusions have been outlined that highlight the main coordinates of the public perception regarding the good faith of electoral competitors. Among these, we wish to emphasize the following:

- In line with the title of the article, we can affirm that there is no specific color of good faith within the electoral competition.

Thus, regardless of the political doctrine and the party's affiliation, there is no specific variable that, when analyzed, characterizes a party, based on the doctrine it promotes, as being perceived as either acting in good or bad faith. This characteristic is influenced by the actions of each individual/politician within the party. Additionally, the characteristic of parties (not of the individuals within them) is that they do not operate at a sufficiently ethical level as desired by the population.

- The variables characterizing „good faith" such as honesty, ethics, sincerity, loyalty, and transparency are not perceived in relation to the political class and, even more so, within electoral campaigns.

These traits, such as honesty, ethics, sincerity, loyalty, and transparency, are essential to ensure a fair and democratic electoral process. However, in many cases, politicians may be perceived as lacking these qualities, and electoral campaigns can be dominated by manipulative rhetoric, unfulfilled promises, and even dishonest behavior. This can undermine public confidence in the democratic process and its elected representatives. Therefore, it is essential to promote and uphold high standards of integrity within the political class and electoral campaigns to ensure that voters can make informed choices and that their elected representatives are truly accountable and dedicated to the common good.

- Although the political agendas of parties may address, even tangentially, the needs of the population (as evidenced by the open-ended question in the questionnaire), they are perceived as not being capable of providing what the people actually need in terms of real and effective solutions to the longstanding issues faced by citizens. This is because political parties are perceived as being more focused on political adversaries and how to win the electoral battle, rather than on the basic needs of the population.

Economic and social practice states that the competitive struggle is, most of the time, „healthy", only if it is not too strong. An intense competitive struggle only excludes the needs of the target group – in the present case the citizens – and the orientation towards surpassing the competitors in the polls by any means, even turning to the illegal and immoral ones. The absence of diagnostic analysis or adequate attention to the needs of citizens in the political program can lead to a lack of genuine representation and to the failure to solve the real problems of society. The „punishment" for the perceived bad faith in the electoral process

[29] Întrebare – Credeți că există bună-credință în campania electorală? – n.a.

consists in absenteeism or elections that can surprise by moving the electorate according to the pole of trust created.

The lack of legal accountability, or the appearance of a lack of such accountability, can undermine public confidence in the integrity and fairness of the electoral process and elected representatives. In a healthy democracy, it is essential that politicians are held accountable for their actions and that effective mechanisms are in place to sanction inappropriate or abusive behavior during election campaigns. A series of measures that could improve this aspect could be: decision-making transparency in the political process (including constant publication of information about the decisions taken), promotion of clear political discourses (avoiding manipulation and misinformation), increasing the responsibility of politicians regarding their promises and actions, both during the electoral campaigns and during the mandate through reporting and monitoring mechanisms.

- There is no legislative framework outlined to punish political slips during the electoral campaign, regarding the lack of „good faith". Thus, where there are no well-established rules of the game, participants can develop their own rules, which can be detrimental to voters and even to honest potential candidates.

The lack of a robust legislative framework to punish political slippage during election campaigns is one encountered in many countries and can have serious consequences for the integrity of the democratic process. The lack of clear rules and effective monitoring and sanctioning mechanisms can create an environment where politicians are tempted to resort to dishonest tactics to win elections, jeopardizing public confidence in the electoral process and democracy in general. To address this issue, it is necessary to develop and implement an appropriate legislative framework to regulate the conduct of politicians and parties during election campaigns. This framework should include clear provisions on electoral propaganda, campaign financing, the behavior of politicians and parties during campaigns, as well as effective mechanisms for monitoring and sanctioning violations.

In addition, it is important that citizens are informed about their electoral rights and the standards of integrity they should expect from candidates and parties. Civic education and transparency in the electoral process are vital to promote an active and conscious participation of citizens in political life and to strengthen democracy.

Because the political candidates fighting for the citizens' vote are no longer perceived as being characterized by the principle of good faith (as it emerges from the sociological analysis), and electoral campaigns are perceived as forms without substance, where the principle of good faith is missing being replaced by bad – faith and unethical activities, by logical deduction, the result of a system characterized by bad faith can never – or at least not without major changes – be governed by the principle of good faith.

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USUCAPION BASED ON GOOD FAITH. COMPARATIVE ANALYSIS BETWEEN THE PREVIOUS CIVIL LEGISLATION AND THE ACTUAL ONE

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Abstract

Usucapion is a special way of acquiring property through long-term possession, it is necessary to comply with certain conditions established by law, such as good faith, fair title, compliance with the stipulated term, undamaged possession etc. It has undergone changes from the time of its appearance until today, of which we will state the most important and defining ones in the following. We will also make a comparison between the old and new regulations and present some examples from jurisprudence.

Keywords: *usucapion, prescription, possession, bona fide*

1. Usucapion, the institution of civil law

1.1.Possession. Usucapion – the effect of the possession

The right of property is regulated in Article 555, according to which private property is the owner's right to possess, use, and dispose of exclusive, absolute, and perpetual goods, within the limits established by law. The status of the holder of the right of private property can be any subject of civil law, as mentioned in Article 553 para. (1) C. Civ., as well as Article 44 (2) of the Romanian Constitution. Law no. 18/1991 and GEO 57/2019 on the Administrative Code regarding the right of public property and the right of private property of the state and of administrative-territorial units.

Possession is finally given a special title in the Civil Code, more specifically, TITLE VIII, in the Third Book On Goods. This is not presented as a novelty, as it appears since the time of the Romans, where there are a variety of opinions about its content. In the first phase, the Romans considered that the person who exercises exclusive material power over human goods, like an owner, considered himself a possessor.[1]

Over time, two great theories of possession are developed. The first theory, Savigny's classical theory, speaks of the need to introduce an intentional element, along with the material one, to produce possession legal effects.[1] The new element, to which the name *animus* was given, was nothing but the owner's belief to be the owner. If this animus domini was missing, we were discussing precarious detention, which means that the one in whose power the good was, knew that he was exercising possession for the owner.

The second theory, belonging to Ihering, was called objective theory and its role was to completely criticize what the opponents argued. In this respect, they point out that both the possessor and the detainer exercise elements that build possession. The difference between

the two is achieved by the lack of intention to act as an owner, in the case of the detainee, belonging only to the will to exercise a power over the work, namely, to perform material acts of use. Moreover, to support the thesis, proponents of the theory believe that the lack of the intentional element can be found in exceptional cases, such as in an alienated person, whose possession is a good, and who does not realize what it does with it.[1]

Of the two combatant theories, the legislator makes a combination, which is apparent from the definitions found both in the previous Civil Code, Possession is the possession of a thing or the use of a right, exercised, and, one or the other, by ourselves or by another on our behalf.", as well as in the current Civil Code which regulates that possession represents, the exercise in fact of the prerogatives of ownership of a property by the person who owns it and who behaves like an owner.

The doctrine considers that the definition offered by the current Civil Code is not clearly expressed, so the possibility for the possessor to exercise all the prerogatives of the right of ownership, which I have set out in the first paragraph, is not expressed, it is a limited one, in particular in the case of immovable property, where the exercise of the legal provision requires proof of ownership of the alien. [2]

Among the legal effects of possession, we mention those that are the subject of real estate:

a) Presumption of ownership instituted in favor of the possessor. The owner is the defendant in court and the plaintiff is the one who has to prove the right of ownership, otherwise the property remains in the possession of the owner.

b) Acquisition of the right of ownership as an effect of long-standing possession of the property. In this respect, the owner may acquire using the purchase prescription the right of ownership of a real estate.

c) Exercise of possessor actions. Possession is protected by law, like the right of ownership, a possibility offered by the regulation in Chapter IV, articles 949-952, of the shares of the owners.

Usucapion (lat. usucapio), also called the procuring prescription, is the special way of acquiring private property, as a result of a long possession, within the terms and conditions provided by law. To exist, it is necessary to exercise an invalid possession, otherwise, as emphasized by Article 932 para. (2), the course of usucapion is suspended. We mention that not all goods are likely to be used, the regulations of Law no. 18/1991 and OUG 59/2019 being applicable, whereas we are talking about the acquisition of goods that are the exclusive subject of private property. We cannot also exclude the incidence of Decree-Law no. 115/1938 regarding the registration of real estate in the land register, from the perspective of usucapion, regarding the possessions started under the previous civil law.

We appreciate that the legislator brings new aspects regarding the current regulations of usucapion, so we will develop this aspect in section 2.

1.2.Usucapio in the Roman law

The institution of usucapion first appeared in the Law of the XII Table (449 a.Chr.), where both movable and immovable property could be used, the term being one year and two, respectively. Thus, Ulpian defines usucapion, „Usucapio est autem dominio adeptio per continuationem possesions anni vel biennii rerum mobility anni, immobilium biennii."[3] Usucapion was closely linked to two other institutions: praescriptio longi temporis and praescriptio longissimi temporis, the latter representing an extinctive prescription, by which a right was extinguished, the right of legal action of the owner. [4]

The time limits provided for by the two exceptions were: in the case of praescriptio longis temporis 10 and 20 years, respectively, depending on where the two lived (the plaintiff and the defendant), and in the case of prasecriptio longissimi temporis, the limitation period was 30 years. The terms are subject to some changes by merging usucapion and praescriptio longis temporis, replacing the extinctive character with the procuring one. [4]

The conditions for acquiring property had to be met cumulatively. Thus, the good had to be susceptible to usurpation, there had to be possession of the good (effective and uninterrupted), the existence of a just title, and the condition of good faith when entering the possession of the good and fulfilling the specific term.[4]

In the past, there were distinct institutions designed to sanction the non-diligent owner, depriving him of the possibility of asking for the return of the good. While today, the invocation of usucapion displaces the right of property in the heritage of the usucapant, in Roman times, the invocation of the two institutions did not imply this, but only the extinction of a right. The owner did not become usucapant, but only freed himself from the possibility of the owner claiming his property. The merging of the two institutions (usucapion and praescriptio) makes one complete the other, so it includes both the sanctioning of the non-diligent owner and the acquisition of the property by the owner.

Moreover, in the case of filing a lawsuit in the claim, it was mandatory to prove the ownership of all those who previously owned the good (probatio diabolica), hard proof to do. In this sense, usucapion changes this condition, it is necessary to simply prove that the requirements imposed by it are met. Cicero defines usucapion as „afinis solicentudinis ac periculi litium (end of anxiety and fear of lawsuits).”[5]

1.3. Usucapio based on good faith

Good faith is an essential element in the field of law, proving to be a fundamental condition, which may lack the rightholder. It brings together the right with the moral values, the conduct embraced by society, from which it cannot be derogated, for the proper conduct of human communities.

Appears in Roman law under the name of bona fides, and Cicero offers it a true definition, sincerity in words(veritas) and fidelity in commitment(constantia)”. [6]

Similar to Roman law, the condition of good faith at the time of entry into possession is taken over by the legislator in the Civil Code of 1864, in art. 486: Good faith is the belief of the owner that he has a right to property on the work possessed, based on a translative title of the property, whose invalidity he ignores.” It follows from this provision that the holder is misled as to the validity of his title, and any means by which this invalidity might be known leads to his qualification as the author of bad faith. The case law at the time also identified several frequent situations in which they were in the presence of an invalid title, such as the acquisition of the good from a person deprived of the property ownership, which was not, the inability of the transmitter, lack of solemn form of the act etc.[7]

Violation of a public order brings not only absolute nullity but also the impossibility of remaining in possession of the good or its fruits, having the obligation to restitute them, as mentioned in the Treaty of Civil Law of 1928, [.] against the provision of Article 18 of the Constitution, will have to return together with the building all the fruits produced by the building, the, without being able to invoke the ignorance of constitutional prohibition.” [7] In this situation we can no longer discuss good faith, it no longer produces any effect, even if it existed at the time of its entry into possession.

Difficulties arise about the title pro herede, where the judicial practice encountered problems. Although they did not consider that the succession ab intestat or universal legate could constitute just title, they did, The code claims that the title pro herede constitutes the right title and leads to a usucapion from 10 to 20 years, according to Article 1858 item 4, according to art, the universal transmission to a good-faith successor is likely to intervert precariousness into useful possession in the person of the successor, who benefits from abridged usucapion by invoking the title pro herede.[8] See section 4 of this paper for an example of this.

The condition that good faith exists at the time of taking possession and at the time of registration of the application for registration was adopted by the contemporary legislator, as is clear from art. 931 par. (2) And Article 938 para. (2).

The difference between the two regulations is that in the case of extratabular usucapion, good faith is not an absolute condition, as property can be acquired even if the owner was of bad faith. In the case of tabular usucapion, the law expressly provides for the fulfillment of this requirement. Just as, the 30-year usucapion did not require the possessor to fulfill the requirement of good faith, while the usucapion from 10 to 20 years is conditioned by it. Also, the law does not provide both under the empire of the previous civil code and the empire of the current code the necessity of the existence of good faith throughout the prescription, as well, as its existence at the time of registration of the application for registration is sufficient.

The provisions of the new Code apply to cases where possession started after the date of entry into force (1 October 2011), in cases where it has started before, the provisions of the code from the date of commencement of possession are applicable, as specified in Article 82 of Law no. 71/2011b. We note, therefore, the ultraactivity of the old law, which is an exception to the principle of immediate application of new civil law, which is possible if an express legal provision is provided.

2. Conditions required by the Civil Code of 1864 and the Civil Code of 2011

The fundamental element that gives rise to usucapion, in the absence of which it could not exist, is possession. From the analysis we have made above, we can see the changes that the institution of usucapion has gone through, from the time of the Romans to the present. Thus, one of the essential aspects was the element of possession, which implied a deadline set for producing effects. Among these effects is the usucapion, the way of acquiring private property.

2.1. The regulations of the Civil Code of 1864

The Romanian Civil Code largely takes over the regulations stipulated by the French Civil Code of 1804, a legislative model representative for many countries of the world. The regulation of usucapion was found in Title XX, beginning with Article 1837. Usucapion was of two kinds: *30-year-old usucapion and 10 to 20-year-old usucapion*.

During the communist regime, the acquisition of ownership was achieved by concluding transactions through hand receipts, and people did not appeal to the notary. The buyer takes possession of the land by completing the hand receipt. That receipt did not have the legal power to transfer ownership in the buyer's patrimony, although it behaved like an owner, submitting all the due diligence specific to a real owner. This was the very basis of usucapion.[9]

According to Article 1890, to operate a 30-year prescription, two conditions were required, namely the useful possession of the good, to be met, which meant that it was not to be affected by any vice, and the uninterrupted exercise of possession within the set time limit.

Article 1895 established the conditions of usucapion from 10 to 20 years. So, the existence of a useful possession, of a just title, of, the condition of good faith, and the uninterrupted exercise during the time prescribed by law constituted the circumstances in which we had regard to the second kind of usucapion.

From the provisions set out in Article 1895, we note some differences in essence, which we will analyze separately. In this sense, we note the need for the existence of a just title that designates a title of property derived from a person other than the owner. If this title were to come from the true owner, it is obvious that we can no longer speak about a purchase prescription, but about the transmission of ownership without fulfilling the conditions related to the passage of time.[8] Article 1897 also states, in paragraph (2), that in the case of a null title, we can no longer discuss usucapion, as it is struck by absolute nullity. Per a contrario, an annulable title leads to the acquisition of property by usucapion from 10 to 20 years. Just title: the transaction, the court decisions to adjudicate some real estate given in the procedure of forced sale, court decision establishing the existence of a translative convention of ownership between the parties of a trial etc. The following are not considered to be just title: lease agreements, deposit agreements, confinement, declarative court decisions, certificate of heir.[10]

Regarding the existence of a just putative title, we cannot discuss the short-term usucapion, because it is necessary for its existence in reality, not just the mere faith of the possessor. The just title proves to be a distinct and necessary condition for the existence of usucapion, differing from good faith. The proof of the right title is made by the one who invokes the usucapion.

Another requirement that we find in Art. 1895 is good faith. To exist, the owner must have the belief that he has acquired the property from the true owner, and this is sufficient if it exists at the time of the acquisition of the property, as mentioned in Article 1898 para. (1).

It is important to specify that as long as good faith is presumed, the proof of pregnancy falls into the hands of the one who invokes bad faith, the just title must be proved by the one who invokes usucapion (art. 1899). Hence the essential difference between the two distinctly regarded conditions.

The last requirement is to exercise within the time limit prescribed by law. Thus, we are dealing with two deadlines. Their application is carried out if the owner lives or not in the territorial constituency of the county court where the building is located. The term of 10 years is granted if the real owner lives in the territorial constituency of the same court where the real estate is located, whereas the term of 20 years is granted when it resides within the territorial range of another county court.

2.2. The regulations of the Civil Code of 2011

The current Civil Code regulates usucapion in Articles 930-934, providing for two forms of real estate usucapion: extratabular usucapion and tabular usucapion. Although it is presented as an absolute novelty in the new Code, it represents only a return to Decree-Law no. 115/1938, which exposed two special cases of usucapion for Transylvania areas, Banat and Northern Bucovina. The provisions of the Decree-Law were implemented until the adoption of Law no. 7/1996 of the cadastre and real estate advertising, the date from which

the provisions of the Civil Code of 1864 were applied throughout the territory. The provisions of the previous Civil Code were also repealed with the entry into force of the new Code.

Tabular usucapion was regulated in Decree-Law no.15/1938, in art. 27, according to which, If they signed up without legitimate cause, real rights, real rights, which can be acquired under usucapion, they will remain validly acquired, if the right holder has possessed them in good faith, according to the law, for 10 years."

Extratabular usucapion was provided in Art. 28, which ordered, He who possessed an immovable good under the law, for 20 years, after the death of the owner inscribed in the land book, he will be able to ask for the registration of the usurped right also, he will be able to ask for the registration of his right, the one who possessed an immovable good under the law, for 20 years, count from the registration in the land register of the declaration of renunciation of the property."

It is noted that the provisions of the new Civil Code are only a takeover, with subsequent additions and modifications, of the regulations of the Decree-Law. Thus, Article 930 (1) of the new Civil Code regulates the extratabular usucapion (usucapio contratabulas) as: *The right of ownership of a real estate and its dismemberments can be inscribed in the land book, based on usucapion, for the benefit of the person who possessed him for 10 years, if:*

a) the owner entered in the land register has died or, where appropriate, ceased to exist;

b) the land register has entered the declaration of renunciation of ownership;

c) the building was not inscribed in any land book.

Paragraph (2) of the same article provides that in all cases, the usucapant may acquire the right only if he has registered his application for registration in the land register before a third person has registered his application for registration of the right for his benefit, based on a legitimate cause, in the course or even after the term of usucapion has been fulfilled.

The tabular usucapion (usucapio tabulas), which we find in Art. 931 par (1), provides that the rights of the person who was inscribed, without legitimate cause, in the land register, as the owner of a real estate or holder of another real right, can no longer be contested when the person registered in good faith possessed the property for 5 years after the registration of the application for registration if his possession was invalid. Also, paragraph (2) of the same article mentions the need for good faith at the time of registration of the application for registration and at the time of entry into possession.

Unlike the old Civil Code, the current Civil Code no longer provides for the retroactivity of usucapion until the moment of the beginning of possession, in the sense that the owner became the owner from the moment of the beginning of possession, not since the deadline or at the time of invocation.[11]

One aspect that we want to specify is related to the just title, about which the old law mentioned the need for it to be struck by relative nullity, to be able to produce effects, the null title cannot call into question the invocation of usucapion. In this respect, the new code no longer specifies this aspect, so a null title can produce, like the annulable title, effects in the sense of acquiring property by usucapion, as well, given the rule of ubi lex non distinguit, nec nos distinguere debemus.[.12]

Another aspect that is important concerns the need for good faith in tabular usucapion, like the usucapion from 10 to 20 years, where we found the same essential condition, in the absence of which the right of ownership could not be acquired by usucapion. We note that its existence is maintained at the time of registration of the application for registration, but also

at the time of entry into possession, becoming a fundamental condition also in the case of tabular usucapion.

Regarding the 30-year and extra-tabular usucapion, the legislator does not specify the need to fulfill this aspect, it follows that even possession exercised in bad faith can lead to the acquisition by usucapion of buildings. The only condition, however, which should not be excluded, is the invalid possession, which, otherwise, as the new Code points out, in Article 932 (2), suspend the course of usucapion (if it is under the vices: discontinuity, violence or clandestination).

3. Usucapio as a sanction

Until it reached the form it takes today, the usucapion was more like a prescription, having the role of extinguishing the right of the owner to claim the good. In other words, usucapion was nothing more than a civil-law sanction against the non-diligent owner.

In the old Code, the legislator regulated it alongside the extinctive prescription, as those on prescription supplemented its provisions. The new Code, on the other hand, positions usucapion in Title VIII, from the third book, dedicated to Possession, but it is worth mentioning through Art. 934 about its additions with the provisions of the extinctive prescription. It follows that there is still a link between the two, consisting of the sanctioning character, the existence of common terms, and rules on the calculation of the term.[13]

Both doctrine[2] and jurisprudence consider usucapion to be a sanction for the owner who shows passivity. Understanding, then, the double effect that usucapion has, we can define it as a distinct institution of possession and prescription. Although it binds them both, however, it acts differently. The reversal of the evidence that falls to the owner transforms the relative character of the presumption of ownership (art. 919). This presumption only reinforces the strength of the institution of usucapion, which is given priority by the mere presumption that the owner of the good is the owner himself.

Therefore, from the interpretation and presentation of the usucapion so far, its authenticity emerges, as it leads to the depriving of ownership of a property of the owner, to the detriment of the acquisition of property by the owner. This leads us to believe that it must be regulated distinctly in the Civil Code because it differentiates itself from the rest of the institutions by the qualities and legal force it has.

4. Jurisprudence

As an example, we will present *Decision no. 4981/2023 of 16.05.2023*[14] issued by the District Court 3 Bucharest, having as object the usucapion.

The applicant requested the finding of the usucapion for apartment no. 14 located in Bucharest sector 3, consisting of 4 rooms, with an area of 92.87 sqm, together with the forced and perpetual co-ownership right over certain parts of the block by nature and destination, as well as the land afferent to the apartment, in an area of 16.16 sqm assigned for use during the construction. It also requested to order registration in the land register of UAT sector 3, the ownership right acquired by usucapion over the apartment.

The applicant submits that she is in a relationship of cohabitation with the defendant, she bought the property in 1997 on his behalf, the reason being the principles that the defendant had regarding the rights of women. After about a year, the relationship between them ends, and the plaintiff remains in useful, continuous, and undisturbed possession, continuing to behave like an owner, with the belief that the apartment once acquired from his money,

belongs to him. Since then, it claims that it had no connection with the defendant, the latter knowing the useful and immediate possession that the applicant exercised over the apartment.

However, on 21.03.2023, the defendant made the request, requesting the rejection as unfounded of the request for usucapion formulated on the apartment, whereas he acknowledges in the sentence of 24.10.2018 that he has been living in the building since 2010. Moreover, the defendant proves the title of the property through the Sale-Purchase Agreement no. 2185/04.11.1997, attesting that the applicant lived without rights in the building. None of the conditions laid down in Article 1895 of the Old Code for usucapion from 10 to 20 years are fulfilled, namely the just title, good faith, and lack of animus element. At the same time, the conditions provided for in Article 930 are not met, namely, the owner did not die, the land register did not include the declaration of renunciation of ownership, or, the building is inscribed in the land book.

Failure to meet the conditions is obvious, following to request the sample with inscriptions. The court agrees and finds that the applicant is unable to prove the right title, which leads to the rejection of the application as unfounded, based on non-compliance with the conditions of usucapion of the old Code, and the new code.

Another example is rendered by the *Decision C.J. no.21/1921, pg. 326-327*[15]. The appellant, unable to prove that he is the successor of the author of the land, cannot claim the land from the intimate, because it has a just title and a long possession for more than 10 years, therefore, the intimate becomes the owner of the land by the 10-year purchase prescription. The court, having no way of using the titles emanating from the true owner, because it does not exist, will have to use the existence of the right title, the, of a long and uninterrupted possession and existence of good faith, provided for in Articles 1895 and 1899 of the old Civil Code, according to which „If the parties that challenge their ownership of a real estate have none other, titles emanating from the real owner, it is to be considered the one that, in addition to the just title it presents, it proves at the same time that it uninterruptedly possessed the real estate in good faith within the time required for the prescription. Good faith is always assumed and the burden of proof to the contrary falls on the adverse side." The High Court confirms the decision of the court and attests that the appellant has no legal basis to claim the land from the intimate.

As regards the considerations that the title pro herede could be just title, we will present a situation on this issue. Thus, the judgment in J.G. no. 5/1927, p. 152-153 [16] submits, based on the provisions of Articles 1895 and 1927. 1879 C's. Civ. 1864, that he who wins in good faith and by a just cause a determined immovable, prescribes his property by 10 years, the just cause representing any translative title of property. In this sense, succession, listed among the modes of acquiring property (art 644), constitutes, by itself, title, which united in good faith, leads to the acquisition of property by 10-year prescription. However, if there is a common author of all heresies, the prescription based on the right title cannot be invoked against another co-led, since the title serves as a basic one, being common to all heresies up to the realization of the division, possession having no exclusive character. When a heresy finds in the immediate succession of its author a property belonging to the succession of a distant author, this heresy may begin in its person a new possession, distinct from that of its author, but which, united in good faith and with the title resulting from its quality of heresy of the author immediately, may have as a result the leadership to the usucapion of 10 years. Moreover, this prescription may be invoked even against the joint heirs of the author or their

descendants, by the heredeans, since they are third parties to the succession of the immediate author.

In the present case, whereas the heresies base their prescription on the immediate successor status of the author, and not on the successor status of the distant author of the parties to the proceedings, it follows that he may invoke the 10-year prescription in his favor against the parties that are not joint-heirs with him in the succession of his immediate author, for the buildings left from the distant author.

5. Conclusions

Usucapion is a special way of acquiring property through long-term possession, per the legal provisions. Its first appearance was in Roman law, where at first it was not to move the right, but only to extinguish it. Over the years, several changes have occurred, reaching the final form, that of a sanction, but also of a way of acquiring property. The changes brought about by the current Civil Code are much more precise and restrictive, such as the case of extratabular usucapion, which, compared to the 30-year usucapion, provides for the express cases in which it operates. We will also find other important changes in the title, the terms of each form, issues related to good faith, retroactivity, and others.

The importance of good faith is a defining legal concept in terms of usucapion, with the legal force to delimit between property titles. Thus, a title acquired in good faith will be considered valid where the law expressly provides for the need to fulfill this condition.

Further, usucapion can also be regarded as a sanction, by its effect of depriving the owner of his right of ownership. Therefore, its framing in the two codes does not reflect its real force itself, considering that it deserves a distinct chapter on possession and prescription.

We consider that the procuring prescription has a fundamental role in the legal field, through its defining features, from which it follows that usucapion is a genuine institution of law.

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GOOD-FAITH IN THE USE OF THE NATIONAL REFERENDUM

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Abstract
The national referendum represents a fundamental instrument of direct democracy, through which citizens express their will on issues of particular importance to the country. Good faith, as a fundamental principle of law, plays a crucial role in ensuring the fairness and effectiveness of this process. This paper aims to analyze the principles of good faith in the use of the instrument of the national referendum in Romania, incorporate relevant legislation and decisions of the Constitutional Court in order to emphasize the importance of respecting democratic principles and the transparent and fair electoral process.

Keywords: *referendum, good-faith, democracy, citizens, national importance, principle of law, fairness, Romania, Constitutional Court, democratic principles, electoral process*

I. Introduction

The notion of good faith is intricate, a complex concept that carries significant moral weight and encompasses values widely acknowledged as fundamental. Good faith boasts a long and rich history, that evolved from a psychological concept into a fundamental legal principle (Ruen, 2011, p. 47). It is a concept that transcends the realm of civil law, extending its reach as a general principle of law applicable across the entire legal system. „In the forum of justice, this meta-legal concept serves as the ultimate standard, consistently playing a complementary role in establishing the ethical minimums and maximums of the behavior of legal subjects" (Ruen, 2011, p. 41).

Even though good faith has a long historical lineage, tracing back to the cult of the goddess *Fides* in Roman law, it lacks a precise legal definition (Ruen, 2011, pp. 47-48). The etymology of the term *good faith* originates from Latin, where *bona fides* combines the adjective *bonus*, meaning good or honest, with *fides*, signifying trust or honor (Ghițu, 2007). Rooted in Roman law,[1] where „the concept of good faith was, for the Romans, the motive and foundation for creating a new category of actions – *bonae fidei iudicia*," the legal doctrine has endeavored over time to define and adapt it to the needs and evolution of contemporary society (Pop, 2019, p. 67). „[Good faith] aims to protect legal values, thus acquiring legal significance precisely from the desire to maintain functional interpersonal relationships" (Gîrbovan, 2008, p. 60). When written law proves rigid, the concept of good faith intervenes to allow for consideration of society's moral standards in conflict resolution (Ruen, 2011, p. 47). This

[1] In antiquity, the Romans used the term „bona fides" to describe qualities such as sincerity and loyalty. Cicero viewed good faith as an essential element of agreements, emphasizing the importance of one's word and the fulfillment of commitments.

principle complements written law and promotes fair and equitable conduct in relations between parties. The mechanism of good faith involves surpassing the initial stage in an individual's consciousness, where it refers to the desire to act within the limits of one's rights, and another stage related to relationships with others, consisting of externalization in the form of certain attitudes or activities that do not affect the rights of others (Gîrbovan, 2008, p. 62).

In Romanian law, good faith represents a fundamental principle, always presumed and protected, regardless of the nature of the legal relationship in which it is invoked (Gîrbovan, 2008, p. 60). Legal subjects are expected to consistently act with the genuine intention of behaving honestly and in accordance with the law[2]. The protection of good faith is regarded as a principle of paramount importance, recognized and encountered in various areas of law. The Romanian Constitution firmly embeds the principle of good faith within its provisions, regulating the rights and obligations of citizens and the functioning of state institutions. For instance, in the articles enshrining fundamental human and civil rights, good faith can be perceived as an implicit principle governing the relationship between the state and the individual, guaranteeing mutual respect and adherence to these rights. Similarly, in articles pertaining to the legislative, executive, and judicial powers, good faith can be understood as an essential component of the fair and equitable functioning of public institutions. Thus, within the constitutional context, good faith represents a pillar of the rule of law and respect for the fundamental norms and values of the Romanian society. Governance based on good faith ensures the upholding of democratic principles and the fundamental rights of individuals, thereby strengthening the **sovereignty of the people and the legitimacy of the state in the eyes of its citizens**: firstly, „national sovereignty belongs to the Romanian people, who exercise it through their representative bodies (...) as well as through **referendum"** (Art. 2 (1) of the Constitution).

„Meant to be an effective mechanism of the direct democracy, an expression of national sovereignty whose exclusive owner is the people," the referendum is the legal instrument through which citizens actively participate in concrete issues pertaining to the organization and functioning of the state (Bărbăţeanu, 2018, p. 418). Etymologically, the term *referendum* also traces its roots back to Roman law, where the gerund of the verb *referare* denoted a procedure for directly consulting citizens on a specific issue, and thus legitimatizing the adopted decision (Safta, 2021, p. 120). In current terms, a referendum is considered a „direct consultation of citizens, called upon to express their opinion, though vote, on a draft law of particular importance for the state or on issues of general interest" (dex.ro). Therefore, referendums are associated with systems of direct and semi-direct democracy – direct democracy is fundamentally characterized by referendums, while semi-direct democracy combines elements of direct democracy with those of representative democracy. „Citizens exercise their right to vote not only to elect their representatives but also to make a sovereign and ultimate decision on major issues" (Criste, 2013, p. 14). Thus, referendums present an opportunity for active citizen participation in shaping the future of the state by explicitly expressing their will regarding specific issues concerning its organization and functioning, as well as political life in general (Bărbăţeanu, 2018, p. 418).

Referendums, as a democratic tool for civic participation, are rooted in a set of fundamental principles, including the principle of good faith. This principle holds paramount

[2] Art. 14 C. Civ. „(1) Any natural or legal person must exercise his rights and fulfill his civil obligations in good faith, in accordance with public order and good morals. (2) Good faith is presumed until proven otherwise."

importance in the context of referendums, as it imposes on both organizers and participants the requirement to conduct themselves with honesty, fairness, and transparency. Romania's legislative system outlines three types of national referendums: for the revision of the Constitution, for the dismissal of the President, and for issues of national interest, which we will analyze by considering the importance of the good faith principle in the use of this democratic instrument. In essence, the referendum is a democratic mechanism based on the trust and participation of citizens, as well as on the respect for the principles of good faith in all its stages, from organization to implementation and follow-up of its results. This article explores various aspects related to national referendums, with particular attention given to the concept of good faith, especially regarding consultative referendums on matters of national interest. How can the idea of bivalence be understood regarding the effectiveness of a referendum, considering that not only political institutions and authorities are involved and interested in the effects of referendums, but also civil society? The purpose of this research is to identify existing shortcomings within national referendums that require realignment with international standards of good faith.

II. Principles of Good Faith in Referendum Usage

The concept of bivalence aptly characterizes the referendum's dual nature, highlighting two distinct yet interconnected perspectives on its effectiveness. On one hand, political institutions and authorities bear the responsibility of organizing and conducting a fair and transparent referendum process. On the other hand, civil society plays a crucial role in monitoring and influencing this process, voicing opinions, disseminating information, and engaging in public debates. But what happens when the referendum is used as a means of manipulation, when the purpose of the referendum serves as a vote of support for a political leader?

To grasp the fundamental principles of referendums and the role of good faith, it is crucial to consider international standards and the recommendations of the Venice Commission, particularly the Code of Good Practices on Referendums, which is the seminal document that reflects widely accepted principles in the practices of democratic states.[3] The Code is largely grounded in the principles of universal, equal, free, and secret suffrage.[4] Equal suffrage entails granting each voter the same number of votes and ensuring equal opportunities for supporters and opponents of a proposal put to a vote, as well as the need for state neutrality and balance in the elaboration of the referendum process (Title I, art. 2). Free suffrage implies not only that voters can freely express their wishes but also that they can form their opinions freely, without being subjected to undue pressure or disinformation campaigns, and with access to information from reliable sources (Title I, art. 3). Within the framework of referendums, citizens exercise their right to vote to decide on issues of national interest. Therefore, like any other large-scale democratic decision-making processes, they must adhere to a set of established rules and norms.

[3] It is based on the experience of the countries that responded to the questionnaires on the basis of which it was developed. Venice Commission, Study on Referendum – Draft Summary Report on National Referendums https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2005)020prov-e.

[4] See Title I of the Code of Good Practices on Referendums adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006). The characteristics of suffrage are extensively analyzed in the Code of Good Practices in Electoral Matters issued by the Venice Commission.

The authorities responsible for organizing the referendum have the obligation to provide accurate and objective information about the issue subject to the vote so that citizens can make informed decisions (Title I, art. 3.1.d). According to the Venice Commission, the clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question should not be ambiguous or suggest an answer, especially by mentioning the alleged consequences of approving or rejecting the proposal. Voters should be able to answer questions exclusively with yes, no, or a blank vote, and they should not be confronted with open-ended questions that require a more detailed response. Specifically, the question could be formulated to some extent ambiguously, with the aim of manipulating voters. In such situations, it is assumed, according to political observers, that the wording of the question on the ballot can significantly influence the voting result: setting the agenda and formulating controversial issues subject to the referendum are sensitive aspects of the process because it is difficult to believe that this will be done based on the specific criteria of direct democracy, that is, by individuals (Varga, 2015, p. 217, citing Sartori). Another issue could be that they may present concise and clear questions in formulation, but which, nevertheless, have legal consequences that are not easily understood.[5] Information campaigns and public debates should be balanced and impartial, providing diverse perspectives on the referendum.

The referendum process must be transparent, citizens must have confidence that their votes will be counted accurately, and that the outcome will be respected (Title I, art. 3.2.a.xiii). Respect for the will of the people is essential. The result of a referendum must be considered the expression of the people's will and must be respected by the authorities, who must act in accordance with the majority decision expressed in the referendum. Some authors raise the issue of a legal paradox regarding referendums – although they are designed to be an effective instrument of democracy, in reality, they are only the „institutionalization of the expression of the people's will" (Varga, 2015, p. 218). „Political decisions are rarely generated by the sovereign people; they are brought to its attention. And the process of opinion formation does not begin with the population; it passes on to the population. Even when waves of opinion occur, it cannot be said that the stimulating factor resides in the population as a whole. When exercising its influence, the people are themselves influenced. Before wanting something, a desire is often induced in them" (Varga, 2015, p. 218).

A significant concern with consultative referendums lies in the potential for the initiating political leader, in Romania being the president, to utilize their influence to manipulate or sway the electoral process, leveraging their political popularity and turning the referendum into a vote of confidence for themselves and their political actions. In a consultative referendum, the focus is on public participation as an opportunity to express one's will or, more precisely, one's preference on a specific issue, rather than making decisions regarding the governance of the country (Varga, 2015, p. 218). Thus, the bivalence is reflected in the duality between official authorities and the voice of civil society in evaluating the referendum's actual impact on the democratic process and decision-making at the community level.

[5] „Over 33% of Romanians do not know what the topic was that was put to a vote in the November 25 referendum, according to an opinion poll released by Insomar. 66.2% of those interviewed said that the topic of the popular consultation, which overlapped with the European parliamentary elections, was to change the voting system. In contrast, 33.8% said they did not know, did not answer, or that the topic of the referendum was „Băsescu's election" or „the European parliamentary elections" ("One in three Romanians does not know what the referendum question was," Gardianul, December 17, 2007).

III. Legislation of the Referendum in Romania

In Romania, a referendum is defined as a manifestation of „direct democracy, through which voters establish their opinion and make a decision directly, without any intermediary" (Safta, 2021, p. 81). As mentioned, the primary legislative reference regarding referendums is the Constitution of Romania, which refers to the possibility of organizing a referendum as an expression of the sovereignty of the Romanian people, as stated in Article 2(1). The constitutional provisions refer to the existence of three types of national referendums – the presidential referendum, the referendum for the dismissal of the president in case of suspension by Parliament, and the referendum for the revision of the Constitution. Analyzing the provisions of Article 95(1), Article 95(3), and Article 151(3), it results that there are two types of decision-making referendums – the one for dismissal and for the revision of the Constitution, and one type of consultative referendum[6] in the case of issues of national interest, initiated by the president (Safta, 2021, p. 84). In addition to constitutional provisions, Law No. 3/2000 contains the rules for organizing and conducting referendums. This normative act defines the methods of determining the results for all three types of referendums: regarding the procedure for the revision of the Constitution – „the result of the referendum is determined based on the majority of valid votes cast nationwide..." (Article 7(2), Law 3/2000); for the dismissal of the president – „the dismissal of the President of Romania is approved if, following the referendum, the proposal has obtained the majority of valid votes cast" (Article 10, Law 3/2000); and for the consultative referendum – „citizens are called to express their opinion [...], deciding with the majority of valid votes cast nationwide" (Article 12(2), Law 3/2000). According to Article 146 i), an important role in the referendum process is played by the Constitutional Court, which has the mission of ensuring the respect for the procedure for the organization and conduct of the referendum, as well as confirming its results. „The Court performs a combination of constitutional review of applicable legal norms, legality control of the referendum organization and conduct procedure, confirmation, and validation of the referendum" (Puskás & Benke, 2012, p. 259). Furthermore, in the following analysis, we will identify how the Court, in various decisions and rulings, attempts to reconcile the existing deficiencies or those arising from legislative proposals aimed at amending the referendum law.

Subsequently, we will conduct an analysis of national referendums with decision-making and consultative characteristics and their effects. Throughout Romania's 35 years of democracy 8 national referendums have been held: 3 of them targeted the Constitution of Romania (December 8, 1991 – adoption of the Constitution, October 18-19, 2003 – successful revision of the Constitution, October 6-7, 2018 – unsuccessful revision); 2 targeted the dismissal of the president (May 19, 2007 – invalidated referendum and July 29, 2012 – invalidated referendum), and the last 3 referendums were consultative on issues of national interest, 1 referendum for the introduction of uninominal voting for parliamentary elections (November 25, 2007 – invalidated referendum), 1 referendum regarding the transition to a unicameral Parliament and reducing the number of parliamentarians to a maximum of 300 (November 22, 2009 – valid referendum), and 1 referendum on justice (May 26, 2019 – valid referendum).

[6] „The consultative referendum is the one that does not produce mandatory legal effects, it cannot determine, as a legal obligation, any conduct on the part of the initiator of the procedure and the other legal subjects." (Delia, 2013, p. 118)

1. Referendums with Decision-Making Character

The referendum for the dismissal of the President of Romania has a mandatory character due to its immediate effect and its organization is established by a decision of the Parliament, according to the conditions provided in Article 95 of the Constitution: if the President of Romania commits serious acts that violate the provisions of the Constitution, he/she can be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the deputies and senators, and after consulting the opinion of the Constitutional Court. If the proposal for suspension from office is approved, a referendum will be organized within 30 days for the dismissal of the President from office (Article 95 of the Constitution of Romania). To be valid, a referendum must meet two conditions: the participation of a minimum number of citizens and obtaining a majority of valid votes cast (Articles 5 and 10 of Law No. 3/2000). The dismissal of the President is, in fact, a people's revocation; the Parliament cannot dismiss the President arbitrarily because the President was elected by the people and not by the Parliament, which is why the President does not answer to the Parliament but to the electoral body that elected him/her through universal suffrage.

The second referendum with a decisional character is the one regarding the revision of the Constitution. According to Article 150, the revision procedure can be initiated by the President of Romania at the proposal of the Government, by at least one-quarter of the total number of deputies or senators, as well as by at least 500,000 citizens with voting rights. Article 151, paragraphs 1 and 3, provide that the draft or proposal for revision must be adopted by the Chamber of Deputies and the Senate, by a majority of at least two-thirds of the members of each chamber, becoming final after approval through a referendum organized within 30 days from the promulgation of the project or proposal regarding this revision. Although there have been several initiatives for constitutional revision, only the 2003 referendum materialized.[7] Regarding the other initiatives, the Constitutional Court issued decisions regarding compliance with the revision limits inscribed as the „hard-core" of the Constitution, concerning the national, independent, unitary, and indivisible character of the Romanian state, the republican form of government, territorial integrity, judicial independence, political pluralism, the official language, and the fundamental rights and freedoms of citizens or their guarantees (Bărbăţeanu, 2018, p. 424). Similar to the referendum for the dismissal of the president, to be valid, the legal quorum of voter turnout must be met. Relevant in this regard is Decision no. 2 of October 18, 2018, of the Constitutional Court, which refers to compliance with the procedure for organizing and conducting the national referendum for the revision of the Constitution on October 6 and 7, 2018, concluding that although the procedure was respected and the result was confirmed, the referendum was not valid because at least 30% of the number of persons registered on the permanent lists did not participate. This finding highlights the importance of respecting the legal quorum of voter turnout and emphasizes the need for electoral procedures to comply with the current legislation for the results to be valid and democratically accepted.

2. The Consultative Referendum

Of particular interest in this analysis is the consultative referendum, encompassed in the provisions of Article 90, which grants the President exclusive competence in determining

[7] The Court confirmed the presence at the national referendum of October 18-19, 2003 and noted that the Law on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 669 of September 22, 2003, was approved by referendum.

national issues of interest for referendum, despite the mandatory requirement to consult the Parliament: „the Constitution does not, however, by reference to a certain period, stipulate the initiation by the President of this form of popular consultation on issues of national interest" (Decision 70/1999). This type of referendum emerges as a presidential attribute that only he can use to consult the people on issues he considers to be of national interest (Art. 2 of the Constitution of Romania). In other words, a distinctive feature of this type of referendum derives from the fact that it is consultative, implicit, and optional, despite its wide sphere of applicability.

Until now, the only valid consultative referendums were held on November 22, 2009 (with a turnout of 50.94%) and the referendum on justice held on May 26, 2019 (with a turnout of 41.28%). The first of these, which also represents our case study, was initiated by the President of Romania, and took place on November 22, 2009, featuring two questions regarding the transition to a unicameral Parliament and reducing the number of parliamentarians to a maximum of 300 individuals. Regarding the results, it was observed that the majority of participants chose „YES" for both questions.

Decision no. 37/2009 of the Constitutional Court regarding the compliance with the procedure for organizing and conducting the national referendum on November 22, 2009, and the confirmation of its results, found that the referendum was conducted in accordance with legal and constitutional provisions. Following the verification of the data provided by the Central Electoral Bureau, it was found that out of a total of 18,293,277 people registered on the permanent electoral lists, 9,320,240 people participated in the vote, representing 50.94% of the total number of individuals registered on these lists, thus meeting the legal quorum. Therefore, the Constitutional Court validated the referendum, as at least half plus one of the total number of individuals registered on the permanent electoral lists participated. Consequently, the Court's decision confirmed the results of the referendum and found that it was conducted in accordance with legal provisions. Furthermore, in Decision no. 2/2019, the Court specified that the consultative referendum, „regardless of the questions posed to the people and its theme, remains a consultation with political effects" (CCR, Decision no. 2 of June 27, 2019, para. 52).

In conclusion, it is important to emphasize the common element that we identified as essential for the success of these referendums: the chosen date by the incumbent president for organizing each of the referendums coincided with the date of other types of elections – the first round of presidential elections (2009) and the European Parliament elections (2019).

3. The Effects of Referendums

Regarding the effects of a valid referendum, these are clear for mandatory referendums (successful revision of the Constitution and dismissal of the President), however, **the current legal framework does not contain express provisions for the effects of the consultative referendums**, nor for cases where the referendum is found to be null or invalid (Safta, 2021, p. 86). The Venice Commission provides in Article 8 that the effects of a referendum, whether decisive or consultative, must be expressly specified in the Constitution or by law. „Decision No. 2/2019, with reference to the considerations of the relevant case law, makes a clear distinction between the referendum on issues of national interest and the other forms of referendum regulated by the Constitution, including in terms of effects" (Safta, 2019). Here, the Court specified that a decisive referendum produces legal effects, and, a consultative referendum produces political effects.

The referendum „with a decisional character, which has the effect of revising the Constitution, is not to be confused with the consultative referendum, which, regardless of the questions posed to the people and its subject matter, remains a consultation with political effects" (CCR, Decision No. 2 of June 27, 2019, para. 52). The Court held that, according to Article 90 of the Constitution, the President of Romania consults the people, and the result of the consultation must be taken into account by the authorities in addressing issues of national interest that have been subject to consultation. This approach does not impose a specific option for certain measures, such as revising the Constitution, but allows public authorities to adopt various measures depending on the political orientation expressed by the consultation. The initiation of the consultative referendum, the questions addressed to the people, and the way in which the authorities capitalize on the responses are part of a political process that has consequences in terms of the political accountability of institutional actors, not in terms of legal accountability. In the case where the political decision involves the adoption of legislative measures, these may be subject to constitutional review according to the applicable legal framework. By Decision No. 682 of June 27, 2012, the Constitutional Court ruled that, in the case of the consultative referendum, the lack of a subsequent procedure does not mean that it has no effects, and that „what distinguishes a consultative referendum from a decisional one is not primarily the question of whether or not the will of the people is respected – this will cannot be ignored by the elected representatives of the people, as it is an expression of national sovereignty – but the nature of the referendum's effect (direct or indirect)" (CCR, Decision No. 682 of June 27, 2012). In contrast to the decisional referendum, the consultative referendum generates an indirect effect, as it requires the involvement of other bodies, especially legislative ones, to implement the will expressed by the electorate.

IV. Case Study: Good Faith and the Consultative Referendum of 22 of November 2009

In our analysis, of the application of the principle of good faith in the case of the national referendum, we will focus exclusively on the 2009 consultative referendum that inquired on whether there should be a transition to a unicameral Parliament and a reduction of the number of parliamentarians to a maximum of 300. In the motivation of our decision, we would like to discuss the idea that the consultative referendum is an attribute of the President of Romania and we aim to identify whether he acted in accordance with the principle of good faith in organizing and conducting the 2009 referendum concurrently with the first round of the presidential elections, when he himself was a candidate for his second and final term.

The November 2009 consultative referendum was initiated by the President of Romania through Decree no. 1507 of October 22, 2009, for the organization of a national referendum. Procedurally, the president's initiative fulfilled the mandatory steps, namely consulting the parliament. Despite the negative opinion conveyed by the parliament in Decision no. 37 of October 21, 2009, the presidential decree was issued, and it included three articles: „Article 1 – The Romanian people are called upon to express their will regarding the following issues of national interest: 1. transition to a unicameral Parliament; and 2. reduction of the number of parliamentarians to a maximum of 300 individuals. Article 2 – For the achievement of the provisions provided in Article 1, citizens are called upon to vote „YES" or „NO" to the following questions: 1. „Do you agree with the transition to a unicameral Parliament in Romania?" 2. „Do you agree with the reduction of the number of parliamentarians to a maximum of 300 individuals?" Article 3 – The date of the referendum will be November 22,

2009" (Decree no. 1507 of October 22, 2009, for the organization of a national referendum). Regarding the result of the consultative referendum, a voter turnout of 50.94% was recorded, of which 77.78% of voters expressed support for the unicameral Parliament, and 88.84% voted for the reduction of the number of parliamentarians to 300. Whether coincidental or not, in the second round of the presidential elections, the incumbent president and initiator of the consultative referendum, Traian Băsescu (32.44%), and candidate Mircea Geoană (31.15%) qualified, with a voter turnout of 54.37% (Permanent Electoral Authority, Presidential Elections of Romania 2009).

Starting from the idea of bivalence in the context of interest in the effectiveness of a referendum and considering that not only political institutions and authorities are involved, but also civil society, we consider it important to emphasize that the consultative referendum of November 2009 led to civil society, through 5 associations – Active Watch, the Media Monitoring Agency, the Pro-Democracy Association, the Center for Legal Resources and Transparency International Romania, to form the „Alliance for the Rule of Law" under whose aegis they challenged the organization of the referendum at the same time as the first round of the presidential elections, initially at the Bucharest Court of Appeal (November 11, 2009, being rejected as inadmissible on November 19, 2009) (AEP, White Paper of the National Referendum of November 22, 2009, p. 26), and after the referendum (November 23, 2009), at the Constitutional Court. Their challenge sought to annul the Presidential Decree no. 1507 of October 22, 2009, for the organization of a national referendum and to invalidate the results of the consultative national referendum held on November 22, 2009. The grounds for the challenge were based on provisions such as Article 146 letter i) of the Constitution, Articles 46 and 47 of Law no. 47/1992 regarding the organization and functioning of the Constitutional Court, and Article 45 paragraph (1) of Law no. 3/2000 regarding the organization and conduct of referendums.

Among the reasons cited for revoking the Presidential Decree were allegations of influencing the electorate's will towards approving the referendum. They argued that „organizing a consultative national referendum on the same day as the first round of presidential elections, in which the incumbent president was also a candidate for a second (and final) term, diverted the referendum from its meaning as an expression of the sovereign will of the people, turning it into a presidential electoral tool." Furthermore, it was argued that the president's use of his constitutional competence to decide on a populist referendum topic provided him with additional notoriety, giving him an advantage over other candidates who did not have the same presidential instrument (CCR, Decision nr. 33 din 26 November 2009). Regarding the request to revoke the outcome of the national referendum, the challengers raised concerns about the president's lack of impartiality and balance in the electoral campaign for the referendum, contending that „constitutionally, it could not be a plebiscite for the approval of his decision" (CCR, Decision nr. 33 din 26 November 2009). Thus, the idea of a one-sided referendum campaign by the President of Romania, aimed at citizen approval by choosing the „Yes" response on the forms containing the two questions that constituted the subject of the referendum, was introduced (CCR, Decision nr. 33 din 26 November 2009). Additionally, it was contested that the president's public stance on this matter was well-known and publicly supported during the presentation of the Presidential Commission's Report (CCR, Decision nr. 33 din 26 November 2009).

Beyond the civil society's objections, the White Paper on the National Referendum of 2009, issued by the Permanent Electoral Authority (PEA), highlights several aspects regarding

how the authorities involved organized and conducted the referendum in question, which, in our view, raise questions about its good faith compliance. Firstly, it addresses President Traian Băsescu's adoption of the referendum topic in the public discourse since the beginning of 2009, contextualizing it within the economic backdrop of the global crisis and its impact on Romania. The referendum was intended to serve as an initial step towards initiating the process of amending the Constitution. Essentially, the underlying stake was considered to be „increased voter turnout, intended to settle the electoral battle for the supreme position in the state" (PEA, White Paper on the National Referendum of November 22, 2009, p. 3). Additionally, the document highlights that „the referendum always focuses on the yes-no dichotomy, i.e., a confrontation between proponents and opponents of the proposal, unlike electoral competition, which is based on pluralism and characterized by a greater variety of solutions available to voters." In this case, the PEA considers that organizing the referendum according to the current legal provisions on elections makes it impossible to ensure equality between proponents and opponents of the proposal subject to the referendum, both within the electoral offices and in the referendum campaign, as there were no opponents. Almost all political parties participating in the presidential elections publicly expressed their support for adopting the proposals subject to the referendum (PEA, White Paper on the National Referendum of November 22, 2009, p. 42).

A final relevant aspect for our analysis is that in its report, the PEA presented a series of findings that we consider essential in analyzing the application of the good faith principle to the President, as the initiator of the consultative referendum. For instance, „the referendum information campaign was conducted through posters featuring the image of President Traian Băsescu with the message 'What they fear, they cannot escape!' followed by the call 'Come to the referendum;' on the campaign website of the presidential candidate, basescu.ro, information about the advantages of a unicameral Parliament as well as those of reducing the number of parliamentarians to 300 could be found. Furthermore, it was considered that the information campaign for the referendum was unbalanced because only the advantages of transitioning to a unicameral Parliament and reducing the number of parliamentarians were presented, without addressing the disadvantages or the issues that these changes entail" (PEA, White Paper on the National Referendum of November 22, 2009, p. 22).

In conclusion, considering the arguments presented above, we believe that organizing a consultative referendum on the same day as the presidential elections, while legally possible, is not advisable due to the potential for creating unfair advantages for the incumbent president, which other candidates do not have access to. Relevant in this regard is also Decision no. 33/26.11.2009 of the Constitutional Court, which, although rejects the requests made by civil society challengers and reinforces the idea of the exclusive presidential prerogative over the consultative referendum regarding its date and subject matter, in accordance with art. 90 of the Constitution, we consider that it complements our conclusion, through the phrase „in order to avoid any suspicions regarding the results of the elections, respectively the referendum, it is advisable that the two electoral operations not be organized on the same day, even if practical arguments, of a financial nature, would justify their simultaneous organization" (AEP, White Paper of the National Referendum of November 22, 2009, p. 22).

VI. Conclusions and Recommendations

Adherence to the principles of good faith in the use of the national referendum instrument is essential to maintaining the legitimacy and integrity of the democratic process. These

principles serve as fundamental pillars in ensuring an authentic representation of the will of the people and in promoting transparent and accountable governance. By respecting good faith, citizens' trust in the democratic process is strengthened and the value of the referendum as an instrument of participatory democracy is consolidated.

The analysis of the referendum legislation in Romania reveals a complex and detailed framework for the organization and conduct of referendums, whose decisive or consultative nature influences how they are perceived and applied in practice. Referendums with a decisive character, such as the dismissal of the president or the revision of the Constitution, involve clear and strict procedures for validating the results, including the observance of a legal quorum of voter turnout. On the other hand, consultative referendums, initiated by the President of Romania in accordance with Article 90 of the Constitution, are optional and do not generate direct legal effects, but rather have political consequences and are used to consult the people on issues of national interest. However, the way in which authorities interpret and act upon the results of a consultative referendum can have significant political implications. The Constitutional Court plays a crucial role in ensuring the legality and fairness of referendum procedures, and its decisions directly impact the validity and interpretation of these procedures.

The November 2009 consultative referendum, regarding the transition to a unicameral Parliament and the reduction of the number of parliamentarians, raised concerns regarding the observance of the principle of good faith and the impartiality of the electoral process. Critics argued that the President of Romania used the referendum for electoral purposes and influenced public opinion in favor of his own political agenda. This controversy underlines the importance of ensuring transparency, fairness, and respect for democratic principles in the organization and conduct of referendums in Romania. Given that the principle of good faith operates primarily at the level of the morality of the actors involved, and in the case of the consultative referendum of 2009, there were suspicions about the true intentions of the president, the only person authorized according to constitutional provisions to initiate a consultative referendum on matters of national interest, we consider it important for such situations to be avoided in the future. In this regard, it is important to note that good faith is not an abstract notion but should be translated into concrete actions by all actors involved in the referendum process. Only by respecting this principle can the referendum be ensured as a real instrument of democratic participation and not just a formality. From our point of view, the legal framework of the electoral campaign should meet the specific needs of referendums. In this sense, firstly, there should be an impartial, non-governmental entity responsible for voter education. The authorities responsible for organizing the referendum have an obligation to provide accurate and balanced information about the issue subject to the vote, so that citizens can make informed decisions, being the second characteristic of a free vote in accordance with international standards and the recommendations of the Venice Commission, especially the Code of Good Practice on Referendums.

In conclusion, we believe that a proposal to revise the Constitution to extend the actors who could initiate a consultative referendum on matters of national interest could be a solution to prevent problematic situations like the one that characterized the 2009 referendum. Given that this type of referendum addresses a national issue, we believe that there should be the possibility of citizen initiative in this regard, as an expression of direct participation, like in the referendum for amending the Constitution. Considering the specific nature and effects of a consultative referendum, we are of the opinion that it is not necessary to meet the same

conditions as those outlined in Article 150 paragraph (2). We consider that a percentage of 10% of eligible voters would be sufficient to initiate such an endeavor, which, in accordance with current legal provisions, is validated by a turnout of at least 30% of the number of persons registered on the permanent electoral lists.

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DOES IT RELEASE YOU FROM SEIZURE? BONA FIDE PRINCIPLE AND CHATTEL PUBLICITY IN THE ENFORCEMENT PHASE

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Abstract

The sale of a car follows the stages of a financial administrative procedure that can reveal the problems often encountered in such cases, realities that have become the norm for several years. Things seem to get complicated when the car in question is affected by procedural documents in a foreclosure; regardless of the point of view from which we try to see the problematic issues, that of the bailiff or the debtor directly involved, that of the sequestration and its publicity, when it involves a vehicle, results to be a subject discussed and contested in the courts, both from a substantial procedural point of view and from the perspective of reported abuses of law, that go and disarm the principle bona fides.

Keywords: *Civil procedure, bailiff, sequestration of vehicle, research paper, execution proceedings, vehicle seizure, legal framework, good faith, termination of sequestration, court decisions.*

1. Consensual sale and forced sale

Consensual sale of a vehicle: an overview.

The sale of a motor vehicle, according to art. 673 of the Romanian Civil Code, corroborated the provisions of art. 1273 para. (1), is regulated by the principle of consensualism, which stipulates that such a contract is validly concluded only by the simple agreement of the parties, and the transfer of the real right of ownership operates *solo contractu*. However, the process of selling a vehicle also involves administrative procedures, including formalities imposed by tax law regulations, without the need for these to be established *ad validitatem*. This contrast between consensualism and formalism highlights the importance of publicity and opposability for the new owners of these movable assets, the presumed good faith according to art. 14 of the Romanian Civil Code being subject to a test of resilience and elasticity.

According to the legislation in force until 1992 (specifically Government Decision no. 601/1992 regarding the vehicle registration certificate), the key element influencing the registration of the vehicle in the name of the acquirer with the police and tax authorities was represented by the authentic form of the sales contract. In this regard, judicial practice demonstrated with concern the relevance of this aspect in determining the consensual nature of the contract. [1]

De lege lata, the formalities to be followed for the deregistration and registration of a vehicle by the competent authorities are included in Joint Order no. 1069/1578/114 of July 28, 2016, issued by the Minister of Regional Development and Public Administration, the Minister of Public Finance, and the Minister of Internal Affairs.

Briefly, the steps to be taken to deregister the vehicle from the seller's name and register it in the name of the buyer are as follows: (i) conclusion of the sales contract, which, according

to Order 1069/2016 Annex 2, must contain the identification data of the parties to the contract, the identification data of the vehicle being sold, the agreed price, and the signature of both parties. It is important to note that, upon conclusion of the sale contract, the seller is obliged to provide the buyer with a series of documents imperatively necessary, such as the vehicle registration certificate, authentication certificate, fiscal clearance certificate, and proof of deregistration of the vehicle from the tax register by the former owner; (ii) following the conclusion of the contract, the buyer is legally obligated to register the vehicle within 30 days at the Directorate for Driving Licences and Vehicle Registration (D.R.P.C.I.V.).

Therefore, all administrative and fiscal procedures revolve around a standardised form of the sales contract, provided in Annex 2 of the aforementioned order; the instituted formalities are provided by law only for the purpose of registering the vehicle for circulation and to ensure its registration in local tax records, without aiming to influence the consensual nature of the sales contract concluded between the parties through a privately signed document.

Enforcement of movable assets.

In the vast array of means for the protection and realization of civil subjective rights within forced execution, frequently encountered is the forced execution of movable assets. This is an indirect enforcement procedure involving the realization of movable assets owned by the debtor to satisfy a monetary claim that the creditor holds against the debtor.

The procedure when speaking about the forced execution of movable assets follows *ab initio* the general and obligatory stages of any forced execution procedure: (i) formulating a request for forced execution based on a judicial or non-judicial enforceable title, (ii) registering the request by the judicial executor and filing the request for approval of forced execution, (iii) obtaining the approval order for forced execution, (iv) summoning the debtor.

In the event that the debtor fails to settle the claim within the prohibitive period of one day from the date of communication of the summons, the judicial executor may proceed with the seizure of the debtor's assets.

To identify the debtor's seizable assets, the judicial executor may use the provisions of art. 660 para. (2) of the Romanian Civil Procedure Code, which establish the obligation of public institutions, credit institutions, and any other natural or legal persons to immediately communicate, in copy, the documents, as well as in writing, the data and information deemed necessary by the judicial executor for the enforcement of the forced execution, including the personal identification number of the person subject to forced execution, even if special laws dictate otherwise.

For the identification of vehicles, the judicial executor, through a protocol concluded between the National Union of Judicial Executors and the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V.), may identify vehicles registered in the debtor's name..

The seizure instituted on vehicles has a legal regime derogatory from the general provisions which require the actual identification of assets [art.s 732 and 738 of the Romanian Civil Procedure Code], their removal, and delivery to a sequestrator-administrator's deposit [art. 746 of the Romanian Civil Procedure Code]. Vehicles can be seized exclusively based on scripts, a response received by the judicial executor in .pdf format from the electronic system created under the aforementioned protocol [art. 740 para. (4) of the Romanian Civil Procedure Code]. The judicial executor is not obliged to evaluate the asset at this moment.

However, the realization of the movable asset vehicle can only be done after the actual identification of the asset, its transfer to the administrator-sequestrator's deposit, evaluation,

and completion of all stages provided by law for each form of realization: (i) amicable sale, (ii) direct sale, or (iii) public auction sale.

Considering the overall perspective on forced execution of movable assets, we affirm that this represents an important legal instrument for the recovery of creditors' monetary claims. The entire procedure of forced execution of movable assets is governed by the principle of legality [art. 627 of the Romanian Civil Procedure Code].

In order to carry out this enforcement procedure that helps ensure the object and purpose of forced execution, judicial practice has encountered impediments in the implementation of legal provisions, both due to unclear and bankrupt interpretations and non-compliant application of those dictated by the legal norm. In this regard, facing such a complex practice, the present work aims to discuss those situations that contravene the appropriate application of these provisions, raising questions about one of the fundamental principles of civil procedural law: the principle of bona fide.

The situation of publicity in the D.R.P.C.I.V. regarding joint assets in the practice of movable seizure within forced execution.

General Considerations.

In accordance with the provisions of art. 2324 para. (1) of the Romanian Civil Code, a debtor who is personally liable is responsible with all of their movable and immovable property, both present and future, as common security for their creditors. However, the application of this rule is limited by the provisions of para. (2) of the same art., which specify that non-seizable assets cannot be subject to this common guarantee for creditors. From a procedural perspective, this rule is reiterated in art. 629 para. (1) of the Romanian Civil Procedure Code, which states that the debtor's income and assets can only be subject to forced execution if they are traceable under the law and only to the extent necessary to satisfy the rights of the creditors."

That being said, in the course of the necessary steps for the realization of the debtor's assets to satisfy the creditor's claim, a subject that often generates discussions is the publicity of the matrimonial property regime of common assets.

When encountered, joint ownership of assets subject to forced execution should not present difficulties or problems when all co-owners are debtors to the creditor. The notion of joint ownership is mentioned, as it is the form of property right that involves its simultaneous exercise by multiple holders. According to art. 632 para. (1) of the Romanian Civil Code, joint ownership can take various forms, such as co-ownership (joint tenancy) or undivided ownership.

In this context, a mention is made of the possibility offered by Romanian law to spouses to choose their matrimonial regime, a choice that will affect the legal situation of both parties' assets. The legal community regime establishes the rule of community ownership of all assets acquired during the legal community by either spouse, from the date of their acquisition; following those sanctioned by art. 343 para. (1) of the Romanian Civil Code, as it is not necessary to prove the quality of common property, but it is the legislator who establishes a presumption of community over all assets acquired by the spouses during marriage.

Thus, common assets cannot be subject to the personal creditors of one of the spouses. This will only be possible if the respective personal creditor requests the partition of the common assets. Partition is a way of terminating joint ownership, being the legal operation by which each co-owner is recognized a share of the property equal to the previous undivided

share. As a result, after the partition, each co-owner becomes the exclusive owner of the allocated property. Pursuant to para. (2) of art. 353 of the Romanian Civil Code, the personal creditor of one of the spouses may request the partition of the common assets only to the extent necessary to cover his claim. In this sense, the text of art. 818 para. (1) of the Romanian Civil Procedure Code specifies the obligation to adopt this measure of partition even in the case of pursuit of immovable property, allowing the possibility of pursuing a determined share of the debtor without the need for partition „*if it is clearly established and clarified and is recorded, by indicating a fraction, in the land register. In this case, co-owners may request the sale of the entire jointly-owned property."* [2]

In light of the aforementioned, discussions in daily practice arise when a personal creditor of one of the owners pursues an asset held in joint ownership or undivided ownership; this impediment is most commonly encountered in the case of the community matrimonial regime, where the apparent disregard of the provisions in this matter can lead to the idea of an abusive exercise of procedural rights.

The seizure of vehicles that are joint assets.

Focusing more closely on the situation of movable assets, the source of the problem lies in the procedure followed in such cases, particularly in the inaccurate information communicated to the judicial executor by the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V.). Based on the provisions of art. 740 para. (4) of the Romanian Civil Procedure Code, the judicial executor wishing to apply the seizure measure does so based on the data obtained from the community public service of the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V.) or the traffic police.

Therefore, the judicial executor may request the seizure measure on a vehicle based on the information provided by the community public service for vehicle registration and driving permits, in cases where the debtor in question is registered as the owner of that asset. The traffic police, based on the notice communicated by the judicial executor, will stop the seized vehicle in traffic and confiscate the registration certificate and identity card, informing the vehicle's driver that the asset is seized and requesting them to appear within a reasonable time before the judicial executor.

At the same time, the traffic police will immediately notify the judicial executor who applied the measure as provided in para. (1). This operation will be documented by the police through a report, which will include a brief description of the seized vehicle, and a copy of it will be handed to the vehicle's driver. Both the documents and a copy of the report will be transmitted to the judicial executor who requested the seizure measure on that vehicle.

A query in the D.R.P.C.I.V. database and the response in the form of a report containing the car's data and the owner's name, in the majority of practices, represent the leverage necessary for the application of the seizure on the vehicle.

In the context provided, against the seizure report, the debtor or third-party co-owner files an enforcement objection, requesting the annulment of the enforcement acts. As an illustrative example, we cite the factual situation retained in Decision no. 1204/2019 of November 8, 2019, pronounced by the Suceava Tribunal, in an appeal concerning the enforcement objection filed by the contestant S.E. in opposition to the respondent A.D.

In substance, the contestant S.E. requested the annulment of the seizure report for movable assets issued in the enforcement file. In fact, she argued how the local Fiscal Service proceeded to annotate the seizure of the car „abusively and illegally" for a debt her husband

had, as the seized car was jointly owned by the contestant and her husband, and the latter's debt was his own.

In response filed by the respondent, they requested the rejection of the objection as unfounded, specifying that all information was collected from the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V.) register, clearly showing that the seized car is solely owned by her husband.

In this case, the certain, liquid, and due debt owed by the debtor to the respondent budgetary institution is acknowledged, resulting from a title, likewise uncontested. However, the debtor has the status of a spouse vis-à-vis the contestant, being enforced for their own debt. Once the community matrimonial regime is established, the first instance court admitted the objection and annulled the act, holding that the movable enforcement was unlawfully initiated without first establishing their share or dividing the asset. Thus, following the succinctly presented facts, the court ordered the admission of the enforcement objection filed by S.E. and the annulment of the seizure report, a decision upheld by the appeals court. [3]

The solution adopted by the panel stands out, becoming even atypical compared to those practised in the case of enforcement of common immovable assets. In this regard, Judgment no. 4833/2018, issued by the Sibiu Court, concerning an enforcement objection, is mentioned.

Contestant C.S.M. requested, in opposition to respondent B.C., the annulment of all enforcement acts concerning a property located in Sibiu, drawn up in the enforcement file. The contestant argued that enforcement cannot be carried out on a property that has ownership rights registered to multiple individuals who are not debtors to the same creditor, stating that the property located in Sibiu is also owned by the contestant. She emphasised that although it would have been indicated to partition the common property, this did not happen due to financial reasons, and that currently, a partition request is pending before the court. The contestant argued that the enforcement on the apartment should be annulled because she is not the debtor notified, and that partition should be carried out before any enforcement procedure.

In response, the other part requested the rejection of the objection as unfounded, arguing that all enforcement acts were performed in accordance with the law and that there is no basis for their annulment, highlighting that no enforcement acts were carried out on the property in question and that the contestant did not invoke any illegality in the enforcement procedure. Additionally, it was indicated that the partition request is pending resolution, and until its completion, the enforcement is suspended by law. According to art. 827 of the Romanian Civil Procedure Code, real rights and any other rights registered after the notation of the real estate enforcement in the land registry cannot be invoked against the creditor who initiated the enforcement or against the one who acquired the property through enforcement, except in cases expressly provided by law or when the creditor or buyer agreed to those rights, or when the debtor or buyer deposited the amounts necessary to cover the pursued claims, including interest and enforcement costs.

In connection with these provisions, together with those from art. 822 para. (1) combined with art. 818 para. (1) and (2) of the Romanian Civil Procedure Code, the court finds that the issuance of the request for notation of real estate enforcement on the property by the judicial executor in the aforementioned enforcement file did not prejudice the contestant's co-ownership right over the property. This resulted in the notation of real estate enforcement in the land registry, and, in accordance with the law, real rights and any other rights registered after this notation are not opposable.

Considering these legal and factual aspects, the court deemed that the request for notation of real estate enforcement on the property and the minutes issued by the executor comply with the aforementioned legal provisions. Therefore, based on the factual and legal considerations presented above, the court rejected the enforcement objection filed by the contestant on the grounds that it is unfounded. [4]

Indications de lege ferenda.

In light of these aspects, the choices made by the court to annul the seizure documents of the movable asset, which turns out to be a common asset, are questioned instead of applying a similar reasoning to that applied in the case of pursued immovable property, where the notation is retained, in order to ensure compliance with art.s 827 and 828 of the Code of Civil Procedure – which generally establish the non-opposability of third-party rights to the pursuing creditor.

However, it is challenging to draw a complete analogy between the enforcement of movable and immovable assets. Although the registration of the enforcement over a common asset does not hinder the exercise of ownership rights by the debtor and co-owner, the procedure for seizing the vehicle documents by the traffic police under art. 740 of the Code of Civil Procedure imposes limitations on their rights.

In such complex circumstances, which can pose true obstacles to strictly complying with legality in the enforcement procedure, a reliable solution could involve integrating and correlating data and information from all registers of property advertising. Through this approach, the attribution of the status of „sole owner" in the reports issued by the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V) when the asset in question is a common one could be avoided.

Nevertheless, we believe that a specific method of seizing these movable assets could be established by law, one that does not restrict their use but only the debtor's disposal rights. Thus, sales or encumbrances of these assets could be non-opposable to pursuing creditors until partition is carried out. Despite potential discrepancies between registers and erroneous information provided by competent institutions, we should not hastily conclude that there is a violation of the principles of bona fide or an abuse of rights in the seizure of vehicles with the legal status of common assets, in the absence of evidence presented by the debtor or an interested third party.

Relevant in this regard may be the provisions of art. 732 para. (4) final sentence of the Code of Civil Procedure, which states that if it is claimed that certain assets (movable) belong to another person, but their rights are not supported by documents with a certain date, the executor will proceed with the seizure of the assets but will make a mention in the seizure report regarding the claimed rights. It is important to emphasize that the law itself allows for the seizure of assets that, from a legal perspective, are claimed by another person, in the absence of conclusive evidence, until the legal situation is clarified.

Chattel publicity

General considerations

The Emergency Order no. 195/2002 regarding traffic on public roads, defines the motor vehicle in art. 6 pt. 6, as a vehicle equipped with an engine for the purpose of travelling on the road. Thus, road tractors and trolleybuses can be considered motor vehicles, while trams,

agricultural tractors, or any vehicle for performing services or works that involve only occasional travel on public roads cannot be considered motor vehicles.

The judicial executor orders the measure of seizing vehicles following the report issued by the public community service for driving licences and vehicle registration or the traffic police.

If the vehicle is seized, according to legal provisions, the judicial executor has the possibility to make this mention on the vehicle's registration certificate and identity card, documents that certify that the respective vehicle can circulate on public roads and its approval. The entire procedure is recorded by the judicial executor in a tracking report, with copies of it being sent to the traffic and fiscal police authorities in whose area the asset was initially registered, for its registration in their own records. Also, the report will be communicated to the traffic police service: according to art. 740 para. (3) of the Romanian Civil Procedure Code, the targeted police authority (in whose system the report is loaded) can stop the seized vehicle in traffic, ordering the lifting of the registration certificate and identity card, sent to the judicial executor who applied the measure.

Once the seizure is instituted, according to para. (5) of the same art. 740 of the Romanian Civil Procedure Code, the debtor will be able to use the vehicle until its realisation, provided that he remits or deposits to the judicial executor a sum as a security policy.

According to art. 742 of the Romanian Civil Procedure Code, the publicity of the seizure is configured apparently as an obligation of the judicial executor, this having as purpose the opposability of the seizure to anyone who, subsequently, will acquire a specific right over that asset. This condition of opposability is materialised by registering the seizure in registers such as the trade register, in the Electronic Archive of Mobile Real Guarantees, the inheritance notarial register etc. From the moment of registration, the seizure becomes opposable to third parties.

Starting from an apparently transparent and clear legislative framework, practice has highlighted various problems regarding the publicity of the seizure, which denote and what consequences its lack would produce, through numerous execution objections in which a violation of the rights of third parties is invoked.

The absence of the notation of the seizure in the National Registry of Matrimonial Regimes: consequences.

A careful analysis of the current legal practice highlights various reasons that have been the subject of execution appeals, citing the complete absence or inconclusiveness of the seizure in the registers mentioned in art. 742 of the Code of Civil Procedure.

To capture the need for uniform judicial practice in this regard, we mention *ab initio* Judgement No. 861/2020 of January 22, 2020, pronounced by the Bucharest Sector 4 Court, concerning the execution appeal.

In this case, the appellant A.D. formulated, in contradiction with the respondent R.T., an execution appeal against the enforcement proceedings initiated by the enforcement authority G.P.A. Through this appeal, A.D. requests the annulment of the enforcement acts, especially the vehicle seizure report, the subsequent acts, and their effects. The appellant A.D. substantiates these requests by arguing, among other things, the illegality of the aforementioned report, as the judicial officer did not comply with the provisions of art. 742 of the Code of Civil Procedure; furthermore, the lack of ownership status of the appellant

regarding the seized vehicles is emphasised, as they do not appear in her asset inventory and are in the process of being registered in the name of the new owner.

Subsequently, the respondent requested the rejection of the appeal as unfounded. It is argued that the seizure was ordered in accordance with art. 740 para. (4) of the Code of Civil Procedure, and any subsequent alienation thereof would not be opposable in the absence of their registration. Regarding the non-compliance with art. 742 of the Code of Civil Procedure, the respondent emphasises that these provisions have effects in favour of the creditor, representing a condition of opposability of the seizure against third parties, but not a condition of validity of the seizure *per se.*

Analyzing the submissions made by the parties, the court finds the arguments of the appellant A.D. to be unfounded. Firstly, the court considered the financial statement provided by the appellant as inadequate to prove the transfer of ownership rights over the seized movable assets. In the implementation of the seizure, the judicial officer duly considered the tax records and the records from the Directorate for Driving Licenses and Vehicle Registration (D.R.P.C.I.V.), reports indicating the appellant's ownership of the seized vehicles, in accordance with art. 740 para. (4) of the Code of Civil Procedure. Regarding the validity of the seizure report, the court determines that it was drawn up in accordance with the relevant legal provisions of the Code of Civil Procedure. The publicity of the seizure referred to in art. 742 of the Code of Civil Procedure, as previously mentioned, only concerns the opposability of the seizure: para. (2) clarifies that, from the date of registration, the seizure becomes opposable, without affecting its validity. As stated in Judgement No. 861/2020, the validity of an act will be analysed and assessed considering the time of issuance, with all subsequent actions aiming at its effects. Taking into account the principle of availability and the configuration of the objective procedural framework through the requests and defences of the parties, the court pronounces the dismissal of the execution appeal as unfounded. [5]

Therefore, non- opposability and nullity are distinct sanctions.

Regarding the situation of the new owner of the vehicles encumbered by seizure, the status of the bona fide acquirer must be carefully analyzed, especially in the absence of notation of the seizure in public registers.

Judgement No. 2010/2021 of November 11, 2021, pronounced by the Bolintin Vale Court, captures a frequently encountered practice of the courts. In this case, the court is dealing with the resolution of the execution appeal filed by the appellants B.B. and T.A., against the seizure measure imposed on the vehicle by the judicial executor, within the framework of his execution file. The appellants request the annulment of the measure: essentially, appellant T.A. argues that he purchased the seized vehicle from appellant B.B., without completing the necessary formalities to finalize the transfer, as previously noted. T.A. contends that he was stopped in traffic, where he was informed of the seizure, stating that until that moment he was unaware of the existence of this measure, neither at the time of purchase nor when he was handed the detection report. Thus, there is a presumption of good faith of the acquirer, which is not rebutted by the evidence submitted to the file by the creditors, and through the instituted seizure, he is prevented from exercising all the attributes of the right of ownership conferred upon him by law, even if at the time of acquisition the seizure was not opposable to him, according to the provisions of art. 742 para. (2) of the Code of Civil Procedure.

In this regard, the court notes that the sales contract concluded between the parties and concerning the vehicle became opposable to third parties through its registration at the Town Hall. At the time of the seizure (December 5, 2019), prior to the conclusion of the transfer

agreement (November 16, 2020), the vehicle still appeared as the sole property of appellant B.B., with both the sale and its opposability occurring after the seizure. It should be noted that, at the time the transfer became opposable to third parties, the publicity of the seizure had not been completed by the judicial executor. Under such circumstances and in the absence of proof of the registration of the seizure as determined by art. 742 of the Code of Civil Procedure, the seizure became opposable to the vehicle's acquirer at the earliest on the date he was stopped in traffic by the police authorities, namely on April 9, 2021.

For these reasons, the court rules by partially admitting the execution appeal filed by the appellants and by lifting the seizure imposed on the movable property, reasoning this decision based on the good faith of the buyer. [6]

In the scenario where the asset was sold prior to the imposition of the seizure, without having a certain date, meaning it was not recorded in tax records or registered, and the seizure has a subsequent date of notation in the National Registry of Movable Property (RNMP), the question arises whether the third-party acquirer has the possibility to obtain non-opposability.

However, we believe the answer is negative. It is important to emphasise that registration with the D.R.P.C.I.V. and local tax authorities does not constitute opposable publicity, as they are not public registers within the meaning of the law. Thus, the absence of a tax registration or vehicle registration does not grant the third-party acquirer the right to invoke the non-opposability of the seizure subsequently noted in the RNMP.

In the event that the sale of the movable property occurred before the seizure was instituted and there was a certain date prior to its publicity, the third-party acquirer could obtain non-opposability of the seizure.

However, clarification is needed regarding who is responsible for lifting the seizure or establishing its non-opposability.

In such a situation, the judicial executor who issued the seizure order should be responsible for lifting the seizure by briefly verifying the authenticity of the transfer document, considering that they are the authority that initiated the seizure procedure. However, we do not exclude the possibility that, through an execution appeal, a request could be made for the establishment of the non-opposability of the seizure, although, according to the provisions of art. 712 of the Code of Civil Procedure, such an appeal is at least unusual. The executor has the obligation to comply with the court decision and implement the measures ordered by the court, including lifting the seizure when the legal conditions for non-opposability are met. It is noteworthy that there is a similarity in effects between the nullity of the seizure and its non-opposability to third parties: both sanctions lead to the lifting of the seizure.

In conclusion, the prerogative of lifting the seizure may initially belong to the judicial executor, who will, however, inform the creditor about the rights invoked by a third party to respect the principle of availability. If the creditor opposes, invoking aspects that require an analysis of rights in an adversarial context, the establishment of the non-opposability of the seizure must be within the competence of the enforcement court.

3.2.1 Seller's liability

Therefore, due to the lack of registration of the seizure in the public registers mentioned in the Romanian Civil Procedure Code, the measure imposed was not proven to be opposable to the buyer, against whom the lifting of the seizure was ordered, following the proof of their

good faith. It naturally raises the question: what consequences does the seller face in such situations?

The alienation of a vehicle encumbered by a seizure may incur the contractual and tort liability of the seller, with neither the absolute nor relative nullity of the sales contract being excluded. In certain situations, the sale of the seized asset may entail the seller's criminal liability. This may include offences such as fraud, deception, or other crimes provided by criminal law, and the seller may be subject to corresponding criminal sanctions depending on the severity of the offences committed.

In conclusion, it is essential for the parties involved to ensure compliance with all legal requirements and to act in good faith in their transactions to avoid such negative consequences.

3.3 „At the request of the judicial executor" – art. 742 of the Romanian Civil Procedure Code

Starting from the phrase „at the request of the judicial executor" in art. 742 of the Romanian Civil Procedure Code, we can extract and highlight the significant aspects related to this condition of opposability of seizures: their publicity. Conducting the publicity of seizures entails bearing costs that follow the regime of enforcement expenses according to the provisions of art. 670 of the Romanian Civil Procedure Code. Although the text seems to impose an obligation on the judicial executor to carry out this publicity, it depends on the creditor's obligation to advance the corresponding costs. Without the advancement of these costs, the legally instituted seizure will not be made known to third parties through the National Registry of Movable Property Publicity, resulting in its non-opposability to a bona fide third-party acquirer.

In the context of objections to execution, in which third-party acquirers invoke the non-opposability of the seizure, the judicial executor does not have passive procedural status according to general rules. Therefore, the process concerning the objection to execution will be conducted between the original parties of the enforcement file and the contesting third party, if the latter has submitted an objection to execution. The executor does not become a party to the judicial dispute but carries out their duties within the enforcement process in accordance with the law and court decisions.

Given the importance of the principle of publicity in the enforcement procedure, it can be argued that the judicial executor should inform the creditor, especially in situations where the creditor is not a professional, about the need to pay the notation fee. Correct and complete information of the creditor in this regard could prevent potential negative consequences associated with the lack of publicity of the seizure and ensure compliance with legal provisions and the rights of the parties involved.

The lack of publicity does not affect the validity of the seizure itself, as detailed in the previous judgments, but only makes it not opposable to third parties. This means that third parties acquiring rights over the seized property can invoke its non-opposability if they have not been properly informed about the existence of the seizure. Consequently, the lack of publicity may entail certain sanctions or legal consequences, and adequate information of the parties involved can contribute to avoiding such situations.

Final mentions

Analyzing the situations presented in the context of forced execution of movable assets, the conclusions drawn highlight the importance of understanding and applying the principles of bona fide and movable property publicity in this procedure.

Regarding movable assets, the onset of the issue indicates that the seizure procedure is initiated by the judicial executor based on information obtained from the public service for driver's licence and vehicle registration (D.R.P.C.I.V.) or the traffic police. This procedure is crucial for identifying assets susceptible to seizure and aims to ensure the creditor's rights are respected.

However, in practice, it has been observed that some seizure procedures are initiated with neglect of essential aspects, such as the matrimonial regime instituted over movable assets. This has led to the emergence of objections to execution, invoking the non-conformity of execution procedures with legal provisions resulting in the annulment of the seizures thus instituted.

Regarding the seizure procedure, it is detailed by relevant legislation, and the judicial executor is empowered to order the seizure strictly based on information obtained from the public service for driver's license and vehicle registration or from the traffic police.

In practice, however, some difficulties are encountered in correctly applying the seizure procedure and complying with legal provisions regarding seizure publicity. These difficulties have generated numerous objections to execution, and courts have often had to clarify legal aspects and evaluate the specific circumstances of each case.

An important aspect is the good faith of third-party acquirers of movable assets, especially vehicles, burdened by seizure. If a third-party acquirer acts in good faith and acquires the asset before the seizure is instituted or before it is recorded in relevant public registers, the court may find the seizure non-opposability to the third-party acquirer.

However, the lack of proper publicity of the seizure can have serious consequences for the seller and may entail legal sanctions, including the nullity or voidability of the sales contract or civil liability for damages. The seller may even be subject to criminal liability if they intentionally dispose of an asset burdened by seizure and violate legal provisions.

Therefore, in light of these situations, it is evident that applying the principles of bona fide and movable property publicity in forced execution is crucial to ensure a fair and lawful process. Judicial executors and courts play a crucial role in ensuring compliance with these principles and in avoiding the emergence of objections or disputes within forced execution procedures. It is important that the information obtained in the correct procedure, and judicial practice provide appropriate solutions in cases with special circumstances.

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Section G

THE INSTITUTION OF JUDGMENT, ITS ROLE IN INHERITANCE AND GOOD FAITH

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Abstract

In the Middle Ages, the ruler of Wallachia or Moldavia judged in good faith the reasons that concerned the right to property in the context of disputes for delimitating the property or seizing an area of it. The judgment books issued in the cases concerning the limits (boundaries) of the property, started to be called 'judgments', a terminology that replaced in the modern era the judgment books, which were called court decisions. In the Middle Ages, the magistrate had the ability to judge and resolve several types of land disputes. Inheritance, or the mass of successional goods was transmitted to the successors, who had a succession vocation, from their estates (ancestors), by legal means, not excluding the transmission also through the manifestation of the last will of the deceased.

Keywords: *judgement, heritage, middle ages, magistrate, good faith*

The holder of the rule institution in Wallachia, as in Moldova, was the 'lord' or/and the 'great voivode'. The first term expresses (dominus = master/lord) his quality as master, owner, of the entire land of the country, and the second highlights the military character (soldier) of the institution. The reign („Domnia") is an original Romanian institution that has no correspondent in neighboring countries.

In the Middle Ages, the ruler of Wallachia or Moldavia was the supreme judge of the country, he had the right to judge in the last instance any person and cause, to invoke a cause from any court, to draft his own judgment, to pronounce any punishment and to forgive the guilty, to give instructions to the governors how to judge.[1]

The princely court was considered to be of good faith, competent to resolve all disputes concerning land ownership. Good faith is in contradictory relations with lies, duplicity, hypocrisy, with all forms of bad faith, but not with error. Dimitri Cantemir shows [2] that the ruler had a special competence regarding the establishment of boundaries, land ownership and servitudes. The party that won the case received a deed confirming (or affirming, as the case may be) the ownership right over the estate and the boundaries of the property that could be constituted from a village or a part of the village. This act had the meaning of a property title, because without it it was very difficult to protect the property. A customary rule was even created in this regard, stating: 'There is no land without a document.[3]

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[1] *History of Romanian law,* vol. I, Academy Publishing House, Bucharest, 1980, p. 254.

[2] D. Cantemir, Description of Moldova, International Litera Publishing House, Chisinau-Bucharest 2001, p. 199.

[3] Elena Aramă, Ion Jecev, The judicial organization until the Ottoman rule, National Journal of Law no. 11/2016, p. 3.

However, the term border has a specific meaning in our old language, the border being the delimitation that separates one village from another, but also the entire area between those borders.[4]

The ruler of Wallachia or Moldavia was the great ruler[5] of the country and intervened personally and on the spot in court. This meant that the ruler judged the causes concerning the right of ownership in the context of disputes for demarcating the property or seizing an area of it. The judgment books issued in such disputes concerning the limits (boundaries) of the property, began to be called 'judgments/rulings', terminology that replaced in the modern era the judgment books, which were called court decisions.

An interesting[6] and eloquent case is the trial of January 9, 1562 between the monks of the Tismana and Roşca monasteries together with the sons of Răsipă, for the villages of Bahna, Ploştina, Leurda, Cireşelul, Turcineştii and Grozeştii, with the entire border. The defendants appeared before Petru Voivod, each claiming the villages with the above lands. The ruler investigated the case in good faith and found that the same case was tried before him by Radu Voivod, when the monks won by swearing with 12 boyars. Radu and Răsipă's sons took law upon law in front of Mircea Voivod, with 24 swearers, but they could not bring them to justice and stayed with the law. After that, they were tried in front of Pătraşcu voivode with 12 jurors, and this time the monks took 24 jurors, with whom they won the trial again. In relation to these lawsuits, Prince Petru no longer judges the case, but gives victory to the monks and the monastery of Tismana..." *that is why I also gave my kingdom to the holy monastery and the godly monks, so that they would have all these villages and ocines and ohabas and unshaken by anyone, according to my lordship"*

In Wallachia, the High Steward had duties as a judicial bailiff (with the exception of Oltenia, where he judged the great ban), his powers being in: criminal matters (thefts, border violations, injuries, damage caused by stray cattle, while the cases that they demanded the death penalty, they were sent to be judged by God). In civil matters, he judges matters related to the ownership of the land, Romanians and Gypsies.

High Steward was documented in 1389 in Wallachia and in 1393 in Moldova.[7] In Wallachia, there was only one High Steward until the 18th century, while in Moldova, in the first half of the 16th century, the directorate doubled, with one High Steward for the Low Countries residing in Bârlad and another, for Upper Country, at Dorohoi.

The high stewards were divine boyars, judges, considered to be of good faith, there were different ranks, for example, the third and fourth rank had six 2nd rank high steward under their command, who judged disputes about border violations and received from the treasury each 500 thalers monthly and annual income of 9,000 thalers.

In the Middle Ages, the high stewards had the capacity to judge and resolve several types of disputes with a land substrate, taking presumed to be in good faith, disputes such as: settling

[4] Henri H., Stahl, Contributions to the study of Romanian Devalma villages, vol. Romanian Book Publishing House, Bucharest, 1998. pp. I – XLV.

[5] Dan Ţop, N. Enache, *History of Romanian law and state, IVth edition,* Zvem publishing house, Târgovişte, 2022, p. 66.

[6] Iosif Florin Moldovan, *Jurors to Romanians – the conduct of trials with jurors. court procedure,* UBB study, Jurisprudence series, no. 2/2012, p. 207, http://arhiva-studia.law.ubbcluj.ro › article, accessed on March 30, 2023.

[7] *The history of Romanian law*, *op. cit*, p. 291.

and resolving misunderstandings between Moldova and Transylvania regarding the mountains and areas that have constituted the border between the two countries; deciding and taking possession of the plots in the Câmpulung area etc. The Câmpulung governors were recorded by the sources of the 18th century deciding the estates of the Câmpulung people, impaling them and putting different residents in the neighborhood in possession. The tenants of Câmpulung could be represented at various decisions and possessions by their decision-makers – good and old people or villagers – as they appear mentioned in the documents. An example in this sense is represented by the land surveyor made by the former medelnicer Dumitraşcu, high steward of the Câmpulung region on 6th August 1748[8].

A crime characteristic of the Middle Ages was the deed directed against property, materialized through the false decision and the moving of boundaries in bad faith in order to increase the land surface[9].

The community was made up of a certain number of elders who had behind them a lord of the land in devolution.[10] The role that the elders had in the life of the community gave rise to terms such as estate, inheritance, body of estate or free holder [11]. Estate, has the meaning of a plot of land that will remain for the descendants of future generations, being considered an asset that comes from 'grandfathers', an inherited asset'.

The right of inheritance developed in close connection with the evolution of village communes, the commune had a superior property right (dominium eminens) over the entire territory inhabited by commune members[12]. From the stage in which the importance of this right decreases, the arable lands come under the definitive control of the patriarchal families that made up the community. These aspects have an overwhelming influence on those called to the inheritance. However, the succession was also then based[13] on legal and testamentary inheritance. Inheritance (the mass of successional goods) was passed on to the successors, who had a succession vocation, from their estates (ancestors) it was done legally[14] and through the manifestation of the last will of the deceased.

According to legal inheritance, legitimate children as well as adoptive children, regardless of gender, have equal vocation to the assets inherited (ocine, dedine) or purchased by their deceased parents.[15] Natural children succeed only to the mother's inheritance.

The stepchild (heister) has the same rights to inheritance as the legitimate one, but only to the succession of the good (own) parent.[16]

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[8] Teodor V. Ștefanelli, *Câmpulung documents..., Institute of Graphic Arts, 'Carol Göbl', Bucharest 1915*. p. 46, nr. 34.

[9] Dan Țop, N. Enache, *History of law and the Romanian state, op. cit.,* p. 92

[10] Henri H. Stahl şi Paul H. Stahl. *The civilization of the old Romanian villages, Scientific Publishing House, Bucharest*, 1968, pp. 11-12.

[11] Petre Buneci, Cristian Moşneanu, *The History of Romanian Law, Librex Publishing House, Bucharest*, 2021, p. 280.

[12] Vl. Hanga, *History of Romanian law. Customary law,* Chemarea Publishing House, Iasi, 1993, p. 94.

[13] Vl. Hanga, *History of Romanian law. Customary law*, Chemarea Publishing House, Iasi, p. 94.

[14] Vl. Hanga, *History of Romanian law. Customary law*, Chemarea Publishing House, Iasi, p. 94.

[15] E. Cernea, E. Molcuţ, *The history of the Romanian state and law*, Şansa Publishing House S.R.L., Bucharest, 1993, p. 116.

[16] Gh. Ghibănescu, *Sources and declarations*, Iaşi, 1933, p. 66, vol. III.

The law of the land also recognized [17] the surviving spouse a right of inheritance in competition with the descendants of the deceased.

Testamentary inheritance was opened on the basis of an oral or written will (diata).[18] Both the spoken testament – ' last words promise ' and the written one were made in the presence of witnesses. Parents could disinherit mischievous or disrespectful sons.[19]

The right to dispose free of charge knew a limit in the institution of the reserve. The direction of the law uses the terms 'falchedie', 'falchidiu' to denote the reserve, unlike the Romanian law, which admitted the invariable reserve of one fourth, the Romanian rule provided for variable quotas.[20]

In the absence of any heir, the inheritance belonged to the lord by virtue of his right of eminent owner.

Jus valahicum (Law of the Land), mainly, a right with a rural character, an agrarian right of people connected to the land, the border, the estate. The term 'judgment' comes, moreover, from the word 'border', which proves that most processes were limited to fixing borders. From here, by extension, decisions are called decisions (judicial, political etc.) and 'estate', etymologically, comes from the property inherited from the grandfather[21].

Many cases were resolved through the books of voluncia through which the courts (especially the ruler or the money), especially in land matters, materialized their decision without a contradictory judgement. The actual defendant was warned by the 'letter of intent' about the decision taken, following which he would capitalize on his possible defenses or rights through a new trial.

Independent books[22] they were of general application. They were, however, very much used in agrarian matters, being a particularly effective element of extra-economic coercion through which the exploitation of dependent peasants was carried out. lso by writ of voluncia, the lord often instructed a deputy to investigate and judge a case, according to the instructions given in the royal order.

In the Romanian legal practice from the 4th – 9th centuries, the furrow oath and the conjurers, who testified to establish the facts and sometimes gave judgments, are indicated as fundamental evidence in the settlement of disputes regarding borders[23].

The ban on close relatives giving statements as a witness was also maintained in the feudal era, the period in which in Central Europe the courts required at least two witnesses to verify the credibility of certain statements.

Among the special procedures in the Middle Ages, the decree is mentioned, along with the ordeal and the scourges. The scope and importance of decisions in economic and social-legal matters made their structure have its own characteristics, and the decision-makers, who took an oath before fulfilling their task, were regarded as a special category of 'jurors', distinguished from other[24]. The land surbeyors they were considered to be people of good

[17] Dan Țop, N. Enache, *op. cit,* p. 88.

[18] E. Cernea, E. Molcuț, *op. cit.*, p. 117.

[19] Idem.

[20] *The history of Romanian law*, vol. I, p. 529.

[21] Florin Negoiță*, History of law (course notes),* http://studentladrept.blogspot.com, 2009/01, accessed on March 28, 2023.

[22] Liliana Creangă, *Evidential elements in medieval justice,* https://ibn.idsi.md › default › files › imag_file, accessed on March 28,2023.

[23] E. Cernea, E. Molcuț, *op. cit.*, p. 44.

[24] Liviu P.Marcu, *The history of Romanian law,* Lumina Lex Publishing House. Bucharest, 1997, p. 136.

faith, who say what they believe, even if they are wrong, as long as they believe what they say.

We meet resolute jurors in civil trials [25] who, by the nature of the attributions they had, fulfilled the necessary probation in the processes of deciding the lands and estates. Lawsuits to confirm this are multiple, given that land has been the main subject of legal disputes[26]. We exemplify in this sense the trial of July 26, 1561 between Tatul and Bădilicea with Moşul and Miclea. Pătraşcu Vodă had given 12 boyars '... *if they walked and decided and put boundary marks...*'. Under the reign of Mircea Voievod, Manul and Miclea demand law upon law 24 boyars and '... they walked and decided with those 24 boyars... *and moved and rejected the borders of those 12 boyars...*"[27].

The document of June 5, 1535, shows the use of sworn oaths when the ruler Vlad Vintilă strengthens the Cutlumuz monasteries from Athos, the Uibăreşti estate, following the trial with the High Steward Neagoe [28] based on the oath of 12 boyars '... *to decide where the old borders were... this is how they walked... to decide and put pillars where the old borders were...*'.

The witnesses swore in good faith before the court regarding the subject of the trial. Jurors or witnesses differed from witnesses in that they did not testify about the subject of the trial, but about the veracity of the defendant's claims that brought them[29] They were initially of the same social category as the party they swore for, later they were mainly boyars. The witnesses were indicated by the gentleman, either numerically or by name, by order of chance.[30]

The furrow oath was a means of evidence used in boundary trials [31]. Its origin is ancient and is based on the concept that the land has the power to defend the righteous and of good faith and to punish those of bad faith who committed wrongdoing.

As noted by a great historian of Romanian law, 'the custom of the land with a furrow in the head rises higher since the settlement of the Slavs on the Romanian lands and goes further since the arrival of the Romanian lictors on these lands.' It loses himself in the pre-Roman past, to be found once again in the very general history of the oath"[32]

The oath 'with a furrow on the head' or 'with a clod of earth on the shoulders', the first in Moldova, the second in Wallachia, as an expression of the 'ordinary formalism of decision-making', was meant to ensure a better establishment of the truth and a fairer resolution of the case"[33]. Another form of judicial symbolism was the earth oath.[34]

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[25] Iosif Florin Moldovan, *Jurors to Romanians – the conduct of trials with jurors. court procedure, art. cit, pp. 208-209,* http://arhiva-studia.law.ubbcluj.ro *› article, accessed on March 30, 2023.*

[26] Bogdan Ghe. Agapie, *The problem of Romanian jurors: a critical study of ancient Romanian law, Tipography* Alexandru A. Terek, Iasi, 1939, p. 11-12, apud Iosif Florin Moldovan*, Romanian Jurors...* art.

[27] *D.R.H.*, B. Wallachia, vol. V (1551-1565), compiled by Damaschin Mioc and Marieta Adam Chiper, Publishing House of the R.S.R. Academy, Bucharest, 1983, doc. 230, pp. 249-251.

[28] *D.R.H.*,B. Wallachia, vol. III, Bucharest, Academy Publishing House of the S.S.R., 1975,doc. 199, p. 333-334.

[29] Gh. Cronţ, *Romanian medieval institutions*, Bucharest, 1969, p. 143.

[30] E. Cernea, E. Molcuţ, *The history of the Romanian state and law, Şansa SRL Publishing House,* Bucharest, 1993, p. 125.

[31] Tereza Danciu, *The history of Romanian law,*vol.1, C.H.Beck Publishing House, Bucharest, 2020*,* p. 108.

[32] G. Fotino**,** *Customs for setting borders, in Pages of Romanian law history,* Bucureşti, 1972, *op. cit*., p. 47.

[33] L.P. Marcu, *The history of Romanian law, op. cit*, p. 136.

[34] D.V.Firoiu, *History of Romanian state and law,* Didactic and Pedagogical Publishing House, Bucharest, 1976, p. 98.

Thus, the one hired to walk correctly on the true boundary of the land in dispute would put land on his head or in a piece of land, swearing that that was the true boundary. Like faithfulness and courage, good faith is not a sufficient and complete virtue, but it is very necessary to the other virtues. For example, in a deed dated June 4, 1667 drawn up by the boyar Bej an Gheuca, it is stated that: 'we, if we saw the honest letter of Marii Dumitale, jumped and gathered the priest and court boers of Marii Dumitale and old townspeople and people of the country, old and young, and they chose two old people and put furrows on their heads and went forward to where Mafteiu Roşea held, we chose and we stood' and in a Gorjan document dated March 15, 1761 regarding a decision between Vlăduţ Gâlcescu and Sandu Crăsnaru, it is shown that: 'still other people, taking a living with earth, went where they knew the old mother and prevailed"[35].

This ancient custom, of origin if, symbolized the punishment of the earth goddess against to the one who would have made false statements, in bad faith, on the occasion of such decisions.

The court decisions of the gentleman had legal force only during his lifetime. The pronounced decisions did not have the authority of res judicata. There was no appeal, the party dissatisfied with the decision could reopen the case at the same court or at a higher court, the royal council and the lord of the country.[36]

For the exercise of appeals, feudal law provided for zavesca – a certain amount of money paid as a fine, in case of reopening the process by the interested party, and hieria, which appeared later, an amount of money that the winner of the process paid to the royal treasury or the governor who had judged him. In case of reopening the trial, the party that lost the trial had the obligation to return to the winner the amount he had paid to guarantee the execution of the judgment. [37]

Conclusions

Finding out the answers to the questions about our past represented, many times, a challenge, which only the sources of research into the history of Romanian law, as much as we have left, urged us to mention them, because without the testimonies of the era to confirm the veracity every working premise, any of the conclusions we would have reached remains doubtful. It is beyond any discussion the finding that good faith can be found both in history and in law, since ancient times, this being a mental state, which is characterized by the sincerity with which the person in error states that he had a representation correct (characterized by conviction, belief, certainty) about a state of fact or law existing at a given time, vision that allowed him to make a decision or have an attitude in a given circumstance.

[35] Al. ȘtefănescuThe historical and picturesque gorge, 1904, p. XXXVIII.
[36] E. Cernea, E. Molcuț, *op. cit.*, p. 124.
[37] E. Cernea, E. Molcuț, *op. cit.*, p. 124.

GOOD FAITH, AN ESSENTIAL CONDITION FOR INVOKING THE „*LEGITIMATE EXPECTATION*" OF OBTAINING AN ASSET, IN ORDER TO GAIN PROTECTION OF RIGHTS GUARANTEED BY ARTICLE 1 OF PROTOCOL NO. 1 ADDITIONAL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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Abstract

Through this study we aim to conduct a succinct analysis of the concepts of „good faith" and „legitimate expectation" in jurisprudence European Court of Human Rights, concentrating on the interpretation and application of these principles within the framework of the European Convention on Human Rights. Therefore, initially, we will examine the origin and development of the principle of good faith, referring to the concept of „bad faith", as a form of abuse of rights, sanctioned by the Convention for the Protection of Human Rights and Fundamental Freedoms, we will continue with some considerations regarding the principle of good faith, as an essential condition for invoking the legitimate expectation assimilable to an asset within the meaning of Article 1 of Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. We will also identify some cases considered to be concrete and relevant, in which these institutions were invoked and applied by the Court.

Finally, we shall conclude regarding the importance and essential role of the principle of good faith in invoking the legitimate hope of acquiring assets within the meaning of Article 1 of Protocol No. 1. additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, in order to guarantee respect for fundamental human rights within the framework of the case-law of the European Court of Human Rights and in the further development of European human rights law.

Keywords: *good faith, abuse of rights, legitimate expectation, Article 1 of Protocol nr. 1 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms*

Preliminary considerations

Good faith is not a new concept of our times, this principle having its origin in the classical period of Roman law. The classicism of Roman law constitutes the stage of evolution of Roman law included in the time interval of the end of the Republic (approximately at the beginning of the first century B.C.) and the reign of Diocletianus (248-305 A.D.) [1], the emergence of the principle of good faith symbolizing, in the history of law, a major reference point in the development and evolution of later legal systems.

During the classicism of Roman law, the celerity of social processes of all kinds required the abandonment of formalism and the adoption of much simplified procedures for concluding legal acts, based on consensualism and good faith (*bona-fides*), the courts generally seeking to apply mainly equity *(aequitas)* in legal relations between parties and less the formalism of legal acts. In support of these ordinances, the interpreter had to submit to the will of the parties when investigating a specific legal act, in order to discover their intention. The same obligation was exercised by interpreters in researching laws to discover the intention of the legislature. According to doctrine, this form of interpretation was very suggestively expressed by jurisconsult Celsus in the famous quote „*Jus est ars boni et aequi"* (law is the art of goodness, necessity and equity, justice) [2].

This principle, also known as „*bona fides*" in classical Latin and, subsequently, also as „*good faith*" in American law [3], continued to develop, and in the context of progress towards a complex and interconnected society, it was necessary to develop rules and principles regulating relations between citizens and state institutions, both horizontally and vertically, the principle of good faith receiving the status of a central element of civil law theory and practice.

Therefore, although it has an obvious historical character in relation to its genesis, the principle of good faith maintains its relevance today, approximately 2000 years after its appearance, and represents one of the fundamental principles of law underlying any legal relationship of substantive or procedural law, being enshrined both in Romanian law, as well as in European and international law.

1. Good faith – admissibility condition for obtaining protection of the European Convention for the Protection of Human Rights

The principle of good faith has disciplined the behavior of the parties involved in various legal transactions/interactions, has created a standard of conduct based on honesty, fairness and mutual respect between them and has become an essential condition in the European system of human rights protection, representing a fundamental element in the jurisprudence of the European Court of Human Rights.

Thus, although the Convention for the Protection of Human Rights and Fundamental Freedoms does not expressly enshrine the obligation to benefit from its provisions in good faith, it regulated the concept of „*bad faith*" as a form of abuse of rights, sanctioned by the existence of the anti-diversion clause of guaranteed rights (Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and with the inadmissibility of the claim in matters of individual cases (Article 35 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

In this regard, from one point of view, we note that the European legislator has provided in the Convention, in Article 17, which bears the marginal title „*Prohibition of abuse of rights",* that „*Nothing in this Convention may be interpreted as authorizing to any State, group or individual any right to carry out any activity or perform an act aimed at the destruction of the rights or freedoms recognized by this Convention, or to limit such rights and freedoms other than those provided for in this Convention."*

According to the doctrine, the text of the law set out above (anti-diversion clause of guaranteed rights) must be understood as meaning that „*none of the provisions of the European Convention may be interpreted as implying for any State, group or individual any right to engage in any activity or perform an act aimed at destroying the rights and freedoms*

recognized by the Convention or to place greater limitations on such rights and freedoms than those provided for in the Convention. It represents the application of the theory of abuse of rights within the framework of the European Convention. This article, which refers to the famous formula „there is no freedom for the enemies of freedom", is historically explained by the will to take measures against any danger from a totalitarian point of view, thus democracy is in a state of self-defense. [4]

However, we note that the principle of good faith is implicitly enshrined in Article 35 § 3 of the Convention, entitled „*Conditions of admissibility",* according to which „*3. The Court shall not accept any individual application brought under Article 34 where: (...) a. it is manifestly unfounded or abusive incompatible with the provisions of the Convention or its Protocols;".*

The doctrine noted that, at the level of the European Convention on Human Rights, the provisions of Article 35 § 3 of Convention for the Protection of Human Rights and Fundamental Freedoms show the following: „*on the one hand, abuse of rights is penalised in matters relating to the admissibility of individual applications; On the other hand, abuse of the rights guaranteed by the Convention may constitute a limit to the protection of that text'. [5]*

We consider that the concept of 'abuse' within the meaning of Article 35 § 3 letter a) of the Convention for the Protection of Human Rights and Fundamental Freedoms must be understood in the ordinary sense, as established within the general theory of that right, in the sense that the holder of a right exercises it outside his purpose in a detrimental manner. [6] Moreover, in this regard, we note that European case-law has established that „*any conduct of an applicant manifestly contrary to the vocation of the right of appeal established by the Convention and hindering the proper functioning of the Court or the proper conduct of the proceedings before it (Mirolubovs et autres v. Latvia §§ 62 and 65) is abusive."*[7]

According to the Practical Guide on admissibility conditions, updated in 2020, „*the situations in which the Court found an application to be unfair can be divided into five typical categories: the Court's disinformation; use of offensive language; breach of confidentiality in case of amicable settlement; the request which is manifestly vexatious or devoid of any real stake; and all other cases which cannot be exhaustively listed. [S.A.S. v. France (MC), paragraph 67].'* [8]

In the following, we shall refer briefly to the abusive lodging of an application from the perspective of the Court's misinformation, by reference to concrete examples.

Thus, in *Bencheref v. Sweden,* an application was found to be unfair *„where an applicant has misled both the national authorities and the Court as to his nationality".*[8]

The European jurisdiction also held that „*a claim is unfair when the applicants have used vague and imprecise terms to make the circumstances of the case appear similar to those of another case in which the Court had found an infringement [Kongresna Narodna Stranka and Others v. Bosnia and Herzegovina (dec.), paragraphs 13 and 15-19]."* [8]

I also note that 'abuse' can also occur by inaction, i.e. *where „the applicant fails at the outset to inform the Court of an essential element for the examination of the case (Kerechashvili v. Georgia (dec.);"*[8]

Finally, with regard to the Court's misinformation, it was also held that „*a claim is unfair if it is deliberately based on facts invented with the aim of misleading the Court (Varbanov v. Bulgaria, para. 36; Gogitidze and Others v. Georgia, para. 76"* [8]

However, as the Court held in Bestry v. Poland, paragraph 44; Mitrović v. Serbia, paragraphs 33-34; Shalyavski and Others v. Bulgaria, paragraph 45, „*misleading information must relate to the very essence of the case for that omission to be considered by the Court to constitute an abuse of the right of individual appeal"* [8]

2. Good faith – essential condition for invoking the „legitimate expectation" of obtaining an asset, in order to gain protection of the rights guaranteed by Article 1 of Protocol No. 1 additional to the Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms did not recognise in its original form the protection of the right to property. The guarantee of property rights was introduced among the rights and freedoms protected by the Convention with the adoption of the first Additional Protocol in 1952, the first judgment of the Court adopted in this matter being in 1982 [9], when, by the decision of Sporrong and Lonnroth v. Sweden of 23 December 1982 (*GACEDH,* no. 57), the Court ensured *'the place of the right to property in all the rights guaranteed by the Convention, thus acceding to the specificity of European human rights law from the perspective of the universal proclamation*.' [10]

According to Article 1 of Protocol No. 1 Additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, „*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties."*

The concept of 'property' is viewed in a broad sense, with the European judge giving it an autonomous scope and considerably broadening the scope of the right to property. [11] Thus, the concept of „asset" transcends its mere material connotation, and its scope includes „*not only tangible property, but a set of rights and interests of a person with the value of patrimonial assets.'* [12] However, the Court limits the protection conferred to the right to property belonging to the property of the individual and does not guarantee the acquisition of ownership of an asset, since, as stated in legal literature, for the provisions of the Convention to come into play, it is essential that property rights and interests are current. [13]

However, since the provisions of art. 1 of Protocol No 1. did not guarantee the right to obtain property, but only respect for existing rights over property, for an application to be admissible, the complainant had to prove that, at some point after the adoption of Article 1 of Protocol 1, he had a right over property and, as a result of State intervention, that right was affected. [14]

Seeing that this approach affects the rights of certain persons, the Court, through its case-law, has accepted that Article 1 of Protocol 1 may also protect the „legitimate expectation" of obtaining an asset.

The first use of the term 'legitimate expectation' in application of Article 1 of Protocol No 1 to the Convention was identified in *Pine Valley Developments Ltd and Others v. Ireland, paragraph 51*, when „*the Court found that a 'legitimate expectation' was created when the planning certificate was granted under which the applicant companies acquired the land with*

a view to its development. The town planning certificate, which could not be revoked by the competent town planning authority, was „an integral part of the property of companies"."[15]

Therefore, according to the case-law of the European Court of Human Rights, in principle, the expression „*legitimate expectation*" must be based on a specific legal provision in force.

At this point in the analysis, we consider it necessary to clarify that the 'legitimate expectation', protected by Article 1 of Protocol 1, must be based on the existence of a rule of national law which gives the applicant a legitimate and certain expectation that he can obtain property. The right to obtain the property must be absolute and indisputable, since otherwise, if the right to obtain the property is subject, under domestic law, to conditions the fulfilment of which is questionable, the applicant will be deemed to have no actual property and no legitimate expectation, Article 1 of Protocol 1 not being applicable in this case.

I note that, in its case-law, the Court has held, „*that there is a difference between the mere hope* of obtaining a good*, however understandable that hope may be, and the legitimate expectation, which must be more concrete than that of mere hope and be based on a legal provision or act, such as a judgment*" (Gratzinger and Gratzingerova v. Czech Republic (dec.) (MC), para. 73; Von Maltzan and Others v. Germany (Dec.) (MC), para. 112]. [15]

From the Court's perspective, as it is apparent from its current case-law, when analysing the hope of obtaining an asset, the concept of „*legitimate expectation"* is examined (Driza v. Albania, paragraph 102) [15], which is based on a legal provision or act, a judicial decision, relevant to the property law at issue. (Kopecký v. Slovakia (MC), paras. 49-50; Centro Europa 7 S.R.L. and di Stefano v. Italy (MC), para. 173; Saghinadze and Others v. Georgia, para. 103; Ceni v. Italy, para. 39; Béláné Nagy v Hungary (GC), paragraph 75). [15]

However, we consider that the legal provision, court decision or legal act relevant to the property law at issue must be invoked or obtained in good faith, otherwise the hope becomes illegitimate.

Moreover, analyzing the word „legitimate", we note that it is defined in the Explanatory Dictionary of the Romanian language as follows:

"*LEGITIMATE, -Ă, legitimate, -e, adj. 1. Which is based on law, which is justified by law, which is recognised according to a right (...) 2. Which is justified, justified; just, equitable. [Acc. and: legitimate] – From fr. légitime, lat. legitimus*." [16]

In these coordinates of principle, we note that hope, in order to be legitimate within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms, must be based on a legal provision, a judicial decision or a legal act, relevant to the property law at issue and the good faith of the applicant. However, hope cannot be the result of a crime, since the principle of *fraus omnia corrumpit* should also apply to European law and, as we have indicated, from the perspective of the protection afforded by the Convention for the Protection of Human Rights and Fundamental Freedoms: „*Abuse of the appeal is a ground of inadmissibility of the application – F. Monconduit – L abouse de droit de recours inidividuel deavant la Comision Europeenne des doroits de l homme"*[17]

3. Conclusions

In conclusion, we consider that, if the European Court of Human Rights identifies fraudulent conduct, it should give priority to the principle of good faith, even where the applicant bases his hope on a legal provision or act, such as a court decision, obtained in bad faith. Thus, the European Court of Human Rights should reject the applicant's application as

inadmissible if it is found that there has been abusive and fraudulent action. Equally, in our opinion, even if the complaint passes the stage of examining the admissibility of the application, the European Court of Human Rights should find that the applicant's expectation cannot be regarded as legitimate as long as it is based on bad faith.

As such, it is essential to underline the importance and fundamental role of the principle of good faith in guaranteeing respect for fundamental human rights in the case-law of the European Court of Human Rights, with certain consequences also in the national law of each Member State, but also in the subsequent evolution of international human rights law.

We consider that the application and observance of the principle of good faith under analysis, an essential pillar in the evolution and interpretation of international human rights law, contributes not only to ensuring a coherent and fair approach in the interpretation and application of national and European law, but also protects against abuse of rights, promoting justice that takes into account the legitimate interests of all parties involved.

We therefore note that a particular interpretation of this principle in the sphere of 'legitimate expectation ' in European case-law strengthens trust in the international legal system and encourages a general respect for the protection and respect of an individual's fundamental rights at both European and national level.

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GOOD FAITH IN PUBLIC PROCUREMENT PROCEDURES

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Abstract

In the public procurement process, compliance with basic principles is crucial. Although public procurement legislation exists in Romania, it seems that according to the European Commission, there are still legislative provisions that are not aligned with EU law, some of them concerning the very principles of public procurement. Moreover, even if existing legislation in Romania defines the legal framework for public procurement, public institutions and authorities sometimes seem to have shortcomings with regard to the implementation of the legislation and compliance with the principles.

Unfortunately, there are situations where non-compliance with these principles but also with general principles such as transparency, efficiency or good faith, lead to flawed procurement procedures and, implicitly, to multiple cases where economic operators are put in the position of challenging the results of public procurement procedures in order to remedy irregularities made by the contracting authority.

Keywords: *public procurement, contracting authority, principles, good faith*

Introduction. Good faith as the foundation of the legal order

The award of public procurement contracts is a complex process with several stages, one such steps being the planning stage which also involves market consultation, the actual organizing of the procedure, awarding the contract, and the final, post-awarding stage, i.e. the execution and monitoring of the implementation of the contract.

The success of the procedure depends on the smooth running of this process. Although the relevant legislation defines the legal framework for public procurement, public institutions and authorities sometimes seem to need additional guidance on the implementation of the relevant legislation to ensure that the principles of accountability, integrity and transparency are rigorously respected. The application of domestic and international best practices during tender evaluation and awarding of contracts requires the knowledge, application and implementation of correct procedures in the tender evaluation process and in the conclusion and monitoring of public procurement contracts, as well as the application of general principles of law, such as fairness, justice and good faith, in addition to those specific to public procurement.

The evaluation commissions must apply the European legislation in force, transposed into Romanian law by specific legal norms (Law no. 98/2016[1], Law no. 99/2016[2], H.G. no. 395/2016[3]) but also other legal norms and principles.

[1] Law No 98/2016 on public procurement, published in the Official Gazette, Part I, No 390 of 23 May 2016.

[2] Law No 99/2016 on sectoral procurement, published in the Official Gazette, Part I, No 391 of 23 May 2016.

[3] Decision No 395/2016 approving the Methodological Rules for the application of the provisions on the award of the public procurement contract/framework agreement of Law No 98/2016 on public procurement, published in the Official Gazette, Part I No 423 of 6 June 2016.

According to the European Commission[4] (hereafter named the Commission), there are still legislative provisions that are not aligned with EU law, some of them concerning the very principles of public procurement. The Commission has reported that it has identified a number of non-compliances with EU rules in a number of countries, which relate to the misalignment of national legislation with European public procurement rules, and calls on these countries to comply with the latter. The states to which the Commission has sent letters of formal notice are: Hungary, Portugal, Romania and Slovenia, drawing their attention to non-compliance with EU public procurement law, thus opening specific infringement proceedings. The EU rules in question are those ensuring equal treatment of economic operators interested in participating in procurement procedures and those concerning transparency: the Public Procurement Directive[5], the Utilities Procurement Directive[6] and the Directive on the award of concession contracts[7]. The four Member States had two months to respond to the concerns expressed by the Commission, failing which the Commission may decide to send reasoned opinions to these Member States.

According to information published on the European Commission's official website[8], Romania has not replied to the letter of formal notice within the deadline, and in this situation the Commission's decision may be to send a reasoned opinion to which, again, Romania would be given two months to respond. If the reply is not satisfactory, the Commission has the option of referring the matter to the Court of Justice of the European Union (hereafter named CJEU), which could ultimately lead to imposing financial penalties.

Whatever the outcome of the infringement procedure, compliance with existing principles and rules is of paramount importance for a transparent and fair public procurement process and the tender evaluation committee is the main body with the competence to achieve this.

According to Article 126 para. (1) of H.G. no. 395/2016 „The contracting authority is required to appoint, for the award of public procurement contracts/framework agreements, persons responsible for evaluating tenders and, where appropriate, requests to participate, who shall form an evaluation committee". Thus, the tender evaluation process must be carried out by a competent committee and, according to the provisions of GD 395/2016, the evaluation committee may include members belonging to the departments of the contracting authority[9]. The appointment, in addition to the evaluation committee, of external specialists called co-opted experts [1] (p. 159), is a particular situation that arises when the evaluation requires in-depth expertise in the field of public procurement or of a technical, financial, legal etc. nature[10].

[4] See, European Commission – Infringements decisions.October infringement package: key decisions, Inf/23/4577. Brussels: 18 October 2023, published on ec.europa.eu ' en ' inf_23_4577, accessed 18 February 2024.

[5] Directive 2014/23/EU on the award of concession contracts (OJEU No L94/1 of 28 March 2014).

[6] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (OJEU No L94/65 of 28 March 2014).

[7] Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJEU No L94/243 of 28 March 2014).

[8] https://ec.europa.eu/commission/presscorner/detail/EN/inf_23_4577, accessed 19 February 2024.

[9] The notion of contracting authority has been repeatedly clarified in CJEU case law, e.g. CJEU Judgment of 5 October 2017, Case C-567/15, ECLI:EU:C:2017:736, CJEU Order of 17 October 2018, Case C-353/18, ECLI:EU:C:2018:829.

[10] Art. 126 para. (3) of H.G. no. 395/2016.

The evaluation committee has a chairperson who is responsible for leading, guiding and ultimately controlling the tender evaluation process. This individual should be responsible, among other things, for ensuring that the tender evaluation process is conducted in accordance with the general principles of law, the principles underlying the award of public procurement contracts[11], and the needs of the institution. For the proper conduct of public procurement procedures, it is not sufficient to ensure effective competition; the principles of transparency and equal treatment required by EU rules[12] must be observed. According to one opinion on the subject, „the application of the principle of equal treatment in public procurement procedures must be approached from the perspective of the objectives it pursues, it is not a concrete goal, it is a desideratum to be achieved through the correct management of the procedures"[2]. The principle of equal treatment in public procurement law has been extensively analyzed in the doctrine [3], moreover doctrinal sources provide a good understanding of EU public procurement law, sources of law and principles underlying the award of public procurement contracts [4],[5].

The role and obligation of the evaluation committee is to identify the best tender and give competent recommendations to the contracting authority on the awarding of the contract. As stated in Article 131 of the H.G. No 395/2016: „ The manner in which the members of the evaluation committee operate depends on the legislation, internal procedures or local practice, and the manner of work of the evaluation committee is determined by mutual agreement between its members"[13], a provision which we believe requires the evaluation committee to comply with the principles and legislation applicable in the field.

Analyzing civil law legislation in force, we note the regulation in Article 14 para. (1) of the Civil Code[14], according to which „every natural person or legal entity must exercise his rights and perform his civil obligations in good faith, in accordance with public order and good morals", and Art. 1170 of the Civil Code provides that „the parties must act in good faith both when negotiating and concluding the contract and throughout its performance". Therefore, the exercise of rights and the performance of obligations in good faith is at the heart of the civil legal order, including in contractual matters.

In the following, we will analyze good faith in the particular case of public procurement procedures, as we believe it is reflected in legislation, doctrine and case law.

Reflecting good faith in the work of the tender evaluation committee of the contracting authority

Since the evaluation committee has tasks starting with the evaluation of tenders and ending with the conclusion and monitoring of the implementation of contracts, it must treat each situation according to its specificity and in accordance with the legal principles and rules incident to public procurement and „in the day-to-day application of the law, practitioners will have to take into account not only the letter of the law, but also its spirit, i.e. precisely these principles of law" [6]. Good faith is also a determining factor, in the sense that „the judge interprets the convention to mitigate its rigor or to make it applicable to new circumstances"[7]. This means, in our view, that in certain circumstances the need arises to

[11] Article 2 of Law No 98/2016.
[12] Article 18 of Directive 2014/24/EU.
[13] Art. 131 of H.G. no 395/2016.
[14] Law No 287/2009 on the Civil Code, published in the Official Gazette, Part I, No. 505 of 15 July 2011.

apply the principle of good faith to the detriment of a legal provision that would clearly affect the interests of one of the participants in the public procurement process.

In order to carry out their duties under the law, the members of the evaluation commission must be familiar with the specific legislation; moreover, the specialized training of public administration staff in this field, as analyzed in the doctrine [8] (p. 249-251), is a right and an obligation of civil servants[15]. Unfortunately, at times the lack of specialized training in the field of public procurement of central and local public administration staff responsible for public procurement, in addition to the lack of knowledge pertaining to legislation leads to a lack of competence in the field of public procurement, with the good faith of the persons involved sometimes being considered questionable.

Good faith being one's intimate conviction that what one is doing is right, sincerity, honesty[16], these are also necessary conditions in the conduct of public procurement procedures and we cannot speak of good faith in a situation where one of the involved parties acts contrary to its own requests or requirements if the other party, reasonably relying on the statements of the former, has suffered damage.

Injury suffered through the loss of an opportunity is a reparable injury in most legislations, and in some European legal systems, reparation for future injury is sometimes even provided for, sometimes even if the occurrence of the injury is not entirely certain [9].

Arguments to this effect also appear in the public procurement rulings of the CJEU. „Where a tenderer is unlawfully excluded from a public procurement contract by a Union institution, the tender procedure may not be reopened" so that the CJEU has in several cases recognized the tenderer's right to damages for „loss of the chance of being awarded the contract", and where there is no doubt that the tenderer would have been declared the successful tenderer, for „loss of the chance of being awarded the contract". The CJEU has consistently stressed „the possibility of attributing an economic value to the loss of the chance of being declared the winner"[17].

As regards the interpretation of the provisions on situations of exclusion of economic operators from award procedures, the CJEU rules that „the establishment of a relationship of trust between the contracting authority and the successful tenderer presupposes that the contracting authority is not automatically bound by the assessment made by another contracting authority in the context of a previous public contract"[18].

Analyzing the provisions of GD 395/2016, we note the obligation of the contracting authority to issue a document[19] to certify the fulfilment or non-fulfilment of the contractual obligations assumed by the contract. „The ascertaining document is issued in order to allow any contracting authority organizing a procedure for the award of a public contract or framework agreement (and not only the one issuing it) to assess to what extent the economic operator to which the ascertaining document refers is in a situation of exclusion of economic operators from the award procedure..."[10] (p. 81).

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[19] Art. 166 para. (1) of GD 395/2016 states the following:, „*The contracting authority is required to issue documents containing information on the performance or, where appropriate, non-performance of contractual obligations by the contractor/contracting partner and, where appropriate, any damages".*

The grounds for exclusion from tender procedures are clearly provided by law (Articles 164, 165 and 167 of Law No. 98/2016, respectively Articles 177, 178 and 180 of Law No. 99/2016) and concern, among others, the conviction by final judgment for committing offences, breach of obligations regarding the payment of taxes, duties, insolvency of economic operators, or the situation where the economic operator has seriously or repeatedly breached its obligations under a contract. But the same legal rules provide that any economic operator in any of the situations leading to exclusion from the procedure has the right to submit evidence exonerating him and allowing him to participate in the procedure[20].

We consider that a balance is required between the right of contracting authorities to exclude operators with irregularities in the performance of previous contracts from the procedures, resulting in the issuance of a negative document, as analyzed in the doctrine [10] and the need to protect economic operators from abusive and discretionary exercise of this right, and in addition to the principle of proportionality and the right of defense, the principle of good faith should be respected.

Errors made by contracting authorities, whether acting in good faith or not, implicitly lead to multiple cases where economic operators are put in the position of challenging the results of public procurement procedures to remedy irregularities in the process of evaluating tenders and concluding contracts.

Appeals are made on the basis of Law no. 101/2016[21], and an appeal may be lodged with the National Council for the Settlement of Appeals (hereinafter N.C.S.C.), an independent body with administrative-jurisdictional activity, whose organization and functioning is regulated by the same legal norm, or with the court. The obligation of prior notification of the contracting authority was removed from Law 101/2016 by GEO 45/2018[22] in order to improve and make more flexible the public procurement system[11] (pp. 208-209) and against decisions rendered by the NCSC may be appealed, both for illegality and for merits, to the specialized public procurement courts, which are competent to settle such disputes[12] (p. 504). It is not our intention here to examine the difference in the legal regime between the administrative-judicial challenge and the exclusively judicial challenge, which has been extensively analyzed in the literature[12],[13],[14].

Exclusion of an economic operator from a procedure

There are many situations in which the NCSC's solutions are in favor of the challenger, but we have chosen to limit ourselves to those in which good faith was sufficient to automatically entail compliance with a basic principle of public procurement such as proportionality and, consequently, the avoidance of disputes.

Thus, in a challenge submitted to this body with administrative-jurisdictional activity, the contesting economic operator was excluded from an award procedure on the basis of the provisions of Article 180 para. (1) letter g) and letter h) of Law no. 99/2016, according to which the contracting entity excludes the participant who has seriously or repeatedly violated

[20] Art. 171 para. (1) of Law 98/2016, respectively Art. 184 para. (1) of Law 99/2016.

[21] Law No 101/2016 on remedies and appeals in relation to the award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as on the organisation and functioning of the National Council for the Settlement of Disputes, published in the Official Gazette, Part I, No 393 of 23 May 2016.

[22] Emergency Ordinance no. 45/2018 for amending and supplementing certain regulatory acts with an impact on the public procurement system, published in the Official Gazette, Part I, no. 459 of 04 June 2018.

its main obligations under a contract from the procedure. The contracting entity has excluded the economic operator on the basis of negative documents, without analyzing the evidence provided by the economic operator in support of its failure to comply with the provisions of Article 180, thus violating its obligation to take all necessary steps to analyze the situation of the tenderer.

The respondent claimed that the contracting entity did not carry out checks to establish whether the conditions relating to the existence of reasons attributable to the tenderer and the serious damage created were met by the certificates in question, and that the evaluation committee infringed the principles of procurement.

It also claims that the evaluation committee's decision was based on mere supposition, that it did not respect the provisions of European law according to which the economic operator is not automatically excluded but after the evaluation process reveals a clear fault, culpable intent or considerable negligence with serious consequences and accuses the contracting entity of not showing good faith in rejecting the tender, that it exercised its right in an abusive manner by ignoring the evidence submitted by the participant in the procedure.

Thus, the cumulative conditions laid down in Article 180(1)(a) of the EC Treaty are not met. (1) letter g) of Law no. 99/2016 for the contesting company to be eliminated from the sectoral procurement procedure.

The decision[23] was in favor of the contested economic operator, in its reasoning the N.C.S.C. held that, by the provisions of art. 184 para. (1), (2) and (3) of Law no. 99/2016, the law regulated the right and the possibility that, even in the actual existence of a case of exclusion, the economic operator may provide evidence to demonstrate its credibility, to overturn the conclusions of the evaluation committee, thus avoiding the elimination of its offer from the tender procedure. The NCSC considered the criticisms of the tenderer concerning the illegality of its rejection to be well-founded and ordered the contracting authority to continue the tender procedure and to complete it in compliance with the provisions of the legislation in force.

In the present case, the assessment of the tender by the members of the evaluation committee in good faith led to the conclusion that the decisive factor in the exclusion of the economic operator from the procedure was not the existence of the negative document, but verification that that document reflected the cumulative fulfilment of the conditions for exclusion, thus also complying with the principle of proportionality.

In another example from the C.N.S.C. case law[24], in which we consider that good faith in the evaluation of tenders would have led to the avoidance of a dispute between the two parties involved in the public procurement procedure, the contracting authority rejected as unacceptable the economic operator's tender because the latter had submitted a document in the financial offer clarifying and detailing the elements of the price, a document which had not been requested by the awarding documentation.

The claimant requested that the documents setting out how the tender was to be submitted be amended, that the report of the procedure and the subsequent acts be annulled and that the procurement procedure (open invitation to tender) be resumed. The documents under scrutiny, financial offer forms made available by the contracting authority, were completed by the

[23] N.C.S.C. Decision No 1932/C11/2075 of 14.09.2022, http://portal.cnsc.ro/decizii.html?a=search&DPD:NumarDeciziePublicat=1932&reg:registrationDate=-#, accessed on 19 February 2024.

[24] C.N.S.C. Decision No 71/C4/3480 of 10.01.2024, http://portal.cnsc.ro/decizii.html?a=search&DPD:NumarDeciziePublicat=71&reg:registrationDate=-#, accessed on 19 February 2024.

participant in the procedure, but the participant considered, on the basis of compliance with Law No 227/2015 on the Fiscal Code[25], that an annex with the detailed calculation of the price offered, which included all the components required by the legislation, was required.

According to Art. 215 para. (4) of Law No 98/2016, a tender is unacceptable when it does not meet the formal requirements for its preparation and submission, is submitted by a tenderer without the necessary qualifications or the price offered is higher than the value estimated by the contracting authority. The fact that the tenderer has submitted, in addition to the forms provided by the authority initiating the procedure, a centralized form completing the minimum and incomplete information required by the authority is not similar to non-compliance with the formal conditions and an evaluation made in good faith should not have resulted in the rejection of the tender as unacceptable.

Therefore, we consider that it was not surprising that the NCSC accepted the administrative-jurisdictional appeal lodged by the economic operator, with the annulment of the contested procedure and the re-evaluation of the bid submitted by the claimant.

An analysis of the case law of the NCSC shows that in the work of tender evaluation committees, the opposite situation can also be observed, when the contracting authority, through the tender evaluation committee, admits and even declares winning tenders that are flagrantly unacceptable or non-compliant.

Thus, a participant in a simplified procedure challenged the report of the procedure declaring the other tenderer as the winner, arguing that the evaluation of the tenders had been carried out superficially and without respecting the principle of good faith. It claimed that the technical proposal submitted by economic operator X did not meet the requirements of the tender specifications, adducing in support of its claims technical data sheets of the products offered by X which demonstrated that the products offered by X did not meet the minimum requirements which the contracting authority itself had imposed.

Moreover, despite X being asked by the contracting authority for clarification of the specifications of the products offered and their technical data sheets and merely sending a simple statement which read that the products met the requirements of the specifications, the evaluation committee accepted the reply to the clarification and, following the evaluation, declared X the winner.

In these circumstances, the respondent requested the NCSC to find that the contracting authority erroneously retained the admissibility of the tender submitted by X, given that there were indications that the tender did not meet the requirements set out in the awarding documents.

By the decision rendered in the case[26] the NCSC upheld the challenge and annulled the report of the procedure in so far as it concerned the contested tender, obliging the contracting authority to re-evaluate the tender in question and issue a new report of the procedure.

According to Law no. 98/2016 „the incorrect application, in the qualification/selection and/or evaluation process of the qualification and selection criteria, the award criteria or the evaluation factors”[27] constitutes a offense, but, as previously stated in doctrine [11] (p. 254), the term „incorrect” is subjective from the point of view of determining guilt of the persons responsible, the incrimination of the application of the qualification and selection criteria; we

[25] Law No 227/2015, published in the Official Gazette, Part I, No 688 of 10 September 2015.

[26] C.N.S.C. Decision No 92/C2/3274 of 11.01.2024,. http://portal.cnsc.ro/decizii.html?a=search&DPD:NumarDeciziePublicat=92&reg:registrationDate=-#, accessed on 20 February 2024.

[27] Art. 224 para. (1), letter h) of Law no. 98/2016.

also agree that the award criterion or the evaluation factors „without compliance with the legal provisions" is clearer.

Conclusions

Good faith is a rather broad and complex concept, not only because of its content, but also because it is bivalent. Thus, it can take the form of a presumption underlying all legal acts and procedures but also the justification, the cause of non-punishment of an excusable error due to ignorance devoid of any fault. The factor which distinguishes between ignorance without fault and a punishable error is the extent to which the action underlying the non-conformity of the action in question with the legal rules applicable to it was intentional or unintentional.

We consider that even in public procurement procedures, good faith can take the form of ignorance without fault, the erroneous belief in the existence of a legal basis through which the contracting entity, by means of the evaluation committee, acts in a way that is detrimental to the economic operators participating in the procedures. All the more so because lack of knowledge of the law and lack of specialized training in the field of public administration staff responsible for public procurement, subsequently leading to a decrease in the competence required to carry out public procurement activities are fairly common problems, as stated in the content of the present study.

Situations where non-compliance with public procurement principles leads to flawed procurement procedures and, by implication, to multiple cases where economic operators are put in the position of contesting the results of public procurement procedures, mean that the good faith of those involved can sometimes be questioned.

Appeals admitted by the NSC which lead to the cancellation or reopening of public procurement procedures require time and resources. As solutions to the previously identified problems, our proposals are aimed at the employment of qualified staff in public institutions, continuous professional training of those involved in public procurement and, ultimately, even administrative measures that we believe should be taken at the level of the contracting authority against those who are found not to have acted in good faith in public procurement procedures within their scope.

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GOOD FAITH ACCORDING TO LABOR LAW

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Abstract

The principle of good faith occupies an essential position in labor law, serving as a fundamental element underlying the dynamics of employment relationships, collective bargaining, and dispute resolution. This essay explores the multifaceted role of good faith in labor law, examining its theoretical foundations, practical applications, and challenges associated with its interpretation and implementation. Through comprehensive analysis, the essay highlights how good faith acts both as a legal obligation and a moral imperative, guiding the behavior of employers, employees, and their representatives in a multitude of labor relations scenarios.

The article argues that the principle of good faith remains an indispensable component of labor law, essential for promoting fair, respectful, and productive employment relationships. However, it also acknowledges the need for ongoing vigilance, adaptation, and dialogue among stakeholders to ensure that good faith continues to serve its intended purpose in the face of evolving labor market realities. The essay calls for renewed commitment to the principle of good faith, advocating for measures to strengthen its application and thus bolster the foundations of fair labor practices, contributing to social and economic justice.

Keywords: *good faith, labor law, employment relations, employment contracts, employer-employee relationship, duties and obligations, fair dealing.*

1. The concept of good faith

The principle of good faith is a concept that exists in many legal systems around the world and has ancient roots. Generally, the principle implies that parties involved in a transaction or contract must act honestly, fairly, and in accordance with the reasonable expectations of other participants.

The history of the principle of good faith can be traced in many cultures and legal traditions. In Roman law, for example, there were similar concepts such as „bona fides", which referred to the obligation to act honestly and respect agreements that were made. In European common law, the concept of „good faith" or „bona fides" was also fundamental in the development of legal systems, jurisprudence, and doctrine.

The introduction of the notion of good faith into Roman contract law would undoubtedly have been impossible without inspiration from the Greeks. Among others, the Stoics, Pythagoras, and Zeno of Elea produced works that laid the foundation for the notions of justice and equity. It is mentioned that this new concept „opens the contractual system to the ethics of what is right and fair, the latter, according to Cicero's dream, binding all men, citizens or pagans, in a universal society of boni viri, of good people." [1]

Cicero defined good faith in a very comprehensive way, explaining that these words have a very broad meaning. He explained that good faith expresses all the honest feelings of a good conscience, without requiring a scrupulousness that could turn altruism into sacrifice. He also emphasized that the law prohibits from contracts clever maneuvers, dishonest negotiations, fraudulent calculations, simulations, and deceitful pretenses, which, under the guise of

prudence and skill, take advantage of naivety, simplicity, and ignorance. Thus, Cicero suggests that good faith is linked to honesty, integrity, and mutual respect in legal relationships, and it implies avoiding any forms of unethical or dishonest behavior.

In the Roman legal system, good faith allowed the judge to intervene actively in legal relationships protected by the rights of action in good faith (especially in determining the amount of damages and creating new obligations based on morality). It seems that from these rights of action in good faith, the contracts based on good faith arose. [2]

In this context, rights of action in good faith, known as „bona fide judicia" emerged. The content of the list of rights of action in good faith varies depending on the historical period and, therefore, the author. According to Cicero's list[3], rights of action in good faith were filed in matters related to guardianship, fiduciary responsibility, and contracts of mandate, lease, and sale. Gaius[4], two hundred years later, added management of negotiorum, deposits, partnerships, and action for rei uxoriae. Finally, Justinian[5] expanded the list of rights of action to include pledges, claims for property division, succession claims to inheritances held by third parties, and actio praecriptis uerbis for exchanges and estimate contracts.

In addition to the development of good faith, medieval law also witnessed the convergence between good faith (bona fides) and equity (aequitas). In this regard, German and French legal scholars initially adopted opposing positions. The former initially considered the two notions distinct before later treating them similarly. However, French authors considered good faith simply a manifestation of equity. It went so far as to proclaim that this theory represents an essential principle of the entire Roman legal system. Later, Justinian transformed jus aequuum into the supreme source of law. [6]

This overlap was primarily based on the extension of the concept of good faith, which was widely applied, resulting in practical confusion with aequitas. Historical ambiguity thus provides valuable insights into certain current issues, particularly regarding the formulation of articles as well as analogous provisions in other civil codes. However, this historical ambiguity can serve as justification for the terminological distinction observed in Dutch law. [7]

In Anglo-Saxon law, the concept of „good faith" has been integrated into many branches of law, including contract law and commercial law. In the United States, for example, the principle of good faith is often applied in various legal contexts, including the interpretation and enforcement of contracts. In many legal systems, case law has played an important role in defining and interpreting the principle of good faith. Judicial decisions have contributed to establishing specific standards and criteria regarding what it means to act honestly and loyally in various circumstances.

It can be specified that several systems consider that good faith generally applies to the law of obligations, not just contract law. Additionally, beyond the sphere of contract law, good faith sometimes affects almost the entire field of private law.[8]

Thus, although the notion of good faith is a universally applicable principle, its applicability is susceptible to numerous difficulties, which result from the theoretical and practical experience of the parties, methodological and theoretical choices, and the parties' affiliation with values that extend beyond the legal domain.[9] These aspects have a personal characteristic for each party to the legal relationship and differ from person to person, even if the parties come from the same background, culture, or social strata. Therefore, legislation, doctrine, and case law do not eliminate the subjective characteristic of the perception of good faith, although they emphasize the objectivity of generally applicable values and criteria.

Even though good faith is subjective in its essence, it also implies an objective component. The two perspectives do not change the subjective nature of good faith but indicate two distinct ways of manifestation: the subjective dimension reflects trust in the reality of a situation, even if it is only apparent to the person concerned, while the objective dimension highlights loyalty (honesty and commitment). [10]

In doctrine[10], it has been established that good faith consists of at least five elements, among which we identify the right intention, which is manifested by the presence of fidelity to the commitment made and the absence of deceit, violence, and fraud. The presence of reasonable diligence of the parties, legality characterized by the lawful nature of the legal relationship, and the last element represent a refrain from causing harm to others in relation to the legal relationship between the parties and is equivalent to the Latin principle of „alterum non laedere."[11]

Good faith and bad faith (diametrically opposed) are subjective perspectives on a legal situation, expressing the belief that it is real, even if appearances can be deceptive.

The emergence and application of the element of good faith do not represent just a value from the perspective of morality but are also a fundamental principle with significant legal implications. Consequently, good faith should not be analyzed individually and in isolation.

2. Good faith according to the Labor Code

In contemporary labor relations, the application of good faith extends beyond bargaining to influence daily operations, workplace culture, and the broader economic landscape. The emergence of new technologies, globalization of the workforce, and changing economic paradigms have all contributed to the evolution of good faith practices, making them more relevant and challenging than ever before.

A solid understanding of a legal system or branch of law cannot begin but only with examining how principles are reflected in that system or branch of law[12], a principle that is undeniably applicable to the norms and institutions of labor law, as a distinct branch of the contemporary Romanian legal system.

Starting from the idea that the individual employment contract is derived from civil contracts[13], which are a concrete expression of the application of the principle of good faith, we observe that the operation of the principle „lex specialis derogat legi generali" was not sufficient to ensure the general recognition of the application of the principle of good faith to labor contracts. Thus, the legislator preferred to provide for the obligation to apply the principle in labor relations under the provisions of Article 8 of Law no. 53/2003, also known as the Labor Code.

It has been recognized[14] that in labor law, due to the complex nature of labor law, there are two categories of principles.

- General principles found in the legal system and applicable to labor law.
- Principles fundamental to labor law, some of which are not found in the general legal system.

The principle under consideration in this article is present in both categories of principles present in labor law legislation because it is found at both the level of fundamental law, at the level of general law, and within special laws.

In Roman law, its origin can be traced back to the principle of consensuality, just as good faith requires the Roman judge to determine what each party owes to the other. The ius gentium introduced a fundamental principle into contract law: consensuality. Since then, the

consensual contract has been distinguished from the contract of pure law, the main feature of ius civile, by the fact that it was sanctioned by a „right of action in good faith", thereby giving the judge a significant margin of discretion, especially regarding the amount of damages awarded. This right of action in good faith also allows the judge to determine whether a party's behavior is consistent with that of an „honest man".

Consensuality is applied in the conclusion of the employment contract, a contract that can only be concluded by the agreement of the parties, even though to comply with the validity conditions of employment contracts, it must meet the form ad validitatem. All individual employment relationships have a strong consensual character because the employment relationship cannot exist without the will of the parties.

Article 41 (1) of the Labor Code represents a repercussion of the application of the principle of consensuality, according to which the individual employment contract cannot be changed without the agreement of the parties, without their consent.

The rule of consensuality and that of good faith have been and remain general benchmarks of private law elevated to the rank of principles by common law, and the presence of the recording of good faith as a general rule applicable to labor relations unequivocally shows us the importance of the requirement of good faith in any legal relationship.

In the general spectrum, the principle of good faith is identified by some authors[9] as a principle of civil law that encompasses the values of good and in antithesis to those of evil.

The two perspectives do not change the subjective nature of good faith but indicate two distinct modes of manifestation: the subjective dimension reflects trust in the reality of a situation, even if it is only apparent to the person concerned, while the objective dimension emphasizes loyalty (honesty and respect for commitments).

Thus, due to the presence of this provision establishing good faith within the architecture of the Labor Code, specifically Chapter 2 entitled Fundamental Principles, the necessity of applying the principle in all employment relationships and according to all subsequent provisions can be observed.[15]

Legislation of good faith provided for by Article 57 of the Constitution is also found in international law, e.g., Article 26 of the Vienna Convention on the Law of Treaties, signed on May 23, 1969, which provides that: „Every treaty in force is binding upon the parties to it and must be performed by them in good faith"; Article 31 clarifies: „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose," similar provisions are provided for in the Treaty on European Union and beyond.

According to the fundamental law, Romanian citizens, stateless persons, or foreigners temporarily in Romania are conditioned and obliged to exercise their rights and freedoms in accordance with the requirements of good faith.

Essentially, Article 8 of the Labor Code represents a transposition of the constitutional principle of exercising rights and freedoms in good faith instituted by law, however, it is necessary to take into account the regulation of Article 14 of the Civil Code (Law 287/2009, republished) which provides that any natural or legal person (we rally to the extensive interpretation that it also applies to entities without legal personality) is obliged to exercise their rights and obligations in accordance with the principles of good faith in accordance with good morals and public order, aspects which are presumed to be fulfilled until proven otherwise.

The expression „good faith" often appears in the context of interpreting legislation, but in Article 8 of the Labor Code, the obligation of continuous applicability of the good faith condition throughout the duration of employment relationships is noted, not just for the purpose of interpreting the norms applicable to the sphere of labor.

It is considered[16] that although the written form of the principle is often an imperfect form, good faith appears at the moment of interpreting the legal norm/clause and is not subject to criticism of the purely grammatical interpretation of the norm or clause, abstracting from the social elements and factors of the contractual parties or citizens.

According to Art. 8 of the Labor Code, employment relationships are based on the principles of consensus and good faith. For a good conduct of these relationships, the parties involved should inform and consult each other. In the exercise of good faith in the employment relationship, the employee should have notified the employer properly when incapacitated for work or, if it was objectively impossible to communicate their exceptional situation, inform the employer upon returning from sick leave about their intention to participate in professional testing[17], and correlatively, the employer has the obligation to inform the person requesting employment, resumption of activity, about the clauses that he/she intends to write/modify.

In doctrine[18], it is considered that the opposite of good faith is bad faith, and the absence of good faith is sufficient to prove bad faith, materialized through abuse of rights, fraud, deceit, or coercion. The main effect of good faith in employment relationships is the absence of abuse of rights by the holders of rights, even if they are employees, employers, or the organizations they belong to.

For a proper application of the principle, it is necessary[10] that the exercise of rights and the fulfillment of obligations be in accordance with public order, aligned with moral values, respecting the law in a rational manner, and with behavior appropriate to contractual relationships.

Some authors[19] have identified two forms through which good faith manifests in employment relationships:

1) Through loyalty, which should be present at the conclusion and throughout the execution of employment contracts.

2) Through the presence of fidelity and cooperation between the parties throughout the employment relationship.

Loyalty entails the responsibility of the parties to communicate necessary information to each other for the conclusion or modification of a specific contract. In the context of employment contracts, the law (Article 17 of the Labor Code) explicitly imposes the obligation on the employer to inform the prospective employee about the working conditions or any potential changes, as an expression of loyalty. It is observed that in the new law on Social Dialogue (367/2022), the obligation to inform, implicitly the presence of loyalty, is extensively regulated and must be omnipresent in the relationships between social partners.

Both in the Labor Code and in the law on Social Dialogue, there are provisions stating that during the execution of employment contracts, the employer must inform employees about any measures they intend to adopt or have adopted, if these measures would affect those employees. Additionally, in the case of collective redundancies, the employer is required to notify the union or its representatives in advance.

Fidelity and cooperation are essential aspects in contractual employment relationships. For the employee, the duty of fidelity arises from the principle of good faith and is explicitly confirmed by Article 39 (2) lit. d) of the Labor Code.

Concretely, it has been noted[19] that in order for a party to act in good faith, it must respect, among others, the following requirements:

- Make every effort to fulfill the duties as per the contract.
- Actively participate in the performance of duties, in fulfilling the rights and obligations established in the contract.
- Respect each other's obligations and rights incorporated into the contract.

The good faith of the contracting parties entails that each party refrain from deceitful or violent actions and from representing a presumed good faith in the execution of a contract as valid even if it has been irregularly concluded[10], benefiting from the legal presumption which can be 'overturned' by any means of proof.

Therefore, in practice, the question has been raised whether the principle of good faith is respected by employers who have transformed the employment contract from a negotiable contract into an adhesion contract. In this case, it can be observed that the principle of consensus is present because a contract cannot be concluded without reaching a consensus between the parties. In the context presented above, it can be considered that the principle of good faith is respected because an adhesion contract, provided for by Article 1175 of the Civil Code, does not eliminate the principle of good faith. It may be considered that good faith is not respected in adhesion contracts when the analysis of the imposed clauses reveals that they, by their effect, violate the requirements of good faith.

According to Article 1170 of the Civil Code, the parties are obliged to act in good faith during the negotiation stage, the conclusion of the contract, as well as throughout the execution of the contractual relationship. Furthermore, the last clause of the mentioned article provides for the imperative nature of the norm of respecting good faith by stating that the parties cannot exclude or limit the obligation to respect good faith.

3. Abuse of rights

By the absence of good faith, it is presumed that we are in the realm of bad faith, which can materialize through the abuse of right exercised by one of the parties[19]. In the absence of provisions within the legislation specifically assigned to the field of labor that regulate the situation of an abuse of right, the provisions of common law become applicable. Thus, according to art. 15 of the Civil Code, the abuse of right represents the exercise of a right in a manner likely to harm or cause damage to the other party, contrary to good faith. However, it should be noted that the exercise of the right can also be reasonable but with the purpose of harming or causing damage, or in an excessive and unreasonable manner but without the purpose of causing harm or damage.

The abuse of right cannot be considered in the exercise of those rights for which the law grants the holder exclusive freedom of action. Thus, although the existence of subjective rights is a condition for the abuse of right, this does not mean that any subjective right can be abused. There are certain absolute rights whose exercise can never entail the liability of the holder[19], as their use involves an exclusive and personal assessment, such as the right to contract or not to contract, the right of revocation of donations, the right to name, dignity, honor, and similar others.

In doctrine, there is also the opinion that discretionary rights could be subject to abuse, but they are not subject to judicial censorship. Attention is drawn to the case where the employer includes in the employment contract clauses that are void in law, and the employee, acting in good faith, respects them even after the termination of the employment relationship,

e.g., the non-competition clause etc. Thus, the question arises whether in this case the employer still respects the requirements of good faith in the employment relationships or we are dealing with an abuse of right.[19]

It can be concluded that the employer is not acting in good faith. However, even though the harm to the employee is not directly pursued, it can be considered that by the effects of the null clause respected by the employee even after the termination of the employment relationship, damage is caused to the employee if, acting in good faith, they change the field of activity in which they had training and experience. In this situation, the employer's action could be considered an abuse of right.

According to the general provisions of labor legislation, good faith encompasses the obligation of both the employer and the employee to act honestly, loyally, and in accordance with the other's reasonable expectations within the employment relationship. This principle is essential for maintaining an atmosphere of trust and mutual respect between the employer and the employee and for ensuring equitable working conditions and respecting the rights of each party.

4. Good faith in Social Dialogue Law

One of the essential milestones in the evolution of good faith was the establishment of collective bargaining rights in the early twentieth century. Countries such as the United Kingdom and the United States witnessed significant labor movements that pressured for the official recognition of unions and the right to collective bargaining. These movements played an essential role in integrating the principle of good faith into labor law, as collective labor agreements inherently require trust and a sincere intention to negotiate from both parties.

However, in the United States, the obligation of good faith is defined more narrowly and is primarily associated with the bargaining process between unions and employers. US labor law, through the National Labor Relations Act, explicitly requires parties to engage in collective bargaining with honest intentions[20], but does not extend the concept of good faith as broadly as some European models.

In the mid-twentieth century, the International Labour Organization (ILO) played a crucial role in promoting good faith in labor relations on a global scale. ILO conventions and recommendations provided a framework for member states to incorporate good faith practices into their national labor legislation, emphasizing the importance of cooperation and dialogue between employers and workers.

The principle of good faith in social dialogue is essential for maintaining constructive and respectful communication among individuals or groups in society. This principle involves approaching dialogue with an open spirit and sincerity, based on mutual trust and well-intentioned efforts.

Social dialogue is not just a means of managing crisis situations; it should be based on mutual trust between parties, on sincerity, and on continuous engagement in the process.[21]

Good faith in social dialogue represents a commitment to sincerity, mutual respect, and openness in interactions among members of a community or society. This authentic and responsible attitude is essential for promoting healthy relationships between people. During social dialogue, participants are sincere in their intentions and behave responsibly towards others, they are receptive to new ideas, listen carefully to the opinions of others, and evaluate their own perspectives in the context of those presented by others.

An important aspect of good faith in social dialogue is mutual respect. Participants recognize each other's right to their own opinion and avoid judgments or personal attacks.

Additionally, good faith in social dialogue involves transparency and authenticity. Participants are honest in their communication and do not hide relevant information or manipulate discussions in their favor, seeking solutions that are suitable for social partners, solutions that lead to the cessation of labor conflicts.

Ultimately, promoting sincere and respectful communication can contribute to building a more cohesive and empathetic community. By understanding and accepting diversity of opinions, people can find more effective solutions to social and cultural problems.

Used correctly and sincerely, social dialogue becomes a proactive mechanism, not just a tool for addressing crisis situations. However, it must be based on mutual trust between those involved, on an honest attitude, and on continuous involvement in the process.

Good faith is essential for both parties involved in an employment contract, both in the pre-contractual phase and at the actual moment of concluding the employment contract. This stems from the legal obligation imposed on the employer to provide information before concluding or amending the individual employment contract, according to Article 17 of the Labor Code, as well as from the legal obligation to initiate negotiations for concluding the collective labor contract.

In the event of a labor conflict, the law provides for the implementation of preliminary procedures, namely that the possibilities for resolving the collective labor dispute through the mandatory procedures provided by the legal act have been exhausted, a mechanism based on the practical establishment of the principle of good faith according to which social partners are obliged to act in good faith and seek solutions before triggering the conflict.

An efficient social dialogue involves, among other things, the existence of labor relations models in which social partners can negotiate in good faith and exercise their collective bargaining and worker participation practices autonomously.

Although collective labor contracts are subject to the provisions of the labor code outlined above, the obligation to apply the principle of good faith is also found in the rules of the social dialogue law. Thus, Article 121 of Law 367/2022 on social dialogue obliges parties to always act in good faith, both in labor dispute resolution procedures and after the completion of any disputes. The imperative nature of the norm remains mandatory for all parties of the social dialogue and in the process of effectively applying all the rules established by the social dialogue law, aiming to ensure or maintain an atmosphere of mutual trust.

5. Conclusions

Technology and globalization have introduced new dimensions of good faith in labor relations. On the one hand, technology facilitates communication and transparency, allowing for more inclusive and efficient negotiations and workplace management. On the other hand, it raises challenges regarding job security, confidentiality, and the digital divide, requiring parties to navigate these issues with sensitivity and integrity.

Globalization, by expanding the labor market beyond national borders, introduces complexities related to intercultural communication, compliance with international labor standards, and the protection of workers' rights in a globalized economy. Good faith in this context requires a commitment to fair labor practices not only within a single country but also in global supply chains and multinational operations.

Beyond the legal sphere of the principle of good faith, its application also contributes to improving communication, which becomes more efficient and transparent. Employees feel more confident expressing their concerns and ideas, and employers are more willing to listen and consider employees' perspectives. In labor relations, it helps strengthen professional relationships between employees and employers. When all involved parties demonstrate sincerity and mutual respect, stronger and more enduring bonds develop within the organization, playing an essential role in social dialogue, serving as the foundation for constructive and productive discussions.

Social dialogue refers to the type of negotiation, consultation, or simply the exchange of information between government representatives, employers, and workers on issues of common interest related to economic and social policy. It is a key element in promoting governance, democracy, and social cohesion. In this context, acting in good faith means engaging in these interactions with honesty, transparency, and a genuine commitment to finding mutually beneficial solutions.

In labor relations, good faith is a multi-faceted principle that has evolved over time to address the changing dynamics of work and the workforce. From its historical roots to its application in modern labor negotiations and daily operations, good faith remains a critical element in promoting positive employer-employee relationships, increasing workplace productivity, and ensuring fair and equitable treatment of workers.

Looking ahead, the future of good faith in labor relations will undoubtedly be influenced by ongoing technological advancements, globalization, and the evolution of labor markets. Embracing these changes while maintaining the basic principles of good faith will be essential for sustaining harmonious and productive labor relations in the 21st century and beyond.

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CONSIDERATIONS ON THE AGENT'S INDEPENDENT PERFORMANCES WITHIN THE AGENCY AGREEMENT FOLLOWING THE GOOD FAITH PRINCIPLE

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Abstract

The agency agreement has already gained a well-deserved notoriety in the local business context. It was initially regulated by Law no. 509/2002 regarding the permanent commercial agents, its legal regime being significantly strengthened by the new Civil Code.

The agency agreement is a complex one, because it includes, in relation to the obligations of the parties, elements of the mandate without representation and, respectively, of the mandate with representation.

To the same extent, the agency agreement is specific to the activity carried out by the professional traders, which implies a certain level of ***autonomy*** *of the parties in the fulfillment of their contractual obligations.*

Thus, the agent is an independent intermediary who cannot be subordinated to the Principal at the same time, according to the Article 2072, 2nd paragraph from the Civil Code.

The purpose of this study is to analyze the extent to which the contractual services of the agent fully and all the time fulfill the requirement of his professional independence, in relation to the obligations of the agent and the Principal derived from the agency agreement, to the dynamics of their obligations, following the good faith principle, being also submitted proposals ***de lege ferenda****, useful to the professionals, theoreticians and business community in general.*

Keywords*: agency agreement, agent, agency, Principal, independent professional, professional-traders, independent character of the agent's services, relation of subordination.*

SECTION I. THE OBJECT OF THE AGENCY AGREEMENT. MAIN TRAITS

The object of the agency agreement is represented, according to the Article 2072, 1st paragraph from the Civil Code, by the operations of negotiation or negotiation and conclusion of contracts, by the agent, in the name and on behalf of the Principal, carried out on the basis of permanent authorization by the Principal, in one or more determined regions, in exchange for a remuneration.

In other words, the agent is empowered **to deal with business** (as an intermediary) or **to conclude business** (as a representative of the merchant). Thus, during the **negotiation** operations, the agent researches the relevant markets, identifies and attracts potential contractual partners for the Principal. Here there are the elements of mandate without representation, as the agent acts in own name and on behalf of the Principal.

During the negotiation and conclusion of contracts, the agent, in addition to what the scope of the negotiation entails**, signs** contracts on behalf of the Principal, being here the elements of the mandate with representation.

As can it be noticed, the legislator is flexible and allows the exercise of the negotiation operations only or also those of negotiation and conclusion of the contracts, depending on the interests of the parties.

The agent must be an **independent intermediary** acting in a professional capacity, not being subordinated to the Principal at the same time, according to the Article 2072, 2nd paragraph from the Civil Code.

In the absence of express legal specifications, it can be interpreted that the legal text refers to the activity of a professional acting in the course of exercising the activity of an enterprise.

Peremptorily, the professional exercise of these activities also reveals the autonomous or independent character of the agent's services and means.

In the same line, we emphasize that, in the context of the Article 2072, 2nd paragraph from the Civil Code, the expression **independent intermediary acting in a professional capacity** takes into account the absence of any subordination relationships in relation to the Principal, without excluding the previously mentioned.

As for the **permanent nature** of the power of attorney received by the agent, it refers to all the operations performed by the agent under the agency agreement and not just a few disparate operations and the **firm, constant** aspect of the collaboration derived from the agency agreement.

The agent's activities concern one or more determined regions, a fact of the nature of giving consistency to the contractual relationship.

Beyond the element of geographical limitation, there is also the limitation for the agent, in the sense that he cannot deal with certain groups of people, within the non-competition obligation, according to the Article 2075, 3rd pharagraph from the Civil Code.

It must also be emphasized the obligation of the existence of the remuneration due to the agent for the activities carried out.

The regulation of the agency agrteement in the Civil Code does not conflict with the legislation that refers to the persons who act as an intermediary in the stock exchanges and the regulated markets of goods and derivative financial instruments, hold the capacity of an insurance and reinsurance agent or broker or provide a service unpaid as an agent (art. 2073, paragraph 1 of the Civil Code). The previously mentioned exclusions are justified by the fact that those situations are regulated by a special legislation, in particular by the fact that an **unpaid** legal relationship cannot be the object of the agency agreement, considering that the latter is signed between professionals, their activity being oriented towards **attainment the profit**.

At the same time, according to the Article 2073, 2nd paragraph from the Civil Code, a person does not hold the capacity of agent if he:a) has the capacity of a legal or statutory body of a legal entity, holding the right to represent it;b) is an associate or shareholder and is legally authorized to represent the other associates or shareholders;c) has the capacity of judicial administrator, liquidator, curator, custodian or sequestration administrator in relation to the Principal. These derogations can be explained by the intention to eliminate confusion and overlapping of duties for functions that contain acts of representation.

SECTION II. THE ANALYSIS OF THE PARTIES OBLIGATIONS

II.1. The Agent's Obligations

a) to fulfill, personally or through his representatives, the obligations arising from the power of attorney given to him, in good faith and loyalty

The duty of good faith performance of obligations is one of the foundations of the performance of obligations both under the current Civil Code and the previous one.

Thus, the execution of the obligations in good faith means, in essence, the implementation of obligations according to their purpose, compliance with public order and good morals, in accordance with the Article 14 from the the Civil Code.

At the same time, the loyal performance of the obligations translates into the existence of lasting relationships between the parties, during which the agent undertakes actions that can significantly affect the Principal's patrimony. This obligation highlights the **equality** of the parties from a contractual perspective.

b) to procure and communicate to the Principal the information that could interest him regarding the regions established in the agreement, as well as to communicate all other necessary information at his disposal;

This obligation represents one of the effects of the execution of the agency agreement, underlining the fact that the legal text does not only take into account the contractually stipulated information, but those that could be of interest to the Principal and are related or linked to the object of the agency agreement.

Also, the agent has the obligation to communicate to the Principal all the necessary information at his disposal, even if they were not expressly requested by the Principal.

Although it is not directly obvious, this obligation highlights the **subordination** of the agent to the Principal.

c) to submit the necessary diligence for the negotiation and, if necessary, the conclusion of the contracts for which he is empowered, under the most advantageous conditions for Principal;

The central element of this obligation is given by the requirement to negotiate under the most advantageous conditions for Principal.

In other words, it materializes the intention of the contracting parties, namely the Principal's intention to negotiate certain legal acts or to negotiate and conclude certain legal acts, through a proxy, and the agent's intention to earn a sum of money.

As is directly derives from the wording of the text, this is a duty of diligence that points-out the relation of the Agent’s subordination towards the Principal.

d) to comply with the reasonable instructions received from the Principal;

This obligation is of the essence of the mandate with representation, for situations in which the agent negotiates and signs documents for the Principal, when his power of attorney prevails, namely the performance of the agent's activities in the context of a relationship of **subordination** to the Principal, in contrast to the non-existence of a relationship of subordination, as required by the Article 2072, 2nd paragraph from the Civil Code.

of the agency activities and only he has the necessary business knowledge to issue instructions to the agent, in accordance with the provisions of the agency agreement.

That's why we appreciate *de lege ferenda* that the formulation **the client's documented and legal instructions i**s much more appropriate to the context, of a nature, therefore, to faithfully reflect reality.

e) to keep in its registers separate records for the contracts that concern each Principal;

The obligation enunciated at this point reinforces the legal requirement in the area of accounting, specifying that, even if there were no separate records for the contracts signed for

the Principal (two distinct accounting documents/records), the segregation of the accounting data will be possible within the same accounting record.

We reasonably appreciate that this requirement highlights, to a significant extent, the relationship of **subordination** to the Principal, as its purpose is to facilitate the transmission of the accounting information to the Principal, at his request or the authorized authorities who can carry out controls/investigations at the Principal's headquarters.

Moreover, to the extent that the agent is a credit institution or a non-banking financial institution, in relation to the applicable legislation, the agent has the obligation to stipulate, in the contracts signed with third parties, the existence of the right to audit or to obtain, upon request, immediately, the necessary information and/or documents.

f) to store the goods or samples in a way that ensures their identification

This requirement is of an organizational or material nature, to ensure the proper execution of the agency agreement (especially the return of these goods to the Principal upon termination of the agency agreement).

At the same time, we note that this requirement emphasizes the **subordination** relationship of the agent to the Principal, because its materialization does not depend exclusively on the will of the agent.

g) not to sell on credit

This obligation is provided by the Article 2076 from the the Civil Code, the content of which is that, in the absence of a contrary stipulation, the agent cannot sell on credit and cannot grant discounts or payment deferrals for the Principal's receivables.

It is indubitable that such a clause is for the protection of the Principal's interests and, in case such an act occurs, the agent may be obliged to pay damages, based on common law (the provisions on the commission agreement that complement the legal framework regarding the agency agreement, according to the Article 2095, 1st paragraph from the Civil Code).

Also this clause reinforces the **subordination** relationship of the agent to the Principal.

h) to immediately inform the Principal, in the event of the impossibility of executing the obligations falling on him

The reason for this clause is to ensure an additional measure of protection for the Principal in the sense of having a certain predictability and traceability of his business.

In case of violation of this obligation, the agent can pay damages to the Principal, according to the Article 2069, 4th paragraph from the Civil Code.

As a result, the **subordination** relationship of the agent to the Principal is accentuated.

i) to comply with the content of the exclusivity clause

In summary, the content of this clause (contained by the Article 2074 from the Civil Code) is in the sense that (i) the agent cannot negotiate or conclude on his own account, without the Principal's prior consent, in the region determined by the agency agreements, contracts regarding goods and services similar to those are the subject of the agency agreement and (ii) the agent can represent several principals for the same region and the same type of contracts, only if there is an express stipulation in this respect.

Although the agent has the possibility to carry out the operations specified in subsection (i) and (ii) above, with the prior consent of the agent, we reasonably consider that it is unlikely that the Principal would in practice grant such freedoms to the agent, as the expected profit could be significantly reduced and, at the same time, the Principal’s control over the execution of the agency agreement would be affected. Of course, it is not completely excluded that such situations may exist, based on rigorous financial and market analyzes of the principal, most

likely, but they exist formally, in the sense that they create for the agent the vocation for the rights contained in the Article 2074 of the Civil Code.

The clause is established with the aim of protecting and maximizing the Principal's interests, the **subordination** relationship of the agent vis-à-vis the Principal being obvious, derogations being allowed only if there is an express consent coming from Principal.

j) to comply with the non-competition clause

In essence, it is the contractual stipulation whose effect consists in restricting the agent's professional activity during the agency agreement or after its termination.

Such a clause has as its object only the geographical region, the group of people, the goods and services individualized by the agency agreement, it manifests itself for the duration of this contract and thereafter a maximum of 2 years (the Article 2075 from the Civil Code).

In addition to the fact that additional protection is created for the Principal, the effective performance of this obligation must be carried out in such a way that there are no excesses that could lead to the interpretation that the freedom to contract of the agent and his eventual subcontractors would be affected.

In the same line, this clause highlights the subordination relationship of the agent to the Principal.

k) to notify the principal of the receipt of complaints regarding the defects of the goods sold or the services provided by the principal

Such an obligation derives from the reality of the business, respectively the third party tends to address the agent from whom he contracted the good or service, to file complaints about the defects of the contracted products and services.

Another justification lies in the fact that such a circumstance can also benefit the agent who can negotiate a higher commission, especially since the agent can accept such an obligation, if he wishes.

The clause highlights the **independent** nature of the agent's performance.

II.2. The Principal’s obligations

The Principal's obligations highlight and strengthen, to the same extent, the agent's position as the main factor in the contractual agency relationship, with the role of facilitating the agent's fulfillment of his contractual obligations.

As a result, we will not insist on these clauses, but we will highlight some aspects regarding the payment of the commission to the agent even in the absence of his intervention (the hypothesis described by the Article 2083, letter c) from the Civil Code. The situation-premise for the payment of the commission is the agent’s intervention, as a rule. In the present situation, the payment of the commission, in the absence of the agent’s intervention, under the conditions that the contract was concluded with a client from a region or with group of determined persons for which the agent had received exclusive power of attorney, could violate the principle of the good faith and could even create the risk of interpretation of an illegitimate enrichment (the Article1345 from the Civil Code). Thus, the simple existence of an exclusivity clause, without any effective intervention of the agent, does not fully legitimize, in our opinion, the right of the agent to cash the commission. Thus, we propose *de lege ferenda* the amendment of the Article 2083, letter c) from the Civil Code in the sense that the right to cash the commission exists if at least the **agent’s indirect intervention** can be proven. In this context, the passivity of the agent leaves a free corridor for other more agile agents, which can really generate profit.

Regarding the hypothesis contained in the Article 2084, 1st paragraph, letter a) from the Civil Code, which regulates the remuneration of the agent **after the termination of the agency agreement,** we propose *de lege ferenda* that this text should refer to **the agent's exclusive intervention** and not to the conclusion of the contract as an effect of the agent's intervention **in principle**, related to the conclusion of the agency agreement, because the agency agreement is signed, first of all, in consideration of the agent's traits (only a person who fulfills the conditions required by the Civil Code may sign an agency agreement; these conditions require a certain specialization so we do not consider ungrounded the qualification of the agency agreement as **intuitu personae**), a rule that must be maintained during the agency agreement and after its termination.

SECTION 3. CONCLUSIONS

From the economy of the agent's obligations, it follows that he has a subordinate position in relation to the Principal, coming closer to the general pattern of the mandate, so that the wording of the Article 2072, 2nd paragraph from the Civil Code that the agent acts **independently**, not being a subordinate of the Principal, is not fully supported.

To the extent that the cited legal text considers that the agent is the owner of the means, resources, including the professional expertise, with the help of which he performs his obligations derived from the agency agreement, it can be stated that he acts independently, but **in collaboration** with the Principal.

Related to the above, we propose *de lege ferenda* the reformulation of the Article 2072, 2nd paragraph from the Civil Code in the sense that the agent is an independent intermediary with regard to his means and resources, including the professional expertise, used in the execution of his obligations derived from the agency agreement, acting on the basis of the Principal's instructions and under his supervision. As a result, the reference to the non-existence of the subordination relation will be removed. The propopsals *de lege ferenda* in this study, including the one regarding the *intuitu personae* character of the agency agreement, are in the execution of the principle of good faith and, together, are likely to recalibrate some aspects derived from the execution of the agency agreement (the reconsideration of the characteristic performance specific to each contracting party, the setting-up of the commission, in a higher amount maybe having in view the consistent instructions provided by the Principal and the resources needed to perform such ongoing oversight, fiscal impact namely if the agent's activity is independent or not).

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ABUSE OF RIGHT AND THE RIGHT TO TERMINATE AN INDIVIDUAL EMPLOYMENT CONTRACT DURING OR AT THE END OF THE PROBATIONARY PERIOD – CASE STUDY

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Abstract

The study aimed to analyze, in a synthetic manner, and in relation to judicial practice, the relevance of good faith as an abstract legal standard in the context of the abuse of right concerning discretionary rights.

The presentation of a recent case study demonstrates the direction of recent judicial practice in the sense that discretionary rights (purely potestative) are susceptible to abuse of right.

In particular, the present study shows, comparatively, both the opinions supporting and those excluding the possibility of abusing the right by issuing a termination notice of the employment contract during or at the end of the probationary period under art. 31 Labor Code.

Keywords: *abuse of right, discretionary rights, good faith, termination of the contract during or at the end of the probationary period*

DISCRETIONARY RIGHTS – THE RIGHT TO TERMINATE THE CONTRACT AT THE END OF THE PROBATIONARY PERIOD.

Discretionary rights, also known as potestative rights, represent the power given to a person to modify, extinguish, or recreate a pre-existing legal situation through a unilateral legal act. This power constitutes the legal essence of a potestative right, as opposed to legal acts that directly express the principle of freedom of will. Exercising potestative rights represents the direct manifestation of the legal power of these rights and only indirectly the freedom of will. The essential aspect of potestative rights is the ability of the holder to intervene, through a unilateral will, in existing legal situations involving the interests of persons other than the holder of those rights. These persons must accept the modification, extinguishment, or recreation of the legal situation through the unilateral manifestation of the will of the holder of the potestative right.[1]

In doctrine, it has been noted that there are rights whose exercise, even abnormal, cannot be considered abuse, as these are classified as absolute or discretionary rights. Abuse of right cannot be retained in the case of exercising rights left exclusively to the discretion of their holder. In the past, this category included a limited number of rights, but currently, doctrine has expanded this category. [2,3]

The argument for which such rights are not susceptible to abuse resides in the fact that their diversion (either by exercising or not exercising the right) from a material, objective point of view, cannot be achieved – *„there are certain subjective rights that, from a practical point of view, cannot be exercised abusively, even if subjectively their holders would aim to divert these rights from their recognized purpose."* [3]

Alongside the two contradictory opinions, a third opinion has been circulated in doctrine: *„discretionary rights could also be susceptible to abuse, but they are not subject to judicial censorship, taking into account a superior reason that excludes the application of the abuse of right theory."*[3]

Following this line of argumentation, recent doctrine has made a distinction between the abuse of right and the risk caused to the passive subject by the arbitrary exercise of potestative rights, identifying other legal institutions that could be invoked to apply control over the arbitrariness of the right holder (for example, nullity of the act) and it was retained that *„The mechanism of action of potestative rights leads us to the conclusion that, if potestative rights can only be controlled through compliance with the conditions imposed for their valid birth, it means that, when these conditions are met, there can be no question of abuse in their exercise. If the right is exercised without respecting the conditions imposed by law or contract for its exercise, it will be ineffective. In the case of potestative rights of legal origin, the conditions for exercising them are also the conditions for the valid existence of these rights. Now, if the right could not be exercised because it can only exist validly in the presence of conditions that are anticipated to be met, then it is not susceptible to abuse, as abuse can only be of a right that can be exercised. To verify how the notifying party has assessed the exercise of the right as opportune and legitimate, good faith is an indispensable criterion. (...) The assessment of good faith in the preliminary stage of exercising the potestative right distances it from the abuse of right, which presupposes the assessment of good faith under the conditions in which a right can be validly exercised. (...) Good faith is relevant in the preliminary stage of exercising the potestative right, regarding how the holder of the right appreciates the fulfillment of the conditions provided by law or by the parties for exercising the right."* [4]

In labor law, the right to terminate the employment contract during or at the end of the probationary period is considered a unilateral right of withdrawal: „*The probationary period is an interval during which the employer and the employee have the opportunity to evaluate the conditions for exercising the rights and obligations set forth in their contract. On the one hand, the employer is offered the opportunity to practically assess the professional preparation, particularly the employee's aptitudes in relation to the specific requirements of the position. On the other hand, the employee has the opportunity to determine to what extent their expectations regarding the exercise of the profession, the work environment, the qualities of the employer etc., are met."* [5, p. 26]

The probationary period in labor law relations is regulated domestically by Article 31 of the Labor Code, and „*from the perspective of the legal nature of the probationary period clause, this is a clause of withdrawal (optional), freely negotiated by the parties*." [5, p. 27], it is a benefit recognized to the parties with optional character [6, p. 157], thus providing „*a simplified way of terminating the employment contract subject to the probationary period, advantageous, based on the principle of legal symmetry, to both parties. The solution is justified by the precarious nature of such a contract; it is not consolidated until after the probationary period expires and only if the employee professionally meets the requirements of the position in which they are assigned or if they are satisfied with that position and wish to continue the activity*." [7]

Although it is optional, once the parties have agreed to its inclusion, the legal effects produced are those provided by law and there can be no further intervention either on the existence of the clause itself or on the effects and/or the established period.

The contractual clause by which the parties agree that either of them may unilaterally terminate the employment contract represents, equally, an exception to the principles of *pacta sunt servanda and mutual consensus, mutual dissensus*, and is governed, from the perspective of labor legislation, by Article 55 letter c) of the Labor Code (which is supplemented by Article 31 paragraph 3 of the Labor Code), and from the perspective of common law, by Articles 1276 and 1277 of the Civil Code, which regulate the unilateral termination of the contract. [5, p. 26]

ABUSE OF RIGHT IN EXERCISING THE RIGHT TO TERMINATE THE CONTRACT UNDER ARTICLE 31 OF THE LABOR CODE

The premise of abuse of right is the very existence of the subjective right, as „*the prerogative conferred by law under which the holder of the right can or must carry out a certain conduct or demand others to carry out a conduct appropriate to their right, under penalty recognized by law, for the purpose of exploiting a direct, born and current personal interest, legitimate and legally protected in accordance with the public interest and the norms of social coexistence."* [8, p. 49].

The new regulation of abuse of right emphasizes the objective criterion of its evaluation, offering freedom in identifying potential abuses and relying on subjective criteria. This eliminates the need to prove bad faith and focuses exclusively on determining whether the exercise of the right was excessive and unreasonable, contrary to good faith. This eclectic perspective on abuse of right combines the subjective criterion of the purpose of harm or detriment with the objective criterion of excessive and unreasonable exercise, in accordance with the standard of good faith. [10, p. 98]

In light of the new perspective, the evaluation of the purpose of exercising the right is based on the criterion of proportionality and reasonableness, replacing the abstract notion of socio-economic purpose. This new objective element must be analyzed together with the lack of intention to harm, which constitutes a constant subjective element. Thus, the diversion of the right from its initial purpose must be established through the prism of the proportionality and reasonableness of its exercise, in accordance with the standard of good faith and the comparability criteria defined by law. [8]

The requirement to act in good faith also exists in labor law relations, as a particular application referred to in Article 8 of the Labor Code. From this perspective, the situation of termination of the individual employment contract during or at the end of the probationary period, according to Article 31 of the Labor Code, has been analyzed.

The essence of terminating the individual employment contract during the probationary period is (also) the benefit of not motivating the notification – a benefit that substantially contributes to simplifying the procedure established by Article 31 paragraph (3) of the Labor Code. In practice, the benefit of not motivating the decision has been used to generate the termination of legal relations for reasons unrelated to verifying the employee's skills.

Since 2011, through Decision no. 653/2011 pronounced by the Constitutional Court, it has been explicitly stated that the lack of motivation of the notification does not lead to the conclusion that the common law court cannot ascertain and sanction a possible abuse: „*However, although the employer is not required to justify the decision to terminate the individual employment contract, the* ***Court considers that any abusive attitude of the employer*** *– for example, obliging the employee to perform duties that do not correspond to the function or position occupied –* ***could be challenged in court under the principle of good***

***faith in the conduct of labor relations, a principle enshrined in Article 8 of the Labor Code**, but also in Article 57 of the Constitution.*

In a recent contentious case[1], the judicial debate was brought forward regarding the possibility of annulling the notification of termination of the contract at the end of the probationary period based on the abuse of right committed by the employer. In the trial that opened the way for these discussions to unify the practice, the following legal issue was discussed – **to what extent, at the end of the probationary period and through the mechanism of unmotivated notification provided by Article 31 paragraph 3 of the Labor Code, can the termination of the employment contract be unilaterally decided based on reasons unrelated to directly verifying the fulfillment of the conditions and aptitudes necessary for the employee to occupy the position.**

It was noted, **by majority vote**, the circumstance that in such a situation we are facing an **abuse of right** and the following considerations are relevant to support the majority opinion:

*„Thus, the notification provided for by Article 31 paragraph 3, **although it does not provide motivation as a form requirement, still cannot mean that it is devoid of any reason to justify it in fact. Even though the notification issued by one of the parties does not need to be motivated, it must be the expression of exercising the rights in good faith, the right of the parties to unilaterally terminate the individual employment contract cannot be qualified as an absolute right, which does not entail limitations. (...)***

*From the content of the provisions mentioned above (Article 8 and 31 of the Labor Code), it follows that**, although the parties have the right to unilaterally terminate the employment relations, without the need to motivate the written notification, this right cannot be interpreted in the sense of the parties' possibility to terminate the contract abusively, without respecting the principle of good faith in the conduct of labor relations. (...)***

Therefore, it is evident that, unlike the termination clause, the employer's right to issue the notification based on Article 31 of the Labor Code is not a discretionary faculty, it does not simply represent a right to change one's mind, because seen in this way, the probationary period would turn the employer's obligation into a purely potestative resolutive condition, which, although valid in pure civil contracts, cannot be accepted within individual employment contracts.

In conclusion, if the purpose of the probationary period is to verify the suitability between the employee and the position occupied, then the presumption operates that the termination notification, although not motivated in writing, is based on a mismatch between the employee and the position, a mismatch whose finding, made by the act of issuing the notification itself, leads to the conclusion of the absence of the necessary qualifications for the employee to occupy the position.

However, this presumption can be overturned by the employee, by proving that the issuance of the notification was based on reasons unrelated to the verification of their qualifications, of their personal suitability for the position offered by the employer. (...)

Therefore, concluding an employment contract, with or without a probationary period, never implies uncertainty of salary rights and can never be considered to be concluded under

[1] Case no. 1975/99/2020 civil judgment no. 1784/2020 of the Iași Tribunal – where the employer terminated the employment contract based on Article 31 of the Labor Code concerning several employees, citing a precarious financial situation. The employees who were dismissed were selected based on their length of service, and the measure of dismissal was exclusively applied to employees in the probationary period.

the resolutive condition of the existence of necessary funds. Therefore, the lack of money does not give the right to simply dismiss employees.

Thus, in this case, the diversion of the provisions of Article 31 of the Labor Code from the purpose for which they were instituted is evident, by terminating the employment relations of all persons employed following the competition in the period August-December 2019 and who were in the probationary period.

From this perspective, the employer created a different situation between employees in similar situations (employees following the competition in the period August-December 2019) based on a criterion other than that legally regulated (namely personal aptitudes), namely that of being in the probationary period. However, the employment relationship of the person in the probationary period differs from the other employment relationships exclusively in terms of the employer's ability to terminate the employment relationship without motivating the measure, without a professional evaluation, without disciplinary investigation, but it does not exclude the employee from other rights, such as those regarding non-discrimination. (...)

Therefore, the court holds that the issuance of the termination notice of the claimant's employment contract was carried out for reasons unrelated to the spirit of the law, representing an expression of the employer's abuse of rights, which is why it will annul Decision no. 295/27.03.2020 – Termination Notice according to Article 31 paragraph 3 of the Labor Code, issued by the defendant, and will order the reinstatement of the claimant to the position held prior to the issuance of the notice.

In the same case, **the minority opinion** was that in such a situation we are **NOT** facing an abuse of rights, and the following considerations are relevant to support this opinion:

„Regarding the legal nature of the probationary period, as established in doctrine, it represents, in a first opinion, a legal clause of termination of contract, a resolutive condition that affects the very existence of the employment contract. Moreover, the Constitutional Court, through Decision no. 653/2011, established that employment relationships have a precarious nature, being consolidated only after the expiration of the probationary period. (...)

The right to establish a probationary period belongs exclusively to the employer, who is recognized and granted the ability to establish or not a probationary period, the purpose being to verify both the professional compatibility and the personal compatibility between the employer and the future employee. The employer uses a legal norm to avoid entering into an area of law that complicates the procedure for terminating employment relationships.

The employer does not abuse this norm but uses it in concrete situations to avoid additional unnecessary expenses, since such an instrument is available, and therefore cannot be reproached for being diligent and using legal norms, especially since during the probationary period we are dealing with a precarious employment relationship, with a flexible possibility of termination.

I opine that the employment relationship, not being consolidated, cannot offer maximum protection to the employee. Stipulating the probationary period in the employment contract entails the application of Article 31 of the Labor Code and has its source in the will of the parties who have included such a clause, the imperative effects of the law reflecting on the effects produced by such a mention on the contractual relations between the parties.

I consider that we cannot speak of a discretionary and abusive application of the provisions of Article 31 of the Labor Code, considering that we are discussing a precarious employment relationship.

Even if we were to accept that the notice of termination of employment relationships was issued only for the sole reason that there were no funds to pay salaries, as the contestant claims, the direct intention to commit abuse of rights by the employer cannot be established.

If this situation of lack of funds were real and constituted the sole reason for terminating the employment relationship, the employer was placed in the position of choosing between old employees with consolidated and absolutely protected employment relationships and employment contracts practically affected by this clause of termination or resolutive condition. Therefore, adopting a solution similar to the one requested in terms of consolidating employment contracts in the probationary period and restructuring by reducing the other category of personnel benefiting from indefinite-term employment contracts – consolidated, would have amounted to destabilizing the entire activity of the employer.

Consequently, the employer cannot be blamed for any fault, let alone direct intention and acting in bad faith. The prior steps (letters to the ministry, consultations with the union) taken by the employer only confirm that it sought solutions and acted in good faith.

The abuse of rights occurs whenever someone exercises a right with the intention of harming another, and the use of that right ceases to be lawful. In no case has it been proven that the employer concluded these employment contracts in bad faith, knowing that they would not be subsequently consolidated because bad faith must be assessed in relation to the entire legal relationship between the parties and not just in relation to the notice of termination of the employment contract. Beyond these aspects, I consider that if the employee succeeds in proving the abuse of rights, he has the opportunity to ask the court only for damages, and in no case for reinstatement. The employment relationship between the employee and the employer was not consolidated at the time of issuing the notice, and in the event that reinstatement is ordered, following the annulment of the notice and the restoration of the parties to the previous situation, the question arises whether the employment relationships will be resumed from the point where they left off, that is, with an employee in the probationary period or with a consolidated contract. I believe that reinstating the employee, in this case, is equivalent to interference in the employer's internal personnel policy, which is not allowed."

The legal issue was brought up for debate also in the Court of Appeal Iaşi and was recorded in the Minute regarding the legal issues interpreted and applied non-uniformly, in the matter of labor and social security disputes, second quarter/2021, June 11, 2021, and **it was decided by a majority vote that the right to unilaterally terminate the contract at the end of the probationary period can be exercised abusively, and therefore, a judicial review from the perspective of the reasons underlying the termination of the contract is allowed as follows** [2]:

„Regarding the discretionary right of the employer to terminate the employment contract or the necessity of the existence of a termination cause related to the purpose for which the probationary period is instituted, a validity condition of the termination of the contract during the probationary period, the judges and legal assistants present at the meeting ***opined that***

[2] In terms of the court's competence to verify the good faith of the parties and the absence of abuse or manifest error in the exercise of rights regarding the termination of the contract during the probationary period, there are also the judgments pronounced by the European Union Civil Service Tribunal, for example in cases F-83/15 Antonio Pujante Cuadrupani v. European GNSS Agency (GSA), F-5/12 Slawomir Bogusz v. European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) – paragraph 72.

the termination of the contract, at the end of the probationary period, must be related to the verification of the fulfillment of the conditions and aptitudes necessary for the occupation of the position by the employee.

The employer is not obliged to justify the decision to terminate the employment contract during the probationary period, starting from the presumption that the reasons are related to the purpose of the probationary period, of verifying the employee's competencies; this presumption can be overturned by the employee who can prove that he was unfairly dismissed during this period (for example, because she is pregnant).

The phrase „without the need for justification" does not mean „for any reason," but it refers to the formal conditions of the act, in the sense that it is not necessary to present in writing the reasons that substantiated the employer's decision to terminate the employment contract during the probationary period. The validity of the written notification, a unilateral act that produces the effect of terminating the employment contract during or at the end of the probationary period, is indissolubly linked to the purpose for which the law provides this procedure, in the sense that the termination of the contract during the probationary period under the specific formal conditions provided by Article 31 paragraph 3 of the Labor Code, must be related to the professional aptitudes of the employee."

Conclusions.

As conclusions, we appreciate, as a generally valid opinion, that discretionary rights are susceptible to abuse. In particular, the right to terminate the employment contract during or at the end of the probationary period through a written notification, without notice and with the benefit of non-motivation, represents a practical exemplification of a unilateral right of withdrawal, and its exercise must be in accordance with the purpose for which the norm was enacted and must adhere to the principles of good faith.

In recent jurisprudence, we observe a subtle and correct distinction being made between the right of withdrawal under common law, where the unilateral decision to exit a contract need not be circumscribed to any prerequisite situation, and the specific right regulated by Article 31 of the Labor Code, where the mechanism of non-motivated notification is regulated with the purpose of *verifying the employee's aptitudes.*

The use of the mechanism provided for in Article 31 of the Labor Code for terminating the employment contract in a simplified form must exclusively fulfill the role of verifying the employee's aptitudes, and its use for situations unrelated to the employee's aptitudes may, depending on the specific circumstances of each case, constitute a situation of abusive exercise of the right, and such abuse can be judicially recognized and sanctioned.

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GOOD FAITH – A CONDITION FOR THE VALID EXERCISE OF DISCRETIONARY RIGHT OR A CRITERION FOR ASSESSING THE ABUSE OF RIGHT?

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Abstract

The analysis of the subjective dimension, reflected in good or bad faith, continues to have overwhelming importance in the legal evaluation of concrete circumstances. Good faith is not merely a principle of law; it represents an abstract legal standard, which, although not explicitly defined, serves as a reference point for defining opposing concepts, as well as for the consolidation and/or recognition of certain rights.

The purpose of this study is to analyze, in a concise manner, the importance of elements related to good faith as an abstract legal standard, compared to bad faith, in the context of the phenomenon of abuse of right.

Similarly, this study synthetically analyzes, from the perspective of the element of good faith, the alleged incompatibility of discretionary rights with the abuse of right.

Keywords: *good faith, bad faith, abuse of right, discretionary (potestative) rights. Analiza dimensiunii subiective, reflectată în buna sau reaua credinţă, continuă să aibă o importanţă covârşitoare în evaluarea juridică a circumstanţelor concrete.*

GOOD FAITH (ABSTRACT LEGAL STANDARD) AND BAD FAITH.

The legal concept of good faith was initially outlined by Marcus Tullius Cicero in his work *De Officiis,* where the philosopher defined it as a combination of *„truthfulness in words (veritas) and fidelity in commitments (constantia)"*.

Good faith is established as a general principle of law, and within Romanian private law, the concept of good faith, as an abstract legal standard, is defined in Article 14(1) of the Civil Code, stipulating that *„**every natural person or legal entity must exercise their rights and fulfill their civil obligations in good faith**, in accordance with public order and good morals."* In the current context, alongside the concept of good faith, two other essential notions are introduced, namely public order and good morals.

Good faith is conceptualized as *„that psychological state of the subject of a legal relationship which defines their honest attitude towards the rights and obligations arising from such legal relationship."* [1] Good faith represents a transposition of honesty from the moral sphere to the legal one. In contrast to morality, law considers human actions in their external context, without ignoring the intentions that preceded them. [2]

In the absence of a legal definition of good faith, it is considered that[1] „*Good faith is an example of the interpenetration of moral norms with legal norms (D. Gherasim, op. cit., p. 228). The principle of good faith operates and produces effects in „the most varied fields of*

[1] In other specialized studies ([1], [4, pp. 9-10]), components of good faith have been identified as follows: „*(i) right intention, consisting of the absence of deceit, fraud, and violence, fidelity in commitments, and honesty and loyalty; (ii) diligence, as an expression of prudence; (iii) legality, consisting of circumscribing actions within the limits of the law, and (iv) temperance, consisting of the absence of the intention to harm or prejudice."*

civil law: the assessment and interpretation of legal acts, the conclusion and execution of contracts, the exercise of civil rights, as well as all modalities of acquiring rights by a person acting in excusable error" [3], as well as the fact that „*Good faith, public order, and good morals are the guiding principles according to which the parties to a legal relationship must act in exercising their rights and fulfilling their obligations."* [1]

Bad faith is often conceptualized in opposition to good faith, being defined in doctrine by reference to the concept of good faith as a legal standard. It is observed that, in antithetical manner, bad faith is based on psychological aspects that are contrary to morality and social ethics. *„Conversely, bad faith is based on psychological acts that are repugnant to morality and social ethics, and the law sanctions them according to the seriousness of the act committed by the legal subject acting in bad faith. Bad faith means „malicious intent, imprudence, illegality, and causing harm, all as a result of dishonesty."* [3] *„The antithesis of good faith is thus bad faith, 'manifested by deceit, violence, fraud, and abuse of rights"* ([3], [4]).

The two concepts – good faith and bad faith – are considered complementary notions and, *„Without defining bad faith, it represents the opposite of good faith, so these two concepts can only be viewed and analyzed in antithesis. Therefore, just as good faith represents a set of virtues that must animate the will, as a psychological element of external conduct, so bad faith represents an external attitude that the legislator repudiates in various forms, from the refusal to recognize a right to the sanctioning of the author. This does not mean that bad faith will always produce effects against the author, as there are situations in which the legislator recognizes certain effects even in favor of the author (for example, the right of the possessor in bad faith to acquire ownership through adverse possession)."[1]*

To delimit the concept of bad faith from that of good faith, it has been argued, essentially, that good faith is not merely the absence of guilt: *„good faith [...] does not simply lead to the idea that its opposite is nothing but guilt;* ***bad faith is manifested not only by the subjective aspect of the committed illegality*** *but also by its objective aspect, consisting of the deviation or diversion of the exercise of subjective rights from the purpose for which it was recognized by law"* and that *„exercising a right with the purpose of violating the right or freedom of another is indisputably an abusive exercise, and such exercise involves the objective criterion in its assessment."* [1]

ABUSE OF RIGHTS IN RELATION TO THE CONCEPTS OF GOOD FAITH AND BAD FAITH.

Abuse of rights has undergone various definitions[2] throughout its evolution, many of which place abuse of rights in the sphere of harmful intent, often associated with bad faith. Developing a complete and exhaustive definition of the concept of „abuse of rights" is problematic because the analysis and definition thereof have predominantly been related to theories adopted in a specific historical context. [3]

[2] Over time, there have been numerous definitions of abuse of rights, each related to the adopted theory. In contemporary doctrine, the definition of abuse of rights is recognized as „*the exercise of a subjective right in violation of the principles governing its exercise"* [5, pp. 34-35.]. Consequently, exercising a right constitutes abuse of rights when done *„(i) disregarding the law and morality; (ii) in bad faith; (iii) by exceeding its limits; (iv) by disregarding the economic and social purpose for which it was recognized"* [5, pp. 34-35.]

[3] Since the recognition of the theory of abuse of rights, doctrinal controversies have revolved around the definition, or rather, the elements to be analyzed for qualifying the exercise of rights as abusive or not, thus shaping two intermediate positions – the subjective conception and the objective conception.

The essence of abuse of rights lies in its exercise beyond recognized and protected internal and external limits, with the potential to cause harm. In the contemporary Romanian legal context, the concept of abuse of rights is grounded in objective criteria and distances itself from bad faith, emphasizing the absence of good faith, which can often be realized both intentionally and negligently ([4, p. 115], [8], [9]).

A definition of abuse of rights from the perspective of addressing good faith is that ***„abuse of rights is a form of violating good faith"*** [4, p. 105]. It has been argued [10, pp. 86-87] that *„This statement takes into account the violation of good faith rather than the exercise of the right in bad faith,* ***because bad faith is not the opposite of good faith****; they are not two sides of the same coin, so not everyone who behaves contrary to good faith is also acting in bad faith."*

To support the idea that abuse of rights can also be committed negligently [10, pp. 86-87], not just intentionally, and thus, that behavior contrary to good faith does not always imply bad faith, it is evident that the new Civil Code does not exclusively refer to the bad faith of the right holder when exercising it with the intention to harm another. Excessive and unjustified exercise of a right, in contradiction with good faith, are ways of committing abuse of rights that can also be done negligently.[4] *„While good faith is a rule of conduct, an abstract and presumed standard, not subject to proof, which considers the ideal attitude of a reasonable and balanced person, bad faith is no longer a standard but characterizes a certain conduct, that which the holder of the right specifically exhibits and therefore is subject to proof. The fact that the definition of abuse of rights considers the excessive and unreasonable exercise of the right establishes the conclusion that it can also be committed negligently."* [10, p. 87].

The absence of the element of bad faith[5] in the current regulation emphasizes the objective criterion for evaluating abuse of rights, providing freedom in identifying a possible abuse of rights based on both subjective and objective criteria. This absence does not require an analysis of the exercise of the right with the intention to harm another, but focuses exclusively on verifying **whether the exercise of the right was excessive and unreasonable, contrary to good faith**. *„The new legal provisions embrace an eclectic conception of abuse of rights, with the first hypothesis evoking the subjective criterion by referring to the purpose of harming or damaging another, which implies a consideration of the author's subjectivity*

The conception known in history as the subjective theory placed the existence of abuse of rights in interdependence and close connection with the psychological, intentional element consisting of the intention to harm [6]. According to this theory, whenever a person exercised a right with the intention of harming another, the use of the right ceased to be licit and fell into the realm of abuse.

On the other hand, in the development of the objective theory, derived from the notion of misuse of power in administrative law, emphasis was placed on the criterion of the social destination of the right, considering the existence of abuse of rights whenever the right was exercised „contrary to the purpose of the institution, its spirit, and its objectives." [7].

[4] For this reason, even the new Civil Code does not only consider the bad faith of the holder in defining abuse of rights when exercising the right with the purpose of harming another. The excessive and unreasonable exercise of a right, contrary to good faith, are ways of committing abuse of rights that can also be done negligently." [10, p. 87].

[5] Article 14 Civil Code: (1) Any natural person or legal entity must exercise their rights and fulfill their civil obligations in good faith, in accordance with public order and good morals. (2) Good faith is presumed until proven otherwise.

Article 15 Civil Code: No right can be exercised with the purpose of harming or injuring another or in an excessive and unreasonable manner, contrary to good faith.

as well as the objective criterion by assessing the excessive and unreasonable exercise of the right against the standard of good faith." [10, p. 98].

The new perspective on the purpose of the norm focuses on a criterion of proportionality, rather than an abstract notion of economic or social purpose: *„(...) currently, the exercise of subjective rights contains a (new) objective element consisting of the proportionality and reasonableness of the exercise (cumulatively met), to which the constant subjective element of good faith is added, consisting of the absence of the intention to harm. (...)"* [1]. Thus, the purpose of exercising the right must be evaluated objectively, in relation to the comparability criterion of Article 15 of the Civil Code, which refers to the excessive and unreasonable nature of the exercise of the right. Therefore, diverting the right from its recognized purpose must be determined based on the proportionality and reasonableness of its exercise. [6]

In conclusion, currently, abuse of rights is a complex concept with multiple aspects, in contrast to the initial conception that attributed it a simplistic nature. The sanctioning of abuse of rights primarily stems from the injustice of the prejudice suffered by the victim, who bears the effects of the excessive exercise of the right by the holder to the detriment of legitimate interests. The evident disproportion between the benefit obtained by the holder and the prejudice suffered by the victim represents the starting point in analyzing the appropriate remedy for this injustice. [7]

THE ALLEGED CONCEPTUAL INCOMPATIBILITY OF POTESTATIVE (DISCRETIONARY) RIGHTS WITH ABUSE OF RIGHTS

Starting from the analysis of the category of rights exercised by a person, in the specialized literature [11], it has been found that there are certain rights whose exercise, even abnormally, cannot be considered abusive, given their *classification as absolute (discretionary) rights.* According to this reasoning, *„abuse of rights cannot be retained in the exercise of those rights which the law leaves exclusively to the discretion of their holder. In this category, in the past doctrine, a limited number of rights have been included; recent doctrine has increased the number of rights not susceptible to abusive exercise."* [12]

The argument supporting that such rights cannot be subjected to abuse is based on the observation that their distortion, either by exercise or non-exercise, from a material and objective point of view, is difficult or impossible. In the author's words, „*there are certain*

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[6] *„Substantiated in the form of economic and social imperatives subsumed under general, communal interests, the purpose has proved regressive and utopian because, by exceeding subjective limits, it actually negated the personal interest that motivates any kind of action of an individual in a democracy. Therefore, the purpose of exercising the right – not only material but also procedural – must be viewed objectively, by reference to the comparability criterion of Article 15 of the Civil Code, which is that of excessiveness and unreasonableness. In other words, diverting the right from its recognized purpose is determined based on the proportionality and reasonableness of its exercise. Proportionality means that the result pursued by the holder of the right should not be clearly disproportionate to the harm caused, i.e., for the holder to achieve a minor result, they cause major damage to another subject of law. Reasonableness means (with reference to an action) within ordinary limits, which is not exaggerated, moderate, balanced."*1]

[7] "We therefore argue that in the current state of civil law, abuse of rights is a much more complex concept than envisioned by the proponents of the theory bearing its name and that it no longer finds its sole foundation in the malevolent intent of the holder, which is why there is talk of its 'plasticity.' The sanction for abuse of rights is primarily demanded by the injustice of the prejudice suffered by the victim who bears the effects of excessive conduct in the exercise of legitimate interests. The evident disproportion between the advantage of the holder and the prejudice suffered by the victim is the starting point for analyzing the appropriate remedy for the unjust situation in which the victim is placed." [10, p. 97].

*subjective rights that, practically speaking, cannot be exercised abusively, even if subjectively their holders would aim to divert these rights from the purpose for which they were recognized."[*12]

In parallel with these two contrasting views, a third perspective has been proposed in the specialized literature: *„discretionary rights would also be susceptible to abuse, but they are not subject to judicial censorship, taking into account a higher reason that precludes the application of the abuse of rights theory."* [12]

However, most authors believe that the recognition, in itself, of the *„discretionary rights category logically excludes abuse of rights due to their special nature"*.

Discretionary rights (also referred to as potestative) represent, in relation to the main examples regulated in positive law, „*the power conferred on a person to modify or extinguish a pre-existing legal situation or to recreate a legal situation through a unilateral legal act constitutes, in this conception, the legal substance of a potestative right. Unlike legal acts that are a direct expression of the principle of freedom of will, unilateral acts that constitute an exercise of potestative rights are, directly, the expression of the legal power of these rights, and only indirectly, the manifestation of freedom of will. (...) What is essential for potestative rights is the power of their holder to intervene, through their unilateral will, in pre-existing legal situations in which the interests of other persons besides the holders of these rights are present (...), these persons, who have rights or interests in the pre-existing legal situation, must submit to and accept the modification, extinction, or recreation thereof, through the unilateral manifestation of will of the holder of the potestative right (potentior)."* [13]

The conceptual incompatibility between the notion of potestative (also known as discretionary) rights and the notion of abuse of rights stems from the premise that these rights do not have internal limits of exercise [13] and, therefore, „*In the absence of internal limits, potestative rights can be exercised up to their external limits, that is, until the exhaustion of the prerogatives that constitute their legal substance. The idea of balance between the spheres of exercise of rights belonging to different persons is irrelevant. From a conceptual point of view, there is an incompatibility between the notion of potestative rights and the notion of abuse of rights."* [13]

It is argued that *„by exercising his right, the holder of the potestative right not only violates the sphere of exercise of rights and legitimate interests included in the pre-existing situation and belonging to other persons, but may also modify or abolish these rights and interests. Also, by hypothesis, the only possible collision of the sphere of exercise of the potestative right is with the spheres of exercise and legal substance specific to the rights and interests included in the pre-existing legal situation. But this collision, to the extent that potestative rights are validly established, is neither illicit nor unfair. Consequently, there is no longer any utility for internal limits that would prevent the exercise of the potestative right when it affects the sphere of exercise of rights and interests included in the pre-existing legal situation and belonging to other persons. On the contrary, by hypothesis, the potestative right has the prerogative of interference in the pre-existing legal situation, and the respective persons have the obligation to submit to this interference."* [13]

In recent doctrine, a distinction has been made between abuse of rights and the risk caused to the passive subject by the arbitrary exercise of potestative rights, identifying other legal institutions to which recourse could be made for the application of control over the arbitrariness of the right holder (for example, the nullity of the act) and it has been noted that „*The mechanism of action of potestative rights leads us to the conclusion that, if potestative*

rights can only be controlled in terms of complying with the conditions imposed for their valid establishment, then, when these conditions are met, the issue of abuse in their exercise can no longer be raised. If the right is exercised without complying with the conditions imposed by law or contract for its exercise, it will be ineffective. In the case of potestative rights of legal origin, the conditions for exercise are also the conditions for valid existence of these rights. Therefore, if the right could not be exercised because it can only exist validly in the presence of conditions that are already met, then it is not susceptible to abuse, as abuse can only occur with a right that can be exercised. ***To verify how the denunciation holder assessed the exercise of the right as opportune and legitimate, good faith is an indispensable criterion. (...) Assessing good faith in the preliminary stage of exercising the potestative right distances it from abuse of rights, which presupposes assessing good faith under the conditions in which a right can be validly exercised. (...) Good faith is relevant in the preliminary stage of exercising the potestative right, regarding how the right holder assesses that the conditions provided by law or by the parties for exercising the right have been met."*** [14]

THE CONSEQUENCES OF THE ALLEGED INCOMPATIBILITY BETWEEN DISCRETIONARY RIGHTS AND ABUSE OF RIGHTS

In debate, it starts from the premise of the non-existence of internal limits of law, focusing especially on qualifying good faith as an essential condition for the valid exercise of the potestative right – a element considered a priori. As a practical consequence, in the absence of good faith, the exercise of the right cannot be considered valid, and the sanction consists of the nullity of the act, instead of sanctioning it as abusive.

However, we consider that this conception undermines the entire stability of private law relationships. Good faith is *elevated to the rank* of a general principle of law and is presumed in private law relationships and is considered to „represent, in a very general manner, that psychological state of the subject of a legal relationship that defines his honest attitude towards the rights and obligations arising from such a legal relationship. Good faith thus represents the honest transposition from the realm of moral relationships to that of legal relationships."[1]

In light of the role played by the concept of good faith in Romanian private law, qualifying good faith as a distinct element of exclusive exercise of a category of rights – those potestative and not those of other categories, invalidates the relative presumption of good faith in all private law relationships.

By analyzing good faith in the context of qualifying abuse of rights, we find that the current conceptualization thereof focuses on objective criteria and distances itself from the notion of bad faith, focusing primarily on the absence of good faith, which can be largely intentional or negligent [8,9,15]. Thus, an intrinsic aspect of the abuse of rights institution is the evaluation of how the exercise of the right was carried out – *excessively and unreasonably, contrary to good faith* (according to Articles 14 and 15 of the Civil Code).

The theoretical debate regarding the incompatibility of abuse of rights with subjective potestative rights generates, in practice, discussions regarding the choice of the legal institution or legal basis to which the interested party (the passive subject in the legal relationship) can resort to protect its interests by reducing or eliminating the damages caused by the exercise of the potestative right by its holder.

Such a judicial approach, depending on the chosen opinion, may be based either on the finding and sanctioning of abuse of rights or on the finding and sanctioning of the nullity of

the act/right exercised contrary to good faith as being exercised without all valid conditions for its exercise being fulfilled.

The implementation of the practical consequences of the theoretical discussion according to which abuse of rights would be incompatible with potestative rights generates, in procedural context, the triggering of new discussions related to the sanctioning of the procedural act drawn up and, implicitly, the assessment of the extent to which an action requesting the finding of abuse of rights exercised by the holder of a potestative right is admissible.

In the jurisprudence of the European Court of Human Rights, it is noted that the principle that access to justice must be free and non-discriminatory, according to Article 6, paragraph 1 of the European Convention on Human Rights, does not refer exclusively to procedural conditions, but also to the effective possibility of accessing justice. It is emphasized that it is imperative for Article 6(1) to protect first and foremost the effective access to the court before describing procedural guarantees in detail. Thus, fairness, publicity, and expeditiousness of the process make no sense in the absence of access to justice.[16]

In Romanian legislation, by Article 21 of the Romanian Constitution, entitled „*free access to justice,"* both the right to a fair trial and the resolution of cases within a reasonable time, as well as the right to free access to justice, are regulated. Therefore, to discuss the fairness of a trial, it is first necessary to ensure free access to justice, which implies the real possibility of addressing a court of law.

Also, in the practice of the European Court of Human Rights, it is noted that the „right to a court", like the right of access, is not absolute: rights may give rise to limitations, **but they cannot restrict an individual's free access in such a way or to such an extent that the right is affected in its essence** [Philis v. Greece (no. 1), para. 59; De Geouffre de la Pradelle v. France, para. 28; Stanev v. Bulgaria (GC), para. 229; Baka v. Hungary (GC), para. 120; Naït-Liman v. Switzerland (GC), para. 114]. Moreover, **limitations are not compatible with Article 6 para. 1 unless they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought** [Parohia Greco-Catolică Lupeni and Others v. Romania (GC), para. 89; Naït-Liman v. Switzerland (GC), para. 115]. **The right of access to a court is affected in its essence when its regulation ceases to serve the purposes of legal certainty and good administration of justice and constitutes an obstacle preventing the litigant from seeking resolution of the dispute on the merits by the competent court** [Zubac v. Croatia (GC), para. 98].

In the light of Article 6 of the Convention, **the right to a court includes not only the right to initiate an action but also the right to a legal resolution of the dispute** [Parohia Greco-Catolică Lupeni and Others v. Romania (GC), para. 86; Kutić v. Croatia, paras. 25 and 32, concerning the suspension of proceedings; Aćimović v. Croatia, para. 41; Beneficio Cappella Paolini v. San Marino, para. 29, regarding a denial of justice].

In the practical application of doctrines defining abuse of rights and according to positive legislation, the national judge must analyze how the potestative right has been exercised and whether the intentions/actions of the holder of this right were in line with the concept of good faith, thus assessing the legality of the exercise of this right. It is important to note that abuse of rights can also be verified in the case of potestative rights, in all legal branches.

CONCLUSION.

In an ideal paradigm of the legal domain, interpersonal relationships should adhere to the fundamental principle of good faith, avoiding the abuse of rights for purposes of intimidation

or personal gratification – evidently, the constraints imposed by human condition sometimes represent obstacles to achieving this aspiration.

Progressively, the recognition and sanctioning of abusive behaviours have become increasingly relevant in various branches of law, and the complexity of this process has led to the need to identify and clarify specific criteria for evaluating and interpreting abuse of rights.

Good faith continues to represent an essential pillar in evaluating situations of abuse of rights, surpassing the simple status of a legal principle, being an abstract, undefined standard to which definitions of concepts in antithesis refer, as well as the strengthening or recognition of rights.

In this sense, using good faith to force a theoretical distinction between potestative rights and other categories of rights, in order to exclude the former category of rights from the scope of the concept of abuse of rights, lacks a solid theoretical foundation.

Moreover, the practical consequences of this distinction are significant from a procedural perspective, as it could lead to the rejection of potential actions seeking verification and sanctioning of abuse of rights as inadmissible, without conducting thorough judgment, which could lead to excessive limitation of free access to justice and even denial of rights.

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GOOD FAITH IN SOME UNNAMED CONTRACTS

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Abstract

This article examines the multi-faceted concept of 'good faith' in contractual relations, examining its significance from historical, legal and practical perspectives. Originating in the principles of Roman law, the concept of good faith has evolved to become a fundamental aspect of modern contract law. In the European Union (EU), the Court of Justice emphasises the importance of good faith, ensuring that the legitimate expectations of the parties are honoured.

In the context of French, Austrian and Spanish law, the doctrine of so-called „exécution de bonne foi" requires parties to act honestly and fairly, even in the case of unnamed contracts. Turning to Romanian law, the Civil Code obliges parties to act with integrity and transparency, with the courts consistently emphasising good faith in the interpretation and performance of contracts.

In conclusion, this article underlines the universal relevance of good faith in contractual relations, which transcends borders and legal systems. It underlines the need for parties to act honestly, fairly and transparently in their contractual relationships, whether in traditional civil law contexts or in the evolving landscape of unnamed contracts and in particular those in the field of information technology.

Keywords: *good faith, contracts, Romanian law, European Union, EU Jurisprudence, Romanian law, unnamed contracts, IT contracts, Court of Justice, interpretation, enforcement, integrity, transparency, jurisprudence, principles, ethical standards, technology, adherence, obligations, legal systems.*

1. INTRODUCTION

Good faith, a fundamental principle in contract law with origins dating back to Roman jurisprudence, continues to play a key role in shaping contemporary contractual relationships. As legal systems evolve, particularly within the European Union (EU) and Romanian jurisdictions, an understanding of the nuanced application of good faith in unnamed contracts becomes imperative. This article aims to delve into the complex web of good faith principles, examining their meaning and implementation in various legal frameworks.

The concept of good faith, or bona fides, transcends mere adherence to contractual terms; it embodies a broader ethos of fairness, reasonableness and honesty in contractual relationships. Hence the expression: „good faith is the soul of the contract". Rooted in Roman law, where it was integral to the development of fair and equitable contractual relationships, good faith has since become a guiding principle in modern legal systems around the world. In the EU context, where legal harmonization is a key objective, the principle of good faith is enshrined in directives, regulations and case law, reflecting its fundamental importance in promoting confidence in commercial transactions.

Good faith serves as a fundamental element in maintaining the balance of contractual relationships, ensuring that the parties act with integrity and transparency. Beyond the mere enforcement of contractual obligations, the principles of good faith guide the parties in their

interactions, promoting cooperation and mutual respect. In essence, good faith acts as a moral compass, guiding the parties in their conduct and ensuring that the spirit of the contract is respected.

2. THE PRINCIPLES OF GOOD FAITH

2.1 About good faith in general

At its core, good faith is the foundation of contractual governance, ensuring that parties act with integrity and transparency throughout the contractual process. In the EU, the principle of good faith finds expression in various legal instruments, including directives such as Directive 2019/771 on contracts for the sale of goods. This Directive not only emphasises the obligation of parties to act in good faith, but also stresses the importance of pre-contractual negotiations and pre-contractual performance in promoting mutual trust and understanding.

Similarly, in civil law jurisdictions such as France, Austria and Spain, principles of good faith permeate every aspect of contractual relations. In France, the concept of bonne foi or négociations de bonne foi is enshrined in the Civil Code, stressing the importance of honesty, fairness and cooperation between the contracting parties which means that the parties to negotiations have a general obligation to act loyally and honestly towards each other. The French courts, guided by the principles of fairness and reasonableness, interpret contracts in the light of the parties' reasonable expectations, ensuring that the spirit of good faith is respected. In Germany Section 242 of the German Civil Code (BGB) sets out the general obligation to perform contracts in good faith.[1]

2.2 Good faith in Romanian legislation

In Romanian law, the principle of good faith occupies a central position both in legal provisions and in judicial case law, serving as a guiding principle in contractual relations. Enshrined in the Romanian Civil Code, in particular by way of general provisions in Articles 14 and 1170, this principle obliges the parties to behave honestly and fairly throughout the contractual process, emphasising their commitment to the highest standards of integrity and transparency.[2]

In addition, Romanian case law has consistently stressed the importance of good faith in the interpretation and enforcement of contracts, reaffirming its importance in protecting the legitimate expectations of the parties. The courts have adopted a robust approach to good faith, recognising its essential role in maintaining the balance between the rights and obligations of the contracting parties.

In particular, through the decisions rendered by the High Court of Cassation and Justice of Romania, the Supreme Court serves as a basic pillar that exemplifies and evokes the commitment of the judiciary to uphold the principle of good faith, by referring in its decisions to various normative acts that refer to good faith:[3]

a) Article 11 para. (1) of the Romanian Constitution, republished: „*(1) The Romanian State undertakes to fulfil faithfully and in good faith the obligations incumbent upon it under the treaties to which it is a party*";

b) Article 31 para. (1) of Law no. 590/2003: „*Art. 31. – (1) The obligations provided for by the treaties in force shall be performed faithfully and in good faith*."

The application of the principles of good faith extends to all areas of contract law in Romania [4], including unnamed contracts, where courts strive to ensure that the reasonable

expectations of the parties are met and justice is done. In interpreting unnamed contracts, Romanian courts rely on the principles of fairness and reasonableness, guided by the general obligation of good faith, as present in the Romanian Civil Code.

Moreover, the principle of good faith in Romanian law transcends contractual obligations, permeating various aspects of legal discourse and societal interactions. It embodies fundamental values of honesty, fairness and trust, which are essential for building a harmonious and prosperous society. By promoting a culture of good faith, Romanian law not only ensures the fair resolution of contractual disputes, but also contributes to the overall integrity and credibility of the legal system.

In conclusion, the principle of good faith occupies a central position in Romanian law, underpinning the contractual governance framework and shaping the rights and obligations of the parties. Through its legal provisions and judicial interpretations, Romanian law underlines the importance of honesty, fairness and integrity in contractual relations. By upholding the duty of good faith, Romanian courts help to promote trust, cooperation and justice in commercial transactions, thereby fostering an environment conducive to economic growth and prosperity.

2.3 Good-faith in unnamed contracts

Unnamed contracts, which often arise in scenarios where parties engage in informal or oral agreements, pose unique challenges to the application of good faith principles. Despite the absence of explicit contractual terms, courts in various jurisdictions, including those in the European Union and civil law countries such as France, Germany, Austria and Spain, have consistently recognized the importance of good faith in interpreting and enforcing these contracts.

In the European Union, the Court of Justice has stressed the importance of good faith in ensuring fairness and equity in contractual relations, regardless of whether the contract is formally documented or not. European case law reinforces the idea that parties entering into agreements, whether named or not, are bound by an inherent obligation of good faith, which requires them to act honestly, fairly and reasonably throughout the contractual process.

Also across the European Union, courts have adopted a pragmatic approach to the interpretation of unnamed contracts, guided by the general principle of good faith. The French courts, in particular, rely as mentioned above on „exécution de bonne foi", which obliges the parties to perform their contractual obligations in a manner compatible with the legitimate expectations of the other party. This principle ensures that even in the absence of formal contractual clauses, the parties are held responsible for their conduct and must act in a way that upholds the purpose and spirit underlying the agreement.

Moreover, the application of good faith in all contracts, even unnamed ones, serves to promote fairness, equity and trust between the parties, fostering an environment conducive to commercial transactions. By recognizing and enforcing the duty of good faith, the courts contribute to the stability and predictability of contractual relationships, thereby increasing the overall efficiency and effectiveness of the legal system. This approach not only protects the interests of the contracting parties but also promotes a culture of integrity and cooperation in commercial transactions, ultimately strengthening the basis for trade and commerce.

In conclusion, good faith in unnamed contracts reflects a commitment to uphold the principles of fairness, honesty and reasonableness in contractual relationships. In various legal systems, courts have consistently recognized the importance of good faith in the interpretation

and enforcement of agreements, regardless of their formal name. By adhering to the „duty" of good faith, parties can navigate the complexities of contractual transactions with confidence, knowing that their rights and obligations are protected by law.

IT contracts, characterized by their complexity and dynamic nature, present unique good faith challenges. In the EU, directives such as Directive 2019/770 on contracts for the provision of digital content and digital services address the particularities of unnamed contracts, emphasizing the obligation of parties to act in good faith and provide accurate information.

Another example is the General Data Protection Regulation (GDPR) which imposes additional obligations on parties to IT contracts, emphasizing the importance of transparency, accountability and fairness in data processing activities.

In Romanian law, the legislation on some information technology services is aligned with EU directives, emphasizing the importance of good faith in digital transactions. The Romanian e-commerce law regulates online contracts, imposing an obligation on parties to respect the principles of good faith in electronic transactions. We believe that Romanian courts should be aware of the challenges posed by contracts in the IT field, and can always invoke the principle of good faith to ensure fair dispute resolution and protect the interests of parties in the digital field.

The imposition of 'good faith' obligations in outsourcing and other commercial contracts is increasingly common. Even so, this concept is in the view of some authors [5] *poorly defined in English law and its effect on a commercial contract is uncertain*.

In one case [6] a client repeatedly and grossly miscalculated service credits due under a long-term catering contract. The obligation imposed on both parties involved to act in „good faith" played a key role in determining the court's decision in this case, as the court held that the client's conduct was a clear breach of the express obligation to act in good faith, thus entitling the service provider to terminate the contract. It takes some imagination to see the relevance of the judgment also in the context of an IT development outsourcing contract and for the outsourcing company.

3 HOW DOES GOOD-FAITH HELP?

A court may use the principle of good faith in different ways to ensure fair and equitable outcomes in judicial proceedings.

In interpreting contracts, when a dispute arises over the terms of a contract, a court may use the principle of good faith to interpret the agreement. This involves looking beyond the literal wording of the contract to consider the intentions and expectations of the parties. Courts will assess whether each party acted in accordance with the principle of good faith during the formation and performance of the contract. If one party is found to have breached the obligation of good faith, the court may interpret the contract in a way that favours the plaintiff.

Courts can imply clauses in a contract based on the principle of good faith or exclude them. These are terms that are not expressly mentioned in the contract but are necessary to give effect to the parties' intentions. For example, a court may imply a duty of good faith and fair dealing, which requires the parties to act honestly and fairly towards each other during the course of the contract. Or it may conclude that a particular clause was not stipulated in good faith by one of the parties.

When talking about contract enforcement, good faith can also be used by courts to determine whether a party has breached a contract. If a party does not act in good faith or

behaves in a way that undermines the purpose of the contract, the court may find that it has breached the contract and award damages or other relief to the party not at fault.

The judiciary system can, in order to avoid unconscionable contracts, use the principle of good faith to prevent the enforcement of contracts that are unfairly unfair or one-sided. If a contract is found to be fundamentally unfair because one party takes advantage of the other's vulnerability or lack of understanding, the court may refuse to enforce it.

In the spirit of promoting fairness and equity, good faith is a fundamental principle in judicial proceedings. It ensures that parties are treated fairly and that their legitimate expectations are protected. Courts may consider good faith as a factor when deciding on remedies, such as ordering specific performance or awarding damages.

The judge may also encourage the parties to negotiate in good faith to reach an out-of-court settlement and conclude a transaction. A party who fails to negotiate honestly or in good faith during settlement discussions may face consequences if the case goes to trial.

In cases involving consumer contracts, courts can use the principle of good faith to protect consumers against unfair practices. This includes assessing whether businesses have acted in good faith when dealing with consumers, ensuring that consumers are not misled or taken advantage of.

In short, a court can use the principle of good faith as a guiding principle in interpreting and enforcing contracts, ensuring fairness and equity, preventing unfair behavior and promoting the overall integrity of the legal system. It provides a framework for judges to assess the conduct of the parties and make decisions that uphold the principles of justice and fairness.

We illustrate in support of the above how courts have applied the principle of good faith in resolving cases involving various types of even unnamed contracts.

Courts have been more open to applying clear obligations relating to good faith actions. For example in the UK in both the Mid-Essex Hospital Services NHS Trust case referred to above and Portsmouth City Council v Ensign Highways Limited [2015] EWHC 1969 (TCC), the court considered clear obligations to act in good faith in the context of outsourcing, where providers challenged how their customers assessed service failure points. In both cases, the court interpreted these strict good faith obligations to ensure that they did not overlap with other obligations explicitly expressed in the contracts.

In Portsmouth v Ensign, Ensign argued that Portsmouth CC breached an express duty to act in good faith by changing the way it exercised its discretion to award service failure points. The contract gave the board discretion to award service failure points and included a maximum „award" rate for any service failure provided by Ensign. As circumstances changed, the council came under increasing budgetary pressure and began to award the maximum service failure points for each failure encountered. The court considered Clause 44 and in particular Clause 44.4.1, which stated that „*PCC and [Ensign] shall deal fairly, in good faith and co-operate with each other and with interested parties*".

The Court concluded that because the award of service failure points was a discretionary decision and did not involve cooperation, it did not fall within clause 44.4.1, which in its context appeared to relate more to best value issues. These examples underline the importance of paying attention to the drafting of good faith obligations, particularly as regards their scope, as courts tend to interpret them in a restrictive way.

Despite the rejection of an extended duty to act in good faith, the court in Mid-Essex Hospital Services NHS Trust and Portsmouth v Ensign found in each case, applying standard

contractual rules of interpretation, that in exercising their discretion, customers had an implied duty to act honestly and on proper grounds and not in an arbitrary, irrational or capricious manner. **Unfortunately, the court did not specify how this standard differed from good faith.**

There is no clear-cut judgment on the precise meaning of good faith in the commercial context, each conclusion being based on the particular circumstances of the case. However, some key trends can be identified. Honesty is an essential element of good faith, and the court held in Horn v Commercial Acceptances [2011] EWHC 1757 (Ch) that good faith involves disclosure of all material facts.

In Yam Seng, the court asked whether „*in the specific circumstances, the conduct would be considered commercially acceptable by reasonable and honest persons*". Again, the court stressed the importance of honesty and also the second element of good faith, namely a certain level of „*commercial acceptability*". In Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWHC 2145 (Ch), bad faith was defined as „*commercially unacceptable*" and the court found that IDC had acted in bad faith by improperly accessing Bristol Groundschool's computer systems.

4 CONCLUSIONS

In conclusion, the principles of good faith stand as pillars of integrity and fairness in contractual relationships, shaping the rights and obligations of the parties in various legal landscapes. From its origins in Roman law to its contemporary manifestations in EU directives and national law, good faith serves as a beacon of trust and cooperation, guiding parties towards fair outcomes. The evolution of contractual governance has made the principles of good faith adapt to the complexity of modern transactions, emphasising transparency, rationality and mutual respect.

As legal systems continue to evolve, the importance of good faith in contractual relationships cannot be overstated. In the European Union, where legal harmonisation is a central objective, the principle of good faith serves as a unifying force, ensuring consistency and predictability in commercial transactions. Similarly, in Romania and other civil law jurisdictions, the principles of good faith play an essential role in upholding the integrity of contractual relationships, promoting trust between the parties.

Looking ahead, continued adherence to the principles of good faith will be essential to meet the challenges of a rapidly changing legal landscape. Whether it is for non-standard contracts, including IT contracts, or traditional commercial (including electronic) transactions, the spirit of good faith remains paramount to ensure fairness, equity and justice for all parties involved. By adopting the principles of honesty, reasonableness and cooperation, stakeholders can create resilient and sustainable contractual relationships, laying the foundations for a fairer and more prosperous future..

Moreover, the concept of good faith extends beyond the realm of contract law, permeating various facets of legal discourse and social interactions. It embodies fundamental principles of fairness, trust and integrity that underpin the structure of civil society. As such, the promotion of good faith transcends mere contractual obligation; it fosters a culture of ethical behavior and mutual respect, essential for building harmonious and prosperous communities. In an increasingly interconnected world, where global trade and digital transactions abound, adherence to the principles of good faith serves as a beacon of hope, ensuring that justice and fairness prevail in all human endeavors.

Moreover, the principles of good faith not only contribute to the stability and predictability of contractual relationships, but also serve as a cornerstone for stimulating innovation and creativity in commercial transactions. By fostering an environment of trust and cooperation, the principles of good faith encourage parties to explore new opportunities and go beyond the boundaries of traditional contractual frameworks. In this way, good faith not only protects the rights and interests of contracting parties, but also catalyzes economic growth and prosperity, driving progress and development in a rapidly changing global landscape.

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THE IMPORTANCE AND NECESSITY OF DEFENDING THE NATIONAL FOREST FUND

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Abstract

One of the important of Romania's resources which is an essential component of the environment is the national forest fund. With a special role in maintaining the ecological balance, through the surface they occupy, through their functions for environmental protection and their economic, social and strategic role, forests are particular importance for Europe. Therefore, their protection, sustainable management and their rational exploitation are priority problems of the European Union.

Keywords: *national forest fund, illegal cutting, legal protection*

Introduction

The national forest fund has a special importance resulting from its character of „good of national interest", occupying an important place in the economy of our country

The main product of the forest – ***the wood*** – represents an indispensable good for satisfying people's needs and whose value increases day by day.

In addition to the fact that forests provide the wood mass that constitutes the raw material in the wood processing industry, they serve to protect agricultural land against drought, land erosion and landslides, as well as for improving and restoring the natural qualities of the soil, having an essential role in regulating the climate as well as in purifying the air and reducing pollution, in the production of oxygen necessary for life, while ensuring a balance between the components of the environment. Last but not least, we emphasize the importance from a social, tourist point of view, of recreational activities.

However, in the context of deforestation, illegal cutting of trees, irrational exploitation of forests, beyond their capacity for regeneration and growth, as well as extreme weather phenomena, such as the floods or droughts of recent years, which had devastating consequences on certain regions of the country, the importance of the forest fund acquires vital connotations for communities and the safety of the population in areas prone to these calamities.

The legal protection of forests, especialy the forest fund, in the general context of environmental protection constitutes one of the main attributions of the state, economic operators and citizens.

In the set of measures for rational management and sustainable management of the national forest fund, the focus falls on the activity of protection of the forest fund, which aims to prevent and limit losses caused by extreme weather phenomena, various diseases and pests, but also combat them.

The Order of the Minister of Agriculture and Rural Development no. 766/2007[1] regulates the organization and management of the activities of prevention, detection and assessment of losses caused by dangerous meteorological phenomena and other harmful factors. For this purpose, special commissions are organized that approve the plans for the prevention, defense and reduction of losses caused by dangerous meteorological phenomena and other harmful factors and take measures to prevent and limit losses.

In Annex 1 to the above order, the dangerous meteorological phenomena and the main harmful factors that can cause damage to the national forest fund, the forest vegetation outside the national forest fund and the objectives installed in them are provided, namely:

a) the dangerous meteorological phenomena considered are: torrential rains, heavy snowfalls, storms and blizzards, ice deposits, hoar-frost and poles, early or late frosts, hail, drought.

b) g) the damaging factors are: biotic factors (diseases, harmful insects, animals) and abiotic factors (floods, fires, landslides, lbank breaks, macroporous landslides, seismic movements causing damage or destruction, accidental pollution, acid rain.

Regardless of the form of ownership, the protection of the forest fund includes the following essential aspects:

- protection against illegal cutting,
- ecological reconstruction,
- forest regeneration and care,
-protection against pollution,
- protection against diseases and pests,
- preventing and extinguishing fires,
- the protection of hunting and fishing funds in mountain waters, including those of accumulation.[2]

Regarding the first aspect, regardless of the form of ownership, the exploitation of the wood mass must be carried out in such a way as to ensure the integrity of the national forest fund and the forest vegetation outside it, in compliance with the forestry rules and in accordance with the instructions regarding the terms, methods and periods of collection, removal and transport of wood approved by Order of the Minister of Environment and Forests no. 1540/2011[3].

The Forestry Code establishes in article 34 that forest lands that are public property of state its aren't subject to the establishment of the right of ownership or any dismantling, prohibiting the reduction of the area of the national forest fund.

The Forestry Code establishes certain obligations for forest owners. One of their essential obligations is to ensure the protection of the forest against illegal cutting of trees, degradation, destruction, theft, grazing, as well as other acts that cause damage to the forest fund, supported by the police units and gendarmerie.

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[1] … de aprobare a Normelor metodologice privind modalitatea de prevenire, depistare, evaluare si aprobare a pierderilor cauzate de fenomene meteorologice periculoase si alti factori daunatori fondului forestier national, vegetatiei forestiere din afara fondului forestier national si obiectivelor instalate in acestea, publicat în M. Of. Nr. 646 din 21 septembrie 2007.

[2] Daniela Marinescu, Maria Cristina Petre, *„Tratat de dreptul mediului*", ediţia a V-a, revizuită şi adăugită, Editura Universitară, Bucureşti, 2014, p. 285.

[3] *... pentru aprobarea Instrucţiunilor privind termenele, modalităţile şi perioadele de colectare, scoatere şi transport al materialului lemnos,* publicat în M.Of.nr. 430 din 20 iunie 2011, cu modificările şi completările ulterioare

Protection of the national forest fund against illegal occupation of land from the forest fund, illegal cutting of trees, theft, destruction and degradation of forests or objectives of any kind located in the forest fund, grazing, as well as against other acts damaging to the integrity of the forest fund is organized and executed according to the Forest Fund Protection Regulation, approved by Government Decision No. 1076/2009[4].

Also, Government Emergency Ordinance no. 195/2005 on environmental protection[5] provides in article 69 that the owners of land belonging to the national forest fund, but also of land belonging to forest vegetation outside it, have a series of obligations, such as:

a) to maintain the wooded area of the forest fund, of the forest vegetation outside the forest fund, including junipers, bushes and existing meadows, their reduction being prohibited, except in the cases provided by law;

b) to exploit the woody mass under the conditions of the law as well as to take measures for reforestation and, respectively, completion of natural regenerations;

c) to properly manage the resulting exploitation waste, under the conditions provided by law;

d) to ensure compliance with the forestry rules for the exploitation and technological transport of wood, established according to the law, in order to maintain the biodiversity of the forests and the ecological balance;

e) to respect the forestry regime in accordance with the provisions of the legislation in the field of forestry and environmental protection;

f) to ensure the application of specific conservation measures for forests with special protection functions, located on very steep slopes, with sliding and erosion processes, on gullies, rocks, at the upper altitude limit of forest vegetation, as well as for other such forests;

g) to respect the forestry regime established for the preservation of the woody vegetation on the wooded pastures that fulfill the functions of protecting the soil and water resources;

h) to ensure the rational exploitation, organization and development of meadows, depending on their recovery capacity;

i) to exploit the forest resources, the hunting and fishing fund, according to the legal provisions in the field;

j) to exploit the meadows, within the limits of creditworthiness, with the number and species of animals and in the established period, based on specialized studies and specific legal provisions;

k) to protect the forestry, hunting, fishing and meadow heritage within the protected natural areas, in the terms established by the management plans and specific regulations;

l) to notify the environmental protection authorities about accidents or activities that affect forest ecosystems or other such terrestrial ecosystems.

The control over the observance of the forestry regime for the national forest fund, in order to ensure its integrity, both within the legal circulation of the respective lands, and in the direction of preventing illegal tree cutting, belongs to the central public authority responsible for forestry, through the National Directorate of Forests- Romsilva.

Regarding the ecological reconstruction, the regeneration and the care of the forests are activities carried out according to the technical norms included in the forestry facilities and elaborated according to the specialized studies, by RNP Romsilva. In the case of forest

[4] *...pentru aprobarea Regulamentului de pază a fondului forestier,* publicată în M.Of.nr.721 din 26 octombrie 2009.

[5] Publicată în M.Of. nr.1196 din 30 decembrie 2005, cu completările şi modificările ulterioare.

regeneration, the forest regime is applicable, aiming at the conservation of the gene pool and the eco pool, the creation of high quality stands, as well as the continuous exercise by them of their protection functions.[6] According to The Forestry Code, the forest regime is the general way of managing a forest, based on seed germination.

Article 33 of The Forestry Code establishes an obligation for the administrator of the forest fund, the public property of the state, and for the owners of forests, the obligation to establish the Forest Conservation and Management Fund, interest bearing, non-taxable, tax-deductible and having the regime of fiscal reserves, available and in the account of the administrator or the provider of forestry services. The sources of constitution of the fund, as well as the manner of its use, are regulated in paragraphs (3)-(8) of article 33 of The Forestry Code.

Considering the fact that forests are not only a source of raw material, they have an essential role in regulating climatic factors, in preserving and protecting the environment. It is known that pollution has a fast action and can cause a radical change in the configuration of natural systems. Pollution of the forests leads to a considerable decrease in growth, and finally to the total drying of the trees, and at the same time the influence of pollution can also be felt on the recreational function.

In order to limit and prevent the effects of pollution, it is necessary that the polluted industrial units are not located near forests.

By virtue of the „polluter pays" principle, any natural or legal person who causes damage through pollution is obliged to pay the cost of the measures necessary for restoration and ecological reconstruction.[7]

In order to protect forests and forest vegetation against diseases, pests, in order to liquidate their outbreaks, but also to prevent them, the establishment of the phyto-sanitary quarantine regime is of particular importance. The state of health of forests is monitored through the National Forest Vegetation Monitoring System in Romania, implemented in 1990, when Romania joined the International Cooperation Program regarding the assessment and supervision of the effects of air pollution on forests (ICP Forest).[8]

According to art. 48 of the Forestry Code, the owners of forest lands, forest protection curtains and degraded lands on which afforestation works have been carried out, as well as the forest departments that provide forestry services or their administration are obliged to apply and comply with the specific rules of fire protection, approved by order of the head of the central public authority responsible for forestry. Also, prefects, mayors, county and local councils, units of competent state authorities in the field of civil protection, combating the effects of calamities and disasters, according to their legal attributions, have the obligation to intervene in fire prevention and extinguishing actions in the forest floor and in the forest vegetation outside it.

The Forestry Code also imposes on natural persons who find fires in the national forest fund the obligation to immediately notify the unique emergency number and to participate in their extinguishment. The forestry code also imposes on natural persons who find fires in the national forest fund the obligation to immediately notify the unique emergency number and to participate in their extinguishment.

[6] Daniela Marinescu, Maria Cristina Petre, *op. cit*., p. 287.
[7] Idem, p. 288.
[8] Idem.

Another aspect of the protection of the national forest fund concerns the protection of the hunting fund and the fish fund in the mountain waters.

Thus, the central public authority responsible for forestry establishes mandatory technical rules for the protection and management of hunting and fishing funds in mountain waters, mandatory for all their owners, regardless of ownership.

Conclusions

Being one of the most important resources, it is necessary to concentrate the tutor's activities for its defense**.** This is necessary because the negative effects of deforestation and illegal tree cutting are felt more and more strongly in the environment, so that, at the present time, combating these illegal actions is not only a problem at the national level, but also at European and global level.

This is necessary because the negative effects of deforestation and illegal tree cutting are felt more and more strongly in the environment, so that, at the present time, combating these illegal actions is not only a problem at the national level, but also at European and global level.

The European Union has adopted a series of forestry measures and normative acts necessary for the protection of the environment and sustainable development and which mainly aim at areas such as the protection of nature and biodiversity, environmental impact assessment and environmental liability etc., and the European Commission ensures the application of the resulting measures from these normative acts.

The member states of the European Union transpose these measures into their national legislations, trying in a joint effort to stop the illegal cutting of trees, deforestation, but also the best possible management of this resource.

Considering the current situation of the national forest fund, we consider it necessary to develop some strategies and policies taking into account the role and importance of the forest in terms of its functions in human life.

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GOOD FAITH IN ACQUIRING AND EXERCISING COPYRIGHT

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Abstract
From its origins in Roman law to its application in contemporary legislation, the concept of good faith has played an essential role in striking a balance between the interests of subjects of law. Essentially, good faith imposes a standard of ethical conduct, fairness in the relationships between rights and obligations holders. In this analysis, we will examine the key aspects of good faith in the context of acquiring and exercising copyright, exploring its role in civil law and special legislation, in order to highlight the importance of this concept in the regulations concerning the acquisition and exercise of copyright. Ultimately, the purpose of the research is to provide perspectives for professionals in the field and to examine the practical possibilities for applying this fundamental principle.
Keywords: *bona fides; patrimonial copyright; civil law; civil contracts*

1. Introduction

Good faith has become particularly important in the context of copyright acquisition, being an essential link in the chain between creators, users and persons entitled to exploit a work. A foundation that determines the acquisition of authorship and the ability to transfer or license related patrimonial rights, contractual negotiations, as well as the management of disputes regarding the use of intellectual creations, good faith emerges as an ethical and legal principle that influences both the way of exercising the content of the legal relationship and the interactions of subjects of law in the management of copyrighted works. Through this analysis we aim to highlight the importance of respecting the principle of good faith in ensuring a fair and efficient management of copyright, in the context of a legal framework with a vague practical applicability, in which the concept of good faith is either promoted and respected, or is combated through abusive practices. In a social context based on diverse realities, the universal notion of good faith becomes a standard for fair and moral contractual behavior.

In this research we aim to analyze the principle of good faith in relation to the ways of acquiring authorship, proving and publicizing this status, establishing contribution shares in the case of collective or joint works and overlapping authorship in the context of independent development of identical creations. Last but not least, we will analyze the author's possibilities to enhance their rights by means of civil law.

2. Good faith in acquiring authorship

From the analysis of contemporary doctrine and legislation in force, it unequivocally emerges the *intuitu personae* nature of the author's status of a work. Since the creative process implies, by its essence, a personal contribution, the legal nature of copyright has been a controversial subject at doctrinal level, emerging both a *real* character, derived from the notion of *property,* and a *personal* or even *clientele* character, derived from the content of copyright:

patrimonial rights and moral rights.[1] As far as we are concerned, we support the opinion that copyright has a complex nature, derived both from the content of copyright and from the features of a property right: the author has, over their creations, both moral rights, which cannot be ignored, and attributes specific to the property right, adapted to the characteristic legal regime.[2]

In accordance with Article 3 (1) of Law 8/1996 on copyright and related rights, republished, with subsequent amendments and completions, the status of author is acquired by „*the natural person or natural persons who created the work."* Since intellectual creations are a category of personal property, whose existence and protection have a special legal regime, proving the status of author is a particularly challenging issue. Under Romanian law, the authorship of a work cannot be proven through documents or traditional means of civil law, as the legal protection of a work is not conditioned by formalities of publicity; rather, the work is protected by copyright which arises, *simply by creating the work, even in unfinished form.*[3] As it is a fact, the proof of an intellectual creation can be established by any means of evidence. Therefore, good faith in proving the authorship of a work, regardless of its specificity, has a critical role and serves as a basis in ensuring compliance with the law in the field of intellectual property. In applying the principle, the author of intellectual creation assumes the mission of protecting and preserving the means that confirm the originality and authenticity of the work and has the responsibility to prove that the work belongs to them.

Although we consider the legal regulation to be fair, because conditioning the birth of copyright on certain formalities or subsequent actions after creating the work would jeopardize the very existence of copyright over the work, good faith in claiming authorship is a fragile principle, since it can be overturned by deceptive actions of individuals seeking to wrongfully claim authorship, and practice can provide various situations where the paternity of the work is questionable.[4]

The violation of the principle of good faith from this perspective is frequently encountered in the fraudulent attempt of a third party to claim the authorship of the work. This practice, recognized as abusive, is prevented by the Romanian legislation by means of

[1] For details of the debates, see Violeta Slavu, *Intellectual Property Law*, Hamangiu Publishing House, Bucharest, 2017, pp. 176–180.; Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *Copyright and related rights. Treaty*, C.H. Beck Publishing House, Bucharest, 2005, p. 35.

[2] Christine Giulia Abaza, „Substantive conditions of the mortgage contract on copyright", *Annals of „Titu Maiorescu" University*, 2023, p. 71.

[3] Article 1 (1) of Law 8/1996 on copyright and related rights, republished, with subsequent amendments and completions.

[4] In this regard, we invoke the Decision of the High Court of Cassation and Justice, Civil Section I, nr. 4505/2013 inhttps://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=105909#highlight=##. The Court held, in this case, that *the appellants had given a restrictive interpretation of the legal texts invoked, without any justification in that regard. According to those texts, the creator of a work retains the moral right to claim recognition of their right against third parties (other than the assignee with whom they have concluded the assignment contract) and the right to demand the establishment and cessation of infringements by these third parties, but this provision merely preserves in his favor a right of action which has been transferred along with the assignment contract to the assignee; In other words, the law does not prohibit the assignee from defending the moral rights of the assigning creator, but still allows the assigning creator to make those defenses if the assignee fails to do so."*

protection of both civil[5] and criminal law: the unauthorized appropriation of another author's work constitutes a crime and is punishable by imprisonment from 6 months to 3 years or by fine.[6]

The authorship of intellectual creation is closely connected to the moral rights of the author, whose exercise cannot be transferred to other persons. Unlike the legislation of other states, such as that of the United States,[7] the Romanian legislator does not allow the waiver of moral rights of the author, considering them, imperatively, inalienable.[8] As a consequence, the exploitation of works by good faith acquirers of the author's economic rights from the apparent author could be paralyzed by the exercise of the moral rights of the true author.

In the context of solving the difficulties encountered in determining the status of (co)authorship of an identical creation, the hypothesis of concurrent creation by two individuals, without collaboration, must be considered. In this situation, the good faith of the authors becomes a determining factor in the attribution process of the (co)author status, based on the indisputable evidence from the relevant research and their conclusions. It is worth mentioning that there are situations in which apparent good faith can actually hide practices associated with industrial espionage. A controversial case in this area is related to the simultaneous discovery of the double helix structure of DNA by James Watson and Francis Crick, as well as Rosalind Franklin and Maurice Wilkins. James Watson and Francis Crick published the famous paper in the journal Nature in 1953, detailing the spiral structure of DNA, known as *the double helix model.* At the same time, Rosalind Franklin, a researcher at King's College London, and her colleague Maurice Wilkins, produced X-ray images of DNA that provided crucial information about its structure. Although Franklin and Wilkins were not co-authors of the article published by Watson and Crick,[9] their work was essential to understanding DNA. This case has been subject to a complex analysis from the perspectives of both good faith, which supports the idea of coincidence of similarity of research results and the practical possibility of independently reaching the same scientific discoveries, and bad faith, which advances the opinion that the research result obtained by Watson and Crick could be considered plagiarism, based on the previous practical findings made by researcher Rosalind Franklin.[10]

Good faith is most prominently manifested in the acquisition of copyright in joint and collective works.[11] Since establishing the contribution shares in joint or collective works is

[5] In a case a good faith acquirer of usage rights of a work from an apparent author is prevented from exercising those rights by the true author, the acquirer may file, against the bad faith alienator, an action for warranty against eviction, based on the provisions of Article 1.695 of the Civil Code.

[6] Art. 197 (1) of Law 8/1996 on copyright and related rights.

[7] For details on studies of moral copyright and the possibility of waiving them, see Kimbereley Isbell, Chris Weston, *Authors, Attribution, and Integrity: Examining moral rights in the United States*, April 2019, pp. 82–83.

[8] Art. 11 (1) of Law 8/1996 on copyright and related rights.

[9] James Dewey Watson, Francis Harry Compton Crick, „Molecular Structure of Nucleic Acids. A structure for Deoxyribose Nucleic Acid", *Nature*, vol. 171, 1953, pp. 737–738.

[10] Matthew Cobb, Nathaniel Comfort, „What Watson and Crick really took from Franklin", *Nature*, vol. 616, 17 April 2023, pp. 657–660.

[11] The distinctions between joint and collective works can be identified in Articles 5 and 6 of Law 8/1996 on copyright and related rights. At the same time, we consider it necessary to mention that, although art. 6 (2) refers to the fact that the ***copyright*** *in the collective work belongs to the natural or legal person at the initiative, under whose responsibility and under whose name it was created,* this unfortunate wording creates the premises for erroneous interpretations regarding the content of copyright: even if economic rights may belong to a person other than the author, moral rights cannot be separated from the author. Thus, we consider that the interpretation of the

the result of negotiation among the co-authors, their contribution cannot be determined *a priori,* but only at the time of completion of the work, when the contribution of each author can be assessed, but, in the absence of technical or, in some cases, aesthetic criteria, in defining the contribution shares, only the good faith of the co-authors can influence the conclusion of the agreement in which they determine these shares. The attempt by some co-authors to unjustly claim percentages of contribution may paralyze the very dissemination of the work to the public. In its attempt to bring order to the chaos created by the significance of crediting an intellectual creation, the legislator has created public institutions and registers, or has provided the establishment of private organizations, with the role of registering these creations, regardless of their nature – whether scientific, artistic, trademarks, graphic signs etc. In this regard, we will make brief references to O.S.I.M. (the State Office for Inventions and Trademarks)[12] and O.R.D.A. (the Romanian Copyright Office).[13] Despite its efforts, the legislator cannot completely prevent bad faith, so that the wrongful attribution of a work and registration in registries according to the principle *qui prior tempore potior iure* can only create an appearance of right with which the true author must fight even more arduously.

In the absence of regulations that condition registration in these registries on the presentation of indisputable evidence determining authorship of the work, the process of determining the author continues to be based on the good faith of the applicant, who seeks registration as the holder of the intellectual creation.[14] As the High Court of Cassation and Justice itself stated, „*registration with ORDA does not constitute proof of authorship, the court being sovereign in assessing, depending on the circumstances of the case, whether copyright exists and who the copyright holder is."*[15] Thus, it is the legislator's responsibility to regulate the admissible evidence in determining the status of the rights holder, but the primary role in

legislative text must take into account only the economic rights of the author, not the moral rights, and, *de lege ferenda,* we opine that the legislator should expressly make this distinction to avoid its misapplication.

[12] According to the law, O.S.I.M. has a role in *ensuring the protection of industrial property, in accordance with the national legislation in the field and with the provisions of international conventions and treaties to which Romania is a party.* Essentially, O.S.I.M. is the custodian of the national registers of protection titles granted for trademarks, inventions, geographical indications, designs and models and other similar creations and issues protection titles that confer exclusive rights to their holders within the territory of Romania – art. 1 (2) and Article 3 (1) of Law 573/1998 on the organization and functioning of the State Office for Inventions and Trademarks.

[13] O.R.D.A. is a specialized organization, subordinated to the Government, as the sole regulatory, supervisory and record-keeping authority in the field of copyright and related rights. O.R.D.A's responsibilities include, among others, to supervise the functioning of collective management organizations, which are legal entities established under the law, with the approval of O.R.D.A. and operating in accordance with to the regulations governing non-profit associations. Their role is to manage the copyright or rights related to copyright entrusted to them by their holders.

[14] In support of the argument, we refer to the fact that the documentation required for the registration of a trademark within OSIM is contained only from a standard form and proof of payment of the related fees, proof of the applicant's title is not required. Indeed, the author of the creation or any other interested person may file an opposition to registration, under the law, but, given that the registration within OSIM of intellectual creations managed by it offers protections similar to registration in the land register, the principles of transparency, efficiency and accountability in the process of managing registrations and oppositions should be similar, to not compromise the rights of true holders.

As far as copyright is concerned, we mention that Art. 158 (5) of Law 8/1996 provides that the collective management organization has *the right,* but not the obligation, to refuse membership if the applicant does not prove the claimed rights.

[15] High Court of Cassation and Justice, Civil Section I, Decision no. 614/2020 in https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=159103#highlight=##

resolving conflicts over the determination of intellectual property authorship belongs to the one called upon to resolve such cases, namely the judge.

3. Good faith in exercising copyright

As mentioned above, the content of copyright comprises both economic and moral aspects. All these distinct rights arise at the moment the work is created, so that the author can exploit their creation in any way they see fit. Good faith in exercising copyright can be examined from two perspectives: the exercise by the author, in their own name and for themselves, of both economic and moral rights, or the exercise by a third party of the author's economic rights and the author's exercise of their moral rights; the latter situation is recognized in doctrine as the exception to ***the principle of true authorship***.[16]

Since exploiting an intellectual creation implies the conclusion of acts and performing actions that promote both the interests of the author, whether pecuniary or moral, but also the interests of the party entitled to exploit it, the law provides the author several means of civil law to exploit the work, including the possibility to assign or license, either exclusively or non-exclusively, the economic rights of copyright. Those institutions presuppose, by their essence, the conclusion of an agreement between the author of the work and the acquirer of the rights, at which point good faith in negotiations and in the application of the principle of autonomy of will have crucial significance. As stated in the specialized literature, *'in contractual matters, there is increasing talk of both contractual balance and contractual loyalty and good faith',* and the latter principle is not only applied to the performance of the contract, but also has a vital character, including in negotiations.[17]

Because it lacks sufficient express regulation, the principle of good faith in negotiations and delineation of practical guidance has become a mission of specialized literature and a task for judges. In this regard, faced with practical problems that highlight bad faith in various cases, some authors have argued that „*it was incumbent upon the magistrate, through responsible and creative work, by analogy with other legal provisions, to complete the application of this notion from the level of philosophy and polemics of law to the level of life and everyday problems of litigants."*[18] If *bona fides* should be the foundation of legal relationships, and the principle has moved from the realm of morality to positive law, only by its affirmation, according to art. 14 of the Civil Code, without establishing a comprehensive regulation of its application and sanctions for non-compliance, the legislator empties the very legal norm we referred to of its content.

Therefore, bad faith in negotiations and the pursuit of one's own interests can be quite a common practical aspect, especially when the author is forced to rely on specialized third parties to exploit their work. Of course, the contrary interest shown by the parties in negotiating contracts is understandable, but the exacerbation of the role of the latter may create the premises for defeating good faith, especially in the case of a dominant position in the market. There are numerous situations in which the author, lacking the means to exploit their own creations, finds themselves forced to conclude contracts that may be considered unfair in order to derive some benefits from the exploitation of their work.

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[16] Violeta Slavu, *Intellectual Property Law*, p. 188.

[17] Gabriel Boroi, Alexandra Carla Anghelescu, *Civil Law Course. General part.*, 3rd edition, Hamangiu Publishing House, Bucharest, p. 151.

[18] Nina Ecaterina Grigoras, *Good faith. Judicial practice.*, vol. vol. I, Hamangiu Publishing House, Bucharest, 2007, p. V.

The legislator makes a timid attempt to protect the author of the work by referring to an appropriate or equitable remuneration,[19] without defining these terms. By limiting itself to a generic expression, the legislator closes the path to practical progress in the judge's analysis of the legal norm, compared to the negotiation of the parties, preventing the assessment which, in case of conflict, the courts are called upon to make.[20]

However, we specify that the legislator provides remedies in the event of contracts in which the principle of contractual balance is affected, through civil law institutions such as lesion as a defect of consent or hardship, which allow the judge to annul or adapt the concluded contract, at the request of the interested party, when the conditions imposed by those institutions are met. Finally, the general norm character of the Civil Code serves as support for the special law regulating intellectual property law.

Regarding the exercise of moral rights of the author, since they are inalienable, actions exercised in bad faith, derived from these rights, can have significant practical and legal consequences.[21] The possibility of preventing the performance of contracts by invoking moral rights of the author may generate significant difficulties for publishers or producers. When an author decides to exercise their moral rights, such as the right to object to changes made to their work or the right to withdraw the work, exceeding the limits mentioned by law, this can significantly affect the plans and investments made by publishers or producers regarding that work. In cases where the author invokes moral rights at an advanced stage of the project or before its completion, publishers or producers may encounter difficulties in finalizing and promoting the respective work, leading to significant financial losses and damage to contractual relationships. Additionally, if the author decides to exercise their moral rights in an abusive or unjustified manner, this may damage the reputation and credibility of publishers or producers in the industry, causing them professional and commercial harm.

The issue of exercising moral rights of the author may also arise in the case of collective or joint works, among co-authors. The scenario is straightforward when the author of the intellectual creation is unique, since the exercise of moral rights represents their exclusive attribute and no third party can impose the manner in which the author intends to exercise them. However, in the case of joint or collective works, moral rights, such as the right to decide whether, how and when the work is to be made available to the public,[22] the right to decide under what name the work is to be made available to the public, the right to demand respect for the integrity of the work and the right to withdraw the work, must be exercised by agreement of all authors. In practice, for the exercise of these rights, the unanimity rule must be considered, with each co-author theoretically having a „veto right" regarding the exercise

[19] In this regard, see art. 40^1, art. 71, art. 101, art. 119 of Law 8/1996 on copyright and related rights.

[20] However, there are several indicative criteria regarding the clauses that should be included in copyright assignment contracts in art. 42-44 of Law 8/1996 and regarding the determination of additional amounts due to the author or artist, when the remuneration is significantly disproportionate compared to the net income obtained from the exploitation of the work. In this regard, we invoke the provisions of art. 45^1 of Law 8/1996.

[21] In this regard, we mention the Decision of the Constanta Court of Appeal, no. 45/C of 15.05.2014 in https://portal.just.ro/36/Lists/Jurisprudenta/DispForm.aspx?ID=823

[22] With regard to this right, we note that the principle does not have absolute validity; There are some limits of legal order, within which it is allowed to use the work without the prior authorization of the author. In this regard, we mention the provisions of art. 35-37 of Law 8/1996. For details, see Violeta Slavu, *Intellectual Property Law*, pp. 202–203.

of the enumerated rights.[23] This can have significant consequences, ranging from the temporary „paralysis" of the exercise of the rights of other co-authors to creating conditions that make it impossible to exploit such work.

De lege ferenda, we believe that the legislator should regulate the exercise of moral rights of the authors, in order to highlight good faith in their exercise and to protect the dignity and recognition of the contribution of each co-author. An explicit and detailed regulation of moral rights contributes to legal clarity and certainty favorable to both authors and those who acquire the rights to use the work, thus avoiding ambiguities and inefficient disputes. This regulation and the establishment of possible limits would not be contrary to the essence of the author's moral rights, provided that the author, from the moment the work is created, knows that these rights do not have an absolute character, and their exercise should at the very least, require well-founded justifications that the judge can analyze and decide whether there is good faith, or not, in their exercise by the opposing party. By taking this attribute from the judge, we consider that exclusive power is granted to the author of bad faith, to the detriment of bona fide co-authors and the acquirers of the exploitation rights of the work.

4. Conclusions

In light of the observations made in this paper, the fundamental importance of the principle of good faith in the field of intellectual property becomes evident. The principle of good faith serves not only as an ethical framework for the behavior of parties involved in legal relationships concerning copyright, but also as an essential pillar in ensuring a balance between the interests of various subjects of law in the field of creativity and innovation.

Our analysis has highlighted the crucial role of good faith in the process of protecting and managing copyright, emphasizing the need to promote and respect this principle in both legislative and practical framework of copyright law. In a society characterized by continuous growth of innovation and technological change, the adoption and application of high standards of good faith is becoming increasingly important to ensure adequate protection and fair management of intellectual works. Good faith in negotiations, contract execution, determination of contribution shares in collective works and clear and balanced regulation of intellectual property, emerge as essential principles that help promote and protect the concept, in all aspects of its creation and exploitation. Through theoretical and practical analysis of this principle, the central importance of good faith in ensuring a proper balance between the interests of rights holders, thereby fostering trust in the legal system.

Therefore, legislation and practices in this field must continue to promote and encourage the respect and application of the principle of good faith in all aspects related to the acquisition and exercise of copyright, thus contributing to the development of a suitable legal framework adapted to the current needs and challenges of society.

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ALTERNATIVE DISPUTE RESOLUTION THROUGH MEDIATION IN ROMANIAN LAW

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Abstract
Mediation is a method of resolving disputes amicably, with the help of a third-party mediator, in conditions of neutrality, impartiality, confidentiality, and with the free consent of the parties. Mediation is based on the trust that the parties place in the mediator, as a person able to facilitate negotiations between them and to support them in resolving the conflict, by obtaining a mutually convenient, efficient, and sustainable solution.
Keywords: *litigation, mediation, mediators, reduced costs, speed, consensual solutions*

1. The beginnings of mediation in Romania

Alternative Dispute Resolution [1] is a procedure for extrajudicial resolution of disputes, without the need to file a lawsuit with the classic, state justice system. This concept appeared in the second half of the 20th century, being a fundamental element of the Anglo-Saxon and American legal systems alike.

In Europe, several EU member countries have adopted this procedure, in varying proportions, for use within their national justice systems.

In regards to Romania's accession to the EU, the actual negotiation process was officially launched in February 2000 (during the meeting of the EU General Affairs Council to launch the Intergovernmental Conference) and lasted until December 2004.

In 2002, the European Parliament considered January 1, 2007, as the target date for Romania's accession to the European Union, and on November 13, 2002, the Commission adopted a „Roadmap" for Romania and Bulgaria. The European Council of December 17, 2004 (Brussels) confirmed the conclusion of the negotiations on Romania's accession to the European Union.

During the pre-accession period, the European Commission issued annual evaluation documents on the progress made in the accession preparation process, each respectively monitoring reports that assessed the degree of fulfillment of the commitments assumed by Romania in the negotiations.

The pre-accession process was long-lasting – almost 7 years – and consisted of the negotiation of all 31 chapters agreed by both parties for accession to the EU.

In 2004, during the Irish and Dutch presidencies, the last 9 chapters were closed, including Chapter 24. Justice and Internal Affairs [2]. In this chapter, there are also references to the mediation procedure, in the sense that Romania must adopt regulations to relieve the courts of justice by resolving disputes through mediation. As a consequence, the Parliament of Romania discussed and adopted Law No. 192 of May 16, 2006, on mediation and the organization of the mediator profession, published in the Official Gazette of Romania, Part I, no. 441 of May 22, 2006.

On January 1, 2007, Romania became a member state of the European Union. The status of a member state implies both rights and obligations. All of these derive from the treaties and

legislation adopted by the European Union from its inception to the present, just like in the case of any other member state of the European Union.

The integration of Romania into the European Union is a process that began with Romania's accession to the European Union. Romania's accession to the European Union took place on January 1, 2007. This date was proposed at the Thessaloniki Summit in 2003 and confirmed in Brussels on June 18, 2004.

1.1. Stages of mediation

More than 17 years have passed since the publication of Law no. 192 of May 16, 2006 [3], on mediation and the organization of the profession of mediator, so we can make a brief analysis, from a theoretical and practical perspective, about this procedure and the alternative resolution of disputes through mediation in Romanian law.

Thus, mediation is a way of resolving disputes amicably, with the help of a third party specialized in the role of mediator, in conditions of neutrality, impartiality, confidentiality, and with the free consent of the parties.

Mediation is based on the trust that the parties place in the mediator, as a person able to facilitate negotiations between them and to support them in resolving the conflict, by obtaining a mutually convenient, efficient, and sustainable solution.

If the law does not provide otherwise, the parties, natural or legal persons, may resolve their disputes of any nature through the mediation procedure, even after the initiation of a lawsuit before the court.

Mediation is based on the cooperation of the parties and the use, by the mediator, of specific methods and techniques, based on communication and negotiation.

The methods and techniques used by the mediator must serve exclusively the legitimate interests and objectives pursued by the parties in conflict.

The mediator cannot impose a solution on the parties regarding the conflict subject to mediation.

After careful research of the mediation request and after analyzing the conflict, with all the parties involved in the conflict, after the word of each party, the mediator summarizes what each party present at the mediation says and identifies the problems that must be solved at the mediation for each party in the conflict.

The mediator draws up the agenda of problems to be resolved through mediation and obtains the agreement of each party at the mediation. (Note: the problems at mediation are similar to those heads of claim from a claim filed by the plaintiff and which must be resolved by the judge through the court decision that he will pronounce).

By the common agreement of the parties, the mediator draws up the prioritization of the problems from the agenda of problems, therefore establishing the order in which he will mediate and resolve the problems from the agenda of problems. (Note: The criminal action is addressed first in mediation in criminal cases because criminal law takes priority over civil law, and the civil action is addressed second in mediation in criminal cases because civil law follows criminal law. See also the regulation, first, of the criminal action and then of the civil action in the Criminal Procedure Code, art. 14 and following).

In order, we proceed to the construction by the parties, technically piloted by the mediator, of mutually convenient, efficient, and sustainable solutions. All of these are retained by the mediator to be entered into the Mediation Agreement.

Joint or separate mediation sessions are organized, as appropriate:

Regarding joint mediation sessions: They usually last 1 hour and a minute recording is made at the end of the session, signed by both parties and the mediator. The minutes should include a summary of the discussion, the options generated for resolving the issues submitted to mediation, and the date and time of the next joint session, which the parties will be given notice of.

Regarding separate mediation sessions: The mediator meets with each party individually in an adjoining room. They usually last 3-5 minutes each, and no minutes are taken.

If, during mediation, a situation arises that could affect the purpose of mediation, the neutrality, or the impartiality of the mediator, the mediator is required to bring it to the attention of the parties, who will decide whether to maintain or terminate the mediation contract.

The mediator has the right to close the mediation procedure, proceeding by the provisions of Article 56 of Law no. 192/2006, which are applied accordingly. In this case, the mediator is required to refund the fee, in part, by the terms set out in the mediation contract under Article 54, paragraphs (1) and (2) of Law no. 192/2006.

If the conflict subject to mediation presents difficult or controversial aspects of a legal or other specialized nature, the mediator, with the consent of the parties, may request the opinion of a specialist in the relevant field.

When requesting the opinion of a specialist outside of his office, the mediator will only highlight the controversial issues, without disclosing the identity of the parties per Article 55, paragraphs (1) and (2) of Law no. 192/2006.

1.2. Regulation of mediation

The Law also regulates some very important special provisions, namely:

1. Special provisions on family conflicts:

a) The mediator will ensure that the outcome of the mediation does not conflict with the best interests of the child, will encourage parents to focus first and foremost on the needs of the child, and that the assumption of parental responsibility, separation in fact or divorce does not impede the growth and development of the child – Article 65 paragraph (1) of Law no. 192/2006.

b) If, during the mediation, the mediator becomes aware of the existence of facts that endanger the normal growth or development of the child or seriously prejudice the best interests of the child, he is obliged to report to the competent authority – Article 66 paragraph (2) of Law no. 192/2006.

c) The agreement of the spouses about the dissolution of the marriage and the resolution of the accessory aspects of the divorce is submitted by the parties to the court competent to pronounce the divorce – Article 64, paragraph (2) of Law no. 192/2006.

2. Special provisions on mediation in criminal cases:

a) In criminal cases, mediation must be conducted in such a way that the rights of each party or procedural subject to legal assistance are respected and, if applicable, the services of an interpreter. The minutes drawn up by this law, through which the mediation procedure is closed, must show whether the persons between whom the mediation procedure took place benefited from the assistance of a lawyer and the services of an interpreter or, where appropriate, to mention the fact that they have expressly waived these rights – Article 68 paragraph (1) of Law no. 192/2006.

b) In the case of minors, the guarantees provided by law for the conduct of the criminal process must be ensured, in a corresponding manner, within the mediation procedure.

The mediation procedure is closed, as appropriate:

a) by the conclusion of an agreement between the parties following the resolution of the conflict;

b) by the mediator's finding that the mediation has failed.

c) by the submission of the mediation contract by one of the parties.

In the case where the parties have concluded only a partial agreement, as well as in the cases provided for in letters b) and c), any party may apply to the competent court or arbitration court per Article 56, paragraphs (1) and (2) of Law no. 192/2006.

At the closing of the mediation procedure, in any of the cases mentioned above, the mediator will draw up a Minutes of Closing of the Mediation Procedure, which is signed by the parties, personally or by a representative, and by the mediator. The parties receive one original copy of the minutes – Article 57 of Law no. 192/2006.

When the parties in conflict have reached an agreement, a written agreement can be drawn up -The mediation Agreement, which will include all the clauses agreed upon by them and which has the value of a private document. The Mediation Agreement may be partial or total, as appropriate. As a rule, the agreement is drafted by the mediator, except for cases where the parties and the mediator agree otherwise.

In this context, it is worth noting a special note: In the case where the conflict subject to mediation concerns the transfer of the right of ownership of immovable property, as well as other real rights, partitions and succession cases, we underline, under the penalty of absolute nullity, the Mediation Agreement drafted by the mediator will be presented to the notary public or the court – see Article 58, paragraphs (3), (4), (41), (5) and (6) of the special mediation law.

The parties' agreement must not contain provisions contrary to the law and public order. If the law requires the fulfillment of certain substantive and formal conditions, the legality of the mediation agreement can be verified and attested by the parties' lawyers or by a notary public, if they were assisted during the mediation procedure, or by another lawyer or notary public chosen by the mediator with the agreement of the parties per Article 58, paragraphs (1), (2), (21), (22) and (3) of Law no. 192/2006.

The understanding of the parties is binding on them.

The mediation agreement verified and attested by the parties' lawyers, by the notary public, or by another lawyer or notary public chosen by the mediator with the agreement of the parties is an enforceable title.

The understanding of the parties may be affected, under the law, by terms and conditions.

The parties may request the notarization of their understanding from the notary public.

The parties or the interested party may appear before the notary public for the notarization of the mediation agreement.

The document drawn up by the notary public, by which the understanding from the mediation agreement is authenticated, has the power of an enforceable title.

The parties or the interested party may appear before the court to request, fulfilling the legal procedures, to issue a judgment that will consecrate their understanding.

The competence belongs to either the court in whose jurisdiction the domicile or residence or, as the case may be, the headquarters of any of the parties is located, or to the court in whose jurisdiction the place where the mediation agreement was concluded is located. The judgment by which the court approves the understanding of the parties is given in camera

and constitutes an enforceable title under the law. The provisions of Articles 438-441 of Law no. 134/2010 on the Civil Procedure Code, republished, with the modifications and supplements, apply accordingly – Article 59, paragraph (2) of Law no. 192/2006.

The judge, if he considers it necessary, requests the presence of all parties.

Regarding the execution of the mediation agreement, two clarifications are required:

1. The mediation agreement is fulfilled voluntarily by the party against whom it was pronounced, immediately or on the date stated in it.

2. The mediation agreement, after it has obtained the power of an enforceable title, following the law, is enforced by force in the same way as a court decision.

2. Advantages of mediation

Compared to domestic law regulations, mediation has the following advantages:

1. The duration of a mediation procedure is short, for example between a few days and a few weeks, depending on the complexity of the case and the mediator's skills;

2. The costs of mediation are low. Mediation involves paying a fee to the mediator, a fee that can be negotiated depending on the case's benchmarks (complexity, number of parties etc.);

3. Mediation sessions are confidential (both the mediator and the parties or their representatives are obliged by law to respect the confidentiality of the data and information disclosed during the session), thus protecting the image of the parties involved;

4. Through mediation, a solution favorable to both parties is obtained, resulting from the negotiation between the parties (the solution belongs to the parties, being generated and constructed by the parties);

5. Through mediation, the relationships between the parties are preserved, precisely because the solution found is the result of their will and satisfies their interest;

6. Mediation is not a stressful procedure. The mediation procedure is convenient, taking place in a pleasant setting;

7. Flexibility. At mediation, the date and place of the session are set according to the possibilities of presentation of both parties.

Regarding territorial competence, we specify that the mediation request is filed with the mediator's office in the jurisdiction where the party making the request resides or has its headquarters.

Mediation usually takes place at the professional office of the mediator, which is inviolable. [4] If necessary, mediation can also take place in other places agreed upon by the mediator and the parties in conflict based on Article 51 of Law no. 192/2006.

Regarding material competence, after the matter or object of mediation, [5] we show the following categories of cases that can be mediated:

1. In the field of consumer protection – the 4 situations regulated by the special law;
2. In the field of family law – the situations of Article 64 of Law no. 192/2006;
3. In the field of disputes that concern neighborhood relations;
4. In the field of professional liability, namely malpractice cases, to the extent that other procedures are not provided for by special laws;
5. In labor disputes – only those arising from the conclusion, execution, and termination of individual employment contracts. In other words, labor disputes arising from the modification or suspension of individual employment contracts and those referring to collective labor contracts cannot be mediated;

6. In civil disputes whose value is less than 50,000 lei;

7. In criminal cases, both in the criminal and civil aspects. In the criminal aspect, the provisions on mediation apply only in cases of offenses for which, according to the law, the withdrawal of the prior complaint or the reconciliation of the parties eliminates criminal liability per the provisions of Articles 67 and following of Law no. 192/2006.

Two years later, in 2008, the European Parliament adopted a directive on mediation in civil and commercial matters [6], and there are currently several European regulations on mediation [7], namely directives, recommendations, and norms in several areas of law: civil, commercial, criminal, administrative, consumer protection etc.

The EU acquis [8] obliges us to harmonize the European legislation as fully and accurately as possible with the existing regulations in domestic law, and therefore the common acquis is constantly evolving, being in a permanent dynamic.

Conclusions

Mediation is a way to resolve conflicts amicably, being an extrajudicial procedure, for the alternative resolution of disputes, with reduced financial resources for the litigant parties, being a legal way to relieve the courts which are congested with the extremely large number of requests and files from the justiciables.

It is very important to specify that in any convention that concerns rights over which the parties can dispose, they can introduce a mediation clause, the validity of which is independent of the validity of the contract of which it is part.

It is extremely important to emphasize that the mediation activity is carried out equally for all persons, without distinction of race, color, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth, or social origin, and the most important regulation is the one that provides that mediation is a public interest activity.

In order to encourage the use of the mediation procedure to settle disputes before court action is taken or even in the early stages of a dispute, it would be useful to establish obligations for the parties involved in the dispute. For example, the party who refuses to comply with the invitation to mediation should be obliged to bear the costs of the procedure advanced by the party who initiated it, irrespective of the court's decision. This sanction is intended to relieve the courts of cases of low complexity. In addition, it ensures that the parties have the option of resorting to this procedure, provided that they are fully, genuinely, and demonstrably informed of the alternative methods of dispute resolution.

Bibliographic notes

[1] Alternative Dispute Resolution (ADR), Alternative dispute resolution, sometimes translated as „*alternative dispute resolution*", or „*alternative conflict resolution*", See Ignat C., Şuştac Z. (2010), Mediation Manual, University Publishing House, Bucharest, p. 3.

[2] Justice and Internal Affairs, often abbreviated JIA.

[3] See Law no. 192 of May 16, 2006 on mediation and the organization of the profession of mediator, published in the Official Gazette of Romania, Part I, no. 441 of May 22, 2006, as amended and supplemented.

[4] See the provisions of Article 28, paragraph (1) of Law no. 192/2006 on mediation and the organization of the profession of mediator, as amended and supplemented

[5] See the provisions of Article 60^1, paragraph (1), letters a)-f) and, for penal cases, the provisions of Articles 67-70 of Law no. 192/2006.

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

[7] See Recommendation No. R (99) 19 of the Committee of Ministers to Member States on mediation in criminal matters, Recommendation No. (2001) 9 on alternative dispute resolution between administrative authorities and private individuals, Recommendation Rec(98)1 on family mediation, Recommendation Rec(2002)10 on mediation in civil matters, the European Code of Conduct for Mediators etc.

[8] The common acquis is a collection of common laws and obligations that form the ensemble of the EU legislation and is incorporated in the justice systems of the EU member states.

CONVERSION OF GOOD – BELIEFS FROM A PRINCIPLE OF PRIVATE LAW TO A PRINCIPLE OF PUBLIC LAW

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Abstract

The principle of fulfilling in good faith the obligations assumed by signing a treaty was enshrined as a principle of international law in Article 2 of the UN Charter adopted in 1945. However, the principle existed long before that as a norm of constitutional custom recognized at a generic level of states. This principle was formed by continuous repetition in the practice of states, which thus recognized its value and accepted it as a freely assumed obligation. Its persistence is explained by the lack of effective sanctions in international law, which would ensure the signatory states of a treaty, that none of them will evade its execution. In the absence of such a guarantee, the fulfillment of the contractual clauses in good faith by the states parties to the treaty, remained the only possibility for compliance with the treaty. Good-faith (bona fide) was thus shaped as a principle of international relations in a customary way, becoming through continuous and long repetition, a norm of ***jus congens,*** *thus being recognized and accepted by states. The Vienna Convention on the Law of Treaties reconfirmed it and gave it a comprehensive regulation. Art. 31 of the Convention provides that a treaty must be interpreted in good faith according to the ordinary meaning to be attributed to the terms of the treaty in their context and in the light of its object and purpose. The declaration on the principles of international law regarding friendly relations and cooperation between states, according to the United Nations Charter, gives this principle particular importance, stating, among other things, that the fulfillment in good faith by the UN member states of the obligations assumed in accordance with the Charter, is of the utmost importance to the maintenance of international peace and security and to the achievement of the other objectives of the United Nations.*

*The present study aims to treat a fundamental notion in the evolution of the Romanian legal system, namely good faith. The choice of this study is not random, it is due to the fact that good faith is so often invoked by theoreticians, but also by practitioners, in everyday realities, in legal realities, even if the substrate, the source of this is known or not foundation. Good faith (****lat. Bona fide)*** *signifies loyalty in observing international law, fidelity in observing international obligations, it representing a component element of the* ***pacta sunt servanda*** *principle, according to which states have the obligation to respect and apply exactly the treaties to which they are party.*

Keywords: *good faith, public law, legal concept, international commitments, loyalty, rights and freedoms, abuse of law.*

1. Introduction to the study of good faith

A traditional principle of civil law, but also a concept of great moral value, good faith (bona fide) is transformed into a constitutional rule with the value of a constitutional obligation. Its scope is expressly limited only to the exercise of constitutional rights and freedoms and does not include any other subjective rights. However, the limitation does not in any way prejudice either the supreme legal force of the rule thus established, nor its intrinsic value, as a moral principle, aimed at the exercise of rights and freedoms in itself, regardless

of the legal manifestation of the rights and freedoms of other legal subjects. Moreover, this is also the interpretation of the Constitutional Court regarding the regulation of art. 57, „Good faith was raised by the Constitution to the level of constitutional categories, thus imposing itself on all legal subjects and all legal relationships, regardless of their nature. That is why the judiciary and, of course, the constitutional justice, is obliged to take it into account when judging any processes" (Decision of the Constitutional Court no. 2/ 1995)[1] and Decision of the Constitutional Court no. 146/ 1999.[2] [1] [2] Moreover, „the exercise by a person of a right recognized by law cannot justify, by itself, a presumption of bad faith" (Decision of the Constitutional Court no. 1190/2011).[3] [3] As the Constitutional Court specified, „overturning the presumption of good faith, provided for as such by the provisions of art. 57 of the Basic Law, can only be achieved by proving bad faith in relation to the factual circumstances of the case and not by the fact that the person exercised certain fundamental rights and freedoms" (Decision of the Constitutional Court no. 5/ 2015)[4]. [4] A particular application of the same idea, limited to the matter of civil law, can be found in art. 14 paragraph (2) of the Civil Code, which states that „good faith is presumed until proven otherwise".[5] [5] Good faith in the exercise of rights seems to be presumed by the very fact that by indicating the conduct to be followed, any other options are excluded. Of course, the competent authorities must assess, in each individual case, „to what extent the invocation of a constitutional text is legal or not and to what extent the exercise of a right, even constitutional, is abusive" (Decision of the Constitutional Court no. 40/1993).[6][6] And from this perspective, the abuse of law remains **an undetermined legal concept**, lacking a legal definition, identified eminently through casuistic means. The provision of art. 15 Civil Code, according to which „No right can be exercised with the aim of harming or damaging another or in an excessive and unreasonable way, contrary to good faith" does not bring any additional conceptual clarification to the general notion of abuse of right, but is content to resume in the matter of civil law (by violating the prohibition of avoiding legislative parallels established by art. 16 of Law no. 24/2000 on the rules of legislative technique for the elaboration of normative acts) the general principle already existing at the constitutional level.[7] [7]

The Constitutional Court appreciated that by art. 454 of the Code of Civil Procedure, the debtor is given the opportunity to voluntarily and in good faith execute the definite, liquid and enforceable obligation established by the writ of execution, in order not to harm the recognized legal right of the creditor and this in the absence of the intervention of the coercive force of the state (Decision of the Constitutional Court no. 178/2004)[8]. [8] **Mutatis mutandis**, in this way the solidarity of the members of a human collective established in the state is also implemented, giving expression to the unity of the people regulated in art. 4 of the Constitution.

[1] Published in the Official Monitor of Romania no. 47 of March 13, 1995.

[2] Published in the Official Monitor of Romania no. 628 of December 23, 1999.

[3] Published in the Official Monitor of Romania no. 803 of November 11, 2011.

[4] Published in the Official Monitor of Romania no. 188 of March 19, 2015.

[5] Law no. 287/2009 regarding the Civil Code was published in the Official Gazette of Romania, Part I, no. 511 of July 24, 2009, was amended by Law no. 71/2011 and rectified in the Official Gazette of Romania, Part I, no. 427 of June 17, 2011 and in the Official Gazette of Romania, Part I, no. 489 of July 8, 2011).

[6] Published in the Official Monitor of Romania no. 278 of November 30, 1993.

[7] Ioan Muraru, Elena Tănăsescu – The Constitution of Romania, Comments on articles, Edition 3, Publishing House C.H. BECK, Bucharest, 2022, pp. 500-501.

[8] Published in the Official Monitor of Romania no. 443 of May 18, 2004.

It follows from the above that the abusive exercise of rights and freedoms is susceptible to sanctions, as the case may be, through contraventional means and even through the application of criminal sanctions (Decision of the Constitutional Court no. 140/1996).[9] [9] As an example, the Constitutional Court established that „the possibility of applying judicial fines in the case of the exercise of procedural rights in bad faith corresponds to the requirements of Article 57 of the Constitution, which establishes the fundamental duty of citizens to exercise their constitutional rights and freedoms in good faith – faith, without violating the rights and freedoms of others" (Decision of the Constitutional Court no. 170/ 2004).[10] [10]

Good faith refers to the exercise of rights and freedoms **in abstracto**, regardless of the relationships that may be established between their holders and other members of society. The social dimension, relating the individual to the collective, was included in the content of the same constitutional norm through the reference not to violate the rights and freedoms of others (**neminem laedere**). This is a natural duty, related to the very concept of right and/or freedom. The legislator allows each individual infinite possibilities of manifestation until this manifestation can harm the other members of the community. The limit of any right is found in the right or freedom of others, and this social dynamic could not function in security conditions in the absence of respect for this principle with universal value of Enlightenment origin. Or, in the expression of the Constitutional Court, „the juridical-philosophical concepts promoted by democratic societies admit that the freedom of a person ends where the freedom of another person begins" (Decision of the Constitutional Court no. 62/ 2007).[11] [11] The reason why this principle of international law was enshrined in the Constitution of Romania is based on the fact that Romania, as a member state of the UN, has never abdicated from its obligations assumed by treaties or other international conventions. As such, the Constituent Assembly would not have had special reasons to make a reparative gesture, at the constitutional level, enshrining this principle. Point 15 of the Theses for Title I of the Constitution states that „The Romanian State undertakes to strictly respect its international commitments and to execute in good faith the obligations of the treaties to which it is a party". This text was needed, in the conditions in which the political regime had changed in Romania, which attracted a set of commitments made by the Romanian state through international treaties concluded in the previous period. It was also a signal given to the international community that in the future, Romania will respect its assumed international obligations. Moreover, the rapporteur of the Commission for the elaboration of the draft Constitution for this chapter of the Theses mentioned the following in the Constituent Assembly: „As an organic element integrated in the international environment, through the statements expected with the value of fundamental principles, Romania confesses its pacifist and humanist vocation, as well as the certainty of her international commitments".[12] [12]

2. A legal solution to ensure the supremacy of the Constitution in relation to treaties that contain provisions contrary to the fundamental law

On the occasion of the revision of the Constitution in 2003, art. 11 paragraph (3) was supplemented with a new text, according to which, in the event that a treaty to which Romania

[9] Published in the Official Monitor of Romania no. 324 of December 4, 1996.

[10] Published in the Official Monitor of Romania no. 430 of May 13, 2004.

[11] Published in the Official Monitor of Romania no. 104 of February 12, 2007.

[12] Cristian Ionescu, Corina Adriana Dumitrescu (coordinators) – The Constitution of Romania, Comments and explanations, Publishing House C.H. Beck, Bucharest, 2017, pp. 221-222.

is to become a party includes provisions contrary to the Basic Law, its ratification may have place only after its review. Art. 20 paragraph (2) of the text of the Constitution adopted by the Constituent Assembly in 1991 had already enshrined the priority of the provisions contained in the international human rights treaties over domestic laws, but during the constitutional review of 2003 this paragraph was amended introducing an exception of the case where the Constitution or domestic laws contain more favorable provisions.

The Constituent Assembly derived from 2003 had added to the structure of the Fundamental Law a new Title dedicated to Euro-Atlantic integration, which also included a provision regarding the priority of the provisions of the constitutive treaties of the European Union and of the other binding provisions over Romanian laws, if they contained contrary provisions. Thus, it became necessary to introduce a constitutional filter that would prevent the entry into the national legal order of some provisions contained in the treaties, if they contravened the provisions of the Basic Law. The goal pursued by establishing such a filter was to ensure the supremacy of the Constitution over any legal norm, including over the European legislation fortified by the Parliament.

For the functioning of the constitutional filter, the Constituent Assembly completed article 145 of the text of the Constitution voted in 1991[13] and adding a new attribution of the Constitutional Court. [13] The Court thus gained the authority to rule on the constitutionality of treaties or other international agreements, on parliamentary initiative. If the Court, so notified, were to find the conformity of the international treaty, subject to constitutionality control, with the provisions of the Fundamental Law, the treaty could no longer be the subject of an exception of unconstitutionality. The derived Constituent Assembly could also have opted for another solution, consisting of a much more effective control of the constitutionality of treaties **a priori**, as it would have ensured the blocking in domestic law of some international treaties that would have contained provisions contrary to the Constitution. In the Decision of the Constitutional Court issued following the examination of the legislative proposal to revise the Constitution[14], the Court stated that international treaties are, in principle, an appropriate area for the constitutionality control procedure and that it is reasonable for this to be clarified before the treaties enter into force. [14]

Regarding the treaties that are subject to parliamentary ratification, Law no. 590/2003 on treaties[15] provides that after their agreement or adoption, at any stage of their conclusion, the presidents of the legislative Chambers can request the Constitutional Court for an opinion on the compatibility of the treaty provisions with the provisions contained in the Constitution. [15]

The obligation to observe international treaties in good faith is thus not only an obligation of public international law of the Romanian state towards the other signatories of the treaty, but also an obligation of constitutional law that belongs to all the authorities involved in the execution of such an international treaty. The Constituent Assembly, however, elevated good faith, as a general legal principle, to the constitutional level by providing in art. 57 of the

[13] The Romanian Constitution of 1991, adopted in the Constituent Assembly Session of November 21, 1991, entered into force following the approval of the national referendum of December 8, 1991, amended and supplemented by the Law on the revision of the Romanian Constitution no. 429 / 2003, Published in the Official Gazette of Romania no. 758 of October 29, 2003.

[14] Decision of the Constitutional Court no. 148 of April 16, 2002 – Published in the Official Gazette of Romania no. 317 of May 12, 2002.

[15] Published in the Official Gazette of Romania no. 23 of January 12, 2004.

Constitution that Romanian citizens, foreign citizens and stateless persons must exercise their constitutional rights in good faith, without violating the rights and freedoms of others. In a systematic interpretation of the constitutional texts, it is necessary to conclude that in the normative conception of the Constituent Assembly, the principle of good faith (**bona fide**) is equally opposable to public authorities in the relations they have with each Romanian citizen and the person in a given moment on the territory of Romania. The principle of good faith thus becomes a general constitutional principle, equally and equally applicable to both the rulers and the ruled.

In practice, the Constitutional Court established, for example, that the imposition by law of the condition that an authentic notarial deed be authenticated by a notary public in office in Romania „...contradicts the obligation to exempt the superlegalization of the documents to be presented on the territory of Romania, an obligation assumed by the Romanian state through the Convention on the Suppression of the Requirement of superlegalization of Foreign Official Documents, adopted in The Hague on October 5, 1961, and as a consequence, contravenes the constitutional provisions of art. 11 paragraph (1) which enshrines the obligation of the Romanian state to duly and in good faith respect the obligations deriving from the treaties to which it is a party" (Decision of the Constitutional Court no. 195/2015)[16] [16]

The meaning of the word „just" implies the fulfillment by Romania of the international treaties to which it is a party and their application in accordance with the interpretation given at the international level and in accordance with the obligations assumed at the signing of the treaty. Romania is bound to respect exactly and in good faith only the treaties in force. Also, by correlation with art. 20 of the Constitution, Romania is required not to denounce human rights treaties, to respect the sovereignty of other states and the norms of international law, as one of the ways to stop the absolutist tendencies of the state and violation of human rights is also international pressure.

The new Civil Code regulates the concept of good faith in art. 14, paragraph (1), ruling on the fact that **any natural or legal person must exercise their rights and perform their civil obligations in good faith**, in accordance with public order and good morals. Thus, alongside the concept of good faith, two essential notions appear, namely that of public order and good morals.

The protection of good faith is elevated to the rank of principle, the principle of the protection of good faith is encountered and recognized in several matters of civil law, and the doctrine and jurisprudence currently support that good faith is presumed regardless of the matter in which its issue is raised. We consider that we are in the presence of a fundamental principle of civil law whose content is given by the fact that good faith is always presumed and protected in civil legal relations.[17] [17]

The Constitution itself establishes the obligation of Romanian citizens, foreigners and stateless persons, within the framework of art. 57, namely to exercise their constitutional rights and freedoms in good faith, without infringing the rights and freedoms of others.

Etymologically, the expression „good faith" comes from the Latin language, where the term „bona fides" groups: the adjective „bonus" – good – with the meaning of good man, honest man, virtuous man and the noun „fides" – faith, belief, trust, honor. As a legal

[16] Published in the Official Monitor of Romania no. 396 / 2015.

[17] Ion Dogaru, Sevastian Cercel – Civil law. The general part, C.H. Publishing House. Beck, Bucharest, 2007, page 21.

institution, good faith finds its origins in Roman law, appearing at the end of the Republic, together with Praetorian property, when the development of trade, especially that of slaves, required the protection of buyers who were in good faith in transactions which were perfected, without having fulfilled the formalities and solemnities required by law in the case of mancip things.[18] [18]

It is beyond any discussion the finding that good faith is a mental state, which is characterized by the sincerity with which the person in error states that he had a correct representation (characterized by conviction, belief, certainty) about a state of fact or law existing at a given moment, vision that allowed him to take a decision or have an attitude in a given circumstance, because man can distinguish between truth and lies, justice and injustice, good and bad, equity and injustice, licit and unlawful. The state that we say is good faith arises at the level of the individual's psyche, because the expression of consent for the transmission, respectively for the acquisition of a right or for the exercise of the attributes that a right confers in consideration of a certain quality requires a mental process of forming an attitude that allows him to act.[19] [19]

3. Quo vadis, bona fides? Where does good faith begin and end?

One person sells a thing to another and, after agreeing on this transaction, on the thing and the price, the parties part without saying anything. Let's imagine that the seller delays the delivery of the work, or performs his obligation in bad faith, for example by continuing to wear the **work, damages it.[20]** [20]

In ancient Roman law, formalism determined contractual relations, and the first civil contracts, formal and unilateral, were characterized by the fact that the actions arising from them were of strict law (stricto juris), with the consequence of a reduced power of appreciation and interpretation on the part of judges. The development of society determined the abandonment of formalism, and the new contracts, synalagmatic, were at the same time contracts of good faith (actio bona fidei), within which there was a greater freedom of judicial interpretation.[21] [21]

Art.1170 of the New Civil Code establishes that the general obligation to act in good faith during the negotiation and execution of the contract is regulated in the national legislation. In another opinion, the opposite is argued, appreciating that it would represent an implicit obligation, the source of other contractual obligations: the obligation of loyalty, the obligation of cooperation, the obligation of contractual coherence, the obligation to inform, advise, warn etc.[22] [22]

A distinction must be made between non-compliance with the obligation to act in good faith during the contract execution phase and non-compliance with a (fundamental, main) contractual obligation, in order to avoid possible confusion: **the contractual obligation refers to the register of an economic performance and contributes to the achievement of the**

[18] Felician Sergiu Cotea – Good faith. Implications regarding property rights, Hamangiu Publishing House, Bucharest, 2007, page 1.

[19] Felician Sergiu Cotea – Ibidem, page 3.

[20] Grigore Dumitrescu – On actions of good faith, Romanian Law Study, Typography Hope, Bucharest, 1906, page 3.

[21] Romanian Pandects, No. 1/2003, Walters Kluwer Publishing House, page 10.

[22] Adriana Pena – Good faith in Romanian and European jurisprudence, Hamangiu Publishing House, Bucharest, 2020, page 17.

purpose for which it was contracted, while the requirement of good faith has moral connotations.[23] [23]

We can consider that good faith appears when the parties agree on the operation, they being willing to accept the legal sale-purchase operation, also agreeing on the work and the price. Along the way, the seller's good faith turns into bad faith, acting inconsistently on the good.

Signaling the existence in the Civil Code of these two diametrically opposed institutions, which in most cases act in tandem, in the sense that the absence of one implies the presence of the other, as well as the lack of a legal definition for bad faith, as, moreover, of a general character, and for good faith, **it raises the question whether the two states do not actually constitute a unity.** Starting from the finding that good faith is „founded on moral rules being absolutely indispensable for social life itself", while „the anti-social manifestations that concern us present themselves in the form of bad faith, which by itself constitutes a distinct notion producing effects legal", in the specialized literature it was concluded that „it cannot be stated that bad faith is only an exception to good faith, each of the two having to be considered as a distinct legal notion, with appearances diametrically opposed to each other „.[24] [24]

But where does good faith begin and end? How exactly can this be proven? There are situations where people are in good faith when concluding a civil legal act, but what will happen if along the way the person who is supposed to be in good faith finds out about the existence of a defect in the act, although there was no action in this meaning from the real owner? **Can we still talk about good faith as long as the acquirer of a good fails to reveal the veracity and verisimilitude of the act?**

4. At what point must there be good faith?

Regarding the moment when good faith had to exist, the provisions of art. 1922 are express, possession in good faith, along with the just title and „unjustified" possession (peaceful possession and without malice) were required throughout the term provided for by law, the provisions of the Calimach Code being contrary to those of the current Civil Code, art. 1898, paragraph (2), which require possession in good faith only at the moment of „acquiring the property" (the moment of beginning possession).

In this sense, good faith must exist throughout the term provided by law. However, **the omission to qualify a deed as defective, on the part of the purchaser in good faith, after the acquisition of a property, can still qualify him as a purchaser in good faith?** As long as there is no claim action, although in good faith upon acquisition, the acquirer knows the existence of a situation contrary to the law, of the non-compliant conclusion of a civil legal act, but omits to disclose these facts, a fact that leads to the conclusion that an inversion has occurred of good faith in bad faith, although this is a tacit one.[25] [25]

Tacit bad faith is not presumed to be good faith, including in the absence of an action in claim regarding an immovable asset. Let's not forget how, in the case of the contract, good

[23] Romanian Pandects, No. 1/ 2003, Walters Kluwer Publishing House, page 14.

[24] Felician Sergiu Cotea – Good faith. Implications regarding property rights, Hamangiu Publishing House, Bucharest, 2007, page 19.

[25] Dimitrie Gherasim – Good faith in civil legal relations, Publishing House of the Academy of the Romanian Socialist Republic, Bucharest, 1982, page 15.

faith begins both at the negotiation and at the conclusion of the contract, but also throughout its execution.

5. Conclusions

The legal principle of good faith found its application, as expected, in Roman private law. For example, in the matter of the mandate, the trustee was obliged to exercise the mandate in good faith[26]. [26]

Similarly, in the case of usufructuary, bona fides was the belief of the usufructuary that the thing in his possession was abandoned or that its owner had the capacity to alienate it[27]. [27]

From the private law rule, good faith has extended its effects to public law relationships. It can be said that good faith has been constitutionalized, if we attribute to the Declaration of the Rights of Man and of the Citizen, the significance of an act with constitutional value. Art.4 of the Declaration provides that „freedom consists in being able to do everything that does not harm another.

Thus, the exercise of the natural rights of each person has no other limits than those that ensure the use of the same rights for the other members of society. These limits can only be determined by law". The reading of art. 57 of the Romanian Constitution read in the key of the Declaration, shows that the Constituent Assembly has taken over exactly the substance of the ideas contained in this document.[28] [28]

If good faith is accepted from a constitutional point of view as a principle of public law, then the state is obliged to delimit with great clarity and precision the scope of exercising citizen rights, which implies a legal regime that guarantees good faith. The application and observance of this principle cannot be left to the discretion of the holders of subjective rights. The state is obliged to ensure the respect of these rights through legislative and jurisdictional measures and, likewise, through administrative instruments[29]. [29]

First of all, the state is obliged to punish abuse in the exercise of rights in a timely and drastic manner. According to the principles of civil law, good faith is presumed (**bona fides praesumitur**), which means that the proof of bad faith (**mala fides**) rests with the opposing party, the one who claims that a legal subject exercised his rights through abuse. According to this rule, also applicable in public law, whoever invokes the exercise by a person of his rights recognized by law in bad faith, must prove it.

From the point of view of art. 57 of the Constitution, the exercise of subjective rights in good faith induces the idea of an appearance with the truth that the holder of the respective right acts in accordance with the law, i.e. his capacity as the holder of the right is legitimate, and his exercise strictly respects the legal framework prescribed by the state. In other words, the legal purpose established by the legislator for the exercise of the right is respected.

As a principle of public law, good faith should also be found at the basis of the activity of public authorities, when they exercise their constitutional and legal powers and especially

[26] Constantine St. Tomulescu – Romanian private law, University of Bucharest, Faculty of Law, Bucharest, 1973, page 296.

[27] Constantine St. Tomulescu – Ibidem, page 181. The principle of good faith still remains a principle of civil law.

[28] Tudor Drăganu – Constitutional law and political institutions, Elementary Treaty, vol. I, Lumina Lex Publishing House, Bucharest, 1998, page 191.

[29] Ion Deleanu – Institutions and constitutional procedures in Romanian and comparative law, CH Publishing House. Beck, Bucharest, 2006, pp. 467-468.

in the mutual institutional relations in which they are linked according to the principle of separation and balance of the three powers of the state. The Constitutional Court refuted such an opinion by Decision no. 802 of November 9, 2006[30], which we consider wrong. In the mentioned decision, the Court holds – we consider erroneously – that „the provisions of art. 57 of the Constitution concern exclusively natural persons- Romanian citizens, foreign citizens and stateless persons- who must exercise their constitutional rights and freedoms in good faith, without violates the rights and freedoms of others. [30] Therefore, the provisions are not applicable to the representatives of the public authority, who can be sanctioned for possible abuses in the exercise of their duties through multiple mechanisms, predominantly of a jurisdictional nature established both at the constitutional and legal level".In my opinion, the obligation of good faith also rests on the state in its relations with society, as a whole, and with each individual citizen. In CEDO jurisprudence, it was mentioned that the European court is in a position to verify whether the state – through its organs, usually the judicial ones – has used its powers „in good faith, with care and in a reasonable manner"[31] [31]

I consider it unfair that natural persons – Romanian citizens, foreign citizens and stateless persons- are bound by the imperative constitutional obligation to respect the principle of good faith in legal relations with their peers and with the public authorities with whom they come into contact, and that the state be exempted indirectly from this obligation and to benefit from another legal regime, as a consequence of the abuses they resort to in relations with natural persons.

Exceeding the legal attributions of a public authority is equivalent to the abuse of power, which indirectly shows that the said public authority did not comply with the will of the Constituent General to impose the observance of good- faith. Since the state results from the sovereign will of the people, and state power, being a power established by constitutional provisions, has by its essence a limited character established by the Constitution itself, it is assumed that all state authorities act in good faith when exercise their powers (right) of government. As such, whenever there is a reasonable reason that the state (the President of Romania, the Parliament, the Government, the courts, the Constitutional Court, the People's Advocate etc.) violates its obligation of good faith towards the citizens, they are entitled – individually and collectively – to oppose the state, to resort to their right of resistance against oppression (abuse of rights committed by the state). In this capacity, citizens are entitled, not only as sovereigns of political power, but also as a party offended by the bad faith of the governors in the tacit contract agreed with the state, to demand the punishment of the guilty and the return of the guilty public authorities to the state of constitutional normality. The textual argument on which this conclusion is supported is the very constitutional provision in art. 52 paragraph (3) of the Constitution which regulates the patrimonial liability of the state for the damages suffered by persons due to judicial errors. Moreover, the same constitutional text provides that the responsibility of the state does not remove the responsibility of the magistrates – prosecutors and judges – who exercised their function in good- faith. As bad-faith is the antonym of good- faith, it is understood that the Constituent Legislator also had in mind the sanctioning of magistrates who deviated from the rule of exercising their professional rights, in good faith thus committing judicial abuses.

[30] Published in the Official Monitor of Romania no. 11 of January 8, 2007.

[31] Corneliu Birsan – European Convention on Human Rights, Commentary on articles, vol. I, Rights and Freedoms, All Beck Publishing House, Bucharest, 2005, page 782.

Here is an argument for, in a future revision of the Constitution, good faith to be regulated as a general principle of the exercise of any rights and freedoms recognized by the state to citizens and, as the case may be, to those categories of dignitaries and civil servants whose duties involve resorting to public force.

6. References

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[17] Ion Dogaru, Sevastian Cercel, Civil Law. The general part, C.H. Publishing House. Beck, Bucharest, 2007, page 21.

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[26] Ion Deleanu- Institutions and constitutional procedures in Romanian and comparative law, CH Publishing House. Beck, Bucharest, 2006, pp. 467-468.

[27] Decision of the Constitutional Court no. 802 of November 9, 2006 – Published in the Official Gazette of Romania no. 11 of January 8, 2007.

[28] Corneliu Birsan- European Convention on Human Rights, Commentary on articles, Vol. I, Rights and Freedoms, All Beck Publishing House, Bucharest, 2005, page 782.

[29] Ion Deleanu – Institutions and constitutional procedures in Romanian and comparative law, CH Publishing House. Beck, Bucharest, 2006, pp. 467-468.

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GOOD FAITH AND THE ABUZE OF A RIGHT IN THE CIVIL CODE

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Abstract

The abuse of rights regulated in Article 15 of the Civil Code has two elements: subjective and objective. The subjective element is good faith, not exercising a right with the intention of harming another person. It also existed in this form in the former Decree No 31/1954 on natural and legal persons. The second element, the objective one, consists in the reasonableness and proportionality of the exercise, which departs from the collectivist conception of the economic and social purpose, in accordance with the general public interest to be pursued in its exercise, of Decree No 31/1954. The purpose of the exercise of the right - material and procedural - is now referred to as excessive and unreasonable. Proportionality means that the result sought by the right holder must not be manifestly disproportionate to the harm caused, i.e. in order for the right holder to obtain a minor result, he causes major harm to another subject of the right. Reasonableness means (with reference to an action) within ordinary limits, which is not exaggerated, measured, balanced.

Keywords: *abuse of rights, economic and social purpose, excess of powers, good faith, proportionality, reasonableness.*

Starting from the good faith that must accompany any manifestation of will of a subject of law, provided for in Article 14 of the Civil Code, the legislator has regulated, in Article 15 of the Civil Code, the concept of abuse of right as "that right exercised with the aim of harming or damaging another or in an excessive and unreasonable manner, contrary to good faith". Abuse of right is, first of all, the exercise of a subjective right, so that it is always in accordance with the normative content of the law, being at least formally in accordance with it; if it were not, there would be no abuse of right, but a tort committed outside the existence of any right[1]. In other words, the notions of „abuse of right" and „lack of right" are distinct, do not overlap and are even mutually exclusive[2]. Although it is for the first time expressly regulated in substantive civil law, abuse of rights is not a new legal concept. It was developed by doctrine and case law on the basis of the old Civil Code, starting from the exercise of a right on the basis of the subjective element of good faith, i.e. not exercising a right with the intention of harming another person[3]. Subsequently, the concept of abuse of rights was taken up for legislation in Decree no. 31/1954 (now repealed by the New Civil Code) and, from there, in other private law acts, such as Law no. 31/1990 *on companies* (art. 136[1]) or Law no. 297/2004 *on the capital market* (repealed art. 210 paragraph (2)), respectively Law no. 24/2017 *on issuers of financial instruments and market operations*

[1] Ion Deleanu, *Drepturile subiective și abuzul de drept*. Editura Dacia, Cluj-Napoca, 1988, p. 78.

[2] Dumitru Florescu, *Sancționarea abuzului de drept în perspectiva unui nou Cod de procedură civilă*, in Revista Română de Drept no. 2/1973, p. 87.

[3] Nicolae Georgean, *Studii Juridice*, Atelierele Grafice Socec & Co., Societate Anonimă. București, 1930, vol. III, p. 6.

(art. 46 paragraph (3)). Although harm and damage to another person are provided for in the text of Article 15 of the Civil Code in an enumerative manner, as if they were different concepts with alternative applicability, in reality the terms are, in civil legal language, synonyms, so that the enumeration is tautological[4] and, *de lege ferenda*, should be corrected.

The institution of abuse of rights has historically been built on the misuse of power in administrative law, i.e. the use of the power conferred for a purpose other than that for which it was conferred. Misuse of power consists not in an openly committed illegality, but in the incorrectness of the purpose and intention of the author of the act[5]. In France, the theory of *excess of power* was embraced in civil law mainly by jurisconsults such as Louis Josserand, who pointed out that an abusive act is an act contrary to the purpose of the institution, its spirit and its aim, rights being granted to the holders so that they may exercise them *for a specific purpose, which is the social aim*[6]. The theory was also put forward in France at the time of the proposed amendments to the French Civil Code at the beginning of the 20th century, and gradually became part of the doctrine and aroused passionate debate, one of its opponents being Marcel Planiol himself[7], who said that "the right ends where the abuse begins". With this formula, which was not new but had existed since Roman times in the form of the adage that "no one is liable for damages when he makes use of his right" (*neminem laedit qui suo iure utitur*), the great French civilist showed that, by definition, a right can only be harmful if the holder exceeds his rights. The theory of *excess of power* has received the name of *objective theory*, because it adds to the *subjectivism of the right holder*, consisting of bad faith, equivalent to the intention to harm (*animus nocedi*)[8], *the objectivity of the purpose* for which the right was recognized by the legislator. The objective theory appeared in our positive law with Decree no. 31/1954, complementing the subjective theory in that morality and ethics, although necessary, were not considered sufficient in the exercise of the right because, being neutral in relation to the ideology of the purpose, they could not be abstracted from the ambience of the class interests[9] of Marxist politics. Hence, the objective theory, originally French, was circumscribed under the communist regimes, the aim, the finality of subjective law, being clothed in the garb of the economic-social aim, in accordance with the general, common interest to be pursued in its exercise (Articles 1 and 3 of Decree No 31/1954 *on natural and legal persons*)[10], a theory which was based on the

[4] See, in a similar way, și Sache Neculaescu – *Abuzul de drept, sancțiune sau remediu*, în *Noul cod civil. Studii și comentarii*. Editura Universul Juridic, București, 2012, by Marilena Uliescu (coordonator), vol. I, pp. 130-131. The author presumes that the inspiration source was the Criminal Lae, where the harm is corporal.

[5] R. Alibert, *apud* Mihai P. Popescu, *Abuzul de drept în societățile anonime*, in Revista de drept comercial și studii economice, year 1942, p. 158.

[6] Louis Josserand, *De l'esprit des droits et de leur relativité (Théorie diete de l'abus de droit)*, Paris, 1927, p. 292.

[7] *Apud* C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român* (1928), ed. 2. Editura All, București, 1997, vol. II, p. 468.

[8] Bad faith is exclusively intentional, for the purpose of harming another; fault is excluded.

[9] Ion Deleanu, *op. cit.*, p. 66.

[10] „Civil rights may be exercised only in accordance with their economic and social purpose" (art. 3) is a Soviet regulation, taken over by all communist states (see Mihail Eliescu, *Răspunderea civilă delictuală*. Editura Academiei Române, București, 1972, p. 164), its role being „to ensure the uninterrupted increase in the material well-being and cultural level of working people, through the development of the economic power of the country"(Article 2).

absorption of private property into common socialist property[11]. This conception was also dispersed by case-law, in a decision of the former Supreme Tribunal[12].

As can be seen from the definition of abuse of rights in Article 15 of the Civil Code, the legislator has now made a change of vision, eliminating from the exercise of subjective rights, the economic and social purpose circumscribed to the general, public interest, probably (and) on the basis of the fierce and justified criticisms made after 1990, Articles 1 and 3 of Decree No 31/1954. Octavian Căpățînă said that "the regulations of articles 1 to 3 of Decree no. 31/1954 - not yet repealed (in 1996, n.n., S.B.) - irreparably compromised the elementary rights of the individual and of any collective entity, socialising them as a mere material object. From personal prerogatives, intended by the nature of things to promote one's own interests, they have been downgraded to the level of instruments designed to ensure the supremacy of general interests - those of oppression, those of the strangulation of fundamental freedoms - over the residual (minimal) faculties of the holder deprived of his natural legal protection" [13]. Corneliu Bîrsan, in his turn, stated that "Articles 1-3 of Decree no. 31/1954, which expressly referred to the obligation to harmonise subjective rights with the public interest, can no longer be used to define abuse of rights. In the conception we propose (in 1994, n.n., S.B.), the exercise of a right will be considered abusive only when the right is not used for the realisation of its purpose, but with the intention of harming another person"[14]. Last but not least, Ion Dogaru warned that "nowadays (in 2009, n.n., S.B.) there is no longer any question of the obligation to harmonise subjective rights with the public interest, and the benchmarks for the normal exercise of a subjective right are: good faith and the aim or purpose for which that right has been recognised by law, thus abandoning the imperative of the permanent correlation of that right with the public interest"[15].

The purpose for which a right has been recognised is further set out in Article 12 paragraph (1) of the Civil Procedure Code, according to which "procedural rights must be exercised in good faith, in accordance with the purpose for which they have been recognised by law and without infringing the procedural rights of the other party". In the doctrine based on the new codes, an attempt has been made to define the purpose for which a procedural right was recognised - i.e. an objective element - as not to harm, by exercising it, the rights and freedoms of others. In a first opinion[16] it was stated that "good faith [...] does not simply lead to the idea that its reverse side would be nothing but guilt; bad faith is manifested not only by the subjective aspect of the wrong committed, but also by its objective aspect, consisting in the deviation or diversion of the exercise of the subjective right from the purpose for which it was recognised by law" and that "the exercise of a right with the aim of infringing the right or freedom of another is indisputably a wrongful exercise and such

[11] Constantin Oprișan, *Drepturile subiective civile, mijloace prin care se asigură dezvoltarea personalității umane*. Revista română de drept no. 8/1967, p. 88.

[12] Plen. T.S., dec. nr. 24/1962, in *Culegere de decizii pe anul 1962*, p. 96.

[13] Octavian Căpățînă, *Societățile comerciale*, ed. 2. Editura Lumina Lex, București, 1996, p. 45

[14] Constantin Stătescu, Corneliu Bîrsan, *Teoria generală a obligațiilor*. Editura All, București, 1994, p. 163.

[15] Ion Dogaru and Pompil Drăghici în Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu (coordonatori), *Bazele dreptului civil*, vol. I-V. Editura C.H. Beck, București, 2009, vol. III, p. 274.

[16] Ion Deleanu, *Tratat de procedură civilă*. Editura Universul Juridic, București, 2012, vol. I, pp. 570-571.

exercise involves the objective criterion (s. n., SB) in its assessment". In a second opinion[17], it was pointed out that "deviation from the purpose for which (the right, n.n., SB) was recognised by law may take [...] the form of harm". In a third opinion it was said that "the abuser of the right diverts its purpose from its economic and social purpose"[18], and in a fourth and final opinion[19] it was given as an example of a diversion of purpose where "the purpose for which the law recognised the right to bring an action to establish the paternity of a child out of wedlock, namely that of determining family relationships, is diverted towards the purpose of denigrating the defendant's family image".

Without contradicting the theory of the intertwining of the subjective element with the objective one, in the sense that, through a mischievous, malicious attitude, with a harmful purpose, there is a diversion of the right from its purpose (especially as this theory is not new, it was also formulated under Art. 723 of the old Civil Procedure Code: "[...] speaking expressly of the element of bad faith, the party diverts the procedural right from the purpose for which it was granted by the law, but the new purpose that is intended to be given to it is the injurious one, of teasing the adversary or a third party" [20]), in view of the fact that, however, the two elements are distinct[21], we consider that the reference of the purpose to the injurious result is unnecessary, and even erroneous. In other words, there is no need to show that the right has been diverted from the purpose for which it was recognised (objective element) by proof of intent to tease, to harm, since such teasing/harm is a necessary and sufficient expression of bad faith, as a purely subjective element. As a result, although the purpose exists as an objective element, it must be isolated, in the analysis of the exercise of the objective right, from the subjective element of bad faith. The objective element, consisting of the purpose for which the right was recognised, is analysed according to comparability criteria, which determine whether the right exercised was excessive or not.

It must be said from the outset that this criterion is not that of the general, public interest, which existed under Decree No 31/1954. Any reference to the combination of personal and general interests, including those of a community, must therefore be stubbornly avoided, as otherwise we would end up in the dangerous situation of the ultra-active nature of an abandoned principle of law (for example, in an opinion based on the New Civil Code, it has been stated, in a critical manner, that the exercise of subjective rights should be in line with general interests[22]). The purpose of Article 12 paragraph (1) of the of the Civil Procedure Code, that the interests of the individual are not confused with those of the community, must be sought in the new substantive law[23], which is Art. 15 of the Civil Code,

[17] Daniel Ghiță, *Repere privind fundamentul abuzului de drept, elementele abuzului de drept procesual și sancționarea acestuia în Noul Cod de procedură civilă*. Revista „Dreptul" no. 2/2016, p. 39.

[18] Paul Perju in *Noul Cod Civil, comentarii pe articole*. Editura C.H. Beck, București, 2012, by Flavius A. Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coordonatori), p. 15.

[19] Delia Narcisa Theohari, Marius Eftimie, în *Noul Cod de procedură civilă. Comentarii pe articole*, de Gabriel Boroi (coordonator). Editura Hamangiu, București, 2012, vol. I, p. 42). As we can see, in the example given, the idea of misappropriation of purpose is, in fact, an injury to another, which means that there is not an objective element, but a subjective one: bad faith.

[20] Dumitru Florescu, *art. cit*., p. 88.

[21] In the same way, see Sache Neculaescu – *Abuzul de drept, sancțiune sau remediu*, in *op. cit*., by Marilena Uliescu (coordonator), vol. I, p. 110.

[22] Carmen Tamara Ungureanu in *Noul Cod Civil*. Editura Hamangiu, București, 2012, by Collective authors, vol. I, p. 34.

[23] Ion Deleanu, *op. cit.*, p. 113.

the procedural rule being just another facet of the substantive one or, as Professor Stătescu said: "the procedural rule is subordinate to the substantive law rule, that in order to determine the exact meaning of the procedural rule, one must start from the content of the substantive law rule"[24]. This therefore implies ignoring the substantive law relating to the procedural law rule (Article 723) of the old civil procedure code, a substantive law represented by the provisions of Articles 1 to 3 of Decree No 31/1958, now repealed[25] (in fact Article 723 was introduced into the Code only a few years after the Decree). The fact that the purpose for which the right was recognised is no longer provided for in Article 12 paragraph (1) of the Civil Procedure Code as "economic-social" is irrelevant, as any subjective right is economic-social by nature (right-function)[26], in the sense that the holder is seeking economic-social results (moreover, the term in question was not mentioned in Art. 723 of the old civil procedure code).

Circumscribed in the form of economic and social imperatives subsumed under general, public interests[27], the purpose has proved regressive and utopian because, by going beyond subjective limits, it actually denies the personal interest that motivates any kind of action of an individual in a democracy. Therefore, the purpose of the exercise of the right – not only material but also procedural – must be considered, from an objective point of view, by reference to the comparability criterion in Article 15 of the Civil Code, which is that of excessiveness and unreasonableness. In other words, the deviation of the right from the purpose for which it was recognised is determined by reference to the proportionality and reasonableness of its exercise. *Proportionality* means that the result sought by the rightholder must not be manifestly disproportionate to the harm caused, i.e. in order for the rightholder to achieve a minor result, he must cause major harm to another subject of the right. *Reasonableness* means (with reference to an action) within the usual limits, which is not exaggerated[28], and balanced.

As a conclusion, today, the exercise of the subjective right contains a (new) *objective element* consisting in the *proportionality* and *reasonableness*[29] of the exercise (cumulatively met), to which is added the constant *subjective element* of *good faith*, consisting in the absence of *intent to harm*. In other words, the exercise of the subjective right is circumscribed by the principle of *neminem laedit qui suo jure utitur*[30], and is restricted as follows: (i) *subjectively*, *by bad faith*, equivalent to the desire to harm and/or (ii) *objectively* – i.e. even in the absence of intention to harm – *by the excessive (disproportionate)* and *unreasonable nature* in relation to the result sought[31]. The repetition of good faith at the end

[24] Constantin Stătescu, *Cu privire la raportul dintre norma de drept procesual și norma de drept substanțial. Implicații referitoare la cumulul răspunderii civile delictuale cu răspunderea contractuală*, in Revista Română de Drept" no. 7/1967, p. 7

[25] Grațian Porumb, *Codul de procedură civilă, comentat și adnotat*. Editura Științifică, București, 1962, vol. II, p. 498 and Dumitru Florescu, *art. cit.*, p. 89.

[26] Dumitru Florescu, *art. cit*., p. 89.

[27] Traian Ionașcu and others, *Tratat de drept civil*. Editura Academiei Române, Institutul de Cercetări Juridice, București, 1967, vol. I, p. 165.

[28] Romanian explanatory dictionary, ed. 1998.

[29] In an opinion to which we do not subscribe (Daniel Ghiță, *art. cit*., p. 44) it has been said that this element is a subjective one, specifically a form of fault.

[30] "No one is harmed who uses his right" (Felicia Ștef, *Dicționar de expresii juridice latine*, Editura Oscar Print, București, 1995, p. 145).

[31] In the same way, see Sache Neculaescu - *Abuzul de drept, sancțiune sau remediu?,* in *op. cit.*, by Marilena Uliescu (coordonator), vol. I, p. 126, from which we quote: "The new legal provisions embrace the

of Article 15 of the Civil Code, after appearing at the beginning in antithetical form ("no right may be exercised in order to harm or damage another or in an excessive and unreasonable manner contrary to good faith") is not a tautology, but is intended to express a criterion of conduct, on the basis of which excessive and unreasonable character is assessed; it is true that it could just as well have been omitted, so as not to cause confusion between the subjective and objective elements.

In procedural matters, the abuse of rights is sanctioned primarily by the state's refusal to recognise the right exercised in this way, a refusal which takes the form of the rejection of the application for legal action (brought, for example, for the purposes of defamation or denigration), together with the claim for costs. If the abusive right exercised has an existence in itself, the sanction will affect only the act containing the right, and if that act forms the basis of other procedural acts, these will also be ineffective[32]. In addition, the person who abuses the procedural right may also be liable to a judicial fine. The sanctioning of the abusively exercised material right is sanctioned by the nullity of contractual clauses considered to be abusive, but only in relations between professionals and consumers (according to Law no. 193/2000) or by ordering the holder of the abusively exercised right to cover the damage thus caused to the holder of another subjective right, or even to the holder of a simple interest, as long as this interest is legitimate and serious and, by the way it is manifested, creates the appearance of a subjective right (art. 1359 Civil Code).

Although the right exercised falls within its external limits, the abuse transforms it into an unlawful act, so that the abusive act becomes a species of unlawful act[33]. As a result, when the abuse of rights, whether material or procedural, has caused damage, the rules of civil liability in tort will be applicable under Article 1353 of the Civil Code[34], provided, of course, that the other legal conditions are met. Fault may be expressed not only in the form of intention, equivalent to bad faith, or gross negligence, equivalent to intent[35], but also in all other forms of fault, including the slightest[36]. Moreover, the theory of equity or of objective, autonomous liability, which is becoming more and more established not only in judicial practice but also in regulatory matters – such as in the regulation of neighbourhood relations (Article 630 paragraph (1) and (2) of the Civil Code) or liability for damage caused by animals (Article 1374 of the Civil Code) or property (Article 1376 paragraph (1) of the Civil Code) – is based on the simple need to cover the damage caused by the improper

eclectic conception of abuse of right, the first hypothesis evoking the subjective criterion by referring to the purpose of harming or damaging another, which implies reference to the subjective attitude of the perpetrator, and the objective criterion, by referring to the excessive and unreasonable exercise of the right to the standard of good faith".

[32] Viorel Mihai Ciobanu, in *Noul Cod de procedură civilă, comentat și adnotat*. Editura Universul Juridic, 2013/2016, de Viorel Mihai Ciobanu, Marian Nicolae (coordonatori), vol. I, p. 33

[33] Dumitru Florescu, *art. cit*., p. 87.

[34] For a view that liability for abuse of rights, as a wrongful act committed with guilt, is not strictly a tort, but "a distinct source of civil liability", see Daniel Ghiță, *art. cit*. Apart from contractual liability, which therefore presupposes the existence of a contract, we do not see what other form of liability, sui generis, would exist in our law.

[35] Dimitrie Gherasim, *Buna credință în raporturile juridice civile*. Editura Academiei Române, București, 1981, p. 124.

[36] In the same way, see Sache Neculaescu – *Abuzul de drept, sancțiune sau remediu*, in *op. cit*., de Marilena Uliescu (coordonator), vol. I, p. 110. For a view that fault can only be one "with foresight", see Daniel Ghiță, *art. cit.,* p. 45 (by fault with foresight, the author means a form of fault of lesser intensity than serious fault).

exercise of the right, in the absence of any form of fault[37]. The textual argument in favour of the perpetrator's liability not only for intent, but also for fault in the exercise of the right, or – as we have noted – even in the absence of any form of fault, is that the subjective element need not necessarily accompany the objective element: "no right may be exercised with the aim of injuring or harming another or in an excessive and unreasonable manner [...]". The tortfeasor may therefore be required to cover the damage caused by the exercise of the right even where the subjective element of bad faith is lacking, the legal text providing, as we have seen, for the alternative (not cumulative) existence of the two elements, subjective and objective. An example has been given in the literature from French practice[38], where the builder of a 21-storey building was ordered to pay damages, in the absence of any fault, for the loss consisting of a reduction in the value of neighbouring buildings. However, by way of exception, it has been held in doctrine[39] that a person who exercises a right improperly may not be in tort in two situations: (i) when he has sincerely and legitimately but mistakenly believed in his right (situation of appearance in law) and (ii) when he has fulfilled an obligation (attribution).

[37] For that, see Philippe Malaurie, Laurent Aynes, Philippe Stoffel-Munck, *Obligațiile*. Editura Wolters Kluwer, București, 2010, p. 39, the authors mention the so-called virtual fault, developed by case law, i.e. the fault resulting only from the damage: *res ipsa loquitur* ("the thing speaks for itself"), which completely eliminates the existence of fault, i.e. an approximation to the theory of risk. See also, with reference to the American system, Constantin Stătescu, *op. cit*. Last but not least, see also Sache Neculaescu - *Abuse of law, sanction or remedy*, in *op. cit*., by Marilena Uliescu (coordinator), vol. I, p. 118. For a contrary (older) view, according to which guilt must exist, at least in the case of abuse of rights, see Ion Deleanu, *op. cit*., p. 112.

[38] J. Flour, J.L. Aubert, E. Savaux, *apud* Sache Neculaescu – *Abuzul de drept, sancțiune sau remediu*, in *op. cit*., by Marilena Uliescu (coordonator), vol. I, p. 119.

[39] Sebastian Bodu, *Tratat de drept societar*. Editura Rosetti Internațional, București, 2014-2015, vol. I, p. 568.

BRIEF CONSIDERATIONS OF GOOD FAITH WITH REGARD TO THE CONDUCT OF THE EMPLOYEE'S PRELIMINARY DISCIPLINARY INVESTIGATION

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a. Introductory Considerations.

According to Article 8 of the Labour Code, labour relations are based on the principle of consensus and good faith. In employment relationships, good faith is manifested in particular by the obligation of the parties to inform and consult each other when concluding and during the performance of the individual employment contract, an obligation expressly enshrined in Article 8(2). (2) of Article 8 of the Code. Thus, from the texts of the Labour Code which develop these provisions, good faith takes the form of the pre-contractual and contractual obligation to inform, the obligation to consult, the obligation to cooperate, the obligation of confidentiality and the obligation of fidelity. These legal rules must also be analysed in the light of the regulation of good faith in the Civil Code (Articles 14-15).

In view of the forms of good faith provided for by the Civil Code, subjective good faith and objective good faith[1], good faith in the employment relationship is manifested mainly as a rule of conduct (objective) and operates as a relative legal presumption. Good faith in the objective sense implies honest, fair, loyal and reasonable conduct[2] in the exercise of subjective rights and the performance of legal obligations or those arising from the conclusion of the individual employment contract.

Basically, acting in good faith by either party - employer or employee - means that bad faith is excluded, that the parties have correctly fulfilled their contractual obligations, fidelity and cooperation from the beginning to the end of the employment relationship. Breach of the requirement that no right shall be exercised with the purpose of injuring or harming another or in an excessive and unreasonable manner, and therefore contrary to good faith, constitutes an abuse of rights[3].

Good faith must not be superimposed on moral values, as respect for them constitutes a general, distinct duty (Article 11 of the Civil Code). Good faith does not mean respect for the rule of law either, since violation of the rule of law means lack of good faith, and therefore an unlawful act.

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[1] M. Nicolae, *Buna-credință și echitatea în Noul Cod civil (Good Faith and Fairness in the New Civil Code),* in Revista Română de Drept Privat (The Romanian Magazine of Private Law) no. 4/2020, p. 70 and the following.

[2] M. Nicolae, *Buna-credință în raporturile de muncă Good Faith in the Labor Rapports)*, in the volume *In memoriam Ion Traian Ștefănescu*, Editura Universul Juridic (The Legal Universe Publiching House), 2022, p. 141. The reputed civil law author distinguishes, also in labour law, between objective good faith as a legal principle, objective good faith as a general or special rule of conduct and subjective good faith as a necessary legal condition for the acquisition of a right or a legal situation.

[3] I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii (Labor Law Theoretical and Practical Treatise),* fourth edition, revised, Ed. Universul Juridic (The Legal Universe Publishing House), București, 2017, p. 94; F. Roșioru, *Dreptul individual al muncii. Curs universitar (Individual Law of Labor. University Course of Lectures),* Editura Universul Juridic, București, 2017, p. 233; A. Țiclea, *Buna-credință – principiu al dreptului muncii* (The Good Faith – a principle of labour law), Revista română de dreptul muncii (Romanian Review of Labour Law) n. 11/2013, pp. 15-22.

Thus, in the absence of a complete legal determination of the content of good faith, given the variable content of the concept, it is subject to interpretation by doctrine and, especially, by judicial practice. Identifying the functions of good faith in employment relations is all the more complicated because the rights and obligations derive from both the law and the employment contract and are intended to ensure the "multilateral protection" of employees.

Starting from these delimitations, the aim of this study is to capture the way in which the courts perceive good faith when carrying out a disciplinary investigation/sanction of an employee.

b. The Question of Good Faith in the Case of Prior Disciplinary Investigation.

According to Article 251 para. (1) of the Labour Code, no disciplinary sanction, with the exception of a written warning, may be imposed until a prior disciplinary investigation has been carried out. The purpose of the disciplinary investigation is to prevent abusive, unlawful or unreasonable measures ordered by the employer, taking advantage of his dominant position.

The disciplinary investigation starts with a written summons to the employee. The employee shall be summoned by the person designated by the employer or by the chairman of the disciplinary investigation committee or by the external consultant specialized in labour legislation authorised by the employer to carry out the disciplinary investigation[4].

1. The Labour Code does not expressly provide for the manner of convening the meeting. Thus, the employee may be summoned by any means of communication which ensures the transmission and confirmation of receipt. The purpose of the inquiry is to give the employee the right to formulate and support all the evidence and reasons that he considers necessary with regard to the facts that are being alleged.

In the absence of an express provision on how to communicate the written summons, it is questionable whether the provisions of Art. 252 para. (4) of the Labour Code, which provides for the communication of the decision of disciplinary sanction and which stipulates that the decision shall be communicated personally to the employee, with a signature of receipt or, if communication is made by registered letter, communication shall be made to the address or residence communicated by the employee. Since the summons to the employee must be made in order to achieve its purpose, in accordance with the provisions of Article 8 of the Labour Code, we consider that analogy is excluded. In the event that the written summons to the preliminary disciplinary investigation is communicated, the employee is aware of the possibility of incurring disciplinary liability at the primary stage of exercising the right of defence. On the contrary, in the case of the communication of the disciplinary sanction decision, the employee has gone through the stage and knows that it is possible to receive the sanction decision, being the one who should show diligence for receiving the decision. Thus, the communication can be made by handing it to the employee, by registered letter with acknowledgement of receipt, by courier, by bailiff, by e-mail. It is the employer who must show good faith within the meaning of Article 8 of the Labour Code by opting for the form of communication of the notice of meeting which ensures that it is

[4] I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii (Labor Law Theoretical and Practical Treatise),* fourth edition, revised, Ed. Universul Juridic (The Legal Universe Publishing House), București, 2017, pp. 845-850; I.T. Ștefănescu (coordinator), *Codul muncii și Legea dialogului social (Labour Code and the Social Dialogue Law)*, Editura Universul juridic, 2017, pp. 479-480.

received effectively and in good time. In this case[5], it was decided that the communication made by the employer to the employee's address in writing did not correspond to such a desire, given that the employer was aware that the employee had informally changed his place of residence and that correspondence was by email, a procedure agreed by both parties. The court found that the employer had not shown good faith in the way it summoned the employee and that the time limit set for the disciplinary investigation was unreasonable, with the consequence that the employee did not appear. The summons was of a purely formal nature, which led to a finding that the decision imposing the disciplinary penalty was invalid.

On the other hand, the employee summoned for disciplinary investigation must also show good faith in receiving the correspondence. If the employer chooses to communicate the summons personally to the employee, the refusal to receive it amounts to bad faith on the part of the employee.

The employer may prove this by a statement from the person(s) in charge of handing out the invitation and those present. In such a situation we do not consider that the employer would be obliged to repeat the communication procedure and send the summons by other means. If the employer chooses to send the summons by registered letter, the employee's failure to return the mail and the return of the envelope to the sender will result in the summons procedure being repeated by the same or alternative means in order to obtain proof of communication.

2. Article 251 of the Labour Code does not contain a time-limit within which the summons must be sent so that the employee can effectively and efficiently exercise his rights of defence in the preliminary disciplinary investigation.

As mentioned above, the summons to the disciplinary inquiry cannot be formal. Although the law does not lay down a specific time-limit to be respected by the employer, it must be reasonable, so that the employee has a real opportunity to effectively prepare his or her defence to the alleged facts. However, that requirement is not met if the employee becomes aware of the summons after the date on which he should have appeared or if he does not have the time necessary to travel to the place of summons or if he does not have a reasonable time to prepare his defence. The assessment of the reasonable time will be made on a case-by-case basis by the courts, taking into account aspects such as: the number of working days between the date of receipt of the summons and the date of the summons; the time needed for the employee to travel from his/her home or workplace to the place where the investigation is taking place, the time needed to contact the trade union organisation or an external consultant specialised in labour law to assist him/her; the number and complexity of the facts that are alleged; the type of evidence likely to be used in the exercise of the right of defence and the time needed to obtain it (e.g. the time needed to obtain the evidence, the time needed to obtain the evidence, etc.). If the summons has not been served within a reasonable time, the employee may ask the person empowered to summon him to appear for a new deadline.

If the employer does not allow a reasonable time for the employee to appear for an investigation and to formulate defences, we consider that the employer is in breach of the

[5] Civil ruling no. 326/A/6 aprilie 2017, Court of Appeal of Timișoara, published in *Formele răspunderii în dreptul muncii. Practică judiciară comentată și adnotată (The Forms of Liability in the Labor Law. Judicial Practice Commented and Annotated*, by C. Șiman and L. Dima, Editura Universul Juridic (The Legal Universe Publiching House), București, 2024, p. 156-159.

obligation to cooperate, not expressly provided for in Article 8(2). (2) of the Labour Code, even though it is inherent in the performance of the contract in good faith, thereby demonstrating bad faith.

Where, by internal regulation or collective agreement, the employer is required to comply with a certain time-limit, failure to comply with the time-limit is not a question of bad faith on the part of the employer, but a breach of a contractual rule, and failure to comply with the time-limit affects the validity of the preliminary disciplinary investigation.

If the employee, believing that the time-limit was unreasonable, has not requested the disciplinary investigation committee to grant a new time-limit, he may not plead the unreasonableness of the time-limit in court. This interpretation is also based on the principle of good faith in employment relationships. Accordingly, the employee cannot deliberately accept the vitiation of the disciplinary investigation procedure by passively assisting in irregularities which he accepts in order subsequently to rely on them in his favour.

3. In the context of the convening of the preliminary disciplinary inquiry, Art. 251 para. (2) of the Labour Code provides for the *subject of the investigation to be specified*.

The role of this provision is also to ensure that the employee's right of defence can be exercised effectively and efficiently. In this context, it is questionable whether the employer must describe the act and communicate the report/statement of the alleged disciplinary offence and whether he must communicate all the documents on file. Otherwise, whether the employer's bad faith can be invoked.

We note a difference in the wording of this provision from the one referring to the content of the disciplinary sanction decision and which refers to the "description of the act" that constitutes disciplinary misconduct - Art. 252 para. (2) letter a) of the Labour Code. The use of different terminology may be due to the time gap, the procedural gap and the different stage of evidence between the time when the summons is drafted and the time when the disciplinary sanction decision is issued. At the time of the issuing of the notice of disciplinary proceedings, there are indications that an offence has been committed, but the elements of disciplinary misconduct are crystallised during the preliminary disciplinary investigation. Therefore, with regard to the subject matter of the investigation, the facts known to the employer which create the prerequisites for the disciplinary sanction will be stated, which may be less elaborate, but not incomplete or imprecise, as this would prejudice the employee's right of defence. We believe that the failure to indicate the subject matter in the summons could result from the attached documents which allow the fact to be identified or even from the attached referral report. We do not consider that the employer's bad faith is in question if, having indicated the subject of the summons, he does not send the employee the other documents in the file.

4. A final point we would like to highlight concerns the possibility of the employee being called in for *a preliminary disciplinary investigation while on leave*.

According to Article 148 para. (1) of the Labour Code, rest leave shall be taken on the basis of a collective or individual schedule drawn up by the employer in consultation with the trade union or, where appropriate, the employees' representatives, for collective schedules, or with the employee, for individual schedules.

The employer may recall the employee from rest leave in case of force majeure or urgent interests requiring the employee's presence at work - Art. 151 para. (2) of the Labour Code. The text does not define the notion of "urgent interests", but we consider that these

interests refer to the (production) activity of the employer, to the performance of the activity, and not to the respect of the work discipline in the establishment.

In conclusion, since good faith is a fundamental legal concept, it has multiple applications, not only legislative but also judicial. As is clear from the practical aspects mentioned above, it is for the judge to define the content and conditions of application of the obligation to act in good faith. In relation to the legal rules governing disciplinary liability, it should be noted that in cases where the employer acts beyond the external limits of the disciplinary prerogative, i.e. without right, there is no abuse of rights, but rather an unlawful act[6], in breach of the mandatory rules.

[6] V. Pribac, *Abuzul de drept și contractele de muncă (The Abuse of Law and the Employment Contract),* Editura Wolters Kluver, București, 2007, pp. 124-125.

GOOD FAITH - *PRIMUM MOVENS* OF LAW. CIVIL PROCEDURE.

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« Il ne suffit pas d'imaginer un mécanisme ingénieux, une horlogerie des lois et d'institutions. Il faut une énergie pour mettre le mécanisme en mouvement. Et cette énergie (…) ne peut être trouvée que dans (…) la foi… » (Kant)

Abstract

An institution predominantly outlined in substantive law, good faith governs the conduct of civil trials, serving as both a guardian and a tool available to courts to protect equity. This legal institution consists of two elements: an intrinsic one and an extrinsic one. This represents the private conviction and the directed manifestation of behavior towards honoring commitments, a concept that allows the judge to assess the conduct of the litigants, both in substantive and procedural law relations.

Good faith in civil trials must be demonstrated throughout the entire litigation process, from drafting and arguing the pleading, submitting and giving evidence, participating in the trial, submitting defenses, motions, and exceptions, exercising the right to defense, presenting conclusions on the merits of the case, pursuing appeals, until the enforcement of the enforceable title, for the genuine redeeming of interest, rather than solely to vex the opponent, delaying the process, or hindering the discovery of judicial truth during the trial. If actions are not carried out within the external limits and for the purpose provided by the legislator, the presence of an abuse of rights will be found. The obligation of good faith is incumbent on all parties involved in the trial, namely the plaintiff, defendant, judge, court personnel, and third parties involved in the trial. In assessing compliance with the obligation of good faith, the court must analyze behavior equitably, objectively, and impartially to ensure the procedural guarantees of all litigating parties.

Keywords*: good faith, civil procedure, litigation, parties, procedural rights, abuse of rights.*

Introduction.

A fundamental concept, good faith, is defined in DEX as „*a person's belief that they are acting by a right and in conformity with the law or what is proper*" or „*the obligation of correct behavior that parties must keep at the conclusion and execution of contracts or, in the case of states, treaties*." . These definitions underline, on the one hand, a concept of a moral nature, namely a person's honest belief that they are behaving in accordance with legal provisions, and on the other hand, they outline the mutual respect owed through the obligation of individuals or states to adequately fulfill commitments made through contracts or treaties. Therefore, the notion of good faith has two components: belief (an intrinsic element) and behavior (an extrinsic element).

Although it is a fundamental institution of current legal systems and a guardian as well as a tool for protecting equity, good faith began to take shape in the legal field in ancient times. Although attributed to the Roman jurist Marcus Tullius Cicero, much earlier, even if not expressly mentioned, the idea of good faith emerged through the manner in which the obligations imposed by the Law of the Twelve Tables were respected. In Roman times, the notion of *bona fides* represented, on the one hand, devotion to the given word (*fides*), and on the other hand, it was the behavioral standard (*bene agere*) applied by the judge in *ius honorarium* actions to verify whether the parties acted diligently in fulfilling contractual obligations (*bona fides*). Similarly, the English also consecrated good faith through the *Magna Carta Libertatum*. In the Middle Ages, good faith entered the sphere of canon law, and the failure to fulfill assumed obligations constituted a sin "punished" by ecclesiastical courts, which had the competence to settle such disputes . Also, during this period, good faith was integrated into the concept of equity; there wasn't a well-defined boundary. In the modern era, following the entry into force of the French Civil Code in 1804, good faith suffered a decline in favor of the principles of autonomy of will and social solidarity. Moreover, good faith was not only part of behavioral ethics and the legal system but also served as a support for many philosophers.

As we do not aim to conduct an exegetic analysis of the evolution of good faith, we only show that in contemporary times, good faith does not have a legally established definition, but it represents a fundamental institution for maintaining the balance of all legal systems, being elevated to the rank of a principle. From the analysis of the regulation of this principle, we gather that good faith signifies the intimate conviction and the directed manifestation of behavior towards honoring commitments, as well as a concept that allows the judge to assess the conduct of litigating parties, both in substantive and procedural law relations. There, good faith plays a very important role in the meticulous endeavor to discover the truth and dispense justice, through its functions in substantive law. These functions have been eloquently captured by French doctrine, but considering the national regulations' French inspiration, these are also applicable in understanding the concept in domestic law.

Good faith supports the judge in discovering the truth by allowing them, through the interpretative function, to examine the conduct of the parties in the execution of the contract, namely whether the manner of execution corresponds to the true intent of the parties at the time of assuming contractual obligations. On the other hand, the complementary function enables the court to compel the debtor to fulfill even the unwritten contractual clauses that are mandatory due to the manner in which contractual obligations were assumed . The third function of good faith, the limiting function, has the role of imposing the execution of contractual obligations within the internal and external limits of the law. Therefore, to render justice in a specific case, the judge will be bound to verify whether the exercise of subjective rights was carried out within the limits of the law or constituted an abuse of rights . The last function, the adaptive one, is closely related to the theory of unforeseeability and allows the judge to intervene in the understanding reached by the parties in the event that, due to reasons beyond the parties' control, the agreed upon contractual obligations have become excessively burdensome for one of the parties.

Although good faith is closely related to substantive law, being inseparably linked to the conclusion and interpretation of contracts, as well as the fulfillment of contractual

obligations, nevertheless, it concerns civil procedural law as well, with the first three functions being applicable, in our view, in civil procedural law as well.

Good faith in civil procedural law.

According to Article 12 of the Civil Procedure Code: „(1) *Procedural rights must be exercised in good faith, according to the purpose for which they have been recognized by law, and without violating the procedural rights of another party. (2) The party who exercises their procedural rights abusively shall be liable for the material and moral damages caused. They may also be liable, under the law, to pay a court fine. (3) Furthermore, the party who does not fulfill its procedural obligations in good faith shall be liable according to paragraph (2)."*

This legal provision imposes on the litigating parties the obligation to act in good faith during the trial, meaning to perform procedural acts within the limits of the purpose for which they were designed. This imperative obligation aligns with the constitutional principle provided by Article 57 of the Constitution, which is mandatory for all Romanian citizens, foreigners, or stateless individuals. Thus, this principle transformed into a duty implies the obligation of the rightsholder, when exercising rights, to act in accordance with the legitimate purpose for which they were provided (intrinsic element) and with the general obligation to respect the rights of others and not to harm others through the exercise of their own rights (extrinsic element) .

Given the above, procedural rights must be exercised under the same conditions as substantive rights, meaning with respect to the purpose for which the procedural means were provided by law, without causing injury to the adversary and without violating the rules of the litigation process. This principle has a purely procedural nature by virtue of which, with respect to procedural guarantees, the judge is required to verify how the parties fulfill their procedural acts. However, analyzed in depth, it suggests that it is the parties themselves who must exercise their rights and obligations with the honest belief that they are pursuing the judicial process to assert their own right, not to wrong others.

The essence of this procedural principle is that in the case of exercising procedural rights in bad faith and by distorting the purpose of the procedural institution, the party will commit an abuse of rights and will be liable for the damages caused to the party whose procedural rights have been violated .

The meanings of good faith in civil procedural law.

One meaning attributed to good faith in civil procedure is the intentional element underlying the exercise of civil subjective rights . In other words, the first civil procedural institution governed by bona fides is the civil action itself, which according to Article 29 of the Civil Procedure Code represents „*the set of procedural means provided by law for the protection of the subjective right claimed by one of the parties or of another legal situation, as well as for ensuring the defense of the parties in the process."*

From the correlation of this legal provision with the principle of good faith regulated by Article 12 of the Civil Procedure Code, it follows that the judge must verify whether the pleading was submitted with the purpose of asserting a claim or protecting an infringed subjective right, or whether the action is brought to congest the court's activities or to

inconvenience or harm the opponent. In this sense, the court could consider that evidence of submitting the pleading in good faith is the notice of default of the debtor prior to the filing of the lawsuit, separate from the claim itself. Otherwise, according to Article 1522 paragraph (5) of the Civil Code, in correlation with Article 454 of the Civil Procedure Code, if the debtor has not been notified beforehand, or was not legally in default, the creditor shall bear the court fees. In this situation, even if the creditor had an unsatisfied claim in the substantive plan, upon examination of the intrinsic reason for filing the lawsuit, the court will find that it was driven by bad faith, namely without attempting prior amicable resolution of the dispute.

In chronological order after filing the lawsuit, good faith must govern the entire course of the civil process. Thus, since the civil lawsuit encompasses all procedural means provided by the legislator for the protection of rights and these means of manifesting of the civil lawsuit, whether they are pleadings, notices of defense, appeals, etc. , all must be exercised in good faith. Considering this meaning of good faith, the court must verify whether the motions filed in the lawsuit are valid or lead to stalling. For example, to grant a motion for postponement due to lack of defense under Article 222 of the Civil Procedure Code, it must be verified whether there is a valid reason not imputable to the party or their agent; otherwise, the court has the possibility to postpone the pronouncement of the judgment, upon request, for the submission of written conclusions. Since this basis for postponement is exceptional, and the legislator does not specify justifying reasons, we note that a reason for granting such a request could be the death of the conventional representative shortly before the court hearing.

Furthermore, another representation of good faith in the conduct of civil trials is the obligation of the parties not to excessively and unjustifiably oppose any requests from the opposing party to give evidence or carry out procedural acts, thus requesting an objective analysis of the motions, namely whether they are useful and relevant to the resolution of the case or lead to stalling. Likewise, this obligation is also present in the manner in which the judge handles the resolution of the lawsuit, who must settle the parties' motions objectively and impartially, and respect procedural guarantees. These obligations of the court are inherent to good faith as an intrinsic element of the right to a fair trial principle .

In conclusion, good faith is a defining element of civil trials, which is shaped as a procedural duty of all parties involved in the civil trial, parties, judge, participating third parties, and justice auxiliaries, all must demonstrate in the exercise of procedural acts the belief that they are acting in accordance with the letter and spirit of the law.

Abuse of rights.

As previously mentioned, the legislator imposes, through the imperative provisions of Article 12 of the Civil Procedure Code, that parties must exercise their procedural rights with respect to the purpose for which they were recognized by law, without harming other participants in the civil suit; otherwise, legal liability is incurred as a result of committing an abuse of rights.

To establish the liability of a party who acts in bad faith, the court must analyze the institution of abuse of rights institution, which, according to doctrine , consists of two constitutive elements, one subjective and one objective. The subjective aspect has a psychological connotation, namely the filing of the lawsuit with the clear intention to harass

the opposing party or to overload the role of the competent court, while the objective aspect concerns the exercise of the substantive right to file the lawsuit in order to obtain unlawful or detrimental results in relation to the opposing party, rather than obtaining a real benefit and coercion of the debtor who refuses to fulfill their obligations willingly, with the coercive force of the state.

Upon initiating the lawsuit, according to Article 194 of the Civil Procedure Code, the plaintiff has the obligation to indicate the identification data of all parties (to legally conduct the process of citing all parties to ensure equality of arms), to detail the facts and legal grounds (so that the court can assess the claim, establish jurisdiction or the value of court fees, etc.), or to include the evidence on which each claim is based. Another situation in which abuse of rights may arise is the submission of evidence to be heard in the lawsuit. Even though the court, by virtue of its active role in discovering the truth provided by Article 22 of the Civil Procedure Code, is bound to re-establish the legal grounds of acts and facts brought before it, the parties have the obligation to respect the conditions for exercising procedural acts, according to Article 10 of the Civil Procedure Code. Otherwise, according to Article 196 of the Civil Procedure Code, the pleading will be found void .

Furthermore, the right to participate in the trial must be exercised in good faith; otherwise, abuse of rights occurs. Thus, with regard to this right, the parties must inform the court of any change of residence or address where procedural acts are communicated, they must mention the presence of the party in court when attending the court hearing, whether in person or through an agent.

Regarding the parties' right of disposition over the trial, it must also be exercised within the limits of good faith. Thus, if the plaintiff chooses to withdraw the pleading after it has been served to the defendant, the obligation to pay court costs for both parties will remain with the plaintiff if the defendant proves that expenses were incurred in preparing their defense. Likewise, if the plaintiff wishes to withdraw the lawsuit after the initial hearing, to avoid exercising this right abusively, the legislator requires that withdrawal can only be legally executed with the express consent of the defendant. Otherwise, the plaintiff may waive the claimed right itself or leave the case pending to become obsolete . From the analysis of the situations mentioned above, in order to avoid committing an abuse of rights, the parties must pursue the purpose of the action, understood as „the recognition, pronouncement of the plaintiff's right and, in principle, its enforcement. "[1] .

To trigger the liability of the party committing an abuse of rights, the court will need to verify whether certain cumulative conditions are met, as follows: the author of the abusive act must be the rightsholder, the author of the abusive act must have the capacity to exercise the act, the exercised act must respect the external limits imposed by the legislator, but the act must have been exercised in bad faith and with a different purpose than that instituted by law. As for sanctioning abuse of rights, although there are a limited number of procedural provisions governing the sanction of abuse of rights, the court may apply a court fine and damages on the author, and regarding the legal act, it will be void of content and effects or will be annulled . It is important to mention that the analysis of these criteria will be conducted according to the court's own belief, as the legislator only indicates the limits within which the analysis should be conducted.

[1] By compelling the defendant through the rendered judgment and, in case of non-compliance, the enforcement of the provisions of the judgment.

Conclusions.

Good faith is a fundamental institution of current legal systems, serving as both a guardian and a tool in the hands of the court to protect equity. Although it is an institution primarily established in substantive law, it must also govern the civil trial process, being expressly or implicitly regulated by the Civil Procedure Code. This legal institution, even though it does not have an explicitly established definition, encompasses two aspects. The intrinsic aspect entails a person's honest belief in behaving in accordance with legal provisions, while the extrinsic aspect entails the manifestation of behavior in line with both the letter and the spirit of the law.

In the civil procedural aspect, good faith takes on several dimensions, among which we mention, in a non-exhaustive manner, that it is an intentional element underlying the exercise of civil subjective rights, an intrinsic element of the right to a fair trial principle, as well as a procedural duty.

Good faith imposes on all parties involved in the trial—plaintiff, defendant, judge, court personnel, or third parties involved in the litigation—to perform each procedural act within the external limits and for the purpose provided by the legislator; otherwise, abuse of rights is committed. Sanctioning abuse of rights can apply to both the author of the act and the abusive act itself. Thus, the author may be subject to a court fine and the obligation to compensate for the injury through damages, while the act itself will be void of effects or annulled.

The obligation to exercise all procedural acts in good faith persists throughout all procedural stages, including the enforcement phase. Therefore, civil action must be initiated to enforce a right, and all procedural acts performed by the parties— motions for evidence, defense submissions, exercise of appeals, and opposition to the adversary's motions—must be carried out for the genuine pursuit of an interest, rather than strictly to vex the adversary, delaying the process, or obstructing the discovery of judicial truth in the trial. Moreover, parties must not oppose the adversary's requests excessively and unjustifiably. As for the judge, they must verify whether the parties have acted in good faith, however, this analysis must be conducted objectively and impartially to ensure respect for procedural guarantees, as good faith is also an intrinsic element of the principle of the right to a fair trial. In conclusion, good faith is a guardian of equity protection.

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GOOD-FAITH IN EXECUTING THE INDIVIDUAL EMPLOYMENT AGREEMENT IN CORRELATION WITH THE EMPLOYEE'S OBLIGATION TO BE PROFESSIONALLY FIT

Dr. **Ştefania Stanciu**

Abstract

The parties of the employment relationship need to act in good-faith in regards to the manner in which they conduct this relationship. This principle applies to all the rights and obligations the parties assume during the employment relationship. The employee's obligation to be professionally fit at the time of applying for a position, also at the time of conducting the individual employment agreement and to remain professionally fit for the entire duration of the employment relationship is one of the obligations that are subject to the principle of acting in good-faith. In equal part, the manner in which the employer exercises the right to verify the professional fitness of the employee during the employment relationship is also subject to the same principle. This paper aims to explore how the parties of the employment relationship act in good-faith regarding the professional fitness obligation, how breeching this principle can affect the employment relationship and how bad-faith can be sanctioned.

The principle of conducting employment relationships in good-faith is expressly stipulated by article 8 paragraph (1) of the Labour Code[1], that transposes in the employment legislation the common law principle that is regulated by article 14 paragraph (1) of the Civil Code[2]. By correlating the two legal provisions it can be concluded that the good-faith in conducting employment relationships entails exercising the rights and fulfilling the obligations by the parties of these relationships according to the moral values and by complying with the legal order. Good-faith needs to be manifested in regards to all the aspects of the employment relationship, starting from the initial negotiation – that can lead to the establishment of the legal relationship if it results in the conclusion of the individual employment relationship, continuing with the manner in which the resulting individual employment relationship is executed and ending with the termination of the legal relationship, no matter the grounds for this termination. The need for exercising the rights and executing the obligations in good-faith applies to both the employer (or the potential employer, if the analysis is in regards to the recruiting period) and the employee (or potential employee/candidate and in regards to all these stages of the employment relationship.

In executing the individual employment agreement the employee is responsible for the obligations arising from the legal provisions, both those expressly provided by article 39 paragraph (2) from the Labour Code, as well as those that are a result of the interpretation of other applicable legal provisions, as well as those arising from the individual employment agreement, or, if the case, from the applicable collective labour agreements. One such

[1] That states that "*Employment relationships are based on the consensual assertion and good-faith principles*."

[2] That states that "*Any physical or legal person needs to exercise their rights and to execute their civil obligations in good-faith, in accordance with the legal order and good morals*."

obligation that rests with the employee and that derives from the interpretation of the legal provisions is the obligation of the employee to correspond professionally for the position that he is selected and subsequently employed for (to be professionally fit for the position), both at the conclusion of the individual employment agreement but also subsequently, for the entire duration of execution of this agreement.

The existence of this type of obligation related to the professional fitness results from the interpretation of the legal provisions related to:

- the selection of candidates for employment based mainly on their professional skills[3];
- the probationary period, especially the scope of regulating such a period for employment agreements that is expressly stated as being for verifying the skills of the new employees, but also to the possibility of sanctioning the unfitness of the employee during this period, including the professional unfitness by allowing the termination of the employment agreement at the initiative of the employer by simple notification[4];
- the sanctioning of non-compliance with this obligation of professional fitness after the completion of the probationary period with the possibility to dismiss the employees for professional unfitness.[5]

The obligations in relation to the professional fitness of the candidate that participates in a selection/recruiting procedure for occupying a vacant position need to be analysed in regards to formalizing the intent to participate in this selection/recruitment procedure by applying for the position and also in regards to the stages the potential employer includes in the selection/recruitment process.

In regards to the preliminary stage when formalizing the intent by applying for the vacant position, the individual should verify his compliance with the general requirements for filling the position indicated by the potential employer within the announcement regarding the job opening (for example the education requirements, seniority in the field, age[6], holding certifications, diplomas or authorizations, possessing specific skills or knowledge, such as the use of certain equipment or the knowledge a foreign language, etc.). The good faith of the candidate in relation to his obligations in relation to professional fitness in this situation needs to be shown in regards to complying with these general requirements and not presenting an application that is clearly not suited to the need as expressed by the potential employer, thus avoiding to burden the candidate selection process.

In regards to the actual selection/recruitment process most of the times, this process also involves an actual verification of the candidate's professional skills and their correspondence with the needs of the potential employer, in order for the candidates to be offered employment. This verification can be made in any manner that is considered useful and relevant by the potential employer (that should however set the verification stages in good-faith), for instance by organizing interviews, selections, exams, practical trials etc., during which the candidate is required to prove that he has the necessary abilities and knowledge to occupy the vacant position, meaning that he is professionally fit for it. A

[3] The provisions of article 29 of the Labour Code support this interpretation

[4] Under the conditions stipulated by article paragraph (3) of the Labour Code

[5] Based on the provisions of article 61 paragraph (1) letter d) of the Labour Code

[6] As long as the requirements of the potential employer are reasonable (for instance requiring candidates to be above the age of 18 years for activities that need to be performed under hard or dangerous conditions) and not rooted in discrimination

potential manifestation of the candidate's bad faith during this stage could intervene in case of possible frauds during these verification stages. On the other hand, it was established[7] that the employer should also prove due diligence in selecting the appropriate workforce for the activities that are under his coordination and supervision. A potential manifestation of the bad faith of the potential employer could be the selection for employment of individuals that prove evident professional unfitness during the selection/recruitment process.

During the selection/recruitment process for occupying a vacant position the candidates don't have an actual professional fitness obligation towards the potential employer as no employment relationship is established yet, but it could be said that they do have an obligation to prove their professional fitness in order to establish this employment relationship. However the candidates should adopt during the selection/recruitment process a conduct that shows good-faith as the imperative provisions of article 8 paragraph (1) of the Labour Code covers, as mentioned above, all stages of the employment relationships, including these preliminary stages.

Taking the above under consideration, this paper will not make a further detailed analysis of the obligations related to the professional fitness during the period that precedes the employment but instead will focus on the obligation of professional fitness that is born at the time of the conclusion of the individual employment agreement and needs to be observed by the employees for the entire duration of the execution of this agreement.

Once the individual employment agreement is concluded, no matter if a probationary period is agreed upon or not, the employee has the obligation to maintain a level of professional fitness for the position that he occupies.

Even if the Romanian legislation includes legal provisions regarding the professional unfitness it does not however include any express mention of the obligation of professional fitness as this obligation is not included in the ones established for the employees by article 39 paragraph (2) of the Labour Code. The existence of this obligation of professional fitness is contoured by the sanctioning of non-complying with this obligation with the most severe type of sanction that can be used in a an employment relationship against an employee – the termination of the employment for professional unfitness, either by simple notification during the probationary period or by dismissing the employee for his professional unfitness after the probationary period has ended or in the cases where a probationary period was not agreed upon.

The professional fitness has been defined as being "*the general capacity or ability of the employee to execute, at a certain time, in an appropriate manner the individual employment agreement (to fulfil specific work tasks) based on pre-established requirements/standards that are in accordance with the nature of the work and on certain specific conditions the activity is performed under*."[8] This definition directly refers to the appropriate execution of the individual employment agreement, being underlined the obligational nature of the professional fitness.

Given the above definition it can be concluded that the employee has an obligation of professional fitness towards his employer, that refers to maintaining the professional activity at the level that is specified as being the expected level for the employer at the time of

[7] Barbu, Vlad; Cernat, Cosmin – „*Analiză critică asupra dispoziţiilor legale privind perioada de probă*" in The Romanian Employment Law Magazine No. 4/2008

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concluding the employment agreement, or at least at an average reasonable level for someone that occupies the specific position and has an appropriate qualification. This means that the employee needs to make the reasonable efforts to fulfil the work responsibilities entrusted to him by his employer and that are specific to his position at a level that is accepted as being objectively appropriate. If during the execution of the individual employment agreement due to the evolution of the working conditions, to upgrades or changes in technology, to changes or automation within the work process etc. the expectation of the employer regarding the professional fitness level of the employees has changed, the employees are held at the new professional fitness standard only if they benefited from proper training and an adaptation period, prior to imposing this standard and if the changes that intervened in the standard do not change the nature of the work that needs to be performed.

The expectations of the employer are made know to the employee by inserting in the individual employment agreement as essential elements[9] the responsibilities that are specific to the offered position and the evaluation criteria that will be used for the periodic professional evaluation of the employee, but also by setting performance objectives (in the Internal Regulation or in specific internal procedures). These performance objectives are not set in direct correlation with the professional fitness but they usually include a performance baseline that can be considered as the reasonable level of professional fitness. The employer can also set minimum quantitative results that are required to be reached (usually refered to as targets) or even quantitative and qualitative criteria that need to be observed.

In regards to the responsibilities that are specific to the position and the evaluation criteria the employee is informed even prior to the conclusion of the individual employment agreement, the potential employee being aware of the professional expectations that the employer has from him. If the selected candidate considers these expectations to be reasonable and in accordance with his profile, he can accept or decline the job offer. As long as the employee was made aware of these expectations, it is to be assumed that the employer will keep them at least at the initial level for the entire duration of the employment and that the employee will use the necessary diligence in being professionally fit for this entire duration. The employee's good-faith in relation to the execution of his professional fitness obligation is a result of using this diligence.

From the date of acceptance of the offer and the conclusion of the individual employment agreement, it is assumed that the individual that has now become an employee fully assumes the obligation to meet the requirements of his employer from a professional point of view. Also, if these requirements change during the course of the employment relationship, the employer communicates these changes in an adequate manner and, if necessary, asks for the express consent of the employee, the later has the obligation to make efforts considered reasonable in relation to the capabilities of an average person in order to preserve his state of employment fitness.

It should also kept in mind, as noted[10], the fact that the employer has the prerogative to establish the performance standards (objectives) and to professionally evaluate the employees, being able to change during the execution of the individual employment

[9] According to article 17 paragraph 3 of the Labour Code

[10] Alexandru Țiclea – „*Tratat teoretic și practic de dreptul muncii*", Second Edition, Universul Juridic Publishing House, Bucharest, 2024

agreement the focus of these professional evaluations. At the same time is should also be noted that the expectations of the employer should remain at an objectively reasonable level for the entire duration of the employment relationship.

Taking into consideration all these aspects it can be concluded that the employee should prove good-faith in maintaining the necessary level of professional fitness, while the employer should prove good-faith in maintaining a reasonable level of his expectations regarding the professional fitness of his employees.

The obligation of professional fitness is one that requires a continuous execution, meaning that it is necessary to be observed for the entire duration of the employment relationship but also that at any time during the execution of the employment agreement the employer can check if the obligation is observed in an appropriate manner, by verifying the level of professional fitness. Even if the professional fitness existed at the date when the employee first occupied the position (and it is expected to be properly verified by the employer as being at the required level at that time during the selection/recruitment process), this professional fitness should continue to exist for the entire duration of the execution of the individual employment agreement. If at a given point during the execution of the employment agreement in time the professional fitness was considered to be met this does not exclude the possibility that at a later verification the employer will find that this is no longer the case.

The employer has the possibility of verifying the professional fitness at any time during the execution of the individual employment agreement, this possibility being part of his prerogatives regarding the organization of the activity. However, the employer must use this prerogative responsibly - on the one hand in order to ensure the performance of the activity in good conditions, and on the other hand in order not to use employees that do not have the skills and knowledge necessary to perform the activity, as this could affect their security and the one of their colleagues, but also can limit the possibilities of professional development of these employees that could instead pursuit more suitable position. Likewise, the employer must not abuse the possibility of verifying the professional fitness of his employees, thus showing good faith.

Failure to comply with the obligation of professional fitness leads, as mentioned previously, to the possibility of the employer having the initiative to terminate the individual employment agreement, either by notifying the employee on the termination during the probationary period, or by dismissing him for professional unfitness (after observing the mandatory procedure).

Although a series of instances in which both the employee and the employer can show bad faith in relation to the employee's professional fitness obligation have been highlighted above, as a general rule, non-compliance with the principle of good faith is not directly sanctioned in this context.

Regarding the conduct of the employer, an abuse of law is usually invoked in relation to the manner in which the employer exercises his prerogatives in establishing employment conditions, procedures and ways of verifying professional skills upon employment or during the probationary period, as well as in relation with the manner the professional fitness is verified. The abuse of law is most often invoked while challenging the measures taken by the employer. For instance a candidate can challenge the job announcement claiming irregularities in the required conditions for occupying the position (for this analysis being of importance the conditions that are related to the professional abilities of the candidate)

and invoking that they are not adequate for the activity that is specific to that position (for instance university education is required for an executional position that requires mainly practical abilities that are not subject to university classes). In order to increase the chances of success of such claims, the focus is usually not set on the bad faith of the employer, but on proving that the selection/recruitment process was discriminatory.

A candidate can also challenge the manner in which professional skills were verified during the selection/recruitment procss, but even in this context, the abuse of law is usually linked to the violation of other legal provisions, especially those regarding equal treatment.

Acting in bad faith is most commonly invoked in regards to the conduct of the employer (the manner in which he verifies the professional fitness of the employees) when the result of the verification of the professional fitness leads to the termination of the employment during the probationary period. Considering the fact that the employer can decide during the probationary period the termination of the individual employment agreement by means of a simple written notification sent to the employee, without the need to justify the decision not to continue the employment relationship, employees that challenge such a measure usually do not have other legal arguments apart from invoking bad faith in the exercise of this right. It is true that after the changes made to article 64 of the Labour Code by Law no. 283/2022 by introducing paragraph (4) allows, (according to the interpretation that is in majority at this moment), that the employee whose individual employment agreement is terminated during the probationary period request the justification of the decision in situations where they believe that the termination was caused by the exercise of rights provided to the employees by law[11]. Even with this new legislative development, the employees still mainly invoke bad faith on the part of the employer in relation to the assessment of their fitness for the position, including the professional one.

If the professional unfitness was established after the completion of the probationary period, the employees that challenge the measure ordered by the employer as a result of this finding, namely their dismissal, can also invoke issues related to bad faith in the verification of the professional fitness, but more commonly they submit to the analysis of the courts irregularities regarding the dismissal for professional unfitness procedure as it results from the legal provisions and the applicable internal rules, meaning that the argumentation of the courts rarely touch on the issue of non-compliance with the principle of good faith in the resolution of such cases.

Also in regards to the conduct of the employee, his bad faith in relation to his obligations in relation to professional fitness is also not commonly directly sanctioned. Thus, if a candidate does not meet the general conditions required for occupying the position, or does not pass the verification tests, he will not be offered the position, his possible bad faith passing into the background. A possible fraud of the verification tests, if discovered, will also lead to the non-conclusion of an individual employment agreement, and if this fraud remains undetected, the professional unfitness may be found later, either during the probationary period or outside of it.

In regards to the possible bad faith of the employee related to his obligation of professional fitness resulting from the failure to submit diligence in order to maintain the state of fitness during the execution of the employment agreement, this also will not be

[11] The rights that are recognized by article 17 paragraph (3), article 18 paragraph (1), article 31, article 152^1, article 152^2, article 153^2 and article 194 paragraph (2) of the Labour Code.

sanctioned directly, but possibly as a result of establishing the professional unfitness. Depending on the specific manner in which the employee's bad faith is manifested in submitting the diligences to preserve his professional fitness, this may even be the basis for a disciplinary sanction of the employee.

Even if the sanctioning of acting in bad faith usually is relegated to the background it remains particularly important to exercise the rights and fulfil the obligations in relation to the professional fitness in good faith in order to ensure a good professional relationship during the employment.

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