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Reflections on the Principle of Equal Treatment in EU Law and the Jurisprudence of the Court of Justice of the European Union and the European Convention on Human Rights

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Abstract. The paper presents some of the most relevant aspects of European non-discrimination law established through European Union law and the European Convention on Human Rights, looking also at the evolution of the norms and milestones of case-law on equal treatment within the two systems. The paper gives an overview of the non-discrimination concept as interpreted by the Court of Justice of the European Union and by the European Court of Human Rights. We examine the similar elements but also give insight into conceptual differences between the two human rights regimes when dealing with equal treatment. The differences mainly stem from the more complex approach taken by EU law although, based on analysed norms, cases, and provisions, the aspects of equal treatment in EU law are largely consistent with the practice of the ECtHR. Lastly, the paper briefly places the European non-discrimination law within the multi-layered human rights system, giving some food for thought for the future potential this concept brings.

Keywords: equal treatment, non-discrimination, European Union Law, European Convention on Human Rights

Introductory Remarks

The necessity of the legal protection of equality and equal treatment has philosophical roots dating back centuries.[1]

Given its nature, the question of equality and equal treatment – a rather complex phenomenon – can be examined from various angles and levels. The criterion of equality can be found likewise in vast number of international agreements from

1 Mohay 2016. 1.

general multilateral treaties to bilateral ones. Those general documents[2] served as grounds for adopting regional documents with similar content.

The question of equal treatment is too broad to be examined in one paper, but in the regional context, especially bearing in mind the characteristics of EU law and the emerging tendency of a fundamental rights-based approach, it is more worth focusing on the regional perspective, exploring and comparing the layers and manner of protection granted by the Court of Justice of the European Union (hereinafter: CJEU) as well as the practice of the European Court of Human Rights (hereinafter ECtHR, or 'the Court') taken as a measure of last resort in our regional context under the auspices of the Council of Europe.

Reiterating the regional context, the term European non-discrimination law suggests that a single Europe-wide system of rules relating to non-discrimination exists; however, it is in fact made up of a variety of contexts,[3] a multi-layered regime which consists of a national level, a European Union level, and a Council of Europe (hereinafter CoE) level. Of course, the provisions existing in national law are usually at least partly meant to ensure fulfilment of international or supranational obligations of the state in question. Certainly, the national level serves as a starting point, given the fact that the claimants in cases of potential violation of their rights will first seek material and procedural protection on that level. However, the national level of protection in equal treatment goes far beyond the scope of this paper.

Therefore, in this multi-layered regime, the paper will focus on the two-level system established by the European Union (EU) and CoE, giving some food for thought for further analyses – thereby not meaning, of course, to discount the efforts

2 The Charter of the United Nations explicitly refers to equality on several occasions. The UN Charter Preamble states: 'the people of the United Nations are determined to reaffirm faith in fundamental rights (…) in the equal rights of men and women and of nations large and small. Afterwards the governing principle of the Charter is to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.' As for the Universal Declaration of Human Rights, the enjoyment of rights is guaranteed by the UDHR Article 2, while the mentioned UDHR Article states that 'everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (http://www.un.org/en/universal-declaration-human-rights/). The wording of the International Covenant on Civil and Political Rights is similar, at Part II, Article 2 (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx). It obliges each State Party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

3 European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe 2010. 12, 16. See also: European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe 2018.

made by other regional international organizations such as the OSCE.[4] However, within the EU and the CoE systems, various important players granting institutional protection or expertise have to be noted such as the European Committee of Social Rights (ECSR) and the Fundamental Rights Agency of the EU (FRA) – however, those are not in the focus of this paper. Furthermore, I should briefly note that under the CoE system there is a vast number of international regional agreements which in some form and to some extent safeguard some angles of the prohibition of discrimination, e.g., the Framework Convention for the Protection of National Minorities[5] or the European Social Charter. It is, however, quite undisputed that the most effective (even if not perfect) control mechanism is the one established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and its Court, the European Court of Human Rights (ECtHR).

Analysing the interference between the ECtHR and CJEU as well as their leading documents, the European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the ECHR, and the Charter of Fundamental Rights, we could possibly distinguish at least three layers of connection.

The first one would be the procedural one, meaning the interference between various procedures before the ECtHR and the CJEU, the second would be the interference with regard to the principles – this would mean the actual analysis of the equal treatment measures before the two courts –, and, lastly, the interference between the two courts could be analysed from the prospective of a certain right safeguarded both by the ECtHR and the CJEU.

The scope and the manner of the interference on a principle level, i.e. pertaining to equal treatment, will be analysed in the upcoming sections. It should already be stated that the source of the interference mainly stems from the concept of *equal treatment* itself, but the multiple EU sources of law referring *expressis verbis* to the ECHR, and even sharing the minimum meaning and scope of rights (especially bearing in mind the provisions of articles 52 and 53 of the Charter)[6] and case-law of the Court of Justice of the European Union (CJEU), should not be underestimated either. The opposite is also true: the ECtHR has dealt also with the issue of human rights protection in connection with European Union Law,[7] and the ECHR also contains an *expressis verbis* reference to the European Union.[8]

4 See, e.g., ODIHR publications on the subject matter, e.g., Anti-Semitic Hate Crimes (https://www.osce.org/odihr/430859) and the Guide to Addressing Hate Crime at the Regional Level (https://www.osce.org/odihr/402536).

5 Convention text and explanatory report available in Hungarian at: https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c1308.

6 OJ C 202.

7 For more information on the topic, see: Mohay 2015. 327–337.

8 ECHR Article 59 (2) provides that 'The European Union may accede to this Convention'.

1. The European Union Law-Based Perspective

In the law of the European Union, the requirement of equal treatment has several facets; it exists as a value,[9] a general principle, a fundamental principle,[10] and a fundamental right,[11] permeating the complete institutional mechanism of the EU in different forms. Given the fact that equal treatment within the EU legal order has multiple sources, the principle of equality can be found in numerous provisions of EU law at different levels and in different policy fields. I will refer only to the most relevant ones by which we can draw conclusions relating to the nature of equal treatment within the EU legal order and CJEU jurisprudence.

The fundamental-rights-based equal treatment provisions developed over time parallel to the development of the EU (and previously the Communities) itself. In the Rome Treaty, the equal treatment principle meant only the equal pay for equal work principle,[12] mainly focusing on employment and the internal market; it also included provisions against discrimination based on citizenship.[13] The CJEU developed the relevant law via method of interpretation – as it had done in relation to other fundamental rights and their violations – and found the source of protection for equal treatment in the general principles of EU law. As stated in the *Überschär* case, 'the general principle of equality, of which the prohibition on discrimination on grounds of nationality is merely a specific enunciation, is one of the fundamental principles of community law'.[14]

Following the adoption of the Maastricht,[15] Amsterdam,[16] and Lisbon treaties,[17] the notion of equal treatment has been broadened by introducing a more fundamental-rights-centred approach.

9 TEU OJ C 326, Article 2.

10 Peter Überschär v Bundesversicherungsanstalt, C-810/79, ECLI:EU:C:1980:228. However, this stance is also reiterated – inter alia – in Recital (4) of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, 37–43. This is also called the Goods and Services Directive.

11 Charter of Fundamental Rights, Chapter III, OJ 2000/C 364/01.

12 Article 119 of the Rome Treaty (http://data.europa.eu/eli/treaty/teec/sign).

13 Article 7 of the Rome Treaty (http://data.europa.eu/eli/treaty/teec/sign).

14 Peter Überschär v Bundesversicherungsanstalt, para. 16.

15 The Treaty of Maastricht – inter alia – amended Article 2 and introduced Article F, which provides safeguards for the Union to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law (https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf).

16 The Treaty of Amsterdam enhances the concept of equal treatment by adding several further provisions on equality. The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts is available at: http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf (see e.g. Articles 2, 118, 119).

17 See, e.g., Preamble, Article 1a, Article 2, Article 8 (OJ C 306). However, the Charter of Fundamental Rights, which became legally binding by the Treaty, should not be underestimated either and is addressed at later stages of the paper.

With regard to primary law as it stands today, the Treaty on European Union[18] (TEU) contains numerous provisions relating to equality. If we take as example the preamble, articles 2,[19] 3, 4, and 9, they all refer to equality in some form, and an *expressis verbis* prohibition on discrimination is apparent also from those articles.

The Treaty on the Functioning of the European Union (TFEU) addresses also some specific issues of equal treatment, dedicating to it an entire chapter.[20]

Article 18 of TFEU states that any discrimination on grounds of nationality shall be prohibited.[21] In order to secure that aim, under paragraph 2, the European Parliament and the Council may adopt rules by the ordinary legislative procedure. Article 19 of TFEU empowers the Council to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Many secondary norms relevant for this paper stem from this legal basis, such as Directive 2000/78 establishing a general framework for equal treatment in employment and occupation[22] and Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[23] (hereinafter: Employment Equality Directives). Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[24] (hereinafter: Racial Equality Directive) should also be mentioned, just as EC Directive 2004/113 on implementing the principle of equal treatment between men and women in the access to and supply of goods and services[25] (hereinafter: Gender Goods and Services Equality Directive).

The relevant provisions of the Charter of Fundamental Rights – binding since the entry into force of the Lisbon Treaty – can be outlined as follows: the preamble itself proclaims that equality is a universal value of the Union.[26] In addition, an entire chapter (III) is dedicated to equality, a standalone right in this situation, and articles 20 to 26 contain specific prohibitions with regard to several aspects of equality.[27]

18 OJ C-326.
19 OJ C-326.
20 TFEU Part Two, non-discrimination and citizenship of the Union.
21 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT) OJ C 326.
22 OJ L 303.
23 OJ L 204.
24 OJ L 180.
25 OJ L 373/37.
26 OJ 2000/C 364/01.
27 Those are: equality before the law, non-discrimination, cultural, religious, and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, and, last but not least, integration of persons with disabilities – OJ 2000/C 364/01.

Furthermore, other articles which similarly safeguard protection for equal treatment related to enjoyment of rights could be easily identified.

In this context, we cannot forget about Article 52 granting similar meaning and scope to Charter rights as those in the ECHR – including equality and non-discrimination – or, alternatively, a higher standard of protection. This wording regarding more extensive protection serves as a further basis for possible interference between the two human rights systems, although in this case intended for the benefit of the rights holders.

When it comes to deficiencies and limits of application, it is well known that all the elaborated provisions oblige EU institutions and bodies with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law, so the application of EU fundamental rights alone correlates strictly to the implementation of EU law. Furthermore, with regard to the given secondary norms, besides the fact that they are only applicable when implementing EU law, other deficiencies were also stated, inter alia, in the joint report by the Commission to the Council on the application of Racial Equality Directive and Employment Equality Directive.[28] Despite the 20-year gap, some statements are still not outdated such as the issue of access to justice, underreporting, not harmonized sanctions and remedies as well as varying standards of national case-law.[29] In order to address the abovementioned deficiencies, the Commission drafted a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation – a so-called horizontal directive. However, after 12 years, it is still at the proposal stage.[30]

2. The Relevant Provisions of the ECHR

Unlike EU law, under the ECHR, the source of equal treatment protection is more limited, having rather unitary source. Although equal treatment can be tackled

28 COM/2014/02 final.

29 Report from the Commission to the European Parliament and the Council – Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive') COM/2014/02 final http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0002.

30 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation [L2008/0140]. http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52008PC0426 COM/2008/0426 final – CNS 2008/0140/.

through the prism of ECHR rights, Article 14 of the ECHR[31] *per se* guarantees non-discrimination only in conjunction with substantive rights, i.e. the rights set forth in the Convention. Even if the application of Article 14 does not presuppose a breach of those provisions[32] – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of them.[33]

Albeit Article 14 enumerates examples of protected rights, it can be seen from the practice that the ECtHR interprets the scope of application of the provision rather extensively. These characteristics give Article 14 an ancillary nature.

In particular, Article 8 of ECHR and Article 1 of Additional Protocol 12 serve as door openers for the application of the equal protection guarantee. With this extensive interpretation, almost any fact has some kind of connection to a convention-based right. Furthermore, as an additional example, if we take harassment: it may fall under the right to be free from inhuman or degrading treatment or punishment under Article 3, while instruction to discriminate may be caught by other Articles such as freedom of religion or assembly under Article 9 or 11 of ECHR depending on the context.[34] Therefore, from that angle, one could conclude that Article 14 of ECHR does not differ much from a general prohibition of discrimination as established by Additional Protocol 12.[35]

Article 1 of Protocol 12 provides a general non-discrimination clause and thereby affords a scope of protection, which extends beyond the enjoyment of the rights and freedoms set forth in the Convention. The Protocol was ratified by 20 states to date;[36] unsurprisingly, the low number of ratifications – out of which only 10 EU Member States – undermines the practical applicability and relates to the inability or unwillingness of the vast number of CoE States to grant extensive protection for everyone within their jurisdiction. I believe that the ratification of the Protocol has a potential to be a 'Trojan Horse' of sorts.

The relationship between Article 14 and Additional Protocol 12 is also summarized in the case of *Sejdić and Finci v Bosnia and Herzegovina*,[37] whereas

31 According to ECHR, Article 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

32 See, e.g., Carson and Others v United Kingdom, Application no. 42184/05, ECLI:CE:ECHR:2010:0316JUD004218405, para. 63: 'The ECtHR held that the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention.'

33 Molla Salli v Greece, Application no. 20452/14, ECLI:CE:ECHR:2018:1219JUD002045214, para. 127.

34 Handbook on European Non-Discrimination Law – 2018 edition, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf, 67.

35 Petersen 2018. 130.

36 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=aRs5LrIw/.

37 The case considered applicants Mr Sejdić and Mr Finci, complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms set forth in the ECHR, and Article 1 of Protocol No 12 extends the scope of protection to 'any right set forth by law (…) Reiterating once again that it thus introduces a general prohibition of discrimination'.[38]

3. Addressing Common Elements

The first connection stems from the concept of non-discrimination itself. In general, this concept refers to less favourable treatment of a subject that is determined through an *in concreto* comparison between the alleged victim and another person who does not possess the protected characteristic in a similar situation.[39] The wording is in line with the ECtHR's interpretation as elaborated in the *Nachova and Others v Bulgaria* case, where the Court summed up that discrimination meant treating differently, without an objective and reasonable justification, persons in relevantly similar situations.[40]

ground of their Roma and Jewish origin. They relied on articles 3, 13, and 14 of the Convention, Article 3 of Protocol no. 1, and Article 1 of Protocol no. 12. 15. Under the current Constitution in the BiH, the Parliamentary Assembly is bicameral, consisting of the House of Representatives and the House of Peoples. The 42 delegates of the House of Representatives are directly elected, two-thirds by the Federation and one-third by the Republika Srpska (Art. IV Paragraph 1 of the Constitution). The number of mandates is not defined based on ethnic criteria but is divided between the two entities on a territorial basis. The House of Peoples consists of fifteen members: five Bosniak, five Croat, and five Serb delegates. While the five Serbian delegates are elected by the National Assembly of the Republika Srpska, the Bosniak and Croat members are elected by the Bosniak and Croat members' delegates of the House of the Peoples of the Federation (Art. IV, Paragraph 1 of the Constitution). Thus, the formation and election of the two chambers are based on the principle of parity, namely the parity of the entities (both chambers) and peoples (House of Peoples). Similar to the presidential elections, the election for the House of Peoples excludes Serbs from the Federation and Croats and Bosniaks from the Republika Srpska as well as all Others (such as the applicants) from both entities. As stated by Judge Bonnello in his dissenting opinion, it might be said that all of the weak features of Bosnia and Herzegovina's statehood, visible but ignored at the moment of its accession to the Council of Europe, have shown themselves to their full extent in the case of Sejdić and Finci 13, which prima facie might look as the simplest the ECtHR has dealt with, but they may be amongst those most insidious cases. Given the fact that this judgement was not implemented so far, other similar cases arose before the ECtHR such as Zornic v Bosnia and Herzegovina (Application no. 3681/06) and Pilav v Bosnia and Herzegovina (Application no. 41939/07). The Court and Council of Ministers also expressed on several occasions their frustration with the non-execution of the judgment in the case of Sejdić and Finci, encouraging the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees.

38 Sejdic and Finci v Bosnia and Herzegovina, application nos. 27996/06, 34836/06, ECLI:CE:ECHR:2009:1222JUD002799606, para. 53.

39 Handbook on European Non-Discrimination Law (2018 edition) 43; Schabas 2015. 564.

40 Nachova and Others v Bulgaria, Application nos. 43577/98, 43579/98, ECLI:CE:ECHR:2005:0706JUD004357798, para. 145.

From the CJEU case-law perspective, an opposite situation is also relevant: the principle of equality is violated also in instances where different cases are treated equally.[41]

However, there is a relevant procedural distinction, namely that before the ECHR, as a court allowing direct applications from private individuals, the person has to be able to prove his or her direct involvement in order to qualify for victim status. Before the CJEU, such a possibility does not exist; therefore, the question of victim status will probably be decided at an earlier stage of proceedings before a national court. In general, 'for long time pointed out by the scholar, the access of individuals to the ECJ is still poor and insufficient, leading sometimes towards a procedural labyrinth involving two or three jurisdictional levels which can hardly comply with the principle of effectiveness of the judicial system'.[42]

Although discrimination might have different forms, such as direct, indirect, multiple, and intersectoral discrimination, harassment, positive actions undertaken, etc., I will restrict myself to looking only at direct and indirect discrimination.

According to the wording of EU directives, direct discrimination occurs when one person is treated less favourably on the basis of protected grounds.[43] Less favourable treatment was also identified in one of the first cases of the CJEU on direct discrimination – much earlier than in directives –, in the case of *Defrenne*,[44] where the CJEU underlined the principle that men and women should receive equal pay for equal work. This wording is consistent with the ECtHR findings as elaborated, inter alia, in the case of *Carson and Others v United Kingdom*.[45]

Indirect discrimination – as the other type of discrimination to be discussed – occurs in cases where persons with different protected grounds are treated equally. This is where indirect discrimination differs from direct discrimination 'as it moves the focus away from differential treatment to look at differential effects'.[46]

One of the earliest cases related to indirect discrimination, the *Schönheit* case before the CJEU, concerned a retirement pension paid under a scheme such as the one established by the German law, which may entail a reduction in the pension of civil servants who have worked part-time for at least a part of their working life, where that category of civil servants includes a considerably higher number of

41 Hoche GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung, C-174/89, ECLI:EU:C:1990:270, para. 25.

42 Galera Rodrigo 2015.

43 See Racial Equality Directive Article 2, Services Equality Directive Article 2, and Employment and Occupation Directive Article 2.

44 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, C-43/75, ECLI:EU:C:1976:56.

45 Carson and Others v United Kingdom, para. 61.

46 Handbook on European Non-Discrimination Law (2018 edition), 56.

women than men unless the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.[47]

In the ECHR, there is no *expressis verbis* regulation on indirect discrimination – it has evolved through the court's case-law. It was outlined in the case *D. H. and others v the Czech Republic*, where indirect discrimination without objective and reasonable justification was ascertained: the applicants were treated less favourably than non-Roma children in a comparable situation, and this amounted in their case to indirect discrimination.[48] These two decisions rendered by the two courts clearly demonstrate that the two judicial bodies have a common approach when deciding upon the issue of indirect discrimination.

When it comes to protected grounds, under the EU legal order, they exist in parallel in primary and secondary law.

In the directives, the protected grounds vary covering racial and ethnic origin (racial directive), sex with regard to access and supply of goods and services, religion or belief, disability, age, sexual orientation, as regards the Employment and Occupation Directive. With regard to gender, as a protected ground, the protection is safeguarded even more broadly. As stated above, protected grounds exist in primary and secondary law, but in the case of gender equality protection has also another layer: it also exists as a fundamental principle of the European Union.[49] I believe gender equality, with its different layers of sources for protection, qualifies thus as one of the most recognizable aspects of equal treatment. The same goes for the prohibition based on nationality, which is safeguarded by multiple primary[50] and secondary law sources. Not undermining the importance of other protected grounds, in the EU context, gender, age, and nationality portray the most important cornerstones of equality. Nationality has specific characteristics within the EU legal order that should not be forgotten, bearing in mind the four freedoms and the purpose of establishment of the Communities and the Union itself.

Under Article 14 of ECHR protected grounds are, according to the non-exhaustive list, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. With regard to the protected grounds, in *Clift v UK*, the ECtHR held that Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective, or personal characteristic, or 'status', by which persons

47 Hilde Schönheit v Stadt Frankfurt am Main, C-4/02, ECLI:EU:C:2003:583.

48 D. H. and Others v the Czech Republic, Application no. 57325/00, ECLI:CE:ECHR:2007:1113JUD005732500, para. 183.

49 This statement is enshrined also in Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

50 See, e.g., TFEU articles 18, 45, 61, and 77.

or groups of persons are distinguishable from one another.[51] This interpretation seems to be a stringent one.

Analysing the case-law of the ECtHR, it is easy to conclude that most anti-discrimination cases relate to gender identity issues,[52] racial origin,[53] or sexual orientation issues,[54] mostly homosexuality cases.[55] However, besides those classic protected grounds, we cannot forget other relevant statuses either such as discrimination based on parental status[56] or, as a recent example showed, a case[57] concerning the application of Sharia law by the Greek courts. So, the above-mentioned stringency seems to have some flexibility. That is why I consider this Article as a forever inspirational source.

The scope of protected grounds evolved and will evolve in the future because of rapid changes in society. Thanks to the living instrument approach of the ECtHR, this will serve as a basis to adapt to newly identified protected grounds.

Needless to say, in none of the cases are those grounds protected *per se*: there always has to be a clear nexus between the discrimination and the protected characteristic.

Prohibition of discrimination is not an absolute right. Both systems allow justified differential treatment.

The ECtHR will analyse in a step-by-step fashion whether difference in treatment occurred between persons in a comparable situation, meaning that there must be a difference in the treatment of persons in analogous or relevantly similar situations[58] or, conversely, whether not equally positioned persons were treated in the same manner. As a next step, the Court will decide on the lack of objective and reasonable justification afterwards on the legitimate aim of the provision. As stated, in the *Molla Salli v Greece* case, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realized.[59] As stated by the ECtHR in the case of *Burden v United Kingdom*: 'there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable

51 Clift v the United Kingdom, Application no. 7205/07, ECLI:CE:ECHR:2010:0713JUD000720507.
52 P. V. v Spain, Application no. 35159/09, ECLI:CE:ECHR:2010:1130JUD003515909.
53 Nachova and Others v Bulgaria.
54 Identoba and Others v Georgia, Application no. 73235/12, ECLI:CE:ECHR:2015:0512JUD00732 3512.
55 Dudgeon v United Kingdom, Application no. 7525/76, ECLI:CE:ECHR:1981:1022JUD000752576.
56 Weller v Hungary, Application no. 44399/05, ECLI:CE:ECHR:2009:0331JUD004439905.
57 Molla Sali v Greece, Application no. 20452/14, ECLI:CE:ECHR:2018:1219JUD002045214.
58 Molla Sali v Greece, para. 133.
59 Molla Sali v Greece, para. 135.

relationship of proportionality between the means employed and the aim sought to be realised'.[60]

Under EU Law, directives allow for specific limitations in the case of direct discrimination such as the genuine occupational requirement[61] or age,[62] while the general justification is examined only in the context of indirect discrimination.[63]

We see here a differing approach: 'EU law provides only for specific limited defences to direct discrimination and a general defence only in the context of indirect discrimination. In other words, under the non-discrimination directives, direct discrimination will only be justified where it is in pursuit of particular aims expressly set out in those directives'.[64]

With regard to addressing common procedural elements, I wish to emphasize the issue of the burden of proof. To 'address the difficulty of proving that differential treatment has been based on a protected ground, European non-discrimination law allows the burden of proof to be shared'.[65] This basically means that if the claimant is able to present enough evidence to raise the question that discriminatory treatment occurred, then it will be up to the defendant to prove the contrary. Under EU Law,[66] directives – building on the evolutionary interpretation of the CJEU – contain specific rules for Member States for *prima facie* cases of discrimination, and the burden of proof must shift back to the respondent when evidence of such discrimination is brought.[67]

Under the ECHR, this procedural quasi-principle evolved through the case-law of the ECtHR contrary to the generally applied *affirmanti incumbit probatio* principle.[68] Unlike in EU directives, there is no written obligation; however, analysing the ECtHR case-law, we see steps taken towards the shifting of the burden of proof notwithstanding the lack of such a written obligation. In *Nachova and Others*, the Court adopted conclusions that are:

60 Burden v United Kingdom, Application no. 13378/05, ECLI:CE:ECHR:2008:0429JUD001337805, para. 60.

61 This requirement allows employers to differentiate against individuals on the basis of a protected ground where this ground has an inherent link with the capacity to perform or the qualifications required of a particular job. (E.g. a role has to be played by a young artist, a dancer has to be in a good physical shape, etc.) See: Gender Equality Directive, Art. 14; Racial Equality Directive, Art. 4; Employment Equality Directive, Art. 4.

62 See Employment Equality Directive.

63 See Employment Equality Directive.

64 Handbook on European Non-Discrimination Law (2018 edition), 92.

65 Handbook on European Non-Discrimination Law (2018 edition), 231.

66 On the he application of burden of proof in certain Members States, see, e.g., Ringelheim 2019. 49. https://www.equalitylaw.eu/downloads/5005-european-equality-law-review-2-2019-pdf-3-201-kb.

67 Racial Equality Directive Recitals 21–22 and Art. 8, Employment and Occupation Directive Recitals 31–32 and Article 10.

68 Schabas 2015. 570.

> supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.[69]

In the case of *Timishev v Russia*, the Court drew a similar conclusion by reiterating that: 'Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified.'[70] This evolution, I believe, can be thanked to the concept of living instrument applied, as we see, through this example, also in procedural terms.

4. Concluding Remarks

The paper presented some key aspects as regards the nature and regulation of equal treatment law in Europe by examining the relevant provisions on equal treatment in the case-law of the ECtHR and the CJEU, underlining some similarities and differences.

Speaking of interference, the aim and purpose of fundamental rights is not to foster harmonization or uniformity; they concern the empowerment of individuals and the protection of liberty primarily against state authorities. The European multilevel system of rights protection is composed of layers that complement each other, instead of layers that are neatly separated according to their origin (constitutional, EU, or international). Agreeing with Polakiewicz, uniformity is neither required nor desirable in a Europe composed of nation-states, each with its own distinctive traditions of fundamental rights protection.[71]

Under EU Law, equal treatment exists in parallel ways: as a value of the European Union, a general principle, a fundamental principle, and a fundamental right. If we take as an example age discrimination, prohibition exists simultaneously in relevant sources, in the Employment Equality Directive and, as described in Mangold[72] and Kücükdeveci[73] rulings, also as a general principle of non-

69 Nachova and Others v Bulgaria, para. 147.

70 Timishev v Russia, Application nos. 55762/00, 55974/00, ECLI:CE:ECHR:2005:1213JUD0055 76200, para. 57.

71 Polakiewicz 2016.

72 Werner Mangold v Rüdiger Helm, C-144/04, ECLI:EU:C:2005:709, para. 75.

73 Seda Kücükdeveci v Swedex GmbH & Co. KG, C555/07, ECLI:EU:C:2010:21, para. 21.

discrimination. However, the relationship of the principle of non-discrimination as safeguarded by the directive as opposed to a general principle was further elaborated on in the case of Dansk Industri,[74] where the ECJ – arguably by judicial activism – concluded that the principle of non-discrimination is applicable even if the directive is not applicable, providing it with a subsidiary direct effect. Now it is clear that even if the directive establishing the obligation of non-discrimination is not applicable, the general principle can be applied.[75] This opens up then the question of *Drittwirkung* before both courts, which has a tremendous potential in the context of equal treatment.

The parallel coexistence raises several questions such as: should the same value be granted to all protected grounds as established by the Charter and TFEU? Some protected grounds reach the level of general principle – in those cases, like gender, age, and nationality, the layers of safeguards grant higher and more extensive levels of protection. Will they be considered as a source of inspiration for other protected characteristics?

As demonstrated in the paper, not all protected grounds under EU non-discrimination law receive an even measure of protection. The directives prohibit sectoral discrimination, e.g., the Racial Equality Directive prohibits discrimination on the basis of racial or ethnic origin in the context of employment, the Employment Equality Directive prohibits discrimination on the basis of disability, sexual orientation, religion or belief, and age only in the context of employment. 'This has been described as a "hierarchy of grounds" and sits uncomfortably with the very essence of the guarantee of equal treatment contained in international human rights law.'[76]

As already outlined above, the differences stem from the more complex approach taken by EU law, which derives from the nature of equal treatment under EU law, which is more than a mere right. In the EU law context, equal treatment has a complex spectrum which runs through the entire legal system of the EU, from economic freedoms to European Parliament electoral rights.

There are some conceptual differences based on the elaboration above. Whilst the ECHR was established as a general bill of rights, including also the prohibition of discrimination under Art. 14 of ECHR as a particular human rights aspect with the function of a minimum guarantee within a larger system of the same type, the original European Community law was essentially economic in nature.[77]

Furthermore, speaking of the development the two human rights regimes have undergone, especially with regard to the scope of the law, again, there are

74 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen, C-441/14, ECLI:EU:C:2016:278.

75 Zaccaron 2016.

76 The European Union and International Human Rights Law, Office of the High Commissioner, Europe Regional Office 20.

77 Tobler 2014. 524.

conceptual differences. From the beginning, the ECHR has had a very broad material scope, meaning that it has covered many aspects of life. Subsequently, the Convention developed mostly through case-law, in particular through the ECtHR's often applied doctrine of the Convention as a 'living instrument', which must be interpreted in the light of present-day conditions but, I would say, also in procedural terms. This means that much could be achieved through interpretation, making no formal amendments to the ECHR or the adoption of new conventions unnecessary in many areas. This is also true of non-discrimination, where, apart from Protocol 12, there have been no formal changes in the ECHR. Instead, the focus has rather been on the implementation and enforcement of the existing law. In contrast, European Community law and later EU law developed very dynamically through Treaty revisions, the adoption of secondary law and case-law from the CJEU.[78]

An important characteristic of the ECHR is that the protected rights are guaranteed relatively broadly, within the jurisdictions of the State Parties. As seen in ECtHR case-law, in some cases, applicability is even possible in extraterritorial situations.[79] That provision is considerably broader than EU law, given its limited approach as primary and secondary norms only oblige Members States as long as they implement EU law. However, it may raise questions on what to consider as implementation, especially in the case of secondary norms.

But it is not all black or white because, even though it is limited based on the provisions of Article 52(3) of the Charter, the level of protection granted by the EU might be more extensive than safeguards by the ECHR. The introduced secondary norms also foresee the possibility of direct application of the norms between private individuals,[80] which has a tremendous potential. On the ECtHR side, although generally the ECHR obliges Member States and not individuals, bearing in mind the positive obligations of Members States, this positive obligation might potentially evolve.

In the case of *Ärzte für das Leben*, the Court recognized that sometimes Article 11 requires positive measures to be taken, even in the sphere of relations between individuals.[81] Bearing in mind this evolutive approach together with the living instrument concept, it is not excluded in my view that under the ECHR equal treatment will evolve so as to – at least in some dimensions – be secured between private individuals.

78 Tobler 2014. 525.

79 The extraterritorial ECtHR application was confirmed in a large group of cases. See: Ryngaert 2012. 57–60.

80 See, e.g., Article 3 of Employment and Occupation Directive.

81 Platform 'Ärzte für das Leben' v Austria, Application no. 10126/82, ECLI:CE:ECHR:1988:0621 JUD001012682.

The broader scope of the protected persons might contribute to effective protection of a minimum standard for alleged equal treatment related to violation in European regional context.

As regards convergence, several aspects can be found. First of all, the protected grounds are similar. But, more importantly, the evolutionary interpretation of protected grounds by both courts could positively influence the interpretation by the other court. As portrayed in the case of *Molla Salli*, the protected grounds remain the source of inspiration for future reference of European non-discrimination law.

The justification for less favourable treatment follows a very similar approach even though it is not the same in the two legal orders, given that the scope of differentiation is wider in the relevant provisions of EU law.

A dialogue between the two regimes exists in multiple ways. Besides the institutional dialogue, such as the one based on Article 6(3) of TEU[82] as well as the Charter, the dialogue of courts cannot be underestimated either. The courts – even after the Charter has become binding –, although in limited frequency[83] but in a constant manner, maintain communication. Such concrete interference can be found in the already cited *D. H. and Others v the Czech Republic* case[84] or, the other way around, before the CJEU, in the more recent case of *Dorobantu*. The case concerned the personal space available to each detainee in the absence of minimum standards in that respect under EU law; the CJEU ruled to take account of the minimum requirements under Article 3 of ECHR,[85] resulting thus in the ECHR to be quasi directly applied.[86]

These cases also portray the usual schedule when the protection is granted by EU legal order. In the first round, under European non-discrimination law (not considering the national level), it is up to the CJEU (needless to say when the protection is granted by EU legal order) to decide, while the role of the ECtHR is of subsidiary nature. When it comes to the application of the ECHR, there are two options: the normal level of protection as granted by Article 14 (ancillary although stringent) and the advanced level as per Additional Protocol 12. Needless to say, the higher is the number of ratifications, the stronger the protection of equal treatment within the CoE context.

Reiterating the regional context and the term European non-discrimination law, we could conclude that the introduced aspects of equal treatment in EU law are largely consistent with the ECHR; however, to date, there is still no external

82 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

83 Krommendijk 2015.

84 ECtHR reference to the EC directive 2000/43, para. 61.

85 Dorobantu, C-128/18, ECLI:EU:C:2019:857.

86 Mohay 2019.

control mechanism for EU law compliance with fundamental rights. So far, in an indirect manner for the EU and in a direct manner for the EU Member States, the Convention remains the constitutional instrument of European public order and measure of last resort.

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Possible Ways for Development of the Consular Service in the South Pacific

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Abstract. The author presents the specific elements of diplomatic and consular work in the South Pacific region from the perspective of a career diplomat. He shows the main geographical and political characteristics of Australia which influence consular activity and also the characteristics of the beneficiaries of consular services who need to be served by the consular infrastructure. The study presents several models for undertaking Hungarian consular work and for organizing the Hungarian consular network in Australia. The author also outlines current inconsistencies in the regulations applicable to consular activity in Australia under domestic, international, and Hungarian norms as well as functional issues and the possible ways to correct them. In his conclusions, the author formulates proposals for the redesign of consular organization in Australia.

Keywords: Australia, Hungarian diplomacy, diplomatic relations, consular relations, Vienna Convention

1. Introduction

Related articles[1] have reviewed the main stages of the establishment of the Hungarian diplomatic and consular network in the South Pacific region from a historical aspect. In this article, we are dealing with the possible ways of the developmental opportunities on the field of consular work, so focusing primarily on the present and the future. The place of our investigation is still in the South Pacific, but from a consular point of view we are also looking at the entire Pacific Basin.

1 See: Domaniczky 2017. 44–62. For further details, see Domaniczky 2019a. 257–261 and Domaniczky 2018. 341–361.

We examine five possible models below, observing their advantages and disadvantages from a diplomatic and consular point of view and selecting the most appropriate model for Hungarian interests and Australian capabilities.

2. Hungarian Interests – Australian Characteristics

Above all, it is important to note that recognizing and exploiting the potential of each model requires an understanding of certain Australian characteristics and local potentials. Here only the most important ones can be mentioned.

3. Canberra, the Australian Capital City

Although the capital of Australia was founded more than a century ago in 1913 – the founding fathers of the young country had dared to dream something big.[2] Built from scratch for about half a century, the Australian capital began to find its own role only in the 1990s. It took another couple of decades to become a clear and primary political, administrative, and diplomatic[3] centre within the country (by the 2010s),[4] but as a city it has not grown into its gown yet.[5]

During the decades of 'upbringing', the role of the capital was first played by Melbourne and later, supplementing to the functions of Canberra, Sydney and Melbourne as co-players together.[6] Owing to the technical advancement, Canberra

2 A Swedish anthropologist, a member of the Kon-Tiki expedition of 1947, Bengt Danielsson (1921–1997) spent more time in Australia in the mid-1950s. In his book, he aptly said about Canberra: 'The only flaw in Griffin's plan was that it was oversized compared to Australia's financial strength. […] So the city of 30,000 people is like a little kid dressed in big clothes. If at some point the baby enters his dress, if this city is ever built, it will certainly not be artificial or strange …' See full quote: Domaniczky 2018. 411–412.

3 The capital has welcomed a growing number of diplomatic missions since the 1940s, and its weight has only slowly increased, alongside the generally older consular offices in Sydney. Currently, according to the Australian protocol, diplomatic representation can only be established in the federal capital.

4 It is important to recall here a symbolic change from 2009. Although the Australian prime ministers have maintained their official residence (The Lodge) in Canberra since 1927, with few exceptions, in 1996, Prime Minister John Howard (1996–2007) did not move to the capital but remained in Sydney after his election. Instead of the Lodge, the secondary seat in Sydney (Kirribilli House) became the primary residence of the Prime Minister during these years. Howard travelled to Canberra from here, which was a good symbol of the Prime Minister's views on the weight and role of the Australian capital. After the Howard era, Prime Minister Kevin Rudd (2007–2010) moved permanently back to Canberra.

5 The half-million inhabitants expected to be reached in the 1960s by 1990 will probably only become a reality by 2035. See also: Brown 2014. 222.

6 See more on the connections of these three cities: Domaniczky 2019b (in press).

is getting closer and closer to Sydney, a metropolis that is heavily expanding to the west, about two hours away by road.

4. The Two Pillars of Australian Economy and Society: Melbourne and Sydney

Australia's history, economy, and society are built on two pillars: the two coastal metropolises in which more than 40% of the country's population lives: Melbourne and Sydney. Sydney is the oldest European settlement on the continent, and it is currently the country's largest city and the main centre of economic life. But having got strength from the 19th-century gold rush, Melbourne has become the first capital of the federated Australia. The southern metropolis is still an administrative centre and one of the biggest transport hubs of the continent. In addition, due to its diverse programme offers and multicultural background, it is also referred to as the cultural capital of the continent.

The relationships between the two metropolises, which had once been quarrelling, are close and complex, and the development and operation of each city can only be properly understood in the knowledge of the other. The 'third sister', the largest inland city and the current capital, Canberra, is closely linked to both cities, but via its location is increasingly connected to Sydney, so it is worth considering the two cities together as Sydney-Canberra.

So, the expression 'two pillars' actually covers three cities: Melbourne, the southern metropolis, and Sydney-Canberra, which are relatively close together. From a diplomatic point of view, it is not enough to be present in Canberra alone, but it is also necessary to continuously monitor and evaluate the events of the two metropolises in order to get a full picture of Australian possibilities and potentials. However, from a consular point of view, the number of potential clients and cases, the composition of the diaspora have regional differences, and these should be carefully examined before making a decision on the development of the consular network.[7]

7 In Sydney, where there was a Consulate General between 1968 and 2009, the Hungarian diaspora was well-surveyed from a consular aspect, with a large majority of clients already having consular affairs. Currently, it requires only 'follow-up' to recent events. By contrast, Melbourne is hardly known from a consular point of view since a permanent professional consulate has only been in operation in the city since 2013. There, with the right methods, the customer base could be significantly expanded with new customers. Owing to big constructional works in the 1950s and 1970s around Canberra, more than a thousand Hungarians lived in organized structures at one time: they had Hungarian clubs, associations, and regular weekly events. By the turn of the millennium, the organized community had completely disappeared, and although there are still a thousand people who claim to be Hungarians in the Canberra area, they are mostly of different generations living scattered in the vicinity of the capital city.

5. The Coercive Power of Distances

Australia is the sixth largest country on Earth. It is the only country that covers an entire continent. Australia has been trying to increase its population since the end of the Second World War with its planned immigration policy, but the population density is still around 3 inhabitants per km².[8] The majority of the population lives in the two metropolises (Sydney and Melbourne) and Canberra,[9] the state capitals[10] and the East Coast. More than 80% of the country is sparsely populated or uninhabited,[11] while transport is – except for airplanes and cars – difficult, costly, and time consuming. Air traffic between the six state capitals is continuous, giving the impression that these settlements are situated close to each other. But in reality, without the airplane, big cities are at least a thousand kilometres apart;[12] for example, the dynamically developing Perth is 2,700 km from the nearest Adelaide and 4,300 km from Brisbane.[13]

All these features should be taken into account in the planning of consular work. Because of distances and high costs, one-stop-shop business and the widest possible use of electronic solutions should be sought and preferred.

6. The Scattered Hungarian Diaspora

In this vast country, most Hungarians live in the state capitals, including Melbourne and Sydney, but a minority is scattered throughout the continent – from the homesteads on the rims of deserts in South Australia to the tiny villages of Tasmania. There are minor differences in the composition of urban communities (regarding who, when, and where they came from and what their destination was), but, more importantly, the first generations, who originally lived in Hungary, are found in every community. The distribution of the Hungarian diaspora in Australia should be taken into account when determining consular districts. Due to the dispersion of the first generations, who usually have the most Hungarian affairs, the greatest contribution to the Hungarian community would be to increase the role of electronic services.[14]

8 The density is 105 persons/km² in Hungary and 84 persons/km² in Romania.
9 Half of the country's population lives in these three cities.
10 Sydney (New South Wales), Melbourne (Victoria), Brisbane (Queensland), Perth (Western Australia), Adelaide (South Australia), Hobart (Tasmania).
11 This is the region of the so-called Outback. See for map: Domaniczky 2018. 369.
12 For example: Brisbane from Sydney, Sydney from Melbourne, Melbourne from Adelaide.
13 For comparison: Budapest (Hungary) is 1,700 km from London (United Kingdom) on road, 2,700 km from Aberdeen (UK), 4,200 km from Kuwait City (Kuwait), and 4,500 km from Omsk (Russia).
14 Given a simple practical example: first-generation clients regularly apply for Hungarian police clearance certificates to extend their Australian visas or to obtain Australian citizenship. The length of the process has been reduced from 8 weeks to 2 to 3 days in recent years, but personal

7. Possible Models for Diplomatic and Consular Work in the Region

7.1. A Multi-Centred Diplomatic and Multi-Centred Consular Network

This can also be called a historical model.[15] Since the opening (1975) of the Canberra Embassy, there were two Hungarian missions in Australia – although hierarchically organized by the law, they were practically equivalent: the Embassy of Canberra and the Consulate General of Sydney.[16] The period of dual representation lasted for nearly four decades (1975–2009), and, although diplomatic work was primarily for Canberra and consular work for Sydney during this period, there were overlaps between the two representations.

At the diplomatic level, the 'disturbing interferences' were only partly due to the decisions of the Hungarian side. The ambiguity also existed on the Australian side due to the different weight and role of the two cities, Sydney and Canberra, as we have already mentioned above in the Australian context.

Given the changes taking place on the Australian side, the Consulate General of Sydney was quickly closed by Hungary at the best possible time (2009). Making the Embassy of Canberra an exclusive actor coincided with the strengthening of the Australian capital. By the way, the processes in Australia have confirmed the 'historical' nature of this model: due to the Australian tensions to strengthen Canberra as the capital city, this dual representation model could not be restored even if Hungary was to reopen the Consulate General in Sydney.[17]

identification is still requested. Therefore, some clients have to travel a whole day to lodge an application although they could apply for it using electronic applications through the client gate if the programs allowed delivery of papers abroad. In other words, there are great opportunities in the development of electronic administration (especially since the introduction of electronic personal identification card), which could facilitate the administration for the diaspora, which is scattered throughout such a large area.

15 See: Domaniczky 2019a. 257–261.

16 The previously strong position of the Consulate General in Sydney was also due to the circumstances of the establishment. Although between two states diplomatic relations are usually established at first, and this implicitly includes consular contacts too (this is why the Vienna Consular Convention states that 'Unless otherwise stated, the agreement between the two States on the establishment of diplomatic relations shall include' [Art. 2 (2) of the VCC], in this case consular relations were first established between Australia and Hungary, and a consulate was opened (instead of an embassy), which was followed years later by diplomatic contacts. The Consulate General in Sydney therefore carried out diplomatic duties for a longer period on the basis of customary law, as it is otherwise possible under Article 17 of the Vienna Consular Convention.

17 The diplomatic weight and role of a re-opened Consulate General would not have been closer to that of former Consulate General even if the intentions of Hungary had been directed to do so. Canberra as a diplomatic centre has a strong 'attractive effect' due to the proximity of the two cities: although more foreign missions are in Sydney than in Melbourne, according to the

What seemed to be precisely timed on the field of diplomacy, however, it has caused long-term disruption and uncertainty in consular work. The position and role of the Consulate General at one of Australia's largest transport hubs[18] – easily accessible not only within the Sydney area but also from various parts of the country – could not be taken over[19] by a foreign mission in a less accessible[20] area like Canberra.

7.2. Unified Diplomatic and Consular Centre

It was the era of one-stop shop with a unified diplomatic and consular representation from the closure of the Sydney Consulate General until the opening of the Melbourne Consular Office (2009–2013).[21] This meant that the existing embassy building – built mainly for representative purposes but also with a consular department in the suburb of Deakin of the Australian capital – was considered the centre of diplomatic and consular work during this period.

From the point of view of diplomatic work, this solution, which channels all the relevant information in the closest location to the political centre, will undoubtedly enable effective work. However, the relationship between the capital and the two metropolises is complex, not only in the past but also in the present. The strengthening of Canberra does not mean that events in the two largest cities, Sydney or Melbourne, can be ignored by the diplomats based in the Australian capital. On the contrary, Australia's structure is not centred, so diplomatic work in this model cannot be conducted from a single centre.[22] In addition to the Canberra centre of gravity, the Canberra diplomats must be present in both metropolises. The task cannot be outsourced if it is to be carried out to the right standard: in order to understand the full political picture, diplomats residing at Canberra must act in three places at a time.

Australian Department of Foreign Affairs' website, the consular corps of the southern metropolis is more characteristic with its own features and activities than the Sydney one.

18 This major city – Sydney – is home to one of the country's largest Hungarian communities, which is politically most active as well (both towards Hungary and Australia).

19 The development of optimal solutions (system of consular reception days, selection of the proper locations, and communication of these provisions) took longer, and, by the time a new system could be consolidated, Hungary moved towards other solutions.

20 The 'hard to reach' expression for Canberra only makes sense relative to Sydney. A seaside port city of 5.5 million inhabitants is obviously busier and easier accessible than the mainland capital Canberra, which has 350,000 dwellers, with an airport that only accepts international flights since 2010. Despite its relatively small size and location, Canberra is easily accessible by road, rail (from Sydney), and by plane (primarily from Sydney and Melbourne).

21 Almost exactly four years passed between the closure of the Hungarian Consulate General in Sydney and the opening of the Hungarian Consulate in Melbourne (30.09.2009–23.10.2013).

22 This requires an assessment of existing buildings, the consideration of whether existing spaces would be sufficient for more business or client traffic, or whether a new, separate building would be required for the consular work.

The only limit to the establishment of a unified diplomatic centre based on the Hungarian decision is, therefore, Australian conditions, which allow for centralization only to a certain extent.

The organization of a single diplomatic and consular centre also has significant consular advantages and disadvantages. Establishing such a centre usually entails serious, long-term return on investment. Concentrated administration requires a high level of consular (professional and infrastructural) background, but procedures at one-stop consular days and the consular work generally can be streamlined and standardized. That is, the Canberra-based Hungarian consulate would need a larger, duly trained staff and a modern purpose-built consular department to handle a large number of cases, meeting both security and technical requirements. It is not a prerequisite, but such centres are usually established in settlements with a significant Hungarian community.[23]

7.3. Single Diplomatic Centre – Decentralized Consular Network

With two consular offices opened between 2013 and 2018, Hungary has now decided to implement this solution. In addition, the Embassy's consular section also continues to operate between the two organizationally satellite offices in Melbourne (2013) and Sydney (2018). Although there is a unified diplomatic centre in Canberra, there is still a three-point consular network (Canberra–Melbourne–Sydney). Though there are differences in the legal status,[24]

23 From a consular point of view, administration starts with gathering information, and potential clients are most easily reached at Hungarian events such as club meetings and dinners. Canberra, on the other hand, has a relatively small and unorganized Hungarian community, so larger Hungarian communities need to be visited on longer trips travelling from Canberra. If we are thinking of a single consular centre, good accessibility is worth keeping in mind: the consulate should be located in an easily accessible public transport location, which would require a different central location in Canberra than the current suburban one.

24 In terms of legal status, Hungarian and international law and the practices of the two countries are different. With respect to the Hungarian regulations, Act LXXIII of 2016 on Long-term External Service (abbreviated henceforth as LES), the law clearly states: 'As part of the Hungarian mission… there may be a consulate and a vice-consulate. The consulate and the consular office shall not have their own budget and management' (Article 3, session 2). In contrast, according to the Vienna Diplomatic Convention (ratified by Hungary in 1965 and by Australia in 1968, abbreviated henceforth as VDC), 'The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established' (Article 12). Hungary has introduced a specific hybrid form (on the name of 'consular office') in its own national law, primarily to simplify the organizational framework and to expedite the managerial matters, but which is clashing with the articles of the two Vienna Conventions, classing the foreign missions into diplomatic and consular representations (Article 3 VDC, Article 3 VCC). Australia, as the receiving state, defines its protocol on foreign missions on the basis of the Vienna Conventions: thus, under Hungarian law, the satellite missions like consular offices on the Australian side appear independently, in accordance with the Vienna Consular Convention, each headed by one 'senior' diplomat. Otherwise, the differences in the legal status are caused by the Hungarian statutory regulation (being

staffing,[25] and tasks[26] of consular centres, they must work under the same rules in their established consular district.[27] Because of the above, the elements of the network are only seemingly equal,[28] but the consular section of the embassy[29] stands out both structurally and conceptually. This distinction should be consistently enforced: either centralized (i.e.: returning to the pre-existing model of a unified diplomatic and consular centre) or moving forward on the path started by setting up the two consular offices, and the embassy itself should be completely exempted from consular work.[30] In Canberra, a diplomat commissioned with a secondary consular role seems sufficient to deal with urgent and diplomatically sensible consular matters, and the current Canberra consular staff could be distributed between Melbourne and Sydney (see two models below). Only after this clean-up in profile targeting a purely diplomatic mission

contrary to the Vienna Conventions) (i.e. the national law should have used other methods to achieve the goals on the field of legal simplification).

25 As regards staff, the Vienna Conventions distinguish between diplomats dealing with consular affairs at diplomatic missions (see articles 1 and 3 of the VDC, articles 1 and 3 of the VCC) and consular officers (articles 1 and 3 of the VCC). The Australian practice is changing accordingly: the diplomatic staff of the Embassy dealing with consular affairs is taken as diplomats, and the consular staff of the consulates are classified as consular officers.

26 Regarding tasks, the diplomatic missions in Canberra are in a privileged position due to legislation and the Australian protocol. Obviously, the diplomats dealing with consular matters at the embassy have to arrange the local cases or any consular matter having interference with the diplomatic matters. According to the Australian protocol, those diplomats who are responsible for consular matters and work at the embassy can operate throughout the country regardless of the consular district.

27 Hungarian and Australian regulations are different in this respect as well although the basic source of law is the Vienna Conventions for both countries. But in Hungary the Embassy's consular department also has its own consular district (Article 3 of the VDC states that '[c]onsular functions are … also exercised by diplomatic missions in accordance with the provisions of the present Convention'; therefore, the embassies' consular departments are subject to the provisions of the VDC on consular districts). However, according to the Australian protocol, consular staff working at embassies can operate throughout the country, regardless of consular district (https://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/3-Diplomatic-missions-consular-posts-and-other-representative-offices.aspx; last accessed on: 14.07.2019).

28 However, several attempts have been made to standardize positions and numbers in recent years. Cf.: LES Art. 8, Sess. (2). On this basis, the heads of all three consulates were upgraded senior consuls. Efforts have also been made to establish the similar consular districts, but this is not confirmed by practical data and results. See also Footnote 43 on a possible division of the consular districts.

29 For the structurally and conceptually prominent position of the Embassy's consular office, see footnotes 24–27.

30 At the moment when consulates are opened in the cities with the two largest Hungarian communities, it is no longer necessary to maintain a consulate with a small Hungarian community which is less accessible than the two coastal transport hubs. Clients usually choose location to lodge applications based on travel times and costs, not caring with borders of consular districts. In addition, the organization of consular work deploys resources from diplomatic work, the premier task of the unified diplomatic centre, instead of organizing consular days in Canberra itself by the closest Hungarian consular mission of Sydney.

in Canberra and two consular offices of the same rank in coastal metropolises would this model be operational in the medium term.[31]

7.4. Unified Diplomatic Centre – Peer-to-Peer Consular Network

In fact, this model offers a solution[32] for all elements of regulation, with a single diplomatic centre in the capital and two independent consulates in the two coastal metropolises. Given Canberra's proximity to Sydney, the Embassy's consular section would be worth eliminating altogether. Regular consular days held by the consular staff of the Sydney consulate should be enough to handle consular issues in the capital. Extension in Sydney's status and jurisdiction could be used to launch a (Southern) Pacific Consular Centre. To this end, one of the consular posts could be upgraded to the status of a regional consular officer, similar to the current regional posts[33] (a regional director responsible for managing an economic region or the regional IT administrator).[34]

If the consular department of Canberra Embassy ceases to operate, there are two ways to divide up its responsibilities: either to develop only one of the remaining two consulates or to develop both of them at the same time.

In the first case, we are talking about a hierarchical multi-centred model where consular services could be organized in a uniform way (see the last model), whereas in the second case the tasks would be divided between Sydney and Melbourne. If the regional consular officer was to move to Sydney, where a regional administrator had already been deployed, the consular district of Melbourne would have to be expanded, and the only possible solution would be to extend the Melbourne consulate's jurisdiction to Western Australia.

There are many arguments[35] for the Melbourne office's expansion, all of which are negated by the local heritage regulation,[36] which hampers the development

31 The existence of two satellite consular offices, which are part of the embassy but operate in different states, continues to be contrary to Art. 12 of VDC.

32 Since the network is multi-centred, the individual elements should operate at least on a consular level, making Australian and Hungarian regulations and practice compatible.

33 See Government Decree 223/2017 (VIII. 11.) on the detailed rules for the management of foreign missions of Hungary. See: articles 15–17 of the Government Decree and Art. 29, Sess. (1) of LES.

34 The main duty of this consular officer could be to assist the professional work of consular offices in the Asia-Pacific, which primarily deal with visa matters. The Sydney consulate of Hungary, as currently the most heavily trafficked mission in Australia, deals only with citizenship and other typical matters and can be easily involved in the development of uniform practice in these regions.

35 Melbourne is home to the largest and most organized Hungarian community. Several Hungarian houses and Hungarian organizations operate here. The city has a radial structure and is easy to travel to, with the most developed public transport within Australia. It is a domestic transport hub (air, rail, road), but Melbourne can also be reached by international flights from any overseas direction.

36 Not only the building itself in which the consulate is currently operating (https://vhd.heritagecouncil.vic.gov.au/places/102762; last accessed on: 16.07.2019) but the entire neighbourhood

of technical and security background needed to build up a modern consular department.

Naturally, the development of the two centres can take place from different perspectives. Consular work also involves cultural and other tasks.[37] With this in mind, for example, the Melbourne consulate, as a Hungarian mission in the Australian cultural capital, can be developed into a Consulate General expanded with a Hungarian Cultural Institute.[38]

In Sydney, a consulate with an extended jurisdiction to Canberra could be upgraded to a joint consulate or consulate general with a tourist office (a workplace for a Hungarian Tourist Representative) that would be able to organize trips to Budapest and even to the V4 capitals, precisely based on greater consular traffic.

7.5. Unified Diplomatic Centre – Hierarchical Multi-Centred Consular Network

If the Melbourne consulate fails to remove into a modern, fully-fledged building,[39] only one of the two consular centres – the Sydney one – can be upgraded. Again, there are more options. It will be the Consulate General of Sydney as the Consulate General responsible for current affairs in Canberra, and possibly also the Regional Consular Centre of Hungarian missions in Southeast Asia and around the Pacific.[40] As a Consulate General, in addition to serving Canberra, it may be responsible for Melbourne as a Consulate, with a consular district enlarged with Western Australia.

is an important part of the cityscape (called North Fitzroy Heritage Overlay Area), all of which makes external and internal conversion significantly difficult or even impossible.

37 See Art. 5 of the VCC and Art 57, Sess. (1) to (3) of the LES.

38 On the Hungarian side, the idea that Australia needs to reopen its embassy in Budapest has come up many times. This goal cannot be realistically pursued, and Australia has been steadily scrapping its Central European diplomatic network for about two decades. In the longer term, they are likely to be present only in Berlin (Germany is one of their most important European trading partners) and Belgrade (the largest Australian diaspora of Central European origin is linked to the former Yugoslav states). However, the situation is not hopeless, for example, when we approach cultural diplomacy. Highlighting the similarities between Budapest and Melbourne, the Hungarian side could encourage the setting up of an Australian cultural institute through a real estate offer. In other words, not on the diplomatic platform but on the cultural front, there might be a chance to re-establish Australia's presence in Budapest. On a reciprocal basis, Hungary could offer to open a Hungarian institution in Australia, especially in Melbourne, which it plans to open in the Southern Hemisphere, to which it can also request a plot or contribution.

39 It must obviously be considered here whether the aspects of representation or consular work are more important for Hungary. If the former, the historical suburbs of Carlton or Kew, are to be considered, if the latter takes precedence, a downtown office building lease would be the best option.

40 Outlining just one option: Jakarta (Indonesia), Singapore (Singapore), Kuala Lumpur (Malaysia), Manila (Philippines), Hanoi and Ho Chi Minh City (Vietnam).

In Western Australia, setting up an independent consulate should continue to be considered as this state offers many economic opportunities and would also make it easier for the far-flung Hungarian community to deal with consular affairs. If Hungary was to decide to set up a consulate in Perth, it would probably be best to open it as a vice-consulate under Melbourne or Sydney as this would be in line with the VCC.[41]

Beyond the consular distribution of tasks, Melbourne could be further developed in the cultural and Sydney could be vested in the touristic task areas mentioned above, so that both of our metropolitan offices could get a local identity that would help them to operate in the long term.

8. Summary

We have tried to review the possible developments of the Hungarian missions in Australia, depending on Australian capabilities and current opportunities in our diplomatic and consular network. We argued that the current situation (a single diplomatic centre – a decentralized consular network) is only a step towards the right direction but not a definitive one because it is not sustainable in the medium and long term. The diplomatic duties were grouped in Canberra a decade earlier, with good timing. However, in order to ensure the smooth running of diplomatic work, the diplomatic centre should either be upgraded to a single consular centre or completely exempted from consular work. The establishment of a consular centre in Canberra would be a step back to an earlier model which, after having consular offices in the two largest cities of Australia, Hungary has already passed; in addition, it would lead to unnecessary expenditure and capacity for diplomatic work.

However, the merger of the consular department of Canberra Embassy with the Sydney consular office would open the way for further development of the busiest local Hungarian consular representation and possibly for a regional consular centre.

In this context, the situation in Melbourne should also be considered. Here the consular office's current seat is a barrier to any further consular development. However, if the seat is relocated, the extension of Melbourne's consular district to Western Australia should be considered. Thus, both consulates could be given the rank of Consulate General, and Australia would be divided diagonally between the two consular offices.[42]

41 See as a model the Vancouver Consulate of Hungary (https://toronto.mfa.gov.hu/page/vancouveri-konsululatus; last accessed on: 16.07.2019).

42 In this case, it would include Sydney as consular district: New South Wales, Queensland, Australian Capital Territory, and Northern Territory, while Melbourne would include Victoria, South

We also suggested considering a non-consular development in the profile of the two consulate headquarters. This could mean setting up a Hungarian cultural institute in Melbourne, the continent's cultural capital, and setting up a tourist office in Sydney, the busiest transport hub of the continent and the South Pacific. In the long term, both institutions could have a positive impact on the consular work, and the establishment of both a cultural and tourist centre fits with the objectives of the current Hungarian cultural diplomacy and the aims of the Hungarian Tourism Agency.

Finally, it is necessary to decide on a possible consulate in Perth to discover the business potential of this western state capital and to facilitate the arrangement of the consular work for the Hungarian community of that state. This consulate, if Western Australia belongs to Melbourne's consular district, would be subordinated to the Melbourne Consulate – as a vice-consulate –, or it would belong to the Consulate General in Sydney if no further development can be done in Melbourne.

In other words, we are arguing for the implementation of the latest model (a unified diplomatic centre – a hierarchical multi-centred consular network) simply because the existence of independent consulates would resolve the legal controversy currently caused by the non-autonomous satellite consular offices attached to the embassy in Canberra. Of course, the rank of Consulate General does not mean that the Ministry of Foreign Affairs cannot implement the work organization and management regulations that it considers to be optimal, with lower levels of legislation.

Finally, we want to argue against a simplification that Melbourne and Sydney can only be viewed in the same way. On the contrary, although the two cities are worth being treated together, it is only worth considering the different 'styles' of the two cities.[43] That is why we argued for the development of the consular network to suit both Hungarian interests and Australian conditions, when we proposed to centralize diplomatic work in Canberra, cultural work in Melbourne, and tourist agency work in Sydney. Consular work could form the background and basis for all of these, and in both cases the rank of the Consul General would be needed not for the title but for the sake of legal consistency.

Australia, Tasmania, and Western Australia. For Hungarians, this would be a roughly equal distribution: 40-40 thousand in each consular district. See also: Domaniczky 2018. 309–341.

43 The argument that each representation should have a consular section with the same number of staff and subordinates in the same rank only looks good statistically but does not provide adequate answers to the characteristics of each city. Although it sounds good that trade commissioners can cover an entire continent from an external economic point of view, it would be worth focusing on consular work first and, secondly, on cultural and scientific cooperation. At the current trade volume, it would be enough if one trade commissioner was placed in the classic diplomatic centre, Canberra. The trade commissioners at consular offices would be replaced with consular staff.

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Shareholders' Right to Information – A Comparative Analysis of Hungarian and Romanian Company Law

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Abstract. This study examines one of the basic rights of shareholders, the right to information in Hungarian and Romanian company law. The right to information is a non-property, organizational right originating from the shareholder's membership right, which is related to the convening of the general meeting of the company limited by shares and the voting right that can be exercised there. The right to information is the individual right of the shareholder and the individual obligation of the company. The right to information belongs to all shareholders, regardless of the extent of their financial contribution. The exercise of the right to information is a fundamental principle and serves the protection of the shareholder, but, in addition to its protective nature, it stands at the basis of the preparation of the decisions of the company's shareholders.

Keywords: company limited by shares, right to information, shareholders, Hungary, Romania, company law regulations, general meeting, business secrets, trade register

1. Introduction

The company limited by shares is the most complex form of companies as economic enterprises; it is a capital company in which the personal traits of the members (shareholders) are less significant, with greater emphasis on the resources placed by them at the disposal of the company, the capital. It may also be said of the company limited by shares that it constitutes a concentration of capital which is able to function independently of its shareholders. In the organizational functioning of the company limited by shares, the principle of democratic governance is applied, whereby as a rule during the company's shareholders' meetings

the majority of shareholders may pass valid decisions, while the task of controlling the company falls to the executive officers, the supervisory board supervises management with the aim of protecting company interests, and the auditor is a guarantee for the legal functioning of the company.

From the shareholders' perspective, property rights may seem more significant than organizational rights with no monetizable value because the primary goal of the 'investor' is achieving a profit, which he/she is able to attain either by payment of dividends or capital gains (the difference between the price at which stock was bought and resold). In order to achieve such profit, it is also indispensable for the shareholder that the company function efficiently because he/she is only entitled to dividends from any corporate profits remaining after taxes have been paid. This is the reason why, in order to exercise his/her rights over assets, the shareholder may have an interest in exerting influence over the control of the company. This influence may be primarily exerted by exercising his/her rights within the organization, which do not pertain to any property or asset.

According to the point of view formulated in Hungarian legal history literature, two groups of shareholders have been formed:

> The first, smaller group consists of large shareholders who have ceased to be anonymous capitalists and were able to exert decisive influence on the control of the company. Opposing them stood the large mass of small shareholders who have acquired shares only in hopes of a dividend or of profiting from an increase in the share price but were unable, and in large part also unwilling, to meddle in the affairs of the company. The small shareholder is less of an entrepreneur but more rather becomes a creditor.[1]

As it is apparent from the cited text of legal literature, it is from the perspective of 'large shareholders' that it may become important for them to exercise their non-property/organizational rights for they are the ones who in effect are able to wield decisive influence over the control of the company. Naturally, the property and non-property/organizational rights should also be considered as rights to which minority shareholders are entitled to, based on the principle of equal treatment, and it is for this reason that regulations attribute a large degree of attention to ensuring the exercise of non-property rights for the minority shareholder, like, for example, initiating a session of the shareholders' assembly or developing the agenda of such assemblies.

In our study, we examine one of the basic non-property rights of shareholders, the right to information in Hungarian and Romanian company law. We endeavour to examine the shareholders' right to information from the perspective of legislations which constitute the backbone of company law regulations that are

1 Translation by the author. Horváth 2004. 180.

currently in force in these two countries: the relatively new Hungarian Civil Code (henceforth used as: Civil Code/CC), which also integrated the company law, and the already obsolete, fragmented Romanian Law no. 31/1990, the Law on companies (henceforth used as: Companies Act). As it is also stated in Hungarian legal literature, as relevant to the significance of comparative legal analysis of company law, various experiences to which national company law regulations give rise, may, through their comparative evaluation and the formulation of conclusions, contribute to the development of various company law regimes.[2]

While Hungarian and Romanian company law rests on different foundations of legal doctrine – in Hungarian company law the German influence, while in the Romanian a stronger French influence may be demonstrated –, the rules in force do show similarities in the case of both countries. Numerous differences, especially solutions developed by jurisprudence, may also be demonstrated. According to our view, the topic to be examined is timely as ensuring the exercise of the right to information and this protection is a constant presence in various company law norms. At the same time, the topic – which is the object of our enquiry –, the interpretation of relevant company law norms, can also be readily discovered in the rich jurisprudence of various courts.

2. The Role of the Right to Information

The right to information is a non-property, organizational right originating from the shareholder's membership right, which is related to the convening of the general meeting of the company limited by shares and the voting right that can be exercised there. The right to information is the individual right of the shareholder and the individual obligation of the company. One of the basic purposes of the law is for a well-informed shareholder to be able to exercise the rights related to the general meeting such as the right to control and have a say in the company's business. The exercise of the right to information is a fundamental principle and serves the protection of the shareholder, but, in addition to its protective nature, it establishes and prepares the decisions of the company's shareholders. As correctly stated in the French legal literature, a shareholder's right to information should be considered as a means of practising his/her voting right.[3] The right to information is a fundamental shareholder right guaranteed by both Hungarian and Romanian company law provisions. The right to information belongs to all shareholders, regardless of the extent of their financial contribution. It is also not possible to limit this with the consent of the shareholder. By this right we

2 Szikora 2017. 182.

3 Germain–Magnier 2011. 397; Mestre–Pancrazi–Grossi–Merland–Tagliarino-Vignal 2016. 395–396.

mean the shareholder's right to information (access to documents, provision of information).

For a shareholder informed in the affairs of the company, information is also a means of defence and discretion. Think, for example, of a minority shareholder, for whom knowledge of company information can provide protection against majority shareholders and is also the legal basis for various legal remedies. At the same time, a minority shareholder can only request judicial review/control of company decisions if he or she has the appropriate information. The right to information, in addition to its protective nature, is of paramount importance in reconciling shareholder interest and corporate interest.[4] Having information on the operation of the company, the shareholder can weigh the potential risks of his investment[5] and, if he/she considers that the risk exceeds the normal business risk and does not want to take on more risk, he/she can decide to sell his/her shares.

In summary, only an informed, up-to-date shareholder is able to assess the effectiveness of the company's management and at the same time be able to take measures at the general meeting that guarantee the security of his/her investment and provide him/her with a profit in the form of dividends. In reality, however, most shareholders tend to be more 'indifferent'. As Ödön Kuncz correctly states, we can distinguish two types of shareholders: *permanent shareholders*, the majority of whom see only capital investment in their membership and a smaller part of whom manage the fate of the company, and *nomadic shareholders*, who buy shares because of the marketability and suitability for speculation.[6]

3. The General Meeting of the Company Limited by Shares and the Right to Information

3.1. Hungarian Company Law Regulations

The inalienable right of a shareholder is to attend the general meeting, where he may request information from the senior executives of the company limited by shares, make comments and motions, and vote in the possession of a share with voting rights. The shareholder has the right to information before the general meeting [CC Section 3:17, para. (3), CC Section 3:258] but may also request more information at the general meeting in connection with what was said there [CC Section 3:257]. The senior executives of the legal entity are obliged to provide the members of the legal entity (shareholders) with access to the documents and

4 Catană 2007. 2.
5 Török 2005. 3–10.
6 Kuncz 1939. 323–324.

records concerning the legal entity. The right of access to documents is a personal right of a member of a company, which s/he is entitled to regardless of his property contribution.[7] The right to information and access to documents may be denied if the legal person violates business secrecy, if the person requesting the information abuses his/her rights or fails to make a confidentiality statement despite having been requested to do so [CC Section 3:23].

The general rules regarding legal persons of the Civil Code Section 3:17, para. (3) provide that the meeting of the decision-making body shall be convened by the senior official by sending or publishing an invitation. The invitation shall include the name and registered office of the legal entity, the time and place of the meeting, and the agenda of the meeting. The agenda must be indicated in the invitation in such detail that those entitled to vote can form their position on the topics to be discussed before the general meeting, prepare for the decision, and make appropriate decisions in the interests of the company at the moment of the general meeting.[8]

There are many examples in judicial practice when the convening of a general meeting is not considered lawful by the judicial forum if the agenda is determined in such a general, superficial way that its precise meaning cannot be discerned with average skill and attention.[9]

As one of the decisions of the Court of Appeal of Szeged points out, the agenda only sets the framework for the meeting of the supreme body, reflecting the issues that the members can discuss and decide at the meeting. Therefore, each item on the agenda may not contain all the details. The aim of Civil Code Section 3:17, para. (3) is not for the shareholders to arrive at the meeting of the supreme body with a position that has been finally established on all issues, without any doubt, since the essence of the general meeting is to discuss the issues and form their opinion there, but to come to the general meeting with sufficient basic training and information so that they can formulate any further – relevant – questions, thus helping to make decisions.[10]

An improperly convened meeting of the decision-making body may be held only if all those entitled to participate are present at the meeting and unanimously agree to hold the meeting [CC Section 3:17, para. (5)]. In connection with holding an improperly convened meeting, it is important that the right to information of the person entitled to participate, in this case the shareholder, is not violated. In our opinion, the shareholder may also decide that, in the absence of prior information, s/he does not wish to participate in the resolution of the irregularly

7 BH 1998.12.598: Legfelsőbb Bíróság Cgf. VII.33.429/1996 [Supreme Court of Hungary].

8 Kisfaludi 2014. 226.

9 See: Kúria Pfv.21491/2016/5 [The Curia of Hungary], Szegedi Ítélőtábla Pf.21252/2016/3 [Court of Appeal of Szeged], Fővárosi Ítélőtábla 16.Gf.40.695/2009/7 [Budapest Court of Appeal].

10 Szegedi Ítélőtábla Pf.21185/2015/8 [Court of Appeal of Szeged].

convened meeting but agrees to hold it. A shareholder may also decide to agree to hold a meeting that has not been duly convened, to vote on matters that are clear and undisputed to him or her, and to abstain or vote on matters that are not obvious and potentially controversial. A decision may be taken at a meeting of the decision-making body only on an item on the agenda which has been duly communicated. However, if all those entitled to participate are present at the meeting of the decision-making body, a decision may be made on issues not included in the agenda provided that the persons entitled to participate unanimously agree to discuss it [CC Section 3:17, para (6)]. This regulation is intended to facilitate the operation of the company.[11]

The regulations regarding legal persons of the Civil Code Section 3:17, para. (3) are completed by Section 3:258 with the provision on the obligation for general information of shareholders. Paragraph (1) of the secondly cited Section stipulates that the senior executives of a limited company are obliged to provide the shareholders with all the information necessary for the discussion of the items on the agenda. Civil Code Section 3:258, para. (1) does not specify exactly what information the board of directors should provide to shareholders, but it is clear that informing shareholders relates to the items on the agenda of the general meeting. Shareholders may request to be briefed on the agenda in a written request at least 8 days before the date of the general meeting. The response containing the information must be received by the shareholders at least 3 days before the general meeting. Section 3:258 does not contain a requirement regarding the form of the reply, but it may be inferred from the phrasing that it must be given in writing. It is important to mention that the shareholder's right regulated in this § can only be exercised in connection with the matters set out in the agenda items of the general meeting. If the Board of Directors considers that the information provided in the request for information is not related to the items on the agenda of the general meeting, it may refuse to respond.[12] In our opinion, the 8-day deadline can only apply to a written request for information and may not restrict the exercise of the shareholder's rights set forth in Section 3:257 of the Civil Code to be informed at the general meeting. Thus, if the shareholder failed to request written information at least 8 days prior to the general meeting, s/he may do so at the general meeting itself. In our view, the subject matter of a request for information at a general meeting is not limited by law, so any question that could have been asked in advance and has not been formulated in advance for any objective or subjective reason may be asked in advance.

Section 3:258, para. (2) stipulates the right of information related to the report of the senior officials according to the Accounting Act. The Board of Directors and the Supervisory Board shall disclose the relevant information of the report to the

11 Osztovits 2014. 406.
12 Kisfaludi 2014. 465.

shareholders at least 15 days prior to the General Meeting. It can be concluded from the wording of the second paragraph that the information may be provided earlier; however, a shorter deadline may not be prescribed by the Articles of Association. The Civil Code does not specify what constitutes substantial information in relation to the financial statements or the report of the board of directors/supervisory board, nor does it clarify how that information should be made available to shareholders. In our opinion, the manner of disclosing the relevant information should be stated in the Articles of Association of the company limited by shares; however, if the shareholders have failed to do so, the regulations for sending the invitation to the general meeting shall apply.

Civil Code Section 3:272 contains special provisions for public limited companies in connection with the announcement of the invitation to the general meeting and its content. A separate provision for a public limited company is needed because the shareholder's right to information is much more likely to be violated due to the larger number of shareholders. The method of sending an invitation to the general meeting is not discussed in this paper; however, with regard to the content of the invitation, it is important to mention that it must include the conditions for exercising the right to supplement the agenda and the place where the original and full texts of the draft resolutions and documents to be submitted to the general meeting are available. Among other things, the company must publish on its website the proposals related to the matters on the agenda, the relevant reports of the Supervisory Board, and the proposed resolutions. At the request of shareholders, the materials of the general meeting to be published shall be sent to them electronically at the same time as the disclosure. The purpose of the regulations is to facilitate communication, which is more difficult for public limited companies due to the large number of shareholders, and to ensure the exercise of the shareholder's right to information.

The statutes of a public limited company may not restrict or exclude the shareholder's right to information. The statutes' regulations regarding this are to be considered void. Section 3:258, para. (3), however, does not state what happens in case the Board of Directors withholds information from shareholders related to the items on the agenda of the General Meeting with reference to Section 3:23, para. (2) of the violation of business secrets and economic interests of the company limited by shares. In such a case, if the shareholder considers the refusal to provide information to be unreasonable, he/she may request the court of registration to oblige the legal person to provide the information. At the general meeting, the shareholder is entitled to request information regarding what was said at the general meeting if he/she did not request or receive adequate information on the issues to be discussed before the general meeting or needs further information to resolve certain issues. Although we agree that the right to enlightenment stated in Civil Code Section 3:257 is not the same as the right to information in Section 3:258, para. (1), given that in the first case the information must be requested at

the general meeting, while in the second case the briefing takes place several days before the general meeting. We believe that the request for information could be with the same content in both cases, as I have already explained – the shareholder may also request information at the general meeting on the issues listed on the agenda and to be discussed. Of course, the Articles of Association of a public limited company may contain an *expressis verbis* provision for this right, but, in the absence of this, the right to information at the general meeting of shareholders may not be infringed either.[13] However, a request for information may relate to what has been said at the general meeting, any new information on the agenda, or new items on the agenda of the general meeting.

3.2. Romanian Company Law Regulations

Following the 2006 amendment of the Romanian Companies Act, Article 117^2 was added, the first paragraph of which takes over the provisions of Article 184 of the previous version of the Act and, on the other hand, includes the OECD's Corporate Governance Recommendations.[14] Prior to the 2006 amendment, Article 184 of the Companies Act provided that the company's annual accounts as well as reports of senior executives and auditors should be deposited at the company's registered office or branches within 15 days prior to the general meeting for shareholders to inspect. Shareholders were able to request copies of the annual report and the reports of senior executives and auditors at their own expense.

These provisions have been taken over in Article 117^2 (1) with some amendments and additions. The amendments include that the company's annual accounts, senior executives' (board of directors, supervisory board) and auditors' reports, and dividend proposals should be deposited at the company's registered office from the moment the general meeting is convened. Prior to the 2006 amendment to the Companies Act, the wording of the Act *expressis verbis* provided that shareholders had 15 days prior to the general meeting to exercise their right of access to the file. On the other hand, Article 117^2, which was inserted into the law after the amendment, does not provide for this, only that the documents listed above may be viewed by shareholders at the company's registered office from the moment the general meeting is convened, and the company is obliged to provide a copy of the documents. So, the question is what counts as the moment of convening a general meeting? In order to answer this question, we need to examine the legal provisions for convening a general meeting. It can be read from the provisions of the Companies Act that the general meeting cannot be held earlier than 30 days after the publication of the invitation in the Official Gazette, so the shareholder has 30 days from the publication of the invitation to inspect

13 Osztovits 2014. 809.

14 Cărpenaru–Piperea–David 2014. 390.

the company's official documents listed by law. Of course, the date of the general meeting in the invitation published in the Official Gazette may also be more than 30 days. In this case, the company must grant shareholders a right of access to the file for the entire period between the appearance and the holding of the general meeting.

The invitation to the general meeting may also be sent to the shareholders by registered mail (via post) or, if the company's Articles of Association allow it, by e-mail with a qualified electronic signature, to the e-mail address provided for this purpose. In this case, in our opinion, the moment of receipt of the letter or receipt of the e-mail in the account is considered to be the moment the invitation takes effect. If the company has its own website, then, in order for shareholders to have free access to information, the invitation to the general meeting but also the agenda items supplemented at a subsequent shareholder request, the annual financial statements, and the reports of senior executives and auditors must also be published on the company's website. In this case, the publication of the invitation on the website constitutes the moment of convening, even if the invitation has not yet been published in the Official Gazette or the shareholder has not yet received the invitation to the general meeting by registered mail or electronically.

Different views have been expressed in the literature regarding what exactly counts as the moment of convening the general meeting, from when the shareholder can exercise the right of access to the file. According to some opinions, which we ourselves agree with and have already been described previously in this paper, the moment of convening is the date when the shareholders were notified of the holding of the general meeting in the manner prescribed by the Companies Act or the Articles of Association.[15] According to this position, the moment of convening is the publication of the notice of the general meeting in the Official Gazette or the receipt of the registered letter with invitation or the receipt of an e-mail. A contrary opinion states that the sending of a notice of convocation for publication, the sending of a registered letter, or the sending of an e-mail is already considered the moment of the summons.[16]

Article 117[2], para. (3) of the Romanian Companies Act allows all shareholders, regardless of the amount of their financial contribution, to address issues related to the operation of the company to the company's senior executives before the general meeting is held, but after its convening. The questions may relate to both past and future operations.[17] Questions must be formulated in writing and forwarded to senior executives, who are required to answer questions at the general meeting. The Companies Act does not require senior executives to respond in writing or orally to questions asked by shareholders. In our opinion,

15 Schiau–Prescure 2009. 356.
16 Cărpenaru–Piperea–David 2014. 392.
17 Duțescu 2010. 104.

the answer can also be given orally in the framework of the general meeting, given that the minutes of the general meeting are drawn up, which the shareholder can later view and request a copy with reference to his/her right to information. The questions asked may also highlight issues that are not included in the agenda items detailed in the invitation to the general meeting.

Unless otherwise provided in the company's memorandum and in the Articles of Association, the company's senior executives may publish their answers on the company's website, and the information so published shall be deemed to be a response. Of course, there is nothing to prevent a shareholder from asking a question again at the general meeting if the answer posted on the website is not exhaustive. The shareholder may explicitly request a written answer to his/her questions at the general meeting. This is especially justified in cases where, due to the complexity of the issue at hand, the company's senior executives are unable to provide an immediate answer at the general meeting. Senior executives may refuse to respond to the general meeting only if it seriously harmed the interests of the company. In such a case, senior executives may invoke Article 144^1, para. (5) of the Companies Act, which prohibits members of the board of directors from disclosing confidential information and trade secrets about the company.

The legislature did not impose a sanction for violating the right to information, but in Romanian case-law we find many examples of a shareholder basing his action for invalidity on a resolution of the general meeting on Article 117^2, para. (3) of the Companies Act. The development of the case-law was also defined in Article 135 of the Companies Act prior to the 2006 amendment.[18] Pursuant to the first paragraph of the repealed provision, shareholders had the right to request information on the company's operations, financial and economic situation from the general meeting between the general meetings, but not more than twice during the financial year. If the company's board of directors did not comply with the shareholder's request within 15 days of filing the shareholders' request for information, the shareholder could apply to the competent judicial authority, which could oblige the company to pay a certain daily fee for the delay to the requesting shareholders. We can see that under the repealed provision the judicial authority could not oblige the company to provide the information requested by the shareholders; however, the fine imposed on the company could have prompted it to provide the requested information.

According to some interpretations in the Romanian legal literature, in the repealed Article 135 of the Companies Act, the legislator deliberately used the plural shareholder designation, thus inclining shareholders to address their issues in an organized and joint manner rather than individually to the company's senior executives. On the basis of this interpretation, the company could also have rejected the shareholder's request for information on the grounds that they could no longer exercise their right under Article 135, given that the two opportunities for information

18 Act 441 of 2006 repealed Article 135.

had been exhausted in the year in question.[19] In our view, the legislature did not intend to restrict the shareholders' right to information, and the interpretation that emerged stems only from the superficial and often inconsistent wording of the text of the law. In the wording of Article 117[2], para. (3) of the Companies Act 2006, the legal norm explicitly allows all shareholders – regardless of the level of their contribution – to bring to the attention of the general meeting and address issues related to the operation of the company or to senior executives of the company.

As mentioned above, the legislature did not impose a sanction for violating the right to information, but it is a criminal offence under Article 271 of the Companies Act and punishable by six months to three years in prison for the founder, manager, managing director, auditor, or board member as far as he/she provides shareholders with inaccurate information about the financial and economic situation of the company in bad faith in order to obscure the real situation of the company.[20]

The publication of the invitation to the general meeting in the Official Gazette of Romania serves to inform the shareholders. The invitation shall state the place and time of the meeting and shall include the items on the agenda of the general meeting. Different views were expressed in the literature as well as in the case-law on the level of detail in which the invitation should describe the items on the agenda. In our opinion, the provisions of the Companies Act only state that the items of the agenda to be discussed must be clearly and unambiguously indicated in the invitation to the general meeting; however, the law does not require a detailed description of these. Decision no. 2096/09.01.2012 of the Bucharest Court of Appeal supports this position by adding that it is not enough for the invitation to the general meeting to simply list the items on the agenda but also to explain them in order to provide effective and prior information. The interests of minority shareholders are protected by a provision that allows shareholders representing individually or jointly at least 5% of the share capital to supplement the agenda items.

4. The Right of the Shareholder to Be Constantly and Continuously Informed

4.1. Hungarian Company Law Regulations

As stated in the Explanatory Memorandum of the Hungarian Civil Code, there is an information asymmetry between the senior executives of the legal person and the members of the company, in this case the shareholders, the senior executives

19 Cărpenaru–David–Predoiu–Piperea 2002. 307; Duțescu 2010. 104.
20 Tița-Nicolescu 2018. 150.

of the joint stock company having more information or more accurate information than the other shareholders.[21] This is because senior executives have regular access to information as a result of their activities, while shareholders, unless they are members of the company's management, do not necessarily have the information to make strategic decisions and control management.

a) Access to Documents and Protection of Business Secrets

As already mentioned, the right to information and clarification cannot be limited or excluded by the Articles of Association of a company limited by shares. Information may be disclaimed only in cases stated in Civil Code Section 3:23 if the legal person violated a trade secret, if the person requesting the information abuses his/her right, or if he/she does not make a declaration of confidentiality despite the invitation. According to Section 3:23, the senior official is obliged to provide the members with information about the legal entity and to also provide them with access to the documents and records concerning the legal entity.[22]

Access to documents may be tied to the shareholder's written declaration of confidentiality, or it may be refused by senior executives if it has violated the company's business secrets, if the person requesting the information abuses his/her right, or if the shareholder does not make a declaration of confidentiality despite the invitation. If the shareholder considers the refusal to provide information to be unjustified, the Civil Code shall apply Section 3:23, para. (2), and the registrar may request the court to oblige the legal person to provide the information. The court of registration has jurisdiction to conduct non-litigious legality supervision proceedings.[23] In legal proceedings, a shareholder may request the enforcement of his right to information only if a body of the company (board of directors, supervisory board) has made a board decision refusing the request for access to the file.[24] This position is consolidated by the Court of Appeal of Győr, which upheld the decision that in the case of an application for access to documents the court of registration has no jurisdiction to adjudicate it, only in that case if the company's bodies have decided to exclude access to documents, refusing to grant access.[25]

According to the case-law, the right of access to documents is a fundamental membership right and a means for the shareholder to control the lawful operation of the company and the management. That is why that right cannot be precluded by reference to business secrets alone. Of course, the information and data obtained by

21 Bill no T/7971 on the Civil Code.

22 Any shareholder shall be entitled to request a copy or an extract of the minutes of general meetings from the board of directors [CC Section 3:278, para. (5)].

23 BH 2010.12.550: Legf. Bír. Gfv. X.30.013/2010 [Supreme Court of Hungary].

24 Varga 2007. 4–7.

25 Cgtf. IV. 25 335/2016/2 Győri Ítélőtábla [Court of Appeal of Győr].

enforcing the law must be treated as a trade secret by the shareholder.[26] According to a similar view, disclosure of information covered by business secrecy by a member (shareholder) does not constitute disclosure of the information or disclosure by an unauthorized person. In accordance with established judicial practice, in our view, the right of access to documents, as one of the fundamental rights of membership, cannot be limited to a shareholder by reference to the protection of business secrets. The obligation to maintain business secrecy applies not only to the company's senior executives but also to the company's members/shareholders. In the event of a breach of this obligation, the person required to maintain secrecy shall comply with the provisions of Act LIV of 2018 on the protection of trade secrets and may be subject to the sanctions specified in the law.

b) The Share Register and the Right to Information

The board of directors of a company limited by shares is required to keep a share register of its shareholders which is accessible to anyone [CC Sections 3:245–248]. The share register is, on the one hand, the foundation of the exercise of shareholder rights since its entry is a precondition for the exercise of membership rights,[27] and, on the other hand, it serves to inform the public. One of the individual rights of a shareholder is to ask the head of the share register to be entered in the share register. As a general rule, entry cannot be refused. Entry in the share register is not mandatory for the shareholder; it is only a legal option. However, at the request of the shareholder, the head of the share register is obliged to delete the shareholder from the share register immediately.[28] According to Civil Code Section 3:246, para. (4), the data deleted from the share register must remain identifiable.

The share register is a public register open to everyone, the function of which is to identify and get to know the shareholder registered in the share register. The rules concerning the disclosure of the share register and access by third parties are mandatory; they cannot be legally deviated from in the Articles of Association. There is no legal interest in accessing the information in the share register, wherefore access to the share register must be provided without any probability of legal interest.[29]

The share register provides information about the company limited by shares on the one hand and about who are the shareholders and how many as well as what kind of shares they have on the other hand.[30] Another important function

26 ÍH 2004.144: Fővárosi Ítélőtábla [Budapest Court of Appeal] 16. Cgf. 44.281/2004/2.
27 Veress 2019. 206.
28 Papp 2011. 490–491.
29 BH 2017.4.124: Kúria [The Curia of Hungary], Gfv. VII. 30.112/2016.
30 Kisfaludi–Szabó 2008. 1150.

of the share register is that the shareholder can exercise his shareholder rights against the company, including the right to information and access to documents, only if s/he is registered in the share register. Of course, the non-entry in the share register does not affect the shareholder's right of ownership over the share, and thus the right to transfer the shares.

The share register is kept by the board of directors of the company [CC Section 3:245, para. (3)], but they may instruct a clearing house, central securities depository, investment firm, financial institution, lawyer, or auditor to keep the share register. The permanent auditor of the company may not be instructed to keep the share register. If the share register manager is a foreign resident, access to the share register must also be provided at the registered office of the company limited by shares or at a site (office) located in the same settlement as the registered office of the company.[31] In the case of a public limited company, the fact of the order, the details of the trustee, and the information on access must also be published on the company's website. It is also important from the point of view of the right to information that if the data recorded in the issued share or in the share register change, these will be modified by the management.

Disclosure of the information contained in the share register means that it can be inspected by anyone, be it a shareholder of the company limited by shares or an outside third party. However, a copy of the data in the share register can only be requested by the person for whom the share register contains existing or deleted data, i.e. only by a person who was or is a shareholder of the company and has applied for entry in the share register. Civil Code Section 3:247 follows from the provisions of para. (2) that a shareholder who has not requested to be entered in the share register does not have the right to request copies because the share register does not contain information about such a shareholder. The right of access to the share register cannot be denied on the grounds that it would violate the company's business secrets, and so Section 3:23, para. (2) is not applicable in this case.[32]

The applicant may request a copy only of the personal part of the share register. The public limited company or the person entrusted with the management of the share register must provide access to it at all times during its working hours at its registered office. A copy of the book of events may be requested from the manager of the share register, who must issue it to the holder free of charge within five days of the request. During the inspection of the share register, the company limited by shares is obliged to inform the inspector (shareholder) if it has initiated an ownership matching to keep the share register. However, if the share register already contains the details of the shareholder matching, the manager of the

31 Government Decree no. 67/2014. (III. 13.) § 1.
32 Kisfaludi–Szabó 2008. 1156.

share register is obliged to inform the insider about the record date of the last shareholder matching.[33]

c) Minutes of the General Meeting and Right to Information

Minutes shall be drawn up of the general meetings of the company limited by shares and the resolutions passed there [CC Sections 3:278-279] signed by the secretary of the minutes and the chairman of the general meeting. The board of directors of the public limited company is obliged to place and keep the minutes of the general meeting and the attendance sheet of the general meeting among its own documents. If the Articles of Association of the company limited by shares allow for decision making without holding a meeting, the shareholders shall vote in writing. Of course, no minutes will be drawn up of the general meeting in such a case, but the board of directors is obliged to notify the shareholders of the result of the vote. The result of the vote will be notified to all shareholders listed in the share register, whether or not they attended the general meeting. The Civil Code does not specify how the notification may be made, but in our opinion this issue can be settled in the Articles of Association of the joint stock company.

In the case of a conference general meeting, what has been said and the decisions taken must be recorded in such a way that they can be verified later. If a record has been made of what was said at the general meeting, the minutes shall also be prepared on the basis of the record, which shall be certified by the board of directors.

Any shareholder who does not participate in the general meeting may request a copy of the minutes of the meeting or an extract containing part of the minutes from the board of directors. Civil Code Section 3:278, para. (4) serves to inform shareholders and third parties, according to which the board of directors of a public limited company must submit the minutes of the general meeting and the attendance form to the registry court within thirty days after the end of the general meeting. This provision in Act IV of 2006 on business associations, Section 238, para. (3) required all public limited companies, regardless of their form of operation, to create the possibility for the company to submit only a certified copy of the extract from the minutes and the attendance form to the court of registration with reference to the protection of business secrets. The Civil Code has now retained this requirement only for public limited companies, with the modification that the public limited company is required to submit the minutes of the general meeting, thus eliminating the possibility to submit an extract.[34] Of course, a private limited company is also obliged to keep the minutes of the general meeting and submit them to the court of registration in the procedure

33 Government Decree No. 67/2014. (III. 13.) § 4. para. (2).
34 Gál 2018. 392.

for amending the register.[35] Civil Code Section 3:279 states that a public limited company is obliged to publish the resolutions passed at the general meeting. The method of disclosure is not regulated by law; however, it is clear that the decision can be published at least on the website of the joint stock company. As we can see, in the case of a public limited company, the range of persons entitled to information is wider than the shareholders of the company. In our view, by extending the scope of beneficiaries, the legislator intended to ensure capital market transparency because only detailed information of investors can ensure the proper and efficient functioning of the market.

d) Changes in the Status of the Company Limited by Shares and the Right to Information

The shareholder has the right to information and access to document also in the case when the company limited by shares decides on a transformation, merger, or division. Regarding changes in the status of legal entities and companies, Civil Code and Act CLXXVI of 2013[36] contains provisions. When drafting the provisions regarding the status changes, the legislative took into account Council Directives 82/891/EEC and 89/666/EEC and Directives of the European Parliament and of the Council 2005/56/EC, 2009/101/EC, 2011/35/EU, and 2012/30/EU, which have since been repealed by Directive 2017/1132.

The Civil Code places among its general rules applicable to legal persons the general provisions on the transformation, merger, or division of legal persons [CC Sections 3:39–47]. Here we also find regulations on the mandatory disclosure of members (shareholders) of a legal entity. The change of status is decided by a resolution of the members or founders (shareholders) of the legal entity (joint stock company). Following the decision, the management (board of directors) of the legal entity is obliged to prepare a plan containing the draft balance sheet corresponding to the decided change of status so that the members or founders (shareholders) of the legal entity can make a well-founded and serious final decision on the change of status.[37] The management is obliged to communicate the completed draft balance sheet to the members or founders (shareholders).

According to Act CLXXVI of 2013, under the common rules on changes in the status of legal persons, the decision-making body of a legal person decides on the change of status twice (the two-seat procedure is the rule). First, the decision-making body (general meeting) of the legal person (company limited by shares) determines whether the members of the legal person agree to the change of status on the basis of a proposal from the management (board of directors) of the legal

35 Kisfaludi 2014. 488.
36 Act CLXXVI of 2013 on the Reorganisation, Merger and Demerger of Legal Persons.
37 Sárközy 1998. 193.

person. If the legal person has a supervisory board, the supervisory board shall also give an opinion on the proposal prior to the decision of the decision-making body. If the members (shareholders) do not agree with the intention to transform, it will become pointless to discuss the detailed issues related to the further change of status.[38] However, if they agree to the transformation, merger, or division of the legal entity, the management will prepare a plan for the change of status, which it will communicate to the members (shareholders) in writing. Informing the members and getting to know the plan thoroughly is necessary in order for a final decision on the change of status to be made at the meeting of the decision-making body at the second decision making [Act CLXXVI of 2013, Sections 1–11].

In the case of a merger of legal entities, after the first meeting of the members of the legal entities affected by the merger, the management is obliged to provide all information related to the merger. As part of the draft terms of merger and division, a contract of merger or division shall be drawn up and communicated to the members of the legal person in writing together with the plan. Following the final decision on the merger or division, the legal entity is obliged to initiate the publication of a notice to the Company Gazette within eight days of the decision, which must be published in two consecutive issues.

In the event of a merger or division of public limited companies, the management of the public limited companies has additional obligations. At the same time as drawing up the merger or division agreement, they must draw up a written report justifying the need for the merger or division and the share exchange ratio, explaining the legal and economic aspects. A complete or abstract copy of the documents available to the shareholders shall be prepared at the request of the shareholder at the expense of the joint stock company. The management is also obliged to inform the shareholders at the general meeting if there has been a significant change in the company's assets between the preparation of the merger or division plan and the date of its approval by the general meeting [Act CLXXVI of 2013, Section 24, paras. (2)–(3)]. The application of Section 24, para. (2) of the Act is complicated by the fact that it is not clear from the text of the act what the legislator means by a document available to the shareholder. In this case, the general rules on access to documents in the Civil Code and judicial practice apply.[39]

The public limited company shall submit the plan, the draft contract, the written report prepared by the senior executives, and the auditor's report to the court of registration of the merging limited liability company or the demerging limited liability company thirty days before the general meeting approving the merger or division agreement. With this provision, the law ensures access to information for shareholders on the one hand and for creditors on the other.[40]

38 Bakos 2011. 117.
39 Adorján–Gál 2010. 175–176.
40 Bakos 2011. 138.

The companies limited by shares participating in the merger are obliged to ensure the shareholders' right of access to the file. Therefore, at least thirty days prior to the second general meeting deciding on the merger, each shareholder may inspect the merger plan, the content of the merging companies' accounts for the last three years, the written report of the management, and the auditor's report at the registered office. Shareholders of merging companies may also inspect the records of a company of which they are not shareholders. At the request of the shareholder, they shall make a copy of all the documents available to them or of each of the documents specified by the shareholder at the expense of the joint stock company. If a shareholder requests the sending of documents electronically or consents to the sending of documents electronically, the documents shall be sent to the electronic address provided by him/her [Act CLXXVI of 2013, Section 25, paras. (1)–(3)]. In our view, the right of access to the file of the shareholders of the merging company cannot be denied by reference to business secrets. However, if the company limited by shares provides free access to the documents on its website at least thirty days before the date of the general meeting approving the merger agreement and at least until the close of the general meeting, it is exempt of the obligations contained in Section 25, paras. (1)–(3) of Act CLXXVI. In the case of publication on the website, the company must ensure that the documents can be downloaded and printed from the website. However, one must continue to have access to the documents at the company's registered office [Act CLXXVI of 2013, Section 25, para. (4)].

e) Trade Register and the Right to Information

In conformity with the introductory provisions of Act V of 2006 on Public Company Information, Company Registration and Winding-Up Proceedings, the purpose of the Law is to establish the procedure for founding and registering enterprises and the constitutional rights of entrepreneurs, security of trade, creditors' interests or other public interests to ensure full accessibility of the data in the public register of companies, either directly or electronically. The tasks of the court of registration are listed exhaustively in the law, which include the obligation to provide information on company documents and company register data.

The purpose of the company register is to make the registered company data available to the public so that anyone (including the shareholders of the company limited by shares) can view it without proving their interest.[41] Existing and deleted company register data and company documents are public. The public company information is provided by the Court of Company Registration, the Company Information Service, and the publication in the Company Gazette [Act V of 2006, Section 10, para. (1) and Section 11]. In the Court of Registration, anyone can

41 Sárközy 2014. 261.

view the company documents free of charge and make a note of them. A copy of the company register, a company statement, or a company certificate can be requested. The copy of the company certifies all existing and deleted data of the register of companies, the extract of the company certifies the existing data of the register of companies, and the company certificate, depending on the application, authentically certifies some existing or deleted data of the register of companies. The deleted data must remain identifiable in the company register [Act V of 2006, Section 12, para. (1)].

4.2. Romanian Company Law Regulations

a) Share Register, Resolution Book, and the Right to Information

Pursuant to the first paragraph of Article 177 of the Companies Act, a public limited company is required to keep various records in connection with the operation and activities of the company. Thus, the directors or the board of directors is required to keep a register of shareholders, a book of general meetings and resolutions passed thereon, and a record of the bonds issued. The share register must indicate the surname and last name, ID number, residence (in the case of an individual), name and registered office (in the case of a legal person) of the shareholders as well as the payments made for the shares. The Romanian Companies Act also allows the share register to be kept by an authorized person (*Depozitarul Central*), but the law also stipulates that this can only be a legal entity authorized for this purpose. The share register is public, so not only shareholders but also third parties can gain insight into it. Furthermore, the share register is also important from the point of view that the transfer of shares and the exercise of the rights conferred by a share are only possible if they have also been transferred to the share register.[42]

The book of general meetings and resolutions is the record of the minutes of the meetings and deliberations of the general meeting. The minutes shall include the resolutions passed at the general meeting, the number of votes cast, possible abstentions, and dissenting opinions on the resolutions. Similar to the book of general meetings and resolutions, the minutes of the meetings of the senior executives of the company limited by shares and the decisions made there are prepared, and then they are entered in a single register/book. Decisions must be recorded in order to be valid and enforceable.

Pursuant to Article 131, para. (5) of the Act, a public limited company is also obliged to inform the shareholder of the resolutions passed at the general meeting and the result of the vote at the request of an individual shareholder. If the company has its own website, the results of the general meeting voting must also be published on this website within 15 days from the date of the general meeting. The provision mainly serves the interests of shareholders and provides adequate protection for

42 Duțescu 2010. 109.

those who did not attend the general meeting of the company limited by shares. The text of the law does not specify how the information is to be provided, but this can be deduced from Article 178, which requires senior executives to make copies of the share register, of the book of general meetings, and of the resolutions issued at the request and expense of shareholders and make them available to them. The resolutions passed at the general meeting must be submitted to the court of registration so that they can be published in Annex IV of the Official Gazette. Therefore, resolutions of the general meeting can only be enforced after this step against third parties. There are 15 days to submit resolutions to the general meeting; however, the wording of the law is inaccurate and does not clarify when the 15-day period begins to run. In our opinion, the time limit begins to run when the person chairing the general meeting and the secretary of the general meeting have authenticated the minutes by signing them. In our view, this moment coincides with the end of the general meeting, when the minutes of the general meeting must also be prepared. There is also a position in the literature that the 15-day deadline starts after the closing of the general meeting; however, the minutes of the general meeting can be prepared within the available deadline.[43]

The law does not require a public limited company to present minutes of meetings and decisions of senior executives at the request of a shareholder.[44] Of course, this does not mean that a shareholder cannot request and receive access to these minutes. They may do so, for example, in accordance with the principles and procedure laid down in the company's statutes. Unless the Articles of Association of the public limited company provide for this and the senior executives deny the shareholder the right of access to the file on the grounds that the Companies Act does not *expressis verbis* instruct senior executives to present minutes of their meetings and decisions at the shareholder's individual request, the general meeting may instruct senior executives to present the requested minutes. There is also an example in case-law that, at the individual request of a shareholder, a court decision required the senior executives of a public limited company to present the minutes of the meetings and the decisions taken there.[45]

b) Changes in the Status of the Company Limited by Shares and the Right to Information

The shareholders' right to information is guaranteed by Article 244 of the Companies Act, which requires the company's senior executives to make the draft merger or division agreement available to shareholders at least one month before

43 Duțescu 2010. 109.
44 Catană 2007. 6.
45 Cărpenaru–Piperea–David 2014. 626. Curtea de Apel Ploieşti [Court of Appeal of Ploieşti], Decision no. 1270/2001 2001. 248–251.

the date of the general meeting deciding on the draft terms of merger or division. The company's senior executives must also prepare a detailed written report explaining the legal and economic aspects of the draft merger/division agreement and the share exchange ratio. Article 244, para. (3) of the Act provides that the preparation of a written report is not obligatory if the shareholders of the companies involved in the merger/division agree to it unanimously. In addition to the draft contract and the accounts, the following must be made available to the shareholders: the annual accounts and annual business reports of the companies involved in the merger or division for the last three financial years; the auditor's report; if necessary, an interim report covering a date not earlier than the first day of the third month preceding the date of the draft terms of merger/division if the last annual report relates to a financial year ending more than six months before that date; an expert examination of the draft terms of merger or division and a record of contracts not yet performed with a value of more than 10,000 RON.

If the company has its own website and has published the listed documents on its website, it is not obliged to make them available to shareholders at its registered office. However, regardless of the publication on the website, the company is obliged to make copies or extracts of the listed documents free of charge at the request of the shareholders and to make them available to the shareholders. With the approval of the shareholders, the information and copies of the documents may also be sent to the parties concerned by e-mail. However, if the documents relating to the merger or division can be downloaded from the website, the company is not obliged to send the required documents on paper or electronically at the shareholder's request.

c) Trade Register and Right to Information

Last but not least, shareholders can obtain information on the transactions recorded in the trade register relating to the company from the trade register kept by the National Trade Register Office (*Oficiul Național al Registrului Comerțului*). The trade register is publicly available under Article 4 of the Trade Register Act,[46] which governs it, and is therefore available not only to the company's shareholders but to everyone. The Registry shall provide – at the expense of the applicant – a certified copy of the entries in the Register and the documents submitted by a particular company as well as the information relating to the data contained in the Register, and it shall issue certificates as to whether a particular document or transaction has been registered. Documents can also be requested and issued in person, by post, and electronically.

Of course, the documents and transactions recorded in the trade register and the information stored there do not provide a complete view of the operation of

46 Act no. 26/1990 on the Trade Register.

a company. However, the applicant may obtain important information from the company statement and request copies of the company's Articles of Association as well as of amendments thereto but also information pertaining to shareholders, senior executives, or auditors.[47]

5. Conclusions

The shareholder has the right to information under both Hungarian and Romanian Company Law. According to both regulations, in addition to constant and continuous briefing, the shareholder has the right to be informed about the items on the agenda of the general meeting and to be informed about the report. While the Hungarian regulations provide the shareholders with information prior to the general meeting, regarding the items on the agenda of the general meeting [CC Section 3:258], the Romanian legislation also provides for the possibility for the shareholder to formulate questions to the company's senior executives in matters related to the company's operations, which are not included in the agenda, after the convening of the general meeting and before its holding. Questions must be sent in writing or by e-mail to senior executives, who will answer the questions previously formulated in the framework of the general meeting [Companies Act Article 117^2 para. (3)]. However, taking into account Hungarian Civil Code Section 3:23, para. (1), it cannot be ruled out that a shareholder may request information in connection with matters not included in the invitation to the general meeting in the period after the convening of the general meeting and before its holding.

There is also a position in the Romanian literature that the right to ask questions belongs to the shareholder only in the period after the convening of the general meeting and before the general meeting. In our view, this position is not correct[48] as we see there is no legal impediment to the shareholder asking additional questions to the senior executives of the company during the general meeting in connection with the questions already asked in writing before the general meeting or new questions which arise during the meeting. We believe that when the law is amended, it would be reasonable to clarify this issue and supplement and clarify the text of the law.

Unlike the Romanian regulations, the Hungarian regulations *expressis verbis* provide for shareholders the right to be informed at the general meeting. Pursuant to Civil Code Section 3:257, the shareholder is entitled to request information at the general meeting; however, it no longer becomes clear from the relevant provision of the above cited section what the request for information may cover.

47 Duțescu 2010. 114–115.
48 Schiau–Prescure 2009. 356.

According to one of the positions expressed in the literature, the shareholder may request further information only in connection with what has been said at the general meeting.[49] In our opinion, the subject of information and requests for information at the general meeting are not limited by law. As a result, the shareholder may ask the General Meeting any questions that he or she could have asked in advance. In our view, the difference between the two rules is not fundamental to the issues outlined above. In the two examined legal regulations, the different legal places – building on each other and complementing each other – result in similar solutions in both regulations.

In both Hungarian and Romanian company law, the rules for keeping the share register are given priority. This is due, on the one hand, to the fact that registration is a precondition for the exercise of membership rights[50] and, on the other hand, that the share register is intended to inform the public. Both company laws provide for the necessary data to be entered in the share register. With regard to the data to be reported, there is a difference in the fact that the Romanian legislation requires the indication of the personal identifier (personal number) of the natural person shareholder. The discrepancy does not appear to be significant although, in our view, the inclusion of a personal identification number in a public register is unfortunate. The relevant company law rules in both states allow the share register to be maintained by an authorized person [CC Section 3:245, para. (3), Companies Act Article 180, para. (1)].

While according to the Hungarian regulations a copy of the share register can only be requested by the person for whom the share register contains existing or deleted data, and the copy can only contain data concerning his/her person [CC Section 3:247, para. (2)], the Romanian legislation allows anyone to request copies of the ownership structure from the share register at their own expense. In our opinion, the Hungarian company law solution is the right one, according to which anyone can inspect the share register, but only the shareholder concerned can request a copy. According to the position expressed in the Hungarian legal literature, with which we ourselves agree, this is a 'coherent rule because the shareholder is not entitled to request a copy of the share register or any part of it but only of the part concerning it'.[51] In our view, the shortcoming of the Romanian regulation is also that it does not provide for the subsequent identification of the data deleted from the share register, and thus no asset is provided in the share register.

49 Osztovits 2014. 809.
50 Veress 2019. 206.
51 Kisfaludi–Szabó 2008. 1156.

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The Applicability of Artificial Intelligence in Contractual Relationships

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Abstract. The appearance and the impacts of AI and digitalization on the different types of legal work as well as on different legal areas and in relation to certain legal institutions are examined and analysed nowadays by many research studies in many ways. In this study, we examine the impact digitalization and AI have on the law of obligations, particularly on the law of contract, and the challenges national legislators shall face in the near future. In the first part of the study, we deal with the formation of contracts by electronic means. After the short review of the related Hungarian regulation in force, recent EU legislation will be presented, which was generated by the expansion of both digital content and digital services. In the second part of the study, attention will be paid to a relatively new phenomenon, the so-called smart contract. In the course of our examination, we attempt to designate the framework of the notion of smart contract and to draft all those questions relating to smart contracts which shall be answered over time by legislation and by contract law.

Keywords: digitalization, digital transformation, conclusion of contract by electronic means, smart contract, intelligent contract

1. Introductory Thoughts

The fourth industrial revolution, the one we are witnessing, fundamentally changes our world and almost all areas of our life. The process called digital transformation impacts our work activity, and our private life does not remain intact either. In parallel with the 'smartening-up' process, almost all professions undergo changes to some extent, and thereby artificial intelligence (hereinafter referred to as: AI) appears and is integrated into the work of lawyers.

The appearance and the impacts of the AI and digitalization on the different types of legal work and on different legal areas as well as in relation to certain

legal institutions are examined and analysed nowadays by many research studies in many ways. The scope of the problems posed and the questions to be answered are extremely colourful and virtually infinite.

In this study, we will take a closer look at the effects of digitalization and AI. We will examine how these phenomena and impacts infiltrate the law of obligations and the law of contract, while attention will also be paid to future challenges.

The starting point of the first part of the study is the formation of contracts by electronic means, a kind of contract conclusion which was made possible by the appearance and the spreading of the Internet and which has already become widespread today. After the short review of the relevant Hungarian regulation in force, recent results of the EU legislation will be presented. This legislative reform was generated by both the spreading of the digital content and digital services and the demands which arose due to contracts relating to products containing or linked to digital content or digital services.

The smart contract constitutes the core element of the second half of the study. In some ways, this contract can be deemed as an improved version of the conclusion of a contract by electronic means. Nevertheless, as it will be later clearly visible, the content of the expression 'smart contract' is much wider since this contract has a special character not only in its conclusion but in its performance. In the course of our examination, we attempt to designate the framework of the notion of smart contract and to formulate all those questions relating to the smart contracts which shall be answered over time by legislation and by contract law regulation.

2. Formation of Contracts by Electronic Means – First Steps Towards the Modernization of Contract Law

Contract law is the most dynamic part of civil law. This characteristic shows itself not only in the operation but in the development of contract law, which has been adapting itself for centuries to the needs raised by everyday life. Due to this adaptation process, different types of contracts have evolved, and more specific and less classifiable contracts have appeared. Over time, the development process and the adaptation had an effect on the process of the conclusion of the contract and partially transformed it: modalities of contract conclusion extended, and the formation of contract by electronic means has become an everyday occurrence today.

However, it is important to mention that the application of this method by the contracting parties in the conclusion of their contract means only a technical change because the parties' intention, which is conveyed or which they wish to convey by the transaction, will not change, and the form of the conclusion of the contract does not affect the intention of the parties.

In 2000, rules on electronic commerce were adopted at the European Union level. As Directive 2000/31/EC[1] (hereinafter referred to as: e-Commerce Directive) indicated, the main aim of its adoption is to create a legal framework to ensure the free movement of information society services between Member States.[2]

According to the implementation duty prescribed by the e-Commerce Directive, the Hungarian legislator adopted Act No. CVII of 2001 on certain issues of electronic commerce services and information society services (hereinafter referred to as: e-Commerce Act), which, in accordance with EU rules, determines the requirements of starting and pursuing service activity relating to the information society. The e-Commerce Act contains special provisions on the conclusion of contracts by electronic means,[3] bearing in mind the aspects of consumer protection such as the interests of consumers during the online contract conclusion and the protection of consumer interests.

The e-Commerce Act prescribes for the service provider to make the general contracting terms and conditions appropriately available, i.e. in a way that allows the recipient of the service to store and retrieve them. The e-Commerce Act also specifies those elements and information which the service provider shall provide to the recipient of the service prior to the sending of an offer by the latter person. The provisions on the service provider's duty to provide information are basically imperative. Nevertheless, parties are allowed to derogate from these rules with their mutual consent if the contract is to be concluded between a service provider and a non-consumer recipient.[4] In this regard, it should be noted that the above mentioned provisions shall not apply to contracts concluded exclusively by the exchange of electronic mail or by equivalent individual communications, e.g. text message or online chat.[5] Moreover, the e-Commerce Act also contains provisions on the identification and correction of input errors. These rules are non-mandatory as well.

The rules of the conclusion of contract by electronic means are also regulated by the current Act No. V of 2013 on the Hungarian Civil Code (hereinafter referred to as: HCC). The HCC, in essence, follows and takes over the relating provisions of the e-Commerce Act[6] with minor modifications, while these rules remain in force. It is important to note that the provisions of the HCC, except the provision on the entry into force of a statement made electronically, relate exclusively to those contracts which are concluded online by 'click-wrapping'. These rules, in a way similar to the

1 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, 1-16.

2 Directive 2000/31/EC, Recital (8).

3 e-Commerce Act, articles 5–6.

4 e-Commerce Act, Article 5, paragraph 3.

5 e-Commerce Act, Article 5, paragraph 4.

6 In their co-authored study, Judit Barta and Mário Čertický observe that differences between the provisions of the e-Commerce Act and the HCC generate uncertainty in jurisprudence. See Barta–Čertický 2018. 307–331, 313.

provisions of the e-Commerce Act, shall not apply to contracts concluded exclusively by the exchange of electronic mail or by equivalent individual communications.[7]

The above-mentioned provisions of the HCC constitute part of the law of obligations, i.e. they have basically non-mandatory nature. Therefore, contractual parties, in accordance with Article 6:1, paragraph 3 of the HCC, are allowed to derogate with their mutual consent from these provisions. Nonetheless, derogation is excluded by the HCC in the case of consumer contract, i.e. when the contract is to be concluded between an undertaking and a consumer. If, contrary to the prohibition, contractual parties derogate from the relating provisions, their agreement shall be deemed as null and void.[8]

3. Towards the Creation of the Single Digital Market

In the late spring of 2015, the European Commission published a communication in which it launched the Digital Single Market Strategy for Europe[9] and envisaged the creation of the single digital market to achieve the preservation of the leading position of Europe in the digital economy. The digital market to be created means a market where the four fundamental freedoms prevail on the one hand and where both individuals and undertakings can conduct their online activity without barriers on the other.

In its three pillars strategy, the Commission worded a plan for a multi-annual period. At the same time, it drafted several measures which are to be carried out by the legislative bodies of the EU. In its communication, the Commission drew attention to the reasons why consumers and smaller undertakings demonstrate a timid attitude to cross-border electronic commerce. As the Commission worded, this attitude mostly stems from the complexity and unclear nature of the regulation on such transactions. Moreover, regulations are not fully harmonized, and therefore the legal provisions to be applied are often different. Although full harmonization has already been realized

7 In the legal practice, the question arose whether electronic mail without electronic signature (simple e-mail) shall be deemed as a written legal statement in the application of Article 6:7, paragraph 3 of the HCC. The relevant judicial practice is not uniform. There is a decision in which the court, regarding the given situation and its circumstances, deemed the simple e-mail as a written legal statement (Gfv. VII.30.417/2014/2). Nevertheless, according to the majority of the members of the New Civil Code Advisory Board, the court shall examine in all cases if the form of communication under the given circumstances complies with the conditions determined by Article 6:7, paragraph 3 of HCC. It means that a statement can only be deemed as written if the form allows for the content being properly recalled in and for the person who made the statement and the time when the statement was made being identified. About this question, see: Pomeisl–Pozsonyi 2020. 44–49; Barta 2019. 13–20, 17–19.

8 HCC, Article 6:85, paragraph 2.

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions – A Digital Single Market Strategy for Europe, COM (2015) 192 final. Brussels, 6.5.2015.

in certain areas (e.g. consumer protection rules of electronic commerce), in other areas only a minimum harmonization was prescribed by the EU directives. There were other segments of electronic commerce where the relevant European regulation was deficient or did not exist at all (e.g. in the case of digital content). Considering all these deficiencies, the Commission submitted a legislative proposal which is partly aimed at the adoption of new EU measures and at the revision of the already existing legal framework.[10]

After a multi-annual preparatory process, two new directives were adopted at the EU level in the spring of 2019.[11] In the future, these directives will form the regulatory framework of the contracts for the supply of digital content and digital services. The adoption of these legal measures is arguably one of the greatest regulatory achievements of the last two decades in the field of contract law and consumer protection in the EU.

In the case of consumer contracts, i.e. contracts between consumers and undertakings, the rules set forth for the formation of the contract by electronic means require particular attention. In the course of the adoption of the relevant rules, the EU legislator has considered this aspect from the very beginning. Nevertheless, the increasing number of online contracts concluded presented both the European and the national legislators with new challenges. Notwithstanding the fact that the number of online contracts is increasing, there is still some uncertainty on the consumer side, in particular in the case of cross-border purchases. Albeit this is due to several factors, consumers' uncertainty regarding their basic contractual rights and the lack of a clear regulatory framework of contracts for the supply of digital content and digital services have the greatest impact.

Directive 2019/770/EU contains common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or a digital service,[12] as Recital (11) of Directive 2019/770/EU declares that the main aim of the directive is the full harmonization of the rules on the conformity of digital content or a digital service with the contract, remedies in the event of a lack of such conformity or a failure to supply and the modalities for the exercise of those remedies, and the full harmonization of the rules on the modification of digital content or a digital service. Accordingly, the scope of the directive covers

10 For the detailed description of the proposal and the summary of the problems raised, see: Merdi 2017. 125–162; Romachuk–Racheva 2016. 95–106; Carvalho 2019. 194–201; Gellén 2017. 3–9.

11 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, 1–27; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019, 28–50.

12 The content of Directive 2019/770/EC is reviewed and analysed in detail by Karin Sein and Gerald Spindler in their co-authored studies. See: Sein–Spindler 2019a. 257–279; 2019b. 365–391.

all contracts for pecuniary interest[13] under which the trader supplies or undertakes to supply *digital content*, i.e. data which are produced and supplied in digital form,[14] or a digital service to the consumer. *Digital service* means a service that allows the consumer to create, process, store, or access data in digital form. Moreover, the notion covers all those services that allow the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.[15]

In addition to defining the basic expressions, Directive 2019/770/EU specifies the subjective and objective requirements for the conformity of a digital content or digital service. Furthermore, it contains provisions on the liability of the trader and on the burden of proof. Within the framework of the directive, all those remedies are determined which the consumer can claim against the trader for the failure to supply, i.e. in the event of non-performance or in case of a lack of conformity. Directive 2019/770/EU also sets forth the duties of both the consumer and the trader in case of the termination of the contract by the consumer and contains rules on the reimbursement of the price paid by the consumer.

According to Article 24 of Directive 2019/770/EU, Member States shall adopt and publish the measures necessary to comply with the directive. These measures shall apply from 1 January 2022.

As it was mentioned above, another legal norm was also adopted within the framework of the Digital Single Market Strategy for Europe. Directive 2019/771/EU lays down the common rules on certain requirements concerning sales contracts concluded between sellers and consumers. In the application of the directive, the term 'goods' should be understood broadly since it includes 'goods with digital elements', i.e. it covers all those digital content and digital services which are incorporated in or interconnected with such goods in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions.

It is clear that the subject-matter of Directive 2019/770/EU and Directive 2019/771/EU coincides in certain cases, e.g. conformity of goods, digital content and digital services, applicable remedies in the event of a lack of such conformity, and the way of their exercising. Therefore, the directives' conceptual system is coherent, 'digital content' and 'digital service' are defined in the same way in both documents. Nevertheless, the scope of application of the directives is different: provisions of Directive 2019/771/EU shall basically not apply to contracts for the supply of digital content and digital services. However, provisions shall apply for a digital content or digital service incorporated in or interconnected with goods, which are provided with the goods.[16]

13 According to Article 3, paragraph 1 of Directive 2019/770/EU, the consumer pays or undertakes to pay a price for the digital content or digital service supplied or undertaken by the trader.

14 Directive 2019/770/EU, Article 2, point 1.

15 Directive 2019/770/EU, Article 2, point 2.

16 Directive 2019/777/EU, Article 3, point 3.

In addition to differences in the subject-matter of the directives, it is important to note that the texts of the directives expressly declare that the directives should complement each other.[17] Accordingly, Directive 2019/771/EU has a similar relationship with the provisions of Directive 2011/83/EU[18] since it is complementary to them.

In terms of content, Directive 2019/771/EU follows the regulatory structure of Directive 2019/770/EU. On the one hand, it determines the subjective and objective requirements for the conformity of goods. Furthermore, it provides for the liability of the seller and for the burden of proof as well as for the remedies which are available for the consumer. Finally, the directive contains provisions on the termination of the sales contract.

The deadlines for the implementation of the directives are the same, as is determined by Directive 2019/770/EU. However, Directive 1999/44/EC[19] on certain aspects of the sale of consumer goods and associated guarantees is repealed with effect from 2 January 2022, i.e. with the beginning of the application of the new rules.

The above introduced new European legal norms definitely have an impact on the future development of electronic commerce in the EU. Nevertheless, the restructuring of the regulation of electronic commerce, in particular of the rules on consumer protection regarding the supply of digital content and digital services, poses a major challenge for the national legislators as well. Beyond that, the implementation of the above mentioned directives appears as a concrete task in the legislation of the Member States; national legislators shall have regard to policy reasons and, along them, decide on how to integrate the rules prescribed by the European acts into their law in force, i.e. they shall decide whether to adopt a single act or to amend the existing legal rules.

4. Intelligent Contracts – The New Generation of Contractual Agreements?

4.1. Conceptual Framework. Main Characteristics and the Difficulties of Definition

During the examination of the different digital technologies' impact on the law of obligations, the appearance and interpretation of 'intelligent contracts', or 'smart

17 Directive 2019/770/EU, Recital (20) and Directive 2019/771/EU, Recital (13).

18 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, 64–88.

19 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, 12–16.

contracts', and their incorporation into the framework of classic contract law is one of the most frequently examined areas.

As it was mentioned before, the emergence of the conclusion of contract by electronic means brought merely technical changes in the method of the formation of the contract. Conversely, smart contracts mean not only a new kind of contract conclusion, but the application of this contract type based mostly, but not exclusively, on blockchain technology[20] also impacts the performance of the contract. Indeed, in the case of application of this technology, the fulfilment of conditions and terms determined in the contract leads automatically to the performance of the contract.

In relation to smart contracts, the expression 'blockchain' should be explained. Blockchain is a kind of so-called 'distributed ledger technology' (DLT), which, in order to distribute values and information, allows the establishment of a peer-to-peer (P2P) relationship between parties who are geographically absent or who do not trust each other. Blockchain is typically public, but, due to the different cryptographic processes it employs, it is able to provide a satisfactory proof of transactions without the need for the involvement of an intermediary.[21]

In the case of applications of the blockchain technology, the different asset movements, the conclusion and the fulfilment of contracts, the tracking of the phases of these operations, and the processing of different data take place entirely by computer encryption.[22]

Determining the conceptual framework of smart contracts is not an easy task since it does not have a generally accepted, universal definition.[23] At first sight, it can be surprising since the topic of smart contracts is one of the most frequented and most researched areas in the borderlands of computer science, digitalization trends, AI, and jurisprudence. The lack of a definition is due to several reasons.

a) Although the expression 'smart contract' has already been present for more than two decades in the public consciousness,[24] it appears as a relatively new

20 The operation of smart contracts is mostly, but not always, based on the blockchain technology. However, there are other platforms, e.g. the Hungarian-developed TrustChain, which ensure the online conclusion of contract but are not based on blockchain technology. About TrustChain, see: www.trustchain.com.

21 De Filippi–Wright 2019. 13–14.

22 The functioning of blockchain technology is not reviewed in detail within this study. For a detailed elaboration of the topic, see: Glavanits–Király 2018. 173–183; Szuchy 2020. 75–83; Csitei 2019.

23 De Caria 2019. 731–752. In spite of the fact that smart contracts do not have a generally accepted worldwide definition, there are countries where a regulation has been adopted which recognizes the application of blockchain technology and smart contract, and, at the same time, this designates to a certain extent the conceptual framework of these contracts. For instance, several states of the USA, e.g. Arizona, Delaware, Nevada, Ohio, Tennessee, and Wyoming, have rules on smart contract. See Catchlove 2017.

24 The expression was used at first by Nick Szabó. He defined smart contract as '[a] set of promises, including protocols within which the parties perform on the other promises. The protocols are usually implemented with programs on a computer network or in other forms of digital electro-

phenomenon in the present contractual practice inasmuch as it came to the forefront of the attention of legal professionals interested in computer science and programming only in the last few years due to the spread of bitcoin and blockchain technology. Additionally, it should be mentioned that the original meaning of the expression at the time of its first use (1998) by Nick Szabó is not identifiable with all those elements which the not strictly limited concept of smart contract covers.

b) In defining intelligent contract, the complexity of the technology upon which the functioning of this contract is based also causes difficulties since the conceptual delineation of smart contract is not possible without a detailed knowledge of blockchain technology. Creating the concept of intelligent contract requires at least a minimum knowledge and understanding of the information technology behind the contract. However, such a knowledge and perception are a quite serious challenge for average legal professionals, who have only user-level computer skills. It is an additional difficulty that the name 'smart contract' is basically created and used by IT specialists, therefore in the sense used by them, i.e. smart contracts as merely computer protocols have no real legal relevance.[25]

In short, due to all factors mentioned above, it is not possible to speak about the general and universal concept of smart contract. Nevertheless, several definition attempts appear in the quite rich and expanding literature relating to the topic. A typical feature of such definitions is that, instead of the conceptual delimitation of smart contracts, they identify and highlight the main characteristics of the construct itself. Nevertheless, the designation of the conceptual framework of intelligent contract is not an aim in itself. This kind of work is absolutely necessary to make remarks and to draw conclusions regarding the relationship existing between smart contracts and traditional contract law. Moreover, based on all these, it becomes possible to make recommendations and, in a given case, to designate the directions of the transformation of contract law, triggered by technological development. However, beyond the relatively precise designation of the conceptual framework and the creation of the logical closure, the definition method shall also be flexible. It means that the scope of the concept shall be 'moveable' in order to be able to adapt itself later to the relatively fast-changing technological environment, upon which the operation of intelligent contracts is based.

Thanks to the particularly high level of attention for the different issues of intelligent contracts and to the quantity of studies published recently, the number

nics, and thus these contracts are "smarter" than their paper-based ancestors. No use of artificial intelligence is implied.' See Szabó 1996.

25 This is the reason why the expression 'smart contract' appears in clarified form in the foreign, mostly English-language literature. 'Smart contract code' means the contract in the IT sense, while the expression 'smart legal contract' is used for the purpose of analysing the topic from a legal perspective. See Stark 2016.

of definition attempts is practically endless. Therefore, providing a complete picture of these various, sometimes more, sometimes less complex definitions seems hardly possible. Regarding this, some potential definitions of the smart contract will be presented in the following.[26]

If we designate the conceptual borders of the intelligent contract, we are given more options. From the technical point of view, an intelligent contract is a kind of computer protocol which, usually by the application of blockchain technology, executes itself automatically, without the contribution of any other actor or intermediary.[27] In addition, the transaction is automatically registered in a distributed database. With regard to this latter feature, these blockchain-based contracts are often called in the practice 'decentralised intelligent contracts'.[28] According to another approach, smart contracts are an agreement incorporated into digital form, which execute and enforce themselves;[29] it is an objective and infallible computer program which establishes, performs, and enforces the agreements.[30]

A further definition considers that smart contracts are computer programs of a new type, which are independent from a central operator and which are able to make the contract, in whole or in part, self-executing by transforming the contract terms to computer code.[31]

According to the simplest and briefest phrasing, a smart contract is a self-executing agreement.[32]

After reviewing the sometimes simpler, sometimes complicated wordings of intelligent contract definitions, it is clear that there is a common characteristic which is included in them: all of them contain the self-executing nature of the contract, which can be deemed as the key feature of smart contracts. Self-enforceability and a tamper-proof nature[33] can be identified as further essential features of the intelligent contract.

If a smart contract is approached from the point of view of traditional contract law, it should be noted that it cannot be deemed as a specific type of contract, just like the different groups and contract types existing and regulated by national laws. Instead, a smart contract can be perceived as an improved, 'upgraded',

26 In his previously referred work, De Caria collects several definition attempts of the smart contract. See De Caria 2019. 735 (Footnote 23).

27 De Filippi–Wright 2019. 33 (Footnote 21); Woebbeking 2019. 106–113, 107.

28 De Caria 2019. 733 (Footnote 23).

29 Werbach–Cornell 2017. 313–382, 320.

30 Mik 2017. 269–300, 270.

31 Rohr–Wright 2019. 463–524, 473 qtd. by Glavanits–Király 2018. 180 (Footnote 22).

32 Raskin 2017. 306–341, 306.

33 Tamper-proof enforcement means that the smart contract cannot be stopped or modified. This raises several problems, which are not to be discussed within the framework of this study. About the elaboration of this topic, see Mik 2017. 283–284 (Footnote 31); Clack–Bakshi–Braine 2016. 4.

AI-supported version of the *formation of contract by electronic means*. Smart contracts are independent from any particular type of contract, and therefore they ensure that contracting parties conclude and perform their contract online, fully virtually, without meeting, and using the guarantees granted by the blockchain technology.

Smart contracts are practically 'type-independent' as they, in theory, can appear in any form of contract. Nevertheless, it should be added that there are and will always be contracts which would not be appropriate for conclusion as smart contracts or for the transformation of which into smart contracts no need would arise.

Regarding the appearance, a smart contract always contains the contract terms in translated form, i.e. as computer code. In some cases, smart contracts appear exclusively in encoded and encrypted form. In other cases, smart contracts are the encoded version of a traditional contractual document. However, there are also other cases, where intelligent contracts combine the two forms and appear as a hybrid which contains the elements of the traditional contract together with the computer code.[34] Regardless of the form of smart contracts, their most important characteristics are their irrevocability (finality) and automation.[35]

When contractual partners conclude an intelligent contract, both the performance and the enforcement of the contract are ensured by an immutable computer code by using (most often) blockchain technology.[36] Such a contractual construct allows for parties to rely exclusively on the blockchain technology instead of establishing and strengthening mutual trust. In such a case, parties leave the performance of contractual obligations to be fulfilled via blockchain technology, irrespective of whether changes occurred after the conclusion of the contract either in the external circumstances or in the parties' attitude to the contract or to each other or in their intention, motivation, or goals to be reached by the conclusion of the contract.

4.2. The Place of Intelligent Contracts in Traditional Contract Law

Before finding the right place for intelligent contracts within the system of traditional contract law, two fundamental questions must be answered. First, it should be discussed if these contracts are truly intelligent, or 'smart'. It is evident that these attributes are not to be taken in a literal sense.[37] Nevertheless, it is also important to see that a smart contract goes much further than some kind of digitalized contract. The name of the legal institution is also misleading: it suggests that the use of artificial intelligence is essential in the operation of the contract, while

34 Cieplak–Leefatt 2017. 417–427, 418.
35 Szczerbowski 2017. 333–338, 333; Raskin 2017. 306 (Footnote 33).
36 Savelyev 2017. 116–134.
37 Müller–Seiler 2019. 317–328, 318; De Caria 2019. 736 (Footnote 23).

this is not the case.[38] In general, a given contract shall be deemed as intelligent if it is able to communicate with another computer protocol.[39] Smart contracts based on blockchain technology fulfil this criterion.

Secondly, it is also a question if clauses existing in encoded form as computer protocols can be subjected to a classic contract law approach and deemed as forming a contract which includes the consent of the contracting parties, or not.

The answers to the questions asked above are quite diverse. There is a sense, for instance, in which the expression 'intelligent contract' is a mere habit since these constructs are neither intelligent nor are they contracts.[40]

In their study, Werbach and Cornell do not dispute that intelligent contracts can be considered contracts in the proper meaning of the term,[41] but, at the same time, they draw attention to the fact that the legal enforceability of the agreement is an important question which must be examined in order to assess the legal nature of smart contracts. According to Werbach and Cornell, with the application of smart contracts, contracting partners probably intend to avoid the legal enforcement of the contract since the automation of performance precludes or, at least, minimizes the possibility of breach of contract by either of the parties.[42] For this reason, they conclude that intelligent contracts still cannot be deemed as contracts in the traditional sense, but they are more like a 'gentlemen's agreement', which is informal and typically has no legal binding force, wherefore they cannot be enforced by way of a judicial proceeding.

The arguments put forward by Werbach and Cornell definitely reflect the approach of Anglo-Saxon contract law. Nevertheless, we presumably come to a different conclusion if we intend to examine the legal nature of smart contracts on the basis of continental contract law. In this latter approach, legal enforceability is an essential element of the contract.[43] In lack of enforceability, the given legal relationship is a so-called 'natural obligation' which the debtor may perform, but the performance of which cannot be required or enforced by the creditor. In this case, if smart contracts are considered as contracts in the legal sense, it shall also be assumed that legal enforceability relates to them. However, it is important to note that in the case of smart contracts the non-applicability of a judicial proceeding, i.e. the lack of legal enforceability, is due to the fact that the automated performance of the contract theoretically precludes any problems of enforcement or the emergence of a dispute.

38 De Caria 2019. 737 (Footnote 23). It is important to note that opposing views also exist in the relating legal literature. Most of them emphasize that the use of AI is one of the essential elements of the concept of intelligent contract. See O'Shields 2017. 177–194; Scholz 2017. 128–169.

39 Carron–Botteron 2019. 101–143, 109.

40 Grimmelmann 2019. 1–22.

41 Werbach–Cornell 2017. 339.

42 Ibid.

43 Vékás 2016. 21.

At present, the question of legal enforceability of smart contract remains unanswered since it requires further discussion. Nonetheless, in the course of elaborating an answer to this question, it will be crucial how the smart contracts appear: is there a traditional contract or not prior to their conclusion, before the contractual parties' intention becomes recorded only in encoded form?

When comparing smart contracts with traditional contracts, the difference between the two legal institutions is apparent.[44] From the legal viewpoint, a less relevant difference is the appearance of the contract, as contractual terms do not appear in paper format but in the form of computer code in the case of smart contracts. Actually, this seemingly almost irrelevant feature is of paramount importance since this element ensures the self-executing, automatic performance of the contract. Regarding the performance of the contract, this characteristic is relevant from a legal point of view, which reflects a completely different approach compared to the logic of traditional contract law. Classic contract law mainly aims at treating the losses and injuries suffered by the parties in relation to their contracts. Conversely, in the case of the application of smart contracts, contractual parties, by the automation of performance, preclude the possibility of a breach of contract by either of them, overshadowing the above mentioned function of traditional contract law.[45] According to this characteristic of smart contracts, Raskin brings an illustrative example in his related work, when he compares the contractual parties to Ulysses, who had himself tied to the mast of the ship so as to be able to resist the deadly seduction of the Sirens.[46] Although the different factors impacting the existence and performance of contracts do not mean mortal danger to the contractual parties nor to the contract, the parallelism drawn by Raskin can be correct. Contractual parties, indeed, commit themselves *ex ante* to comply with the terms stipulated in their contracts and, at the same time, to avoiding the occurrence and the legal consequences of the breach of contract by either of them. Considering the aspect of contractual law, the course of contractual phases[47] is incomplete in the case of intelligent contracts since the phase of breach of contract is left out due to the exclusion of future breaches of contract. In other words, the 'life-cycle' of a smart contract is shorter since it comes to an end by the performance of the contract, which is automatic due to the action of the computer code.

Relating to the application of smart contracts, full automation constitutes the main problem. Nevertheless, the amendment of contract is no less problematic since it is, in theory, also precluded.[48] Smart contracts are less flexible than agreements fixed on paper. After the conclusion and the encoding of the contract,

44 In their co-authored work, Stefan Grundmann and Philipp Hacker review and analyse the differences between smart contracts and traditional contracts. See Grundmann–Hacker 2017. 255–297.

45 Werbach–Cornell 2017. 318.

46 Homer: Odyssey, Book XII: 39–52; Raskin 2017. 309.

47 Vékás 2016. 77–79.

48 Clack–Bakshi–Braine 2016. 4.

parties have no opportunity to make any amendment in their contract. The contract runs to completion, to the programmed 'expiration date' without external intervention, regardless of any external circumstance, and without reacting to any such circumstance.[49]

The amendment of the contract is only possible if the parties include the potential future amendments (e.g. indexation clause, payment deferment, moratorium, etc.) into their agreement at the time of the conclusion of the contract. Therefore, these clauses are to be also encoded and automatically executed if the prescribed conditions are fulfilled. Nevertheless, since parties are not able to anticipate and cover every situation, there will always be such external circumstances arising after the conclusion of the contract which would impact the existing contract but which cannot be treated at all because of the intelligent nature of the contract.

From the programming aspect, it is practically impossible to insert such a 'sensitive' command into the contract which is able to handle unforeseeable changes in circumstances occurring after the conclusion of the contracts since the potential consequences of these changes are very diverse, and therefore these potential outputs cannot be fully programmed.[50]

As it was mentioned before, there are also cases where smart contracts are linked to the contract in the traditional sense. Broadly speaking, two different methods are conceivable. In the first case, a contract is concluded in the traditional way, but this legally binding agreement will be later transformed into computer codes by the use of the technology built into the smart contract. This action allows the application of blockchain technology, and the performance of the contract will be automated. In this case, the smart contract can have two roles. It is possible that it only provides support for the performance of the contract by the blockchain technology, i.e. it makes the payment transparent and safer. However, it is also possible that the contract transformed to computer code is fully performed by the intelligent contract.[51]

In the above-mentioned cases, the existence and operation of a smart contract is necessarily preceded by the conclusion of a traditional contract. Therefore, in these cases, *smart contracts are nothing but the dematerialization of the traditional contract*.

Nevertheless, there are cases where smart contracts do not appear as the computerized manifestation of the traditional contract, but the contractual parties conclude their contract from the beginning in coded form, without defining their contractual intention, rights, and duties in understandable terms, in legal language. In these cases, the relationship between the contractual parties is exclusively regulated by the smart contract, i.e. both offer and its acceptance take

49 Mik 2017. 281.

50 For the in-depth elaboration of the question, see Carron–Botteron 2019. 120–121.

51 Carron–Botteron 2019. 111–112.

place in encoded form via the blockchain, which records and stores the agreement of the parties.[52] From that moment, smart contracts are not a mere computer code but a real and binding contract ('smart legal contract'), which establishes rights and duties for the contracting parties. In this regard, intelligent contracts are the platform facilitating the conclusion of the contract. However, the mere fact that the contract is concluded exclusively in this form, via the Internet, raises the question of the appropriate protection of the offeree, who typically does not have IT expertise, only user-level computer skills.

Closely linked to this latter topic, it should also be examined how a 'non-expert', i.e. a person having only average computer knowledge, can effectively participate in the negotiations prior to the conclusion of the contract and in the preparation of the draft agreement and its assessment. Actually, in lack of technological knowledge, parties must rely on a third party, who transforms (encodes) the traditional contract into an intelligent contract. This third party may be a human programmer. This moment calls for a special type of confidence from the parties. This case is similar to the situation where, because of the use of legal terminology, a client has problems with the understanding of the language of the contract, and therefore he requires the explanation of these terms by a lawyer. As it was said, the situation is similar but not the same as in the case of a smart contract, where the client having no programming knowledge is practically in complete darkness concerning the content of the contract, even if the given smart contract was encoded in the simplest programming language. Precisely for this reason, it is common in practice for contractual parties to ask the programmer to state that the smart contract appearing in encoded form and made by him/her complies with the expressed intention of the contracting parties and that it contains the terms and conditions envisaged by them.

The involvement of a third person, the IT expert, in the process of contract conclusion – which is required because of the lack of technological expertise by the parties – is not only a question of confidence, but it raises further questions relating to liability. There may be situations in which the non-performance of the contract is due to a programming error. A situation can also arise where the intelligent contract does not fully cover, does not express faithfully the parties' intention because the contractual parties did not use sufficient precision when informing the IT expert who was preparing the smart contract.[53] How should a situation be assessed where a smart contract made by a programmer is to be used by the parties for an unlawful purpose?[54] All three situations give birth to liability questions which cannot be answered yet since the regulation of smart contracts is controversial, and it generates quite a lot of problems at this time.

52 Carron–Botteron 2019. 113; Jaccard 2018. 22.
53 For the explanation of this topic, see Hoffmann 2019. 168–175.
54 Savelyev 2017. 20–21.

5. Closing Remarks

According to American futurist Martin Ford, we are not at the beginning of the development of information technology, and in a short time we will reach a steep section of the exponential curve, which represents technological progress. The events accelerate, and the future can arrive long before we can prepare for it. Digitalization and the fourth industrial revolution open up new perspectives which we could not have imagined before. New constructs appear, which make us uncertain and raise a number of questions.

Ford's thoughts can be especially true if we compare the particularly rapid tempo of technological development to the circumstantial and quite slow process by which legislation is developed and which would be (unrealistically) expected to react to technological advances by creating a regulatory framework.

However, regulation does not exist in itself but always has its own purpose. Therefore, legislators are under the duty to react to the regulatory demands which arise due to technological development and to modernize the existing legal framework to the extent necessary.

The achievements of the modern age affect all areas of the law. Due to the spreading of the Internet, almost all segments of life have changed. These changed situations call for the amendment of existing rules or for the adoption of new provisions.

At the beginning of the 2000s, a process started in the field of private law, particularly that of contract law, which resulted in the gradual development of the rules of electronic commerce. Accordingly, provisions on contracts concluded by electronic means also appeared, including special consumer protection rules.

Nevertheless, the development process did not stop at this point. The spreading of digital tools forced the legislators to face up to new challenges. It soon became clear that contracts using these tools need more detailed rules. Directive 2019/770/EU and Directive 2019/771/EU, which were shortly reviewed above, can be understood as an answer to the above mentioned regulatory demands since these legal norms contain express rules on the digital content and digital services and the supply of digital services.

The expansion of contracts for the supply of digital content or digital services is a major challenge for national legislators, particularly in the case of cross-border online contracts. Similarly, it is also a difficult situation for legislators when the demands for amending an already existing regulation or for creating new rules have not arisen in the specific subject-matter of contracts but due to a new method of contract conclusion.

Concluding a contract by electronic means is an ordinary procedure today. Nevertheless, the conclusion of a contract via the Internet enters another dimension, when electronic means join cryptography, another achievement of technological

development. In these cases, it is possible that a given contract exists only in the form of computer code.

In some ways, intelligent contracts mark a new phase, practically the end of the development of contract conclusion by electronic means. Nonetheless, due to the involvement of a new element, i.e. cryptography, these contracts are completely different from any other previously known form of usual solutions of contract conclusion.

The use of intelligent contracts starts from the idea that the transformation of traditional agreements into computer codes and their storing in blockchain make the contracts tamper-proof and self-executing, or self-enforcing. Application of smart contracts brings numerous benefits. By the exclusion of human routine tasks and intermediaries, the process of contract conclusion becomes less risky and more cost-effective at the same time. On the other hand, due to the use of artificial language, these contracts are always univocal, while traditional contracts carry several uncertainties because of the use of human language.[55]

Though the widespread use of intelligent contracts offers several opportunities, their real application, due to their nature, is limited in several ways. Moreover, the application of this contracting method is also restricted by the regulatory environment in force.[56]

There can be no question that the appearance of blockchain technology and intelligent contracts based on this technology revolutionize contractual practice. Nevertheless, the expansion of their application requires the revision of the existing regulatory framework and the rules of contract law. In some countries, for instance, in certain states of the USA, the development of a legal regulation on intelligent contracts has already started, or the relating provisions have already been adopted. On the contrary, the legal status of smart contracts is still uncertain in the jurisprudence, which makes it more difficult for the national legislators to create their own rules on smart contracts. Though the appropriate application of the legal provisions in force can be a solution, it is unsatisfactory since smart contracts constantly bring about new questions in practice.

During the examination of intelligent contracts, the question whether the law, particularly contract law, shall react to such a construct, which is so far from the thinking of lawyers and other professionals having legal knowledge, is often asked.

There is no doubt that law shall reckon with the massive expansion of intelligent contracts and that it shall answer in the future the difficult questions raised by them. One of these questions is if smart contracts can eventually replace traditional contracts, i.e. if smart contracts can appear as real alternatives of traditional contracts over time.

55 That conclusion is contradicted by James Grimmelmann. See Grimmelmann 2019. 20–21.
56 Szuchy 2020. 82.

It may be too soon to answer such questions, even if we know that the future is happening now. However, one thing is certain: the emergence of intelligent contracts and their online conclusion in encoded form opens a new era of contract law.

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Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content – Recent European Case-Law

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Abstract. Case-law of the Court of Justice of the European Union as well as procedures taking place before the Commission aiming to clarify certain aspects regarding freedom of services – in this case, the principle of free transmission and retransmission of audiovisual media services – have always been regarded as particularly important in offering guidance in interpreting and applying European legal norms. The adoption in December 2018 of the revised text of the Audiovisual Media Services Directive (Directive 2018/1808) marks the transition to a new, amended legal framework. It also enables the critical review of the last case decided before the Court of Justice of the European Union, still instrumented according to the provisions of Directive 2010/13/EU: Case C-622/17 (Baltic Media Alliance v Lietuvos radijo ir televizijos komisija). While the main focus of the present paper lies with Case C-622/17, for a cogent understanding of the extended judicial and legal context of the case, we will briefly examine the four procedures successfully submitted to the Commission (by Lithuania and Latvia between 2015 and 2018), based on Art. 3 of the AVMSD (restriction based on public policy reasons – in this case, incitement to hatred), and the only procedure based on Art. 4 (the 'anti-circumvention procedure') submitted in the lifespan of Directive 2010/13/EU by the Kingdom of Sweden (2017).

Keywords: European law, audiovisual media regulation, freedom of transmission and retransmission, restrictions, Audiovisual Media Services Directive, CJEU, Case C-622/17

1. Introduction

Acting as the main media policy tool of the European Union, the Audiovisual Media Services Directive (AVMSD)[1] establishes the legal framework for a con-

1 Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation,

vergent media landscape and covers all services of audiovisual content irrespective of the technology used to deliver the content. The implementation of the EU digital strategy comprises also an extensive revision process of the AVMSD, started in 2015 and concluded in December 2018, Member States having to transpose it into their national law by 19 September 2020.

Although more recently the revised directive's *material scope* also extends certain audiovisual rules to video-sharing (online) platforms (VPS-s), such as YouTube, and user-generated content shared on social media services, such as Facebook, aspects relating to the *territorial scope* of the AVMSD remain unaltered. The territorial scope of the Directive gains importance in the context of dynamic and globally expanding cross-border broadcasting and content distribution. Establishing jurisdiction of a Member State over broadcasters is one of the key issues in this field and the 'cornerstone' of EU media policy. The country of origin principle is used in establishing jurisdiction over audiovisual media services (including here all types of content).

In the revised text of the AVMSD, the principle of freedom of transmission or retransmission of audiovisual media services also remains unaltered though the European legislator has significantly amended the legal norms governing restrictions of non-domestic broadcasts.

As of this moment (June 2020), transposition of the revised AVMSD into the national law of all Member States is not fully concluded. Procedures for preliminary rulings before the CJEU or procedures regarding the compatibility or incompatibility of measures concerning the provision of audiovisual media services initiated before the adoption of the revised text and judged in the timeframe 2018–2020 have been based on the former provisions of the AVMSD.

Taking into consideration that scholars in the field of European media law have long argued that restriction of freedom of transmission should be read in the light of case-law, the fact that the case-law of the Court of Justice of the European Union as well as procedures taking place before the Commission aiming to clarify certain aspects regarding freedom of services – in this case, the principle of free transmission and retransmission of audiovisual media services – have always been regarded as particularly important in offering guidance in interpreting and applying European legal norms, the present paper aims to present a critical review of the latest case decided in front of the Court of Justice of the European Union, still instrumented according to the provisions of Directive 2010/13/EU: Case C-622/17 (*Baltic Media Alliance v Lietuvos radijo ir televizijos komisija*).

or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ L 303 of 28.11.2018, 69); Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version) (OJ L 095 15.4.2010, 1).

While the main focus lies with Case C-622/17, for a cogent understanding of the extended legal and jurisprudential context of the case, we will briefly examine the four procedures successfully submitted to the Commission (by Lithuania and Latvia between 2015 and 2018), based on Art. 3 of the AVMSD (restriction based on public policy reasons – in this case, incitement to hatred), and the only procedure based on Art. 4 (the 'anti-circumvention procedure') submitted in the lifespan of Directive 2010/13/EU by the Kingdom of Sweden (2017).

While case-law in the field of cross-border audiovisual media services has been extensively reviewed by academics and legal practitioners, procedures before the Commission have been known to a more restricted circle of scholars. A 2018 study on media law enforcement without frontiers[2] attributes very limited practice in the field of procedures for deviation from the country of origin principle as a cause to insufficient legal clarity and certainty about the extent of the power of Member States to apply the procedure.

2. The Territorial Scope of the AVMSD – The Country of Origin Principle

The country of origin principle has been intensely analysed, criticized, and endorsed over the decades under the Television without Frontiers Directive TWFD (1989)[3] and then the AVMSD (2007),[4] the case-law of the European Court of Justice also contributing to the shaping of this debate.[5] Even though media consumption habits have undergone significant changes in this period, with emerging new technologies resulting in a highly diverse audiovisual media landscape, this principle still remains the governing element for the regulatory framework for European media markets and audiovisual media offers. It states that a provider that falls under the jurisdiction of one EU Member State can rely on complying with the legal framework of (only) that specific State in order to be authorized to disseminate content across all EU Member States.

2 Media law enforcement without frontiers 2018-2. 13.

3 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989. 23–30).

4 Naming here only a few titles from an otherwise abundant critical literature: Cole 2018. 2011, Weinand 2018, Wagner 2014, Craufurd Smith 2011, Polyák-Szőke 2009, Herold 2008.

5 Notable cases including: Case C-56/96 VT4 Ltd. v Vlaamse Gemeenschap [1997] ECR I-3143; Case C-212/97 Centros v Erhvervs-ogSelskabsstyrelsen [1999] ECR I-1459; Case C-11/95 Commission v Belgium [1996] ECR I-4115; Case C-14/96 Paul Denuit [1997] ECR I-2785; Case 33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging [1974] ECR 1299; Case C-23/93 TV 10 SA v Commissariaat voor de Media [1994] ECR I-4795; Case C-355/98 Commission v Belgium [2000] ECR I-1221.

The country of origin principle creates rules both for original (sending) Member States and for host (receiving) Member States.

Member States are required to ensure that all broadcasters of audiovisual media services falling under their jurisdiction are compliant with the national regulatory framework. This requirement also guarantees that the minimum requirements laid down by the relevant European legislation are met by all audiovisual media content providers operating in Member States.

Receiving Members States are required to ensure the freedom of transmission for audiovisual media services originating from another Member State, restriction of transmission being prohibited on areas that are harmonized by the AVMS Directive.

The country of origin principle comprises the prohibition of double jurisdiction/avoidance of absence of jurisdiction and acts as the key element in guaranteeing the freedom of transmission.

This principle is enshrined in Art. 2 of the AVMS Directive,[6] declaring in its first paragraph that 'each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.'[7]

However, the scope of the Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.[8]

Art. 2 contains a detailed set of circumstances under which jurisdiction for media service providers can be established and organized by primary as well as ancillary or technical criteria (the text before the 2018 revision also contained a fallback clause in case that jurisdiction could not be determined and identifying the competent Member 'in which the media service provider is established within the meaning of articles 49 to 55 of the Treaty on the Functioning of the European Union'[9] (TFEU).

3. Exceptions to the Country of Origin Principle under the AVMSD – Exceptions from the Principle of Freedom of Transmission

Derogations from the country of origin principle as expressed in the legal provisions of AVMSD are possible only in certain cases such as situations not cov-

6 All references to and citations from AVMSD pertain to the legal provisions of the Directive before its revision unless explicitly stated otherwise.

7 AVMSD, Art. 2.1.

8 AVMSD, Art. 2.6.

9 AVMSD, Art. 2.5.

ered by the coordinated area, exceptions due to violations (provisional derogations), and exceptions due to circumvention of law.

Measures based on grounds that fall outside the fields coordinated by the Directive can be taken by national regulators against providers of audiovisual media services established 'in another EU Member State if these measures are based on grounds outside the fields [coordinated] by the Directive. However, whether this may be deemed to be the case is interpreted in a restricted fashion according to current Court of Justice of the EU (CJEU) case-law.'[10]

Exceptional derogations from the retransmission requirement due to violations imply provisional measures (the unrevised text of AVMSD differentiates between linear services and non-linear services).

> The Directive provides that use may be made of the possibility of derogation in the case of a television broadcast when it 'manifestly, seriously and gravely infringes' the provisions of Article 27(1) or (2) of the Directive concerning the protection of minors or the ban under Article 6 on incitement to hatred based on race, sex, religion, or nationality and when such an infringement has taken place on two occasions over the previous 12 months.[11]

In a similar fashion to limitations based on the grounds that fall outside the fields coordinated by the AVMSD, the procedure of exceptional derogation from the retransmission requirement initiated on the grounds of Article 3(2) must be interpreted restrictively. The procedure sets out a series of measures to be taken by the Member State in order to preserve compatibility with European law (these measures imply a consultation phase and the provision of information and then a notification to the European Commission for evaluation). Procedural steps in the unrevised text of AVMSD are similar for linear and for non-linear audiovisual media services, but,

> in contrast to linear services, paragraph 5 specifies an *urgent procedure* in the case of on-demand services: the obligation to provide information about a planned derogation can be dispensed with when urgent action is required – and the relevant information (including a statement of the reasons why the matter is particularly urgent) is provided later. The Commission must examine the question of compatibility with European Union law 'in the shortest possible time'.

Provided that the required procedural steps are complied with and the European Commission confirms its conformity with Union law, the 'reception' of the content can be prevented. However, this does not include supervisory measures in the

10 Media law enforcement without frontiers 2018-2. 23.
11 Media law enforcement without frontiers 2018-2. 16.

form of enforcement that directly target the foreign provider but ways of preventing the distribution of services (by involving infrastructure managers, for instance) instead of the imposition of a fine, for example.[12]

The third method for circumventing Article 3(1) of the AVMSD is set forth in Article 4(2), which refers to the CJEU's so-called 'circumvention case-law' with regard to linear media services ('circumvention of law' denoting the phenomenon of 'forum shopping' for the most favourable jurisdiction). Besides case-law, professional forums have also made significant efforts to analyse and interpret circumvention of law: the European Platform of Regulatory Authorities (EPRA), established in 1995, as Europe's oldest and largest network of broadcasting regulators has had the issue of circumvention cases on the agenda as early as 1996.[13]

Restriction of freedom of reception and retransmission by a Member State invoking anti-circumvention procedure has been given the form of a detailed and complex set of actions, as laid down by the text of the Directive.

Two aspects are pertinent from these provisions: firstly, that the procedure is complex, time-consuming, and particularly challenging as far as Members States relying on it carry the burden of proving intentional circumvention and, secondly, that the procedure applies only to broadcasters, not to on-demand audiovisual media services, and non-linear audiovisual media services fall under the general regulatory framework provided by the CJUE. This is to be inferred from Recital (57) of the E-Commerce Directive (non-linear audiovisual media services being not only subject to the AVMS Directive but also to the E-Commerce Directive).[14]

4. Recent Case-Law Pertaining to the Restriction of Freedom of Reception

4.1. The Anti-Circumvention Procedure

Bearing in mind the above listed difficulties pursuant to the measures against alleged circumvention of stricter rules, also evidenced by scholarly work[15] stating that the choice of establishment because of a favourable regulatory climate as such does not prove the motive of circumvention, it should not come as a surpri-

12 Media law enforcement without frontiers 2018-2. 24.

13 34th EPRA Meeting Content Regulation and New Media: Jurisdiction Challenges in a VOD Environment. Brussels, La Hulpe, 5–7 October 2011.

14 Oster 2016. 168.

15 Castendyk–Dommering–Scheuer–Böttcher 2008. 859–861.

se that the anti-circumvention procedure in the spirit of the AVMSD has known only few instances of consideration and only one fully completed procedure.

The only Member State to fully execute the anti-circumvention procedure based on Art. 4 in the history of these provisions spanning 10 years was the Kingdom of Sweden. This was the first time that the Commission decided on the application of Article 4 of the AVMSD.[16]

In December 2014, Sweden notified the Commission of the proposed measures in relation to two broadcasters broadcasting to Sweden from the UK for alleged circumvention of stricter Swedish rules on alcohol advertising, but then it subsequently withdrew the notification due to formality shortcomings, and thus at that moment it was not investigated by the European Commission. As the case was ongoing, Sweden opted for renewal and notified the Commission in October 2017 of its intention to impose measures (fines) under Article 4(4) of the AVMSD against the broadcasters. The notifying authorities assessed that the broadcasters in question have established themselves in the United Kingdom in order to circumvent the stricter Swedish rules concerning the prohibition of all forms of TV sponsorship by parties whose principal activity is to manufacture alcoholic beverages and all forms of marketing of alcoholic beverages through commercial advertising in TV programmes.

In arguing that the broadcasting companies direct their programming, wholly or mostly, towards the territory of the notifying Member State, the Swedish authorities asserted that both broadcasters target with their television programmes the territory of Sweden. The notifying authorities considered that this is supported by the fact that the programmes in question are broadcast in Swedish or have Swedish subtitles and contain advertising directed towards Swedish markets. Moreover, both broadcasters have a licence to broadcast in the Swedish terrestrial network, whereas it is not possible to view the broadcast in the United Kingdom via cable or satellite.

The European Commission has decided, on the basis of the AVMS Directive, that the Swedish intention to impose their ban on alcohol advertising on two broadcasters based in the UK and broadcasting in Sweden is *not compatible with EU law*.

In order to impose such a ban on the UK broadcasters, Sweden should have demonstrated, under the specific procedure contained in Art. 4 of the AVMSD, that the broadcasters in question established themselves in the UK *in order to circumvent* such rules. The burden of proof lies with the Member State, and the

16 Commission Decision of 31.1.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.1.2018 C(2018) 532 final.

Commission found in this case that Sweden failed to prove circumvention on the part of the broadcasters.

The argumentation provided by the Commission in this case evaluated the claim that one of the broadcasters in question established in the UK in order to circumvent stricter rules and found that at the time when MTG established itself in the UK (1986) the Television Without Frontier Directive enshrining the country of origin principle had not yet been adopted, and the mere adoption of a Commission's proposal does not amount to existing legislation as it remains uncertain whether and when such proposal would be endorsed by the European Parliament and the Council in the legislative process and, if so, in which form and content. The company in question could not have drawn from the mere existence of a Commission's proposal any guarantee of the fact that such proposal would be adopted or that it would not be adopted in a substantially modified form.

Furthermore, it should be considered that Sweden in 1986 was not yet a Member of the then European Economic Community (EEC) and that it would not become a member until 1995, i.e. approximately 8 years later. In addition, Sweden only became a member of the European Economic Area and was therefore bound by the Directive in 1994, i.e. 7 years after MTG's decision to establish itself in the United Kingdom. Moreover, the European Convention on Transfrontier Television, containing similar rules, was only signed in 1989, only entered into force for other Contracting Parties in 1993, and was never ratified by Sweden.

As a consequence, circumvention was not legally and technically an option when the company established itself in the United Kingdom, and for this reason no causal link between the stricter Swedish rules and the broadcasting company's decision to establish itself in the United Kingdom can convincingly be made on the basis of this argument.

4.2. Procedures for Temporary Derogation from the Principle of Freedom of Transmission

In contrast to exceptions on the ground of circumvention of law, exceptions citing infringements on public policy grounds have been resorted to by Member States on more instances and have been deemed as compatible with European legal provisions by the Commission. All four cases of procedures for temporary derogation from the principle before the revision of the AVMSD refer to public policy reasons, namely incitement to hatred. *Sedes materiae*, the reasonings and judgments of the Court are almost identical in these cases: Lithuania has initiated 3 procedures between 2014 and 2017[17] (Com-

17 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or

mission decisions in 2015, 2017, and 2018) and Latvia one procedure in 2018 (Commission decision in 2019).[18]

Given their historical similarities as formerly being part of the Soviet Union and their sizeable Russian-speaking minority, which appears to be the addressee of television broadcasts deemed as pro-Kremlin propaganda, Lithuanian and Latvian authorities have resorted to a policy of fines and broadcast suspensions to curb the influence of Russian state media. This policy implies a more ample framework, containing, besides procedures for temporary derogation from the ban on restriction of retransmission, other means from outside the scope of the AVMSD (for example, the refusal to register a local branch of Russian state news agency, blocking access to local versions of Rossiya Segodnya's Sputnik website, and, lately, financial sanctions).[19]

Actions taken in 2014 by Latvian and Lithuanian regulators (blocking Russian-language channels for inciting hatred and provoking conflict) were analysed by the Commission in a discussion paper.[20] Judging by the presence of a satellite uplink, jurisdiction in the Latvian case was attributed to Sweden and in the case of Lithuania to Sweden and the UK. These regulators were reacting to a perceived potential for incitement to violence in their own countries, stemming from Russia's actions in Ukraine. While clearly a concerted effort of the two Baltic countries, formally only Lithuania notified the Commission and followed the required series of steps in the procedure.

administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final.

Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final.

18 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 3.5.2019, C(2019) 3220 final.

19 https://en.rebaltica.lv/2020/03/will-the-biggest-baltic-russian-media-house-survive-eu-sanctions-breach/.

20 European Commission, Doc CC AVMSD (2014) 4 rev Discussion Paper on the Application of articles 3 and 4 of the AVMSD case study: Suspension of Some Russian-language Channels in Latvia and Lithuania (2014).

The mandatory consultation phase with the Swedish regulating authority holding jurisdiction failed to reach a mutually satisfying solution because Swedish law

> prevents the regulator from taking action against audiovisual media services that are retransmitted to other States and are not intended for audiences in Sweden. The Swedish Broadcasting Commission (SBC) concluded that the broadcasts had not breached any of the rules applicable to the broadcasts since there are no rules regarding impartiality and accuracy in respect of satellite channels contained in the RTA [*Radio and Television Act* – author's note]. Issues regarding, for example, freedom-of-expression offences are not assessed by the SBC. Instead, such questions are handled by the Chancellor of Justice, who is the sole prosecutor in cases concerning offences against freedom of expression.
>
> The Chancellor of Justice has, however, concluded that the broadcasts do not constitute offences under the Fundamental Law since the programmes are neither broadcast from Sweden nor intended to be received in Sweden. If an alleged offence does not fall under the Fundamental Law or the remit of the Chancellor of Justice, it may be handled by the police and a public prosecutor. The Swedish Police have, however, in turn concluded that there are no indications that a crime has been committed that could be prosecuted under Swedish law.[21]

In 2015, the Lithuanian regulator repeated the block on the Russian channel in cause (RTR Planeta), and the Commission determined that the Lithuanian regulator had adhered to the procedures required by the Directive and deemed its restriction of the service compatible with European Union law. In confirming the legitimacy of the Lithuanian reasons for restricting the transmission of RTR Planeta, the Commission drew on the Court's interpretations of incitement and hatred from the 2011 Mesopotamia Broadcast and Roj TV case, which included both animosity and intention to direct behaviour. The argument invoked by the broadcaster citing freedom of speech was rebutted.[22]

In a nearly identical fashion, Lithuania repeated the procedure in 2016 and 2017 as it deemed that similar circumstances made it necessary: on the second occasion, measures for temporary suspension, not only of the retransmission of

21 Media law enforcement without frontiers. 78–79.

22 See Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final, recital (16) et seq.

the television broadcast RTR Planeta but also of access to it including on the Internet, in the territory of Lithuania were sought.

> As regards the argument that the broadcaster does not have editorial responsibility over views expressed by participants of a talk show, the Commission [recalled] that, in relation to television broadcasts, the Directive defines editorial responsibility as the exercise of effective control both over the selection of the programmes and their [organization] in a chronological schedule [Article 1(c) of the Directive], [and] as a consequence the broadcaster's argument that editorial responsibility does not extend to the views expressed in a programme cannot be retained.[23]

While in the previous two decisions against RTR Planeta the Lithuanian authorities imposed a suspension of three months, in the third case (2018) they imposed a suspension for a substantially longer period (i.e. twelve months). The Commission observed that national authorities enjoy a margin of discretion in deciding which measures and/or sanctions to impose on broadcasters for infringements of the prohibition under Article 6 of Directive 2010/13/EU, and therefore the Commission would only question under Article 3(2) of the Directive the measures taken by the national authority, and precisely the duration of the suspension imposed on the broadcaster concerned in cases where this appears to be manifestly disproportionate.[24]

After reviewing the arguments by the national authorities emphasizing that RTR Planeta has already engaged in violations of Article 6 of Directive 2010/13/EU several times in the past and that the broadcaster has not modified its behaviour following the two previous suspension decisions, the Commission concluded to share the assessment justifying a substantially longer suspension period.

Latvian authorities followed a similar path after the 3-month suspension in 2014 of the broadcasts by the Russian-speaking channel Rossiya RTR (operating a satellite uplink and properly observing the procedure). As the infringements continued with Rossiya RTR broadcasting in Latvia content deemed to incite to hatred, involving on the one hand action intended to direct specific behaviour and, on the other, language that can be considered to create a feeling of animosity

23 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final, recital (23).

24 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final, recital (20).

or rejection with regard to a group of persons, the national regulating authorities decided to suspend the retransmission for a period of 3 months, and their measures were deemed compatible with EU law by the Commission.

In the subsequent Commission actions regarding the Baltic States' problems with Russian-language broadcasts, one can see states being given more room to restrict services in the name of public order or security.[25]

As far as the efficiency of these procedures is concerned (in their specific context), there are diverging opinions and practical examples which also indicate a more nuanced picture: evidence in the Baltic States indicates that shutting down a specific Russian-language channel has seen either a spike in interest to other accessible Russian channels[26] or a migration to online platforms and freely available channels where the same broadcast can be viewed without limitations (for example, YouTube).

4.3. Case-Law before the CJUE – Baltic Media Alliance Ltd. v Lietuvos radijo ir televizijos komisija, Case C-622/17

In the lifespan of Directive 2010/13/EU (2010-2018), *Mesopotamia Broadcast and Roy TV v Germany [2011]* (joined cases C-244-245/1) marks the first case argued based on the legal provisions of the then newly adopted Directive, while *Baltic Media Alliance Ltd. v Lietuvos radijo ir televizijos komisija* (Case C-622/17) marks the last one instrumented according to the unrevised text.

Though reference for a preliminary hearing was lodged in 2017, initial measures brought against Baltic Media Alliance Ltd. (BMA) by Lithuanian regulatory authorities can be seen in a wider context, integrated in the concerted effort of Lithuania and Latvia aiming to curb pro-Kremlin Russian influence among their Russian-speaking national minorities. As early as 2014, the EU Commission paper has discussed the issue of jurisdiction for two Russian-speaking channels broadcasting in Lithuania: RTR Planeta and NTV Mir Lithuania (subsequent dealings with RTR Planeta, under Swedish jurisdiction, were presented earlier). As to NTV Mir Lithuania, Lithuanian authorities disputed UK jurisdiction claiming that the major part of NTV Mir Lithuania was a rebroadcast of the Russian channel NTV and that the editorial decisions about the content of that channel were not taken in London. Moreover, it was asserted that despite the fact that the company Baltic Media Alliance Ltd. holds a licence for the channel NTV Mir Lithuania from the UK regulator (Ofcom), it has only one employee in the UK at an address where more than 200 other companies are registered. On the other hand, 200 persons would be employed in Riga by another company – Baltic Media Alliance – to distribute this and four other channels, licensed by Ofcom

25 Broughton Micova 2019. 9.

26 A Report of Anti-Disinformation Initiatives 2018. 11.

to the Baltic Media Alliance Ltd., the satellite uplink being also located in Riga. The issue at hand was then settled by the assertion of Ofcom that Baltic Media Alliance is established in the UK, with an Ofcom licence.[27]

On 18 May 2016, the Lithuanian authorities adopted a decision which required that bodies retransmitting television channels by cable and other persons providing Lithuanian consumers with a service relating to the distribution on the Internet of such channels to distribute the channel NTV Mir Lithuania only in pay-to-view packages (or, if such packages were not offered, in return for an additional fee which could not be included in the price of the basic package) for a period of 12 months from the entry into force of that decision. That decision was based on the fact that a programme broadcast on 15 April 2016 on the channel in question, entitled *Ypatingas įvykis. Tyrimas* (Special Event: Investigation), contained information that incited hatred based on nationality, prohibited under the relevant national law.

On 22 June 2016, the regulating authority adopted a new decision which amended its initial decision, removing the obligation to distribute the channel NTV Mir Lithuania only in pay-to-view packages and initiating the procedure for the temporary suspension of that channel. In that connection, that authority notified BMA of the infringements identified in its initial decision and the measures which it intended to take should any such infringement occur again. As required by the procedures seeking temporary derogation, the Lithuanian authorities also notified Ofcom, the NRA for Baltic Media Alliance.

On the same day, BMA brought an action before the Vilnius Regional Administrative Court (*apygardos administracinis teismas*) in Lithuania, seeking the annulment of the decision of 18 May 2016, arguing in particular that the decision was taken in breach of the Audiovisual Media Services Directive, which requires the Member States to ensure freedom of reception and not to restrict the retransmission in their territory of television broadcasts from other Member States for reasons such as measures against incitement to hatred.

Deciding to stay the proceedings, the national court lodged a request for preliminary ruling, asking the Court of Justice whether a decision such as that taken by the Lithuanian authorities is covered by the AVMSD.

Taking into consideration that the decision disputed by BMA refers to a withdrawn decision, the Lithuanian regulating authority (LRTK) and the Lithuanian Government asserted the hypothetical nature of the questions raised and, consequently, also the issue of admissibility. However, both the Advocate General, and the Court agreed that in the present case the referring court stated in the order for reference that, notwithstanding the amendment to the decision of 18 May 2016

27 European Commission, Doc CC AVMSD (2014) 4 rev Discussion Paper on the Application of articles 3 and 4 of the AVMSD case study: Suspension of Some Russian-Language Channels in Latvia and Lithuania (2014).

by which the Lithuanian authority withdrew the measures challenged by BMA, it will have to rule on whether it infringed BMA's rights by that decision and whether the decision was lawful when it was adopted.

In his Opinion, Advocate General Henrik Saugmandsgaard Øe expressed the view that the AVMSD which requires Member States to ensure freedom of reception and not to restrict retransmissions on their territory of television broadcasts from other Member States for reasons such as incitement to hatred does not prevent the Republic of Lithuania from adopting such a measure.

According to the Advocate General, the directive does not prevent the receiving Member State from controlling, by certain specific arrangements, the distribution of television programmes originating from other Member States. The receiving Member State can thus require television channel distributors, on public interest grounds, to organize the services offered by them in such a way that certain channels are included only in specific packages. Such measures do not hinder the retransmission or reception as such of the channels concerned. Those channels can, if those rules are observed, still be broadcast and consumers can view those channels legally provided that they subscribe to the appropriate package.

Moreover, the Advocate General expresses an opinion which was favourable to the measure adopted by the Lithuanian authorities against the television channel NTV Mir Lithuania, as being compatible with the freedom to provide services enshrined in Article 56 of the TFUE (the measure is justified and proportionate). In that regard, the Advocate General observed that the Republic of Lithuania has, by means of a reasonable measure, legitimately sought to protect the Lithuanian information area from Russian propaganda in the context of the information war to which the Baltic States are subject.

> We cannot lose sight of the background to the present case. According to the information provided by the LRTK and the Lithuanian Government, Article 33(11) and (12)(1) of the Law on information for the public was adopted in order to protect the Lithuanian information area and to provide a swift response[28] to Russian propaganda in the context of the information war to which the Baltic States are subject in view of their geopolitical situation. The

28 'I note that, as well as being onerous, the procedure laid down in Article 3(2) of Directive 2010/13 is relatively long. Those features explain why, in practice, that procedure is rarely used (and is rarely successful). See: European Regulators Group for Audiovisual Media Services (ERGA) – Report on territorial jurisdiction in a converged environment, 17 May 2016, in particular pp. 9 and 12. Moreover, at the time of the case in the main proceedings and in respect of television broadcasting, that directive did not provide for an urgent procedure allowing an immediate derogation from the freedom to receive and retransmit a television broadcast, even though such a measure was already laid down with regard to on-demand audiovisual media services in Article 3(5) of that directive. I note, however, that the recent Directive 2018/1808 has just extended that urgent procedure to television broadcasts.' – opinion of Advocate General Saugmandsgaard Øe delivered on 28 February 2019. Footnote no. 64.

> EU institutions have themselves noted that the Baltic States are confronted with the spread in the media of false information targeted at their Russian-speaking minorities, with the aim of denigrating those States, of undermining the European narrative based on democratic values, human rights and the rule of law and, more generally, of destabilising the political, economic and social situation of those States.
>
> (65) Given the particularly great influence that television has on public opinion, the Lithuanian legislature's reaction seems perfectly reasonable.

The Opinion provided by Advocate General Henrik Saugmandsgaard Øe also tackled the issue of editorial responsibility, another long-standing element in the dispute surrounding the de facto establishment of Baltic Media Alliance. In his reading, BMA could be seen as deemed to be established in the United Kingdom, in accordance with Article 2(3)(c) of the AVMSD, only if a significant part of its workforce involved in the pursuit of the audiovisual media service activity operates in that Member State. In his argumentation, even if it were demonstrated that the editorial responsibility for the channel NTV Mir Lithuania is assumed not by BMA but by a Russian company and/or that the editorial decisions are taken in Russia and the condition regarding the workforce laid down in Article 2(3)(c) of Directive 2010/13 is not fulfilled, the connecting factors laid down in Article 2(4) of the directive, which concern the use of a satellite or an uplink in a Member State, would still have to be examined.

The decision rendered by the Court of Justice follows the conclusions presented by the Opinion and, accordingly, asserts that:

> a national measure does not constitute a restriction within the meaning of Article 3(1) of the directive if, in general, it pursues a public policy objective and regulates the way in which a television channel is distributed to consumers of the receiving Member State, where those rules do not prevent the retransmission as such of that channel. Such a measure does not introduce a second control of the channel's broadcasts in addition to that which the broadcasting Member State is required to carry out.
>
> As regards the disputed measure, the Court notes that the Lithuanian legislature, by adopting the Lithuanian law on information for the public, on the basis of which the decision of 18 May 2016 was taken, intended to combat the active distribution of information discrediting the Lithuanian State and threatening its status as a State in order, having regard to the particularly great influence of television on the formation of public opinion. The [legislation also intends] to protect the security of the Lithuanian information space and guarantee and preserve the public interest in being correctly informed. The information referred to in that law includes material inciting the over-

> throw by force of the Lithuanian constitutional order, inciting attacks on the sovereignty of Lithuania, its territorial integrity and political independence, consisting in war propaganda, inciting war or hatred, ridicule or contempt or inciting discrimination, violence or harsh physical treatment of a group of persons or a person belonging to that group on grounds, inter alia, of nationality.[29]

In its observations, the Lithuanian regulating authority stated that:

> the decision of 18 May 2016 had been taken on the ground that a programme broadcast on the channel NTV Mir Lithuania contained false information which incited hostility and hatred based on nationality against the Baltic [States] concerning the collaboration of Lithuanians and Latvians [during] the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries, policies which were said to be a threat to the Russian national minority living in those countries. That programme was addressed in a targeted manner to the Russian-speaking minority in Lithuania and aimed, by the use of various propaganda techniques, to influence negatively and suggestively the opinion of that social group relating to the internal and external [public] policies of Lithuania, Estonia, and Latvia, to accentuate the divisions and [polarization] of society, and to [emphasize] the tension in the Eastern European region created by Western countries and the Russian Federation's role of victim.[30]

The decision of the Court seems to correspond in spirit with the Commission's actions regarding temporary suspensions and giving Member States more room to restrict services in the name of public order or security as it considers measures restricting freedom of transmission as pursuing, in general, a public policy objective.

5. Conclusions

European case-law regarding limitations to the principle of freedom of transmission as regulated by the AVMSD before its revision in 2018 comprises actions before national regulating agencies, a relatively small body of procedures before the Commission, and a case judged by the CJUE.

29 Court of Justice of the European Union, Press Release No 87/19, Luxembourg, 4 July 2019, https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-07/cp190087en.pdf.

30 Court of Justice of the European Union, Press Release No 87/19, Luxembourg, 4 July 2019, https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-07/cp190087en.pdf.

As far as procedures of temporary derogations are concerned, the answer can be found in the overly complex and time-consuming nature of these legal provisions. This issue was addressed in depth during the revision process of the Directive, with both Article 3 and Article 4 modified in order to absorb best practices and experiences of the case-law and implementation suggestions made by NRA-s, representative bodies, legal scholars, or other interested parties.

As a general overview, the revised Directive confirms and facilitates the country of origin principle by ensuring transparency among Member States on jurisdiction: thanks to a database which contains a list of providers under Member States' jurisdiction, it will be easier to determine the country whose rules apply to each provider, and this information will be publicly available.

The procedures in the case of exceptions to the country of origin for TV broadcasting and video on-demand services have been aligned, resulting in a single procedure irrespective of linear or non-linear audiovisual media services. The list of causes that can be invoked for the temporary derogation from the freedom of reception reunites all previously known instances and also adds new circumstances – namely, when an audiovisual media service provided by a media service provider under the jurisdiction of another Member State manifestly, seriously, and gravely infringes point (b) of Article 6(1) or prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence. In the revised text of the AVMSD, Article 6 refers to the obligation of Member States to ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain:

a) any incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter *or*

b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.[31]

The amended legal provisions are not one-sided: besides giving Member States a wider space to exert limitations based on public policy reasons, the revised Directive also asserts the obligation for Member States to respect the rights of defence of the media service provider concerned and, in particular, give that provider the opportunity to express its views on the alleged infringements.

The new set of provisions relating to the anti-circumvention procedure does not conceptually differ from its predecessor text versions but is visibly simplified in its administrative course of action, with the European Regulators Group for

31 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, 6–21).

Audiovisual Media Services (ERGA) confirmed as part of the apparatus for consistent enforcement of the Directive.

The efforts invested in the implementation of these procedures ensure, without doubt, the involvement and perseverance of the European legislator to provide efficient legal tools for issues regarding freedom of reception and the ban on restricting retransmission. The fact that these procedures intensified over time in the lifespan of the Directive until its revision could indicate the acuteness of an ongoing problem (as is the serious issue of disinformation campaigns or incitement to hatred combated by public policy means) on the one hand and also the acquirement of a certain familiarity in exploiting these procedures on the other hand.

However, the question remains as to the efficiency of these procedures in the context of a rapidly changing converged media landscape. Monitoring in particular the effects these legal provisions produced in the Baltic States, it was concluded that the suspended television broadcasts or audiovisual media services were replaced extremely rapidly either by similar or (nearly) identical broadcasts by the same broadcaster or by formats not affected by the decision of the national regulating authority reinforced by the Commission (pirate channels, freely available online platforms, etc.).

Regarding the Baltic Media Case, the first question as to its factual effects would be the actual introduction of paywalled foreign broadcasts: although now deemed legal and compatible with EU law, so far, to our knowledge, neither Lithuania nor other Member States have yet resorted to this option.

It is too early to draw far-reaching conclusions regarding the effects of the recent case-law before the revised text of the AVMSD is transposed by Member States and potential new cases arise, where a ground for comparison also permits an in-depth analysis.

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The Ecclesiastical Patrimony of the Romanian Church United with Rome from the Perspective of the Events of 1948[1]

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Abstract. The author presents the historical process by which the Romanian Church United with Rome was supressed and forcibly merged into the Romanian Orthodox Church beginning in the late 1940s at the behest of Communist authorities, leading to the loss of its assets. The precursors of this process are presented, especially the efforts by the Romanian People's Republic to modify the terms of its historic arrangements with the Catholic Church, the Concordat, and the withdrawal of the Romanian State from this arrangement. The study presents in detail, based on archival research conducted by the author in the archives of the former Securitate, and on legal norms (some of them classified at the time) the preparation and the pressure to which the Romanian Church United with Rome, its faithful and its clergy were subjected, in order to successfully force its so-called 'return' to the Orthodox Church. The author concludes the study by eliciting the fates of the remarkable clergymen who opposed the forced unification and were brutally punished by the Communist regime.

Keywords: Greek Catholic Church of Romania, Romanian Church United with Rome, communist persecution of Romanian Greek Catholics, communism, Romania

1. State Control over Religious Affairs in the Romanian People's Republic

It seems paradoxical but the signal for launching the battle initiated by the new communist leadership against the social and economic establishments of the tra-

1 This study is an expanded version of the author's lecture presented at the conference with the title *The Change in Ownership of Church Property in Romania* organized by the Balassi Institute – Hungarian Institute Bucharest on 10 February 2020. Unless otherwise specified in the body text or the footnotes, all quoted texts are translations by the author and are translated from Romanian.

ditional Romanian society apparently bears the endorsement of legality conferred by Mihai I of Romania's signature.

Communists did not have any illusions regarding the 'humanity and the full support of people' when ideologically implementing and applying their governmental programmes. Beyond subtleties and political gimmicks, something else was needed. A set of firm measures applied with strong hands was urgently required as this was the logistical support necessary for maintaining and consolidating the political power obtained in that well-known historical context. It was also notorious that part of the 'material well-being' necessary for communists came from the NKVD (People's Commissariat for Internal Affairs) and then, from 1946, from the MVD (Soviet Ministry of Internal Affairs) funds, while 'generosity' varied according to Moscow's interests. Yet, once in power, 'brotherly aid' was not sufficient any more for the communists. Their desire increased in direct proportion to their immorally and unscrupulously obtained positions. The major disadvantage, however, continued to be generated by the fact that the economic means were not fully in their possession.

In order to remedy this situation, the Council of Ministers approved the establishment of the *Ministerial Committee for the Implementation of the Economic Recovery and Monetary Stabilization Programme* in its meeting held on 14 June 1947. This programme became reality on 12 July 1947, when, following this decision, Law no. 248 was promulgated. The first step towards the economic despoiling of the country was taken. Even in the context presented, the target was not reached. Barely liberated from the minimal hindrance that the king's person might have represented, the committee started its work. On 31 January 1948, Decision no. 202[2] was adopted, which – having the force of a law – stipulated the immediate transfer of certain categories of goods into the property of the state.[3] Therefore, besides the legislative impact of the norms mentioned, it could be accepted that at the time they represented – together with the entire set of measures aimed at securing communists in power for the long term – the starting point of consolidating their government.

The arsenal of harshly restrictive-repressive legislative and administrative measures elaborated at that time pursued – as a matter of priority – the modifications that were about to operate in relation to the Penal Code.[4] The publication of this new legal instrument during the phase of removing the former minister of

2 See in this respect Popescu 1999. 33.

3 Even if we ignore its formulation using a defective legislative technique, Decision no. 202/1948 made reference to a series of assets belonging to the ecclesiastic patrimony of all religious denominations aimed at being confiscated without discrimination. In the case of the Romanian Church United with Rome, recourse was also made to other special laws to despoil it for forty-two years.

4 The Penal Code, republished in the Official Journal of Romania, no. 48/27.02.1948.

justice, the communist Lucrețiu Pătrăşcanu,[5] marked the reconfiguration of the legislative basis. Then, by means of this apparently legal gimmick, the judiciary, assigned to and abandoned for party political and class interests, provided the people's militant arm, i.e. the Securitate, with an arsenal of means of action against the political opponents and the intimidation of the masses unsatisfied with their standard of living. Subsequent versions of the Penal Code were adapted according to the functional necessities of the repressive apparatus, ignoring the infringements of fundamental legal principles.

Evidently, there was a correlation between the moments preceding the arrest of the élite made up of high-ranking officers of previous regimes, political personalities of historical parties, even those previously used by communists, former police, gendarmerie, or secret service officers and the number of phases for the amendment of the Penal Code, granting the Securitate the opportunity to massively operate successive arrests with ease.

In reality, in this phase, this atheist, demolishing attack was first targeted against Roman Catholics, Romanian Greek Catholics, Adventists, and Zionists. The strained relationship between the hierarchy of the Catholic Church and the communist authorities, increasingly intense during 1948–1952, captured the attention of the Roman Curia. From a jurisdictional point of view, the sinuous evolution of the Latin Archdiocese of Bucharest was masking the intention of separating native Catholicism from its traditional bed, the Petrine Apostolic See. Thus, on 17 January 1949, Archbishop Aloysius Gerald Patrick O'Hara, Regent of the Apostolic Nunciature in Bucharest,[6] accepted the resignation of Archbishop Alexandru Th. Cisar from the leadership of the Roman Catholic Archdiocese in Bucharest. Then, the Holy See entrusted him with the office of Apostolic Administrator of Bishop Anton Durcovici's archdiocese, the Roman Catholic diocese in Iaşi, starting with 14 April 1948.

The mandate of Bishop Durcovici lasted almost three and a half years, until his arrest on 26 June 1949. Under these circumstances, from 29 June 1949, Archbishop Cisar returned to lead the archdiocese as Apostolic Administrator. Unfortunately,

5 Controversial communist leader, born in Bacov on 4 November 1900 and executed in Jilava on 17 April 1954. For details, see Betea 2001.

6 Born in the USA in Green Ridge, Pennsylvania on 4 May 1895 and deceased on 16 July 1963 in the United Kingdom, he held different ecclesiastic offices (priest, bishop, archbishop) as well as a series of diplomatic functions such as the representative of the Holy See. He was involved in reconfiguring and re-establishing the Catholic hierarchy in Romania in our reference period. Thus, he was the principal consecrator of Roman Catholic bishops Anton Durcovici (5 April 1948) and, clandestinely, Ioan Duma (8 December 1948), Adalbert Boros (12 December 1948), Imre Alfréd Erőss (2 February 1949), Constantin Szilárd István Bogdánffy (14 February 1949), Iosif Schubert (30 June 1950) and of Romanian Greek Catholics: Ioan Ploscaru (30 November 1948), Ioan Dragomir (6 March 1949), Iuliu Hirțea (28 July 1949). Furthermore, priest Alexandru Todea was also clandestinely ordained in the sacristy (christening chapel) of Sfântul Iosif Cathedral by Roman Catholic Archbishop Iosif Schubert on 19 November 1950 according to his instructions given before his expulsion.

this new mission of Archbishop Cisar also came to an end as quickly as it started, in May 1950, when the communist authorities ordered him to take up compulsory residence in Orăştie, where he remained until 15 August 1953.[7] Simultaneously, an attempt was made at the decapitation of the Roman Catholic Church in Romania by means of three trials instrumented by the communist justice system, in essence, legal farces, extensively commented on at the time.[8] The isolation or the attempt to compromise the clerical leadership and the Catholic élites was aimed at dismantling Catholicism of both traditions from this area, whether Latin or Oriental.

These were followed by staging the 'show', similarly to the Ruthenian Greek Catholic scenario of the years 1946–1949. At the end of 1948, the Romanian Church United with Rome (Greek Catholic) was forcedly incorporated into the Romanian Orthodox Church for almost half a century. Under the frail motivation of preserving the artificial state of things, dictated by the political power favourable to Orthodoxy, the entire diocesan choir[9] and hundreds of priests, the representative segment of the Romanian Greek Catholic denomination, those who had previously refused to convert, received various punishments. Initially intimidated and then removed from the pastoral mission, they were eventually imprisoned just like ordinary criminals. Unfortunately, they were not the only ones. They were joined by an emblematic figure of Romanian Orthodoxy, who – with his attitude towards the 'dismounting' of communists in this area – proved to be an anti-communist opponent typical of church hierarchy, especially of the Eastern tradition. Through his belonging to a certain denomination, the hierarch concerned represents a milestone in the resistance of the Romanian Orthodox Church. This attitude, anchored in the essence of his being, may be identified in most accounts of the Orthodox Bishop of Oradea, Dr Nicolae Popovici's public appearances before his forced retirement.[10]

7 Doboş 2004. 164–175.

8 The most well-known show trial of the time, that of a 'group of spies, traitors, and conspirators in the service of the Vatican and the Italian Intelligence Centre', featured the priest of the Italian Church in Bucharest, father Clemente Gatti OFM. Together with him, Bishop Augustin Pacha, clandestine priest-bishops Aldalbert Boros and Iosif Schubert were co-defendants. Monsignor Vladimir Ghika, a representative figure of Romanian Catholic spirituality, was also a victim of the show trials of the time.

9 The semantic meaning of the term differs from its musical meaning. It was a term in use, and it referred to Romanian United bishops holding offices at the time.

10 Born in Biertan, Târnava-Mare County (today Sibiu) on 3 January 1903, to parents Ion and Ana. His intellectual formation was exceptional, attending renowned educational centres in the country and abroad. Famous theologian, priest, teacher, and bishop, he proved to be a personality of Orthodox education in the interwar period. He was promoted Bishop of the Romanian Orthodox Diocese of Oradea on 28 June 1936. He got into conflict with the communist authorities, which proved fatal to him. By order of the authorities and following the decision of the Holy Synod of the Romanian Orthodox Church, he was forcedly retired, being ordered at the same time to take up compulsory residence, as a form of punishment, at the Cheia Monastery

The last phase, chronologically overlapping the authoritarian-totalitarian quarter of a century defining the cult of Nicolae Ceauşescu's personality, was that of subtle, indirect persecution. A lot tougher but also perversely disguised, it aimed to 'penetrate' clerical élites, and hence the Securitate attempted to infiltrate the church hierarchy all the way to its top.[11] In essence, it manifested itself through the application of the policy of the iron hand in velvet gloves. On the one hand, the communist regime tried to recruit and attract the majority of the representatives of all legally recognized religious denominations into an organization which proclaimed itself as largely representative: the *Front of Socialist Unity and Democracy* (FDSU). This was an annex, another 'appendix' to the Communist Party. Politically unregimented and multi-confessional in theory, it functioned between 1975 and 1989. On the other hand, however, it continued to use the apparently legal instrument of supervising and intimidating religious denominations, the famous *Department for Religious Denominations*. Through this body 'rebranded' in 1957, the 'pulse' of spiritual life within religious denominations recognized in communist Romania was taken, using territorial inspectors.[12]

in Prahova County. He died at the age of 57 in Biertan on 20 October 1960, while his rights of residence were still being restricted. See *Martiri pentru Hristos, din România, în perioada regimului comunist*. 565–580.

11 Two examples support this allegation. The first one, the confession of an Orthodox priest about his brother, also an Orthodox priest, unveiled as an informant of the Securitate in his file. The second example, that of a high-ranking hierarch, Archbishop and Metropolitan Bishop of Sibiu, whose 'human weaknesses', condemned by canon law and Christian morality, were known to and exploited by the Securitate. This explains his rapid ascension in the ecclesiastical church hierarchy, contrary to the predictions of his contemporaries. The mediaeval Transylvanian town, where his priestly career and didactic activity had started and unfolded, was the scene of transition from his capacity as a trainer of entire generations of theologians to that of occupant of the bishop's seat. Simultaneously, he dedicated himself to collaboration with the bodies of the communist political police. See the National Council for the Study of the Securitate Archives (C.N.S.A.S.), External Intelligence Service (S.I.E.) fund, file no. 4896, sheets 10–11.

12 At the same time, consequently and firmly, with the guilty 'blessing' of the obedient FDSU hierarchy, the totalitarian regime demolished several places of worship in the capital. The aim was both the physical destruction of the edifices themselves and their erasure from collective memory in a desperate need to find an enemy to scapegoat. Churches that belonged to the Romanian Church United with Rome were treated in the same way. The Romanian Greek Catholic church Adormirea Maicii Domnului – Acvila in Bucharest was included in the systematization plan (a programme of orchestrated demolition disguised as urban development). The document of the I Deanery of Bucharest does not leave any room for interpretation.

> 'I Deanery of Bucharest no. 375 of May 10, 1984 (to) Acvila parish.
> Following the order of the Holy Archdiocese of Bucharest no. 3956/1984, upon the note of the Department of Religious Denominations 3088/1984, we inform you that, in its meeting held on 13 April 1948, the Diocesan Council of the Holy Archdiocese of Bucharest has approved the demolition of the Acvila parish church – situated on 37 Sirenelor Street (Acvila no. 40) (…)'. See Marcu 1997. 147.

2. Legal Means by Which Political Control Was Exerted

There was also an overt discrepancy between the festive declarations of the communist authorities concerning freedom in Romania and the generalized suffering of the populace.[13] This argumentation is based on a simultaneous analysis of the *Report on the Draft Constitution of the Romanian People's Republic*, presented to the Great National Assembly by Gheorghe-Gheorghiu Dej, the leader of the Romanian Workers' Party and omnipotent political decision maker from the top leadership of the country (by which he argued, among others, that 'freedom of conscience, freedom of speech, freedom of the press, freedom of assembly, etc. have an honourable place in the draft Constitution'),[14] as well as on the texts of some final decisions issued by the Council of Ministers of the Romanian People's Republic on the administrative measures adopted, which remained secret by not being published. Without entering into details, this analysis highlights the discrepancy between the great masses and the political leaders of the moment as well as the gap between the ideology and the deeds of communist leaders.

2.1. The Constitution of 13 April 1948

The Constitution of 1948 sharply marked the transition to a brutal statist regime based on the rule of a single party and dictatorship, to a controlled and politically subordinated economy. It provided the premise for implementing the cult of personality characteristic to the Gheorghe Gheorghiu-Dej Government and, later on, to that of Nicolae Ceauşescu's regime in an exacerbated form. The communists sensed the reactions to this new constitutional configuration at the level of society in general; but they had equally also anticipated the answer they were about to receive from ecclesiastical circles, of which especially Catholics proved to be reluctant:

> Even the Pope in Rome will no doubt find reasons to criticize our Constitution because it is not in line with the tendency of the Vatican to mingle into the internal affairs of different countries under the pretence of guiding Catholic believers. Who knows if the Vatican, that has punished millions of Italian Catholics of the Popular Front with some sort of religious excommunication, shall not consider to also curse us because our constitution does not stipulate the obedience of our Catholic citizens to the political directives of the Vatican

13 From political insult to food shortages, to restricting the freedom of movement, poor employment rate and remuneration compared to party activists and to the political nomenclature.

14 Gheorghiu-Dej 1953. 527.

> or because we have let ourselves tempted by the shining of the American golden calf to whose feet the Vatican wishes to lead its believers (…).[15]

2.2. The Unilateral Termination of the Concordat with the Holy See

It was not long before anti-Catholic hysteria produced the intended effects. In approximately one month after the communist leader held his speech, on 18 July 1948, the regime in Bucharest unilaterally terminated the Concordat with the Holy See in a statement of the Council of Ministers. The Romanian state was in serious breach of diplomatic conventions, showing lack of elegance towards the Vatican by ignoring the provisions of Article 23 of the Concordat, which stipulated that termination was possible upon six months' notice of the party initiating it.

Against the background of the cruel reality characterizing the ever-changing Romanian political scene, on 22 February 1948, Gheorghe Gheorghiu-Dej was having difficulty acknowledging a bothering truth for the government: 'The Catholic Church is one of the few forces capable of opposing communism in Romania.'[16] Therefore, amid the process of absorbing the collaborationist wing of social democracy detached from Constantin-Titel Petrescu's party by the communists and establishing the Romanian Workers' Party, First Secretary Dej was raising the communists' 'awareness' of a potential enemy: Catholics living in the country.

The First Secretary was aware of the long-lasting independence of the Catholic Church in relation to the Romanian state. This reality was previously enshrined in the 1927–1929 Concordat. He was also aware of the significance of irenic-hierarchical subordination to Apostle Peter's successor in the See of Rome of all national Catholic administrative structures. And, last but not least, he realized the threat posed by the anti-communism of prelates and clergy, by the vast anti-socialist action of the Catholics, with deep ramifications among the afflicted masses, in relation to the government's intentions and interests as well as their possible international support, especially by the West behind the iron curtain. At the same time, Dej, who in the meanwhile had become the uncontested leader of the Worker-Communist party,[17] was surely in possession of important data

15 Gheorghiu-Dej 1951. 174. See also *Raport asupra Proiectului de Constituție făcut în fața Marii Adunări Naționale 1948*.

16 See the National Council for the Study of the Securitate Archives (C.N.S.A.S.), 'D' documentary fund, file no. 8793, sheets 11–12, passages from informative surveillance notes dated on 2 March 1948: 'The passage from Gheorghe Gheorghiu-Dej's speech regarding the relationships between the Orthodox Church and the Catholic Church completely indisposed Roman Catholic believers, who had the impression that those were their last peaceful days (…). The Catholic clergy was preparing for "tribulations". (…) Catholic priests became very circumspect for fear that the authorities would prohibit the celebration of the divine service'.

17 As responsible for the party, he was no doubt in charge of the Romanian secret services as well. Crowded with Soviet agents, subordinated to party interests, through infiltration and the elimi-

regarding the Catholic population in the country. There were 2.7 million Catholics at that time, of whom, contrary to the confused general opinion, the majority, i.e. 1.8 million, were of Romanian ethnic origin, either Romanian Greek Catholics or Roman Catholics. More precisely, over one and a half million of the total Romanian Catholics belonged to the Romanian Church United with Rome, while the others, approximately three hundred thousand inhabitants of counties in Moldova, were of Latin rite.[18] There was also a small segment of the population that belonged to the Armenian Catholic confession.

3. The Catholic Church as the Enemy of the Communist State

Generally, the communist authorities were permanently preoccupied by restricting the sphere of influence of the Catholic Church in Romania. First, they strived to treat this 'return' as a national problem, a measure aimed against Anglo-American imperialism, deliberately ignoring the religious foundation of this issue. Then, under the impact of the reactions caused, they tried to put the burden of responsibility for the deterioration of relationships between Romania and the Vatican on the Catholic clergy. The question why so much hostility existed against the Catholic Church, and implicitly against the Catholic Church in Romania, may be answered by identifying the politically responsible persons practising this anti-Catholic discourse. It is well-known that Ana Pauker was always one of them. A sinister character of the time, becoming minister for external affairs, she represented the new leading political class coming from the Soviet environment 'purified' of the traumatizing experience of Stalinist purges; she was an assiduous promoter of the anti-Catholic attitude. As responsible for Romanian external affairs of the time, she promoted – up to the limit of identification with it – the trend in favour of terminating diplomatic relationships with the Vatican[19] as early as 1949.

nation of any specialists still holding positions of power on 23 August 1944, this force served as an instrument for the application of measures to 'return' to Orthodoxy.

18 Information is to be found in the introductory study of Professor Stanciu Stoian, Minister of Religious Denominations, of the work with the title *Cultele Religioase în Republica Populară Română* (Stoian 1949). Although this information was gathered before 23 August 1944, it refers to the proportion of population belonging to the Romanian Greek Catholic denomination, i.e. 8.41%, as long as the Orthodox denomination and those close to it represented 67.04%. For details, see Stoian 1949. 41–42.

19 In this regard, see the verbatim reports of the Secretariat of the Central Committee of the Romanian Workers' Party from 16.05.1949 and 10.11.1949. 'Comrade Ana: she pointed out that it was required to provide elements for the termination of relationships with the Pope based on some ordinary crimes…'; 'the entire gang shall remain. We have to do something more serious. (…)

Unfortunately for the communist regime, Romanian society, preponderantly its elitist Transylvanian part sensitive to provocation and compelled to assist to the farce staged by the political class, perceived this attempt at liquidating the Romanian Church United with Rome as being aimed at eliminating a worthy and declared adversary of communism.[20] However, from a practical perspective, in its essence this measure did not bring about the expected consolidation of the Romanian nation, neither through the much acclaimed confessional standardization nor through 'return' to the pen where the herd of believers had scattered from after 1700.[21]

4. Decrees Governing Religious Denominations after the Constitution of 1948

The issue of amending the Romanian legal framework from democratic to fundamentally repressive also resides in the application of the so-called administrative measures proposed, implemented, and supervised by the component structures of the Ministry for Foreign Affairs. Essentially, these measures, used preponderantly in the first two decades of the existence of the communist regime, were legislative norms aimed at increasing the impact of repressive actions, justifying them at the same time through special laws, decrees with the effect of law, decisions issued by the Council of Ministers, and countless crimes committed under the pretence of enforcing the rule of law. To a considerable extent, these administrative measures were fully classified as 'state secrets'. The classification of repressive acts was generated by a contradiction between the pompous statements of the propaganda apparatus and the dramatic reality of everyday life. Even then, these were in serious breach of civic rights and

Comrade Gheorghiu: let's agree in principle to terminate relationships with the Vatican and let us initiate measures for carrying out such an action…' *Arhivele Naționale ale României*, Vol. II. 1949. 263, 550.

20 The inspiring sermons given by Dr Ioan Suciu, a young auxiliary bishop in Oradea and later on the Apostolic Administrator of Blaj, during the period before his arrest, in the year before the abolishment of the Romanian Church United with Rome, are enlightening in this regard.

21 Around the celebration of 10 May 1946, Bishop Ioan Suciu, at the time auxiliary of the Romanian Greek Catholic Diocese of Oradea Mare, was sending a powerful protest to the prefect of Bihor County, exposing some evidently chauvinistic provocations addressed to the Romanian population. At the same time, he was taking attitude against these provocations, indirectly declaring himself the defender of 'the [Romanian] army, Romanian professors, students and peasants (beaten, arrested, wounded, and assassinated)'. In this regard, see the National Council for the Study of the Securitate Archives (C.N.S.A.S.), 'D' documentary fund, file no. 8792, sheets 53–58 and 79–84.

liberties formally stipulated in the constitutional framework,[22] left unscrupulously ignored. As a result, in the course of the process of converting to Orthodoxy, the issues concerned the interpretation of articles 38 and 39 of Decree-Law no. 177/1948, the new law on religious denominations, which regulated the administrative formalities of this conversion. In order to sort out the situation, the Ministry of Religious Denominations, through its specialized department, issued an official statement concerning the application of the articles concerned. However, things did not seem sufficiently clear, not even to the authorities in charge of their implementation. For example, on 12 October 1948, the General Administrative Inspectorate in Cluj felt the need to request further information from the Ministry of Internal Affairs:

> (…) whether it is in the spirit of the official statement:
> 1. To consider as non-existing the community of the Romanian Greek Catholic confession as a result of the act of unification with the Romanian Orthodox Church.
> 2. If the Mayor's Office receiving a declaration of leaving the Greek Catholic denomination is obliged to notify the declaration made by a community that is a component part of the Greek Catholic denomination or
> 3. If in the case of Greek Catholic parishioners who make declarations of conversion to another denomination, these declarations should be forwarded to the Ministry of Religious Denominations, considering that through the act of unification with the Orthodox denomination the Greek Catholic denomination has ceased to exist, both as of right and in fact.

As the situation seemed out of control, the Ministry of Internal Affairs asked the Ministry of Religious Denominations, whose Minister, Stanciu Stoian, answered relatively late, on 28 October 1948, through note no. 39766/948:

> Conversion from one denomination to another may happen both individually and in groups (family heads). At the moment, conversions from Greek Catholicism to Orthodoxy are carried out in groups. In many local Greek Catholic communities (parishes), these conversions reach 100%, and in most parts they exceed 75%. As a result, these parishes are virtually abolished,

22 The first two fundamental laws of the country, of communist inspiration, the Constitution of 13 April 1948 (Title II) and the Constitution of 27 September 1952 (Chapter VII), provided for human rights such as the inviolability of persons and residence, freedom of expression, freedom of the press, and freedom of assembly. But the freedom of assembly was subdued to the duty to 'enrol in the building of Socialism'. As for the other liberties, Article 85 (II) of the Constitution of 1952 stipulated that they are to be exercised 'in accordance with the interest of those who are working and in order to consolidate the regime of popular democracy'. Focşeneanu 1992. 114–115, 130–131.

> while their patrimony, together with the church and the surrounding buildings, shall return to the property of the local Orthodox communities (parishes) together with the congregation. Consequently, the conversions in question make the local Greek Catholic community disappear even if there were isolated believers. The act of unification itself, as a result of a mass movement, may constitute a de facto element for the finding that the Greek Catholic denomination has disappeared. In principle, mayor's offices have the obligation to communicate the declarations of leaving local communities of Greek Catholic confession. However, where these conversions to Orthodoxy represent at least 75%, which virtually renders the local Greek Catholic community non-existent, leaving only isolated believers of this denomination, the communication of declarations may not be carried out anymore, and they shall be forwarded according to the official statement issued by the Ministry, the Ministry of Religious Denominations.

Simultaneously, with the intention to amplify the phenomenon of lawful transfer to Orthodoxy, benefits and derogations from previously applied practices were introduced. It is the case of Decision no. 39.380 of 15 October 1948 of the Ministry of Religious Denominations. Among others, it stipulated that for the return of a community to operate only the signatures of family heads were necessary: '(…) in all cases of conversion from one religious denomination to another, when these conversions happen in groups, the number of family heads shall be taken into account in order to establish the proportion of those converted and those remaining'.[23]

This antithetical positioning between the governing and the governed was also generated, throughout the entire duration of 1948, by a divergent approach to the issue of public education. Thus, dissatisfaction also started from Article 28 of the draft Constitution which prohibited religious denominations to operate and own educational institutions. This approach, which was contrary to the traditional, conservative spirit of the Romanian society, prompted the protest of the Apostolic Nunciature, of Romanian Greek Catholic bishops who edited an opposing statement, while Orthodox bishops from Transylvania, meeting within a regional working conference, protested in their turn.[24]

Nevertheless, this provision was kept in the Constitution. Subsequently, as a complementary measure in the field, Decree-Law no. 175/1948 on educational reform only finalized the idea of unification, nationalization, and laicization of

23 Practically, in this context, a family could be converted to Orthodoxy through the signature of the head of that family. The authorities had repressive administrative measures at hand to compel heads of families to provide such a signature.

24 See the National Council for the Study of the Securitate Archives (C.N.S.A.S.), 'D' documentary fund, file no. 8792.

Romanian education. Thus, Article 35 stipulated that 'All denominational or private schools of any kind shall become state schools', while Decree-Law no. 176/1949 on the transfer of assets belonging to churches, congregations, or private persons that served for the functioning and maintenance of general, technical, or professional educational institutions into state ownership indicated the actual methodology of the transfer of these annexes into state property.[25] This ideological war started by the authorities was aimed at 'religion' as a school subject. Initially, it was brutally removed from the school curriculum, which strictly limited the study of faith-related issues to the ecclesiastical space. Then, it represented a way of completely freeing the public space of religion, strictly limiting its impact.

It is difficult to appreciate the perception of these moves at the time. Certainly, there were singular reactions at the level of the representatives of religious denominations. Furthermore, we know that the Catholic Church of all rites in Romania had a prompt institutional reaction, through the authorized voice of its hierarchs, to the restriction of the freedom of conscience that threatened human dignity. Undoubtedly, the other religious denominations, such as the Romanian Orthodox Church, were conscious of the danger of getting further from the sacred, of the threat of secularization. Yet, as the tradition of Byzantine East was one of 'alignment' to political requirements and not of resistance, there was no institutional reaction on behalf of the Orthodox Church. Certainly, the individual attitude of some Orthodox hierarchs removes the collaborationism label. For example, the perception of the new legislation on religious denominations by the Romanian Orthodox hierarch well-known for his anti-communist reactions may be appreciated as surprising: 'they shall also be responsible for the law on religious denominations, the greatest weapon against the church'.[26] This singular voice uttering non-conformist statements was that of Bishop Nicolae Popovici, *persona non-grata* in the eyes of the communist authorities. The consequences of this positioning: he was silenced aided by the Holy Synod of the Romanian Orthodox Church,[27] without any opposing reaction on behalf of his synodal colleagues.

Decree-Law no. 177 of 4 August 1948 replaced the Law on the *general statute of religious denominations* from 1928.[28] Although they were similar in many ways, affiliations being often very clear, the structural philosophy of the new law from the summer of 1948 had undergone significant alterations. From an external perspective, Decree-Law no. 177 of 1948 represented a new phase in the process of modernizing Romanian society in the field of religion. Cultivating

25 Official Journal of Romania, no. 177/03.08.1948, 6322–6324.

26 National Council for the Study of the Securitate Archives (C.N.S.A.S.), 'I' informative fund, file no. 2669, vol. 1, sheet 113.

27 As a result of his attitude, he had to retire on 4 October 1950.

28 Published in the Official Journal of Romania of 30 August 1948.

a lay spirit that had not existed before, without compromises, proclaiming full freedom of conscience and treating church–state relationships in an eminently pragmatic way as practised in any other state institution represented innovative elements introduced by the cited legal norm.[29] Differences become visible if we make a *de profundis* analysis of the actual intention of the two legal norms. It is also important to note that the new Decree-Law no. 177 of 1948, as opposed to previous legislation, only operated with a single term all throughout its text, i.e. that of 'religious denomination'. In essence, this gesture was a visible sign that no difference was made between denominations, that a 'historical religious denomination' could not *a priori* enjoy certain rights, but all religious denominations had to pass the test of loyalty to the state, a *captatio benevolentiae*, to be 're-accredited'.[30]

Article 10 stipulated that: 'Followers of all religious denominations have to obey the laws of the country, to take an oath under the form and in the cases provided for by law, and to register facts related to civil status at the office of vital records within the legal time limit.' Specifically, as a Romanian citizen, a person had certain obligations to the state, but by means of the law Romanian citizens as believers were compelled by the political power, preoccupied with extorting as many such loyalty declarations as possible, not to waver from requirements imposed by the state. Through the text of the legal norm, cult leaders became implicitly accountable as they were compelled to watch over their followers in order to keep them in line. In the light of the provisions of Article 12, it may be observed that it stipulated the existence of 'a central organization to represent the religious denomination concerned, irrespective of the number of its followers' for all religious denominations.

There were similar attempts even in the period between the two world wars, but in certain cases, also due to historical conditionality, these had failed. Now, without getting lost in details, the political power forced religious denominations, such as the Jewish one or Neo-Protestant churches, to unify and create a central organization.

The law of 1948 placed the organization of churches in Romania under a common denominator by means of provisions of the type:

> Religious denominations as diocesan organizations may have a number of dioceses relative to the total number of their followers. On average, 750,000 followers per diocese will be counted for the creation and functioning of dioceses (dioceses, superintendences). The statutory bodies of each religious denomination shall delimit its dioceses and distribute its followers between

29 See in this regard articles 1, 3, 4, and 5.

30 See also Article 6 – apparently similar to Article 22 of the Law of 1928, which referred to religious denominations that were about to be recognized.

> dioceses, which shall be then confirmed by decree of the Presidency of the Great National Assembly, at the proposal of the culture minister. (Article 22)

These provisions were supposed to enter into force immediately, and they facilitated the operation of radical changes in the administrative organization of churches, first in the case of the Catholic Church and then in the case of the Orthodox Church as well, drastically limiting the number of bishops, irrespective of their ecclesiastical rank and thereby eliminating any potential danger.

Otherwise, given their competencies, the legislator was preoccupied with the issue of the leaders and hierarchs of religious denominations both in 1928 and in 1948. The approach, however, was visibly different. For example, the text of the oath that the representatives of religious denominations had to take at the end of March 1948 was modified by introducing a phrase which did not appear in the previous text: 'I swear that I shall not allow my subordinates to initiate or participate in [text added] and I shall myself not initiate or participate in any action that is liable to affect public order and the integrity of the Romanian People's Republic' (Article 21).

Provisions related to the patrimony of religious denominations, which were specifically designed to serve the purpose of abolishing the Romanian Church United with Rome, were among the essential points of the law of 1948. Thereby, the communist state 'solved' a problem of the past, a sticking point during the debates for the elaboration of the law of 1928.

Then, Romanian Greek Catholic Eparchial Bishop of Cluj-Gherla, Dr Iuliu Hossu, expressed his concern about Orthodox 'proselytizing' and requested that a specification be made that the patrimony should not be divided if a part of the church community opted for another denomination.[31] The legal situation remained uncertain after 1928, and the assets remained tacitly in the possession of those who kept their old faith. The new law predominantly envisaged property transfers to the Romanian Orthodox Church, which took place in Transylvania during the interwar period and created an adequate legislative framework for assets to become the property of Orthodox communities simultaneously with the transfer of followers, hence contributing to the gradual dissolution of the Romanian Church United with Rome, the Church of Blaj.

As for the procedures of transfer from one denomination to another, it should be noted that they were simplified by Decree-Law of 1948. Specifically, some of the much-elaborated details contained in Chapter 3 of the Law of 1928 were eliminated (articles 41–50). Then, Article 38 provided that 'Conversion from one denomination to another or leaving a denomination is free', followed by further details related to the modality of leaving a religious denomination: 'Declarations for leaving a religious denomination shall be communicated to the local

31 Apud Schifirneț 2000. 157–192.

component of the denomination left, through the local communal authority. Upon request, the communal authority concerned has the obligation to issue a proof of this communication.' Finally, Article 39 provided that: 'Religious denominations shall be able to register new followers only if applicants prove that they have announced the leaving of the religious denomination they used to belong to'. These procedures were followed during the autumn of 1948. The procedure of forcefully transferring Romanian Greek Catholic followers to Orthodoxy being in progress, state authorities were veiling the attack against the Romanian Church United with Rome under the appearance of strict compliance with the law.

Given the accelerated secularization of education, details concerning religious education provided for in the law of 1948 strictly referred to the status of institutions for the training of denominational staff. Religious denominations were aided to organize this type of education under the supervision of the state, while schools were under the authority of churches and under the aegis of the Ministry of Religious Denominations, not under that of the Ministry of Education. Faculties of theology had become university-level theological institutes overnight, and their number was well-defined: two for the Orthodox denomination, one for the Catholic denomination,[32] and one for the Protestant denomination.

Finally, the provisions of Law no. 68 of 19 March 1937 on the organization of military clergy were abolished. Military churches and chapels were transferred into the property of parishes of the same denomination from the district they belonged to, together with their entire inventory. For example, the episcopal cathedral of the military clergy in Alba Iulia became the property of the Romanian Orthodox Episcopate of Cluj, Vad, and Feleacu, together with its entire patrimony (Article 59). At the same time, under the circumstances described, although keeping all his titles and personal rights, Bishop Partenie Ciopron, the last bishop of the army and inspector of the military clergy with the rank of brigadier general, was placed at the disposition of the Holy Synod of the Romanian Orthodox Church (Article 60).[33] Apparently, spiritual assistance within the army would not have been affected by these measures. The law stipulated that: 'members of the clergy of all religious denominations must offer assistance and religious services to soldiers each time they are so requested' (Article 58).

The provisions of the decree concerning religious denominations enshrined the unilateral termination of the Concordat – which was later on implemented by the Romanian state – and completely eliminated the 'privileged' system of relationships built by the Romanian Catholic Church with the Vatican in the course of time. This and other elements as well were signalled by the Apostolic

32 It was only for the Roman Catholic denomination as long as, simultaneously with the reorganization of religious education in Romania, the Romanian Church United with Rome was outlawed.

33 Bozgan 1998. 47. Furthermore, see Pinca 2007.

Nunciature in Romania by means of a verbal note addressed to the Ministry of Foreign Affairs on 7 August 1948:

> The Apostolic Nunciature acknowledged the new Law on Religious Denominations published in the Official Journal of Romania No. 178 of August, and it feels obliged to draw attention to some provisions therein which seem to blatantly contradict the principles of freedom and equality enshrined in the Constitution of the Romanian People's Republic, which are otherwise reaffirmed in the new law.
>
> The Apostolic Nunciature in particular must protest against those provisions of the new law that clearly violate the indefeasible rights of this Church, in the name of the Catholic Church and its leader represented in Romania by the Nunciature (…).[34]

Romanian authorities ignored the above document, and they hesitated to formulate an answer for quite some time. It was only later, in the course of October, that – against the backdrop of struggles related to the accelerated process of the forced conversion of Romanian Greek Catholics to Orthodoxy – the draft answer was elaborated, but it was never sent because on 30 October 1948 this issue was closed under the signature of University Professor Stanciu Stoian,[35] Minister of Religious Denominations, as 'overcome'.[36]

The interpretation of the text of the above-mentioned document highlights the true state of affairs. By simply reading the text, some standpoints of the Romanian state adopted in relation to issues raised by the representatives of the Apostolic Nunciature in Bucharest become clear.

> The Ministry of Foreign Affairs considers that the new law on the general status of religious denominations in the Romanian People's Republic, published in the Official Journal of Romania No. 178 of 4 August current year, does not contain anything such as to contradict the principles of freedom and equality for religious denominations enshrined in the Constitution (…).

34 See Ministry of Foreign Affairs of Romania – Directorate of Diplomatic Archives 2003. 336–339.

35 Teacher and corresponding member of the Academy of the Romanian People's Republic (later the Socialist Republic of Romania), he was a university professor, doctor, and centre-right politician, who had been member of several political parties. He was born in Vârteju-Nefliu, Ilfov County, on 21 September 1900, to parents Nedelcu and Niculina and died in Bucharest on 7 August 1984. He was Minister of Religious Denominations in the government of Petru Groza, named on 7 November 1947 instead of Radu Roşculeţ, who had resigned. He was responsible for the religious denominations in several governments. He was replaced as minister by Vasile Pogăceanu, former communist prefect of Cluj, on 23 January 1953. He rigorously applied the restrictive policies of the communist regime against the Catholic Church. However, he was removed without hesitation by the system he had so unwaveringly served right after fulfilling his mandate.

36 Ministry of Foreign Affairs of Romania – Directorate of Diplomatic Archives 2003. 340.

Consequently, the Ministry of Foreign Affairs considers that the objections raised by the Apostolic Nunciature are completely unfounded.[37]

37 The arguments for supporting the assertion of the Romanian government are the following:

The Ministry of Foreign Affairs wishes to remind on this occasion the Apostolic Nunciature that it has been sent as diplomatic representation of what is called the Papal State or the Vatican City State by the Government of the Romanian People's Republic and in no way as representative of the Catholic Church, which has its own representatives in the Romanian People's Republic (…). As for the deliberate and forced interpretation of Articles: 13, 14, 21, 22, 24, 25, 28, 37, 40, and 41 of the new Law on Religious Denominations, the Ministry of Foreign Affairs wishes to remind the Apostolic Nunciature that the authentic interpretation and the application of these legal provisions is the sole responsibility of the Government of the Romanian People's Republic, whose sovereignty may not admit such substitutions and interferences as those contained in the verbal note at issue.

1. as for means 13, 14, and 21, the uncontested right and the constant practices of sovereign states – known as 'placet regium' in the history of the relationships between the Vatican and these states. The Ministry of Foreign Affairs is surprised to find that assertions such as those by means of which a foreign mission wishes to determine the competencies of the Presidency of the Great National Assembly of the Romanian People's Republic or it affirms a right over certain citizens and over a sector within the Romanian People's Republic can be made.

2. in its Note, the Apostolic Nunciature calls into question the provisions of Article 22 of the same law. In this regard, the Ministry of Foreign Affairs specifies that this article of the new Law on Religious Denominations only stipulates one of the practical ways that is necessary exactly in order to put into practice the equality of treatment as far as religious denominations are concerned (…). Only a state that is not aware of its sovereign rights and that is not animated by sincere democratic convictions may tolerate privileges to the benefit of certain denominations and to the detriment of others (…).

3. Articles 24 and 25 of the same law are called into question although it is evident that these articles only naturally extend and ensure the legitimate right of supervision of the State over certain manifestations of religious denominations so as to protect them from committing acts that would compromise the good relationships between religious denominations and the state and would cause harmful conflicts in relationships between religious denominations.

4. as for Article 28, it should be noted that generally the 'public utility' character of an institution is acquired through the way this institution acts and may not be imposed by way of theories and assertions (…).

5. as for the provisions of Article 37 of the same law, the Ministry of Foreign Affairs finds that the Apostolic Nunciature makes an attempt not only at a substitution of sovereignty but even at placing papal sovereignty above the sovereignty of the Romanian People's Republic by the offensive claim to oblige the Romanian People's Republic to subordinate its legislation to the Catholic Codex (…).

6. finally, as for Articles 40 and 41 of the same law, the Ministry of Foreign Affairs would like to underline again that no other jurisdiction of any kind from outside its borders may be accepted within the Romanian People's Republic over its own citizens. The relationships of religious denominations with foreign countries may only be religious in nature. As for the special issue of state control over the external relationships of the Catholic denomination which have as their object what the Apostolic Nunciature calls 'secrets of conscience', the Ministry of Foreign Affairs considers that submitting them to state control could give rise to discussions and discontent on behalf of those interested only if they were likely to damage the democratic order of the Romanian People's Republic (…). Faced with these, the Ministry of Foreign Affairs of the Romanian People's Republic

At first sight, the analysis of the documents exposed highlights that the dispute between the Vatican and the Romanian state was essentially all about the previous general conflict broken out at the beginning of the modern era. It consisted of a different perception of the papacy's intentions to position itself above the political power and the tendency of the state to consolidate its authority over its citizens. This conflict, fuelled by each party with its own arguments, became almost irreducible. Fortunately, a positive side of this conflict facilitated the development of European debates in the field.

The dispute between the Romanian state and the Catholic Church in Romania that lasted until 1989 was actually generated by this reference episode. The state demanded that the Catholic Church adapt its Statute so as to harmonize it with the provisions of the new law on religious denominations. The hierarchy of the Catholic Church, both the legally recognized one and the clandestine one, was always in the position of systematically refusing this request. The Catholic élite had always considered the *Codex* the main element where the state–church relationships should start from. Practically, although there were ebbs and flows in the relationship between the Romanian state and the Vatican, the irreducible controversy on the status of the Catholic Church in Romania could not be definitively settled under those circumstances.

The totalitarian regime did not accept a statute based on the *Codex Juris Canonici*. Thus, although there were several proposals for a draft statute in the course of time, the Catholic Church remained the single religious denomination in Romania that had not institutionally regulated its relationships with the state, refusing to elaborate a statute that would be accepted and recognized. This situation was only remediated by legislation passed after 2000, in a way accepted by the Catholic Church.

The leadership of the Orthodox Church was also concerned about administrative problems. This fear generated an exchange of letters between Patriarch Justinian Marina and the Minister of Culture:

> Dear Minister,
> Article 38 of the Law on the General Status of Religious Denominations of 4 August 1948 provides that: 'Declarations for leaving a religious denomination shall be communicated to the local component of the denomination left, through the local communal authority. Upon request, the communal authority concerned has the obligation to issue a proof of this communication.' Being notified that some mayor's offices have not complied with these legal provisions, which gives rise to confusion, and the new

feels compelled to carefully examine the opportunity of maintaining its diplomatic relationships with the Papal State for the future.
Ministry of Foreign Affairs of Romania – Directorate of Diplomatic Archives 2003. 340.

> followers of a religious denomination are not able to prove that they have left the religious denomination they used to belong to, we have the honour to ask you to intervene at the Ministry of Internal Affairs to take measures so that local mayor's offices apply exactly the provisions of Article 38 of the Law on the General Status of Religious Denominations.[38]

As a result, on 20 November 1948, a circular letter was drafted and distributed by the Ministry of Internal Affairs, hoping that this would put an end to problems related to interpretation: 'County prefects and mayor's offices of cities and municipalities, please take the necessary measures for compliance with the provisions of Article 38 of the law on the General Status of Religious Denominations of 4 August 1948.'

5. The Course of the Process of 'Returning' to Orthodoxy – Chronological Phases and Area-Specific Peculiarities

The intentions of the political authorities highlighted beyond any doubt the blatant interferences of the secular power in the everyday life of religious denominations and the censorship of ecclesiastical authority through administrative measures of a financial nature. At that moment, the church represented a potentially dangerous enemy, which – once escaped from the crosshairs – could give serious headaches to the new central and local administration.

Nonetheless, laicization and secularization represented the extremes between which the church had to choose in order to prove its survival skills, moving forward towards a 'surreal' reality increasingly anchored in the spiral of absurd.

Only the future of the Romanian Church United with Rome was fatally decided. Its motivation was not scientific or founded on solid arguments. It was enough to refer to the precedent offered by the Stalinist model of breaking the religious unity with Rome which had successfully been developed on the canonical territory of the Orthodox Church in the Soviet Union. Directing people towards Orthodoxy, the 'return' of Romanian Greek Catholics was one of the first aspirations of the government. The echoes of this assiduous preoccupation of the majority of state officials were registered and felt in the majority of Romanian Greek Catholic communities.

> As opposed to the multitude of centres opposing the return to the Orthodox Church, the number of centres in favour of this return is much smaller, and most of the time the reasons that have led to this situation are less theological in nature than personal (disputes with diocesan bishops) or social (the

38 Kom 2000. 11.

peasant or worker social origin of some Romanian Greek Catholic priests). Therefore, only the following are indicated:
– Braşov, without actual data in favour but without overt displays against;
– Şercaia parish, Făgăraş County, under the influence of priest Crisan Valeriu;
– Găinari parish, Făgăraş County, under the influence of priest Comsa Gheorghe (…).[39]

Resistant or indifferent, opportunist or altruist, careerists or timorous, Romanian Greek Catholic priests were meticulously classified according to the possibility of being approached and at the discretion of fora involved in their supervision. This is not about a simple painting anymore but a true social fresco stuck in the sphere of religion.

Although the indifference of some Greek Catholic priests as to the issue of returning to the Orthodox Church is simulated and not real, the following may be considered indifferent and hence impressionable: (…)
Florea Ion, from Braşov, without any influence over the masses.
Simu Gheorghe, Dean of Braşov, very popular among the masses.
Fulicea Octavian, from Copăcel parish, Făgăraş County, not popular.
Ilea Petre, from Hârseni parish, Făgăraş County, loved by the population.
Motoc Aurel, from Săsciori parish, Făgăraş County, very popular among the masses.[40]

The perception of the Romanian Church United with Rome about these events and what was happening in reality at the level of ecclesiastical administrative structures are not known in detail. Subsequently, however, one can imagine the difficult state the majority of Romanian Greek Catholics had to endure in the nefarious year of 1948.

1 October 1948, the Friday of that week represents de facto the starting point of the simulacrum of legality intended for the abolition of the Romanian Church United with Rome. The meeting, 'coven' of approximately thirty-eight Greek Catholic

39 Central National Historical Archives (A. N. I. C.), Central Committee of the Romanian Communist Party fund, Administrative-Political Department, file no. 50/1949, sheet 9. Some Greek Catholic priests listed in the document from the archives of the Romanian Communist Party, priests carrying out their pastoral mission within the territory of Sibiu, Făgăraş, or Braşov counties at that time were already considered back then: '(…) of those who agreed more or less honestly, the following may be indicated: (…)
– Priest Florea – Braşov.
– Crisan Valer, from Şercaia parish, Făgăraş County, loved by the masses.
– Comsa Gheorghe, from Găinari parish (correctly Grânari n.n.), Făgăraş County, known by the population as an interesting man (…).'

40 Central National Historical Archives (A. N. I. C.), Central Committee of the Romanian Communist Party fund, Administrative-Political Department, file no. 50/1949, sheets 14, 15.

clergymen, 'aware' of the historical mission they had to 'accomplish', was held in the gymnasium of *George Barițiu High School* in Cluj,[41] under the watchful eye of the Securitate.

Some of them had endured imprisonment in order to accept the office of 'delegate' of priests from the Greek Catholic diocesan province, their mandate not being explicitly presented. Supervised by the representatives of the executive, in the presence of Orthodox Metropolitan Dr Nicolae Bălan of Sibiu, they accomplished the task of liquidating the Church of Blaj.

Traian Belaşcu, priest in Alțina and Dean of the Țichindeal District, was the first speaker. He was elected president of that assembly. Visibly intimidated, he struggled to express in some circumstantial sentences the desire of Greek Catholics to free themselves from 'the supervision of the Vatican, which, against evangelical principles, has engaged in the front of aggressive imperialism, stirring up new wars'. The reasoning of the speaker, as simple as it was forced, invoked the necessity not to desert 'from among our people, who are bravely fighting for peace, national independence, and freedom together with the other democratic powers of the world'.[42]

Then priest Virgil Moldoveanu followed, who tried to highlight the political character of this act, asserting that by this return of Greek Catholics to Orthodoxy the church would become a 'living and active factor within state life', and its priests would become 'the pillars the Government could lean on' in its work for the 'progress of our popular democracy and for the well-being of the working masses'.[43]

Practically, the results of this ecclesiastical meeting were minor. With one or two participants less, two circumstantial documents were elaborated by the 'apostles of reunification'. The content of the materials drafted in a hurry was aimed at popularizing and justifying treason. They were a 'Proclamation' (probably prepared in advance, which is proven by the text of delegation forms from September) and an 'Appeal' addressed to all believers in the country, especially to Greek Catholics. Thirty-seven delegates, apostate priests from the united law, of a canonical representation between the third and fourth level of the ecclesiastical hierarchy, represented the proof of treason committed in their own names in the two documents mentioned.

Then, trying to assign minimum legitimacy to the non-canonical act,[44] the participants descended on Bucharest. Overwhelmed by the responsibility induced

41 It was the first Romanian high school in Cluj which opened on 19 October 1919, pursuant to the order of the Ruling Council from Sibiu.

42 Rădulescu–Sădeanu 1948. 8.

43 Rădulescu–Sădeanu 1948. 11.

44 The participants at the Cluj assembly were ipso facto defrocked and anathematized. They were excluded from the clergy of the Romanian Church United with Rome by decree of Iuliu Hossu, Diocesan Bishop of the Diocese of Cluj-Gherla. Some of them fell afoul of the provisions of ecclesiastic legislation twice as, irrespective of the excommunication decree issued in Cluj,

by their participation in an act that they had probably not understood either *ante* or *post festum*, they found themselves in the capital of the country in order to pay their homage to Patriarch Justinian Marina and to the Holy Synod of the Romanian Orthodox Church. The act of receiving the delegates – of whom, due to the diligent efforts of the Securitate, by then only 36[45] remained – in the 'holy fold and on the spiritual (…) pastures of the Romanian Orthodox Church' had been consummated in the patriarchal residence on Sunday, 3 October 1948. The second act took place at Sfântul Spiridon Nou Church, where the diocesan Holy Mass was held by the leaders of the Orthodox hierarchy with the participation of some Orthodox deans and defecting Greek Catholic priests.

Here, the Synodal act of reception in the Orthodox Church (ratified later on 18 October 1948) and the 'Appeal [of the delegates] to all true believers in the country' with the call to follow the example of those who had left the unification with Rome were read out. The ceremony ended with the 'fatherly' word of Patriarch Justinian Marina and the signing of the synodal register by all participants.

If at the central level the sequence of meetings of a manifestly anti-Catholic character took place according to the above scenario, committees of action for the return of followers and for exerting pressure on priests unwilling to sign were established at the local level. The main objective of sub-prefects, mayors, notaries, gendarmes, priests, and teachers from the mixed teams which were assembled was to explain the appropriateness of the act of 'returning' to ancestral Orthodoxy, decided in Cluj, and to obtain the majority of signatures for conversion to the Orthodox Church until 21 October 1948 (preferably until 15 October 1948).[46]

Based on the confessions published after 1989, four great methodological categories were used to obtain signatures for justifying the 'return' of Greek Catholics to Orthodoxy:

– conversion out of conviction,
– administrative or physical pressure,
– forgery, and
– deceit.

the Apostolic Administrator of Blaj, Ioan Suciu, imposed the serious punishment of canonical anathematization on them.

45 The intention of the authorities was to reunite the symbolic number of 38 participants (priests) at this pseudo-synod, which was identical to the number of participants at the synod for the declaration of unification with Rome from 1698. Some of the participants were lost on the way. This aspect may be found in several works on the topic, but we did not identify any official explanation.

46 Evidently, the authorities made use of the whole range of available administrative means for this 'persuasion'. Thus, in a circular letter addressed to the deans of the Orthodox diocese of Oradea, Bishop Nicoale Popovici, citing the orders of the Ministry of Religious Denomination, requested the finalization of the 'returning' process until 15 October 1948. Urging the priests to fulfil this desire, the hierarch warned that failing this they would be considered to be of bad faith and treated accordingly. See: Kom 2000. 10.

Even in this sense the so-called religious unification was not by any means uniform. Facts followed a different course from one place to the other, and the denominational reconfiguration of different areas was carried out according to the interests of the actors involved and local characteristics. The desired effect was for the state to take over all the movable and immovable assets possessed by Greek Catholic communities up to that moment, including those of followers, and to share a significant part of these assets with the Romanian Orthodox Church.

Simultaneously with efforts to take over the assets of the Romanian Church United with Rome, the 'path of ordeal' for Greek Catholic priests and for the majority of vicars, clergymen, deans, and priests from Blaj as well as from other areas and cities that were diocesan seats had begun. Losses were immeasurable, both at the material and the spiritual level. These can now be estimated after summing up the years of detention and suffering that rewarded faithfulness, even to death, and as a result of the analysis of the feeble patrimonial reality that has precariously sustained the existence of the Greek Catholic community during the entire period of returning to legality, from 1989 up until today.

A possible explanation for the sinuosities registered in the course of the application of legal norms is represented by the fact that the process of dividing the assets and changing the status of properties had dragged on for long, until the 1960s. As we have already asserted, we cannot speak about a unitary methodology of changing 'ownership'. The episcopal cathedrals were taken over by Orthodox hierarchs, who found it appropriate to re-consecrate the places of worship as if they had been defiled. In villages and cities from within the Greek Catholic archdiocese, the places of worship became Orthodox by means of Orthodox priests entering these places and holding divine services there, especially on Sundays following October and November 1948. Later on, modifications regarding the system of ownership were operated in land registers in several phases during the years. Paradoxically, however, in other areas, the status of church ownership had not been changed. Another important aspect of the process of conversion to Orthodoxy which has to be mentioned in this context is as follows: although the majority of Greek Catholic believers were reluctant and opposed the abolition of their denomination, major bloody events, such as those from centres of resistance in areas known and closely monitored by the Securitate – as, for example, the Greek Catholic monastery in Bixad,[47] Satu-Mare County, a renowned centre of pilgrimage for Basilian monks of the Order of Saint Basil the Great from the Romanian province –, were not numerous, and they were unlikely to happen

47 In Bixad, the patrimonial dispute is still on-going to this date. In 1948, state authorities, which had come with the intention to take over the monastery, were simply driven out by the revolted peasants who did not want to give up their place of worship. Today, in 2020, the authorities of the same state refuse to enforce a court decision on the restitution of the monastery belonging to the Greek Catholic denomination.

under the circumstances already presented in the geographic area of Greek Catholic communities.

Against this backdrop, on 21 October 1948, substituting even values of the historical heritage according to the Holy Synod of the Romanian Orthodox Church, the 250th anniversary of the Unification with Rome of October 1698 became the occasion to celebrate in all due pomp and circumstance the 'radiant' religious unification.

In Alba Iulia, in the presence of many participants, a solemn *Te-Deum* was officiated in the Holy Trinity Cathedral, renamed after this event the *Orthodox Reunification Cathedral of Transylvania*. Then, the works of the Great Church Assembly (presided over by the defector Dean Traian Belaşcu)[48] took place under similarly inauthentic auspices. A number of speeches were held, revealing an odd mixture of political-nationalist language intended to justify the arbitrary and unjust so-called 'return' to Orthodoxy. The motion adopted by the Assembly is illustrative, recording that:

> Today, 21 October 1948, on the anniversary of two and a half centuries since here in the Romanian Belgrade some of our ancestors (…) defeated the religious unity of Romanians from Transylvania, uniting with Papal Rome, we, clergy and people, representatives of all Greek Catholic Romanians from Transylvania, Crişana, and Maramureş (…) obeying the command of our ancestors from the Field of Liberty in 1848, following the forever exemplary exhortation of all good Romanians; moved by the call of His Eminence Metropolitan Nicolae of Transylvania of May 1948 and by the fatherly call of His Holiness Justinian, Primate of the Orthodox Church (…); understanding the deep meaning of the 'Cluj Proclamation of 1 October 1948 of the 430 Greek Catholic clerical delegates as well as the meaning of the Appeal of the same servants from 3 October 1948 (…)', we declare that we break off our relations of any kind with the Vatican and papal Rome forever, that we wholeheartedly incorporate ourselves into the Romanian Orthodox Church (…); that we shall comply with all the decisions of the Holy Synod

48 Father Belaşcu's preparations for 'returning' to Orthodoxy began with the period of his detention in Aiud, between 1946 and 1947. In the prison at Aiud, among others, father Nicolae Lupea, Vice-Rector of the Greek Catholic Academy of Theology in Blaj, and Nicolae Grebenea (born in Răşinari on 25 October 1905, former legionary mayor of Slănic-Moldova, deceased on 2 July 2006), Orthodox priest – who otherwise provided the information –, were his colleagues. See Grebenea 2017. 469. It should be noted that other clerics were also subject to similar 'preparation' of their state of mind at that time. Clergymen Gheorghe Dănilă, Ioan Vultur, and other representatives of the Blaj élite, such as Augustin Folea, Rusu Traian, or Adrian Nyerges, were also detained in the prison of Aiud. The latter ones were detained pursuant to note 1377 of 25 July 1947 of the Regional Security Inspectorate of Blaj addressed to the Security Service in Blaj. See National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 5157, sheet 15.

> of our Orthodox Church with the love of a son. From today on, we, all Romanians are and shall remain forever ONE in our right-believing faith, ONE in steadfastly serving our people, and ONE in honestly listening to the new life commandments of our dear Romanian People's Republic. We would like to sincerely thank His Holiness Patriarch Justinian and the members of the Holy Synod for all the parental love they embraced our pure wants and desires with. To the members of the High Presidency of the Romanian People's Republic and of the Government, we express our gratitude for the freedoms granted for all sons of the people, freedoms that have made the reunification of the Romanian church possible. And for all this benevolence we bring 'glory' to God.

The de facto abolition of the Romanian Church United with Rome was enshrined in the provisions of Decree no. 358 of 1 December 1948, published on Thursday, 2 December 1948. The termination of the legal existence of the Romanian Church United with Rome as well as the division of its assets between the Romanian State and the Romanian Orthodox Church were stipulated in two paragraphs bearing the signatures of four persons responsible for generating this unjust and unfair administrative measure: C. I. Parhon and Marin Florea Ionescu from the Presidency of the Romanian People's Republic as well as Cultural Minister Stanciu Stoian and Justice Minister Avram Bunaciu. Communist political leader Gheorghe Gheorghiu-Dej[49] may also be included as a person responsible for this act. Of the several gestures that may be imputed to him, we would like to recall his already mentioned attitude manifested at the debates on voting the new Constitution in April 1948. Additionally, University Professor Stanciu Stoian's[50] burden of guilt as Minister of Religious Denominations may be considered even heavier.

Later on, on 27 December 1948, the Romanian State issued Council of Ministers Decision no. 1719/1948, containing the composition of the inter-parliamentary committee entrusted with dividing the material assets that belonged to the Greek Catholic denomination. It would be a mistake and even malicious to believe that this committee has never functioned. A number of sufficient archival sources unequivocally attest the meetings of the committee that started its activity

49 The new fundamental law of the state conferred upon Dej the quality of Vice-President of the Council of Ministers, a newly created position, undoubtedly dedicated to him. He also held the position of President of the Monetary Recovery and Stabilization Committee, President of the Superior Economic Council, and coordinator of the activities of the Ministry of Economy and Finances. Consequently, he was responsible, being one of the government heavyweights. See *Arhivele Naționale ale României*, Vol. I. 1948, VIII.

50 In his speech held at the enthronement of Justinian Marina as Patriarch of the Orthodox Church in June 1948, he resumed the public attack against the Vatican in an unacceptably virulent tone. As if inspired by Gheorghiu-Dej's speeches, Stoian labelled the papal state as 'a religious instrument in the service of world reactionaries'. As for the Ministry of Religious Denominations, see Footnote 44 supra.

immediately upon its establishment. Between 6 and 21 January 1949, for example, several minutes have been concluded with the intention to distribute the movable and immovable assets of 'former Greek Catholic' organizations to central bodies, 'in the general church interest'. Moreover, from the phrasing of some of those minutes, it may be deduced that the authorities started the formalities for distributing these assets well before October 1948, i.e. even before ordering the official liquidation of the Romanian Church United with Rome, which was abusively dispossessed of its entire material wealth, whether episcopal cathedrals, places of worship, monasteries, schools, seats of associations involved in charitable activities with a social impact, amenity areas, or forestry funds.

Aspects and moments from the fateful year of 1948, especially the start of persecutions[51] in the metropolitan centre of Blaj, are to be found in the evocative lines of father Adrian Teodorescu. Former priest of *Holy Trinity Cathedral* in Blaj between 1949 and 1988, he was a Greek Catholic priest who converted to Orthodoxy but returned to Greek Catholicism shortly before his death around the events in 1989. Within the pages of Report no. 213 of 19 September 1986 registered at the Romanian Orthodox Episcopate of Alba Iulia, the former Greek Catholic priest, who had become an Orthodox dean after the events mentioned, made a radiography of the historical phenomena, which marked the beginning of his sacerdotal mission within the Orthodox Church:

> The quiet cultural and religious centre from the confluence of the Târnava rivers was therefore in full swing. Churches were devastated, museums were robbed, libraries and archives were ravaged or burnt (sic!). The personal belongings of the clerical staff of the Metropolitan Centre in Blaj, which was swept out of the locality, got into the hands of plunderers. Even the alcoves from the basement of the Chapel of Bishops in Blaj were broken into by relentless treasure hunters, and the bone remains were desecrated.

It is worth noting that the Romanian Patriarchy was listed among those mentioned by the author as full beneficiaries of the legalized robbery, organized, patronized, or tolerated by the political authorities,[52] during which the patrimony of the Romanian Church United with Rome was squandered both in Blaj and in the whole country. The management report of the said priest noted that: 'we handed over 6 bishop's garments, some of them in a very good state, of golden and silver thread, 5 bishop's mitres, one bishop's crutch, 14 portraits portraying

51 From the multitude of appellatives used in the literature to refer to 1 October 1948, I consider that the most expressive one for the Romanian Church United with Rome is Good Friday, referred to in the writings of his holiness Bishop Dr Ioan Suciu. As a supplementary detail: the calendar of that year retains the reference date on the Friday of that week.

52 Regrettably, many of the wrongdoers have remained unknown, taking the burden of horrors into the darkness of tombs.

Greek Catholic bishops of Blaj, beginning with Atanasie Anghel and ending with Dr Valeriu Traian Frențiu'.

The analysis of the events should be carried out from a bidirectional perspective. The Greek Catholic hierarchy opposed the governmental measures that affected the existence of the Romanian Church United with Rome as its integrity could not be the object of negotiations. However, at the level of the priesthood, somehow differently structured administratively and scattered all over the metropolitan province, certain 'defects' appeared. All these sideslips meant nothing more to the moment of 1 October 1948. The unification synod in Cluj was but a parody. The delegates were mandated, as they themselves maintained, by '423 clergymen, teacher-deans, and Greek Catholic priests'[53] of an approximate number of two thousand Greek Catholic Romanian priests who shepherded more than one and a half million souls of Greek Catholic faithful. There are no doubt explanations for these compromises, and they could be revealed only by studying them on a case-by-case basis. It is sure, however, that, irrespective of their status – 'returned' or 'not returned' –, priests were obviously dissatisfied. So outraged were they that, without too much effort, the Securitate was aware of this reality in detail. This situation, for example, is reflected, among other things, in Note no. 13/36.503 of 21 December 1949 of the Regional Directorate for the People's Security in Sibiu. Essentially, this document signalled the state of mind of the

53 We, the undersigned clergymen, responsible before God and the conscience of our people, assembled in a holy spiritual sobor on 1 October 1948, for all the blessed reasons shown, decided and accomplished our return to the bosom of our Mother Orthodox Church. With our endless brotherly love towards you, clergy and people of the Romanian Greek Catholic Church, we ask you and urge you to follow our example with confidence, hence proving yourselves good servants of the people and worthy sons of God. Returning to the bosom of the Romanian Orthodox Church from which we temporarily separated approximately two and a half centuries ago, let us have a clear conscience that through this historical act we also serve the will of God who wishes us all to be one and the great interest of our people to be one.

By doing so, be convinced that we shall be rewarded by our Motherland, and we will be blessed by God.

Yours kindly: Traian Belaşcu, dean; Nicolae Jangalău, dean; Aurel Brumboiu, dean; Petru Vancu, priest; Virgil Moldovan, priest; Zaharie Hentea, priest; Paul Madincea, priest; Laurențiu Pop, priest; Ion Onişor, priest; Ion Cisteian, priest; Petru Pop, priest; Zaharia Borzea, priest; Alexandru Stupariu, priest; Emil Colceriu, priest; Septimiu Sântoma, priest; Emil Mureşanu, junior, priest; Cornel Cernescu, priest; Teodor Ploscariu, priest; Ioan Vâțu, priest; Constantin Puşcaşiu, priest; Victor Traian Pop, priest; Mircea Filip, priest, Dr Cornel Pop, priest; Roman Nemeş, priest; Victor Lenciu, priest; Octavian Gherasim, priest; Sabin Truția, priest; Vincențiu Poruțiu, priest; Andrei Coman, priest; George Zagrai, priest; Ioan Florea [priest II in Braşov], priest; Ioan Andraşiu, priest; Victor Negrea, priest; Alexandru Fărăcaşiu, priest; Ioan Pop, priest; Glodean Dumitru, priest. The above delegation is authorized by 423 clergymen, teacher-deans, and Greek Catholic priests.

Mystification had already started at the time. Circular Letter no. 7367/1948, dated 7 October 1948, Sibiu, by which Archbishop and Metropolitan Nicolae Bălan greeted the act of 'returning', speaks of 38 synodal priests and 433 authorizations. There are two possible explanations: either the events did not follow their predefined course, or the evolution of events ignored the planning.

clergy in Târnava-Mică County, a region that – even overwhelmed by rage – had remained the fiefdom of the Greek Catholic Church. The text of the document, drafted by the famous torturer Lieutenant-Colonel Gheorghe Crăciun,[54] presented – in his unmistakable manner and style – ample passages from the statements of several former or unconverted Greek Catholic priests and their attitudes, caught by surveillance or with the aid of informants' reports collected in different circumstances. In a manner characteristic of drafting such materials, some names are also mentioned here. Among them, we find those of the above-mentioned Dean of Blaj, the 'returned' priest Adrian Teodorescu, and that of Dumitru Neda, a recalcitrant clergyman.[55]

54 I would like to mention here that the well-known torturer was born in Mintiul Gherlii parish, Cluj County, on 24 July 1913, to Greek Catholic parents Nicolae and Floarea, and he died in Bucharest in 2001. Until the surrender of Northern Transylvania (30 August 1940), he was a boiler maker at the Romanian Railways (CFR) in Cluj. He then became Securitate officer with the following professional career: 1948–1951 at the Securitate in Sibiu County, 1951–1952 at the Securitate in Craiova County, 1952–15 July 1953 at the Securitate in Constanța County, 15 July 1953–31 August 1954 at the Securitate of Bucharest municipality, 31 August 1954–1 September 1958 at the Securitate in Braşov County; from 1 September 1958 to 1 December 1964, he was in command of the Aiud Penitenciary; between 1 December 1964 and 1 September 1967, he was active within the framework of Directorate III of the Securitate and at the end of his career as an officer within Directorate I of the Securitate between 1 September 1967 and 31 October 1969. He was reassigned to the reserve forces with the rank of colonel on 31 October 1969. As chief of the Regional Directorate of the Securitate in Sibiu at the time, he was responsible for numerous atrocities and infringements against human rights and fundamental freedoms. At the same time, he was the only one taken to court for his deeds after the fall of communism. As a relief, both for him and for those who strived to mimic that they were judging him, he died before truly answering for his crimes before human justice.

55 The Regional Directorate for the People's Security in Sibiu – to the General Directorate for the People's Security (…) it is also determined that the Orthodox and Catholic clergy [sic!] in Târnava-Mică County commented Metropolitan Bălan's dictatorial and brutal behaviour against priests in an unfavourable manner, sustaining that it was due to him that the unification of the 2 churches could not be accomplished in good conditions because the priests did not appreciate the metropolitan. Most priests from the county comment in the same way, and they see the metropolitan as a dictator lacking morality and who is only pursuing material interests for the satisfaction of his pleasures, surrounding himself with servile elements and removing capable and honest elements, not as a spiritual leader of the Church who sets an example with his behaviour. Comparing Metropolitan Bălan's behaviour with that of other bishops, Orthodox Dean Teodorescu Adrian of Blaj, former Greek Catholic, and the resistant clergyman Neda Dumitru from Blaj commented that if metropolitan Bălan would also treat priests as Bishop Herineanu from Roman, who is said to be popular and to help priests, the unification would have been more successful. (…) In this regard, Greek Catholic clergyman Neda Dumitru asserted that archimandrite Ghiuş [Benedict] from the Patriarchy, who seemed to behave in a similar manner to Bishop Herineanu from Roman, would be most indicated for the position of metropolitan, and he would succeed to determine a change in the attitude of resistant Greek Catholic priests.

See National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 5331, sheets 253–254.

6. The Arrest of the Episcopal Choir and of the Representative Clergy

Generally, the impact triggered by the 1 December 1948 moment is perceived differently, from three perspectives. The first one, which comes to the fore, is undoubtedly the harsh and repressive attitude of the political leadership. The second view of the event, as already foreseen back then, was the duplicitous one, characteristic to most of the hierarchy of the Romanian Orthodox Church. However, for the hierarchy and clergymen of the Romanian Greek Catholic Church United with Rome, the events which occurred during the entire course of 1948 and which irremediably affected the normal existence of this denomination were defined beyond doubt as religious harassment or persecution.

His holiness Bishop Dr Ioan Suciu had concisely, clearly, and solemnly stated it on numerous occasions, orally in his sermons held until the moment of his arrest and evidently in writing, that '(…) the only word we can use to term the action initiated against the Romanian Church United with Rome, against its priests and followers is: persecution. (…) a number of priest-deans are locked up by the Securitate organs together with many priests, whose number is increasing each day, for the same religious reason (…).'[56]

Obviously, the entire episcopal Greek Catholic choir subscribed itself to this perception both in attitude and at the level of statements. This is proven by the decisions taken at the episcopal conferences and reunions which took place during that long timeframe of almost ten months.

Arrest and actual detention followed. In spite of our efforts, we could not eliminate all the white spots related to the arrest of bishops. As to substance, such a judiciary-administrative measure presumed at least a hint of legality, even under the precarious conditions of respecting people's rights at that time. Then, it may be assumed that the movements of a potential resistance had also been anticipated. Until now, several variants regarding the moment of and the procedures used for arresting the Greek Catholic episcopal choir have been in circulation. Most of them converged on the variant of the arrest of the bishops on the same date but at different hours. There were also statements in which the date of the arrest of Greek Catholic bishops did not coincide. I tend to subscribe to this last alternative for several reasons. First, the arrests were carried out in several locations. Practically, at the time, the technical means for the transmission of orders and dispositions were in their early days. Therefore, we could not talk about a synchronization of arrests in the current sense of the term. And, last but not least, we should not overestimate the quality of the human factor with which the Securitate operated at that time.

56 National Council for the Study of the Securitate Archives (C.N.S.A.S.), Informative Fund, file no. 5331, sheet 202.

Table 1. Timeline of the arrests of senior Greek Catholic clergymen by the communist regime

No.	Ecclesiastic rank and name of the person arrested	**Date of the arrest**	**Day of the arrest**	**Place of the arrest**	**Hour of the arrest**
1	His Holiness Dr Valeriu Traian Frențiu	29.10.1948	Friday	Oradea	01:00
2	His Holiness Dr Iuliu Hossu[57]	29.10.1948	Friday	Bucharest	01:30
3	His Holiness Dr Ioan Bălan	29.10.1948	Friday	Lugoj	in the afternoon
4	His Holiness Dr Alexandru Rusu[58]	29.10.1948	Friday	Baia Mare	unknown
5	His Holiness Dr Ioan Suciu[59]	26-27.10.1948	Wednesday	Blaj	01:00 (uncertain)
6	His Holiness Dr Vasile Aftenie	29.10.1948	Friday	Bucharest	unknown
7	Priest-Dean Dr Tit-Liviu Chinezu[60]	29.10.1948	Friday	Bucharest	unknown

57 Arrested pursuant to the mission and search order issued by Service III within the General Directorate for the People's Security (DGSP), no. 6700 of 28 October 1948 by team no. II, made up of Iavorschi Gh., Baroncia Victor, and Dragomir Nelu. National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 736, vol. IV, part II, sheet 307.

58 National Council for the Study of the Securitate Archives (C.N.S.A.S.) Criminal Fund, file 'P', no. 13277, vol. 2, sheet 38. 'Left Baia Mare knowing that I will make a simple Declaration to the Securitate there, I did not take anything with me, and I got here [to the camp in Dragoslavele] via Satu Mare, Oradea, and Bucharest'. Handwritten memories of Bishop Dr Alexandru Rusu addressed to Minister Teohari Georgescu.

59 The first Greek Catholic bishop arrested, the apostolic administrator of Blaj, Dr Ioan Suciu was detained pursuant to Note no. 3544-1948 of the Romanian Metropolitanate United with Rome – Blaj. This was drafted and sent to the Presidency of the Council of Ministers. It was a note of protest against measures applied to the priests and followers of the Romanian Church United with Rome. The arrest order was already issued on 26 October 1948. The resolution of Marin Jianu, Deputy Minister of Internal Affairs, should be mentioned as edifying: 'Comrade Pintilie. 1. This Suciu is removed from the office of bishop, but still, in defiance of this measure, he signs himself with this title. 2. He agitates the population against the regime and makes false statements. 3. He gathers people and agitates them against the laws in order to disturb peace and order in the state. He shall be arrested and investigated as enemy of the regime.' His arrest was carried out pursuant to Order 5 S/55496 of 26.10.1948: 'To the contact group Regional Directorate for Security in Sibiu "Take action for arresting Bishop Suciu. Col. M. Dulgheru".' A day later, '5 S/55496 of 27.10.1948 (…) communicate urgently, within 12 hours, the results of our order 5 S/55496 of 26.10.1948, encrypted (…) Col. M. Dulgheru'. See National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 5331, sheets 203, 204, and 205.

60 Both Bishop Dr Vasile Aftenie and father Dean Dr Tit-Liviu Chinezu were arrested by team no. I made up of Petrache Petre, Marin Vasilie, Enache Ioan, and Dâmbu Vasilie – National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 736, vol. IV, part II, sheet 304. In the case of Bishop Hossu and of the last two bishops, the mission order expressly specified that a search for 'firearms, explosives, and documents that are of interest for

As a conclusion, although we have identified new items of information which do not render the first hypothesis sustainable as there are sufficient reasons to doubt their accuracy, these new references do not offer a strict delimitation of arrest phases. Without getting into a detailed analysis of the phases, including the chronological ones, in the following I will try to present a sequential summary of these arrests.

Administrative detention in different locations which have become ad-hoc prison camps represents the second phase of suffering. In turn, this may obviously be deduced from two or three corroborated documentary sources as well.[61]

a) the period between 29 October 1948 and 31 October 1949 spent in the cellars/cells of the Ministry of Internal Affairs (which functioned in the building between 1946 and 1958; then, between 1958 and 1989, the building hosted the Central Committee of the Communist Party and between 1990 and 27 March 2006 the Senate of Romania);

b) between 31 October 1948 and 26 February 1949 – detainees in the camp[62] organized on an ad-hoc basis in the patriarchal villa from Dragoslavele, former Muscel County, today Argeş. Here, Greek Catholic hierarchs were searched by Patriarch Justinian Marina. He paid the first visit alone on 14/15 October 1948, and then he paid his second visit on 3/4 December 1948, accompanied by Patriarchal Auxiliary Bishop Teoctist Arăpaşu.[63] As a result of these visits, given that in their context Greek Catholic bishops found out details about Decree no. 358/1948,[64] the Romanian Greek Catholic episcopal choir sent its first memorandum of protest against the serious attempt against religious life in Romania to the communist authorities.

order and security in the state, paying special attention to notes, notebooks, and pocket books that these individuals might have on them', should be conducted. At the same time, it is also mentioned that they were taken into the arrest of the Ministry of Internal Affairs – National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 736, vol. IV, part II, sheet 306.

61 One of these sources: the informative surveillance file opened for the Regent of the Apostolic Nunciature, Archbishop Aloysius Gerald Patrick O'Hara. National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 235880, holder O'Hara Gerald Patrice (according to the writing style and terminology of the time used by Securitate agents, it was one and the same person), vols. I. and II.

62 National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 736, vol. IV, part II, sheet 219. Protection provided by 36 armed soldiers led by Second Lieutenant Ionică. See National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 5595, vol. 1, sheet 93, Emilia Sbiera and National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'P' Criminal Fund, file no. 13277, vol. 1, sheet 35: '13/22 March 1949 – Strictly Confidential – Report – Concerning the former Greek Catholic Bishop Rusu Alexandru, who is detained in the villa of the Patriarchy from Dragoslavele parish, Muscel County (…).'

63 Central National Historical Archives (A.N.I.C.), Ministry of Internal Affairs/Police General Directorate (M.A.I./D.G.P.) fund, file 75/1946, sheet 407.

64 The decree of the Presidency of the Great National Assembly which declared the Romanian Church United with Rome illegal was published on 2 December 1948.

This memorandum did not move the authorities to revise their measures already taken. On the contrary, it caused an enhancement in the intensity of repressive acts employed by the state. The action of demolishing the administrative structures of the Greek Catholic denomination continued. This measure was applied all over the country, especially in areas where resistance was anticipated.[65] The protest was ignored, the authors did not receive any answers, but the authorities maintained the measure of administrative detention. Greek Catholic bishops were sent to the Orthodox monastery in Căldăruşani, together with the leaders of the Greek Catholic denomination: clergymen, theology teachers, and deans arrested simultaneously with the bishops. Until then, they were detained in the camp improvised by the government in the neighbourhood of the Neamț monastery.

c) between 26/27 February 1949 and 24 May 1950, forced 'housing' (compulsory domicile) in Căldăruşani monastery for 'one year and three months'.[66] Here, besides the fact that they were detained against their will, Greek Catholic clergymen were prohibited from following their previous daily routine, according to their personal needs and usual habits, especially inasmuch as their spiritual life was concerned.

Here, given the exceptional circumstances, new bishops were ordained, closely observing the norms issued by the Holy See and previously made available by the Regent of the Apostolic Nunciature, Archbishop O'Hara.[67] The senior of the episcopal choir, his eminence Dr Valeriu-Traian Frențiu, raised priests Ioan

65 The informative surveillance file identified as that of his holiness Bishop Dr Vasile Aftenie, 'I' Informative Fund, file no. 154136, contains detailed information about the last period of the bishop's life. Most data and references this file contains are consistent with the details that the diocesan bishop of Cluj-Gherla, who, forced by circumstances, has become the memorialist of Romanian concentration camps, presents in his book. Thus, I cite from report no. 73579 of 22 February 1949:

Concerning the memorandum of bishops Iuliu Hossu, Alexandru Rusu, Vasile Aftenie, Ioan Bălan, and Ioan Suciu, written on 11 December 1948 and approved by Traian Frențiu, forwarded to this General Directorate for People's Security Piteşti under no. 73579 of 17 December 1948 (…), we have the honour to report the following:

As the presence of these bishops in one place only makes them more fierce and reiterates their decision not to follow the example of the majority of the Greek Catholic population returning to Orthodoxy, we are of the opinion to separate them from one another (…).

National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheet 29.

66 National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheet 200. In this respect, see also National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'P' Criminal Fund, file no. 13277, vol. 2, sheet 54: 'General Directorate for People's Security No. 523/157.691 28. Dec. 1949/29 Dec. 1949 (stamp). Take measures for taking Bishop Alexandru Russu, presently detained at Căldăruşani Monastery – Ilfov, to the arrest of the Ministry of Internal Affairs.' In all these cases and situations presented, there is a perfect resemblance between the data contained in the indicated memorial source and those coming from the Securitate Archives, practically confirming one another if put together.

67 See National Council for the Study of the Securitate Archives (A.C.N.S.A.S.) 'P' Criminal Fund, file no. 13278, vol. 11, sheet 34.

Chertes and Dr Tit–Liviu Chinezu, Greek Catholic Dean of Bucharest, to the rank of bishops.

Two diocesan bishops were taken from Căldăruşani monastery to be investigated for alleged faults. The first one to leave his mandatory residence with the destination Bucharest – the seat of the Ministry of Internal Affairs – was Bishop Dr Ioan Suciu, the apostolic administrator of Blaj, on 10 May 1949.[68] He was suspected of having tight relationships with individuals from the American military mission. From American soldiers to armed resistance in the mountains, there was only one missing link, which officials strived to attribute to Bishop Dr Suciu among others. Furthermore, he was suspected of elaborating and disseminating manifestos against the measures promoted by the government against religious denominations. The reason was that a series of documents were found at his resting place in Dragoslavele, in the lining of the sofa Suciu was sleeping on, after the bishops had left.

Then, a few days later, on 25 May 1949, Auxiliary Bishop Dr Vasile Aftenie[69] followed, with the same destination, the seat of the sinister Ministry of Internal Affairs. The vicar of Bucharest was under scrutiny of Directorate V of the Securitate for alleged previous adherence to the National Resistance Movement.[70]

Dr Alexandru Rusu, Greek Catholic Bishop of Maramureş, was also exposed to a mock trial, already initiated before his administrative detention. He was also

68 National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheet 29: 'Ioan Bălan and Ioan Suciu, irreducible opponents of the regime, shall be isolated in an inaccessible hermitage each and make it impossible for them to keep contact with their former residencies in Lugoj and Blaj, where compact groups opposing unification are still reported.'

69 National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheet 29: 'there is information that he must have been linked to subversive organizations'.

70 As for Bishop Aftenie's journey through captivity, we should mention the content of a 'personal file', the last one the Securitate drafted about him. Registered under no. 523 on 10 May 1950, the date of the bishop's death, this document clarifies the last moments of his life, which are to be found in the above-mentioned file.

> Bishop Aftenie Vasile stayed in Căldăruşani until May 1949, when he was transferred to a monastery in Sinaia – Prahova, where he was held for approximately 10 days and then taken to the General Directorate for People's Security. The investigations related to Bishop Aftenie Vasile yielded the following results: In the spring of 1947, Attorney-at-Law Aurel Mărgineanu informed him of the subversive organization 'National Resistance Movement', indicating to him that the organization was made up of elements unsatisfied with the regime (…). In the spring of 1947, the same Mărgineanu gave Bishop Aftenie Vasile a memorandum in order to submit it to the Papal Nunciature and then the Nunciature to forward it to the Vatican. (…) It follows therefore from his statements that are on file that he was part of the subversive organization 'National Resistance Movement' by receiving manifestos from this organization and accepting to send the memorandum to the Nunciature. The aforesaid was under investigation.

National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheets 136–138.

taken from Căldăruşani in order to be investigated in the same sinister location of the Ministry of Internal Affairs on the ground that he was 'already involved in a lawsuit for trafficking foreign currency (…), his guilt as to economic laws being precisely established'.[71]

All three bishops resisted the harsh investigations and not one of them betrayed his faith. Only two of the Greek Catholic bishops would survive these so-called investigations. Dr Vasile Aftenie, General Vicar of the Greek Catholic Archdiocese of Alba Iulia and Făgăraş, with his seat in Bucharest, 48 Polonă Street until his arrest, died within the walls of the Văcăreşti prison on 10 May 1950.[72]

d) between 25 May 1950 and 4 January 1955, for 'four years, seven months, and 11 days',[73] '36 Catholic clergymen and an Orthodox priest',[74] together with the political and military élite of the interwar period, the representatives of the Romanian 'intellectuals', the five surviving Romanian Greek Catholic bishops were held at the county prison reserved for political detainees in Sighet.[75] Their only fault was to dedicate their lives to the centuries-long desire of Romanians, the creation of a unitary Romanian state, while, in the same context, they could be blamed of having the joy to contribute to and participate in its realization. Thus, these true heroes had become simple statistical numbers, only sporadically to be calculated with, in order to express the degree of respect for liberties and civil rights in communist Romania.

The Greek Catholic bishops were stripped of sacerdotal and diocesan distinctions, bearing the unjust dishonour with dignity and serenity. They were deprived of elementary external attributes that differentiate humans from animals, their clothing and underwear. Equipped with the outfit specific to feared evildoers, they had to perform activities beneath their dignity, some of which exceeded by far their remaining physical potential. This whole time they were also subjected

71 National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheet 29.

72 'On 25 March of the current year, he had one of his hands and one of his legs paralysed. On 27 March of the current year, he was hospitalized in the Hospital of the Văcăreşti penitentiary, with the observation that he should receive medical care. On the night of 9/10 May of the current year, the said Aftenie Vasile succumbed.' National Council for the Study of the Securitate Archives (C.N.S.A.S.) 'I' Informative Fund, file no. 154136, sheets 136–138. Under those circumstances, he became the first victim among the Greek Catholic bishops who died for their faith. At the level of his conscience, there was not even a shred of doubt. He stood unflinching in spite of a comprehensive arsenal of temptations the authorities used to tarnish his image and defeat his will. If internally he was not affected at all, his body was crushed by torture because it was scarred by the marks left on him by savagely applied instruments of pain. Death under those harsh conditions came as his salvation. It occurred against the background of a generalized paralysis, which by miracle the bishop survived for almost ten days.

73 Hossu 2003. 218.

74 Hossu 2003. 228.

75 This would become one of the prisons for the extermination of the political and intellectual élite, such as those in Râmnicu-Sărat, Galați, Aiud, Craiova, Braşov, Oradea, and Piteşti.

to a strict regime meant to exterminate them through starvation, exposure to the elements, and traumatizing corporal punishments.[76]

7. Brief Conclusions

Consequently, the dramatic character of the existence of religious denominations during the atheist materialist regime characterized by a manifest tendency of state authorities to despoil the ecclesiastical patrimony is remarkable and worthy of being honoured.

However, summing up the information presented, if the other religious denominations managed to survive at the limit of normality, with their patrimony affected in different ways, there is no ecclesiastical patrimony of the Romanian Church United with Rome that we could speak of during the time gap of the more than forty-two years of catacombs and illegality from the period of communist persecution.

The Church of Blaj had, by the end of this persecution, officially ceased to exist.

76 The statistical data contained in the criminal complaint of 22 May 2007, submitted to the Prosecutor's Office by the High Court of Cassation and Justice, Military Prosecutor's Offices Section concerning the abuses and crimes committed, ordered or inspired by 210 former commanders and officers in charge in the Romanian penitentiary system, identified by the Institute for the Investigation of Communist Crimes is suggestive in this regard. These cadres of the repressive-penitentiary system are accused of having used the detention system as the main instrument for carrying out the social extermination policy for the physical liquidation of certain social categories (bourgeoisie, landowners, peasants, intellectuals, students, clergymen) by means of assassination, deportation, imprisonment, forced labour and for the scheduled extermination of political detainees between March 1945 and December 1989. Upon documentation in different archives and based on the testimonies of the very few survivors, a considerable number of victims of the detention regime, coming from the different categories above, had been identified by the experts of the above mentioned institute according to the following:

– members of the Romanian military élite (106 people dead and arrested in prisons);
– members of the religious élite (586 Orthodox priests, 84 Greek Catholic priests, and 52 Roman Catholic priests);
– members of the Romanian political élite (836 de prominent personalities);
– members of the economic and business élite (672 economists, smallholders, and businessmen);
– members of the Romanian intellectual élite (221 intellectuals: historians, professors, writers, lawyers, journalists, engineers, doctors, actors, etc.);
– political activists (1,022 persons).

Furthermore, we should note the calculation of the total detention period for Greek Catholic bishops and priests, which – according to Viorica Lascu (see Lascu 2009. 67), distinguished professor in Cluj, daughter of academy member and priest Alexandru Borza – sums up to a total of 153 years of imprisonment for bishops and, together with the priests, a total of over seven hundred years.

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The Legal Status of Jewish Properties after the Second World War[1]

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Abstract. The author examines the legislative means by which the Jewish minority in Romania was dispossessed of its assets prior to World War II by the fascist regime and in the wake of this war by the communist regime. The study examines how the post-World War II government wilfully hindered the restitution of unlawfully taken Jewish assets and how it not only allowed the perpetuation of the dispossession which took place during the Holocaust but also added measures for the nationalization of Jewish assets. The post-1989 restitution process is also examined briefly to outline the successive failures of the Romanian Government to enact proper restitution.

Keywords: Jewish minority in Romania, Holocaust, dispossession of assets, nationalization of assets, fascist regime, communist regime

1. Introduction

The issue of Jewish property in Romania dates back to the period preceding the communist regime, and it continues to be of relevance to this day.

For the Jewish population of Romania, the development and creation of Greater Romania represented the granting of civil rights obtained upon the enrolment of Jews into the Romanian Army in the 1916–1918 campaign, the Balkan wars, the War of Independence, and enshrined in the Constitution from 1923 on the one hand, while a gradual increase in different anti-Semitic trends thereafter transformed into veritable discrimination and exclusion measures, population dislocations, forced deportations, and mass murder on the other hand.

Beginning with 1938, the implementation of an active anti-Semitic policy may be observed in Romania through numerous regulations and measures affecting the

1 This study is an expanded version of the author's lecture presented at the conference with the title *Changes in the Ownership of Church Property in Romania* organized by the Balassi Institute – Hungarian Institute Bucharest on 10 February 2020.

Jewish population, imposed by the Goga-Cuza government, by the governments of the royal dictatorship, or by the authorities of the Antonescu dictatorship.

2. State-Sponsored Anti-Semitic Measures of the Interwar Period and Their Effects

Active anti-Semitic policies started during the royal dictatorship through Law no. 169 passed by the Goga-Cuza government on 21 January 1938 on the revision of citizenship for members of the ethnic Jewish minority, signed into law by Carol II of Romania and the President of the Council of Ministers, Octavian Goga. Practically, 225,000 of the 750,000 Jews living in Greater Romania lost their citizenship in this way. This act affected hundreds of thousands of Jews who gained citizenship after 1919, mostly Jews from Bukovina and Bessarabia. The loss of citizenship would later allow their deportation to Transnistria during 1941–1942, which claimed a disastrous toll in lives. As a result of these anti-Semitic actions, many Jews converted to Christianity in order to escape persecution, especially in Transylvania and Banat.[2]

On 8 August 1940, Carol II of Romania approved Decree-Law no. 2650, elaborated by the Ion Gigurtu government, on the legal status of Romania's Jewish inhabitants and Decree-Law no. 2651 on the prohibition of marriages between Romanians by blood and Jews. These are the first race laws of an overtly fascist nature which limited the civil rights of the Romanian Jewish population.

Pursuant to the Decree-Law of 8 August 1940, Jews could not obtain ownership over rural properties or rural industrial enterprises in Romania. This decree was amended by Decree-Law no. 3347 of 5 October 1940, which denied Jews the right to own, acquire, or possess rural properties in Romania under any title or quality. Rural properties, together with their entire inventory, dead or alive, grain and nutrient stocks passed into state ownership. Practically, economic Romanianization entailed the transfer of goods into state ownership and administration and then into the property of ethnic Romanians.

Anti-Jewish legislation applied in Romania between 1940 and 1944 was abolished by Law no. 641 of 19 December 1944.

In his book with the title *The Economic Destruction of Romanian Jewry*, Jean Ancel mentioned that: 'Committed "without receipt" and by employing force, torture, arms and bats, the theft of Jewish property by the Legionnaires has never been truly evaluated.'[3]

2 Stan 2012. 66.
3 Ancel 2007.

The Jewish population of Romania was practically reduced by half after the war. Of the 780,000 Jews in 1938, the number of Romanian Jews had decreased to approximately 375,000 by 1945, increasing to 420,000 in 1946 due to the numerous Jews deported from different countries, who temporarily settled in Romania.

Law no. 641 on the Abolition of Anti-Semitic Legislative Measures answered most of the Jewish demands of the time:

– reinstatement to their previous workplaces (from which they were laid off, starting with September 1940); readmission to chambers of liberal professions: education, health, the bar association;

– annulment of sales contracts concluded under duress.

In the document *Note regarding the Echo Produced by the Laws on the Amendment of Law no. 19 of December 19, 1944 on the Abolition of Anti-Semitic Legislative Measures*,[4] it was pointed out that Law no. 641/12.19.1949 had caused serious disturbance and agitation both within the Jewish population and within the entire democratic public opinion of the country, while the decrees of 24 April 24 and 4 May 1945 were diametrically opposed to the solutions adopted on 19 December 1944, comprising provisions that seem to have stemmed from manifest hostility towards Jews, victims of dispossession regimes applied by the National Romanianization Council (NRC), and to protect the beneficiaries and profiteers of those regimes.

3. The Aftermath of the Abolition of Anti-Jewish Measures – Nationalization Instead of Restitution

The law on the abolition of anti-Semitic legislation was the result of a compromise between the Rădulescu government and the representatives of the Liberal and National Peasant Party, and it provided for regaining occupancy over homes Jews were evicted from by means of a judicial procedure. However, to this end, moving deadlines were granted to certain categories of National Romanianization Council tenants, and these deadlines were later not complied with. Jewish clerks could be reintegrated to their previous jobs only through a judicial procedure and only within the limits of the capacity of the enterprise concerned.

The restitution of incomes collected by the NRC, the payment of sums owed for sold, destroyed, or consumed goods as well as compensation of any kind and the sums that the state – if governed by the rule of law – might have owed with any

4 Document reference number P000218_011, Pătrăşcanu and other war criminals, People's Tribunal.

title to members of the Jewish population were postponed for an indeterminate period.

The Ministry of Justice postponed the moving deadline to 23 April 1945, stating that this was a unique and exceptional deferral measure. However, at the beginning of April, Minister Nicolau made a statement in the name of the Government at a meeting held in the Izbânda Room and thereafter broadcast to the media, declaring that the deferral deadline for NRC tenants was postponed to 11 May 1945 due to the Easter holidays.

Contrary to the statement made on 24 April 1945, Decree-Law no. 314 on the application of articles 39 and 42 of Law no. 641/1944 was passed, which granted the NRC tenants the right to move not only into the homes occupied by Jews as tenants but also into homes where they were only tolerated. The punishment provided for resisting the measure was a fine of 1–5 million lei or correctional imprisonment from 6 months to 5 years.

On 4 May 1945, the law regulating the relationships between owners and tenants was published in the Official Journal of Romania, which granted the majority of NRC tenants the right to renew their lease agreements for another year, until 23 April 1946, and thus court decisions pronounced for the reintegration of Jewish tenants were annulled.

These laws increased the disquiet of the Jewish population, whose members considered that their legitimate rights were now being disregarded. Almost all lawsuits based on Law no. 641/1941 were retried.

Instead of causing remorse in those who expelled the Jews from their homes, the laws that granted privileges to profiteers caused remorse in those who did not take advantage themselves of the benefits granted by the NRC.

On 15 November 1945, Dr W. Filderman, President of the Union of Romanian Jews, and Attorney-at-Law Emil Focşăneanu were heard by the Ministry of Justice, Lucrețiu Pătrăşcanu, where they presented a memorandum concerning the provisions of Law no. 314 of 24 April 1945 that allowed compulsory subrogation in favour of all NRC members. Filderman also requested the amendment of the Law on invalids, orphans, and widows of war in order to allow the assimilation of invalids and their survivors, victims of the massacres in Iaşi and Bucharest, as well as of invalids and the survivors of persons deported from Transnistria to invalids of war for purposes of their retirement.[5]

Jewish reactionary circles took advantage of this change in attitude of the Government towards the Jewish problem, causing distrust among Jews towards equality between nationalities. Distrust in internal political factors directed the attention of some Jewish people to external support.

5 Document reference number 3690074_03003927, 15.11.1945 Filderman to Pătrăşcanu, Disk no. 3, Filderman Fund, Yad Vashem Institute.

The reinstatement of Jews to their rights was slow and partial, followed by a long chain of lawsuits. Since many properties had been abusively taken over and people had left their homes without having the right to take anything from them, many Jews were not able to prove their ownership with documents in areas where no land registers existed. The issues of assets left without heirs (those who never returned from deportation) and of granting legal status to the survivors of pogrom victims and to victims of deportation to concentration camps have remained unresolved. Many did not receive any help with recovering their homes or with their reconstruction, which resulted in several lawsuits. Since up to 2019 most of the archives were classified, the exact number of lawsuits filed between 1945 and 1948 is not known.

However, between 1944 and 1948, Romanian Jews were financially aided by the Joint Distribution Committee (JDC) to rebuild their synagogues, ritual baths, to build cafeterias, and to distribute aid during the 1946 drought, including to the Romanian population.

Communism declared itself to be a new civilization, superior to capitalism, considering itself the embodiment of 'absolute humanism', a society free of any distinction on grounds of class and in which people could live in complete freedom.

Discussions and promises regarding *restitutio in integrum* had not yielded any results, but Jews were employed – for the first time – in the state apparatus because they did not have a fascist past and they had professional qualification. However, their access to state jobs was not well received as they were considered usurpers. Jews were gradually integrated into Romanian cultural life.

Lacking popular support, the Romanian Communist Party adopted the *national front* strategy between 1944 and 1947, accepting to function within the framework of a multi-party political system, gradually abolishing all political structures, including the structures of minorities, until 1963.

On 29 November 1947, the UN voted the creation of a Jewish state, Eretz Israel. The instability following the famine and the fear of war determined the Jewish population to massively immigrate to this new state of Israel.

In 1948, the communist regime issued Decree no. 113 of 29 June 1948 on assets left behind Jews who fell victims to persecution and died without heirs, which stipulated that the Federation of Jewish Communities became the owner of these assets. These assets were taken into property after inventorying the assets and rights retained from Jews during the Holocaust. Persons possessing assets that belonged to Jews had to submit a declaration concerning these assets to the tribunal, subject to the penalty of imprisonment from 1 to 5 years. Yet, these people were hard to find as there was no information about all the persons who were deported to concentration camps and died.

By Decree no. 177 of 4 August 1948, which was in fact the new law on religious denominations, the state took over the management of the issue of religious denominations, and the Ministry of Religious Affairs became a supervisory and control authority.

In 1949, the transfer of social institutions into the property of the Ministry of Labour and Social Provisions as well as the transfer of medical institutions into the property of the Ministry of Health were decided by a decision of the Council of Ministers: 18 hospitals, 3 maternity wards with 1,742 beds, 24 dispensaries, 4 dental ambulatories, 71 soup kitchens with 20,189 assisted people, 27 homes with 13,340 boarders, and 8 schools with 42 well-equipped professional sections, where 2,270 students were studying. Confiscation was carried out, ostensibly, in order to 'ensure full equality for the Jewish population',[6] as an 'advantage' for the Jewish population. Jewish communities were only left with the administration of the religious necessities of Jews as well as the administration of synagogues and Jewish cemeteries.

On 1 June 1949, the new powers determined the approval of the new Statute of the Mosaic Cult, highlighting the strictly religious nature of Jewish communities and forcefully merging different rites.

All this time, different Zionist Jewish organizations were organizing the emigration of Jews to other places in the world. Many were asking for approval for emigration, but, because of the uncertain situation in Romania, many Jews managed to emigrate illegally. In 1948, the Communist Party raised the issue of Jewish emigration, but it had a moderate discourse on this topic. According to the report of the Central Committee of the Jewish Democratic Committee on emigration among the Jewish population during 1950,[7] approximately 50,000 Jews emigrated to Israel.

Upon the request of the political leadership, the Ministry of Internal Affairs elaborated a programme which established the criteria for emigration to Israel, based on individual requests. Since the requests were individual, many families were separated as only one family member could obtain a favourable opinion and therefore an exit visa, while others could not. The requests submitted by technicians, whose leaving could have affected the production process, were rejected. The state leadership was surprised by the great number of requests. In spite of the attempts to stop emigration, the Jewish population continued this process up until the 2000s. Today, the Jewish community in Romania counts only approximately 8,000 members.

The communist leadership revoked the Romanian citizenship of emigrants, and they lost their right of property over the assets they had once possessed in Romania. These assets were transferred into state property.

6 National Council for the Study of the Securitate Archives, Romanian Intelligence Service (SRI) fund D.d. 3067/1949, sheet 95, Report of 9 April 1949.

7 National Archives Central, Committee of the People's Republic of Romania, fund, d. 50/1950, sheet 319.

The collectivization process lasted from 1949 to 1962, and party structures, the militia, the Securitate, the army, border patrol troops, and paramilitary formations were all involved in it.

The Groza government had taken measures for a housing census since 1948 already, at the level of the entire country, an initiative which could have been justified by the need to evaluate the consequences of the war (at a demographic level, by counting the dead and the missing; furthermore, assessing the destruction and abandonment of immovable property).

On 8 January 1949, the Central Service of Assets within the Ministry of Internal Affairs elaborated and put into circulation a series of instructions for establishing 'which parts of an immovable property' could be considered to exceed the 'normal needs' of its owners. A family made up of a wife and husband was assigned one room. The next step was taken by means of the nationalization decree in 1950 (Decree no. 92/1950). In 1951, Decree no. 111 on abandoned assets was adopted. Although the network of services implementing the nationalization process encompassed the entire country, the result did not satisfy the communist leadership.

Thus, until 1989, the extension of cities and the forced urbanization of rural localities (so-called systematization) had been carried out by means of expropriations, many of them abusive. Jewish communities were expropriated of different land parcels or buildings by means of decrees which stipulated pecuniary compensations, which, however, were not always paid.

4. Post-Communist Norms for Restitution and Their Effects

The Revolution of 1989 brought about major changes in the legislation of the state with respect for private property being enshrined in law. Successive laws were adopted for the restoration of property rights, including for religious denominations. Law no. 18/1991 on the land fund stipulated the right to property over land. This law limited restitution to a maximum of 10 hectares per applicant. Law no. 112/1995 regulated the legal status of certain immovables used for housing. Law no. 169/1997 settled the issue of the restitution of forested land only for natural persons.

In 2000, different normative acts entered into force which concerned the immovable properties belonging to national minorities and implicitly to the Federation of Jewish Communities in Romania (Government Emergency Ordinance no. 101/2000 on the Amendment of the Annex to Government Emergency Ordinance no. 21/1997 on the Restitution of Immovable Property That Belonged to the Jewish Communities in Romania; Decision no. 1334 of 14 December 2000 on the Amendment of the Annex to Government Emergency Ordinance no.

83/1999 on the Restitution of Immovable Property That Belonged to Communities of Citizens Belonging to National Minorities in Romania).

Later norms included Law no. 501/2002 on the Approval of Government Emergency Ordinance no. 94/2000 on the Assets of Religious Denominations and Law no. 66/2004 on the Approval of Government Emergency Ordinance no. 83/1999 on Community Assets.

In 1998, the Charity Foundation (in Romanian: *Fundația Caritatea*) was established by the Federation of Jewish Communities of Romania together with the World Jewish Restitution Organization with the aim of acquiring ownership of – as well as reclaiming, possessing, protecting, administering, and capitalizing – Jewish immovable properties to be restituted by the competent authorities to the Federation of Jewish Communities in Romania.

Law no. 10/2001 was enacted in order to remedy certain problems occurring in judicial practice that could not be resolved. This law regulated the situation of immovable property taken over abusively by the state or any legal entity during the communist period as well as property taken over based on the law on requisition, because the courts gave contradictory decisions on the legality of the Nationalization Law, and a possible exceeding of the competency of courts in this field was also taken into consideration.

In order to resolve the great number of restitution requests, the National Authority for Property Restitution was established by Government Decision no. 361/2005, an entity without legal personality, under the authority of the Office of the Prime Minister. This new institution absorbed the Authority for Monitoring the Unitary Application of Law no. 10/2001 but also the staff and the activity of the Department for the Application of Law no. 9/1998 from within the Office of the Prime Minister.

After the establishment of the National Authority for Property Restitution, another structure was created: the Property Fund for ensuring the resources necessary for compensations. Those descendants whose lands confiscated by the communist regime could not be restituted were compensated with shares in this fund. Initially, the state was the sole shareholder of this fund and owned shares with a value of almost 13 billion RON.

In 2007, Government Emergency Ordinance no. 25/2007 granted legal personality to the National Authority for Property Restitution and placed it under the authority of the Ministry of Economy and Finances.

The directorate for the coordination of the technical secretariats of the Special Restitution Committee has been established by Government Decision no. 1068/2007, and it is competent to resolve cases related to restitution claims submitted by former owners (religious denominations and communities of citizens belonging to national minorities).

Until 2008, former owners only received shares of this fund from the National Authority for Property Restitution. Then, they also received money. Everything went very slowly. People lost their patience and trust in the Romanian state, so applications started to flow to the ECHR. Over 2,000 such files stacked up on Strasbourg judges' desks.

The ECHR took a stance and issued a pilot decision against Romania.[8] The state was obliged to find – within maximum six months – a generally valid solution for all files in which the restitution of confiscated land was requested. Without a quick solution, the state was risking the suspension of its right to vote in the European Council.

The classification of national archives represented a big problem until the entry into force of Law no. 53/2019 on certain measures for studying the history of the Romanian Jewish Community. Documents to prove ownership over property that was subject to restitution were requested. Given that during the Holocaust the assets of Jews were confiscated and the titles of ownership were in large part destroyed or lost in the concentration camps, and then during the Communist period and immediately after the Revolution of 1989 many highly influential politicians were shown by documents to have benefitted from nationalization, the reconstruction of ownership titles for numerous movable and immovable assets became impossible.

Other norms concerning the restitution of Jewish property were enacted both in Romania and in the international field. These include: The Paris Peace Treaties of 1947; Decree no. 113/1948 on Assets Left Behind by Jews Who Fell Victims to Persecution Measures and Died Without Heirs; Government Emergency Ordinance no. 36/2002 (updated) on the Regulation of the Property Rights of the Federation of Jewish Communities in Romania; Law no. 489/2006 on Religious Freedom and the General Legal Status of Religious Denominations; the Terezin Declaration of 30.06.2009, to which Romania is a signatory; European Parliament Resolution of 14 December 1995 on the Return of Plundered Property to Jewish Communities; European Parliament Resolution of 16 July 1998 on the Restitution of Property Belonging to Holocaust Victims; European Parliament Resolution of 17 January 2019 on Cross-Border Restitution Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars.

5. Conclusions

As we have seen, the restitution of property stolen, looted, or nationalized form the Romanian Jewish community remains an ongoing process with many hurdles. Such hurdles are partly due to state interference, partly to non-unitary

8 In the case of Maria Atanasiu and Others v Romania, applications nos. 30767/05 and 33800/06. http://hudoc.echr.coe.int/eng?i=001-100989 (accessed on: 10.03.2020).

jurisprudence, and partly to unwillingness. It is hoped that in the wake of the pilot decision in the case of *Atanasiu and Others v Romania* passed by the European Court of Human Rights, this process may at last unfold, resulting in the restitution of a small part of the assets of which the Jewish inhabitants of Romania have been violently dispossessed.

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Sovereignty in the Era of Globalism: EU Energy Regulation in the Shadow of Sovereignty?

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Abstract. In our globalized world, the phenomenon of Babylonian confusion can be observed in relation to the concept of sovereignty, and the boundaries of national, European, and international law are becoming increasingly blurred. In the following, I will seek an answer to the question how the notion of sovereignty is being redefined, and the scope of its interpretation expanded in our globalized and Europeanized surroundings. In this context, I will present firstly some major international and Hungarian approaches to the definition of sovereignty in modern times. Secondly, I will examine how the sovereignty of the Member States has developed in the European Union, highlighting to what extent we can talk about a sovereign energy policy of the Member States in the light of shared competences adopted in the field of energy policy. Thirdly, I will scrutinize how EU energy policy can change in the near future and what kind of a role Member States can play in this process. As there is still no universally accepted definition of sovereignty, the role of science is essential in the conceptualization of the term. The Treaty of Lisbon has brought a supranational turn also in the field of energy, but Member States still have a relatively wide leeway to create their own regulatory framework that takes into account their national and regional characteristics. Environmental considerations in recent years have led to the initiation of a single energy market and the creation of the European energy union that is expected to become more intense in the near future. Therefore, it is crucial for Member States, both at a national and a regional level, to be actively involved in the establishment and formulation of community law in order to be able to represent their interests effectively.

Keywords: sovereignty, globalism, energy policy, European energy union, shared competence

1. Introduction

The concept of sovereignty has been a key concern for political and legal scientists since the age of absolutism, but its essential content is constantly changing. In addition to the various perceptions of different dogmatic schools, the political conditions of the given period also greatly influence the ideas of sovereignty. In today's globalized world, the phenomenon of Babylonian confusion can be observed regarding the concept of sovereignty. With regard to the sometimes contradictory ideas, perhaps the only thing in common is the recognition that the previously classical notion of sovereignty can no longer be maintained in today's modern context, and its content is also changing. Theories of sovereignty can be fitted together in a manner similar to mosaic pieces, and the image thus assembled always reflects the individual and unique point of view of the creator in the form of an image of sovereignty.

This paper aims to reflect on the modern concept of sovereignty and attempts to briefly summarize a few key Hungarian and international theories by flashing the mosaic pieces of the concept of sovereignty related to our globalized world. Due to space limitations, the paper does not attempt to process the classical doctrines of sovereignty and their changes until the middle of the 20th century. The framework of the paper is provided by the supranational, globalized world enmeshed by international organizations, in connection with which I am looking for possible answers as to the nature of the concept of sovereignty. I am examining all this in the context of the relations between the European Union's energy policy and the room for manoeuvre given to Member States. Basically, I am looking for an answer to the questions as to how the sovereignty of the Member States vis-à-vis the European Union may change as a result of broadening or reinterpreting the conceptual framework of sovereignty and EU energy policy, to what extent we can talk about a sovereign energy policy of the Member States in view of the shared competences adopted in the field of energy policy, what direction the energy policy of the European Union may take in the near future, and what role the individual Member States will play in this process.

2. Sovereignty in the Age of Globalization

Despite numerous theories created regarding the conceptual phenomenon of sovereignty in the course of the centuries, there is still no universally accepted, uniform definition to it. Nagy sees it as a definition quagmire,[1] and Takács considers even the etymological background of the word to be cavalcade-like[2]

1 Nagy 1996. 228.
2 Takács 2011. 144.

and refers to the concept of sovereignty with the metaphor of chimera,[3] claiming that 'mentioning sovereignty in respect of the states […] signifies something extraordinary', just like the appearance of a lion, goat, or serpent-headed monster was seen to prognosticate a storm, shipwreck, or volcanic eruption by the ancient Greeks.

Instead of describing the content of sovereignty, Szalai considers it desirable to define the term itself. He argues that Bodin and Hobbs prompted a wave of misconceptions by wanting to grasp sovereignty through its content. According to Szalai, this is a mistaken approach because the content of sovereignty is constantly changing; so, if we want to grasp sovereignty through its content, we can easily destabilize the use of the word itself.[4]

It is advisable to approach the issue of sovereignty in an *interdisciplinary* way because, among other reasons, each branch of the social sciences deals with the issue of its interpretation from its own point of view. Bayer also shares the thoughts of Jackson, one of the most recognized experts on the subject,[5] when he writes that 'sovereign statehood is a multifaceted and far-reaching idea that calls for interdisciplinary research'.[6] In his *reflexive theory of state*, Cs. Kiss explains the need to bring the sciences that examine state research from different aspects under one umbrella, thus creating a common domain of interpretation for sciences operating with the phenomenon of the state, such as law, administration, military science, law enforcement, political science, sociology, economics, philosophy, and theology.[7] Each of these well-distinguished, independent disciplines examines the state, and consequently sovereignty, by taking the specific approach characteristics to it, and the reflexive state theory approach[8] helps to unite and harmonize different views and perspectives on sovereignty.

The interdisciplinary nature of sovereignty in the 21st century is well indicated by the fact that the concept initially analysed and used by the political and legal sciences is increasingly demanding a place for itself in economics as well.[9] With regard to the concept, Bod argues that the development of economic processes and the economic openness characteristic of the countries make the application of the

3 Takács 2015. 10.
4 Szalai 2015. 125–126.
5 Jackson 2007.
6 Translation by the author. Bayer 2015. 15.
7 Cs. Kiss 2017. 4–47.
8 Proficiency in energy law and energy regulation similarly presupposes the knowledge of various disciplines. The operation of the energy industry cannot be understood without a minimum level of knowledge of economics, technology, geography, and politics. An approach similar to the reflexive state theory may also contribute to the progressive and dynamic development of energy law, and such a complex approach could also be used to establish energy law as a discipline independent from environmental and climate law.
9 Bod 2016.

concept of sovereignty to economic life utterly uninterpretable.[10] Trivial though it may sound, it is undeniable that today's economic processes are characterized by a system of interdependence, and *interconnectivity* appears at the level of both microeconomic units and states. This kind of *interdependence* in and of itself questions the economic independence of states, and ultimately their external sovereignty as well. The room for manoeuvre in the field of economy and politics determines the extent to which a given state can assert its economic and political interests over others. The government's freedom of choice, and ultimately its internal sovereignty, is greatly influenced by its financial circumstances as well as other economic and technological factors. Furthermore, logical correlations cannot be ignored either since 'economic processes follow certain internal regularities and decision makers can only disregard their existence to their own detriment'.[11]

The trilemma of sovereignty was formulated by Rodrik, and, according to his theory, democracy, national sovereignty, and economic globalization cannot be strived for simultaneously. If we insist on democracy and want to expand it, we must choose between the nation-state and close economic integration. If we choose the nation-state and self-determination, we must choose between deepening the democracy and expanding globalization. Our problems stem from our reluctance to face these inevitable choices.[12] As for economic sovereignty, it can also be established that 'in times of crisis, the nation-state (or the political forces acting on its behalf) activates itself, and may even resume certain powers temporarily'.[13] At times like this, a rearrangement of international norms can be observed, but this does not mean the return to the status quo ante which existed before globalization.

In addition to the interconnectedness of economic processes, the various large multinational corporations, global regulatory agencies, and international NGOs also act against sovereignty. Bayer highlights the phenomenon of *deterritorialization*, taking place as a result of the fact that in today's accelerated world 'citizens may develop a multidirectional attachment, loosening their exclusive loyalty to their own state and shaking even their identity they have thought to be firm. Their loyalty is now shared among other institutions, non-territory-based sovereignty regimes with a highly relative territorial affiliation.'[14]

In the modern world, the sovereignty of nation-states is being constrained by an increasing number of transnational institutions, the most striking example of which is the European Union for us, but we could also mention other *intermundums*, such as various free-trade zones, offshore islands, diversified economic zones, currency unions, and, last but not least, financial networks.

10 Bod 2015. 30.
11 Translation by the author. Bod 2015. 36.
12 Rodrik 2014. 18.
13 Translation by the author. Bod 2015. 42.
14 Translation by the author. Bayer 2015. 20.

In my view, however, it is not right to view these institutions solely as entities undermining sovereignty. It should not be forgotten that their establishment was generated by the sovereign states themselves, primarily in order to ensure through them the economic development expected by their citizens. However, in order for this to be realized in its fullest possible form in the future, it is indeed necessary to have nation-states whose active actions are essential in shaping the global economic world order and in reconstructing the conceptual system of sovereignty. Rabkin directly believes that the sovereignty of the states themselves constitutes the basis for global international cooperation as they have both democratic legitimacy and the power of enforcement. According to his theory, international cooperation is legitimate, but it presupposes a precise and limited transfer of power to an international body and that the states ultimately retain control.[15]

According to Molnár, the block-like sovereignty in the classic sense is basically challenged by three novel developments nowadays: *globalization*, *deterritorialization*, and the *internationalization*, or *denationalization* of the law. Although the author examines each process primarily through the mirror of international law, his conclusions also hold true in the system of relations of the European Union. In the context of globalization, he states that: 'In today's interdependent world, the boundaries of national legal systems cannot be clearly determined as internal legal systems are no longer independent from the influences affecting them, whether of a(n international) legal or other origin.'[16] In his view, deterritorialization relativizes territorial sovereignty, and the European Union is an excellent example of this as it 'ultimately does not really take into account the demand of the states for sovereignty'.[17] Moreover, the denationalization of law can be seen in the fact that international law seeks to govern more and more issues that used to be classified as the internal affairs of the states, thus rendering legislation more and more uniform. In the light of the phenomena of deterritorialization and denationalization, I will examine below how the European Union has gained strength against sovereign Member States and how this has affected the outlines of energy policy.

3. Road to the European Energy Union

Although energy has always played a central role in the Member States of the European Union, it was only after decades that initiatives were taken to develop a coherent energy policy. The diverse role and importance of energy and the sources of energy are well illustrated by the fact that the European Coal and Steel

15 Rabkin 2004. 187.
16 Translation by the author. Molnár 2015. 147–149.
17 Translation by the author. Molnár 2015. 151.

Community was set up in 1952 as one of the first supranational organizations to oversee the popular raw materials of the era. The European Atomic Energy Community, which is considered to be the other basic treaty of the European Community, established a kind of regulatory framework around nuclear energy, deemed to have a significant impact on national security and the environment. International organizations set up to act as the guardians of peace have paved the way for EU energy policy through the harmonization of legal norms and the common regulation of energy law.

The room for manoeuvre of the Member States was already reduced by the liberalization of the energy markets, and the EU energy policy actually embarked on a path to independent political unity already at the time, as evidenced by the conclusion of a number of international energy treaties and the creation of strategic partnerships.[18] Compared to other industries, the energy sector began to open its doors to free competition in the EU only gradually, and somewhat belatedly, which was ultimately motivated by the security of supply and the reduction of costs. The liberalization of the energy markets began in the mid-1990s, and several attempts were made to unify the support system for renewable energy.[19] The European Commission did not formulate the objectives of the Community's energy policy until 1997, which included, in addition to integrating the Member States' energy markets and ensuring free competition, the creation of sustainable development and the promotion of research and development.

In order to achieve these goals and as a result of global trends affecting Europe, the legal harmonization of the EU energy market, the aspirations related to climate change, the promotion of renewable energy sources, and the implementation of carbon neutrality have gained enormous momentum over the last two decades. All this has greatly contributed to the fact that by 2010 the number of energy policy instruments created by the European Union exceeded 350.[20] However, it is a matter of policy to assess to what extent and at what cost the goals can be achieved while ensuring the security of energy and supplying cheap and affordable energy for all. We must not forget about the increasingly eroded weight of the European Union in global processes and the fact that the United States, China and other Asian and some South American countries have far exceeded the EU in terms of emissions.

Anyway, it was the Treaty of Lisbon which brought about a decisive change in the process of tightening of the EU's energy policy by listing it among the shared competences, similarly to environmental protection. The third energy package of the European Union, adopted in 2009, further broadened the scope of harmonized legislation in the field of energy regulation, which can also be seen as a precursor to an integrated and functioning energy market. It was only after that, in 2014, that

18 Pálfiné Sipőcz 2011. 148.
19 Hoerber 2014.
20 Benson–Russel 2015. 195.

a commitment to the European energy union, the most ambitious European energy project since the European Coal and Steel Community, was made.[21] Some authors describe the 2000s as an era of a 'hesitant supranational turn',[22] as the germs of harmonized energy regulation clearly began to take root alongside energy policy enforcement and regulation by the dominant Member States, and energy policy was no longer seen exclusively as a Member State issue, but EU institutions also gained some role, subject to certain limits.

The European energy union is considered by many to be the most important policy idea meant to reform European energy policy and regional cooperation in line with long-term climate protection objectives. Juncker, President of the European Commission, summed up the goal of the European energy union as follows in his welcome speech: 'For too long, energy has been exempt from the fundamental freedoms of our Union. […] This is about Europe acting together, for the long term. I want the energy that underpins our economy to be resilient, reliable, secure and growingly renewable and sustainable.'[23]

The energy union gives hope to the resolution of the greatest paradox of EU energy policy, i.e. the settlement of the tension between national sovereignty over the energy sector and community perspectives based on a system of solidarity and cooperation. The energy union also offers a potential platform for integrating sustainability measures with energy policy, ensuring the consistent and effective decarbonization of European economies. Aligning the market and environmental aspects of European energy policy with import dependence can also be regarded as the culmination of development in the field. However, the concept has seemed to be mostly like an 'empty box' so far which the various stakeholders always want to fill with contents befitting their short-term interests.

In the study of the European energy union, the theory of the *optimal currency area*[24] is worth highlighting among Mundell's economic theorems. In his view, monetary union tends to be established by and between countries geographically close to each other and historically closely cooperating in the field of economy. This statement is true to the energy union as well. In addition, economic rationality demands such cooperation to take place when the desired benefits are expected to outweigh the associated costs. Similarly to monetary autonomy, sovereign energy policy is often not limited by another power but by economic logic and rationality itself. When the Member States of the European Union cast their ballot in favour

21 MTA-DE Public Service Research Group.

22 Wettestad–Eikeland–Nilsson 2012. 65–84.

23 European Commission Press Release 2015.

24 The essence of an optimal currency area is that the participating countries use a common currency whose exchange rates have been permanently fixed to each other, but at the same time the common currency can change flexibly vis-à-vis the outside world. The optimal functioning of the currency area reduces the need for nominal exchange rate adjustments and strengthens the external and internal balance of the currency area.

of the European energy union,[25] they were, in a sense, sacrificing their sovereignty for a higher level of benefit hoped for.

4. Sovereign Energy Policy in the European Union?

The view of Italian jurist Francesco that a nation-state-based administration is nothing more than a historical relic seems to be correct in relation to the European Union.[26] As a result, EU Member States and their policies as well as the European Union itself are constantly undergoing changes, which are also heavily influenced by the global economic impacts described above. There is essentially a multi-level governance between the European Union and the Member States, in which the constitutional foundations of sovereignty remain unchanged, but, in addition to the development of the EU into an independent polity, local and regional actors also have a significant role to play.

Even within the European Union, today's views on the legitimacy of nation-states are strongly divided. Some believe that the concept of nation-state is becoming more and more outdated as traditional state frameworks disintegrate and systems of economic interdependence emerge. In their view, the diminishing legitimacy and authority of the nation-state makes the Member States vulnerable on their own; therefore, closer and intensive European integration should not be seen as a threat but rather as an opportunity to provide a platform to keep unregulated globalization within certain limits. In this form, European integration is not about losing national sovereignty but rather about the joint exercising of sovereignty by the Member States. On the other side, there are the efforts to put sovereign nation-states and sovereign Member State policy at the forefront.[27] A good example of this is the Brexit process or the judgment of the German Constitutional Court in May 2020, which, for economic reasons, directly questioned the principle of the primacy of EU law, ruling against the judgment of the Court of Justice of the European Union on the bond programme.

The authors cite much of Monnet's thoughts on the united Europe, which he saw as the key to restoring and preserving peace, saying that: 'There will be no peace in Europe if the states are reconstituted on the basis of national sovereignty. […] The countries of Europe are too small to guarantee their peoples the necessary prosperity and social development. The European states must constitute themselves into a federation.'[28]

25 European Commission News 2019.
26 Máthé 2013.
27 Kende–Szűcs 2009. 43.
28 Fondation Jean Monnet pour l'Europe, Lausanne. Archives Jean Monnet, fund AME. 33/1/4.

It is clear that economic relations and the demand for the well-being of society have remarkably affected the sovereignty of the Member States as early as the beginning of the European Union, an organic transformation that has been unstoppable ever since. There is no doubt that the size of markets is indeed an issue which is relevant to the design and success of individual policies. This is no different in the case of the energy policy examined below, either.

The exploration of the European Union cannot ignore its constant, dynamic change, which has gradually deepened European integration and broadened the scope of the internal market. The shaping of EU policies, such as the Community's energy policy, has also been heavily influenced by bargaining processes between Member States and the EU institutions as well as by lobby groups and interest groups in the background since the very beginning. It is in this context that some authors emphasize the importance of constitutional dialogue as 'decisions are not made exclusively and explicitly by state bodies alone, on their own and without any influence'.[29]

Article 4 of the Treaty on the Functioning of the European Union (TFEU) lists energy as a shared competence, just like environmental protection. Matters falling under shared competences can be regulated by the Member States and the European Union alike; however, national parliaments can only exercise the right of regulation if the EU has not exercised it or has previously waived its regulation. It is in this form that the principle of precedence – also known as the doctrine of pre-emption – applies. Shared competences essentially include everything that the founding treaties do not classify as exclusive or supporting competencies. The TFEU regulates the provisions on energy under a separate title, where the objectives of the European Union's energy policy are formulated as set out in the Treaty.[30] As a general rule, legislation on energy shall be adopted by the European Parliament and the Council as part of the ordinary legislative procedure. This is complemented by Article 192(2)c of the TFEU, according to which the Council 'shall adopt measures significantly affecting the choice of one of the Member States between different energy sources and the general structure of their energy supply' unanimously, in accordance with a special legislative procedure and after due consultation. However, Article 194 of the TFEU also provides that the special legislative procedure shall not affect (i) a Member State's right to determine the conditions for exploiting its energy resources or (ii) its choice between different energy sources and the general structure of its energy supply.[31]

The foregoing clearly reveals the tendency of how the energy sector was covered first by national regulations and then by the direction of EU regulation with the development of technology. The TFEU designated the system of

29 Translation by the author. Drinóczi 2015. 70.
30 Kende–Szűcs–Jeney 2018.
31 Kende–Szűcs 2001.

competences between the Member States and the EU but left a relatively wide room for manoeuvre within that to be filled by primary and secondary EU norms or, in their absence, by national legislation. The principle of pre-emption raises interesting questions regarding regulatory powers for an industry that is changing almost day by day due to the constant advance of technology. In recent years, the regulation of innovative, forward-looking energy issues has emerged within the traditional directions of the energy sector (electricity, gas, district heating, nuclear and renewable energy). Within that, the implementation of smart homes, the development of modern forms of energy storage, and the spread of e-mobility are among the most dynamically developing areas of energy law, and these trends go hand in hand with a growing amount of energy awareness among consumers. The question is whether Member States will be able to keep up with the regulations or will be overtaken by the European Union, which could in the latter case again cut itself a bigger slice from the cake of the field of energy law.

In view of all this, the reaction of energy experts Járosi and Kovács to some specifically adopted packages of measures is particularly interesting. According to them, 'the euphoria of voluntary and joyful dissolution in European Solidarity will mean the death of national self-determination for many. The scepticism in the eastern part of the EU is completely natural and well-founded.'[32]

All of this, of course, can be overcome by the states as long as the benefits of commitment promise to be higher. Going further, some authors believe that rules enacted within international systems also change the interests of nations. Koch rightly argues that nations benefit from various advantages as members of the international community and are therefore willing to change their views on certain issues.[33]

Renowned political scientist Mair[34] is of the view that national institutions and national governments are increasingly losing their ability to shape their own national environment. His finding is thought-provoking, especially in the light of Article 4 of the TFEU on shared competences. It is undeniable that Hungary's room for manoeuvre in energy policy is closely linked to the European Union, which sets the most important priorities and goals to be achieved in all policy areas. These objectives need to be pursued by the Member States individually and collectively alike, which will in turn reduce the political, regulatory, and economic disparities between them as potential policy determinants. It is not surprising therefore that comparative policy research is becoming increasingly focused on the implications and achievements of the various energy policy instruments used by the Member States, i.e. whether they are suitable to achieve the EU's objectives. Compared to this, it is often a secondary question of how the

32 Translation by the author. Járosi–Kovács 2017. 81–95.
33 Szalai 2015. 134–135.
34 Mair 2003. 303–326.

policy measures pursued by the individual Member States differ from each other. So long as they prove suitable for achieving the objectives within the framework provided by EU legislation, their differences will in a sense fall beyond the sphere of interest.

5. Expected Directions of EU Energy Policy

Some say that the increase in the powers of the European Union in energy policy can also be explained by the fact that the European Commission recognized the social impacts of energy dependency and tried to link it with solving the problem of energy security through the enhanced integration of the internal market and the diversification of supply. High energy prices and increased energy dependence in the new Member States had in the past further increased the share as well as the uncertainty of energy (typically gas) imports from Russia, a problem that was clearly revealed by the supply disruptions in 2006 and 2009. With the European Commission at the forefront, the EU was committed to taking a united action on behalf of Member States that are fundamentally in need of energy imports, thereby reducing their energy dependence and economic vulnerability, primarily to Russia, which was previously prone to use the so-called 'Energy Card', thus manipulating the economic sovereignty of other countries and the European Union.

The three objectives of the European Union's energy policy, i.e. security of supply, sustainability, and competitiveness constituting the so-called 'policy triangle', remained unchanged after the commitment to the energy union, but the shift in emphasis regarding these goals continues to be an open issue.[35] The logic of the theorem of 'the impossible Trinity' formulated by Nobel Prize-winning Canadian economist Mundell can be properly applied to energy policy objectives as well.[36] In my view, the direction of EU energy policy will be determined by efforts to create an equilibrium within the energy policy triangle.

As early as 1989, McGowan[37] examined how a market-driven approach to energy policy could create security of supply when confronted with a policy of sovereignty and economic nationalism. The issue remains relevant as the re-emergence of sovereignty and security issues today may reduce the EU's limited bargaining power. McGowan basically outlined three possible models in the system of relations of the EU and the Member States regarding energy policy.[38]

35 Szuleczki–Fischer–Gullberg–Sartor 2016. 548–567.

36 Mundell. According to the classic thesis of the 'impossible trinity', a state cannot simultaneously enforce autonomy in the field of monetary policy, free international capital movements, and a fixed exchange rate. You can only choose two at a time, and the third cannot be realized against them.

37 McGowan 2008. 94.

38 McGowan 1989. 552.

According to one of the outcomes, Member States would continue prioritizing *their own energy policies* and resolving any conflicts that may arise without the involvement of the Commission. Another option is for them to create the *European energy market* by reinforcing the Commission's role and develop an EU energy policy that is able to respond to emerging market failures. Under the third option, they would *relegate energy policy agendas to the background* in order to address a more urgent field. McGowen considered this one to be the most likely with regard to the environmental pressure. The Commission's role in shaping environmental policy has grown steadily since the 1970s thanks to the 'silence' of the Member States on the matter. The regulation of the energy sector was essentially included within the action plans of the European Union based on its intersections with environmental protection.

McGowen did not rule out the mixing of the various scenarios, either. In his view, the Member States could retain their autonomy in the highly controversial areas of energetics, leaving the other issues to be settled by a single energy market. As for the energy policy areas handed over to the European Union, the Commission would be in charge of resolving competing and conflicting needs, such as increased competition and security of supply, with due regard for the environment. If we recall the visions of the European Union formulated in the 1980s for the post-2000s period, we can see that the Commission actually seeks to balance policies in this way. However, according to McGowen, time would tell if the coordination and implementation of the various policy considerations would be successful.

Now, from the perspective of 30 years, it can be seen that, exactly due to *environmental considerations*, the energy policy of the EU has contributed to the emergence of a single energy market, while the key issues remained in the hands of the Member States as it is expressed in the form of shared competences. I believe that a mix of the three possible directions outlined by McGowen will basically govern energy policy in the 30 years to come as well. Given the current trends and the re-emergence of the idea of sovereignty among the Member States, I do not rule out the possibility, either, that the rapid processes of Europeanization that began in the energy sector in recent years may slow down or come to a halt for a while, even if they do not suffer a reversal. At the same time, in view of it being affected by technology, the operation of the energy sector is essentially intertwined with globalization and is well reflected in EU policies.[39] That is why I consider it important for nation-states not only to be passive observers but also to play an active role in setting the new frameworks of the EU legislation and legitimizing the new standards; otherwise they could easily fall victim to Europeanization.

39 Bartle 2006.

6. Conclusions

On certain issues, the energy policy of the European Union cannot be successful if it ignores the interests of the Member States and the limits of the capacities of the countries. The energy policy of the EU or the energy union cannot function effectively without the consensus of the Member States or the reinforcement of regional markets. There is no doubt that national regulators rely heavily on EU legislation, but even so there is a relatively wide room for manoeuvre to create a regulatory framework giving priority to domestic specificities and taking government priorities into account with due regard to the needs of the stakeholders of the industry and consumers alike. None of these aspects may be overlooked in the creation of a sovereign energy policy and in the regulation reflected in energy law. At the same time, international examples proving that the legal policy instruments and methods applied by the EU are viable or even suitable for being adapted outside Europe should be highlighted.

In my view, the biggest challenge in regulating the individual energy sectors is to create a well-regulated, sovereign energy policy based on energy security in the Member States which is in line with EU requirements and leaves ample scope for renewable energy sources. Energy policy is one of the most dynamically developing policy sectors, constantly changing and evolving as a result of environmental and economic change, with predetermined short-, medium-, and long-term objectives to be achieved. Hungarian energy policy and energy law have a specific development direction which differs from the EU average at a certain level, within the framework allowed by shared competences. A well-functioning, stable regulatory environment also has a positive effect on energy entrepreneurship, which in turn will positively influence the economy as a whole in the long run. In addition to the domestic implementation of EU acts, it is necessary to prioritize energy security in such a way that, in addition to conventional energy sources, renewable energy sources could also play a role. At the EU level, various forms of regional energy policy cooperation with a higher capacity to assert their interests may be of key importance, especially for the smaller countries in Central and Eastern Europe.

Nowadays, political forces opposing globalization and Europeanization are gaining strength. They aspire to reinforce the sovereignty of the given country and, though not necessarily abolish supranationalism, limit its role and place greater emphasis on bilateral organisms rather than on extensive multinational organizations. An excellent example of these processes is Brexit as well as the current policy of the USA, with special regard to the speech delivered by Donald Trump at the 74th General Assembly of the United Nations,[40] in which he declared before the nations of the world that: ‘The future does not belong to globalists. The

40 Trump 2019.

future belongs to the patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbours, and honour the differences that make each country special and unique.'

There is no doubt that the questions and problems raised by globalism are waiting to be answered, as is the concept of sovereignty yet to be redefined. 'The effects of accelerated globalization basically threaten the states with emptying the notion of sovereignty.'[41] And science must also be at the forefront along with politicians in conceptualizing and then answering the challenges of the future, even if, in Jellinek's words: 'Sovereignty was not brought to life by egghead scholars but by powerful forces whose struggles have been the subject of centuries.'[42]

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41 Translation by the author. Bayer 2015. 19.

42 Translation by the author. Jellinek 1914. 435, Pongrácz 2016.

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On the Patrimony of the Romanian Orthodox Church during the Communist Regime. Some Aspects[1]

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Abstract. The study examines the extension of state control over the assets of the Romanian Orthodox Church during the communist period of Romanian history. The author examines the topic by separately presenting norms and measures applied to immovable and then to movable assets which were nationalized or taken under state control based on various legislative measures and pretexts. In the study, the process by which the land and immovable assets, both of an ecclesiastical use and used for supporting educational and other church activities, is examined. The measures taken against the land and forestry assets held by the Romanian Orthodox Church by way of its institutions (parishes, monasteries, etc.) is presented as well as the fate of some church buildings. The author also examines the various measures aimed at bringing movable assets of the Romanian Orthodox Church under state control, including by confiscation and forced inclusion into museum collections.

Keywords: Orthodox Church of Romania, nationalization, communism in Romania, collectivization, confiscation

1. Introduction

The issue of church patrimony in the recent past is still much debated, but perhaps it is not that well-known. After 1989, interest in this patrimony focused on legal remedies, starting from the premise that numerous abuses were committed during the communist regime. However, the history of this topic seems much more difficult to understand and get to know as it has undergone several phases,

1 This study is an extended version of the author's lecture presented at the conference with the title *The Change in Ownership of Church Property in Romania* organized by the Balassi Institute – Hungarian Institute Bucharest on 10 February 2020.

both from the point of view of its legal evolution and especially from that of the practices of communist authorities.

In our study, we aim to open the way for a discussion on the destiny of the patrimony that belonged to the Romanian Orthodox Church during the communist regime from a historical perspective. We do not seek to exhaust this subject as, besides a general presentation of the legal framework and highlighting some particular situations, which is our aim, we consider that an immersion into the archives of the past is necessary.

We would also like to point out that in this paper we talk about 'church patrimony', i.e. the totality of assets belonging directly to the church, regardless of their religious or non-religious character.

Church patrimony is made up of immovable and movable assets, which both can be sacred in character (places of worship and liturgical instrumentation). The following are regarded as immovable property: firstly, places of worship, including monastic establishments, then administrative buildings (diocesan centres, deanery seats, and parochial houses), educational, cultural-spiritual, social-philanthropic locations as well as agricultural/forestry-related properties and possessions. Objects with a liturgical character, libraries, and archives are considered movable assets.

2. Conceptual Clarifications and Historical Contexts

When we discuss church patrimony during the communist regime, we shall briefly turn our attention to the Russian space during the Bolshevik and Stalinist revolutions. It is well known that during this period most church assets had been abusively confiscated by the representatives of the Bolshevik regime. The contemporary representations of Bolshevik revolutionaries tearing down and desecrating sacred spaces and objects in great fury have become infamous.

Many pieces of patrimony, especially those made of precious metals but also the bells were melted or sold, some even abroad. The buildings, in particular places of worship, were either demolished during the atheist campaign or transformed for purposes alien to their spiritual destination. Some were set up as warehouses, pubs, or they were assigned cultural-educational destination, i.e. museums, show venues, lecture rooms, etc. Furthermore, land holdings were confiscated by the Bolshevik regime, and, practically, the Russian Church had to retreat to the catacombs. Many icons of the defiled churches were hidden and kept with great devotion (some were even buried) by the believers.

However, things were very different when the communist regime established itself in Romania. In 1943, after Stalin had rediscovered the church and in the context of the 'Great War for the Defence of the Country', when icons were taken

on pilgrimage led by priests to the defensive Soviet lines to lift the spirits of the soldiers of the Red Army, it became clear for many that the political regime of Moscow adopted a different approach towards the church. We do not wish to insist upon the circumstances and the way in which these events, which had practically changed state–church relationships in the Soviet Union to a great extent, unfolded. However, we would like to underline that this was in fact an ingenious way, which would prove effective for instrumentalizing the institutional dimension of the church to the benefit of the Soviet political factor, which would also become a model for the states that were to form the Socialist Bloc. In other words, after 1945, Christian churches on the territories occupied by the Soviet army were allowed to function, but on a much diminished scale, without public manifestations and only in a strictly spiritual dimension. That is to say that the communist regime only allowed the church to possess sacred spaces, while its social, economic, and cultural-educational duties were eliminated as the patrimony designated for these functions was suitable for nationalization.

3. Immovable Church Property

The main legal modifications regarding church patrimony were adopted by the communist regime in 1948. Decree-Law no. 175 of 2 August 1948 on the educational reform promoted the principle of 'state public education', which practically abolished any type of private education. Otherwise, Article 35 stipulated that 'all denominational or private schools shall become state schools'.[2] In other words, the assets owned by such schools had become the property of the state, a measure which foreshadowed the adoption of Decree-Law no. 176.

This measure of abolishing schools funded by religious denominations or with a religious character was correlated with the provisions of Decree-Law no. 176 of 3 August 1948 on the transfer into state ownership of assets serving the process of education, which in art. 1 provided that:

For the purposes of a good organization and functioning of state public education and for the purpose of widening and democratizing education, all movable and immovable property which belonged to churches, congregations, religious communities, for-profit or not-for-profit private associations, and, generally, to private persons or legal entities and which served for the functioning of schools that passed into state ownership according to Article 35 of the Law on public education shall be transferred into state property and allocated to the Ministry of Public Education, which is to use them for educational purposes (…) All properties which served for the functioning, maintenance, and support of the schools, dormitories, homes, or cafeterias on 1 January 1948, as well as those thereafter acquired for the same

2 Translation by the author. Official Journal of Romania, part I, no. 177, 3 August 1948, 6324.

purpose, shall be considered movable and immovable property falling within the scope of this Article.[3]

As far as the Orthodox Church is concerned, the law targeted, for example, the patrimony of the National Orthodox Women's Association in Romania, which owned schools, dormitories, and kindergartens, or the patrimony of the 'Nifon Mitropolitul' Establishments in Bucharest, with the seminary[4] named after its founder.[5] Primary denominational schools from Transylvania and Banat had already been nationalized by the Romanian State during 1919–1920. However, a problem concerning the ownership rights over the patrimony of these former denominational schools still persisted as after 1919, although transformed into state schools, they were functioning in the old building as of right belonging to parishes.[6] After 1948, these were practically confiscated by the communist authorities for the sole reason that primary state schools were functioning there or for other purposes (community centres, farm seats, shops, or dispensaries).

As a preamble to this law, in a Decision of 31 July 1948 of the Council of Ministers, the 'Nifon' Establishment was disbanded as a foundation, and its entire patrimony was allocated to the State represented by the Ministry of Public Education. Since its foundation, the aim of the 'Nifon' Establishment was to support the theological seminary (founded in 1872 by decree of Carol I of Romania) situated on 11 Iunie Street 2 (today, the building is occupied by a commissariat of the Ministry of National Defence) and to offer scholarships using money arising from income offered by agricultural holdings and the 'Nifon' Palace (built in 1891) situated on Calea Victoriei (1 Doamnei Street) in Bucharest.

The Central Seminary in Bucharest, an imposing edifice situated on 39–49 George Coşbuc Boulevard in Bucharest, met the same fate. In 1948, the Seminary was closed down, and its building was in danger of being lost by the church. In the same fateful year, the Faculty of Theology in Bucharest was practically closed down and expelled from the University Palace. Beginning with January 1949, the new university-level theological school, i.e. the Theological Institute in Bucharest, functioned in the building of the Central Seminary, but after less than a year it was moved to its current location, into the building of the former Teacher Training Girls' School (2–4 Sf. Ecaterina Street). The reason for the last move:

3 Translation by the author. Official Journal of Romania, part I, no. 177, 3 August 1948, 6324.

4 Of the seminary's graduates, we name Stelian Popescu, Director of the *Universul* newspaper in Bucharest, or Eugen Cristescu, Director of the Special Intelligence Service during the Antonescu government. More than 1,600 students graduated this seminary.

5 Here we shall also mention charitable, medical, and educational private foundations managed by high-ranking servants of the Romanian Orthodox Church, such as 'Madona Dudu' in Craiova, 'Sf. Spiridon' in Iaşi, or the 'Brâncoveneşti Establishments' in Bucharest.

6 At the moment of nationalization, the heads of the Orthodox Church in Transylvania were opposed to this measure of the state. According to documents from the ecclesiastical archives to which we had access to, these buildings had been leased to the mayor's offices concerned, and priests were keeping strict records thereof.

the building of the former Central Seminary was confiscated by the communist authorities. Today, it hosts the Technical Military Academy.

Decree-Law no. 177 of 4 August 1948 on the general status of religious denominations was the third law of this normative package meant to restrict religious denominations in Romania in manifesting themselves, in a yet unprecedented manner. Article 29 provided for an inventory of all movable and immovable church assets, which was to be communicated to the Ministry of Culture. This explains the numerous inventories of different structures within religious denominations we have found in archives and which were periodically communicated to the Ministry/Department of Culture. In other words, state authorities were aware of every modification concerning the inventories of religious denominations.

Article 36 of the same law regulated the patrimony of religious denominations that had disappeared or had their recognition withdrawn by the Ministry of Culture. According to this Article, the patrimony of disappeared/unrecognized denominations became 'state property by *ope legis*'.[7] This was not something new in the field, but this remark is important because the law also stipulated that all denominations in Romania had to initiate the process for regaining recognition by governmental authorities by drafting and submitting a new statute for their organization and functioning. The statute proposed by the Greek Catholic and the Roman Catholic churches was not endorsed by the Ministry of Culture, wherefore the patrimonies of these two churches were much more exposed to nationalization by the communist state.[8]

Article 37 of the law on denominations regulated the patrimony of denominations whose followers would move to another denomination. Thus, if at least 10% of the followers of a denomination were to switch to another denomination, a proportionate part of the patrimony of that denomination would also pass to the new denomination. If the majority of the followers were to move to another denomination, they would move with the place of worship and its annexes. If at least 75% of its followers were to move to another denomination, the entire estate of that denomination would pass to the new denomination.[9]

This provision envisaged the conversion of Romanian Greek Catholics to Orthodoxy, which was to commence one month later. We refer to assets taken over

7 Official Journal of Romania, part I, no. 178, 4 August 1948, 6394.

8 It should be mentioned that in the case of the Roman Catholic Church in Romania, unlike in the case of other denominations, communist authorities employed a different approach. Although during the entire course of the communist regime this church had never been recognized alongside the other denominations, its servants received their salaries (Article 33) and the patrimony which served directly the purposes of this denomination (except monasteries) remained in its possession. However, due to this exact legal provision, the Roman Catholic Church was permanently exposed to a fragile status, many times ensured through diplomatic channels between Romania and the Vatican, especially after 1973 (the visit of Nicolae Ceauşescu to Pope Paul VI).

9 Official Journal of Romania, part I, no. 178, 4 August 1948, 6394.

by the communist state as an effect of the process of converting Romanian Greek Catholics to Orthodoxy (September–November 1948) and abolishing the Romanian Greek Catholic Church (1 December 1948). Although the text of the law gave the impression that the Romanian Orthodox Church would take over the patrimony of the former church, this procedure was somewhat different. Consequently, it was the communist state that instrumented the handover/takeover process of the former Romanian Greek Catholic churches with their entire inventory to the new Orthodox communities or to the old pre-existing ones in the localities concerned, while assets without a sacred destination (schools/cultural, social, and economic institution buildings) were confiscated by the communist state. Some places of worship, such as the Prislop monastery in Hunedoara County or the churches of Vad and Feleac in Cluj County, had been Orthodox before the appearance of the Romanian Greek Catholic Church in Transylvania. At the same time, some cathedrals were not taken over by the representatives of the Romanian Orthodox Church but by delegates of the Ministry of Culture, leaving the impression that the Romanian Orthodox Church was involved in the process of taking over former Romanian Greek Catholic assets. For example, the cathedral and schools in Blaj were taken over by Traian Belaşcu, metropolitan vicar (former Romanian Greek Catholic priest), because Metropolitan Nicolae Bălan of Transylvania refused to do so. The same happened in the case of the former Romanian Greek Catholic cathedral in Lugoj, which Bishop Veniamin Nistor of Caransebeş refused to take over, or in the case of the 'Samuil Vulcan' United Denominational School in Beiuş, which had already been confiscated before the process of converting Romanian Greek Catholics to Orthodoxy began and before the adoption of the law on state education, i.e. on 26 July 1948.[10]

Another normative framework affecting the activity of the church concerned agricultural-forestry holdings. Decree no. 83 of 2 March 1949 launched the agricultural collectivization process in Romania, following the Soviet model. According to those stated at the plenary meeting of the Central Committee of the Romanian Workers' Party held a few days after the adoption of this decree, among the social categories involved, priests were included in the *kulak* category because it was considered that they owned land.

The first measure taken by the communist authorities was to take over diocesan holdings in March 1949. Then, parochial holdings followed. In fact, priests owned parochial holdings in order to supplement the incomes they were entitled to as part of their salaries. At the same time, many of these priests from rural areas owned agricultural land inherited from their families; hence, they were added to church holdings so that they could be more easily included into the *kulak* category. Pursuant to the law on collectivization, this social categorization brought about financial and in-kind levies, which the priests were not able to bear. In most

10 For details, see: Mihoc 1996–1997. 168–169.

cases, priests did not produce as much as they had to hand over; therefore, they were purchasing from the black market in order to honour their obligations set in kind to the state. Many times, even crop seeds necessary for the following year were confiscated from them.

Thus, according to practices employed in the case of other agricultural landowners, priests were also compelled to hand over their agricultural land for the purpose of establishing agricultural fellowships, which were precursors to agricultural collectives. In this situation, in October 1949, Patriarch Justinian requested that the government reduce agricultural quotas and taxes for the 2–5 hectares on average or that priests should receive their entire salaries from the state. After many discussions between Patriarch Justinian and the communist government, the solution that priests from rural areas should hand over their agricultural holdings in exchange for their entire salaries and pensions being paid by the state and their children being accepted in state schools was only reached in 1954. In conjunction with the Patriarch's settlement with the communist authorities, priests were compelled to participate in the collectivization campaign through their involvement in committees for persuading people to join agricultural fellowships. Some priests became involved in this campaign, but many times the repressive communist structures discovered duplicity in their activity. They were compliant in front of the authorities, but in reality priests were urging citizens not to give in to intimidation and not to work on holidays, refused to make church agricultural holdings available or to help in other communal work. The authorities considered all of the above as impediments in the way of the socialization of agriculture. Therefore, beginning with 1958, a wide-ranging intimidation campaign was commenced through confiscations and arrests. Article 209 of the Penal Code stipulating the crime of 'plotting against the social order' was amended to this end, and sanctions were tightened to 25 years of imprisonment or forced labour for life.[11] Thus, hundreds of Orthodox priests were arrested and investigated under the accusation of undermining the process of collectivization and sentenced to many years of imprisonment. This way, local authorities confiscated their agricultural properties and also church properties under their administration (parochial houses, agricultural lands, etc.) as they were considered personal assets.

The solution adopted in the case of monasteries was different. Many Orthodox monastic establishments held agricultural and forestry holdings used to support themselves. A law of 1938 gave arable lands and forests to the biggest monasteries to support their monks and the historical monuments and charitable institutions they owned. After March 1949, the Church was compelled to transfer the majority of its agricultural holdings to the state. Each monastery kept 5 hectares for

11 Roske–Abraham–Cătănuş 2007. 46–47.

household needs plus one hectare for each tonsured monk. Tonsured monks were subject to the quota and tax regime provided for by governmental regulations.

Nevertheless, the communist state wanted to take over all agricultural holdings owned by monasteries and also their entire inventory. For this reason, monasteries were imposed agricultural quotas difficult to comply with. Then, in order to counter the development of Orthodox monasticism, which had expanded after 1945, Minister of Internal Affairs Alexandru Drăghici, in a memorandum submitted to the party and state leadership in 1955, proposed that more than half of the monasteries should disappear so that the state could take over their agricultural holdings and their immovable inventory. Al. Drăghici's plan was put into practice beginning with February 1958, when a campaign for the intimidation of monks (often resulting in arrests) was initiated by the representatives of the Department for Religious Denominations, the local authorities, and the Militia, closely aided by the Securitate in order to determine them to leave their monastic establishments and therefore to determine the dissolution of the monasteries concerned. By 1960, of the 204 monasteries in 1957, there were only 103. The land was taken over by farms (for ex. the case of Prislop Monastery), forests by forestry district, and many buildings belonging to the former monasteries became either the seats of agricultural units or medical institutions, most of them becoming asylums or TB sanatoriums (for ex. Guranda or Bârnova monasteries), as envisaged by Minister Al. Drăghici in 1955.[12]

Bukovina Church Forest Fund represented a particular case. It was established by the Austrian state in 1786 under the name 'Greek-Oriental Religious Fund' by adding up the holdings of Bukovina monasteries, owned ever since their foundation. The ownership of the Metropolitanate of Bukovina was recognized by the Romanian state even after 1918.

According to archival documents, Bukovina Church Fund held an area of approximately 192,000 hectares, mostly forest land, alongside industrial and commercial enterprises, a forestry school, the Vatra Dornei and Iacobeni baths with their mineral water springs, agricultural and forestry exploitations, forest railways with annexes and forest districts, etc.

Of the incomes of this Fund, the Orthodox Church in Bukovina supported the salaries of the clergy, of the entire administrative apparatus, including those of its theological schools, offered scholarships, renovated/repaired places of worship (parish churches and monasteries), built primary denominational schools, supported educational and health institutions in Cernăuți, Suceava, Rădăuți, and Câmpulung, supported the editing of the first Romanian-language textbooks, subsidized the cultural and educational activities of the Cernăuți university centre, etc.

In order to take possession of this patrimony, communist authorities made recourse to the solution applied a year before to private or church foundations. Bukovina Church Fund was abolished as an institution by Decree no. 273 of 24

12 Luchian 2010. 159–160.

June 1949 (unpublished),[13] and its patrimony was nationalized by the communist state pursuant to Law no. 119 of 11 June 1948.[14] This Fund has not been returned to the church to this day.

There were also exceptions which we could consider fortunate. We are talking about the small wooden churches which were practically saved by Patriarch Justinian from disappearance. The wooden church in Stâna de Vale, place of worship in the Mureş region dating from the 17th century, which was brought by Carol II of Romania to the vicinity of the Royal Palace in Sinaia in 1934, is one such example. Then, in the context of taking over the former royal patrimony by the communist authorities, in order to avoid its falling into disrepair, Patriarch Justinian obtained this church in 1951 and moved it to the priests' sanatorium in Techirgiol, establishing a nuns' hermitage around it, which exists even today.

The wooden church by Castle Bran (dating from the 18th century), brought by Queen Mary in 1932, fell into disrepair after the abolition of the monarchy. In 1956, Patriarch Justinian moved it to Jercălăi, Prahova County, on the ruins of a monastic establishment, and he established a hermitage around it, which exists even today.

The wooden church from the dissolved 'N. Filipescu' College in Predeal, place of worship from the 17th century, originating in Maramureş, was brought by Patriarch Justinian to the retirement home in Dragoslovele, and a hermitage was established around it.

Horea Church in Albac, Alba County, shared the same fate. It was saved in 1907 by historian Nicolae Iorga by bringing it to the Brătianu Courtyard in Florica, Argeş County. After the confiscation of the former liberal leaders' property by the communist authorities, the small wooden church was closed. In 1954, Patriarch Justinian obtained it, and moved it to the centre of Băile Olăneşti, Vâlcea County, where it still stands today.

It is interesting, however, that, except Horea Church, these churches figured in a Securitate record from 1980 as being 'in the administration of the Romanian Patriarchate', and not at all as church property.[15]

Another patrimonial aspect concerning the Romanian Orthodox Church is related to demolished churches, especially in Bucharest in the 80s. Here it is worth mentioning that in the case of the 20 churches demolished in or moved from Bucharest the communist state committed a series of abuses. According to canon law, recognized by the communist state, if a parochial church was in danger of being demolished, the statutory body deciding in this matter was the parochial

13 It was a common practice of the communist authorities not to publish certain decrees, such as this one or those related to the expropriation of private property, for reasons of 'public utility'.

14 Valenciuc 2010. 233–241.

15 National Council for the Study of the Securitate Archives (C.N.S.A.S.), Documentary fund, file 13367, vol. 1, sheet 268.

council of the church concerned, a decision which was then communicated by the Diocesan Centre to the Department for Religious Denominations. According to archival documents, in most cases, the parochial councils concerned decided against the demolition of places of worship, employing the solution of moving. Although the Department was notified of parochial council decisions, churches were demolished either by way of adopting a decree by Nicolae Ceauşescu on the application of the systematic plan or by adopting such a decree subsequent to the demolition.[16]

4. Movable Church Property

Evidently, this patrimony concerns assets that are sacred in nature, i.e. the liturgical instrumentation as well as religious/theological printed materials and church archives. The mobility of these assets from religious denominations to the communist state was influenced by two main aspects: (1) the verification of ecclesiastical libraries and archives by the representatives of the state, especially those from the State Archives and the Department for Religious Denominations, and sometimes by Securitate officers, and (2) the sacred assets taken over or confiscated, or even taken in custody for an undeclared period for the purposes of museum collections.

In the extra-Carpathian Romanian space, the appropriation of patrimony constituted of movable assets, even of sacred ones, for museum collections had already been a standard practice since the 19th century. This custom has its origins in the initiative of some men of culture, former 1848 revolutionaries (supporters of the idea of secularizing Romanian society, after the French model), such as Alexandru Odobescu, Dumitru Papazoglu, or Cezar Bolliac. In the context of the secularization policy affecting monastic properties, visits were paid to monasteries, and numerous religious objects and artefacts were taken into custody (i.e. confiscated), hence forming the basis of the Museum of Antiquities in Bucharest.

This practice was resumed during the communist regime. Patrimony assets made of precious metals were targeted first, and their possession became a misdemeanour if they were not declared to state authorities, and punished accordingly. Furthermore, if such goods were not conserved and capitalized according to law, they could be taken into custody for state museum collections. For example, in April 1959, when arresting Dimitrie Balaur at Caşin Church in Bucharest, the Securitate carried out a search in this church and found several gold coins. These gold coins were donated before 1948 for supporting the finalization of the church that was under construction, in times when gold had

16 We shall return to this topic in an extensive study based on archival documents.

already become a prohibited metal. The gold was confiscated by the Securitate, and priest Balaur was convicted for many years of imprisonment. At the time, this case gained notoriety in Bucharest.

Probably something was learned from this case. Around 1962, at Boteanu Church in Bucharest, in order to legalize such a donation, the gold was directly introduced into the collection box from where the priest registered it and sold directly to the National Bank of Romania.

In 1949, state authorities moved to the purging of libraries and church archives, an action that was repeated after 1968, after the scandal stirred by the Spiridon Cândea case.[17] This scandal also generated a major Securitate action, launched in 1972 under the name 'Antidote', by which all ecclesiastical printed materials and archives underwent verification in order to detect aspects of a Fascist-Legionary character. Such actions, though of a smaller scale, were also carried out at the level of some Orthodox diocesan centres, such as in 1971, when the Securitate seized the 'documents with a legionary character' from the archives of the Archdiocese of Râmnic. Besides the Securitate, the persons authorized for religious denominations (împuterniciții de culte in Romanian) – as territorial representatives of the Department for Religious Denominations – were also responsible for the 'supervision and control' of church archives.

As for sacred goods, it must be stated that the first legal regulation to this end was adopted by means of Council of Ministers Decision no. 661/1995 on the establishment of museums and museum collections. Later on, by Decree no. 724 of 23 October 1969 on the protection and preservation of assets of national interest that represent artistic, historical, or documentary values, as well as of certain objects that contain precious metals and precious stones, specific of religious objects, the Communist authorities turned to making a rigorous inventory of all the assets owned by religious denominations in Romania. During this activity, the representatives of state authorities confiscated or expropriated many religious printed materials, manuscripts, and religious objects, especially iconography found at parishes on the ground that they were not adequately conserved and capitalized, a problem also dealt with by the Securitate.

The inventory process lasted approximately until 1974, when a law on the protection of the national patrimony was adopted. Besides its provisions concerning the definition of the term 'national patrimony object' and the registration of such objects, Article 81 provided for the conservation of objects from private collections as follows: 'Protected cultural assets belonging to the owners provided for in this Article who degrade them in bad faith or do not conserve them according to the obligation of conservation shall be expropriated or confiscated, as the case

17 In 1967, the Securitate had accidentally stumbled upon a large amount of legionary literature in a niche of the bell tower built by priest Spiridon Cândea in his native village, which generated the entire re-purging action of church cultural patrimony from Romania at the time.

may be.'[18] Pursuant to this provision, the representatives of museums and of the National Archives could take into custody, at times even without minutes, and even confiscate patrimony objects from religious denominations on grounds of inadequate conservation or capitalization. Moreover, in most of the reactions expressed upon the adoption of the law – as they were recorded in Securitate documents –, the ideas persist that 'through this law, the state has created the premises for taking possession of certain values', that 'through these measures, the state seeks to strip churches of the ornaments and values they own', or that 'this is about the expropriation of church assets'.[19]

5. Instead of Conclusions

The issue of church patrimony proves to be extremely complicated from the legal framework through communist jurisprudence and historical context to the practices of state authorities in relation to the representatives of religious denominations. For this reason, we consider that our present approach is only the beginning of a debate that shall be channelled especially through documentation in the archives of the recent past.

Furthermore, we shall not overlook how communist authorities related to this issue by virtue of an already established practice in Romanian society. Basically, after 1948, the communist authorities only revived this custom of liberal origin, intensified it in line with the communist experience and thinking in the field, and applied it during a period when conservation and capitalization in museums had become something normal in Western Europe.

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Legal Splinters with Regard to the National Programme for Land Registration and the Land Registry

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Abstract. The National Programme for Land Registration and the Land Registry, which aims to achieve the systematic registration of land in the integrated land cadastre and land register throughout the country by 2023, is in progress. It is a massive undertaking which requires the creation of a new land register and the registration of approximately 40 million immovable assets into it. The present study shows the legal hurdles that have been faced in carrying out the programme. These issues are the following: ongoing property and border disputes between the various owners, succession procedures which have yet to be finalized, and litigation that has arisen as a result of differences between land measurements and the data in the records held at the land registry. Due to the aforementioned legal issues, it is not possible to finalize the systematic registration in the integrated cadastre and land register throughout the country in time (by 2023). Also, there is the legal issue posed by the possibility for the person possessing the immovable asset without valid title to be inducted into the land register as owner, based on a certificate issued by a notary public, which, in our opinion, is contrary to the law.

Keywords: cadastre, land register, land registry, immovable assets, National Programme for Land Registration and the Land Registry, sporadic land registration, systematic land registration

1. Introductory Thoughts

The purpose of land registers is to guarantee rights *in rem* over immovable assets and to provide publicity, allowing for anyone to know relevant information pertaining to immovables such as the owners with title to the property of the immovable, ongoing legal disputes which may affect property rights, and any similar relevant facts.

The role immovable assets play in Romanian socio-economic life has undergone significant alterations due to the frequent incidence of subject substitutions in the person of the owner (mainly transfer from state ownership to private ownership of immovable assets), which occurred after the year 1990 as a result of the application of land laws, thus imposing the necessity for the legal system to ensure the substitution of subjects but also the registration of this substitution.

It is well known that the abrupt historical changes that have occurred in the last century have upset the main thing that guarantees the safe transaction of immovable assets: the authentic land register. The uncertainty regarding the status of nationalized immovable assets (lands, forests) and the lands that have been reallocated to agricultural cooperatives have started to corrode, and even undermine the system. Due to the property reform that started in the 1990s, the number of immovable assets and the underlying lands[1] has risen greatly.[2] A few hundred thousand lots have now been fragmented from main, previously compact parcels.

The operations subject to registration in the land registers have also increased in number and complexity over time, creating a distance between the contents of land registers and the real state of affairs. This is why the modernization of the legal, technical, and material aspect of land registration has become imminent.

1 The underlying land is a piece of land that lies on the surface and is not interrupted by internal or external borders, and the possessor or owner is the same throughout the underlying land.

The concept of underlying land has two main characteristics:

a) Firstly, the land surface is a compact piece of land that is not interrupted by natural or artificial features (rivers, roads, railways, etc.) or by internal and external borders.

b) The second characteristic is that the possessor or owner is the same throughout the land. This is why, as a second exception, we must consider the lands that have the same owner or possessor and are not interrupted by rivers, roads, railways, crossroads, or internal and external borders as underlying lands. In this respect, crossroads and branched roads must be considered as the interrupters of natural cohesion. The underlying land of an immovable asset generally appears together with the components that lie on the land (for example, building, underground garage, cellar, etc.). The underlying land without components is always a separate immovable asset. If the underlying land has the same owner as its component, the underlying land together with its components becomes a separate immovable asset, based on the principle of *aedificium solo cedit*.

2 According to official estimations, from the 40 million Romanian immovable properties, 20% are located in towns and 80% in villages; however, only 11.38 million are registered in the land register: http://www.ancpi.ro/ (downloaded on: 17 November 2019).

The legal basis for this has been Law No. 7 of 1996 on Land registration, which was later completed by the provisions of the new Romanian Civil Code.

Today, the National Programme for Land Registration and the Land Registry[3] is in progress. According to its legal provisions, it aims to provide systematic registration in the integrated cadastre and land register throughout the country by the year 2023, a service which is free of charge to owners, the costs being fully financed by the Romanian state and the European Union. The undertaking requires great attention, significant legal and technical knowledge, precision, openness in exercising one's profession, and knowledge on every aspect that surrounds land registers.

It is legitimate to expect that the completion of agricultural payments and a few million parcels of nationalized property that have been 'reconstituted' to the property of previous owners based on land laws will be registered in the integrated cadastre and land register.[4] It is necessary to create a new register of property instead of the old one; however, this requires complex and innovative solutions regarding form and substance and efficient legal instruments, which can serve people's interests and affairs of property in a more just and efficient way.

It is natural for such a great and challenging undertaking that requires a lot of effort and reshaping to leave behind rough surfaces and splinters. The present paper mentions a few of these rough surfaces and splinters in order for us and the legislator to be able to contemplate the resulting legal problems and anomalies.

2. The Romanian Land Registry Systems

Until the implementation of the new system for the registration of property, the current cadastre and land register systems are used in Romanian law, namely the registration and transcription register, the register of property, and the land register. The systems of registering property that are in effect will cease to exist when the cadastral registers will be finalized for the entire country. When the cadastral registers for the entire country will be finalized, the legal provisions governing land registers that are in force now will be repealed. The systems of

3 Ordinance no. 295/2015 on the National Programme for Land Registration Purposes and Land Registry, published in the Official Journal [Monitorul Oficial] no. 309/2015. Ordinance no. 1427/2017 was necessary in applying the national programme as it contains the technical norms of the work that needs to be carried out in registering land. There is also a procedure regarding the monetary frame and an ordinance regarding the status of the work carried out in favour of the interested parties.

4 By 2018, the cadastral measurements were completed in only 57 out of the 3,181 administrative units existing in the country – village, town, county –, this number amounting only to 1.79%. See: http://www.ancpi.ro/pnccf/stadiu-lucrarilor.html (downloaded on: 17 November 2019).

registration of property that are in effect are therefore temporary and remain in effect only until the implementation of the new system.

The systems now on their way to being replaced, but (albeit temporarily) still in use for registering property, are presented briefly as follows.

a) *The old*[5] *cadastre and land register system of immovable property*. The main purpose of the integrated cadastre and land register is to guarantee the safety of property rights, the undisturbed transfer of property, and the protection of creditor's rights.

The object of registration in the land register is the immovable property item that is in the civil circuit and can be encumbered. Immovable property is an immovable object, an item of property that cannot be moved without destroying or altering it – a property that is fixed to the earth. In the opinion of Bálint Kolosváry, 'immovable properties are parcels of land together with their components and any other benefit which arises out of land; everything else is movable property'.[6] Immovable property includes the land together with its components that can be delimited: the parcel of land and everything that is part of the land (buildings, trees, etc.). Since ancient times, lands have played an important role in people's economic and social lives. Ownership of land – beyond the economic value that is tied to it – also had the meaning of title to the owner.

Ownership and use of land require the marking of land boundaries and the registration of property. During the evolution of society, different versions of land registers have emerged, partly with the aim of protecting the safety of land ownership and partly to facilitate the collection of taxes.

According to the provisions of the Civil Code,[7] immovable assets are strips of land, fountains, rivers, plantations rooted in the earth, buildings and other edifices that are attached to the earth, production support vessels and equipment designed to exploit resources that are on the continental shelf, under the sea, and everything that is a natural or built-in component thereof.

Moreover, materials that are detached from an immovable property item with the purpose of reattaching them later are considered immovable property until their shape changes; also, the same is applicable to the constituent pieces of an immovable property item as long as the detachment from the immovable to which it belongs is temporary. Materials that are used to replace old materials become immovable when they receive this destination.

According to the provisions of the Civil Code,[8] movable property is what the law does not consider immovable. Electromagnetic and similar waves, which are legally produced, obtained, or transported by natural persons and are put

5 The old land registers were introduced based on Ordinance no. 115/1938.
6 See Szladits 1942. 13–16.
7 Art. 537–538 of the Romanian Civil Code.
8 Art. 539–540 of the Romanian Civil Code.

to personal use as well as all kinds of energy, irrespective of the immovable or movable aspect of its source, are considered movable property. The soils and the natural resources found in the soil, the fruits that have not yet been separated from the tree, the plants and constructions that are connected to the soil are all considered mobile assets by anticipation. In order to obtain the opposition of rights to a third party, the rights need to be noted in the land register.[9]

b) *The cadastral record*, maintained by the Land Registry Offices, had the purpose of providing information regarding plots outside the boundaries of settlements for statistical, administrative, and agricultural production purposes. The national land register was the foundation for the creation of parcels of land apt for industrial cultivation as well as for the further registration of the changes that occurred in relation to the land and, later, for the redemption of lands used by cooperatives.

This method of land registration had the negative effect that the guarantee instituted by the court of law ceased to exist resulting in lack of the authentic, *constitutive effect* of registration of ownership in the land register by which transfer of title over immovables to the registered owner normally took place. The land registers became subordinated to the national administration. This negative change had clear ideological reasons as most of the immovable assets that became the property of the state, or were close to being owned by the state (being owned by socialist cooperatives), had been previously owned by individuals violently dispossessed, at times sentenced to death, under the authority of the state.

The transformation of agriculture and the latter's transformation into cooperatives by the use of force – based on the land reform, the administration of the parcels of land, and other political measures – led to the use of tax land registers.

After the socialist reorganization of agriculture mentioned above, the country's agriculture was characterized by industrial farming performed on a large scale, while individual farming was only present on a small scale. The drain of income that originated from land was not of significance because the state procured its income from other sources. New requirements arose in the matter of land registers that were being used for tax purposes. Instead of these, a new register was needed that could become the *basis for agricultural planning* and could keep track of all the land parcels in the country. Data was needed in order to make agricultural planning work. In order to be able to calculate how much grain is needed annually in the country, it was necessary to know the exact number of square meters of agricultural land and the exact percentage that is being used by factory farms and by cooperatives. On the other hand, in order to be able to verify the *proper use of land according to its purpose*, reliable registers were required. This is why a national land register was created.

9 For the classification of goods as movable and immovable, see Veress 2017. 76–77.

The purpose of the national land register was to supply the data which was needed for planning and statistical analysis (for example, to know: the exact square meters of land that is being used for agriculture, the cultivation of grapes, or mowing in a county; the exact owner or the possessor of these plots of land). The register was also the *basis for taxation by way of the land tax and any income tax*.

The national land register kept a record of the parcels of land by categorizing them according to the administrative unit they belonged to – county, town, and village. The parcels of land that belonged to a certain administrative unit were further subcategorized into *inside plots* (those inside the administrative boundary of urban and rural populated settlements) and *outside plots* (those outside the administrative boundary of populated settlements). This meant that there were separate sheets for inside plots and outside plots. The separate registers were necessary because the two types of lands had different *destinations*. The object of land registers incorporated *all parcels of land in the country*. They also contained the underlying land, land register numbers, areas, standards, and types of cultivation as well as owners, possessors, or users. The land register also contained data that was necessary for the purposes mentioned above. The data about the land was organized into work divisions. There were *main* work divisions and *complementary* work divisions. The main work divisions were: the sheet for possessors, the land register and land registry map of the administrative district.

The following complementary work divisions could be found: a table of contents organized by name, a register organized by land registry numbers, etc. The latter data helped to identify the immovable asset.

The sheet of possessors separately contained the following: owner, possessor. There was a separate sheet of possessors for the inside plots and outside plots. Data presented in the sheets of possessors were summed up; this way, it was possible to see the total plots of land owned by the same subject, organized by different types of agriculture.

The land register of a village contained most of the data regarding the plots of land that could be found in the inside plots and outside plots of the village, in the order of topographical numbers. Land registers made possible to record the plots of land that could be found in the village, town, or county based on types of agriculture.

The counties' land registers were organized by the county cadastre, geodesic, cartographic offices (*oficiile județene de cadastru, geodezie şi cartografie*), and their legal predecessor, the Cadastre and Land Organization Office (*Oficiul județean de cadastru şi organizarea teritoriului*). The changes that surfaced in time regarding the owner or the possessor were also registered.

c) *The transcription and inscription registers of the land registry system* applied the principle of 'personal folium', according to which the internal classification

of the register is by the owners of the immovable asset and not by the assets themselves. This system was used in Moldova and Wallachia.

d) *The new and complete land registration system*. The new Romanian Civil Code and Law no. 7/1996 are based on the principle of 'real folium', according to which the internal classification of the register is by goods, not by the owners of the immovable asset. The laws conserve the basic unit of the land registry system as being the parcel of land, according to which the land itself and any edifices erected on it are registered in the same place. The law maintains the completeness of the land registry in the sense that the latter incorporates most of the immovable assets of the country and that it also conserves the basic, classical principles (registration, authentication, publicity, principle of documentation, hierarchy) that stem from the old land registers (which are in force even today), which have been attributes of land registries for a long time.

It is the National Cadastre and Land Registry Agency's (*Agenția Națională de Cadastru şi Publicitate Imobiliară*) remit to record data, rights, and facts that are related to immovable assets. The united land registration system was adopted in the year 2004 because that was the year the land registry offices that had been operating under the supervisions and control of courts (*birourile de carte funciară*) were subordinated to the land registry agency and therefore placed under the supervision of the executive branch of government. The current structure is the following: the National Cadastre and Land Registry Agency is in the centre, and the land registry offices come second.

Nowadays, land registers are kept in an administrative manner as the institution of the land register judge no longer exists. A new profession has emerged, that of the registrar of the land registry.

3. Sporadic Registration in Land Registers

Nowadays, immovable assets are registered in land registers using the sporadic land registration approach, which is based on land registry numbers assigned in numerical order.

According to Land Law no. 18/1991 and the subsequent land laws, when the titles of ownership were filled out, the situations presented in the land registers were not always being taken into account. This way, it became possible for the certificate of title to contain lands that were registered in the land registers as being in the property of other people; in other words, the certificates of title 'overwrote' the land registers, changing the existing situation presented in the land registers and the relationships around possession, even in those places where the old land registry system was in force. The properties were usually not returned to their original locations because land laws did not force the local land division

commission to do so *ope legis.* This way, the old owners would often receive other parcels of land than the ones nationalized from them or their ancestors.

Sporadic registration in land registers[10] is now being rolled out across the entire country, which is slowly leading to the loss of the 'old' land registers that existed in certain parts of the country (mainly in Transylvania). We can say that the land law, which has been altered and amended several times over the past years and which makes it possible to record ownership titles in the land register, has led to situations that may differ from the legal situations presented in the 'old' land registers.

Art. 40, paragraph (3) of the Land Law referred to above states that in those places of the country where the directions set forth by Decree-Law no. 115/1938 concerning the management of land registers are still in effect, the registration of the parcels of land returned to previous owners on the basis of land laws is done in the new land registers based on land register numbers assigned based on specific documentations; the applicable system of registration is the sporadic land registration system. This way, old land registers have lost their original roles, and registration based on assigned land registration numbers has spread.

In conclusion, the registration of parcels of land which have been returned based on land laws has led to the birth of a sketch that is similar to a mosaic in every administrative district. It is impossible to assume that these parcels will someday (by year 2023?) fit into a complete land registry system.

4. On Systematic Land Registration

In essence, according to the National Programme for Land Registration and the Land Registry, the systematic registration in the integrated cadastre and land registers should be finalized throughout the country by the year 2023.

According to the provisions of art. 11, paragraph (2) of Law no. 7/1996, the process of systematic land registration consists of the following steps:

– notifying owners and other interested parties;
– establishing the borders of local administrative districts;
– identifying immovable properties within and outside built-up areas;
– marking the land registry districts;
– obtaining all necessary data with the help of an expert appointed by the land registry[11] and inserting it in the land registration procedure;
– identifying immovable properties in the land registry districts;
– identifying the owners and possessors and those entitled to rights *in rem*;

10 This is how they registered parcels that had been registered based on land titles.

11 The legal and technical data can be collected from the Land Registry Office, public institutions, private and public entities.

– calling upon the services of the Chamber of Notaries in cases where the succession process has not been completed and have them appoint the competent notary public;
– comparing the results of the measurements with data from the records of the land registration office;
– receiving and approving the land register documents;
– at least 5 days before the technical data is submitted to the land registry, it is made public in a local and a national newspaper; there has to be a notification about making these data public at the headquarters of the local council and on the website of the Land Registry Office;
– the results of the measurements must be announced publicly and posted at the headquarters of the local council and on the website of the Land Registry Office;
– filing and resolving complaints that aim at correcting mistakes made in land registry documents or regarding the issue of ownership or possession;
– completing the systematic land registration;
– drafting the new property registers;
– abandoning the old land registers, based on the directive issued by the Director of the National Cadastre and Land Registry Agency, which is made public in the Official Journal;
– the interested parties receive new land registry decrees and new land registry extracts;
– archiving the old land registry documents;
– minimum 90 days after and maximum 2 years before the opening of new land registers, public notaries issue certificates in favour of the possessors, which make it possible for them to be registered in land registers as owners.

In relation to the procedures set forth by the law, we can mention the following 'rough surfaces and splinters':

a) With regard to the presence and notification of owners and other interested parties: it is reasonable to require the presence of these parties at the scene because they know best where the parcels of land are situated, who the neighbours are, and where the land boundaries are. If the owner is not a local, the trip costs money, and the owner has to take a leave of absence from work.

b) Marking the boundaries of the local administrative district: it is well known that in Romania the borders of the local administrative districts (villages, towns, counties) have been determined based on Law no. 2/1968 – these markings are in effect today. The communist regime of those times did not take those borders into account at all; instead, they created other, discretionary markings. This way, it was possible for parcels of land to be moved to another administrative district even though in the past – from a tax and land registry standpoint – they always belonged to a different administrative district. After the ownership reform of 1990, never-ending disputes started between administrative districts regarding

the location of the border;[12] in most cases, these disputes could only be resolved through the final, binding decision of a court of law. This way, considering that the marking of the borders of the local administrative district is the precondition of implementing the National Programme for Land Registration and the Land Registry, in many cases, the fact that the border issues have not been resolved poses a serious threat to the implementation of land registry procedures.

c) Completing the succession procedures: successions need to be finalized through a succession procedure. If there are no legal disputes between the successors, the situation is resolved through a probate process in front of a notary public. *Per a contrario*, if there is a legal dispute, a court of law has to determine the successors and the quota each are entitled to from the estate. It is undisputed that in both cases the interested parties need to pay for the succession procedures; these cannot be free of charge because there is either the fee of a notary public that needs to be paid or the fee for dispensation of justice or the fee of an expert or of a lawyer. Moreover, a succession that is resolved through a court of law requires time, and this way land registry procedures get postponed.

d) Comparing the results of the measurements with data from the records of the land registration office, records of public institutions, and the private records of private entities and legal entities; posting and publicly announcing the results of the measurements; filing and resolving complaints that aim at correcting mistakes made in land registry documents or regarding the issue of ownership or possession – if there is any discrepancy between the measured land and the numbers present in the registers, these numbers need to be compensated either by adding or by subtracting. The unhappy owners can file a complaint at the Land Registry Office as an authority of first instance, and afterwards, if the owner is unhappy with the solution of the complaint, they can bring the matter before a court of law. The latter procedure is very time-consuming, and therefore it cannot be free of charge.

e) In matters regarding land that is located outside a built-up area, there is the possibility to register the possessor as the owner *ex officcio* within 3 years after the recording of the possession if a legal dispute is not recorded in the land register during the 3 years after the recording of the possession. In such cases, the legal provisions governing the statute of limitations are not applicable, the possessor acquires the property right by law upon expiry of the aforementioned period, and there is no need to follow any subsequent procedure or obtain any certificates.[13]

Moreover, the local government must attest that:

– the immovable property is not the object of public ownership and is not privately owned by the state or one of the state's administrative districts,
– the interested party possesses the immovable property as an owner.

12 For example: the dispute between Harghita and Neamț counties. Also, there are a number of border disputes in progress, and resolving these disputes requires a lot of time.

13 Art. 13 (7) of Land Law no. 18/1991.

f) In matters regarding land that is located inside the built-up area, the possessor can be noted in the land register as the owner, based on a certificate issued by a notary public. The procedure begins based on the directive issued by the National Cadastre and Land Registry Agency.

The following papers need to be attached to the petition:[14]

– an extract from the land register;
– an authentic statement from the interested party stating the following:
  i. the possessor is known to be the owner of the immovable;
  ii. if the possessor is married or not. If the answer is yes, the type of the matrimonial community of property must be mentioned;
  iii. the immovable property's title has not been transferred to someone else and/or encumbered;
  iv. the immovable property is in the civil circuit, is not the object of a dispute, and a document can be produced that attests the fact that the possession of the current possessor is not in dispute;
  v. the current possessor is the sole owner or a co-owner of the immovable property;
  vi. a document that attests the possession of the immovable property or a statement; in the absence of such, a document can be produced;
  vii. a document that attests the possession of the immovable property; if it exists, it is presented to the competent notary public;
  viii. a copy of the identity cards and of the birth certificate extract of the possessor is presented.

In our opinion, the possibility for *the possessor to be noted in the land register as the owner based on a certificate issued by a notary public* should be repealed as the procedure is patently unjust because it is only possible to transform someone's rights of possession into property rights – according to the provisions of the New Civil Code – through usucaption (acquisition by prescription). Moreover, in our opinion, it is unlawful not to apply the rules that govern prescription when the possessor is noted in the land register as the owner. How is it possible for the possessor to acquire ownership after 3 years – in accordance with the law – without having to go through any other procedure or acquire any certificates?

Due to the 'rough surfaces and splinters' mentioned above, it is not possible to carry out the systematic registration in the integrated cadastre and land register throughout the country by the year 2023. Moreover, we have serious reservations regarding the fact that the procedures are free of cost. The establishment of the land registration system and its functioning do not reckon with serious challenges, and its services are not yet able to comply with the expectation of them being free (?) of charge.

14 Art. 13 (8) of Land Law no. 18/1991.

In conclusion: we need legal and technical solutions that have been carefully thought out beforehand, are doable, and are not mere legal and technical norms, without substance to them. Legislators need to permanently strive to put land registry laws into practice.

Aside from the modernization of the technical conditions of land registers, there is also a need to review the applicable laws. There are a series of issues that have been raised that need to be regulated through laws.

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