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TEMPORALITY AND NOSTALGIA IN THE HERMENEUTIC LOGIC OF HISTORY

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Abstract: *This study analyzes essential epistemological and ontological aspects of history from the perspective of history hermeneutic logics. A special focus is set on the temporal problems of the logics of history, in particular, regarding interrelations among the moments of historical time, involving the representative and the reference, as well as the chronological core of the event and the text. The settlement of the temporal conflict between the time of an event, narration and perception appears possible using the analysis of time hermeneutic game techniques. The free movement of signs, which no longer represent any meaning, but merely reproduce historical gestures, is expressed in deconstructive logic of copies and simulacra. Within this philosophical context, the issue of nostalgia is related to the subjective experience of historical reflection. Nostalgia is regarded as a way of communicating with history by an interactive subject. The research findings show that currently the existence of mankind requires changes in its relations with the past, and a review of the cognitive methods applied to understand the past against the background of the fluctuating and dynamic horizon of senses in history.*

Keywords: *chronotopos (space-time), space of experience, eternal return, nostalgia.*

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Introduction

Philosophical approach ensures the development of history focused hermeneutic logic that, on the one hand, allows for fundamental contradictions in gnosiology, or general epistemology, in its reference to history, and on the other, considers purely technical issues of history understanding.

In that context, the hermeneutic logic of history offers special solutions for individual and collective, necessary and accidental, potential and real, cause and effect, similarity and difference, fact and facticity, sign and meaning, space and time. Epistemological and ontological issues under the philosophy of history can be mainly solved within the framework of the temporal logic, which systematically changes its priorities.

However, the hermeneutic logic of history is not limited to the temporal aspect, but it integrates various modi of history existence and its understanding, one of which is the practice of mental and spiritual co-experience of the past, eternal return, reflection on past events, simulation of the past reality, in other words, nostalgia. In postmodernity, nostalgia acts as the hermeneutic openness of the reference to the history horizon. The nostalgic experience of history understanding is always intimate and natural, as well as free from cultural stereotypes. The paradox of historical nostalgia in the 21st century consists in the fact that the guarantee of the historic event authenticity, or the purity of its meaning, is ensured by the continuous individual simulations of the past via historic narrative semiotic deconstruction.

In the practice of ontological understanding of historical time and the phenomenon of nostalgia it seems appropriate to apply hermeneutic, phenomenological, structural-semantic and deconstructive methods, which enables understanding of the past as a cognitive, spiritual, mental, social and communicative practice under the philosophy of history. This approach opens an opportunity to reveal the nature of space-time and nostalgia as a way of being for a conscious subject in the reality of history.

The technology of history interpretation cannot be considered ignoring the connection with the phenomenon of time. Contemporary hermeneutic logic is making an attempt to deconstruct historical time through structural dynamics of representative, semantic and other means. On the one hand, the rational deconstruction requires history interpreter's neutrality, while on the other, interpreter's inevitable emotionality and sentimentality entail addressing the subjective aspect of nostalgia and its meaning in the practice of history understanding.

Logical-philosophical approach to the concept of *time* was described by G.H. von Wright[1]. The ontological aspect of the historical time was represented in the existentialism by M. Heidegger[2], J.-P. Sartre[3], K. Jaspers[4], and was further developed in poststructuralism of G. Deleuze[5] and M. Blanchot[6]. Plot and story manipulations with time in historical narrative and the experience of imaginary time and space configuration in literary works were discussed within the philosophy of language by P. Ricoeur[7], J.-F. Lyotard[8], M. Bakhtin[9], and Yu. Lotman[10].

The regularities and principles of historical interpretations, the problem of history understanding were considered within the context of the hermeneutic logic by J.M. Chladenius[11]: in the first half of the eighteenth century he was the first to identify the very historical knowledge as the knowledge of individual things. Once, Russian scholars П. Shpet[12] and N. Kareev[13] pointed to the close connection between the meaning of history and semiotics. Sign structure formation in semiotics

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[1] Г.-Х. фон Вригт, *Логико-философские исследования* [Logico-philosophical studies]. Москва: Прогресс, 1986.

[2] М. Хайдеггер, *Время и бытие* [Time and being]. Москва: Республика, 1993.

[3] Ж.П. Сартр, *Проблемы метода* [Method problems]. Москва: Прогресс. 1993.

[4] К. Ясперс, 1994. *Смысл и назначение истории* [The Origin and Goal of History]. Москва: Республика, 1994.

[5] Ж. Делез, *Различие и повторение* [Difference and repetition]. Санкт-Петербург: Петрополис, 1998.

[6] М. Бланшо, *Опыт-предел. Танатография Эроса: Жорж Батай и французская мысль середины XX века* [Experience is the limit. Thanatography of Eros: Georges Bataille and French Thought in the Middle of the 20th Century]. Санкт-Петербург: Мифрил, 1994, 63–79.

[7] П. Рикёр, Конфигурация в вымышленном рассказе [Configuration in a fictional story]. *Время и рассказ: в 4 ч. Ч. 2*. Москва; Санкт-Петербург: Университетская книга, 2000.

[8] Ж.-Ф. Лиотар, *Состояние постмодерна*, 2009 [The Postmodern Condition]. Available at: https://gtmarket.ru/library/basis/3097.

[9] М.М. Бахтин, *Эстетика словесного творчества* [Aesthetics of verbal creativity]. Москва: Искусство, 1979.

[10] Ю. Лотман, *Структура художественного текста* [The structure of the literary text]. Available at:
https://www.gumer.info/bibliotek_Buks/Literat/Lotman/_14.php.

[11] Г.Г. Шпет, *Первый опыт логики исторических наук. (К истории рационализма XVIII века)* [The first experience of the logic of historical sciences. (On the history of rationalism of the eighteenth century)] Вопросы философии и психологии. Москва, 1915. С. 378–438.

[12] Г.Г. Шпет, *История как проблема логики: Критические и методологические. Исследования*. Ч. 1: Материалы [History as a problem of logic: Critical and methodological. Research. Part 1: Materials]. Москва, 1916.

[13] Н.И. Кареев, *Историка: Теория исторического знания* [History: The Theory of Historical Knowledge]. Петроград: Типография М. М. Стасюлевича, 1916.

opened the way to structuring historical concepts. The comprehensive view of the history of hermeneutic logic development was suggested by Ye. Yurkevych et al.[14], when they discussed hermeneutic logic as a kind of informal logic within the context of the Western history of philosophy and philosophical hermeneutics of Aristotle, A. Augustinus, J. Chladenius, W. Dilthey[15], G. Shpet[16], H. Gadamer[17].

In this research, being further developed in line with the ontological concepts of G. Deleuze[18], Ye. Makovetsky[19], hermeneutic logic by S. Gusev[20], and also hermeneutic phenomenology by G. Shpet[21], the process of nostalgia is regarded as the concept of the philosophy of history, the phenomenon of subjective and public awareness and conscience, the way of the conscious subject, subject openness to the past within the semantic discourse of history.

Following the ontological model offered by G. Deleuze, Ye. Makovetsky[22] built a methodology of structuring chronological rhythms in social history. The scholar attends to the phenomenon of time in its simulative and subjective modi. According to Ye. Makovetsky, metamorphoses of the lost reality occur within the space of thinking, meeting the principle of dynamics and deconstruction, and thus leading from external paradox to the internal action – experiencing the rhythm of life. In its turn, the philosophical approach suggested by G. Deleuze[23] enables to consider the world of nostalgia as a world of simulated things, which is given to people via continuous repetitions / eternal return.

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[14] O.M. Yurkevych, Zh.O. Pavlenko, V.A. Trofymenko, *History of the Development of Hermeneutic Logic*. Revista Notas Históricas y Geográficas, 2021, Núm. 26, pp. 1–28.

[15] В. Дільтей, *Виникнення герменевтики* [The Rise of Hermeneutics]. Філософська і соціологічна думка, 1996, 3-4, С. 167–195.

[16] Г.Г. Шпет, *История как проблема логики: Критические и методологические. Исследования*. Ч. 1: Материалы [History as a problem of logic: Critical and methodological. Research. Part 1: Materials]…

[17] Х.-Г. Гадамер, *Истина и метод: Основы философской герменевтики* [Truth and Method: Fundamentals of Philosophical Hermeneutics]. Москва: Прогресс, 1988.

[18] Ж. Делёз, *Логика смысла* [The Logic of Sense]. Москва: «Раритет»; Екатеринбург: «Деловая книга», 1998.

[19] Е.А. Маковецкий, *Социальная аналитика ритма: Жиль Делёз, или О спасении* [Social Analytics of Rhythm: Gilles Deleuze, or On Salvation]. Санкт-Петербург: Издательство Санкт-Петербургского университета, 2004.

[20] С.С. Гусев, *Смыслы возможного: Коннотационная семантика* [Meanings of the Possible: Connotational Semantics]. Санкт-Петербург: Алетейя, 2002.

[21] Г.Г. Шпет, *Явление и смысл (Феноменология как основная наука и её проблемы)* [Phenomenon and meaning (Phenomenology as a basic science and its problems)]. Томск, 1996. Переиздание Монографии 1914 года.

[22] Е.А. Маковецкий, *op. cit*.

[23] Ж. Делёз, *Различие и повторение* [Difference and repetition]…

This study also regards the hermeneutic logic of nostalgia, engaging the theory of logical semantics and the logic of potential worlds, the principles of which were scrupulously analyzed by S. Gusev[24].

Space-time in a historical story and historical experience

In the eighteenth century, both scholastic and rational logic of history focused on the problem of individual and universal experience. Following G. Shpet[25], we will draw from the analysis of experience definition, given by Ch. von Wolff; which says that experience is what we learn, when we address our perception. According to the content of this definition, attention just turns our perception into experience. In fact, the role of attention is limited to the fact that we achieve more clarity of perception or single out a particular notion from the integrated image. Therefore, experience is inherently the general situation, consisting of several similar or even a single perception. Accordingly, G. Shpet, who developed the logic of historical knowledge in the early twentieth century, came to the following conclusion. Firstly, the person who refers to experience, must have at least one case or one perception, which would lead thereto. Secondly, this perception is not the very experience, but merely the foundation for it. Thirdly, mere attention to perception does not yet express experience.

In case of learning historical experience the process is complicated by the fact that the event, ensuring the possibility of experience is in itself unattainable in the real life and existence modus. Therewith, it is still evident that the way, leading to experience, goes through the perception (since the experience is based on perception). That way, the problem of history experience is transferred to the realm of its *perception technology*. There are grounds to believe that to master historical experience it was necessary to carry out certain experiments with perception, which would allow this experience to be manifested again, though completely different, individual version, which would enable to find the corporeality of history. The development of these experimental perception techniques actually serve as the contemporary technologies of information reproduction, developing a special ability of subjective perception. Overall, the history of the Modern age hermeneutics involved two prominent and influential theories of the logic of historical knowledge: historical induction by

[24] С.С. Гусев, *Смыслы возможного: Коннотационная семантика* [Meanings of the Possible: Connotational Semantics]...

[25] Г.Г. Шпет, *История как проблема логики: Критические и методологические. Исследования*. Ч. 1: Материалы [History as a problem of logic: Critical and methodological. Research. Part 1: Materials]..., p. 269.

J. M. Chladenius (the logic of objective history) [26] and psychological interpretation by W. Dilthey (the logic of subjective life history)[27].

According to W. Dilthey (XIX c.), subjective feelings may not be evaluated based on formal and logical the truth and lie values, but they have the meaning of being true or false. The logic of understanding an individual life was a sort of induction, relying on the interpretation specific feelings as subjective experience facts that can be correlated by analogy and serve as the basis to transit to the holistic understanding of the world. The non-linear transition from assumptions to findings, conclusion (in other words, understanding) is determined by the outstanding irrational nature of the unconscious, which was defined by W. Dilthey as human residue, affecting the spirit of history evolution on the whole. The probability nature of the conclusion is determined by the subjective reliability of individual experience. W. Dilthey pointed to the close connection between the hermeneutics development and history methodology[28].

G.H. von Wright singled out two perspectives regarding the object of the logic of time. The first focuses on the chronological sequence of events. It sets the following questions: is the temporal order linear or only transitive, perhaps, branching in different directions or even circular, repeatedly returning to the home position? The other perspective of time suggested by the logician is related to what G.H. von Wright called "the nature of temporal substance" [29]. Therefore, the potentially arising problems include: whether the time is discrete or endlessly divisible and, if the latter is true, then whether it is compact and dense and, perhaps, continuous? In any case, time undergoes the most operative mobilization, deployment or compression (its structure, temporal intervals) within the textual realm. The logic of time in terms of recording and perceiving history deals mainly with macro-aspects and temporal issues.

The significant contribution to the development of history logic was once made by G.V.F. Hegel[30]. Many principles of his dialectal logic are still meaningful for understanding non-linear history. That way, following

[26] Г.Г. Шпет, *Первый опыт логики исторических наук. (К истории рационализма XVIII века)* [The first experience of the logic of historical sciences. (On the history of rationalism of the eighteenth century)] …

[27] В. Дильтей, Введение в науки о духе. *Зарубежная эстетика и теория литературы XIX-XX веков* [Introduction to the Human Sciences. Foreign aesthetics and theory of literature of the XIX-XX centuries]. Москва: Мысль, 1987, С. 108–135.

[28] В. Дільтей, *Виникнення герменевтики* [The Rise of Hermeneutics]…

[29] Г.-Х. фон Вригт, *op. cit*. pp. 515-519.

[30] Г.В.Ф. Гегель, *Философия истории*: в 14 т. [Philosophy of history: in 14 volumes.] Москва; Ленинград: Государственное издательство политической литературы, 1935, Т. 8, с. 6-19.

Hegel's reasoning about the meaning of history, represented by the idea of the all-embracing spirit, looking back at the past, no matter how great it is, we still deal with the present only, because the past is still true. For philosophy, the past is not lost; the spirit is eternal whereas its current existing form includes all the previous stages. Being the manifestation of this spirit, history comprises individual stages, which developed sequentially, one after another, yet it has always been within itself what it is. In this sense, history knowledge is a kind of *the energy form of existence* – being-in-itself – self-consciousness, in other words, understanding ourselves discovering through ourselves the unlimited and eternal commonality – the actual *depth of spirit*, mentioned by G. V. F. Hegel. This *depth* contains all those elements left behind.

Classical history, as a science, assumes history process objectivity. It studies regularities, but not individual facts, stands for the idea of historical unity, and performs historical development forecasting. In this case, instead of being potential, history becomes something regular and due. Therefore, G. Shpet was against historical universalism, as Ye. Yurkevych noted[31].

Observations show that one and the same statement may be true or false, since its actual meaning changes depending on space and time localization of the event. However, it is not space-time that makes the true value change, but the differences between various parts of the world and changes within the same part thereof. In view of the above, G.H. von Wright came to the conclusion that there are tight connections between time, change (meaning, interpreter's position) and contradiction[32]. These connections are manifested as follows: if there was no time, an assumption of change would lead the assumption of contradiction.

Speaking metaphorically, time is the removal from semantic contradictions. Consequently, textual manipulations with time also naturally reflect on the semantic content of the texts and affect the lift of contradictions and paradoxes. Thus, double, or mutual, dependency of the time and change is expressed. Time implies changes epistemologically, while semantic changes imply time logically. It is also possible to state that the change precedes time epistemologically[33]. The so called perception of time is in fact the perception of things. This way, the change in the way of thing existence inevitably entails the change in the way of its perception and the perception of time. The latter here falls into the time of a historical act, the act of narration and the very act of perception of the historical

[31] O.M. Yurkevych, Zh.O. Pavlenko, V.A. Trofymenko, *History of the Development* ..., c. 23.

[32] Г.-Х. фон Вригт, *op. cit.* pp. 527-528.

[33] Г.-Х. фон Вригт, *op. cit.* pp. 529.

narration. This is the right way to understand Kant's idea, followed and developed by G.H. von Wrightом that the time is the form of learning about phenomena, which, in its turn, implies that it is tightly related to the way of their representation.

In the late 1930s, M. Bakhtin, who attended to the forms of time and chronotopos in the fiction genre of the novel and entitled his research as sketches on historical poetics, indicated relative youth, freshness and further prospects for the development of the studies on the forms of time and space in literature[34].

About half a century later, P. Ricoeur[35], in his work entitled "Time and Narrative" challenged the narrative model of time, marked by him as mimesis, in different areas of the narrative field – a historical narrative, imaginary narrative (fiction) and a philosophical work[36]. P. Ricoeur's aim was to substantiate the unity of the human culture. In the final part of his work on the narrated time, the scholar unites all three pieces of evidence, provided by phenomenology, history and literature, on the ability of the narration to *refigure time*. The intrigue is manifested in the act that configures the time. Meanwhile, the sought corporeality of history, or what Z. Kracauer[37] called the *redemption physical reality* in photography and cinema arts, is expressed in the endless process of building dynamic, collage, plain structures, which minimize in their space unity semantic, value, epistemological and chronological priorities of their components.

Accordingly, if the relation between the time of narration and the narrated time can be called, after P. Ricoeur, "a game with time", then, as he shows himself, the stake in this game is the experience of time[38]. The task of morphology is to single out the correspondence between quantitative relations between time and the relations of time quality, associated with life. It is the real life time that is co-determined by the tension of relations between the two times of narration (narration and narrative perception), and also the *law of form* determined by them. The contemporary experimenting in the field of narrative techniques involves the experience of time. It is to be mentioned though that in this experimentation the very

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[34] М.М. Бахтин, *Творчество Ф. Рабле и народная культура средневековья и Ренессанса* [The work of F. Rabelais and the folk culture of the Middle Ages and the Renaissance]. Москва: Художественная литература, 1990.

[35] П. Рикёр, *op. cit.*

[36] В.А. Подорога, Мимезис [Mimesis]. *Новая философская энциклопедия: в 4 т*омах. *РАН. Ин-т философии*. Москва: Мысль, 2000. Т. 1. С. 571–573.

[37] З. Кракауэр, *Природа фильма. Реабилитация физической реальности* [The nature of the film. Rehabilitation of physical reality]. Available at:

https://royallib.com/read/krakauer_zigfrid/priroda_filma_reabilitatsiya_fizicheskoy_realnosti.html#0.

[38] П. Рикёр, *op. cit.* p. 88.

game transforms into the stake. Yet it is obvious that the polarity of experiencing historical time and the time of perceiving the narrative framework may not be eliminated.

The *lost in perception* is actually that core of the event that changes our attitude to the very act of perception. The aim of perception is to find the unattainable, because it will actually be the historic event. The categories of reason kill it, providing us with a dummy of a historic event, created by analogy. There emerges the problem of perceiving the *gesture* of history not only via the ability to think. According to V. Podoroga[39], the field of provisionally found meaning ceases to exist, and we get into the interval of the "neutral time", the place where we do not perceive but are perceived. This empty time interval cannot refer to the past or to the future, or even to the present, since we find ourselves in the "between-time" of the event.

The event always occupies present, and we must understand it without transitional moments of the present, past and future. There is no present time as chronological, if it is *occupied* by the event. In other words, in the spaces where it exists and manifests itself autonomously from other times, it turns out to be suspended time, and thus it appears as if it were no-time, or between-time. Consequently, in order to perceive the event, we must *stop* the moment of the present at a certain point and make it something that is not in time – the ideal point of the present time, where all the points of the past and future must perfectly co-exist. "No-time-in-time will be the event", according to V. Podoroga[40]. That way, the *co-existence* is the condition of being, where any observer becomes different as long as it lasts, and while it lasts, it keeps evolving in another dimension – in terms of understanding, acquiring and accepting the event.

The disharmony is due to the habit of measuring history using physical time, which closes, limits, counts and encircles it in experience. Meanwhile, the time of global history is to a certain extent supra-historical. In this regard, G. Deleuze identifies "three syntheses of time"[41]. He finds the past cramped between two present times – the one, which was and the other towards which it was the past. Considering the present itself, it is open to the future, expects it thus creating the common time of the present and future. The initial synthesis of time, establishing life of the *passing* present is a ***habit*.** The main synthesis of time, establishing the existence of the past (something that makes the present transient) is *memory*. To the

[39] В.А. Подорога, *op. cit.*, pp. 571–573.

[40] В. Подорога, Навязчивость взгляда: М. Фуко и живопись. *Фуко М. Это не трубка* [Obsession of the eye: M. Foucault and painting. *Foucault M. This is not a pipe*]. Москва: Художественный журнал, 1998, с. 130.

[41] Ж. Делез, *Различие и повторение* [Difference and repetition]....

degree that the past can overall be considered an element that can be focused on each past present that it keeps, this past appears represented in the *actual*. In general, following G. Deleuze, the synthesis of time has two correlated, though non-symmetrical aspects: reproduction and reflection, recollection and recognition, memory and understanding. At the same time, the reflection includes something bigger than reproduction, but this bigger is only an *additional dimension* (topos), where any present is reflected as the actual, along with representing the past[42].

A number of beliefs have been established about time, namely, about its balance, direction, irreversibility, inevitability, countability, absorption power, permeability or capacity. The data, characterizing its properties, naturally prompt an attempt of a similar topographic view of time, which is possible, especially if we name it *chronotopos***,** which means *time-space*. The freedom of our suggestion is in the fact that time acts not as a dimension of the space, but as the space itself – a specific transcendent power field entitled a "pseudo-space" (or pseudo-sphere) owing to its own property of having volume: time inevitably embraces facticity events, and, moreover, affects them with its own dynamics. Therefore, it is possible to speak about the spatial nature of time – *time-space*, along with the *spatial nature* of the factual history – *the space of experience*, from the phenomenological perspective. To that end, every historic fragment is dualistic in its simultaneous belonging to the time-space and the space of experience, and also includes their properties, as an integral element of the system.

A human acts as a multidimensional agent, representative and recipient of history that both experiences and understands it. At the same time, an indifferent historian-positivist, who strives for autonomy and mythologism, is to be replaced with an active self-identical historian-deconstructivist, who builds new abstract time images. The deconstructive interpreter is in a special, third (after time-space and experience space) dimension of differentiation, or *between-space* – the only realm that enables to reflect on the borderline character of history and its back side. Therewith, the interim position of the de-interpreter, being in the historical disruption, ensures its *openness* to the other, *compassion* in another individual destiny. This *inter-space* allows for the internal exchange of mutual immanent presence of agents between the past and the present.

The authority of the historian-writer most frequently sets the dominant meanings and values to historic events (which differs history from the natural science). The text acts as a social element. However, a historian performs the function of a mediator between the recipient and the long past reality, without a strict code of rules and obligations. The

[42] Ж. Делез, *op. cit.*, p. 106-109.

historian creates voluntarily ideal forms of expressing reality in narration, and these forms are absolutely subjective. At its best, history that is written today may seek the correspondence to the contemporary political situation, and also the feedback to the sentimental interest, moral and ethical search of individuals. The significance of history in the human consciousness is always supported by irrational, informal and often psychoemotional factors, one of which is *nostalgia* as a feeling and special path of intellectual-and-will efforts.

Nostalgic experience as an individual hermeneutic practice of history understanding

Nostalgic experience is one of the phenomenological practices of human consciousness. Nevertheless, philosophy has not yet revealed ontological, or rather de-ontological, meaning of this concept. The theoretical relevance of nostalgic experience is confirmed by the increasing attention to the nature of *potential*, since it is within its semiotics that the nostalgic experience is regarded as a form of *potential* existence for a subject, being outside their here-and-now. Furthermore, the nostalgic experience, considered within the paradigm of social being, despite its conventional romantic understanding (deepening, establishing), demonstrates its new meaning via deconstructivism – the eternal return of Self-past simulation (sliding on the surface). It activates the meaning of the nostalgic experience as a way of subject's interiorization (going beyond their limits), the way of their intercultural communication.

Nostalgic experience has a quite clear and stable meaning with its ethical, lyrical and psychological connotation – it is a deeply emotional reflexive activity, correlated in human mind to the moral and ethical justification and redemption. Nostalgic experience is manifested in numerous areas of individual and social practice: in arts, science, history, philosophy, religion, ideology, social and everyday domains (public views, journalism, politics, fashion etc.). Nostalgic experience is the temptation to go back in time in the reserved hopelessness and doom of further existence; however, from the rational-positive perspective, nostalgic experience may be characterized as the awareness of the priority of the past and hopelessness of the present.

Grasping this or that social phenomenon is facilitated not only by the order of the space-and-time continuum, where this phenomenon exists, but rather by a special internal condition of the interiorizing subject, his or her focus on the past, the comparative-analytical principle of reality assessment. Nostalgic experience sets its specific own hermeneutic logic of historic reality understanding.

Regarding the chronology of rhythm within framework of social philosophy, Russian philosopher Ye. Makovetsky attends to the problem of nostalgia and the subjective perception of time[43]. All things existent pulse with paradoxes. The thought follows all existing things, the thought throws a shadow – something that is called a metamorphosis, loose and non-definable, flexible and appearing, an endless multitude of expressions. It is an opportunity to transit from dynamics to statics without any fear to miss the pulse of meaning and the rhythm, of life. The shadow thrown by the thought is a metamorphosis of the sliding existence – continuous nostalgia about it. According to Ye. Makovetsky, in statics, the effect, caused by the thought that follows the paradox, looks like a shadow, and then like what actually throws it. The way from the dynamics of paradox to the light-and-shade statics is the way from the universal thought to individuality of the internal action[44]. The metamorphosis was taken by Ye. Makovetsky either, as a deconstructive Deleuze's method, or as the condition of everything existent (the thought), different from both chaos and order, and held together by the rhythm only.

The metamorphosis is inherent in the surface. The very surface opposes the expression of the existent: this is the basis of Deleuze's logic of meaning. "The meaning is not what can be revealed, restored or processed; it is what is produced by the new machinery. It does not belong to the height or depth, but rather to the surface, which is, in fact, its own dimension"[45]. G. Deleuze also mentions the surface of the first order – sexual, and the surface of the second order – metaphysical[46]. The latter is the surface of the thought. It is on this surface that the metamorphosis of nostalgic experience deploys about things that were lost and the assumption of the immaterial. The application of the deconstructivist methods to nostalgic experience understanding enables to understand the way surface parables renew, or rather provoke self-expression or lost implications.

Pursuant to the principle of world understanding duality stated by G. Deleuze, we find the place of nostalgia in one of these worlds. The first world is the world, given by ideas and copies, the world as an icon; the other world is the world of simulacra[47]. The nostalgic world is the existence of simulated things. Nostalgia itself is determined by acute seeking repetitions. In his work "Différence et Répétition", G. Deleuze pointed out three forms of repetitions: the first one is the repetition caused by

[43] Е.А. Маковецкий, *op. cit.*

[44] Е.А. Маковецкий, *op. cit.*, p. 9.

[45] Ж. Делёз, *Логика смысла* [The Logic of Sense]..., p. 105.

[46] Ж. Делёз, *op. cit.*, p. 287.

[47] Ж. Делёз, *op. cit.*, pp. 329-341.

ignorance or inability to recall, the lack – it is negative; the second form stands for the repetition in the process of establishment-development, similar to the dialectic repetition of the content at different stages of form evolution; and, finally, the third form is the repetition in the eternal return[48]. It is the latter form of repetition that is adequate to the phenomenon of nostalgic experience.

The eternal return states the difference, that is the simulacrum. Only those things that are simulated and unsupported can be saved by eternal returning. The simulacrum is the material life of the meaning in the modus of eternal ideas and changeable things. Following Ye. Makovetsky, ontologically, the simulacrum is ensured by the *non-reliability* of the simulated thing. It is both deal and alive, it is *right* and *wrong*, a thing and a non-thing at the same time[49]. The content of nostalgia is a simulacrum, the metamorphosis of the thought static surface. It is the nostalgic repetition that opens a way to the eternal return. It is a return to the conscious, known, desired, expected, the return that does not lead to the development and does not create anything new. Nostalgic experience is the return for the return itself, a pure return. It does not aim at the result, but at a kind of the effect of another being, the illusion of the depth on the flat surface of thought. There it can be felt and sensed during spiritual practices of loss reflection.

It will be appropriate to regard nostalgia as a way of being, a special way of thinking, where the logic is deontological. The deontological logic is the logic of what is not real, or lost – the logic of going beyond the existence. Although nostalgic experience is recognized as the eternal return, accompanied by the effect of the agent's another being in the reality of the past, it is still the simulativity of nostalgic images and the obvious absence of copies and precedent things that actually confirms the here-being of the nostalgic agent. The nostalgic agent, as is, experiencing the metamorphosis of the sliding existent things is ontological in essence. In its turn, the very nature of the nostalgia content and the agent's logic are deontological. The nostalgic experience is a way of the subject's being here and now, whereas his or her consciousness is in the past. This way is sophisticated, complicated with emotional sadness and the fear of actual events reality.

Hermeneutics considers nostalgic experience as the understanding being. Understanding and interpretation are the methods and technology of acquisition, acting as the subject matter of hermeneutic studies. Nostalgic experience is rather an intellectual-spiritual practice, directed on the interpretation of the experience at the level of psychological

[48] Ж. Делез, *Различие и повторение* [Difference and repetition]..., p. 354-357.
[49] Е.А. Маковецкий, *op. cit.*, p. 15.

amorousness and moral hope for redemption. The point here is about the interpretation of both individual and social spiritual experience, in the latter case, it is the level of the social nostalgia. Hermeneutic technologies are applied to the text that can be of varied nature. The very understanding nostalgic experience determines the nature of the text, preferring empirical to the symbolic. Ontologically, it matches the understanding nostalgic experience with the "action-historic consciousness" suggested by H. Gadamer[50]. The latter fact, in turn, means the involvement of our actual being in history via the awareness of the precedent spiritual experience, thus ensuring the vitality of the existing condition and cultural continuity.

In addition to the image of the interpreter, the text includes the image of the recipient, the type of a certain audience. This *image of the audience*, implied in the text, may be reconstructed through defining the nature of the collective memory as a set of certain stereotypical meanings, necessary to understand the text. According to Ye. Yurkevych, the text is a communicative model, united by the idea of understanding[51]. The idea of dialogue hermeneutics provides us with an opportunity to return to historic experience, but not to the isolated experience of the individual *self*, suspended in the neutral medium, but to the live communication experience. similarly to the text, the human *self* is subject to interpretation. In the nostalgic experience *self* challenges its limits and freedom, correlates its content to other *selves*, thus bringing new meanings, broadening the horizon of consciousness. According to G. Shpet, who singled out *Self* empirical and phenomenological (eidetic), the human *self* undergoes self-interpretation and self-understanding[52]. The individual self-understanding, that is the acquisition of the meaning of oneself, occurs in the process of genetic understanding by the person of his or her own causality and the willingness to reverse, to return, to the their *self*, or, rather, to their eternal and unsuccessful search.

Additionally, self-understanding involves repeated addressing not only to personal, but also to the social experience, shaping the subject. Due to the fact that consciousness acts as a *collective subject* (term by G. Shpet), related to the co-knowledge, co-involvement and co-participation, the past social medium, climate and stereotypes attract us much stronger, than *Self,* by itself. In the nostalgic experience, the past makes a loop

[50] Х.-Г. Гадамер, *Истина и метод: Основы философской герменевтики* [Truth and Method: Fundamentals of Philosophical Hermeneutics]..., p. 192.

[51] Е.Н. Юркевич, *Герменевтические идеи в восточнославянской философской традиции* [Hermeneutic Ideas in the East Slavic Philosophical Tradition]. Харьков: Издательство ХНУ им. В. Н. Каразина, 2002р. 207.

[52] Г.Г. Шпет, *Явление и смысл (Феноменология как основная наука и её проблемы)* [Phenomenon and meaning (Phenomenology as a basic science and its problems)]..., p. 35-40.

around itself, entailing person's dissatisfaction with him or herself and the simulation of hope. In this respect, the very *Self*, as the unity of the multitude of other *unities of consciousness*, is the collective and assembly. "Such concepts as "my motherland", "my moral consciousness", "my freedom", "my right", "my political beliefs" or "my service", doe not only indicate to myself as the *owner*, noted G. Shpet, "but they actually bring the idea of my participation in the collective relations"[53]. Following the understanding of consciousness as social, collective, it seems to be acceptable to single out kinds of nostalgia experience depending on its subject – individual and collective. On the other hand, it is possible to specify its qualitative varieties depending on the specific social effects – the dividing and uniting nostalgic experience, respectively. The latter is typical of the collective experience and the types of collective consciousness of the social subject.

We will define the logic of nostalgic experience as deontological, that is correlating the meanings of the actual and desired. In this case, it is appropriate to consider it theoretically within the framework of the logic of potential worlds (Ye. Sidorenko[54]; S. Gusev[55]). The simulation of logical-hermeneutic semantic structures is overall semiotic, while the opportunity to establish the logic meaning is ensured by the use of the logic of potential worlds, which coordinates the meanings of the text and contexts, text and hypertext[56].

That way, the Russian theoretician S. Gusev introduced the concept of the *absent* reality into the semiotic discourse and landscape, where each fragment of this reality features the modality of potential and possible. The *absent* reality is manifested in the present and in the future, and equally influences the interaction between the person and the world, his or her ontological status of *here* and *now*[57]. The present, where the person always exists, is expressed as a simultaneous projection of the future and the past. Whatever, the individual deals with, everything keeps the traces of something absent here and now. The real world is the totality of multiple traces of the absent. The trace, according to S. Gusev, is simultaneously the *presence of the absent*, the sign, by which people learn about the existence of something that is obviously not given in the actual perception[58]. The

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[53] Г.Г. Шпет, Сознание и его собственник. *Шпет Г. Г. Философские этюды* [Consciousness and its owner. Shpet G. G. Philosophical studies]. Москва: Прогресс, 1994, p. 108-110.

[54] Е.А. Сидоренко, *Логика. Парадоксы. Возможные миры* [Logics. Paradoxes. Possible worlds]. Москва: Эдиториал УРСС, 2002.

[55] С.С. Гусев, *op. cit.*

[56] O.M. Yurkevych, Zh.O. Pavlenko, V.A. Trofymenko, *op. cit.*, pp. 23- 25.

[57] С.С. Гусев, *op. cit.*

[58] С.С. Гусев, *op. cit.*, p. 249.

meaning of many ancient statements is frequently revealed within the context of actions taken by further generations. It happens due to the result of the development and realization of some potential ideas that existed in the past as a possibility and then transformed into the reality in new conditions.

Being focused on the *absent* reality of the future, but not the past, the person faces the situation of choice. This situation is always, in effect, related to a certain hierarchy of initial elements (options), which implies person's assessment of one of these elements as potential. Another situation appears where the received result significantly differs from the expected one. The detection of this situation determines the transition to other opportunities, kept in the stock. It is to be mentioned that every form of the specifically represented reality somehow contradicts the *absent*, i.e. the *potential,* and at the same time it generates the aspiration for one's *other*. What *is there* is not identical to what *could be*. What *will be* is the destruction of what *is*. The future is present in the present as a range of *expectations*[59]. Nonetheless, the nostalgic experience shows that the past is also manifested in the present as the opposite range of *expectations*. In this respect, the reality is never stable and complete. The continuous inversion of the *presence* and *absence* is usually not obvious. However, it is clearly seen in the symbolic being of humans in their creativity, arts and philosophy.

When the object, targeted by the rational-cognitive interest, mental sympathy and human imagination, is the future, then the creation of *potential worlds*, the operation of imaginary objects and processes broadens human experience and prepares for new practices. The preliminary theoretical introduction with the variety of opportunities, concealed in the environment, ensures the indirect later of meanings and senses, which prepares human consciousness for the inevitable changes[60] Otherwise, the inability or unwillingness to adapt, according to many futurologists and analysts, can threaten (or, in any case, considerably complicate) the existence of mankind in new life conditions.

It seems to be significant that nostalgic experience, regarded as a way of being, despite the reverse vector of interest (towards the past), still encourages subject's sociocultural adaptation. On the contrary, nostalgic images, acting as a quite valuable form of the *potential*, enable the subject to free from illusions regarding the future and confirm the sound awareness of the current opportunities and aspirations. Yet the irrational nature of nostalgia is evident. The nostalgic image of thinking does not feature causality and pragmatism. The nature of nostalgia is metaphorical,

[59] С.С. Гусев, *op. cit*., p. 259-261.
[60] С.С. Гусев, *op. cit*., p. 288.

focused on well-known, deeply-rooted meanings and symbols. The *recollection* of their meaning leads the nostalgic subject to the realm of the past. It allows us to speak about the psychological nature of nostalgia.

Being as kind of mental-hermeneutic practice, nostalgic experience is the change in the way of being of the very subject as a method of *Self* sensing in the world. *Self* finds its own belonging to the new semantic space, opening the *Self* to the context (or the world). These metamorphoses occur to the nostalgic subject within the landscape of hermeneutics and phenomenology. For instance, in the aspect of their approach to G. Shpet the concept of hermeneutic phenomenology was established[61]. It seems to be reasonable to accept Shpet's *Self* distinction as the direct consciousness – *Self*-phenomenon (phenomenological approach to consciousness), and the experience of feelings – *Self*-empirical (functional or intentional approach to consciousness)[62].

Conclusions

Therefore, the following conclusions can be made under the conveyed study. The significance of the temporal factor in history interpretation is evident. It is confirmed by the fact that even if the interpretation of history is not regarded as a way of being (at the ontological level), the hermeneutic practice and deconstruction of the historical chronotopos can still affect the ontology of history, and thus require thorough logical research and substantiation of interpretational manipulations with reality of historical meanings. Going beyond philosophical-historical hermeneutics towards the area of ontology is expressed not only when addressing to the temporal problems, but also in the linguistic space of semantic play: through the philosophy of language, logical semantics and phenomenology the irrational dimension of potential worlds is detected, which is the new facticity of history.

The hermeneutic logic itself focuses on the language or verbal, consciousness, which opens the prospects of understanding, in particular, the history from the perspective of logic of speech acts and the philosophy of language. Using language patterns, hermeneutic logic can build a dynamic expressive model of history, which does not provide stable meanings, but ensures their generation, self-reproduction and opening of probable truths as a result of the collision of numerous counter-facts beyond the whole experience of living thorough the historic time.

It is also possible to conclude the deontological nature of nostalgic

[61] Г.Г. Шпет, *Явление и смысл (Феноменология как основная наука и её проблемы)* [Phenomenon and meaning (Phenomenology as a basic science and its problems)]....

[62] Г.Г. Шпет, *op. cit.*, p. 35.

reality, which acts in the modus of potential not as a dead archaism, but as a communicative reality, given in the eternal return. Retreating from the positivist principle of retrospective interpretation of the past, the experience of nostalgic experience shows the irrational moment of our understanding, the intimate image of history – what relies only on the significance of the immediate and unique own human existentiality. The nostalgia practice as the loss reflection opens to the subject the new horizons of social and individual meanings, which enables to speak about it as an intercultural discourse.

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THE KALEIDOSCOPE OF THE IMAGE OF EUROPE IN THE ROMANIAN COLLECTIVE MIND

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Abstract: *The process of "Europeanization of Romania" is, in fact, the process of its modernization, because we have been European since the beginning of our history. We consider three moments to be defining in this sense: Romanization from the beginning of our era, contact with revolutionary ideas from the middle of the 19th century and the contemporary period. From the beginning until today, Europe as a model of civilization has benefited from a multitude of images in the Romanian collective mind. A few, positive and negative, we try to decipher on this occasion.*

Keywords: *history, collective imaginary, Europe, modernization, Europeanness.*

Argument

At a quick evaluation of the three moments that shaped both the history and the being of the Romanian people - the Romanian colonization, the creation of the unitary national state and the transition to capitalism - we can easily state that reporting to the Western-European model meant reporting from the bottom up, from the perspective of the level of organization or modernization at which the two entities were. For this reason, Europe or the West acquired an idealized image in the Romanian collective mind, of an objective or "spiritual pole" towards which we must aim, of a civilization next to which we must sit. “It expresses original values, creations and ideological tendencies; a new culture and literature; new and advanced political-social institutions; achieving a high level of progress, culture and civilization."[1]

This is, perhaps, the reason why Romania manages over the course of a year, as we will see, to offer the most consistent model of Europeanness, in three extraordinary poses, making us affirm at the time that we have "3 reasons why we can be proud of Romania", from the perspective of the pro-European and the self-declared Europeanist at every opportunity. We dedicate a substantial part of our present paper to this pro-European attitude.

We dedicate another segment to "Romanian psychoses regarding Europe", seeking to refer, of course, to those beliefs (held sometimes with

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[1] A. Marino, *Discovery of Europe*, Aius Print Publishing House, Craiova, 2006.

interest) that place the European Union and the West in a disadvantageous, gloomy and even negative light. Recorded on various social, professional, cultural levels, identifiable as well, they constitute a certain chorus in the public space, made up of voices of proper names with positions that are often explainable, although often anachronistic. Democracy, however, would not be as rich and attractive without this critical, negationist and often vitriolic choir, especially since it is one of the values on which the European Union itself is constituted.[2]

The conclusions of this paper, which we assume from the perspective of the didactician and researcher of the European studies area, will try to offer an up-to-date picture of the "Idea of Europe" in the whole set of beliefs, myths, convictions, assumptions and even "Romanian psychoses".

Soulfully close to Europe, organically placed at the twinning of Europe with the East, living peripheral neurotics of this continent, we remain European in ideals and even in the way of being, especially from an external perspective.

Planting seeds in the soil of modernization – Europeanization

We probably weren't ready, but who would be? Who would have had the necessary authority in those moments? Perhaps the political "emanated" leaders? They were too concerned with maintaining power. Perhaps the intellectual elite? It did not break through in the demagoguery, populisms, manipulations and disorder of that time. Maybe the representatives of the historical parties? A “miners' revolt” was created for them...

It is certain that the ideals and idealizations of freedom quickly turned into cruel daily realities. Such a complex, difficult, extensive process quickly showed its fangs. "With noise and joy, with laughter and with tears, under the television projectors of the whole world, the peoples of the East sincerely believed that by giving up the communist activists they would enter directly into the society of abundance. They didn't know they were getting into self-robbing."[3]

In the Romanian collective mind, moreover, the first culprits of the post-December evolution are the Romanians themselves, first in the case of the disappearance of the former collective agricultural enterprises, later due to corruption and the inability to keep the former industrial

[2] See art. 2 of the Treaty on the European Union. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF;

[3] Claude Karnoouk, *Communist / Post-communism and late modernity*, Polirom Publishing House, Iasi, 2000.

enterprises alive). The "self-robbing" to which the author refers was *realized* in reality, a reality that may even find consistent explanations for the entire transition process. Samuel Huntington makes assessments that may seem brave: "Modernization also contributes to corruption by creating new sources of wealth and power. Its connection with politics is not defined by the traditional dominant norms of society, and modern norms are not yet accepted by the dominant groups in society."[4] The transition, therefore, is precisely what creates such conjunctures, in which corruption can even have unsuspected effects: "Like politics or clientelistic politics in general, corruption provides concrete, immediate and specific benefits to groups that might otherwise be on completely removed from society."[5]

At an evaluative glance, today we could easily come to the conclusion that there is no mistake that we could have made and missed. And it is not by chance that I referred to the dimensions of the total transition process, from the economic to the cultural, from the political to the institutional, from mentalities to property. Of all, however, that of mentalities seems to us the most important and the most relevant. Especially from the perspective of the present paper.

Summing up the almost fifty years of communism with the more than thirty years of transition, we easily realize the total, and at the same time sudden, historical shifts that the Romanian collective mind has gone through. However, we also find countless positive sides, although the daily reality may suggest otherwise. And the image of Europe benefits from this reality, complex, dichotomous, but encouraging from several perspectives.

We will deal, however, first with the negative, tendentious, mostly unfounded ones.

Three Romanian psychoses regarding Europe

We find the process (phenomenon) of defaming Europe to be one, if not natural, at least automatic. In a democratic society, where the sources of information and, automatically, of manipulation multiply exponentially, where people are free to choose the channels of information and, most of the time, fall prey to their specific argumentation, ultra-critical attitudes, negative and even destructive will be present in the public space.

The debate, as long as it still exists in Romania, is neither consistent nor consistent. Everything happens instantaneously, most arguments perish in the face of accusations, defamation and vituperative insults – features that are not so present in the media or in European social media.

[4] S.P. Huntington, *The political order of changing societies*, Polirom Publishing House, Iasi, 1999.

[5] Ibidem.

Somehow, however, everything is explainable in this case as well. "It is clear that the peoples of Eastern Europe are tired of the political-ideological debates, with which they have been fed for years and years to adhere, under the empire of necessity, to other substitutes. Practically, today almost no one in the East believes in other individual values apart from family solidarity, nor in other public values than goods and profit." [6]It reached this stage precisely because, as I announced, the transition was neither prepared nor assumed through solid knowledge about what it entails, or through economic strategies to shorten and make it more efficient. "In the early 1990s, the majority accepted that 'reform' was necessary. Later, it was found to be painful on an individual level. Gradually, each wanted someone else to feel its pain."[7]

In such an atmosphere, Europe often fell victim to Romanian expectations and failures. One of the first accusations against it can be formulated in the phrase: *We were forced to sell "the pearls of the Romanian economy in order to be welcomed into the club",* with direct reference to the privatizations of the early 2000s.

A whole series of state-owned enterprises, most of them strategic in the economy (banks[8], energy supply companies, communications) were the subject of property transfers from the state to foreign private companies, with the aim of achieving the objective of "functional economy" and competitive in - a perspective of European accession. "Accession to the European Union can be viewed from the perspective of this optimistic logic, since the EU would provide, arguably, extraordinary support for the transformation of the system."[9] A process that was soon put at the expense of the interests of the European capital, that is, of the EU officials as representatives of this capital of voices sometimes with experience in the field. "They're not the only 'experts' who want to push the idea into our heads that the European Union ministers (commissioners) who "asked us to privatize" are to blame for the shortcomings that fell on citizens as a result of the post-December "privatizations".[10]

We put the whole psychosis of "selling out to foreigners" and to "interested Europeans" to an older communist concept known as "the country in danger". "At the level of political culture, we can observe the use of homogenizing and even panicked discourse, such as "The homeland is

[6] C. Karnoouh, *op.cit*.

[7] Gh. Mihai Bârlea, *Mentalities in transition*, Limes Publishing House, Cluj-Napoca, 2003.

[8] Magazine 22, Privatization of BCR: should we cry, should we rejoice?. Available at: https://revista22.ro/opinii/ilie-serbanescu/privatizarea-bcr-sa-plangem-sa-ne-bucuram.

[9] D. Daianu, in the volume *Ethical frontiers of capitalism*, coord. D. Daianu and R. Vrânceanu, Polirom Publishing House, Iasi, 2006.

[10] C. Cojocaru, *The crime called privatization*, Bucharest, 2008.

in danger!", which seems to me to be a symbolic invariant that can be found both in Nicolae Ceauşescu and in the last period of Ion Iliescu. As well as the manipulation of the myth of national independence - see the memoirs and interviews of various former dignitaries, including Niculescu-Mizil."[11]

The second identifiable psychosis of the European Union is that of *admitting our country for the mercantile purpose of treating us as useful consumers, using us for labor and depriving us of our own cheaply available resources.* Closely related to the other distorted images (otherwise the public imaginary creates manipulative models in italics), the psychosis mentioned above can very well be the subject of a separate analysis on the three mentioned segments. One by one, the image of simple consumers created another one of "low quality food" sold in Romania, that of overqualified workers used as brute force created the complex of inferior and unacceptable working conditions, and lastly, that of the deprivation of one's own resources created platforms and political actions, national policies to limit the use of these resources. We see in this psychosis a reactivation of the Romanian mythology regarding the injustice of myoritic destiny, an inadequacy to the "intimate-foreign" reality and the failure to assume "humility". "On the one hand, humility knows that what is superior cannot humble. That is why it does not come into conflict either with that which causally precedes our freedom, or with that which is endowed with an increased degree of freedom."[12] A kind of awareness of reality - not assumed, however, in the myoritic variant, nor accepted as an obvious reality.

At the end of the section dedicated to Romanian psychoses (complexes) in relation to Europe, we highlight perhaps the most dangerous of them: we are treated as second-rate European citizens, we are seen as second-rate Europeans. Closely related to the previous vision, of consumers – workers, this perspective even created a political slogan in the campaign for the European Parliament elections in 2019. Starting from obvious inferiority complexes, cultivated - not necessarily consistent, the image of discriminated European citizens produced the well-known phrase, "Proud to be Romanian". Used politically, so with the intention of attracting the votes of those who felt dissatisfaction with the EU (as we will explain the context in the next part), the campaign and the slogan "Proud to be Romanian", of the party in charge of the country at that time, even caused damage to the respective political formation, as evidenced by the result obtained and, subsequently, the loss of the government majority.

[11] Vladimir Tismăneanu, *Specters of Central Europe*, Polirom Publishing House, Iasi, 2001.

[12] Gabriel Liiceanu, *About the Limit*, Humanitas Publishing House, Bucharest, 1994.

Of course, the mentioned slogan, as an arrogant reaction to the psychosis of "Romanians - second-rate Europeans", had deeper conjunctural substrates, including illiberal and anti-European tendencies that proved to be penalized by the Romanian electorate. We also attribute this self-minimizing and manipulative vision to an older one, based on the historical conviction of the non-recognition of the qualities of the Romanian people by Westerners, a kind of self-marginalization stemming from dissatisfaction. "Unsatisfied, that's how we feel deep down. Dissatisfied, however, not exactly like a Cantemir, who came with the whole West in him to lean on the Romanian nation. Unsatisfied with what we know we could be."[13]

Three signs of our Europeanness

Maybe not many people saw them as such, certainly fewer people made the connection between the moments and phenomena of August 10, 2018, October 6-7, 2018 and May 26, 2019, each of them transmitting consistent pro-European signals and messages. We are talking about a pro-European atmosphere, which never left the fiber and mentality of the Romanian soul, even if sometimes the body of critics and dissenters seemed predominant.

One by one, evaluating the three moments we mentioned, we call them "the example of adherence to Europeanism" precisely from the perspective of their meanings. August 10, 2018 marks a period in which Romanians started and consolidated the defense of justice, as a European symbol and value, through street demonstrations. For this reason, we consider the moment of August 10 as perhaps the only European example of a popular demonstration (100,000 participants) in support of the rule of law. Rendered as such in the international press[14], the demonstration created empathy both as a reaction to the violent intervention of the law enforcement forces, and through the image that remained emblematic representing the EU flag illuminated with telephone terminals. We therefore emphasize the adherence of Romanians to one of the fundamental values of the EU, Justice, as well as to the European principle of the "rule of law".

The second highlighted moment refers to the "Referendum for the family" of October 6-7, 2018, proposed at the initiative of an NGO and managed to bring the necessary signatures only through the official

[13] Constantin Noica, *Pages on the Romanian Soul*, Humanitas Publishing House, Bucharest, 2000.

[14] *Diaspora riot, 100,000 participants and serious violent incidents*, Deutsche Welle, 11.08.2018. Available at: https://www.dw.com/ro/mitingul-diasporei-100000-de-protestatari-%C8%99i-incidente-violente-serioase/a-45041717.

involvement of the Romanian Orthodox Church. Aiming to amend the Romanian Constitution, more precisely to Article 48 regarding marriage, by introducing the phrase "between a man and a woman", instead of the old phrase "between spouses". Obviously, the amendment aimed to eliminate the possibility of same-sex marriages. Taken over in a populist and politicized manner by the government arch, the referendum marked the electoral moment with the lowest voter turnout in Romania's post-communist period. By not participating, the Romanians showed non-intrusion into the private lives of others, in the light of the European value of human dignity, the principles of non-discrimination and the rights of persons belonging to minorities. A consistent signal of Europeanism, in our opinion.

Finally, the most emblematic message of pro-Europeanism: the result of the European Parliament elections in May 2019. We recall the atmosphere created by the government arch, the reaction of Romanian society to the attempt to undermine the power of justice or the attempt to manipulate the issue of marriage for the purpose political. To these, the campaign with Eurosceptic and illiberal tendencies and suggestions undertaken by these parties under the slogan "Proud to be Romanian" is added. In context, the messages of the two parties in power were towards less involvement of Europe in our internal affairs, under the manipulation that "obviously, the Union has no way of knowing all our problems". The argumentation was not far from the one used by Viktor Orban in Hungary, the eyes of the governors being increasingly focused on Romania's western border.

The Romanians' reaction and attitude towards these trends was eloquently expressed in the results of the voting for the European Parliament, through a new premiere, the main ruling party being a few tenths of a percent away from placing third for the first time in the results, and their partners of government without entering the European Parliament. We evaluate the reaction of the Romanians on May 26, 2019 as the penalty applied to those who could claim that "less Europe would not be so bad." Additionally, we point out the fact that on the same occasion a referendum for justice initiated by the President of Romania obtained the necessary majority, unlike the one before.

Three moments of which, therefore, we can always be proud. Overcoming all the inherent failures and route difficulties, the adherence of the Romanians to Europe proved unshakable - this time with clear evidence!

Our Europeanness!

In the social tumult of the last Romanian century, which began with the interwar period, the mythologized Romanian interwar period, and

ended with our days, the Romanian collective mind went through countless transformations. Forced by history, we put this mentality in the situation of the "Romanian paradox" of Sorin Alexandrescu, that of being able to adapt, assume, at least to bend before the numerous influences, cultures, regimes. Hence a frenzy of change, a continuous trepidation towards something else, a continuous process of change. "The design of what is successive in the plane of simultaneity seems to me the path of a dangerous and sublime passion at the same time: to gain a head start on others, to quickly do everything that others have done leisurely, but also of a valuation of time that is completely different from that which operates in other cultures."[15]

In all this tumult, however, a guiding line remained impregnated since 1848, in the margins of which all ramblings had only the meaning of wandering. The line, the trajectory, proved to be that of our Europeanness. "...with all its theoretical and imitative character, the Constitution of June 9, 1848 remains the true starting point for a new orientation of our people; it represents the symbolic gesture by which the axis of our political and cultural life changed from East to West; the future revolutionary formation of Romanian civilization is linked to it - moreover, sociologically, the only one possible."[16]

Assimilation, synchronism, adaptation, osmosis even, the Europeanness of Romanians remains a historical example with each stage of evolution. Things had actually happened before the Revolution of 1848. "If one can cite anywhere in South-Eastern Europe a truly total and profound assimilation of this aspect of the spirit of the Enlightenment, one would hardly find a better conclusive example than the Romanian one."[17]

However, in order to pay due attention to the negative postures towards Europe in the Romanian mind, especially since history has shown us that such postures can, at a certain moment, take the foreground of the public debate, we will remember that most of the theories that analyze modernization, wherever it happens, talk about the existence of differentiated levels in relation to it. Especially when, between the political-social ideals and the layers of deep society there are design distances. "The great rift is thus between the state and the culture, between the political and the cultural, between synchronization at all costs with

[15] Sorin Alexandrescu, *The Romanian Paradox*, Univers Publishing House, Bucharest, 1998.

[16] Eugen Lovinescu*, History of Modern Romanian Civilization*, Minerva Publishing House, Bucharest, 1997.

[17] Adrian Marino, *op. cit.*

Western values and the ballast of a past still loved and respected, between the flight forward and the flight into the past."[18]

We can say that the existence of layers of modernization is still a natural phenomenon, especially when the effort to leap forward is a consistent one, although we, the Romanians, would rather place ourselves in a parallel leap, on completely different coordinates in comparison with those existent more than 30 years ago. The existence of layers becomes for this reason even more objective. "In the same way, we could talk about a tendentious Europeanization, in those societies where modernization did not include all its components. (...) From my point of view, in this period of European institutional and constitutional construction, a series of dysfunctions appear derived from the gap between the abstract rationalism of the European institutions and the complex realities in each country of the European Union."[19]

Kaleidoscope, therefore, with asymmetrical, multiple images, with sequences of disparate sensations, experiences and impressions. This is our Europeanness, criticized or repudiated, but out of ignorance. We are Europeans, and that cannot be denied. Souls close to Europe, organically placed at the twinning of Europe with the East, living peripheral neurotics of this continent, we remain European in ideals and even in the way of being, especially from an external view.

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[18] Sorin Alexandru, Ibidem, p. 36.

[19] C. Schifirneţ, *Tendential Modernity,* Tritonic Publishing House, Bucharest, 2016, p. 94.

Liiceanu, G., (1994), *About the Limit*, Bucharest, Humanitas Publishing House.

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EXAMINATION OF RELIGIOPHOBIA AND POLITICIZATION OF RELIGIOUS CONFLICTS IN POSTCOLONIAL NIGERIA

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***Abstract*:** *Nigeria, like some other African countries since independence, has been plugged into a series of religious and political uprisings resulting in mayhem, the deaths of thousands of people, and damage to properties. For example, Boko Haram's recent militarization has harmed Nigeria's stability and put the nation under continual danger. As a result, the paper investigates religious conflicts in postcolonial Nigeria in connection to religiophobia and religious politicization as causative variables. Historical and phenomenological approaches are used to achieve the stated goal. Findings reveal that the lack of social control mechanisms that characterized traditional Nigerian societies in the precolonial era, such as kinship, religious inclusiveness, non-religious sentimental political systems, and community wellbeing, led to the escalation of religious conflicts in postcolonial Nigeria. The paper proposes that religious and political ideologists and religious groups should pursue genuine political and religious supremacy devoid of violence.*

Keywords: *Religiophobia, Politicization, Religious Conflicts, Postcolonial, Nigeria.*

Introduction

The postcolonial world of Sub-Saharan Africa is confronted with several obstacles, including ethnic conflicts, religious and linguistic intolerance, and postcolonial wars. In Nigeria, the link between religion and politics has been defined as symbiotic, with religion serving as the ideological preference for national identity over any cultural or historical

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configuration. For example, religion was inextricably related to the political structure in primitive, homogeneous Nigerian communities. Since independence, there have been a number of uprisings and other violent events that have killed thousands of people and caused a lot of damage to property. Boko Haram's increased militarization, for example, has undermined Nigeria's stability and placed the country at constant risk. So, the research looks at postcolonial Nigerian religious conflicts in terms of how religiophobia and the politicization of religion are factors that cause them.

It also looks at the terms "religiophobia" and "politicization" to see how religious conflicts have impacted postcolonial Nigeria's overall development. The lack of social control mechanisms that characterized traditional Nigerian societies in the precolonial era, such as kinship, religious inclusivism, non-religious sentimental political systems, and community wellbeing, led to the escalation of religious conflicts in postcolonial Nigeria, according to the paper, which employs historical and phenomenological approaches. So, the article says that religious and political ideologues, as well as religious groups in the country, should work for real political and religious dominance without using violence.

Describing the Problem

There are violent religious conflicts between the tri-religions in Nigeria. Religious contact among practitioners of African traditional religions was generally calm prior to the emergence of Islam. Nigeria's socio-political upheavals were the fruits of imperialist Britain's divisive and discordant seeds. Mistrust and distrust rose to the fore, poisoning inter-ethnic ties within and between Nigeria's regions. Ethnic and religious differences got worse as the native political class fought to take power from the colonialists. Nigeria's political past is littered with British and self-inflicted blunders. The escalation of ethnic and regional symbolism can also be linked to patronage of sectarian, ethnic, and religious organizations. This scenario is conceived and carried out in an atmosphere of grave state silence and non-intervention. During the 1970s and 1980s, Muslims in Nigeria sought a new Islamic identity for the country to improve its standing in the Muslim world. Developments enraged the polity, instilling among Christians a dread of Muslim dominance. The Second Republic (1979–1983) had its origins in alignments forged during independence.

Religious disputes in Nigeria are frequently the result of political maneuvering and serve as proxies for other conflicts. Doforoh agrees that decades-old and new conflict, as well as deep-seated societal grievances, a diminishing democratic space, and the advent of terrorism and new forms

of violent extremism are undermining peace, sustainable development, and human rights.[1] As a result of the inter-marriage of religion and politics, Nigeria, which was once home to one of history's greatest flowerings of culture and coexistence, is now tormented by many fault-lines at work, ancient and new, overlapping and producing considerable volatility.

Among these are religious upheavals, revived cold war-style rivalry between the country's three religions, ethnic schisms, and various political conflicts. For example, between 1980 and 1993, over twenty-six religious conflicts have been recorded with a death toll of over 6,775, according to official estimates.[2] Economic and social opportunities in modern Nigeria have plainly become insufficient. As a result, problems arise, such as a decrease in faith in reliable institutions. Nigerian society is currently splintered along ethnic and religious lines, which are being used for political gain. Nigeria's territorial integrity, like that of other African countries and the rest of the world, is under jeopardy. Hundreds of millions of people have been forced to flee their homes. The effects of this unrest have spread to neighbouring countries and beyond.

Conceptualizing Religiophobia and Politicization

The term "religiophobia" refers to an unreasonable or obsessive dread or anxiety about religion or religious institutions. In order to transform his or her character into conformity with the perfect God, a religious human being is connected to a perfect universe in terms of morality, power, and education so that humans can conform to the perfection of God. Politics is the process of humans creating, maintaining, and altering the general rules that govern their lives.[3] The politicization of religion is one of the Nigerian nation's blind spots. Religion's substance defines an individual's life in society, governs his interactions with other people, and is at the heart of political order because it legitimizes civil law and forms of sovereignty. Ikechukwu and Clara say that politics and religion seem to be two of the most important cultural factors that shape the way people around the world act.[4]

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[1] P.W. Doforo, personal interview, Religious Leader, Lagos, Lagos State, May 23, 2022.

[2] A. *Damilola,* "Religious Crisis in Nigeria and Way Forward," *Vanguard Newspaper*, available at https://www.vanguardngr.com/2021/12/religious-crisis-in-nigeria-and-way-forward/

[3] P. Iroegbu, *Spirituality and Metaphysics,* Owerri: Enwisdomization Eustel Pub., 2003, p.7.

[4] A. Ikechukwu, and O. Clara, "Religion and Politics in Nigerian Society: Problems and Prospects (a Philosophic Probe)", *Open Journal of Philosophy*, vol. 5, 2015, pp. 193-204.

There is little doubt that the Nigerian polity has issues with religion and politics, such as cosmological exclusivism, epistemic prejudice, myopia, leadership issues, failing governance, and a lack of political culture.[5] Separating religion from politics is difficult, if not impossible, from a pragmatic standpoint. Theoretically, it is different. Because of this, people in our society who want to avoid violence and 'bad' blood need to be careful in their everyday lives.

Theoretical Consideration

This paper is anchored on the theory of social change. Social change can relate to the concept of social progress, or socio-cultural revolution. Evolutionary, functionalist, and conflict theories are the three main theories of social change.[6] Darwin's theory of evolution was adopted by sociologists and applied to society. According to the functionalist view of social transformation, society is similar to a human body.[7] Many argue that this theory overlooks the fact that society's elite frequently creates a false sense of harmony and stability. According to conflict theory, society is inherently unequal and competitive.[8] The wealthy and powerful frequently use vulnerable groups to exert control over the rest of society. According to Momoh, this creates conflict and motivates individuals to act, as a result of which social change occurs.[9] Social change is defined by sociologists as a shift in culture, institutions, and functions.

Sociologists have grappled with various ideas and models throughout history. Successful growth, according to Haferkamp and Smelser, necessitates a fundamental level of social mobilization.[10] Combining systematic with more distinctive, random, or coincidental aspects is the best way to understand social, political, and economic development.[11] Population shifts, war-induced dislocation, or stresses and contradictions are structural factors of societal change. Religion in every human society is an agent of social change. Although Karl Marx and Max Weber anticipated the end of religion and the rise of secularism, occurrences in the twenty-

[5] A. Adogame, "Politicization of Religion and Religionization of Politics in Nigeria," *Religion, History, and Politics in Nigeria*, edited by C.J. Korieh and G.U. Nwokeji, Oxford: University Press of America, 2006, p. 228.

[6] C. Kaufman, *Ideas for Action: Relevant Theory for Radical Change* (2nd ed.), Oakland, California: PM Press, 2016, p. 251.

[7] A. Giddens, *Sociology*, Cambridge: Polity Press, 2006, p. 191.

[8] M. Haralambos and M. Holborn, *Sociology: Themes and Perspectives*, London: Harper Collins, 2008, p. 156.

[9] K. Momoh, personal interview, Politician, Benin City, Edo State, May 28, 2022.

[10] H. Haferkamp and J.S. Neil (eds.), *Social Change and Modernity,* Berkeley: University of California Press, 2009, p. 25.

[11] M. Haralambos and M. Holborn, *cited works,* p. 156.

first century demonstrate religion's continuous dominance, perpetuity, and tenacity. In addition to promoting social harmony, religion could be used to attain specific political and other recognized demands and objectives.

Religious and Political Interactions in Precolonial Nigeria

In Nigeria, there are over 350 ethnic groups, with the Yoruba, Igbo, and Hausa/Fulani being the most populous and politically influential. They all have their own customs, traditions, and dialects, yet in pre-colonial periods, they all accepted traditional religious beliefs and practices. Traditional religion in Hausa land was organized around clans, with a hereditary chief priest overseeing each shrine on behalf of the community. There was a strong belief in ancestral worship, animal sacrifices, and grove rituals in Igbo territory. Yorubas believe in the existence of a Supreme Being known as *Olodumare* or *Olorun*.[12] Every social and political event was consulted with *Ifa* (the oracle of palm nuts). Traditional belief systems revered natural phenomena such as rivers, trees, mountains, hills, iron, thunder, and lightning, but Islam and Christianity did not. People believed in an afterlife, which they saw as a continuation of life itself.[13] In West Africa, notably in Nigeria, the Portuguese were the first Europeans to introduce Christianity. Islam had extended southward to Yorubaland by the middle of the nineteenth century, but it did not have the same political clout as it did in northern Nigeria. During the Ilorin War, between 1830 and 1835, a coalition of Yoruba and Borgu armies fought the jihadists. At the battle of Osogbo in 1840, Oyo-Yoruba armies were able to stop the spread of Islam.

In the early nineteenth century, Christian missionaries followed explorers such as Mungo Park, Hugh Clapperton, and the Lander brothers into the interior of Nigeria. The Niger Expedition in 1845 carried Christianity into the interior, led by Yoruba clergyman Samuel Ajayi Crowther (1807–1891) and European missionaries.[14] The missionaries were welcomed in Yorubaland because they acted as mediators and peacemakers throughout the region's civil conflict. Traditional religion was extensively incorporated into the political structures of all Nigerian civilizations before and until colonization. Institutions including kings, age-grades, guilds, associations, secret societies, and open societies were both religious and political groups that helped to keep the peace. Religious sanctions aid in the prevention of criminal behaviour and the promotion of

[12] A.A. Oladiti, "Religion and Politics in Pre-Colonial Nigeria", *Cogito: Multidisciplinary Research Journal*, vol. 6, no. 2, 2013, pp. 72-84.

[13] I. Umaru, *Personal interview,* Social Scientist, Kano, Kano State, May 27, 2022.

[14] A.A. Oladiti, *cited works*, p. 84.

law-abiding citizens. The role of Muslim *mallams* and the *parakoyi* in political matters was the first manifestation of Islam in politics.[15] Mallams in Oyo and Hausa land originally sought permission from the ruler to live in the town, pray for the people, and preach. By the end of the 1800s, Christianity had not only been brought to Nigeria, but it had also become a part of colonial politics.

In pre-Islamic Nigeria, Muslim academics and clerics were permitted access to kings' courts, and they began to play a major part in policymaking.[16] The emirs viewed the Muslim scholar as a mystic who could use his special skills to solve problems, such as causing rain to fall during a drought or winning wars. It makes little difference whether or not the Muslim scholar possessed the mystic power claimed for him. It's important to note that he believed he had the skills. The Sokoto Caliphate, which functioned as the seat of authority for the newly constituted system of governance, was founded as a result of Dan Fodio's campaign.[17] For administrative convenience and regional peace, the British colonialists embraced the entirely Islamic type of governance they discovered in Northern Nigeria. Traditional religions were marginalized by British colonial rulers, who recognized and protected Islam's interests.

Religious Conflicts in Postcolonial Nigeria

Since the 1980s, both intra-and inter-religious conflict have increased, with the latter becoming more violent in recent years. The most famous episode of intra-religious violence happened in Kano in 1980, following the sermons of Alhaji Muhammad Marwa, a Cameroonian preacher known to his followers as Maitatsine. At least 5,000 people are said to have died in conflicts with the police and army.[18] Following a speech by Christian preacher Abubakar Bako to students at the Advanced Teachers' College in Kaduna state in March 1987, the first significant outburst of inter-religious violence occurred. Following the release of a cartoon depicting the Prophet Mohammed and Jesus Christ, riots erupted once more in 1991. Mallam Yakubu Yahaya, a key figure in Nigeria's "fundamentalist" Islamic movement, and several of his supporters trashed the offices of the government-owned Daily Times. According to reports, one police officer was killed and six others were injured. Further riots broke out in Tafawa

[15] S. Shakar, "Religion, State, and Society in Hausaland: History and the Politics of Incorporation in the Kano Chronicle," *Precolonial Nigeria Essays in Honour of Toyin*, edited by Akin Ogundiran, Trenton, NJ: Africa World Press, 2005, pp. 281-283.

[16] *Ibidem*, p. 282.

[17] B. Mordi, personal interview, Academic, Asaba, Delta State, May 26, 2022.

[18] P.O.O. Ottuh, and F. Erhabor, "Radical Islamism: Trajectories of Human Rights Violations and Abuses in Africa," *Journal of Liberty and International Affairs,* vol. 8, no. 1, 2022, pp. 243-263.

Balewa, a mostly Christian enclave of Bauchi, a predominantly Muslim province. The violence was prompted by Muslims and Christians who disagreed over the usage of an abattoir. After 160 people were reportedly killed, the federal government called in the military to restore peace on April 23, 1991.

At the end of the riots, 80 people were reported dead. Other sources, on the other hand, claim that persons who died where over 1000.[19] A political dispute for control of a neighbourhood populated by ethnic rivals may have prompted the 1991 riots. The Sayawa, one of two mostly Christian tribal groups in Bauchi state, may have reasoned that by electing a Christian as chairman, they would be able to get rid of the Muslims. At least in the case of the Hausa-Fulani, the riot was clearly intended to nearly completely obliterate this dominance.[20] The Nigerian government imposed a curfew on the first day of rioting, but the army did not arrive until the second day. Muslims attacked the Sabom Gari neighborhood, which is predominantly Ibo Christian, destroying cars, markets, homes, and a church. At least one report claims that well-organized Christian vigilante groups were "waiting" for the attack and surprised Muslims. It is unclear how many Muslims versus Christians were killed.[21] The deadliest "religious" fighting occurred in the northern state of Kaduna during the month of May 1992. In the town of Zango-Kataf, a long-running land dispute between the predominantly Christian Kataf and Muslim Hausa ethnic groups culminated in widespread bloodshed. Up to 400 people may have been killed, and 247 people may have been detained.[22] The worst religious violence since the Zango-Kataf incident in May 1992 occurred in the northern town of Funtua, Katsina State, in February 1993. Clashes erupted after a dispute between Maitatsine followers known as the Kalakato and Muslim street vendors known as the Almajiri, lasting two days. Up to 100 individuals were murdered in the fighting, including two police officers, and many more were injured.

Boko Haram is a derogatory term that implies "western education is forbidden." Jama'atu ahlis Sunnah Lidda-awati Wal Jihad is its chosen name, which approximately translates as "Movement for Sunnah and Jihad." Boko Haram established an Islamic caliphate in Gwoza, near the

[19] J. Paden, "Religion and Conflict in Nigeria: Countdown to the 2015 Elections," Special Report 359, United States Institute of Peace, 2015 available at https://www.usip.org/publications/2015/01/religion-and-conflict-nigeria (Accessed March 21, 2021).

[20] A.E. Zakari, personal interview, Academic, Abuja, Nigeria's FCT, May 25, 2022.

[21] I.M. Enwerem, *The Politicization of Christianity in Nigeria. A Dangerous Awakening: The Politicization of Religion in Nigeria*. Ibadan: IFRA-Nigeria, 1995, p. 44.

[22] *Ibidem*, p. 46.

Cameroon border, in August 2014.[23] They also took Bama, Borno's second largest city, and issued signs in September that they were planning an attack on Maiduguri, the state capital, forcing thousands of inhabitants to flee. The organization has wreaked devastation in the northeast and across the northern states. Boko Haram violence surged in the far north and spread to the Middle Belt in the second quarter of 2014.[24] So many atrocities were committed by this group only between April and July 2014. They include the following:

1. Between April 15th and May 5th, more than 120 people were killed in bombings at a motor park in Abuja. A British-born man who is thought to have planned the first attack was caught in Sudan and sent back to Nigeria.
2. On May 21st there was a car bombings in a Christian area of Jos killed over a hundred people.
3. On June 2nd, more than sixty soldiers and civilians were killed in a bombing at a bar and brothel in Mubi, Adamawa State.
4. On June 9th, one soldier and a female bomber were reportedly killed in a suicide bombing at a military barracks in Gombe.
5. On June 25th, twenty people were killed in a bombing at an upscale mall in Abuja just as the Nigeria-Argentina World Cup match was about to begin.
6. On June 26th, an attempted bombing at a police station in a popular market in Mubi, Adamawa State, was foiled.
7. On June 28th, a brothel in Bauchi State was bombed, killing eleven people.
8. On July 12th, the Nigeria police discovered a plot to bomb Abuja's public transportation system with suicide bombers and explosives hidden in luggage.
9. On July 12th, the Nigerian authorities detected a conspiracy to use suicide bombers and explosives hidden in luggage to attack Abuja's public transit system. After a Ramadan sermon by a prominent sheikh, Dahiru Bauchi,
10. On July 23rd, a bomb exploded in Murtala Square in Kaduna, killing more than thirty people. A second device nearly killed former President Muhammadu Buhari.

The Nigerian military has begun to build up its deadly force capabilities, including a bid for forty assault helicopters. It went on to assassinate three sons of the founder, Sheikh Ibrahim Zakzaky, of a Shiite

[23] *Ibidem*, p. 46.
[24] J. Paden, *cited works*.

group in Zaria, the Islamic Movement of Nigeria.[25] Meanwhile, Boko Haram had gained control of areas of Borno, kidnapped hundreds of secondary school girls in Chibok, and carried out Eid attacks in Kano. In mid-October, Nigeria's government announced a surprise cease-fire with Boko Haram. Boko Haram retaliated by increasing the number of girls abducted in the northeast and attacking additional villages. Boko Haram had gained control of Mubi, Adamawa State's second largest city, by late October. According to some estimates, Boko Haram controlled over 20% of Nigerian territory by December 2014.[26] Not all of the violence blamed on Boko Haram in recent years has been perpetrated by the Abubakar Shekau network.[27] Many of the coups and attempted coups have a regional or ethno-religious tint to them.

Politicization of Religious Conflicts in Nigeria

The Nigerian political elite use ethnicity, religion, and region as potent instruments to further their political objectives and hide difficulties arising from their failure to provide progress. Somehow, Nigerians enjoy complete freedom to engage in all types of religious activities, including political and public affairs.[28] The stipulation that no state in the federation should choose a state religion implies secularity, but it is not explicitly stated in the Nigerian constitution. Nigeria's ruling class has utilized public funds to build religious edifices and symbols in order to buy public support and bureaucratize religions Nigeria.[29] Mixing state and religion has caused a slew of issues and confusion, as well as anarchy, rioting, property damage, and bloodshed.[30] In contrast to Emile Durkheim's concept of a puritanical state, this is not the case. Nigeria's political elite frequently uses religious discourses and dogmas to organize and divide the populace, as well as to legitimize their rule over society.[31] The use and abuse of religion in politics is determined by the stakes for power and the stakeholders' egocentric orientation.[32] People also say that religions have the potential to create a

[25] G.C. Nche, A.O., O. Akanu, M.I. Ugwueze, G.U.C. Okechukwu, E.N. Ejem, and O. Ononogbu, "Knowledge and Support for Political Restructuring among Youths in Nigeria: Are there Ethnic and Religious Differences?" *Cogent Social Sciences*, 5, 2020, pp. 68.

[26] I. Enwerem*, cited works*, p. 44.

[27] M.B. Salau, "Religion and Politics in Africa: Three Studies on Nigeria", *Journal of Law and Religion*, 5, 2020, p. 35.

[28] P. Duru, personal interview, Political Scientist, Auchi, Edo State, May 28, 2022.

[29] Nche, *et al*., *cited works*, p.66.

[30] International IDEA (Institute for Democracy and Electoral Assistance), *Democracy in Nigeria: Continuing Dialogue for Nation-Building,* Lagos: International IDEA.

[31] P. Ottuh and F. Erhabor, *cited works,* p. 263.

[32] A. Adogame, *cited works,* p. 228.

theocratic class, as seen in Obasanjo's Pentecostal supporters and the political allies of Islamic fundamentalists. In recent years, Christian and Islamic religious extremism, or revivalism, has exploded in Nigeria.[33] Instead of secularization, there is a rise in puritanical religious practices, which is bringing in new political players. The best thing to do is to accept religion as a part of society and come up with new ways to counteract its bad and intrusive effects.

The current religious issue in Nigeria has been related to a number of factors, many of which are complicated and intertwined. The increase of religious extremism, notably in Islam, as well as political and economic elite exploitation of religious feelings, have all led to the intensification of violence.[34] The government's slow response time in the aftermath of violent outbursts, as well as subsequent crackdowns on religious leaders, have only served to exacerbate the situation. At least for now, the future of the country does not look good, and a big question will be how much control the ruling elite and religious fundamentalists are allowed to have over people.

Some of the high-profile terrorist incidents documented in 1996 were carried out by terrorist groups motivated in part or entirely by religious or political ideology. When attempting to provide a broader perspective on the Boko Haram problem, the religious factor, particularly its politicization, is worth investigating. Usman Dan Fodio began a jihad in 1802, in an attempt to alter what he saw as sinful customs among Hausa kings and nobility, whom he considered anti-Islamic.[35] He deposed them and founded the Sokoto Caliphate, which included the states of Sokoto, Kano, Kaduna, Bauchi, Adamawa, Niger, Kwara, and parts of Plateau.[36] By establishing an Anglo-Hausa/Fulani hegemony throughout the colonial occupation of Nigeria, British colonialists maintained a mutually beneficial alliance with local Muslim rulers. The Muslim aristocracy was given political power under the Indirect Rule regime, which was essentially a colonial administration in Northern Nigeria.[37] The precolonial Sharia Courts were also included in the new colonial administration by the British. In a legal system that was so religiously based, it was impossible to settle arguments or decide on crimes without following some Sharia law teachings.

Christian religious leaders may have been dissatisfied with the arrangement, but they lacked the political clout to try to change it. The

[33] International IDEA, *cited works*.
[34] M.B. Salau, *cited works,* p. 35.
[35] M. Nche, *et al.*, *cited works,* p. 6.
[36] M.B. Salau, *cited works,* p. 35.
[37] I.C. Ejenavi, personal interview, Lawyer, Warri, Delta State, May 22, 2022.

Nigerian military staged a coup on January 15, 1966, to intervene in the country's political crisis; their targets included the country's dominant northern political elites. Except for a few people, the majority of the coup plotters were of Igbo descent, and the victims were all Muslim northerners. This incident sparked the Igbo movement for secession, which eventually turned into the Nigerian civil war between 1967 and 1970.[38] Because the postcolonial reconciliation process wasn't handled well, there was a time when groups, parties, and individuals who were unhappy tried to restructure the country along religious and ethnic lines.

During the Sharia debate, northern Muslims addressed the topic of increasing the status of Sharia courts from state level in the northern area to federal courts across the country. The issue of establishing a federal court of appeal for Sharia cases was eventually dropped; instead, a constitutional assembly reached an agreement, despite the objections of the northern delegates, under which three Islamic law judges could hear cases referred from Sharia courts while still serving on the Federal Court of Appeal.[39] In the late 1970s and early 1980s, the Iranian revolution provided radical Muslims in Nigeria with a platform to launch attacks on incumbent Muslim elites who were suspected of corruption.[40] This type of militancy in the Muslim world is primarily motivated by a religious need to build a universal Islamic order as well as a perception that the West is at war with Islam. The Middle East's struggle against Israel, as well as the United States' war on terrorism in Iraq and Afghanistan, was other major foreign events that sparked radical Islamic reactions in Nigeria during this time, leading to religious conflicts.

The Maitatsine uprisings of 1980 in Kano, 1982 in Kaduna and Bulumkutu, 1984 in Yola, and 1985 in Bauchi were the first violent attempts in a pluralistic, independent Nigeria to impose a stringent form of religious dogma. Many of the variables that contributed to the genesis of the Boko Haram issue are still present in Nigeria, including socioeconomic discontent, pervasive elite corruption, and religious politicization.[41] Some Nigerians worry that Nigeria's admission to the OIC will surely result in the country's Islamization, rendering them irrelevant in the Nigerian public sphere. Religious violence between Christian and Muslim students at the College of Education in Kafanchan in 1987 was a prime example.[42]

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[38] M.B. Salau, *cited works,* p. 38.

[39] I.C. Ejenavi, *cited works*.

[40] M. Nche, *et al*., *cited works,* p. 7.

[41] O.P. Enume, personal interview, Religious Reader, Ondo, Ondo State, May 28, 2022.

[42] A.B. Mahmud, "On the Adoption and Implementation of the Sharia Legal System in Zamfara State," *Sharia Implementation in Northern Nigeria 1999–2006: A Source*

From the 1990s forward, these events planted the seeds of fierce rivalry, suspicion, and discord between Christians and Muslims in Nigeria. After independence from British colonial control, Zamfara State was one of twelve religiously mixed northern states to accept Sharia. Given the emergence of democracy, constitutionalism, and a federal system of government, the adoption of Sharia by any state that professes the real Islamic faith is not a question of choice; it is a requirement.[43] But what happened in the northern states before Sharia was put in place showed the dangers and effects of imposing Islamic rules in a country like Nigeria with a diverse population.

Nigeria has a long history of religious politicization, fundamentalism, and revivalism, all of which have contributed to Boko Haram's emergence and radicalization.[44] The use of religion for political objectives, as well as the resulting violence and intolerance, provided the groundwork for Nigeria's religious conflicts, which have recently erupted forcefully in the Boko Haram crisis.[45] The Boko Haram crisis is not a completely new occurrence; rather, it is part of a long history of political and religious agitation in northern Nigeria. Boko Haram's emergence and radicalization are less mysterious when seen through this lens. In the end, you need to know how easy it is for some people to use religion to justify their own goals if you want to understand Boko Haram in a nuanced way.

The consolidation of the military, the sense of government discrimination against Christians, and the Muslim goal of an Islamic theocratic order for the country all contributed to the Christian Association of Nigeria (CAN)'s birth as a political party. After the civil war ended, the government removed missionaries from Biafra, the country's most Christian region, whose people had supported evangelism in the north. Nigeria severed diplomatic ties with Israel in 1973 due to political differences.[46] Most Nigerians have affection for either Israel or the Arab countries. Depending on their faith, most Nigerians have a tendency to oppose or support any stance regarding Israel. The Islamic North's leadership had always been critical of Nigeria's relationship with Israel and would have ended it long before Gowon, a Christian, ended it. For as long as it lasted, the severance of diplomatic relations with Israel worked against Nigerians because they were unable to travel to Israel and trade,

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Book, 2000, http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria/vol_2_4_chapter_2_part_III.pdf

[43] A.B. Mahmud, *cited works*.

[44] P.O.O. Ottuh and F. Erhabor, c*ited works,* p. 255.

[45] Afrobarometer, "Popular Perceptions of Sharia Law in Nigeria," *Afrobarometer Briefing Paper,* 58, 2009, pp. 1-12.

[46] B. Maiangwa, "Soldiers of God or Allah: Religious Politicization and the Boko Haram Crisis in Nigeria," *Journal of Terrorism Research*, Vol. 5, no. 1, 2014, pp. 29-42.

whereas Israelis were able to do so. Christians claimed the policy toward Israel as proof of prejudice against them because the State's political power has been predominantly dominated by members of the Islamic religion.[47] Nigeria's formal relationship with the Organization of Islamic Conference (OIC) began during the 'Christian dictatorship' of Yakubu Gowon. However, the affiliation was strictly limited to that of a bystander. Until 1986, successive governments considered this to be the best option for a religiously pluralistic state. The decision to join the OIC as a full member sparked a popular outcry that went across ethnic, ideological, and religious lines. [48] For religious reasons, Christian members of the 1977–78 Constituent Assembly opposed this vision for Nigeria, asserting their democratic and human rights. During the debates, Christians became aware of deep-seated anti-Christian attitudes among Muslims, particularly those from the north. Some Muslims have tried to separate Maitatsine and his supporters from real Islam by saying that the upheavals were caused more by the country's social and economic conditions than by religion.

The Way Forward

As a result of the inter-marriage of religion and politics, Nigeria is troubled by multiple fault lines at work, old and new, overlapping and producing great volatility. Among these are religious upheavals; a revived cold war-style rivalry between the country's three religions; ethnic schisms; and various political conflicts. According to government figures, there were approximately twenty-six religious clashes between 1980 and 1993, with a total death toll of over 6,775. [49] These issues must be addressed as soon as possible. In order to solve these issues, it is important to remember the UN Development Programme's (UNDP) series of reports that began in 2002. This research discovered severe gaps in education, basic liberties, and empowerment, particularly among women and young people in that country. According to UNDP reports, political engagement in vulnerable nations has remained low, as evidenced by a lack of genuine representative democracy and restrictions on civil liberties (including religious and political freedoms). [50] At the same time, rising wages, education, and information flows have fueled people's desires for more independence and participation in decision-making. A mismatch between

[47] *Ibidem*, p.30

[48] J.L. Jefferis, *Religion and Political Violence: Sacred Protest in the Modern World*, New York: Routledge, 2010, p. 83.

[49] A. *Damilola, cited works.*

[50] United Nations Development Programme (UNDP), "Religious Conflicts Normally Product of Political or Geostrategic Manipulation, Proxies for Other Antagonisms," https://www.un.org/press/en/20198/sgsm19104.doc.htm.

ambitions and their realization has resulted in alienation and its progeny in some circumstances (apathy and discontent). As a result, national leaders should make correcting this situation a top priority.

Recognizing the role of religious leaders, religious organizations, and religiously inspired lay people in conflict resolution is a critical step toward solving these issues. Without a doubt, religion plays an important role in human connections, particularly in disputes. As a result, it is necessary to recognize that religious claims are frequently used to conceal other objectives and interests, particularly political and economic ones. There is a propensity in much of the non-Western world, especially in very religious cultures, to overemphasize the role of religion in causing disputes. As a result, it is critical to recognize the involvement of religious leaders, religious institutions, and spiritually inspired laypeople in conflict resolution. Usually, rather than attempting to build a fictitious theocracy, people's hearts and minds, hopes and dreams are shaped. People's faiths and beliefs, according to Marshal, shape their perspectives on history, justice, law, mercy, power, human nature, and evil.[51] As a result, it's impossible to approach politics without considering their perspectives on history, justice, law, mercy, power, human nature, and evil. It is important to note that religion can only be used to affect politics if it is both existent and significant enough. For example, a politician can only cynically pander to religious sentiment in order to win re-election or demonize an opponent if religious sentiment exists in the first place. For this kind of political use of religion to happen, religion must be present, and it must be both political and religious at the same time.

In addition, the government at all levels should make education more affordable for all people and make efforts to employ more people. Religious conflict will not abate unless the Nigerian economy improves in the foreseeable future, and it may even worsen. A scenario like this could result in a considerable number of people being displaced, especially in the north, where most of the violence has occurred so far. The government should refrain from interfering in religious matters, as this might lead to social strife, instability, and division. Furthermore, human rights should be respected, and religious tolerance should be tolerated. Finally, people should remember that God is not someone who can be fought for or against, and they should cease inciting turmoil in the name of defending God. In order for the different religions and tribes in Nigeria to be able to live together peacefully, everyone should have the same right to practice their religion without fear of being killed or forced to change religions. Furthermore, Nigeria should return to the kinfolk system, communalism,

[51] P. Marshal, "Politicizing Religion. Hudson Institute," 2021 https://www.hudson.org/research/14598-politicizing-religion

religious inclusivity, non-religious sentimental political systems, and other communal wellbeing in the postcolonial age. Religious and political extremists, especially religious groups in Nigeria, should fight for true political and religious dominance without using violence.[52]

Nigeria's political elite and population should demonstrate an unwavering determination to put ethnic and religious differences aside in order to freely debate, compromise, negotiate, and create the structure of their society. To strive toward the development of a national political philosophy, political parties in the country should be able to communicate their policies using patriotism as a language. The country may avoid the mistakes of colonial and postcolonial leaders who played crucial roles in entrenching identity politics if political parties, lawmakers, and other stakeholders become nonpartisan and disassociated from identity politics. Understanding Nigeria's religious background can help anyone working to promote religious freedom and tolerance in the country.[53] The country will be rid of its current religious and political problems in this way.

Conclusion

So far, the paper has shown that religious conflicts in postcolonial Nigeria are worsened by the lack of social and political control mechanisms that typified traditional Nigerian cultures in the precolonial era. Politics without a theological or ethical grounding is unstable, impotent, and ineffective. Before colonialism, Islam and traditional religion coexisted and impacted one another. The major religions all preached peace and stability and believed in a single Supreme Being. Religious penalties aided in the control of bad behaviour and the promotion of a law-abiding citizenry. All of these contributed to the community's purpose and cohesion, as well as the political system's strength. Somehow, Nigerians enjoy complete religious liberty as well as the right to participate in politics and public affairs. However, instability, unrest, property destruction, and bloodshed have occurred as a result of the mixing of state affairs with religion. Since the 1980s, there has been an increase in both intra-and inter-religious conflicts in the country. Therefore, for postcolonial Nigeria to enjoy total tranquility, the restoration of social control mechanisms that characterized traditional Nigerian societies in the precolonial era, such as kinship, religious inclusiveness, non-religious sentimental political systems, and community

[52] H. Onapajo, "Politics for God: Religion, Politics and Conflict in Democratic Nigeria," *The Journal of Pan African Studies,* vol. no. 49, 2012, pp. 42-66.

[53] Y.B. Usman, "The Federation of Nigeria and the lesson of the People of Nigeria," *Federation and Nation-building in Nigeria*, edited by V. Eliagwu, U. *et al.,* Abuja: National Council on Inter-Governmental Relation, 1994, p. 88.

wellbeing, is a *sine-qua-non*. In addition, religious and political ideologists, including religious groups in Nigeria, should compete and struggle nonviolently for genuine political and religious supremacy. In this way, the country will be free from its present religious and political dilemmas.

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A CRITIQUE OF THE ARGUMENTS IN DEFENCE OF A RIGHT TO A DECENT MINIMUM HEALTH CARE.

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Abstract: *This paper attempts a critique of the arguments advanced in support of a right to a decent minimum of health care. Using the method of analysis and argumentation, it examines arguments earlier given by scholars to justify a right to a decent minimum of health care. It avers that arguments bordering on the need to cater for other sectors of the economy or the dwindling fortunes of the government at some periods on which the right to a decent minimum of health care is justified confuses the unique nature of the health sector and the other sectors of the economy. It concluded that a right to a decent minimum of health care is not enough as most medical issues such as the IVF and similar ones may require huge financial commitment which an individual may not be able to finance. As such, government should embrace the right to an unqualified health care.*

Keywords: *The right to health care, limited right to health care, unlimited right to health care.*

Introduction

This paper is an attempt to justify the need for an unqualified or an unlimited right to health care. By unqualified, unlimited or strong equal access to health care, it should be understood as a social arrangement where the government shoulders all the responsibilities of her citizens on health matters. It examines the works of scholars like Allen, Yvonne Denier and Thomas Halper who defended a right to a decent minimum of health care. It concluded that contrary to the contentious positions held by these scholars, the state should facilitate the citizens' unlimited right to health care.

What are Rights?

It is common place to hear certain things about rights. Sometimes in the quest for justice discussions about rights often come to the fore. In circumstances such as these, there is an implicit assumption that there are certain rights to be enjoyed by individuals within a state. For instance, T.H. Marshall conceives citizenship as a form of rights to be enjoyed by

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members of a political community, namely the state.[1] The famous debate between those in support or against abortion is to an extent about the question of rights.[2] Issues considered in these contexts imply that there are rights. It is therefore expedient to consider the nature of rights. In T. Ozar's account the word rights has many components. Due to its multidimensional nature, a single definition of the word rights is almost impossible. An adequate conception of rights is however possible in Ozar's view provided we understand what it means when we say that somebody has a right to something and be sure of when an individual is qualified as a claimant of a right. Thus for Ozar, rights involves stating what should be the case and the contrary in any given context.[3] Let me explain. In the case of citizenship as a member of a political community, T.H. Marshall considers a citizen as someone who enjoys civil, political and social rights.[4] Whoever does not qualify to enjoy these rights is not a citizen. This example shows one of the ways by which rights are understood by Ozar. In another sense, Ozar argues that discussions on rights are only meaningful where they refer to at least one person. That is, a person who has a right to enjoy a certain thing, against another who does not. This simply suggests that only human beings could be said to have a right to something or the other. Ozar however admitted that sometimes there are endless discussions on the rights of non-humans, but maintains that it may require more proofs.

In Ozar's view, rights are "relational"[5] That is, an individual only has a right to something in relationship to another person who has a duty to perform towards ensuring that the right bearer enjoys it. Contractarians, particularly, Thomas Hobbes argues that the inhabitants of the state of nature surrendered their rights to self-governance to the Leviathan. Their rights to life imply that no one can kill another person, and presupposes that an individual's right to life implies that another person cannot legitimately take his life.[6] In the view of Rainbolt, discussions on rights can only be understood in relationship with Hohfeldian relations. Hohfeldian relations are: claims, duties, liberties, no-claims, powers, liabilities,

[1] T.H. Marshal, *Citizenship and Social Class,* (Cambridge: University Press) 1950, pp. 10-11.

[2] D. Boonin, *A Defence of Abortion.* (Cambridge: University Press) 2003, p. 14.

[3] Patricia, H. Werhane. et al, *Philosophical Issues in Human Rights,* (New York: Random House) 1986, p. 4.

[4] O.P. Gauba, *An Introduction to Political Theory,* (India: Macmillan Limited) 2007, p. 271.

[5] Patricia, H. Werhane, et al, *Philosophical Issues in Human Rights,* (New York: Random House) 1986, p. 4.

[6] R. Janice, *The Classic Social Contractarians,* (U.S.A: Ashgate Publishing Company) 2009, p. 32.

immunities, and disabilities.[7] According to Rainbolt, "a has right when a has a claim or an immunity.[8] For instance, a landlord who rented an apartment out for one hundred and twenty thousand naira per annum in Nigeria has a claim right of the said amount from his tenant. Immunity right is the type of rights that constrains others from arbitrary conduct against the bearer of the right in question.[9] For J.S.Mill: "when we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law or by that of education and opinion."[10] In Paul Patton view, a right to something gives the right bearer a privilege to enjoy the benefits from such right without any hindrance from the state or other individuals.[11] Having discussed the nature of rights up to this level, I proceed in the next section to explicate and examine some arguments advanced in support of a right to a decent minimum of health care.

Arguments in Support of a Decent Minimum of Health Care.

Allen argues that it does not seem to him a realistic project on the part of the society to provide an important level of health care for everybody. The problem with the supposed right to health care, Allen seems to argue, implies that whatever is possible must be done to ensure that everybody enjoys a reasonable access to health care. For him, there is no way this can be accomplished. This is because such right to health care fails to realize that there are periods when there are challenges with the government finances, namely, when the cost of governance must be reduced, which may in turn lead to reduction in the budgetary provisions for the health sector in the overall interest of the other spheres of the economy. In anticipation of this possibility, namely, the dwindling finances of the government and some other reasons, Allen argues for a right to a decent minimum of health care. In other to understand the idea of a decent minimum of health care, it is important to examine some of its characteristics.

For Allen, the notion of a right to a decent minimum has three major characteristics. It has been argued that the notion of a decent minimum could only be explained within a particular society. It is believed that just as the inhabitants of a society may have some rights to other things apart from health care, say education, it may be necessary to embrace the idea of

[7] G. Rainbolt, *The Concept of Rights*, (Netherlands: Springer) 2006, p. 1.

[8] Op. cit., p. 28.

[9] Op. cit., p. 25.

[10] J.S. Mill, "On the connection between justice and utility" in Sher G. (Ed) Utilitarianism, (U.S.A: Hackett Publishing Company, Inc) 1979, p. 52.

[11] P. Patton, "History, normativity, and rights" in Costas Douzinas and Conor Gearty (Eds) The Meaning of Rights, The Philosophy and Social Theory of Human Rights (Cambridge: University Press) 2014, p. 233.

a decent minimum of health care, since a crusade for a right to health care either minimum or strong equal access, must take cognizance of the financial strength of the society and must be agreed upon by her members. The notion of decent minimum is therefore embraced because it takes cognizance of social reality. That is, it allows members to enjoy certain rights to health care to some levels, and also allows such to be improved relatively to the financial strength of the society. The notion of a decent minimum has also been embraced because it does not run into the same problem with the strong equal access principle, even though it recognizes the fact that there are universal rights. The thesis defended by the strong equal access principle is that "everyone has an equal right to the best health – care services available"[12] Allen argues that the strong equal access principle leaves us with no good option, as it constrains our choices to two positions that are not encouraging. It leaves the society with the option of making the status of health care to the people such that it will not meet the professional requirement or make it in such a way that it will be acceptable only when it meets the professional requirement alone. The first option Allen argues will lead to a situation where the inhabitants of the society will not be allowed to pay for goods and services not provided by the state. These people may spend their money on things not as important as their health but find it difficult to make any financial commitment on their health. In cases where the people are allowed to expend their money on their health provided that they do not buy things that are already provided for by the state, the strong equal access principle becomes a decent minimum right to health care. The other alternative is to subscribe to the arrangement where everything required as specified by the professionals in the health sector will be provided by the state. This option, according to Allen limits government intervention in other spheres of the economy because of its enormous financial burden. The notion of decent minimum level of health care has also become popular because it recognizes the fact that health care is multifaceted. It will be difficult if not impossible to provide for everything in the health sector, defenders of this view argued; as such policies in the health sector must consider things that are germane to the survival of the people, that is, health care needs that are basic. In the next section, the view of Yvonne Denier on a right to health care will be discussed.

What is a Human Right to Health Care?

In the view of Yvonne Denier, saying that there is a fundamental human right to health care could be understood in four senses. Firstly, it

[12] Allen E. Buchanan, *The right to a decent minimum of health care, philosophy and public affairs,* 13, 1984, p. 58.

implies that the society has a moral obligation, to provide health care needs of her members. Second, it should be emphasized that this kind of obligation should be understood strictly. This implies that having a right to health care needs should take precedence over and above other things in the prevalent circumstances. Third, to have a basic right to health care, the right bearer should be allowed to enjoy to a very large extent, health care needs and services. Any social arrangement which fails to accord the right – bearer this privilege is nothing other than injustice. Fourth, human right is accorded human beings alone. [13]

Justification of the Right to Health Care.

For Denier, the major reason for a right to health care is due to the purposive nature of such right. A right to health care serves as a vehicle for the attainment of that which is desirable among different people in the world. That is, people in the world are not only willing to live a life that is devoid of pain and physical or non- physical challenges; they are also willing to live in an environment where their life expectancy is relatively reasonable. Health care needs, it may be argued, is not the only thing desirable across the globe, and so will not suffice on the basis of being valued to be considered as a right. Denier bares his mind on three other arguments, which for him, lay credence to arguments in favour of a right to health care. For the purpose of this paper, I consider two of these arguments.

The first argument is what he called basic health- care needs. Basic needs are the essential needs required by human being to live conveniently in a society. They include physical and non-physical materials such as food, clothing, shelter and emotional needs of individuals in the society. They are considered as fundamental needs not only because they apply to the generality of humans but also because without them human beings cannot survive. In the same vein, human body requires certain things for its various organs to perform well. These things include good feeding, good accommodation, environment devoid of dirt, a friendly atmosphere where the person can work. These are the basic health care needs required by all human beings. They are basic because they apply to all culture at all times, and evolve "from human vulnerability and finitude"[14]. The society is under a moral obligation to ensure that these basic needs are enjoyed by her members.

The next argument is what he calls the collective social protection. The idea of a collective social protection is associated with a lot of issues on health matters. It is very unlikely that citizens on their own could corner

[13] Denier, Y. Efficiency, *Justice and Care, Philosophical Reflections on Scarcity in Health Care,* (Netherlands: Springer) 2007, p. 77.

[14] Op. cit., p. 78.

enough resources to provide everything necessary to enjoy a sound health. Apart from this, health-care needs are in most cases unevenly shared when compared to other needs. Thus for instance, a large number of people may require similar quantity of food to survive, but when it comes to health care needs, people's needs for survival are different. By its nature, it is often difficult to say in advance what a particular person's need in the health sector will be. Besides, being able to meet ones health care needs will to a large extent determine the chances of an individual in the society. Lastly, health care needs sometimes may be outrageous, thereby making it difficult for an individual to procure it. Granted that health care needs are fundamental to the survival of human beings, arising from the force of arguments up till this level, it may be relevant to know the range of the health care needs that can be enjoyed by human beings. In a bid to answer this question, Yvonne Denier argues for a limited right to health care needs. For him, having a right to health care cannot be an unlimited one. It is not the case that the society can provide all that is required to cater for the health needs of her members. This is because health care for him is not the only thing desirable. Besides, the fat 'resources' needed to provide for health care services are not in abundance. Available resources must be channeled to other sectors of the economy. Also, the advancement in technology, he argues, has made it practically impossible to argue for an unlimited access to health care, since rapid technological advancements across the globe had increased the demands of health care services. On the basis of this, it would not be economically reasonable on the part of the state to completely finance the health sector. On the basis of these arguments, Denier argues for a limited right to health care. In the next section, I consider the arguments advanced against a right to unlimited right to health care by Thomas Halper.

The Right to Health Care

According to Thomas Halper, the right to health care could be understood in two senses. "It is an obligation on the part of society, negatively or procedurally, not to interfere with the individual's pursuit of health care and, positively or substantively, to provide that care when the individual demands it"[15] Rights understood in these senses, for Thomas Harper is related to the concept of obligation in three ways. Rights in relationship with obligation, simply put, to have a right to something, say education or health care implies that somebody has the obligation towards ensuring that the right bearer enjoys it. In another way the concept of right

[15] T. Halper, "Rights, reforms and the health care crisis: problems and prospects , in, T.J. Bole III& W.B. Bondeson, (Eds) Rights to health care (London: Kluwer Academic Publishers) 1991, p. 135.

also stipulates that the right bearer performs certain duties. Just as the society, community or group to which the right bearer belongs are under certain obligations towards ensuring that the right bearer enjoys his or her right, the right bearer, according to this view is also obliged to perform certain duties corresponding to the right in question. Lastly, right implies that the society is morally obliged to ensure that right bearers enjoy it. "It is not an in personam right that one person may claim against another, but rather an in rem right that one may claim against the whole community:"[16] The next question is: what kind of health care can citizens enjoy? Halper's attempt to answer this question led to his discussion of types of rights to health care. For Thomas Halper, two types of rights to health care exist. There is a type, which he refers to as "an unqualified right". The 'obligations' of the 'society' are formulated without necessarily specifying the requirements for this type of health care. In other words, the only requirement for this kind of right to health, namely, unqualified right, is based solely on medical consideration. Proponents of this version of health care right, argue that the enjoyment of an individual's political rights, is to a large extent determined by his or her access to education, other basic needs of life, and most importantly, such individual must be able to "receive good health".[17] In his desperate move against an unqualified right to health care, Halper advances some arguments against an unqualified right to health care. According to him, the right to an unqualified health care assumes that the virtues of excellence and equality, which hitherto had been accomplished at the cost of either of the duo, can be realized at the same time. Let me explain. Attempt to accomplish excellence is only possible by ensuring that resources, both material and human be adequately provided at that period in time. For instance, excellence in the health sector may necessitate the provision of adequate resources in this sphere of the economy. The same argument can be applied when efforts are being made towards accomplishing excellence in other sectors of the economy. The problem then is, if the right to an unqualified health care is to be accomplished, it calls for the concentration of resources in the health sector, at the expense of the principle of equality, which stipulates that such resources be evenly distributed among all sectors of the economy. This obdurate quest for an unqualified right in the health sector in Halper view will lead to several questions, the answers to which may be interdependent. Thus for instance, assuming that a case is made for an unqualified right to health care, someone may be interested in the kind of health care a particular individual can enjoy. Are we interested in health care services that are required in cases of emergency or otherwise? Harper

[16] Op. cit., p. 136.
[17] Op. cit., p. 136.

seems to maintain that the definition of health by the WHO raises further problems on the right to an unqualified health care. WHO defines health as "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity"[18]. The question is whether it is possible to be healthy as stipulated by WHO. If an individual cannot be healthy as stipulated by WHO, does such individual has the unlimited right to health care where he or she could enjoy an unqualified right to health care especially when there are inadequate financial resources to sustain such project.

Determining whether an individual has a right to health care, in Harper view is further complicated by the individual's disposition. The problem is whether the individual accepts the traditional medical practices against other forms which he may have recourse to especially during sickness. Arguments in favour of the right to health care Harpers argues, glosses over this important aspect of the programme. Suppose an individual has a right to health care but rejects traditional medical practices. Again, Harper seems to claim that what happens to an individual who is involved in practices that could expose him to health hazards such as, smoking or intakes of alcoholic drinks. Let us assume that these practices deteriorate the health conditions of individuals, should we still say that such individuals should enjoy unlimited right to health care? Is it the case that the society has to care for these individuals at all cost regardless of the ways in which they have lived their lives? Granted that the society has a duty towards ensuring that her members enjoy an unqualified right to health care, what are the implications for professionals in the health sector? A regime of unlimited access to health care would necessarily increase the responsibilities of medical personnel. The problem raised by Harper is whether the opinion of the medical personnel matter in circumstances like these, since they shoulder most of the professional responsibilities. If we argue that their opinions do not matter, would it not amount to an infringement on their own rights? In Harper's view, the crusade in favour of an unqualified right to health care is an attempt to employ a non-political means to achieve something that is completely political. The domain of politics is where people compete for resources that are relatively scarce. Any attempt to argue for the regime of an unlimited access to health care implies that special consideration will be given to the health sector over and above other sectors of the economy. This would have given this sector, a head start, against other sectors. Having explicated the major arguments advanced by different scholars against an

[18] Machteld Huber, *Health: How should we define it?* In British journal, 343, 2011, p. 235.

unlimited right to health care, in the next section, I attempt a critique of the arguments against an unlimited right to health care.

A critique of the arguments in support of a right to a decent minimum of health care.

Proponents of a qualified right to health care or a decent minimum level of health care maintain that any arrangement contrary to this, is unrealistic. In support of this contentious position, a number of arguments have been offered. In this section, I examine some of the arguments and argue that they are not strong enough to support their conclusion. On the contrary, I argue for an unqualified right to health care. One prominent argument advanced by scholars against an unqualified right to health care, is the argument from the existence of other sectors of the economy. The thrust of their argument is that, there cannot be an unqualified right to health care because health care is not the only thing desirable, and that, the government cannot afford to finance the regime of an unqualified right to health care. This argument is implicitly premised on the fact that the regime of an unqualified right to health care, requires a huge financial commitment on the part of the government, and that given the existence of other sectors, it cannot be realized. It is however important to stress that the assumption behind a crusade for a right to health care whether a qualified or an unqualified right to health care is the fact that health care is a basic need for humans. As a basic need, it must be met. Basic needs by their nature are such that are required for the optimal performances of human beings. On basic needs, Streeten and Burki maintain:

> BN gives high priority (attaches considerable weight) to meeting specified needs of the poorest people, not primarily in order to raise productivity (though additional production is necessary), but as an end in itself. It covers the unemployables as well as the unemployed: the old, the disabled, the sick.
>
> (Streeten and Shahid Burki,[19]

Considering the necessity of health care needs to the continuous existence of the human race, there are reservations whether a qualified right to health care occasioned by the existence of the other sectors of the economy is a strong argument against an unqualified right to health care. There are other sectors of the economy such as education, agriculture, transportation and many others. The pertinent question is whether in order for the needs of the other sectors to be met, the government should only finance a qualified right to health care or a decent minimum of health

[19] Streeten Paul& Shahid Javid Burki, "Basic needs: some issues", World Development, 6, 1978, pp. 411-421.

care. The existence of other sectors of the economy, to my mind, is not enough reason for a qualified right to health care. Just as the other spheres of the economy are important, it seems to me that the health sector is the bedrock of these other spheres. Without ensuring that the health sector is provided with adequate resources, efforts made in other sectors may merely be a waste of time. Let me explain. Let us begin with the agricultural sector. One major argument often advanced in support of the development of this sector is food security. That is, a country with a functioning and robust agricultural sector will be able to provide enough food for her population. While this is however laudable, it is not enough reason for the government to endorse a regime of a qualified right to health care or a decent minimum at the expense of her citizens, who may have suffered from one form of deprivation from some of the policies of the government. Even when the resources for advanced agricultural policies have been provided, they can only be well utilized when they are managed by healthy professionals.

In the educational sector, the government must also discharge her responsibilities to the citizens. It is however doubtful whether the need to discharge her responsibilities in the educational sector is enough to argue for a qualified right to health care. All over the globe, there are levels of training in the educational sector. The desire level of education for a particular citizen is often different from that of the other. This is explained by the fact that educational goals are not about wishes alone but also border on the mental capability of individuals. On the basis of this, it is often easy for the government to finance the educational sector to a minimum level. This is however should not be encouraged in the health sector. The health of an individual is a matter of life and death. A call for a qualified right to health care or decent minimum of health care to my mind confuses the needs of these sectors.

The argument for a qualified right to health care or a decent minimum of health care also fails, even when, her proponents have recourse to scarcity of financial resources. Let us assume that, the proponents of a qualified right to health care maintain that government of most countries of the world cannot provide everything that is required for their citizens in the health sector, because of the obvious scarcity of resources. In response to this objection, I argue that health care needs are basic, and because of their nature, government should ensure that the available resources be prudently managed to prevent wastages, which have been the bane of most countries of the world. To this end corruption in all forms should be discouraged. Corruption has been the bane of most countries of the world

which has prevented the average citizen from enjoying better health care delivery.[20]

In a desperate move to argue for a qualified or a decent minimum of health care, defenders of this contentions position maintain that government could only ensure that citizens are provided with a decent minimum level of health care. This position assumes that there are lots of factors that have may militate against the desire for an unqualified health care. The current level of technological developments, which have made it difficult, if not impossible to limit the level of health facilities which citizens can access, the peculiar lifestyles of citizens, which to a very large extent may have contributed immensely to their current health status and the implications of the regime of an unlimited health care services on the lives of the medical professionals, are some of the reasons adduced for a decent minimum level of health care. I argue on the contrary that these factors are not only inadequate for a qualified health care but also that the notion of a decent minimum of health care is vague. It is not just enough to argue for a decent minimum of health care, arguments for this seemingly controversial position should be made. Such arguments must show what a decent minimum of health care must conform to and why it should be embraced. Let me explain. The health care needs of citizens are multidimensional. At what point should we expect an individual with a particular health challenge to have enjoyed a decent minimum of health care? Does the notion of a decent minimum of health care begin and end at the primary health care level? Greenhalgh defines primary health care as:

> Primary Health care is what happens when someone who is ill (or who thinks he or she is ill or who wants to avoid getting ill) consults a health professional in a community setting for advice, tests, treatment or referral to specialists care. Such care should be holistic, balanced, personalized, rigorous and equitable, and delivered by reflexive practitioners who recognize their own limitations and draw appropriately on the strengths of others.[21]

Health care needs are fundamental to the continuous existence of the human race. They have to be provided at all cost; otherwise the human race will go into extinction. It emphasizes the prominent place of care in the preservation of the human race.[22] As such, it is very difficult to

[20] Anna, Markouska Nya Adams, "Political corruption and money laundering: lessons from Nigeria" in the Journal of Money Laundering Control, 18, 2015, p. 175.

[21] T. Greenhalgh, *Primary Health Care, Theory and Practice,* (USA: Blackwell Publishing Inc) 2007, p. 12.

[22] R. Fiona, *The Ethics of Care, A Feminist Approach to Human Society*. (Philadelphia: Temple University Press) 2011, p. 2.

determine at which level an individual would have met the condition of a decent minimum. Let us consider the case of a patient who suffers from secondary infertility. "Secondary infertility is defined as the inability to become pregnant, or to carry a pregnancy to term, following the birth of one or more biological children.....".[23]. A woman who suffers from this medical condition will probably begin from the primary health care unit where she may be referred to a specialist. Let us suppose that several attempts made by the woman to conceive naturally were to no avail. The gynecologist had to suggest that she tries IVF an artificial method to conceive, as the last resort. According to Anthony Dyson: "first, IVF refers to the joining of female egg and male sperm outside the woman's living body"[24]. It is a medical procedure that could involve different stages. Anthony Dyson notes:"

> The IVF process can be divided into four phases. The first phase is concerned with the production of eggs (or ova). The second phase is concerned with the extraction of eggs. The third phase is concerned with fertilization (or conception), and the fourth phase with the transfer of the embryo to the mother's uterus (or womb)"[25]

At what point should we consider her to have enjoyed a decent minimum? There are reservations whether she could be considered to have enjoyed a decent minimum at the primary health care level where she was referred to a specialist. Neither can we say she has enjoyed a decent minimum whenever she successfully becomes pregnant through IVF, nor when the pregnancy has matured before delivery. The point being made with this illustration is that health care needs may require several approaches with enormous financial commitment before they could be met. In the process, particularly in the illustration just made, and similar ones, what determines a decent minimum?

It will also not suffice on the part of the defenders of a decent minimum of health care to rely on a utilitarian argument, that what is right should be such that tries to promote the interest of the majority. "Utilitarianism is the view that benefits should be maximized and burdens minimized, where benefits and burdens are functions of individuals' interests, desires and preferences".[26] In this context, defenders of a qualify right to health care may argue that since the woman in question suffers from secondary infertility, it is not right to commit the public financial resources to meet her needs, at the expense of the majority. I argue that

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[23] Secondary infertility, retrieved from Http://WWW.resolve.org.2012/2015.

[24] A. Dyson, *The Ethics of IVF*, (New York: Mowbray) 1995, p. xi

[25] Op. cit. p. 28.

[26] D. Lynons, (Ed) Rights. (Belmont, Cal; Wadsworth Publishing Co. Inc) 1979, p. 6.

such defense would not be enough to override the interest of the woman. Such position has suffered some criticisms from critics of utilitarian who argue that the theory is grossly inadequate because of its preference for the overall interest of the majority. Notable among the critic of utilitarianism is J.S. Mill, who argues against this theory because of its obdurate defense of the majority's interest which for him is capable of promoting injustice. In this context, following Mill's conception of justice, namely, Mill writes,"...it is universally considered just that each person should obtain that (whether good or evil) which he deserves, and unjust that he should obtain a good or be made to undergo an evil which he does not deserve"[27] Arguments for a limited right to health care or a decent minimum on utilitarian's consideration amounts to an injustice on the part of the minority, say the woman with secondary infertility, who may not enjoy all that is required to facilitate the success of her IVF from the state.

Conclusion

This paper examines the works of scholars like Allen, Yvonne Denier and Thomas Halper who argued against an unlimited right to health care. It argues that contrary to the controversial positions defended by these scholars against a regime of an unlimited right to health care, a right to an unlimited right to health care should be embraced by the government because of the enormous financial commitment among patients who are already traumatized by their health challenges. The paper concluded that any other arrangement different from a right to an unlimited right to health care is a threat to citizens' right to life.

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FROM ANXIETY TO ATARAXIA

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Abstract*: Our analysis starts from the premise that anxiety is a philosophical concept, not merely a research topic for psychology, not being reducible only to anxiety neurosis. Thus, we propose the philosophical research of this particularly deep concept requiring a complex approach due to its metaphysical origin and its link to the spirit, to the human being's basic structure. It is also the reason why we appreciate that the solution to the problem of anxiety is eminently spiritual, more specifically, it resides in the 'awakening of the spirit'. A truly free spirit, even if dominated by metaphysical anxieties, cannot lock itself into destructive anxiety. In my opinion, metaphysical anxiety cannot be confused with depression, it cannot be treated with anti-depressants. Did man not have turmoil, metaphysical anxieties, he could not claim to participate in culture. Only the one who goes through metaphysical anxiety can attain the state of ataraxia.*

Keywords*: anxiety, anguish, ataraxia, freedom, spiritual turmoil, philosophy, faith*

The Philosophy of Anxiety

The issue of this article envisages specific aspects of human condition from time immemorial, which resides in the struggle between what we are, feel, think, live and what we seek, desire, achieve and fulfill. Freud said that "our psychic life is a battlefield of antinomian couples".[1] Anxiety and ataraxia are antinomian concepts, like suffering and happiness, evil and good, but which are interrelated, because "evil is only the absence of good"[2], and "unlimited happiness and very violent suffering always happen to one and the same person: because they condition each other and are thus jointly conditioned by a great vitality of the spirit".[3]

In the history of philosophy, anxiety and anguish have been approached and we would like to remind especially the existentialist thinkers, such as S. Kierkegaard, M. Heidegger. Today, indeed, anxiety is

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[1] S. Freud, *Introduction to Psychoanalysis,* Bucharest, Didactic and Pedagogical Publishing House, 1980.

[2] G.W. Leibniz, *Theodicy – Essays on the Goodness* of *God*, *the Freedom* of *Man and the Origin* of *Evil,* Introduction, Iaşi, Polirom Publishing House, 1997, p. 17.

[3] Ah. Schopenhauer, *The Art of Being Happy through 50 Rules of Life*, Rule 5th, Bucharest, Cartex Publishing House, 2018, p. 26.

explained starting from the multiple and diverse disturbing factors that the current world is facing - pandemic, war, technological expansion, etc., being located in the cognitive register of psychology. Anxiety (confused with fear, depression, etc.) has no external cause, not having a biological basis like nervousness.

Therefore, not any turmoil triggers the anxiety of evil. The only anxieties that can lead to ataraxia are the metaphysical ones, but which are consciously experienced by those who aspire to higher knowledge or who question the meaning of life. Most people are stuck in routine without questioning the meaning of life, experiencing anxieties which are related only to the immediate aspects of their lives. For them, existence has no enigmas! Through the original sin, man fell from grace, destroying his absolute freedom. Thus, man was 'condemned' to an essential restlessness, to metaphysical anxiety. It is not by mere that chance Kierkegaard defined anxiety as a 'vertigo of freedom".[4] It is the reality of freedom as the possibility of possibility. This is why anxiety is not found in animals, precisely because they are not spiritually determined in their nature. Man is a synthesis of soul and body. But a synthesis is inconceivable without both sides uniting in a third. This third party is the spirit.[5] Undoubtedly, anxiety is constitutive of the human spirit. How does the spirit relate to itself and to its condition?! It relates as anxiety. This means that it is a state of mind imparted to man from the beginning, but which goes beyond man and is related to a certain sadness of divinity. In this sense Schelling claims that anxiety primarily denotes the sufferings of the divinity at the beginning of its creation.[6] Therefore, when asserted in *Genesis* that God commanded Adam – "but of the tree of the knowledge of good and evil, thou shalt not eat" (*Genesis 2:17*), it goes without saying that Adam did not actually understand His word/ how could he understand the difference between good and evil, when this separation was made, wasn't it, only when he indulged into "the pleasure of life"? If we now assume that interdiction awakens desire, then we have knowledge (instead of ignorance), for Adam must have been aware of freedom - since he wanted to make use of it.....the interdiction makes him anxious, because it awakens in him the possibility of freedom. What had passed by innocence as a "nothingness of anxiety, now penetrated him, also as nothingness, as the terrifying possibility of being free. There is only the possibility of being free, as a kind of higher form of ignorance, as a higher expression of anxiety..... After the word

[4] S. Kierkegaard, *On Anxiety*, Timişoara, Amacord Publishing House, 1998, p. 99.

[5] Idem. The definition of what means to be a human is presented by S. Kierkegaard in *Either/Or,* the second part being subsequently developed more extensively at the beginning of the writing *The Sickness unto Death.*

[6] F.W.J. Schelling, apud. ibidem, p. 97.

(commandment) that forbids followed the word of judgment – "thou shalt surely die" (*Genesis,2,17*).....If we say that interdiction awakens desire, we will say that the word of punishment also awakens a frightening image that disturbs us. Here the terrible turns into anxiety/ because Adam did not understand what was said, here we are facing again the ambiguity of anxiety..... thus innocence is carried to the maximum. It is anxious about the forbidden thing and about the punishment. It is not guilty and yet anxious, as if it had been lost. Psychology goes no further, the author claims, but it can go this far and, above all, it can prove all these things whenever it observes people's lives[7]. The Danish philosopher seeks the source of anxiety in the original sin, explaining the original sin regressively, in the direction of its origins. The anxiety that sin brings along exists only when the individual institutes the sin himself, being nevertheless vaguely present as a "more or less in the quantitative history of the human race. Hence, we shall encounter the phenomenon when one considers himself guilty even of his own anxiety, which cannot be said of Adam. .....anxiety means two things - the anxiety in which the individual institutes sin by a qualitative leap, and the anxiety that penetrated and penetrates together with sin and which, in this way, penetrates the world quantitatively whenever an individual institutes sin. Sin has penetrated anxiety, bearing anxiety with it, and the continuity of sin is the possibility that produces anxiety". Kierkegard speaks of the anxiety of creation which is objective/ on the other hand, the possibility of salvation is only a 'nothing that the individual loves but also fears"/ this is always also the relation of possibility to individuality. Only at the moment when salvation is truly instituted, only then is this anxiety also overcome. I have brought to attention the arguments of the Danish philosopher precisely to demonstrate that the author himself recognized that psychology cannot go very far in the research of anxiety, because it is a metaphysical concept. From this perspective, *metaphysical anxiety is the expression of longing for God, but the longing alone cannot save him*. In fact, *therein lies the metaphysical drama of man living simultaneously in two worlds!* Hence the *unhappy consciousness* that Hegel spoke of, understanding that any consciousness is unhappy because it dislocates itself into subject and object simultaneously. As a problem related to the essential structure of man, *metaphysical anxiety* is not a disease. We encounter it in metaphysically restless spirits, and I have presented above the basis of this assertion. On the other hand, it can be converted into ataraxia, through philosophizing, faith, art, science, through knowledge and self-knowledge. In psychoanalysis and psychology, the term Angst-neurose (anxiety neurosis), used by Freud since 1890, has become an established clinical term denoting a nervous

[7] S. Kierkegaard, *On Anxiety,* op. cit., p. 80-81.

disease caused by the repression of senses which, unable to be expressed, externalized, turn into angst. This neurosis can also be due to the inner conflict between an instinct and an interdiction. The disease manifests itself by palpitations, feeling of suffocation, dizziness. Like any disease, *angstneurosis* can be treated both by psychoanalysis, by psychotherapy and with sedative drugs (valium) or other drugs that have an effect on serotonin. However, it remains a "complex disease", which still defies psychology and psychiatry, having metaphysical explanations. Man's metaphysical suffering is objectified by an anxious but conscious melancholy that can be held under control, not by medication, but by will. Anxiety is a 'disease of the century' we live in. More than 50% of the youngsters on this Planet suffer from anxiety, under various forms, for different reasons, because our life circumstances are particular. Especially after the pandemic, the phenomenon has amplified, and the situation of the war in Ukraine somehow generated a global anxiety, because those who started the war maintain the atmosphere of fear and terror with permanent threats regarding an imminent nuclear attack, a fact that could cause, without a doubt, the Third World War.

Kierkegaard – the philosopher of anxiety

Indisputably, anxiety remains a problem of philosophy because it is a state of mind, it is related to the human spirit, and philosophy is the only discipline of the spirit. Early identified in the concepts of 'fear', 'horror', as well as in the modern terms of 'worry', 'anguish', it was more widely researched by the existentialist philosophy. Anxiety, guilt, and despair are major themes in both modern art and Kierkegaard's philosophy. The most important modern philosophers are his disciples (...)..[8] Starting from his dogmatic base, Kierkegaard has sketched a most accurate portrait of times that seem to be ours rather than his. But how could the phenomena of mass hysteria, the indignation of some people towards the spiritual life and towards the weaknesses of the self be explained if not psychologically and socially? Kierkegaard's diagnosis is short and clear: all this is nothing but anxiety towards the spirit, anxiety of becoming oneself. Unlike fear, anxiety does not have an external cause, and neither does it have a biological basis like nervousness. In the beginning, anxiety is a premonition that man takes in more than he could have thought, it is anxiety towards the uncertain possibilities that frighten him but at the same time attract him. Anxiety is both a psychological prerequisite - for man to become alienated from himself (by falling into sin), as well as a consequence of this alienation. In order to calm down and exonerate himself, man can claim that this limitation is fate, being anxious to admit

[8] Villy Sorensen, *Forward* to S. Kierkegaard, *The Concept of Anxiety,* op. cit.

the very fact that, if we judge it properly, it is his own fault. The opportunity to overcome his anxiety comes only when man recognizes that he has nothing to do with his environment, that it is not chance or strict necessity that prevents him from becoming himself, but his own sin. The free man does not take offense, blame others, but recognizes that the reason for what happens to him lies within himself. And yet man refuses again to accept his sin (anxiety of Evil, IV,1) or to recognize that there is a way out of sin (anxiety of Good, IV,2), namely faith (V).[9] Kierkegaard interprets everything from within, he is not as one-sided as his Hegelian-Marxist counterparts who explain everything from without. The fact that his work encompasses more ethical force than the others' is indisputable. Even more surprising is the fact that no one has penetrated the spiritual, psychological and social phenomenon of anxiety (angst), from an inter and transdisciplinary perspective - philosophical, psychological, sociological, as deeply as the Danish thinker did.

We dare appreciate that S. Kierkegaard - *the philosopher of anxiety*[10], places himself in the horizon of metaphysics with his work "*On Anxiety*"[11], combining somehow the philosophical explanation with the theological one. Thus, according to the Danish philosopher, anxiety does not have a concrete object such as 'fear' or 'fright'. It is an A of 'nothing'.

It has a dogmatic, Christian dimension, relating to sin and spirit. Anxiety arises from the freedom to choose between good and evil, etc. The concept of *Angst* was later resumed by Martin Heidegger[12], who considers that the man suffering from A realizes that there is nothing that constitutes an absolute support point for his principles, ideas and life, these being based on 'nothingness'. Kierkegaard's concept also exerted influence, in the early 1900s, on the existential theology of Gabriel Marcel, Rudolf Bultmann and on the existential philosophy of K. Jaspers, J. P. Sartre and A. Camus, the latter two widely contributing to the spread of the Kierkegaardian thought in Europe. The philosophical and scientific research carried out has revealed that 'angst' has a philosophical, physiological, religious and psychological value. The philosophical force of the word 'anxiety' is limited in the Romanian language, although the tendency of using it seems to be on the rise. The term anxiety is currently used in psychology, which denotes a one-sided and negative approach to this word, because at the level of common

[9] Ibidem, p. 25.

[10] For Kierkegaard, anxiety was not just a concept, but the analysis of a "concrete" state of mind he had been suffering from ever since his birth. His diary entries from 1837, 1839, 1850 describe this long lasting suffering of his, without a direct "reason", this psychic suffocation handed down from one generation to another and acquired through one's own fault.

[11] S. Kierkegaard, *On Anxiety*, *op. cit.*

[12] M. Heidegger, *Being and Time,* Bucharest, Humanitas Publishing House, 2003.

sense anxiety is identified with a pathological state of mind. Kierkegaard himself claims that psychology has anxiety as its object. But he somehow warns that it is necessary to be cautious, because "the history of individual life moves forward from one state of mind to another. Each state of mind is achieved by a leap....Each such leap is preceded by a state of mind which is the closest psychological approximation. This state makes the object of psychology.[13] We do not share the idea that anxiety is influenced by sex, that "women are more anxious than men".[14] What influences anxiety with its forms of manifestation is the freedom of the spirit. Otherwise, as I have shown above, anxiety is related to spirit, it is defined as freedom revealing itself in possibility. The metaphysical perspective of anxiety that transcends the psychological approach entitles us to argue that anxiety is not entirely undesirable. In this sense, in chapter V entitled *"Anxiety - as savior through faith"*, Kierkegaard emphasizes that "every man should go through such an adventure in order to learn to be anxious and not to lose because he has never tried anxiety, or because he sank into anxiety, so he who has properly learned to be anxious has learned the highest thing".[15]. *Learning to be anxious means becoming aware of the finitude of existence, assuming it and seeking inner peace (ataraxia), as a relinquishment to one's own fate*. The need for peacefulness, detachment, ataraxia, the need for faith, for God emerge from anxiety! Let's remember Augustine's *Confessions*[16], his metaphysical anxieties and the desire to overcome them through faith and philosophy - "*Our heart is restless until it rests in You!"* It is very important to understand that anxiety is a specifically human state of mind. Only man can experience anxiety, because he is ambivalent. "However, being a synthesis, he can be anxious, the deeper his anxiety, the greater the man; not in the sense that the world usually considers anxiety - when it is towards something external, towards those things which are outside of man - but in the sense that anxiety is produced by himself. Only in this sense is it meaningful and when it is said that Christ would have been gripped by the anxiety of death[17] and that he would have said to Judas[18]: "what you will to do, do it quickly". And the terrible words that caused Luther anxiety until he preached them: "My God, why have you forsaken me?", not even these words express the suffering so strongly, due to the fact that the latter words describe the state in which Christ is, and the former describe the relationship to a state of mind that does not exist. The Kierkegaardian

[13] S. Kierkegaard, *The Conceptl of Anxiety*, *op. cit.,* p. 99.
[14] Ibidem, p. 105.
[15] Ibidem, p. 203.
[16] Augustin, *Confessions,* Bucharest, Humanitas Publishing House, 2018.
[17] Matei 26, 37-38, Marcu 14, 33-34.
[18] *The Gospel of John*, 13-27.

approach to anxiety deserves due analysis because it insists on the idea of spiritualizing this specifically human condition when it claims: "Anxiety is the possibility of freedom, only such anxiety is absolutely educational, formative, through faith - because it devours all finitudes, discovers everything that is illusory in them. And not even a great inquisitor has at hand such terrible tortures as anxiety does, no spy knows how to attack his suspect so treacherously—at the exact moment when he is most vulnerable, or to make the noose in which he wants to lure him as enticing as anxiety does. And no sagacious judge knows how to examine the accused like anxiety, without letting him slip off, neither to fun, nor to make noise, nor at work, nor by day or by night. The one educated and shaped by anxiety is formed by possibility, and only he who has been formed by possibility is formed according to his infinitude"[19].

Instead of conclusions

Anxiety is *a research topic* that has been proper to the human condition. At the same time, it is *a state of mind*, not always a negative one. Ataraxia is an eminently philosophical concept, denoting the goal of ancient wisdom (Stoicism, Epicureanism, Skepticism)[20], because it means the peace of mind happiness consists of. In this sense, we support the idea that *metaphysical anxiety* is the one that uplifts man and develops his spiritual freedom. "The sage's ataraxia"[21] means 'his refusal to react to good or bad of any kind that could happen to him"[22]. Not by chance, Andrei Pleşu, in his *Introduction to Epictetus' Manual*, appreciates that there are, indeed, more effective and less risky drugs than those prescribed by psychiatrists. In our turn, with this book in hand, we can also proclaim, for the benefit of the neurotics around us (and our own neuroses): "Epictet, not antidepressants". [23] You will see that it really works..... Philosophicall practiced, through positive and deep thinking, anxiety can lead to the state of ataraxia. All our life goes through all kinds of anxieties: from annoyances, sufferings, turmoil, restlessness, worries, anguish, despair [24] and even the horror and fear of death! The great Roman philosopher and emperor who was Marcus Aurelius, sensing the struggle

[19] Kierkegaard, *op. cit.,* p. 102.

[20] Frederick Copleston, *The History of Philosophy. Greece and Rome*, vol. I, Bucharest, All Publishing House, 2008, p. 368.

[21] H. Arendt, *The Life on the Spirit,* Bucharest, Humanitas Publishing House, 2018, p. 142.

[22] Epictetus, *Manual*, Bucharest, Seneca Lucius Annaeus Publishing House, 2016.

[23] Andrei Pleşu, apud. Ibidem.

[24] E. Cioran, *On the Heights of Despair,* Bucharest, Humanitas Publishing House, 1990, appreciated as "the most philosophical book" by the author himself. *Axiety means despair* for Cioran.

of the human being in this world, states: "Life is warfare, and a sojourn in foreign land. What is it then that will guide man? One thing alone: philosophy."[25] The Roman philosopher has in mind the soteriological function of philosophy (salvation through reason), the detachment acquired through philosophy can lead him towards the state of ataraxia, (peace of mind), a condition of freedom and happiness.

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[25] M. Aurelius, *Thoughts to Myself*, Bucharest, Humanitas Publishing House, 2013.

CAPITALIZING ON JUSTICE IN CONDITIONS OF GOOD GOVERNANCE

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***Abstract**: The phenomenon of good governance is in a close and indispensable connection with a qualitative and effective justice system. The adversarial discussions between the opponents are oriented towards prioritizing either human rights or justice. Which of the phenomena can be temporarily sacrificed: good governance or justice? Can a justice in the process of transformation be an effective tool to capitalize on good governance in general and human rights in particular? Can good governance be leveraged in the absence of an independent judiciary? These and other questions are examined in the paper, in order to appreciate the interaction between good governance and justice in the conditions of contemporary society.*

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Introduction. *A need for quality benchmarks in promoting good governance*

Examining the definition of good governance, the conditions for its manifestation, the subjects involved in the process of its realization, we are convinced, in a vast and multifaceted approach, that the phenomenon in question can and must influence justice as well. The corroboration of these two complex dimensions - good governance and justice, imposes the need to capitalize on other characteristics, valid through the prism of contemporary social standards, considering the fact that "the principles of good governance apply to all the powers of the state"[1]. Good governance

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[1] H. Addink, *Good Governance: Concept and Context*, USA, New York, Oxford University Press, 2019, pp.5, Available at:

https://books.google.md/books?hl=en&lr=&id=JCKQDwAAQBAJ&oi=fnd&pg=PP1&dq=Addink+Henk.++Good+Governace:+Concept+and+Context&ots=GulHFqU_C3&si

requires a qualitative level of governance. "It does matter for the people of a country 'to be in good hands (i.e., to be administered by an effective government with a high quality of governance) [...]"[2]. In the conditions of contemporary society, good governance, therefore qualitative governance, is the only state under which a complex and dynamic system of fundamental human and citizen rights and freedoms can be achieved. Both good governance and justice, in terms of functionality, have common final objectives: the effective promotion, protection and restoration of human and citizen rights and freedoms.

Good governance and justice: conceptual correlations

The role and the value of justice in the conditions of good governance consists in ensuring legality, especially by carrying out the judicial control of the legal acts issued by the subjects involved in the activity of public administration. "Courts have not only the right, but even the obligation to critically assess the legality of the government's actions"[3]. This is a form of control at request, not an "automatic" one and has a great importance in limiting abuses from the state administration[4]. Such a form of control is essential for guaranteeing legality and human rights, considering the fact that "in ensuring the rule of law, the executive authorities play a huge role: firstly, the number of public servants of the executive branch is greater than all other combined; secondly, the executive authorities, possessing great powers, directly manage huge financial and material and labor resources [...]"[5].

Representative institutions of justice, exercising the self-governance of the field, should also comply with the requirements of good governance,

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g=c4mmosJ1nEI_mEkmJCCIDhShyoY&redir_esc=y#v=onepage&q=Addink%20Henk.%20%20Good%20Governace%3A%20Concept%20and%20Context&f=false (Google Scholar) (Accessed: October 20, 2022).

[2] N.H. Nabin, M.T.H. Chowdhury, S. Bhattacharya, It matters to be in good hands: the relationship between good governance and pandemic spread inferred from cross-country COVID-19 data, *Humanities and Social Sciences Communications* 8, 203, 2021. Available at: https://doi.org/10.1057/s41599-021-00876-w (Accessed: October 20, 2022).

[3] M. Pilich, Disobedience of Judges as a Problem of Legal Philosophy and Comparative Constitutionalism: A Polish Case, *Res Publica*, 2021, vol. 27, pp. 593–617. Available at: https://doi.org/10.1007/s11158-021-09501-8 (Accessed: October 20, 2022).

[4] B. Rrahmani, Judicial control of administration in Kosovo, *Juridical Tribune*, 2018, vol. 8, issue 2, pp. 385. Available at:
https://www.tribunajuridica.eu/arhiva/An8v2/4.%20Bashkim%20RRAHMANI.pdf (Accessed: October 20, 2022).

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through the principles of citizen participation, social inclusion, transparency, responsibility and professionalism. In this context, the phenomenon of good governance becomes very useful for justice, in particular for the quality and efficiency of justice. However, the value foundation of the concept of good governance, guided by a constructive approach, by tolerance and fairness, will also inspire and substantiate the area of justice, from the perspective of principles, priorities and directions of activity.

We use the term *justice* in a broad sense, as the organizational area of the judicial authority, the system of prosecution bodies, the institution of the legal profession and forms of organization of other subjects that contribute to the realization of justice through functional powers. The restoration of human and citizen rights is one of the basic competences of justice; success in realizing this competence, respecting the principle of celerity and fairness, through real involvement in concrete issues, is an indicator of justice performance.

Good governance presupposes the active involvement of the civil society in this process and, at the same time, both justifies and validates connections of the civil society with justice. The connection is not an equivalent of the direct involvement in the administration of justice, as can happen in the area of public administration. The connection of justice with civil society, under conditions of good governance, is mainly expressed through forms and ways of monitoring the functionality of justice in realizing the competence regarding the effective protection and restoration of human and citizen rights and freedoms. Good governance, oriented towards the affirmation and the consolidation of the supremacy of law, literally dictates certain quality conditions in relation to the activity of justice and the act of justice, but also in relation to the monitoring of justice by the civil society. Integrity and professionalism of the subjects exercising the monitoring and the impartiality of the monitoring itself, are fundamental principles for enhancing the performance of justice, inspired by the essence and objectives of good governance.

In the same conditions, of the expression of good governance, requirements of integrity and professionalism are also assigned to magistrates (judges and prosecutors), with an emphasis on conduct and professional skills. In the same way, the principles and dimensions of good governance - decision-making transparency, citizen participation, professionalism, responsibility, equity and social inclusion (including women[6]), integrity, efficiency and the supremacy of law - also form the

[6] S.A. Dar, A.A. Shairgojri, Role of Women in Good Governance, *Journal of Social Science*, 2022, vol.3(4). Available at: https://doi.org/10.46799/jss.v3i4.360 (Accessed: October 20, 2022).

foundation of justice, from an organizational point of view, but especially from an operational point of view. They do not undermine or contradict the principles of justice, but contribute to the inclusion of the justice pillar into the complex mechanism of achieving good governance at the national level.

Justice, self-governance of justice and good governance: a need for uniform conceptual interpretations

In order to harmonize the activity carried out in the field of justice with the overall activity exercised by other subjects under the conditions of good governance, there is a need to promote a standardized interpretation of the main directions of action on this segment - of ensuring an efficient, solid governance, focused on the priority protection of human rights.

Decision-making transparency. With reference to justice, decision-making transparency covers both the way of organization and the way of functioning. In the organizational aspect, decision-making transparency refers to state policies oriented towards the elaboration of normative acts aimed at the self-administration of justice. In the context of the Republic of Moldova, we note: The Law on the Superior Council of Magistracy[7], The Law on the organization of courts[8], The Law on disciplinary liability of judges[9], The Law on selection, performance assessment and career of judges[10].

The conditions of good governance presuppose the proactive involvement of the civil society in the self-governance of justice, ensured through the Councils for the Judiciary at the national level of each state, or, in the Republic of Moldova - by the Superior Council of Magistracy and the Superior Council of Prosecutors, as distinct organizational and

[7] Law on Superior Council of Magistracy, no.947 of 19.07.1996, *Official Gazette of the Republic of Moldova*, 22.01.2013, no.15-17. Available at: https://www.legis.md/cautare/getResults?doc_id=133033&lang=ro#(Accessed: October 20, 2022).

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functional structures. Beyond monitoring by the civil society, decision-making transparency in the self-governance of justice also means a degree of public communication, which should be a professional and effective one. Transparency also involves explaining the adopted decisions, in a clear and accessible way to the public. In the contemporary world, any institution, any system of democratic institutions has a tendency to communicate with the society - a reality that must be accepted and improved both at the level of judicial self-governance bodies and at the level of the courts. Communication could be provided both directly or "computer-mediated" or "digitally-mediated"[11] and able to ensure visibility as a prerequisite for transparency and efficiency of justice. "Communication visibility refers to the outcomes of activities through which actors strategically or inadvertently: (a) make their communication more or less available, salient, or noticeable to others, and (b) view, access, or become exposed to the communication of others, as they (c) interact with a particular sociomaterial context"[12]. Press releases, releases prepared by public relations officers working within public authorities are often points of reference for journalistic investigations and for various practical and scientific interpretations. Only through communication, the *fake information* phenomenon can be prevented and combated.

In turn, the principle of transparency in the field of justice is in close connection with another set of principles, specific to civil procedure, criminal procedure (publicity, orality, contradictoriality, solemnity, etc.).

We attest a similar situation in relation to the prosecutor's office. There is a need for communication policies and strategies in the activity of the Superior Council of Prosecutors (in the legal systems in which such a structure operates, distinct from a Council for the Judiciary that is responsible for the overall segment of the judiciary's self-governance) and, to the same extent - at the level of all the components of the prosecution institution. Transparency does not interfere with data confidentiality, with regard to certain cases under the management of the prosecutor's office or of the courts, the principle of legality being the basis of the delimitation of public data from private or secret data. The format and content of the communication – choice of the specialist in charge of public relations –

[11] M.Z. Yao, R. Ling, What Is Computer-Mediated Communication?—An Introduction to the Special Issue, *Journal of Computer-Mediated Communication*, 2020, vol. 25, pp. 4–8. Available at: doi:10.1093/jcmc/zmz027 (Accessed: October 20, 2022).

[12] J.W. Treem, P.M. Leonardi, Bart, van den Hooff, Computer-Mediated Communication in the Age of Communication Visibility, *Journal of Computer-Mediated Communication*, 2020, vol. 25, issue 1, pp. 44–59. Available at: https://doi.org/10.1093/jcmc/zmz024 (Accessed: October 20, 2022).

must be the point of reference in providing explanations and arguments, which are clear and accessible to the public.

This category of civil servants - specialists in public relations, as a rule, is ignored, both in terms of professional training and in terms of social guarantees (they have a symbolic salary). Whereas, in the contemporary reality, where, along with the category of *hard skills*, that of *soft skills or "*expanded competencies*"*[13], based on communicative skills[14], acquires specific contours and distinct value in shaping organizational culture[15], the respective position in the staff of public authorities, including the judiciary, is to be rethought and revalued. Contemporary society, being an informed and trained one, with strong intentions of knowledge and evaluation, feels the need for qualified communication with the judiciary and with all the public authorities and state institutions. Transparency is a principle able to establish and build bridges of communication between the concerned subjects, as well as to contribute, in this way, to strengthening trust in state agents.

Citizen participation (participation of the civil society). Another principle of good governance, which is to be properly implemented in the justice sector as well, is that of citizen participation and of the civil society participation. Apparently, the involvement of the civil society in the self-governance of justice would be reflected only from the perspective of the composition of the Councils for the Judiciary (in many legal systems Councils for the Judiciary admit civil society representatives in their composition). It is also the case of the Republic of Moldova, with reference to the Superior Council of Magistracy and the Superior Council of Prosecutors, including the specialized bodies that operate under the authority of the respective authorities.

However, civil society participation has a complex content. For instance, in Ukraine "civil society organisations active in the judicial sphere have given [...] impetus to judicial reform"[16]. Also, representatives

[13] J.E. Rebele, E.K. St. Pierre, A commentary on learning objectives for accounting education programs: The importance of soft skills and technical knowledge, *Journal of Accounting Education*, 2019, vol. 48, p. 72. Available at:
https://doi.org/10.1016/j.jaccedu.2019.07.002 (Accessed: October 20, 2022).

[14] S. Vasanthakumari, Soft skills and its application in work place, *World Journal of Advanced Research and Reviews*, 2019, vol. 03(02), pp. 67-68. Available at: DOI: https://doi.org/10.30574/wjarr.2019.3.2.0057 (Accessed: October 20, 2022).

[15] A. Masduki, at al., Impact of hard skills, soft skills and organizational culture: lecturer innovation competencies as mediating, *Journal al Education, Psychology and Counseling*, 2020, vol. 2, no.1, pp. 101-121. Available at: https://ummaspul.e-journal.id/Edupsycouns/article/view/419 (Accessed: October 20, 2022).

[16] G. Mykhailiuk, Current Challenges for the implementation of Constitutional Reform on Judiciary in Ukraine on its way towards European integration, *Journal of*

of civil society should initiate and maintain common communication platforms, aimed to detect, analyze and (self-) evaluate problems and vulnerabilities in justice, in order to find and design solutions to overcome or prevent them and ensure decision-making transparency.

Another manifestation of the principle, under the conditions of a judiciary engaged in achieving good governance, aims at the representation of legal professions (lawyers, for example) in the composition of the Councils for the Judiciary. In this way, the solid weight of the legal profession, as an institution and of the judicial self-governance entities, responsible for the implementation of policies regarding the enhancement of the performance of the judiciary, is *ab initio* recognized.

In the context of the Republic of Moldova, the President of the Union of Lawyers from Moldova should be part of the self-administration bodies of judges and prosecutors, with the limitation of his/her powers in deciding on the magistrates' access in profession, promotion, other aspects of their professional career, which should be assigned exclusively to magistrates and to civil society representatives. Precisely in such conditions, an interaction between liberal professions and public professions in the field of justice is possible, in order to capitalize on the components of good governance oriented towards the self-administration of justice. Regrettably, national legislative regulations are oriented towards diametrically opposed policies. The exclusion of the President of the Union of Lawyers from the composition of the Superior Council of Prosecutors is a regrettable one, limiting the perspectives of capitalizing on good governance in the local social reality.

Professionalism. Another principle, characteristic of both good governance and justice, is professionalism. "[H]igh professional standards of a judge are prerequisites in preserving the Right to a fair trial", "[t]herefore, a strong attitude towards fairness must be included in the professional standards of judges"[17].

Neglecting professionalism would be able to generate real errors, with serious, sometimes irremediable impact on human rights. The lack of professionalism leaves its mark on the effectiveness of other dimensions as well, such as that of civil society participation.

Contemporary European Research, 2018, vol.14, issue 1, pp.43. Available at: http://ekmair.ukma.edu.ua/bitstream/handle/123456789/15851/Mykhaylyuk_Current_challenges_for_the_implementation_of_constitutional_reform_on_judiciary_in_Ukraine.pdf?sequence=1 (Accessed: October 20, 2022).

[17] M. Šimonis, Effective Court Administration and Professionalism of Judges as Necessary Factors Safeguarding the Mother of Justice – The Right to a Fair Trial, *International Journal for Court Administration*, 2019, vol.10, no.1, pp. 50, 56. Available at: DOI: 10.18352/ijca.294 (Accessed: October 20, 2022).

At the national level, we note a relevant connection between the involvement of the civil society and judicial self-governance in the context of the change in the conceptual composition of the Superior Council of the Magistracy of the Republic of Moldova, in the sense of establishing a numerical parity between judicial and non-judicial members[18].

Another connection we reveal in the context of the recent adoption of the Law on some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors[19]. The law regulates the derogatory way of selecting candidate judges and prosecutors, who are to be presented to the respective Professional Assemblies, which will vote for the election and appointment of representatives in the Judicial Councils (Superior Council of Magistrates and Superior Council of Prosecutors). It is obvious and indisputable that the representatives of the civil society in the composition of the mentioned commissions should meet certain conditions of integrity and professionalism. Because the accession of judges to the composition of the Superior Council of the Magistracy depends directly on the results of the evaluation by the respective independent commission[20]. The independent commission for the evaluation of the candidates' integrity, with a composition of civil society representatives and international experts, is to pay particular attention to the criteria of integrity and professionalism when evaluating the files of judges and prosecutors.

At the same time, starting from the idea that the members of the Superior Council of Magistracy and the members of the Superior Council of Prosecutors - representatives of the professional body and representatives of the civil society have the same status, confirmed by their statutory rights and obligations, then the selection conditions, through the prism of the criteria of integrity and professionalism, should be the same. It would be appropriate for the candidates from among civil society representatives to be preliminarily evaluated by the same independent commission, in order to reduce the risks of political influence in relation to

[18] Art.3 of the Law on the Superior Council of Magistracy, no.947 of 19.07.1996, *Official Gazette of the Republic of Moldova*, 22.01.2013, no.15-17. Available at: https://www.legis.md/cautare/getResults?doc_id=133033&lang=ro#_(Accessed: October 20, 2022).

[19] The law regarding some measures related to the selection of candidates for the position of member in the self-administration bodies of judges and prosecutors, no.26 of 10.03.2022, *Official Gazette of the Republic of Moldova*, 16.03.2022, no.72. Available at: https://www.legis.md/cautare/getResults?doc_id=130320&lang=ro (Accessed: October 20, 2022).

[20] Art.3[1] para (1) letter c) of the Law on the Superior Council of Magistracy, no.947 of 19.07.1996, *Official Gazette of the Republic of Moldova*, 22.01.2013, no.15-17. Available at: https://www.legis.md/cautare/getResults?doc_id=133033&lang=ro# (Accessed: October 20, 2022).

the parliamentary majority. Obviously, the decision-making capacity regarding the designation of candidates representing civil society will belong exclusively to the Parliament. But assigning the competence to select these candidates not to the Juridical, Appointments and Immunities Commission of the Parliament of the Republic of Moldova, but to the respective independent commission for evaluating the integrity of judicial candidates (for the composition of the Superior Council of the Magistracy) would objectively and logically fit into the reform policies of justice. The proposals for normative regulation in the field of self-governance of justice are aimed at making the subjects involved in the development and implementation of public policies in the field responsible.

Principle of responsibility. Good governance, oriented towards the promotion, achievement and effective restoration of human rights and freedoms, requires the accountability of civil servants and public officials. "Central to the principle of accountability is information sharing and transparency [...], accountability [...][being] hard to achieve [...] in the absence of access to information"[21].

Accountability and, above all, responsibility are inherent principles for judges and prosecutors. Currently, the functions of judge and prosecutor, in many legal systems forming a common entity - of magistrates, are based on increased requirements of integrity. By relevance, integrity in the judiciary is often equated with professionalism, which leads us to make certain conceptual delimitations, from a theoretical point of view. The harmonious interaction between these two categories - integrity and professionalism - are more proof of a level of professional legal culture, of the ability to combine professional-legal knowledge with the ability to interpret the law, of the flexibility to adapt in a spirit of integrity to conditions of work and often hostile realities, of the ability to persuade and communicate and even to empathize, without affecting the decision-making process itself. Centrality of empathy with human as a social being can and must be "cognitively managed" through "emotion management", certain recommendations being possible to encompass in "codes of professional conduct"[22], especially for judges, for whom impartiality is a fundamental principle and value of the professional activity.

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[21] S. Nag Ninad, Government, Governance and Good Governance, *Indian Journal of Public Administration*, 2018, vol. 64, issue 1, pp. 122-130. Available at: https://doi.org/10.1177/0019556117735448 (Accessed: October 20, 2022).

[22] B.S. Bergman, Different roads to empathy: stage actors and judges as polar cases, *Emotions and Society*, 2019, vol. 1(2), 163-180. Available at: DOI: https://doi.org/10.1332/263168919X15653390808962 (Accessed: October 20, 2022).

Professional-legal integrity is not a finality achieved when obtaining a higher education diploma. Integrity has only its beginning in legal education, it finds its theoretical explanation and argumentation in this compartment of professional development, the praxiological support being confirmed and improved in professional legal training and it shows its continuity throughout the professional life. Integrity has a complex content and must not be affected by the political conjuncture. It can be severely damaged if used as a fighting tool against opponents. Likewise, integrity cannot be used to hide certain political and legal interests.

In our opinion, integrity cannot be ensured solely through legal professionalism. Legal culture, complex in essence, justifies the need to correlate legal integrity and professionalism through another philosophical and legal concept – responsibility, as a constitutive element of legal consciousness. Namely, professional-legal responsibility, as a psychological and legal phenomenon, contributes to the configuration of legal integrity and professionalism. All these concepts of philosophical-legal origin confirm the interaction between the professional legal culture and the professional legal conscience of the magistrate, contributing substantially to the strengthening of decision-making transparency, to the prevention and combating of corruption in the judiciary. Moreover, along with the concept of legal culture, the doctrine reveals another concept, less analyzed – that of "judicial culture", based on "an ethical dimension, encompassing professional values and standards for judicial performance", "a legal dimension" and "an institutional dimension"[23], professionalism and responsibility being tangential to each of these dimensions.

Responsibility, perceived as function and quality, in the legal sense would mean the ability of the subject to hold the function and the quality of assuming legal and other consequences for a certain conscious behavior (action or inaction). Responsibility exceeds the limits of legal capacity and is only partially regulated by legal norms. In a psychological sense, responsibility characterizes the individual or the collective, and reflects the attitude towards the conscious and independent activities aimed at realizing the values impregnated in the social environment. We believe that we cannot talk about a legal, moral, religious or other kind of responsibility, simply because the corresponding norms are based on the same value system. A subject is responsible both within the limits of the profession, and outside these limits, in any field of social life.

[23] E. Mak, N. Graaf, E. Jackson, The Framework for Judicial Cooperation in the European Union: Unpacking the Ethical, Legal and Institutional Dimensions of 'Judicial Culture', *Utrecht Journal of International and European Law*, 2018, 34(1), pp.31. Available at: DOI: https://doi.org/10.5334/ujiel.452 (Accessed: October 20, 2022).

In the context of approaching the professional responsibility of magistrates, it is necessary to emphasize the extended area of professionalism, especially in the conditions of persistent tendencies to diminish the value of justice in the trichotomous structure of state power. Public intentions with a declarative nature regarding the justice reform, the fight against judicial corruption, the need to strengthen the decision-making capacity regarding the judicial act serve as the basis for establishing a latent, well-calculated control over the process of joining the profession, professional training of the magistrate, career promotion, thus affecting the independence of the judiciary. However, any reform process needs to be clear, simple and with minimal political interventions. The limitation of social guarantees, the unclear pressures exerted by promoting inconsistent reforms or by mimicking reforms, crowding the media space with contradictory information, the lack of an adequate level of professionalism of certain subjects responsible for capitalizing on the reform in justice, generate the opposite effect: deficient professionalism, dependency, injustice. Such effects can be observed both in the national legal reality, regardless of the government and political color, as well as in the legal reality of the European space. The experiences of Poland, Hungary and Romania are equally eloquent.

The legislative interventions of 2016-2017 in the justice sector in Poland denote accentuated tendencies to politicize this branch of power, through the involvement of the legislature, the President of Poland and the Minister of Justice - the same Prosecutor General in the administration of justice[24]. The assignment to the Seimas of the power to appoint the members of the National Council of the Judiciary seriously affected the independence and credibility of this body of judicial self-administration; changes in the disciplinary procedure for judges question judicial independence itself[25].

Although there is an attempt to place responsibility for these vulnerabilities in the area of justice, we are certain that responsibility must be assumed, proportionately, by all the branches of the state power.

"While judges can play their part in sustaining public confidence in the judiciary, there is little they can do against a government bent on cementing its own power. [...] Judges serve as a crucial check on the

[24] G. Borkowski, O. Sovgyria, Current judicial reform in Ukraine and in Poland: Constitutional and European legal aspect in the context of independent judiciary. *Access to Justice in Eastern Europe*, 2009, no.2(3). Available at:
https://doi.org/10.33327/AJEE-18-2.3-a000011 (Accessed: October 20, 2022).

[25] A. Duncan, J. Macy, The Collapse of Judicial Independence in Poland: A Cautionary Tale. *Judicature,* Bolch Judicial Institute, 2020-2021, vol.104, no.3, pp.40-50. Available at: https://judicature.duke.edu/wp-content/uploads/2020/12/DUNCANv2-compressed.pdf (Accessed: October 20, 2022).

executive and legislative branches, and yet they rely, to an extent, on the respect of those branches to retain their independence".[26]

Romania and Hungary have also proved to be "fragile rule of law frameworks": "[...] dimensions of judicial independence that still required to be integrated in the legal and broader legal-cultural, political, and societal frameworks of Hungary and Romania appear to be the personal independence and irremovability of judges, independent decision-making process and autonomy of judges within the judicial organization and the constitutional independence of the judiciary".[27]

Honest justice cannot exist in a corrupt society, the statement being true also in the opposite sense. Any reform process is characterized by complexity. It is true, the overall effort and financial support is considerable. But only in this way there are chances for the development and completion of a genuine reform with effective social impact. This is in agreement with European recommendations in the field[28]. The reduction of the budget of the judicial authority, the extension of the retirement limit of judges (by invoking special pensions), the ongoing fight against corruption in the field of justice have become topics of electoral politics. They are attempts to exploit latent intentions of political control over the jurisdictional sphere.

Responsibility of judges is a finality of the judicial reform. And, in the absence of a typical legal architecture for justice, which must inevitably include institutional and individual independence, in the absence of a corresponding system of social guarantees, of a transparent system of initial and continuous training, career promotion, this goal becomes an illusory and unachievable one. Similarly, the principle of responsibility and accountability of judges ensures stability of the independence of the judge. The absence of responsibility, as a feature that accompanies any human action, attracts vice and error, mistake, which, in turn, demands accountability[29]. The responsibility of the judiciary is to be preceded by an

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[26] A. Duncan, J. Macy, The Collapse of Judicial Independence in Poland: A Cautionary Tale, *Judicature,* Bolch Judicial Institute, 2020-2021, vol. 104, no.3, 2020-2021, pp. 46, 48. Available at: https://judicature.duke.edu/wp-content/uploads/2020/12/DUNCANv2-compressed.pdf (Accessed: October 20, 2022).

[27] P.M. Gyöngyi, *Judicial Reforms in Hungary and Romania. The Challenging Implementation of EU Rule of Law Standards*, Thesis to obtain the degree of Doctor from the Erasmus University of Rotterdam, 2019, pp.206. Available at:

https://repub.eur.nl/pub/124331/ (Accessed: October 20, 2022).

[28] Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges, Strasbourg. Available at: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d (Accessed: October 20, 2022).

[29] L. Barac, Răspunderea și Responsabilitatea – garanţii ale independenţei justiţiei [Accountability and Responsibility – guarantees of the independence of justice]. Available

analysis of the relevant issues. Depending on the field, on the specialization, the problem can be of a different nature, being necessary to be solved accordingly: for instance, through the lens of criminal justice, civil justice, administrative litigation and even through the lens of constitutional jurisdiction. Even if "judicial quality is not only limited to the quality of the decisions or the existences of appeal and higher courts", "the existence of a High Court, Supreme Court and/or Constitutional Court must be seen in the light of judicial quality"[30].

As factors that could contribute to enhancing responsibility of the national judiciary and, as a result - to increasing the quality of the judicial act and trust in the judiciary, we mention: a) the existence of a coherent and qualitative legislative system; b) implementation of transparent measures and mechanisms for access and promotion in the professional career; c) organization of a representative system of (self-)administration of the judicial authority and of the prosecution institution; d) recognizing and guaranteeing the possibility of (self-)reforming the judiciary, including through collaboration between the judiciary, the competent ministry (Ministry of Justice in the case of the Republic of Moldova) and civil society; e) initiating and strengthening a constructive dialogue on justice issues; g) strengthening the legislation aimed at fighting corruption; i) emphasizing the value of justice by boosting a professional social climate in the field; j) strengthening the activity of professional associations in the sphere of justice; f) the organization of an analytical, scientific-practical center in the field of the organization and operation of justice.

To identify the factors that would contribute to the process of enhancing the responsibility of judges, in order to strengthen their decision-making capacity, we believe that it would be opportune to capitalize on certain reform objectives, primarily focused on the promotion of the rule of law and human rights. It would be the same wave of approach reflected in the *Global Governance Indicators*, which specify dimensions of governance ("voice and accountability", "political stability and absence of violence", "government effectiveness", "regulatory quality", "rule of law", "control of corruption")[31] and basic principles of justice, as a sector of governance (non-formal conflict resolution processes, equal

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at: https://www.juridice.ro/166521/raspunderea-si-responsabilitatea-garantii-ale-independenei-justitiei.html (Accessed: October 20, 2022).

[30] P. Albers, *The assessment of court quality: a breach of the independence of judiciary or a promising development*, Council of Europe, 2008, p.2. Available at: http://sites.estvideo.net/laurens1/web-content/pdf/courtqualassessment3.pdf (Accessed: October 20, 2022).

[31] Worldwide Governance indicators. Available at: https://archive.ph/eypt (Accessed: October 20, 2022).

access to justice for all citizens, human rights incorporated in the national practice, court collaborators are responsible, clarity in the administration of justice, efficiency of the legal system)[32].

As a part of good governance mechanism, justice should be approached in a wider context

If previously we addressed only the aspect of self-governance of justice in the conditions of good governance, the indicators and principles in the field of justice characterize Justice as a whole.

Non-formal conflict resolution processes. Non-formal conflict resolution processes aim to reduce the workload for judges and courts, by capitalizing on alternative forms of dispute resolution, such as, for instance, the case of mediation, as a form of social justice. Mediation is carried out through social conciliation and allows magistrates to focus on particular cases, thus strengthening the quality of the judicial act and saving public funds.

Another way would be the involvement of local leaders, representatives of civil society, who would be able to contribute to the solution of certain problems, disputes.

Equally important is the psychological training of the collaborators of the police bodies, at the sector level, in order to train conflict resolution skills not only in the framework of procedural actions. However, the purpose of their activity is not limited only to the identification of delinquents, but first of all to prevention. "[...] It can be assumed that police officers face situations that are highly emotionally charged and they could be overwhelmed by those emotions. Works on emotion regulation and cognitive abilities would help [...] police officers in their daily duty"[33]. The training of specific skills, which would help them react adequately in risk situations and be more effective, in terms of performance, would be necessary from the beginning at the stage of higher education[34].

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[32] T. Saptefrati, Buna guvernare: caracteristici, dimensiuni şi metode de evaluare [Good governance: characteristics, dimensions and assessment methods], *Administrarea Publica [Public Administration]*, 2015, nr. 3(87), pp. 25. Available at: http://aap.gov.md/files/publicatii/revista/15/3.pdf (Accessed: October 20, 2022).

[33] S. Cojean, N. Combalbert, A. Taillandier-Schmitt, Psychological and sociological factors influencing police officers' decisions to use force: A systematic literature review, *International Journal of Law and Psychiatry*, 2020, vol. 70, 101569. Available at: https://doi.org/10.1016/j.ijlp.2020.101569 (Accessed: October 20, 2022).

[34] V. Bondarenko, I. Okhrimenko, I. Tverdokhvalova, K. Mannapova, K. Printenko, Formation of the Professionally Significant Skills and Competencies of Future Police Officers during Studying at Higher Educational Institutions, The *Romanian Journal for Multidimensional Education*, 2020, 12(3), pp.246-267. Available at:
https://doi.org/10.18662/rrem/12.3/320 (Accessed: October 20, 2022).

Access to justice for all the citizens. The principle of access to justice for all the citizens is closely connected with the administrative and functional architecture of the legal profession. The efficiency of the organization, the clarity in the administrative actions, the theoretical and practical value of the intellectual heritage of the legal profession constitute the condition that supports, for the most part, free access to justice for all the citizens of the state. An efficient monitoring of case categories, of the interaction between lawyers working on a contract basis and lawyers providing legal aid guaranteed by the state, access to legal training, direct access to the profession, the ability to organize a constructive dialogue with public authorities responsible for monitoring the implementation of policies in the field of justice, the ability to influence certain reforms in different branches of law, identifying and skillfully solving problems, deficiencies faced by justice, even "[e]ducating clients and opponents"[35] - all these are capabilities inherent to the lawyers corps, as representatives of the liberal profession in the justice sector. The role of lawyers in protecting human rights is substantial.

Human rights incorporated in national practice. Effective justice also requires a periodic and continuous reassessment of the legal and legislative system. In the legal system of the Republic of Moldova the priority of international regulations in the field of human rights is enshrined [36] (Universal Declaration of Human Rights [37], European Convention on Human Rights [38] and its jurisprudence). Republic of Moldova, as a state that intends to become a candidate for joining the European Union, needs to adjust the legal system with the EU acquis and one of the essential areas belongs to human rights and freedoms. A new approach is needed for the process of adopting normative acts and for the subjects involved. In the same way, new training requirements for future judges, prosecutors and exponents of other legal professions are taking

[35] J.K. Robbennolt, V.D. Amar, The Role of Lawyers and Law Schools in Fostering Civil Public Debate, *Connecticut Law Review,* 2021, 451, vol.52, no.3, p. 1105. Available at: https://opencommons.uconn.edu/law_review/451 (Accessed: October 20, 2022).

[36] Art.4 of the Constitution of the Republic of Moldova, no.1 of 29.07.1994, *Official Gazette of the Republic of Moldova*, 29.03.2016, no.78. Available at: https://www.legis.md/cautare/getResults?doc_id=128016&lang=ro# (Accessed: October 20, 2022).

[37] Universal Declaration of Human Rights, adopted by the UN General Assembly in Paris on 10 December 1948. Available at: https://www.ohchr.org/en/universal-declaration-of-human-rights (Accessed: October 20, 2022).

[38] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: October 20, 2022).

shape, with an emphasis on the axiology of human rights. Maybe "the introduction of so-called transitional justice mechanisms", including "the process of replacing old staff" examined in the context of the justice reform in Georgia could also be useful for the reality of the Republic of Moldova[39].

The court staff is accountable. We believe that we are in the area of responsibility, not of accountability in the narrow sense. Confusion of terms generates ambiguities including in practical terms. The conscious attitude towards the activity carried out, the opening of justice as a public service are valuable indicators of justice under the conditions of good governance. The requirement does not only concern magistrates, as recipients, but all officials in the field of justice. The Judicial Councils, the judicial managers must be concerned with building a true organizational responsibility. If organization of justice is not logically grounded, the functional responsibility of individual magistrates will undoubtedly suffer. The judicial map, legislative stability, career stability, attractive social guarantees, decision-making transparency of the Judicial Councils, their coherent and legal activity, the adequate workload of judges and its evaluation can contribute to strengthening the decision-making responsibility of judges and prosecutors. However, the litigant must have a positive attitude towards the agents of the judiciary and towards the justice service in general. Court departments (chancellery, archives, etc.) also need to be involved, as recipients, in the implementation of functional accountability policies, as they are where the formation of the first perceptions and attitudes in relation to justice begins.

Clarity in administration of justice. In the context of clarity in administration, we refer, first of all, to the way of formation and to the functional powers of the Judicial Council (such as is, in the Republic of Moldova, the Superior Council of Magistracy, the Superior Council of Prosecutors and their subordinate bodies). In terms of good governance, it is essential that the policies developed and coordinated with the Ministry of Justice are followed by logical, fair implementation, without political influences. The Superior Council of Magistracy is the guarantor of the independence of the judicial authority. We do not intend to initiate a discreditation of the reform process in the national justice sector (with reference to the legal system of the Republic of Moldova) but emphasize the proactive role that the Superior Council of the Magistracy should have

[39] T. Erkvania, B. Lebanidze, *The Judiciary Reform in Georgia and its Significance for the Idea of the European Integration*, Policy Brief, Georgian Institute of Politics, 2021, no 31, p.5. Available at: https://new.gip.ge/wp-content/uploads/2021/01/GIP-Policy-Brief-31.pdf (Accessed: October 20, 2022).

in carrying out this system of reforms. Clear conditions for career access and promotion, for occupying managerial positions, the development of integrity policies and their uniform and consistent application, the establishment of the procedure for the defense of professional reputation, ensuring transparent communication regarding the stages implemented and/or in progress of policy implementation - are priority objectives which are in logical connection with the principle of clarity in the administration of justice. However, under conditions of good governance, judicial control and the validation of the supremacy of law are inseparable from the independence, impartiality, accessibility, fairness, timeliness and competency of the judicial authority – "central values" which confer uniqueness to courts, in comparison with other public organizations and ensure that "[c]ourts do not operate in the «blind»"[40].

Efficiency of the legal system. As an indicator of good governance, efficiency fits harmoniously, along with other indicators, in the affirmation of the supremacy of law and the rule of law, "viewed as a political ideal, a mechanism for curtailing the abuse of power as well as a mechanism for ensuring that society upholds certain values, for example, human rights" [41] . Consistency and coherence of normative-legal regulations, effective interaction of state authorities and institutions in the sphere of law enforcement, clarity and quality of legal norms are elements characterizing efficiency. "Law has to be rooted in culture in order to be legitimate"[42]. As a strong point that should be emphasized, the supremacy of law can justify, in certain situations, the prevalence of moral norms and not of legal norms. "[I]n the exercise of office, and not outside the sphere of their duties, judges should take into account overriding moral values

[40] P. Albers, *Quality of courts and judiciary: European experiences and global developments*. Council of Europe, pp.3. Available at:
http://sites.estvideo.net/laurens1/web-content/pdf/quality.pdf (Accessed: October 20, 2022).

[41] S. Greenstein, Preserving the rule of law in the era of artificial intelligence (AI), *Artificial Intelligence and Law*, 2022, vol. 30, 291–323. Available at: https://doi.org/10.1007/s10506-021-09294-4 (Accessed: October 20, 2022).

[42] M. Ugo, Foreign Inspired Courts as Agencies of Peace in Troubled Societies. A Plea for Realism and for Creativity, *Global jurist Topics*, 2002, vol. 2(1), Paper presented at the United Nations Conference R*ebuilding Legality. The Case of Somalia*, held in Rome December 11-13, 2001. Available at:
http://repository.uchastings.edu/faculty_scholarship/1146 (Accessed: October 20, 2022).

that should be implemented by the legal order, and not the values or declarations guiding the government policies"[43].

The policies promoted by the government in this area are quite promising, at least at the national level. The adjustment of the legislation to the Administrative Code of the Republic of Moldova, including the amendments to the content of this Code, the revision of the procedural-criminal legislation (vital regulations for strengthening the functional activity of the Prosecutor's Office, especially in the criminal investigation department), of the legislation regarding the organization and operation of the legal profession, of the judicial authority, of other normative acts in important social fields. Such processes must be complex and objective; otherwise, would be created an impression of conjunctural reforms aimed at establishing political control.

Conclusion. Justice is a key element for strengthening and achieving good governance. It is correct that the reform and social development processes start with the modernization of justice. Judicial failures can compromise the very nature of good governance. At the same time, reforms must be carried out simultaneously in all areas of public life, placing emphasis on the need to increase integrity only concerning the representatives of the judicial authority being an erroneous approach, capable of generating doubts in the consistency and correctness of the adopted and promoted policies. In the hope that the reform process at the national level (regarding the Republic of Moldova) will expand its areas and dimensions of valorization, we express optimism in the capacity of affirmation of a functional state of law, in an area liable to be equated with good governance as genuine form of caring for society and not just a "buzzword" or "fashionable" concept[44].

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CURRENT ASPECTS OF BAIL IN THE LIGHT OF FREE ACCESS TO JUSTICE

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Abstract: *In the light of civil procedural law, an important place is occupied by the posting of a bond at the disposal of the court for the purpose of suspending enforcement, as a guarantee of the debtor's fulfilment of the obligation contained in the enforceable title. This study addresses the incidence of the right to a fair trial - in the form of free access to justice (as protected by Article 6 of the E.C.H.R.) - in the hypothesis of the imposition of an obligation to pay a security in an extremely high amount. Among the issues addressed are the possibility of granting exemptions, reductions and staggering of the amount of the deposit, the violation of the principles of fairness and equality of rights of the parties by exempting public institutions and authorities from the obligation to deposit bail in order to suspend enforcement, as seen in the light of domestic case law and the case law of the European Court of Human Rights.*

Keywords: *bail, access to justice, fair trial, ECHR.*

Introductory aspects:

One of the topical issues of ongoing interest on the legal scene is that of ensuring compliance with Article 6(1) of the EC Treaty of the European Convention on Human Rights (ECHR), concerning the guarantee of free access to justice.

The present study aims to analyse the extent to which the guarantees of access to justice are still respected, seen from the perspective of the institution of *bail* (mandatory in the case of provisional suspension of enforcement and suspension of enforcement in the context of a challenge to enforcement).

In the field of enforcement law, older legal literature[1] defined *bail* as "the sum of money or bearer bonds deposited in order to obtain the suspension of enforcement", which is intended "to guarantee the compensation of damages that would be caused to the pursuing creditor by the unjust suspension of enforcement".

The provision of a security deposit (a certain amount of money) in the event of an application for a stay of enforcement in the context of an appeal against enforcement or in a case concerning a provisional stay of

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[1] See in this regard Alexandru Lesviodax, *Contestation of Enforcement in Civil Matters*, Bucharest, Ed. Ştiinţifică, 1967, p. 120

enforcement is not an innovation of the current Code of Civil Procedure. Similar rules were found in the previous Code of Civil Procedure.[2] The payment of a deposit in the amount set by the court has given rise to both problems in practice and disputes in the literature, such as the need to deposit a bail also in the case of an application for provisional suspension provided for in Article 403(4) of the Civil Procedure Code of 1865, or the deductibility of the deposit (in the case of mandatory deposit also for provisional suspension) from the deposit due in the case of an application for suspension itself, but has also been the subject of exceptions of unconstitutionality.[3]

Under the Code of Civil Procedure of 1865, the establishment of only a maximum legal limit in relation to the amount of the bail gave rise to different case law solutions, with some courts setting a very high bail, while others required the debtor to bail derisory amounts. The idea of restricting the right of free access to justice has emerged and developed in relation to the amounts set as *bail* by national courts. The previous legal provisions have been the subject of many criticisms of their constitutionality, and all the exceptions raised have been rejected by the Constitutional Court (mainly on the grounds of the possibility for the party to criticise the amount of the bail through the appeal procedure[4]).

[2] In Art. 403 para. 1 of the Code of Civil Procedure of 1865 stated that "pending the resolution of a challenge to enforcement or other application for enforcement, the competent court may suspend enforcement if a bond in the amount set by the court is posted, unless otherwise provided by law". The original legal text did not regulate any criteria for determining the amount of the security, leaving it to the court's discretion to determine the amount. With the amendments introduced by Law 219/2005, the method of setting the bail was established, with the introduction of Article 723 ind. 1 of the previous Code of Civil Procedure, which stated that "unless the law provides otherwise, the bail shall not represent more than 20% of the value of the subject matter of the claim, and in the case of claims whose subject matter is not assessable in money, shall not exceed the sum of 20 million lei" (2000 RON, n.a.).

[3] See in this regard Decision No 657/2011, published in Official Gazette No 520 of 25 July 2011, Decision No 285/2011, published in Official Gazette No 462 of 1 July 2011, Decision No 915/2012, published in Official Gazette No 864 of 19 December 2012, Decision No 1056/2012, published in Official Gazette No 70 of 1 February 2013. The objections of unconstitutionality were rejected on the following grounds in particular: the bail has a dual purpose: 1. It constitutes a "guarantee for the creditor to cover any damages suffered as a result of the delay in enforcement, through the effect of its suspension", 2. It has the role of "preventing and limiting possible abuses in the exploitation of such a right by defaulting debtors". The Court also ruled that the payment of a bond is not a condition for the admissibility of a challenge to enforcement, but only of the request for suspension of enforcement, in the sense that it cannot be considered that free access to justice would be restricted.

[4] See Decision No 150/2002 (criticism of Article 403 of the Civil Procedure Code of 1865 concerning the setting of bail by the court), Decision No 15/2003 (concerning the

Both in the light of the previous regulations and in relation to the current legal provisions, bail was and is a question of the admissibility of the request for settlement and not of the admissibility on the merits of the claim for the suspension of the provisional enforcement of the enforcement order or the suspension of enforcement in the context of the appeal against enforcement.

In the current legislation, the seat of the subject matter of the institution of bail is found in Articles 719-720, 1057-1064 of the Civil Code. It is based on the "idea of risk"[5], due to its purpose, which is to repair any damage caused to the creditor by delaying enforcement.

In the light of the new Code of Civil Procedure, we find expanded legal provisions on bail, regulating aspects relating to the method of calculating the amount of bail (both for claims that can be assessed in money and for those that cannot be assessed in money), as well as to situations in which no bail is required. The latter is an innovative element compared to the provisions of the previous Code of Civil Procedure.

In addition to its beneficial purpose - to provide protection for the bona fide creditor in the context of enforcement proceedings - the institution of *bail* has aroused interest both in the legal literature and in the practice of the courts in terms of its correlation with the principle of the right to a court or free access to justice.

National case law on the granting of legal aid in bail matters:

In the judicial practice developed after the entry into force of the current Code of Civil Procedure, the condition of admissibility of an application for a stay of enforcement or a provisional stay of enforcement has raised the issue of respect for free access to justice - as defined and protected by the provisions of Article 6(1) of the ECHR.

The problem arose from the establishment by the Romanian legislator of an extremely high amount of bail (compared to the previous legal provisions[6] where only a maximum ceiling could be set[7], but the court had

obligation to post bail in relation to the right to a fair trial), Decision No 346/2003 (concerning free access to justice), Decision No 47/2005 (grounds for the application for a stay of execution in relation to the right to a fair trial), Decision No 389/2006 (concerning the provisional stay of execution in relation to the right to a fair trial).

[5] Evelina Oprina, in Viorel Mihai Ciobanu, Marian Nicolae coord., *New Code of Civil Procedure, commented and annotated*, Bucharest, Universul Juridic Publishing House, 2016, vol. II, p. 687.

[6] We point out that even in the light of the previous Code of Civil Procedure, there were discussions on the need to grant facilities such as public legal aid, especially in cases where the courts established the obligation for the plaintiff to pay the maximum ceiling of 20% of the value of the claim.

[7] The previous Code of Civil Procedure provided in Article 723 ind. 1 for a maximum amount up to which the bail could be ordered: "unless otherwise provided by law, the bail

the power/alternative to impose on the debtor the obligation to pay bail in a percentage that also protects the contestant) which must be recorded at the court's disposal[8] in order to allow an application for suspension (including provisional suspension) of enforcement.

The existence of these new regulations, which legally determined the amount of the security bail (the amount was no longer left to the discretion of the court), dissatisfied the debtor of the bond, as it was considered to be an interference with his right to have a claim against him settled. In addition, the practice of the courts has been to arrive at a divergent range of solutions regarding the payment of security.

We can thus see two pillars in the solutions handed down by national courts:

1. Decisions on the admissibility of applications for exemption/ reduction/ scheduling/deferment of bail

The courts (quite a few in number) that have embraced the idea of granting relief in respect of the application for exemption/reduction/ scheduling/deferment have based their solutions either on the idea of priority application of international conventions - in which sense they have opted for the prevalence of the provisions of Article 6 par. 1 of the ECHR over domestic law, or on the grounds that the provisions of GEO 51/2008 refer in point C3 of the Annex to the possibility of granting public legal aid not only in the case of stamp duty but also for bail[9].

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shall not represent more than 20% of the value of the subject matter of the claim, and in the case of claims whose subject matter is not assessable in money, shall not exceed the sum of 20 million lei" (2000 RON, n.s.).

[8] The regulation contained in Article 719 para. 2 and 3 C. pr. civ. indicates the method of calculating the bail, establishing a distinctive criterion for the amount, depending on the value of the subject of the challenge to enforcement. Thus, the security is calculated as follows: ”10% if the value of the object of the appeal is up to 10,000 lei; 1,000 lei plus 5% for what exceeds 10,000 lei; 5,500 lei plus 1% for what exceeds 100,000 lei; 14,500 lei plus 0.1% for what exceeds 1,000,000 lei”. In the case of an appeal against execution having a non-monetary object, the bail is 1,000 lei, unless the law provides otherwise.

[9] By the Judgment of 07.04.2009, pronounced in case no. 1125/221/2009, the Deva Court held the admissibility of granting a facility for the payment of bail in the light of the content of GEO 51/2008 - which, although it does not expressly provide for this possibility, however, in the Annex form, concerning "granting legal assistance in a Member State of the European Union" also refers to *bail*. This aspect shows precisely the legislator's intention to include bail in the scope of the institutions for which applications for legal aid may be admitted. Also, in the case registered at the European Court of Human Rights under No 60727/10 - SC ECO INVEST S.R.L. and Ilie Bolmadar v. Romania, the Government has submitted several judgments delivered by national courts granting applications for reduction of the amount of bail or exemption from its payment (see final judgments of: 26 August 2008 of the Court of Brăila, of 4 September 2012 of the Court of Botoşani, of 23 March, 3 July and 11 December 2012 of the Court of Sector 2 Bucharest, of 20 July 2012 of the Court of Sector 3 Bucharest, of 15 October 2010, 16

2. Rejection of requests for bail relief:

Other courts have been firm in their view that no relief, reduction, deferment or postponement of bail can be granted, and the applications have been dismissed as inadmissible or unfounded. The reasons were various, including the following: there are no legal provisions in Romanian law conferring a right to benefit from the granting of public legal aid in respect of the payment of bail; free access to justice is not hindered by the possibility for the party to have the merits of his right examined in the context of a challenge to enforcement[10]; it will not be possible to apply the provisions of Article 6 par. 1 of ECHR in the case of proceedings for suspension of enforcement, as these are only applicable in situations where the merits of the case are finally determined[11].

The issue of uneven judicial practice regarding the admissibility of the application for legal aid in relation to the exemption or reduction of bail was also the subject of discussion *at the meeting of representatives of the Superior Council of Magistracy with the presidents of the civil divisions of the High Court of Cassation and Justice and the courts of appeal, held*

January 2012 and 15 May 2012 of the Court of Sector 5 Bucharest, of 2 March 2009 of the Court of Slatina, of 6 December 2012, 21 February 2013 and 19 February 2013 of the Court of Galați).

[10] See in this regard the judgment of 25.02.2014, delivered by the District Court of Sector 4 Bucharest in case no. 4915/4/2014, in Claudiu Drăgușin, *Obligation to pay bail and the right of access to justice,* in *Enforcement. Difficulties and practical solutions,* vol. I, Bucharest, Legal Universe Publishing House, 2016, p. 527: "The impossibility of granting public legal aid in the form of exemption, reduction, staggering or postponement of the payment of the bail pursuant to the provisions of Article 6 of GEO 51/2008 does not affect the right of access to justice of the petitioner, as long as this situation does not prevent analysis of the merits of the challenge to enforcement in relation to which the request for provisional suspension of enforcement was made". In the case in question, having found that there had been no breach of Article 6(1) of the European Convention on Human Rights, the application for relief was rejected as inadmissible.

[11] See in this regard the Judgment of 01.04.2013 of the District Court of Sector 4 Bucharest, delivered in case no. 3438/4/2013, unpublished, where it was held that "the level of the bail is established by law, and the text in question cannot be removed from application in the specific case of the applicant, based on Article 20 of the Constitution, given that Article 6 par. 1 of the Convention does not apply in this case, since the application for provisional suspension of enforcement does not concern a challenge to a civil right or obligation", in C. Drăgușin, art. cit, p. 529; In another case, the court held that "in view of the amount of the security to be lodged, the defences put forward in the case by the plaintiffs in support of their request to be exempted from payment of the security, the court holds that the mere fact that the company is undergoing reorganisation proceedings does not necessarily justify the claim that it has no real possibility of paying it, in the absence of other elements leading to that conclusion. Thus, the court holds that this aspect is not such as to prevent the petitioner's free access to justice"- Bucharest Court, Civil Section IV, Civil Decision no. 3292 A/16.10.2019, extracted from rolli.ro

on 14-15 November 2019 in Piteşti, where they discussed legal issues that have generated uneven practice in civil matters[12].

Following the contradictory debates, the opinion drawn up by the representatives of the National Institute of Magistracy (N.I.M.) - agreed by all the participants in the discussion - was that public legal aid is not admissible if it is requested for exemption or reduction of bail. The arguments developed by the representatives of the N.I.M. referred to the provisions of Article 6 of GEO 51/2008, which "lists the forms of legal aid in a limitative manner", and the amount of money representing the bail required to be bailed for the settlement of applications for stay of execution does not fall within the situations established by those legal rules. It was also held that the reference to the time limit for *bail* in para. C letter e) of the form-annex to GEO 51/2008 could not extend the limits set by the content of the normative act, the annex representing a transposition of Council Directive 2003/8/EC, which means that there may be states in the European Union whose domestic legislation gives the power to regulate public legal aid even with regard to the bail required for the resolution of applications for stay of execution. The view of the participants in the *Meeting* was that the case of *Iosif v. Romania* (application No 10443/03, Judgment of 20.12.2007, published in the Official Journal No 561/24.07.2008)[13] is not such as to provide the possibility of granting a form of legal aid for the posting of bail. At the same time, the considerations of the judgment in *Boldamar v. Romania* (application no. 60727/10, inadmissibility decision of 06.12.2016) did not persuade the participants that the granting of legal aid in the case of bail would be justified, given that the case before the Court was governed by the old *bail* procedure, which did not provide for the possibility of the creditor being paid out of the sum bailed.

Solutions to the divergent problem in the case law of the European Court of Justice:

The admissibility of granting facilities in the form of public legal aid based on respect for the principle of *the right to a fair trial* could not be absent from the analysis of the European Court of Human Rights.

[12] The divergent issue is not entirely new, as it was also the subject of discussions during the *Meeting of the representatives of the Superior Council of Magistracy with the Presidents of the Civil Divisions of the High Court of Cassation and Justice and of the Courts of Appeal, held in* Iasi on 7-8 May 2015.

[13] The argument that the judgment in *Iosif v. Romania* was not taken into account was based on the Court's alleged confusion between bail and stamp duty, the latter being in fact the issue in this case and in relation to the resolution of the appeal against enforcement and not the suspension of enforcement.

The matter was settled by two decisions of the Court, which found that the Romanian State had violated the right to a fair trial by suppressing free access to justice. In the first case to be presented (*Iosif and others v. Romania*[14]) the decision was to condemn the Romanian State for violation of Article 6 par. 1 of the European Convention on Human Rights, while in the second case (*Boldamar v. Romania*[15]), the decision was to reject the application as inadmissible, but the reasoning reveals precisely the violation of the right to a fair trial, by restricting free access to justice.

a. Iosif and Others v. Romania:

In the present case, the applicants Aurel Iosif, Doina Maria Iosif and Daliana Magdalena Bobosila Iosif entered into a mortgage agreement with Bank B. in 1995 concerning a holiday home, thereby constituting security for a loan granted to a third party. Subsequently, the bank and the third party entered into an agreement to amend the subject-matter and maturity of the original contract, without the applicants' knowledge. In 1999, the Bank's claim is transferred to the Authority for the Valuation of Bank Assets (AVBA), which in 2001 issues a summons to the claimants to pay the loan.

The plaintiffs bring an action for annulment of the mortgage and the claim is qualified as a challenge to the execution. The first court (Bucharest Court of Appeal) requires the plaintiffs to pay a security bail of 20% of the value of the loan (calculated on the basis of the full value of the claim and not on the basis of the value of the collateral). As the amount was extremely high (it exceeded the value of the mortgaged property), the claimants failed to pay the security and the court rejected the claim without going into the merits. Although the first court's judgment is appealed, the Supreme Court dismisses the appeal on the grounds of non-payment of security. The execution against the plaintiffs continues in the form of a distraint on immovable property, and the plaintiffs again lodge an appeal. The Bucharest Court of Appeal once again requests payment of a 20% bail. The bail is not paid, the court rejects the appeal and the property is sold at auction. Following the final judgment dismissing the appeal for non-payment of the security, the plaintiffs brought an action before the European Court of Human Rights for infringement of the right to a fair trial on the ground of the obligation to pay security.

The Court declares the application admissible and proceeds to judgment on the substance.

The Romanian Government defended itself by arguing that the obligation to pay bail is an interference *allowed* by the principle of the right to a court, since bail is intended to guarantee the speedy enforcement

[14] Published in M. Of. No 561 of 24 July 2008.

[15] Application No 60727/10, Inadmissibility decision of 06.12.2016.

of the judgment, being a means of protection for the creditor, and its amount is fixed by law, which the courts cannot change.

Analysing the considerations of the case, the Court held that the provisions of Article 6 par. 1 of the ECHR. While noting the possibility for national legislation to include certain limitations on certain rights and freedoms, it nevertheless considers at paragraph 54 that "despite the margin of appreciation which the State enjoys in the matter, the Court emphasises that a limitation on access to a court is compatible with Article 6 § 1 only if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means used and the aim pursued (Weissman and Others v. Romania, no. 63.945/00, 24 May 2006, § 36)". In this regard, it is held that only the establishment of the applicant's personal circumstances is decisive for the assessment of the violation of the right to justice.

Although the circumstances of the case do not refer to an application for a stay of enforcement, but only to the resolution on the merits of the appeal against enforcement, we consider that it cannot be interpreted that the security is in fact a stamp duty. The text of Article 83 of GEO 51/1998, in the form applicable at the time, expressly stipulated the payment of a security, and there can be no confusion with the payment of a judicial stamp duty - which was governed by the provisions of Law 146/1997.

b. Case of *S.C. ECO INVEST S.R.L. and Ilie BOLMADAR against Romania*:

In the second relevant case on bail, examined by the European Court of Human Rights, the applicants ECO INVEST S.R.L. and Ilie BOLMADAR (the company's administrator) concluded a credit agreement with Bank C in 2007. As the debtor company SC ECO INVEST SRL did not comply with its obligations to pay the instalments, the Bank started enforced execution against it and the debtor's accounts were seized. The claimant company lodged an appeal against enforcement in which, in addition to seeking the annulment of the unfair terms (in the credit agreement which constituted the enforceable title), it also sought a stay of enforcement and, at the same time, filed an application for a provisional stay of enforcement. The appeal against enforcement is dismissed for non-payment of the stamp duty, but on the file at the European Court of Human Rights, the claimants do not submit that judgment or proof that it has become final by not being set aside or by the dismissal of the appeal. In the case for suspension of provisional enforcement, in order to examine her application, the court required the appellant to pay a security in the amount of 10% of the sum subject to enforcement, and the appellant, being unable to pay, took the view that the right to justice was restricted by setting the amount of the security at such a high level. Although the appellant applied for a reduction of the amount of

the security, her application was rejected. The applicant also failed to pay the security and the court rejected the application for a provisional stay of execution. The applicant company did not submit a copy of the application for provisional suspension of enforcement or evidence of the company's financial situation to the European Court of Justice.

In the light of the above, the applicant company claims that its right of access to a court has been infringed by the setting by law of such a high amount of bail (10%), and therefore lodges a complaint with the European Court of Human Rights.

In its defence, the Romanian Government argued that the amount of the security was lawful, in view of the possibility for States to regulate certain limitations, in view of the purpose of the security (to protect the creditor against the bad faith debtor) and in view of the fact that the judgment in the provisional suspension case did not affect the merits of the case. The Government argued that the appellant company had the possibility of obtaining an instalment or exemption from the payment of the security, but had failed to prove the lack of financial means.

The Court dismissed the application as inadmissible. However, in spite of this decision, the reasoning of the judgment on the admissibility of legal aid is relevant when the amount of bail is deemed to affect the right of access to justice. Even if the Court acknowledges that the States may impose restrictions and limits, it was nevertheless considered necessary for the courts to examine the applicant's solvency in a situation where he is required to pay certain sums of money, in order to verify whether the party has the possibility of having access to the courts. The grounds of the judgment revealed that the amount to which the applicant was obliged to pay security "constitutes an interference with the party's right of access to a court" (paragraph 35), even though the purpose of the security payment was to protect the interests of the creditor.

The rejection of the application was based on the Court's finding that the applicant company had not demonstrated a financial situation which would not allow it to bail the security (not as the applicant had argued that the implementation of the contractual clauses would be such as to result in a negative financial situation). However, it was held in the grounds of the judgment that there was a legal basis and leverage for allowing an application for legal aid in the form of exemption from payment of the security.[16] The rejection of the application for a judgment against the

[16] See in this regard par. 41 of the Court's judgment: ”domestic law gave the persons concerned the possibility of applying for and obtaining, if they supported their application with specific evidence, a reduction, exemption or deferment of the payment of bail (supra, para. 22), by bringing a separate application before the domestic courts based on GEO No 51/2008 (supra, para. 20)”.

Romanian State was also justified by the fact that the applicant company was at fault for not having understood to pay the judicial stamp duty relating to the appeal against execution (a modest amount of approximately 50 euros) - which led to the rejection of the appeal against execution, which is also relevant to the application for provisional suspension of enforcement. In the light of those circumstances of the case, the drawing of the obligation to bail the security and a possible impossibility of payment did not *per se* constitute a restriction of free access to justice, but the applicant was procedurally at fault.

Even in the absence of a favourable solution for the applicant, we consider that the reasoning of the Court's judgment plays a decisive role in subsequent decisions on applications for legal aid in respect of the exemption, reduction or postponement of bail.

Although the judgment concerned a case under the old rules - the previous Code of Civil Procedure - the Court's considerations cannot be omitted or set aside, as they are more than up-to-date. This also derives from the fact that the new provision establishes an amount of 20% of the value of the subject-matter of the claim (thus much more burdensome for the debtor), double the amount applicable to the case under consideration.

No obligation to bail security in the case of debtors from public institutions or authorities:

Although the courts have the power to give priority to the application of European law (referring in this respect to the provisions of Article 6(6) of the EC Treaty), the Court of Justice is not empowered to do so. 1 of ECHR - respect for free access to justice) and, in the absence of an express legal text in national law, may grant the possibility to the debtor to benefit from exemptions, reductions, instalments of the payment of the security, however, the optic is that of rejecting some applications for the granting of legal aid and the obligation to bail the security for the admissibility of an application for suspension of enforcement. This is the case where the debtor is a natural person or a private legal person.

In the case of legal persons governed by public law, the situation is quite different, since the provisions of Article 7 of the OG 22/2002 on the enforcement of payment obligations of public institutions, established by enforceable titles, which states that "requests, regardless of their nature, made by public institutions and authorities in the enforcement procedure of claims established by enforceable titles against them are exempt from the payment of stamp duty, judicial stamp duty and the amounts established by way of security". At the same time, in accordance with Article 6(6) of Directive 4 and 5 of the same act, the court may order the suspension of enforcement until a final decision has been taken on the

application for the granting of the time limit(s) for payment of the amount due or the provisional suspension of enforcement until the decision on the application for suspension in the first sentence, but without the payment of any security.

As a result, the question arises whether the *principles of fairness and equal rights/treatment of the parties are violated* in the area of bail *by exempting public institutions and authorities from the requirement to post bail in order to suspend enforcement?*

The rationale for establishing such a regulation is that public institutions and authorities are always solvent and no additional security is required to cover any damage.

We consider[17], however, that by regulating such privileges granted to public institutions and authorities, both the principle of equality of the parties in civil proceedings and the principle of fairness[18] are infringed.

The purpose of regulating the institution of security was to represent a "guarantee" for the creditor in good faith; the current Code of Civil Procedure has established that in the event of rejection of the challenge to enforcement, the security is to be used to cover the claims in the enforceable title, as well as the compensation caused by the delay in enforcement. The legal provisions of GEO 22/2002 are precisely contrary to the provisions of the Code of Civil Procedure, since, in the absence of an obligation on public authorities and institutions to bail the security in the event of an application for a stay of execution, further damage will be caused to the creditor who will be late in paying. In this regard, we point out that the text of Article 2 of GEO 22/2002 provides for a six-month standstill period in respect of enforcement, established in favour of the debtor public institution or authority.

In the light of the above, it cannot be argued that the principle of fairness and equal treatment before the courts is applicable to debtors who are natural and legal persons governed by private law, as compared with debtors who are legal persons governed by public law. This leads us to say that it would be justified to regulate public legal aid with regard to the first category of debtors.

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[17] This position has also been expressed by the author at the National Conference of Law Students, Master and PhD Students, in the framework of the paper *Discussions on bail in the case of suspension of enforcement,* Sibiu, 2016.

[18] It should be noted that Article 7 of GEO 22/2002 has been examined from the constitutionality point of view by the Constitutional Court, but all the exceptions of unconstitutionality submitted were rejected: for example, Decision no. 529/2013, published in M. Of. no. 55 of 22.01.2014, Decision no. 331/2013, published in M. Of. no. 454/24.07.2013, Decision no. 332/2013, published in M. Of. no. 452/23.07.2013, Decision no. 253/2013, published in M. Of. no. 395/01.07.2013, Decision no. 236/2013, published in M. Of. no. 365/19.06.2013.

Conclusions and proposals *de lege ferenda*:

We believe that the idea of granting a facility for the payment of *bail* should also be accepted.

De lege lata, there is no express legal provision establishing the possibility of granting effective bail aid.

In the literature [19] it has however been accepted that the court, depending on the financial and family situation of the contestant, could still grant certain reductions in the amount of bail. As a result, the court, which is sovereign in determining the actual amount of the security, will be called upon to assess whether the granting of certain facilities under the provisions on public legal aid will be applicable to the security set during the enforcement phase[20], with reference, of course, to European case law.

However, there were also views that bail and legal aid were mutually exclusive.[21] This stems from the different purpose of the regulation of the two institutions: while legal aid is a guarantee to facilitate access to justice for certain persons in a precarious financial situation, the purpose of bail is to cover possible damages that the creditor might suffer as a result of delays in enforcement due to the suspension of enforcement, while at the same time constituting a means of preventing and limiting possible abuses in the enforcement of a right by defaulting debtors. The lack of facilities granted in the area of bail was justified by the different purpose of bail compared to stamp duty: whereas the purpose of introducing stamp duty is to bear the costs of the administration of justice, the purpose of setting bail is to prevent possible damage which the creditor might suffer as a result of the debtor's delay in enforcing his claim.[22]

We consider that, in order to grant public legal aid in respect of bail, the judge should start from the provisions of Article 3 of the Civil Procedure Code (para. 1. "In matters governed by this Code, the provisions on the rights and freedoms of persons shall be interpreted and applied in accordance with the Constitution, the Universal Declaration of Human

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[19] Evelina Oprina, Ioan Gârbuleţ, *Theoretical and Practical Treatise on Enforcement,* vol. I. *General Theory and Enforcement Procedures under the New Code of Civil Procedure and the New Civil Code*, Bucharest, Legal Universe Publishing House, 2013, p. 386, A.C. Mitrache, *Commentary on the conclusion of 2 March 2009* pronounced by the Slatina Court, in R.R.J. no. 6/2009, p. 130-131.

[20] Florin Radu, *On the reduction or exemption from the payment of bail in the matter of suspension of enforcement*, R.R.E.S no. 4/2010, p. 55-62.

[21] See Denisa Livia Băldean, Gabriela Cristina Frenţiu, *Public Legal Aid in Civil Matters,* The Legal Universe Publishing House, Bucharest, 2010, note to the conclusion of 12 May 2009 of the Deva Court, p. 313.

[22] E. Oprina, I. Gârbuleţ, *op. cit.,* vol. I, p. 384, Bogdan Dumitrache, note to the conclusion of 2 March 2009 pronounced by the Slatina Court, in R.R.J. no. 6/2009, p. 132-134.

Rights, the Covenants and other treaties to which Romania is a party.", para. 2 "if there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and the present Code, international regulations shall take precedence, unless the present Code contains more favourable provisions") and Article 4 of the Civil Procedure Code, which establishes as a fundamental principle the priority application of international treaties on human rights and the precedence of European Union law over domestic law. Article 6 para. 1 of the European Convention on Human Rights establishes the fundamental right of everyone to have free access to justice.

By regulating certain limits - such as the obligation to pay a security - for the resolution of an application for a stay of enforcement and not a condition for the admissibility on the merits of the application for a stay (including provisional) of enforcement, the possibility for the person to benefit from free access to a court to resolve his application is precisely hindered. This is justified not only by the rules governing the institution itself, but also by the particularly high amount of the security.

De lege ferenda, we consider it imperative to intervene in the legislation to settle definitively the issue of the incidence of legal aid in the area of bail.

Similar to the possibility of granting certain facilities in the field of stamp duty, we believe that the legislator should lay down certain cumulative conditions, differentiated according to the individual and the private legal person, for the admission of such a request. However, only an express regulation would exclude the uneven national practice with regard to bail.

With regard to the forms of legal aid, we are of the opinion that, in view of the purpose for which bail was established, only *exemption* and *reduction of* bail would be admissible.

With regard to a possible *instalment* or *postponement* of the payment of the bail, we consider that these are in no way based on bail. Thus, for the debtor of the fee it does not constitute an effective benefit since he would still be obliged to bail the amount and, in addition, the resolution of the suspension request would be delayed. As regards the creditor, granting the application for deferment of payment of the security would only delay the enforcement proceedings. As a result, none of the parties to the enforcement relationship would have an interest in the deferment or postponement of the payment of the security.

However, we do not dispute that a possible regulation of legal aid with regard to the institution of *bail* also has disadvantages:

A first problem is that it would be contrary to the very reason why it was established, namely as a means of protection for the bona fide creditor against the defaulting debtor.

Another difficulty that would be involved is the delay in the resolution of the application for a stay of execution. If the view were to be taken that the applicant is entitled to benefit from certain facilities in the form of legal aid, it would be imperative that the applicant should also be subject to certain cumulative conditions under which he would be exempted from payment of the security/the amount of money owed under this title would be reduced or deferred. However, proving that the conditions are met can often lead to an extension in time of the resolution of the suspension claim. Although in a favourable situation (as it would benefit from a pecuniary advantage), the claimant/ respondent/ debtor himself may no longer be interested in obtaining the facility, as delaying the resolution of the application for a stay of enforcement would lead to the likelihood of his enforcement (in whole or in part) until the resolution of the application for a stay of enforcement. Moreover, it would also violate the principle of an optimal and predictable resolution of the case, which is undesirable.

However, in spite of all the negative effects, we believe that it is fundamental to ensure free access to justice and, in the area of bail, this goal can only be effectively achieved through legislative intervention that also takes into account the protection of the debtor's rights and legitimate interests.

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COVID-19 PANDEMIC AND ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA: A CALL FOR A BETTER APPLICATION

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Abstract: *The world is moving into an uncertain future and one does not need a crystal ball to agree that uncertainty stares the whole world in the face; one only need reference the global pandemic caused by the dreaded corona virus. Famously, for a long time it has been known that when America sneezes the whole world catches a cold, but this time china Coughed and the whole globe was affected. Nigeria was not spared and neither were its security apparatus spared nor the Criminal Justice Administration (CJA) which struggled to cope with the new challenges that surfaced due to the pandemic. In this entire viral hurricane witnessed globally how did the Criminal Justice Administration (CJA) and its attendant legal framework in Nigeria fare? This paper has as its focal point to review said legal framework viz a viz attendant challenges leading to a call for better application of the legal framework to the administration of criminal justice in Nigeria hoping that lessons were learnt from mistakes made.*

Keywords: *Corona virus, COVID-19, Pandemic, Legal Framework, Criminal Justice Administration, Lockdown, social or physical distancing*.

Introduction

"***The chickens have come home to roost; the center can no longer hold and the shaky criminal justice system is falling away like a pack of casino cards***"

The problem with administering criminal justice in Nigeria at the height of the corona virus outbreak, when the virus was imported from northern Italy after traveling via Wuhan, China, was appropriately described by the above caption. On February 27, 2020, news headlines about an Italian man who had arrived at the Murtala Muhammed International Airport two (2) days earlier on a trip from northern Italy revealed the first confirmed case of Covid-19 in Nigeria.[1] Therefore, in

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[1] Aloy Ojilere, 'Covid-19 Restrictions and Safety Protocols; Implication for Woman's Dignity and Sexual Rights in Patriarchal Nigeria' *Nigerian Bar Journal*, (2021) vol. 11, 201.

response to the pandemic, the Presidential Task Force on Covid-19 recommended safety protocols that included using alcohol-based hand sanitizers, washing hands with soap, wearing face masks over the nose and mouth, keeping a distance from others physically or socially, and maintaining general good hygiene.[2] Subsequently, lockdowns, isolation, closure of schools, courts, workplaces, places of worship, airports, seaports, train stations and all borders were also mandated as cautionary measures to suffocate the virus and prevent further rapid escalation. Thankfully by a mere stroke of heavenly providence things are settling back to normal even though Nigeria as a nation is yet to recover from the rude awakening witnessed by its shabby response to an unanticipated event some would attribute to as a force majeure of a monumental scale. In this entire viral hurricane witnessed globally how did the Criminal Justice Administration (CJA) and its attendant legal framework in Nigeria fare? This paper has as its focal point a call for better application of the legal framework to the administration of criminal justice in Nigeria hoping that lessons were learnt from mistakes made. The modus operandi adopted here is to first clarify key terms in the subject matter of discuss, then examine the appropriate legal framework for criminal justice administration during the pandemic, after examination of said legal framework to underscore its reactionary pace in ensuring access justice amidst the pandemic cogent recommendations would be proffered to help strengthen the sectors.

Administration of Criminal Justice in Nigeria; Meaning, Nature and Purpose

An ideal Criminal Justice administration must ensure that there is expeditious dispensation of justice, efficient management of enforcement agencies, seamless protection of the populace from crime, protection of the crime victims, accessible safeguards for suspects or accused person etc. consequently, any criminal justice administration regime that fails to capture the aforementioned elements fails woefully. What is criminal is defined by statute or put differently what amounts to a crime has been codified and made certain.[3] This part of the work seeks to define key terms used in this paper. The Black's Law Dictionary[4] explains the word 'criminal' in three senses. One; 'criminal' refers to having the character of a crime or in the nature of a crime. Two; 'criminal' refers to anything connected with the administration of penal justice. Third; 'criminal' refers

[2] Ibid at [204]

[3] See typically the Criminal Code and the Penal Code for the Southern and Northern parts of Nigeria respectively.

[4] Bryan A Garner, *Black's Law Dictionary, Abridged, 9th* (Minnesota: West 2010) 49.

to one who has been convicted of a crime. A key word in all definitions of criminal is the word "crime" and "crime" per Black's Law Dictionary is an act that the law makes punishable; in other words, it is a breach of a legal duty treated as the subject-matter of a criminal proceeding. This leads back to our point made earlier that what is criminal or what amounts to a crime is codified in statute.

The word 'administration' on the other hand is defined by the Black's Law Dictionary as the management or performance of the executive duties of a government institution or business or in the alternative the practical management and direction of the executive department and its agencies.[5] The last term is the term 'Justice' which is defined as the fair and proper administration of laws.[6] A collation of the three terms 'Criminal Justice Administration' would reveal that we refer to the practical management of crime and criminals with the objective of ensuring fair and proper administration of criminal laws to offences. The crucial question then is how has the Criminal Justice Administration (CJA) fared amidst the novel corona virus pandemic ravaging the entire globe since 2019? Did the pandemic expose loopholes in the Nigerian Criminal Justice Administration (CJA)? Were the institutions of Criminal Justice Administration crippled or did they operate seamlessly? Or ultimately did the pandemic point attention to much needed reform in the CJA sector? The objective of this paper is to critically appraise these questions posed above viz a viz the handling of the corona virus outbreak reaching conclusions on the need for reforms and better application.

Since 2019, the corona virus, a pandemic-level illness, has spread throughout the entire world[7]. Because the corona virus is zoonotic, it typically spreads between people and animals. A new corona virus strain (SARS-Cov-2) that has not been previously found in people is what causes the corona virus disease (Covid-19). On December 31, 2019, in Wuhan, China, the World Health Organization (WHO) first reported it. The Federal Government of Nigeria have established a Presidential Task Force on Covid-19 to provide a high-level, strategic national response to the illness in Nigeria. The Federal Ministry of Health has activated an NCDC-led national COVID-19 Emergency Operations Centre (EOC) to coordinate the national public health response activities are being coordinated

[5] Ibid at 49.

[6] Ibid at 942.

[7] 'POLICY BRIEF the Impact of a Pandemic on Organized Crime CRIME and CONTAGION' (2020) <https://globalinitiative.net/wp-content/uploads/2020/03/GI-TOC-Crime-and-Contagion-The-impact-of-a-pandemic-on-organized-crime-1.pdf> accessed 21 September 2021.

through Public Health EOCs in each state.[8] With the conceptual clarification of the key terms used in this paper it is crucial to consider the legal framework for criminal justice administration operational in the pandemic era.

Examination of Legal Framework on the Control of Crime and Criminal Justice Administration in Nigeria amidst the Covid-19 Pandemic:

1. The Nigerian Police Act 2020

The Nigerian Police Act 2020 repeals the previous Police Act of 2004[9] with the aim of guaranteeing a more effective Nigerian Police Force (NPF) driven by principles of excellence, transparency and accountability, operationally and in its management of resources. Key innovations of the Nigerian Police Act 2020 (NPA) include establishment of appropriate funding framework for the Nigerian Police to ensure that all Police formations nationwide are appropriately funded for effective policing. The 142 sectioned Federal legislation seeks to enhance professionalism in the Nigerian Police Force and create synergy between the Police Force and the communities, its policies to maintain law and order while combating crimes nationwide.

The NPA 2020 is the primary legislation to consider in criminal justice administration in Nigeria as the Nigerian police is the first point of contact in the criminal justice sector noting crucially that the law was passed in the pandemic year hence very relevant. The Act has XVII parts dealing with key components concerning the entire operations of the NPF. Part 1 is the preliminary part which irons out the objective of the Act both general and specific. Section 1 provides for the general objective of the Act by stating categorically that 'the objective of this Act is to provide for a more efficient and effective police service that is based on the principles of accountability and transparency,[10] protection of human rights[11] and fundamental freedoms and partnership with other security agencies.[12] On the other hand the specific objectives of the Act include inter alia:

A. To provide for a police force that is more responsive to the needs of the general public and has entrenched in its operations the values of fairness, justice and equity;[13]

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[8] NCDC, 'NCDC Coronavirus COVID-19 Microsite' (*covid19.ncdc.gov.ng*) <https://covid19.ncdc.gov.ng/faq/> accessed 20 June 2022.

[9] Cap P19 Laws of the Federation of Nigeria 2004

[10] The Nigerian Police Act 2020, s. 1(a).

[11] The Nigerian Police Act 2020, s. 1(b).

[12] The Nigerian Police Act 2020, s. 1(c).

[13] The Nigerian Police Act 2020, s. 2(a).

B. To reposition the police force to uphold and safeguard the fundamental rights of every person in Nigeria in its operations;[14]

C. To bring about a positive change in the public perception of the NPF by ensuring that its functions are performed in a manner sensitive to the needs and well-being of the general public;[15]

D. To empower the NPF to effectively prevent crimes without threatening the liberty and privacy of persons in Nigeria;[16]

E. To strengthen the NPF in the performance of its functions, including safety and security of all persons, communities, and property in Nigeria;[17]

F. To ensure that the police perform its functions by creating the enabling environment to foster cooperation and partnership between it and the communities it serves to effectively prevent, reduce or eradicate crimes;[18]

G. To develop professionalism in the police force by providing relevant training in all police formations in Nigeria for enhanced performance and[19]

H. To respect rights of victims of crime and an understanding of their needs.[20]

In order to ascertain the effectiveness of policing during the pandemic the simple question would be whether the said objectives have been achieved or not? An explanation of the situation of the administration of criminal justice during the COVID-19 outbreak would be helpful.

Part II makes elaborate provisions for the establishment, composition and duties of the NPF Section 4 is of particular interest as it marshals out the primary functions of the Police Force. Consequently, the primary functions of the NPF are:

1. To prevent and detect crimes, and protect the rights and freedom of every person in Nigeria as provided in the CFRN, African Charter on Human and Peoples Rights;[21]

2. To maintain public safety, law and order;[22]

3. To protect lives and property of all persons in Nigeria.[23]

4. To enforce all law and regulations without any prejudice to the enabling Acts of other security agencies;[24]

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[14] The Nigerian Police Act 2020, s. 2(b).
[15] The Nigerian Police Act 2020, s. 2(c).
[16] The Nigerian Police Act 2020, s. 2(d).
[17] The Nigerian Police Act 2020, s. 2(e)
[18] The Nigerian Police Act 2020, s. 2(f).
[19] The Nigerian Police Act 2020, s. 2(g).
[20] The Nigerian Police Act 2020, s. 2(h).
[21] The Nigerian Police Act 2020, s. 4(a).
[22] The Nigerian Police Act 2020, s. 4(b).
[23] The Nigerian Police Act 2020, s. 4(c).

5. To discharge such duties within and outside Nigeria as may be required of it under this Act or any other law;[25]

6. To collaborate with other agencies to take any necessary action and provide the required assistance or support to persons in distress, including victims of road accidents, fire disasters, earthquakes and floods;[26]

7. To facilitate the free passage and movement on highways, roads and streets open to the public; and[27]

8. To adopt community partnership in the discharge of its responsibilities under the Act or under any other law; and[28]

9. To vet and approve the registration of private detective schools and private investigative outfits.[29]

The above cited Section 4 is a massive expansion and improvement from the former Section 4 of the Police Act of 2004. An assessment of these functions viz-a-viz the prevailing actions of the NPF in tackling crime amidst the Covid-19 pandemic would determine the effectiveness or otherwise of the Police in fulfilling its statutory functions thus bolstering administration of criminal justice. Section 5 is also crucial as it provides for duty of the police in the light of our constitutional democracy. Consequently, the NPF is responsible for promoting the fundamental rights of persons in Police custody as guaranteed by the CFRN 1999 (as amended).[30] It is to accomplish this duty by collaborating with and maintaining close working relationship with government agencies and private initiatives especially those offering legal services to accused persons or detainees.[31] Section 5(3) importantly charges the NPF with the responsibility for promoting and protecting the fundamental rights of all persons as guaranteed under the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act[32] and other international instruments on human rights to which Nigeria has assented to[33]. Other parts of the Act make provision on Nigerian Police Council,[34] IGP,[35] and other key administrative heads such as the Assistant IGP and Deputy

[24] The Nigerian Police Act 2020, s. 4(d).
[25] The Nigerian Police Act 2020, s. 4(e).
[26] The Nigerian Police Act 2020, s. 4(f).
[27] The Nigerian Police Act 2020, s. 4(g).
[28] The Nigerian Police Act 2020, s. 4(h).
[29] The Nigerian Police Act 2020, s. 4(i).
[30] The Nigerian Police Act 2020, s. 5(1)
[31] The Nigerian Police Act 2020, s. 5(2).
[32] Cap A9 LFN 2004
[33] The Nigerian Police Act 2020, s. 5(3)
[34] The Nigerian Police Act 2020, s. 6.
[35] The Nigerian Police Act 2020, s. 7 (Part iii).

IGP.[36] The IGP and National Police Council work together to administer the Act and the whole force. The National Assembly appropriation and financial allocations provide funding for the police. This and every other sum of money received by the police department is deposited into the Police General Fund, which was created in accordance with section 26 of the Act.

Part VII provides for the powers of police officers which includes the powers of investigation and arrest.[37] No matter the circumstance, arrest in lieu is prohibited by Section 36 of the Act whether the arrest is made with or without a warrant. Arrest in lieu has always been a hot topic. The police officer is also to prevent offences and ensure security not just of lives and property but of good behaviour.[38] The police officer is the primary contact between the citizen and the security apparatus or institutions of state. According to Section 96 (2), a police officer in Nigeria is prohibited from discriminating against anyone while performing his or her duties on the basis of that person's nationality, gender, socioeconomic status, ethnicity, political affiliation, or any type of handicap.[39] Additionally, a police officer is not permitted to speak or behave in a manner that shows bias against any particular group.[40]

The creation of Community Policing Committees in Section 113, whose goals include fostering communication, cooperation, and transparency between communities and the NPF, is an intriguing novelty. There is also the States Community Sub Policing Committee and the Divisional Policing Committee. This is to foster community policing since the issue of state police remains unresolved. The NPF Act 2020 has made some marked changes or upgrade from the 2004 Act but still falls short as it does not contemplate pandemic level disaster, most likely in the next amendment it is recommended that a section or part be dedicated to making provisions on the modus operandi for policing during a pandemic or a health epidemic. Later in this work it would be crucial to evaluate justice administration during covid-19 by using the functions and duties elucidated above as a measurement rod.

2. Administration of Criminal Justice Act, 2015 (ACJA)

The most important Federal law governing the administration of criminal justice in Nigeria is the Administration of Criminal Justice Act, 2015 (ACJA), The Act signed into law in May 2015 is made up of 495

[36] The Nigerian Police Act 2020, Part IV.
[37] The Nigerian Police Act 2020, s. 31-83.
[38] The Nigerian Police Act 2020, Part IX.
[39] Administration of Criminal Justice Act 2015, s. 2(a) i – v.
[40] Administration of Criminal Justice Act 2015, s. 2(b).

sections in 48 parts of the ACJA. This goal of this Act is to make sure that Nigeria's system of criminal justice administration fosters effective management of criminal justice institutions, prompt justice delivery, defence of society against crime, and defence of the rights and interests of the suspect, the defendant, and the victim. Section 2(1) of the ACJA specifies its applicability, making it applicable to criminal proceedings for offenses established by an Act of the National Assembly and any other offenses punishable in the Federal Capital Territory, Abuja, without prejudice to Section 86. A Court Martial, however, is not covered by its requirements.[41] (The Evidence Act of 2011 and the ACJL employ the preferred terminology "defendants" instead of "accused persons," which is how those who are being tried for crimes are referred to in the ACJA.) The ACJA employs the preferred terminology "defendants" instead of "accused persons," which is how those who are being tried for crimes as evidently used in the Evidence Act, 2011. The Criminal Procedure (Northern States) Act[42] and the Criminal Procedure Act,[43] are repealed by the ACJA. Criminal Procedure (Northern States) Act.[44] Criminal proceedings for offenses defined by a National Assembly Act as well as other offenses punishable in the Federal Capital Territory of Abuja are subject to the provisions of the ACJA.

The Federal High Court has exclusive jurisdiction over the majority of offenses created by the National Assembly[45], with the exception of those crimes created by the Robbery and Firearms (Special Provisions) Act[46], which are tried in the High Court of the State in question.[47] Thus, it is argued that the Act has federal application under Section 2(1) of the ACJA. More specifically, Section 494 of the ACJA defines "court" under the Act to encompass Federal Courts, the Magistrates' Court, and Federal Capital Territory Area Courts presided over by attorneys. Whereas, State High Courts or Magistrates' Courts in the several Southern States would not necessarily be included in this list, despite the phrase "include" indicating that it is not exhaustive. This argument is valid considering Section 490 of the ACJA, which grants exclusive authority to make general court rules for implementing the ACJA's goals to the Chief Judge of the Federal High Court, the Chief Judge of the Federal Capital Territory, or the President of the National Industrial Court. It is imperative to not that the

[41] Administration of Criminal Justice Act 2015, s. 2(2)
[42] Cap C 42 LFN 2004
[43] Cap C41LFN 2004
[44] Cap C 42 LFN 2004
[45] Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 251(2) and (3).
[46] Cap R. 11 Laws of the Federation of Nigeria, 2004.
[47] Robbery and Firearms (Special Provisions) Act, s. 9.

aforementioned authorities are not allowed to establish regulations that will apply to State High Courts or Magistrates' Courts in line with section 490 of the ACJA. Hence, the Federal High Court, the National Industrial Court, the High Court of the FCT, the Magistrates' Court of the FCT, and the Area Courts of the FCT are the only courts that may be subject to the supervision of the aforementioned authorities as the case may be.

The Administration of Criminal Justice Monitoring Committee (the Committee) is also established by the ACJA by virtue of Section 469 and this committee consists of nine members, with the Chief Judge of the FCT serving as its chairman. Section 470 of the ACJA provides that the Committee is tasked with ensuring that the Act is applied by the appropriate agencies in an effective and efficient manner. To accomplish this, the Committee must, among other things, see to it that criminal matters are dealt with swiftly, that the backlog of criminal cases in courts is reduced significantly, that the overcrowding in prisons is kept to minimally, and that people who are awaiting trial are, to the greatest extent possible, not held in prison custody. A secretariat is established for the Committee under Section 471 of the ACJA, a fund is established for the Committee under Section 472 of the ACJA, and the Committee's proceedings and quorum are covered by Section 476 of the ACJA. With this establishment, the ACJA becomes the foremost legislation in Nigeria's framework for administering criminal justice to create a body tasked with ensuring the Act is applied effectively. As will be demonstrated, the many advances made by the ACJA involve the Committee's involvement in criminal justice administration.

According to Section 9 of the ACJA, the police are authorized to search suspects who have been arrested using whatever amount of force that is justified. A police officer operating on an arrest warrant is authorized to conduct a warrantless search of a location where they suspect a suspect is hiding.[48] Generally, like other criminal justice legislations a search warrant is required to search a property. When investigating, a police officer requests a search warrant from a court or a Justice of the Peace and such warrants are issued in the conditions provided under Section 144 of the ACJA, such as upon information given under oath and in writing. According to Section 151 of the ACJA, a search warrant may be executed outside of the court's jurisdiction; in this event, the person carrying out the order must apply to the court and follow its instructions. Also, under section 153 of the ACJA, extensive guidelines are provided regarding the detention of items found during a search.

Furthermore, when a complaint is brought before a magistrate in accordance with Section 115 of the ACJA and the magistrate chooses to

[48] Administration of Criminal Justice Act, s. 12 and 152.

issue a summons, Section 117 of the ACJA provides for the issuance of the summons. According to section 115 of the ACJA, a complaint may be filed against an offense committed by a person whose appearance the Magistrate may compel. Like the CPA,[49] section 116 of the ACJA allows summonses to be issued and served on any day, including Sundays and public holidays.

The ACJA is a monumental piece of federal legislation that is essential to the administration of criminal justice in Nigeria since it contains provisions that address the investigation stage through the conviction and sentencing stage. Its major constraint is that except there are a few rare, unusual circumstances, it only applies federally. As a result, when Covid-19 arrived, the law was flawed and left a gap in the criminal justice system. Another limitation of the law is that it lacks foresight in establishing provisions for the modus operandi in the event of a health epidemic or pandemic.

3. Criminal Code Act[50]

The fundamental laws that define offenses and crimes and further categorize them into felonies, misdemeanours, and simple offences are the Criminal Code Act and its equivalent, the Penal Code (applicable in Northern Nigeria).[51] The Criminal Code Act also specifies punishment for various offenses, adhering to the legal principle that an accused can only be tried for an offense that is specified in writing and carries a specific punishment. This also complies with the provisions of the Constitution, which states that "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute a criminal offense."[52] See the case of ***Aoko v. Fagbemi***[53] where the accused was exonerated since adultery was a crime under the penal code but was not explicitly listed as such and did not carry a sentence.

A cursory look at the interpretation section of the criminal code which is Section 1 reveals the omission of any definition of terms such as pandemic, virus, outbreak, social or physical distancing etc., leading one to opine that the framers of the code did not contemplate or anticipate a global level health emergency crisis and thus did not provide for situations in such instances. The humongous code with 521 Sections has 55 Chapters and 8 Parts making provisions for every possible offence within Nigeria

[49] Criminal Procedure Act.
[50] Cap C38 LFN 2004
[51] Criminal Code Act, s. 3, Cap C38 LFN 2004
[52] Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 36(8).
[53] [1961] 1 ALL NLR 400.

from theft to arson to conspiracy. It is the combined duty of the police, security agencies, the court system and correctional services to see to it that offences and sentences for crimes offending the code are severely dealt with and carried on to the latter. It is crucial to highlight a few sections with the objective that at the end of this work one would be able to assess the effectiveness of criminal justice administration looking at how the criminal code has been enforced in the pandemic.

The definition of a principal offender in Section 7 of the code clarifies the parties to offenses. Hence, a principal offender is somebody who commits the actual act or omission that results in the offense,[54] as are those persons or "a person who enables or aids another to commit an offence",[55] so also is "a person who counsels or procures another to commit an offence."[56] All these persons are directly culpable for the offence committed. The same rule is applicable to those who have a similar intention to pursue an illegal objective;[57] they are both culpable as having committed the resulting offence. In support of the Latin maxim *ignorantia juris non excusat*[58] section 22 is quite intriguing in that it states that, unless knowledge of the law by the offender is expressly declared to be an element of the offence, ignorance of the law does not excuse any act or omission that would otherwise constitute an offense. Furthermore, Section 24 offers essential guidelines on motive and intention. A person is not criminally liable for an act or omission that occurs independently of the exercise of his will or for an occurrence that occurs by accident, subject to the stated provisions of the code relating to negligent acts and omissions.[59] Additionally, in accordance with section 24, the outcome intended to be produced by an act or omission is immaterial unless the purpose to cause a certain result is clearly stated to be an element of the offense constituting the act or omission in whole or in part. Moreover, unless clearly stated otherwise, the reason(s) behind which a person is persuaded to commit a crime, refrain from committing a crime, or establish an intention is irrelevant.[60] These provisions are insightful considering the requirement to wear face mask in public and the need for adhering to vaccine mandates[61] in some places. The code also provides some exculpatory

[54] Criminal Code Act, s. 7(a).
[55] Criminal Code Act, s. 7(b) & (c).
[56] Criminal Code Act, s. 7(d).
[57] Criminal Code Act, s. 8.
[58] Ignorance of the law is no excuse
[59] Criminal Code Act, s. 24.
[60] Criminal Code Act, s. 24 Criminal Code Act Cap C38 LFN 2004
[61] This refers to the mandatory requirement of evidence of having received the covid-19 vaccination as a condition to receive or render services or have access to certain benefits.

indices such as intoxication,[62] insanity,[63] mistake of fact,[64] and immature age[65] to limit criminal responsibility.

According to Nigerian criminal law, a child under the age of 12 is not considered to be criminally responsible for an act or omission unless it can be shown that at the time the act or omission was committed, the child had the mental capacity to understand that he should not have committed the act or made the omission.[66] Evaluating the full code is unsuitable for this paper, we must concentrate on Chapter 23, which deals with offenses against public health, in order to be precise and avoid veering off course.

Ultimately, sections 243 to 248 of Chapter 23 of the Code make various provisions on issues like offering for sale items that are unfit for consumption, [67] adulterating food or drink for sale [68] and dealing in diseased meat.[69] These are all minor offenses. On noxious acts Section 247(a), it is unlawful to pollute an area's atmosphere in a way that endangers the health of nearby residents, businesspeople, or others passing by on a public pathway. On the other hand, Section 247 (b) forbids any action that could spread any disease that poses a threat to human or animal life. This offense has a minor punishment of six months in prison. The code obviously does not account for a widespread pandemic, so how can it properly provide for such an occurrence? It is crucial to draw attention to other laws that are relevant to the administration of the criminal justice system during the pandemic.

Obviously, even the code does not contemplate a widespread pandemic how can it then rightly cater for such occurrence? It is crucial to also highlight other legislations as they relate to the issue of criminal justice administration during the pandemic.

4. The Nigerian Correctional Services Act 2019

The Nigerian Correctional services Act repeals the Prisons Act[70] and has its major objective addressing issues not covered under the repealed Act alongside providing clear rules setting out obligations of the Nigerian Correctional Services (NCS) and inmates rights. The Act has 47 sections with two parts, with part I deal with custodial service while part II deals with non-custodial service. We shall briefly examine the law to see if it

[62] Section 29 Criminal Code Act Cap C38 LFN 2004
[63] Section 28 Criminal Code Act Cap C38 LFN 2004
[64] Section 25 Criminal Code Act Cap C38 LFN 2004
[65] Section 30 Criminal Code Act Cap C38 LFN 2004
[66] Section 30 Criminal Code Act Cap C38 LFN 2004
[67] Section 243 Criminal Code Act Cap C38 LFN 2004
[68] Section 243 (2) Criminal Code Act Cap C38 LFN 2004
[69] Section 244 Criminal Code Act Cap C38 LFN 2004
[70] Cap P29 LFN 2004.

contemplates health emergencies. Section 1 establishes the Nigerian Correctional Services (NCS) to provide both custodial and non-custodial services with the Controller General the person in charge of administration of the correctional service.[71] The Controller-General has the help of a minimum of eight Deputy Controller-Generals, one of whom is responsible for the non-custodial arm of the institution.[72] The Head Quarters of the NCS is in the FCT. Section 2 spells out the objectives of the Act which includes ensuring compliance with international human rights standards and good correctional practices;[73] to provide enabling platform for implementation of non-custodial measures; [74] to enhance the focus on corrections and promotion of reformation, rehabilitation, and reintegration of offenders;[75] to establish institutional, systemic and sustainable mechanism to address the high number of persons awaiting trial.[76]

A cursory look at the legislation shows that only a few sections concern us here in that these are the sections that make provisions related to health. Section 9 proviso declares that 'provided that in every building so declared as a custodial centre, sleeping accommodation shall meet all requirements of health with consideration given, among other things, to adequate floor space, water and sanitation amenities, lighting and ventilation'. This provision states what is ideal and one might add that there is need for physical distancing and crowd reduction to avoid chances of a spread of corona virus. The functions of custodial service are provided for in Section 10 of the Act. These functions are many but chiefly include taking custody of all persons legally interned,[77] providing safe, secure and humane custody for inmates,[78] conveying remand persons to and from courts in motorized formations, [79] empowering inmates through the deployment of educational and vocational skills training programs, and facilitating incentives, and income generation through custodial centres, farms and industries; administering borstal institutions; initiating behaviour modification in inmates through the provision of medical, psychological, spiritual and counselling services for all offenders including violent extremists and implementing reformation and rehabilitation programs to enhance the reintegration of inmates back into the society[80]

[71] Section 1 (3) NCS Act 2019
[72] Section 1 (3) (b) NCS Act 2019
[73] Section 2 (1) (a) NCS Act 2019
[74] Section 2 (1) (b) NCS Act 2019
[75] Section 2 (1) (c) NCS Act 2019
[76] Section 2 (1) (d) NCS Act 2019
[77] Section 10 (a) NCS Act 2019
[78] Section 10 (b) NCS Act 2019
[79] Section 10(c) NCS Act 2019
[80] Section10 (f) NCS Act 2019

etc. Section 12 is crucial as it declares every confined person in a custodial centre to be in the legal custody of the Superintendent and subject to discipline and regulations made under the Act whether or not the person is within the precinct of the custodial centre.

Documentation of inmates is provided for in Section 13 hence; the details of person's offences, biometrics, personal history, risk and needs assessment as well as person's psychological mental health status and his criminal antecedents must be obtained by the administrators of the custodial center. This is crucial and should involve all round health status of the inmate whether the inmate has been vaccinated against the Corona virus or not. For the purpose of this work focus must be narrowed down to Section 23 on health care services in custodial centers. Section 23 (1) states that the correctional service shall put in place health care services for the promotion and protection of physical and mental health, prevention and treatment of diseases. By section 23 (2) health practitioners shall inspect the custodial center daily and advise the superintendent, state controller of correctional service or Controller Generals as appropriate on the quality, quantity, preparation of food;[81] hygiene and cleanliness of inmates and custodial centers;[82] sanitation, lighting and ventilation of the custodial center;[83] suitability and cleanliness of the inmates clothing and beddings.[84] This seems workable and if adhered to ought to curb the spread of COVID-19 in the correctional centers but this provision is observed in breach rather than in obedience. Section 23 (3) of the Act mandates the superintendent to take immediate steps to give effect to the recommendations and if they are not within his competence, to immediately submit a report to the State Controller who would take appropriate action. The correctional center ideally is to establish a health care center and deploy at least one medical doctor in all main custodial centers.[85] Importantly, in the event of death per Section 32 (2) an inquest by a coroner shall be instituted in all cases of death in custody to ascertain the nature and circumstances of the death. Where death is caused by the corona virus then it would be important to carry out contact tracing to isolate known cases and prevent further spread of the virus in the custodial center. In all the legislations cited so far, it is only the Nigerian Correctional Services (NCS) Act 2019 that seems to be near prepared for health crisis and yet the law still falls short of envisaging a viral outbreak.

[81] Section 23 (2) (a) NCS Act 2019
[82] Section 23 (2) (b) NCS Act 2019
[83] Section 23 (2) (C) NCS Act 2019
[84] Section 23 (2) (d) NCS Act 2019
[85] Section 23 (4) NCS Act 2019

5. The Covid-19 Regulations 2020

The COVID-19 Regulations 2020 is the most recent addition to the legal framework on COVID-19 and even though the focus is on criminal justice administration during the pandemic the auspicious timing of the regulation is quite crucial to our discussion. An executive order designating COVID-19 as a serious infectious illness and outlining additional measures to stop its spread is known as the COVID-19 Regulation 2020. In accordance with Sections 2 and 3 and Section 4 of the Quarantine Act,[86] the President of the Federal Republic of Nigeria (FRN) issues the Regulation. Even if the majority of the regulations were in effect throughout the lock down, it is important to look at their specific contents. The Federal Republic of Nigeria's President signed the Regulation on March 30, 2020, and it contains seven (7) major components.

Section 1 declares a halt to all movement in Lagos, the Federal Capital Territory, and Ogun State for a duration initially of 14 days, although this was later extended when the need arose. This cessation of movement became popularly known as “the Lockdown”. Other states of the federation followed suit and movement inter-state and intra state became restricted except for medical personnel and essential services workers. Schools, churches, businesses etc. had to close for the period. During the containment stage, the authorities planned to locate, track down, and isolate every person who had come into contact with verified cases. However, the regulation permitted money market activity and a minimal financial system.[87] Only court matters urgent, essential and time bound according to extant laws pursuant to the Chief Judge of the Federation of Nigeria (CJN) CIRCULAR No: NJC/CIR/HOC/11631 of 23rd March 2020 and other succeeding circular from the head of the judiciary were to be allowed. This played out in the use of the ZOOM media platform for court hearings and hearing without parties present. The flexibility was a whole new experience for the Criminal Justice sector and the Nigerian judiciary as a whole and our unpreparedness was exposed like the proverbial wind that exposes the fowl’s anus when it blows bringing the justice system to a near standstill. While Section 3 of the Regulation suspended both commercial and private passenger flights, Section 2 of the Regulation allowed seaports in Lagos to remain open. Section 4 of the Regulation begged with the populace to comply, pointing out that it was an obligatory sacrifice required for the greater good.[88] Section 5 contains provisions under which the federal government promised relief materials and

[86] Cap Q2 LFN 2004
[87] Section 1 (8)
[88] COVID-19 Regulation 2020, s. 4.

sustenance of the school feeding program. Whether this is feasible remains a mystery as more Nigerians suffered hardship without palliatives. The situation escalated into violence and chaos with the scandal involving state Governors hoarding palliatives and other relief materials meant for the people in warehouses across the country. The government subsequently stipulated in section 5(9) that all federally owned stadiums, pilgrims' camps, and other buildings be transformed into isolation facilities and makeshift hospitals. The presidential task force on COVID-19 was designated as the coordinating body even for the management of cash from charitable contributions provided by private individuals and businesses. The government's commitment to combating the virus is reaffirmed in the final section, section 7. As previously stated, the Regulation was general in nature and didn't specify what specifically needed to be done to combat crime at this time.

Factors currently affecting Criminal Justice Administration in Nigeria amidst the Covid-19 Pandemic:

1. Population Explosion Debacle

Nigeria is a country with an extremely dense population that is rapidly expanding [89] . The most recent official population census was last conducted in Nigeria in the year 2006 by the Nigerian government through the Nigerian Population Commission (NPC) resulting in 140, 431, 790[90] persons in total in Nigeria. Since then, there hasn't been a census, but the population has been growing steadily, therefore estimations based on the anticipated growth are used. Below is a graph of the projected and predicted growth in Nigeria's population from 2016 to 2026 provided by statista.com, a worldwide business data platform with statistics, data, facts, and insights from over 150 countries and 170 sectors.[91]

[89] Paul Ani Onuh, 'Nigeria's Response to COVID-19: Lockdown Policy and Human Rights Violations' *African Security* (2021), 1.

[90] 'Nigeria Census - Nigeria Data Portal' (*nigeria.opendataforafrica.org*) <https://nigeria.opendataforafrica.org/xspplpb/nigeria-census>.accessed 12 July 2021

[91] Ibid.

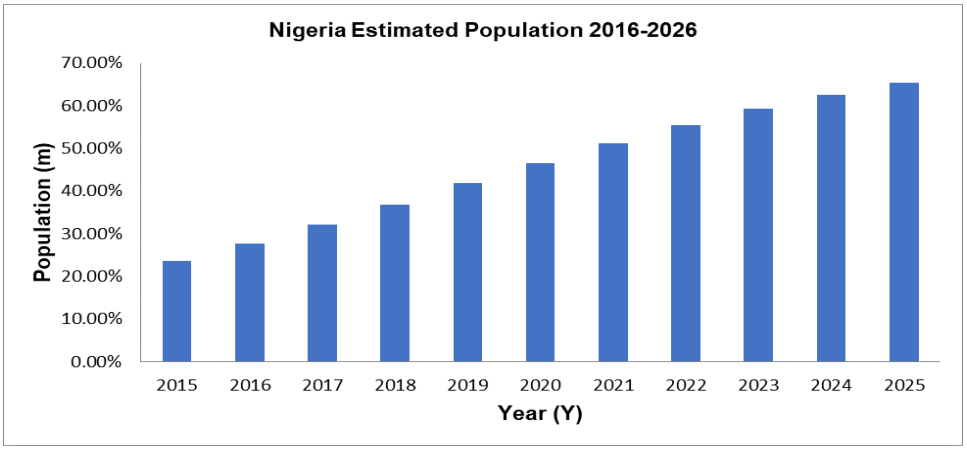

Figure 1.0 Nigeria Estimated Population 2016-2026.[92]

The population explosion is a problem because then there are many mouths to feed with less and less jobs being created by the Nigerian government and the private sector the potential for crime becomes too immense.

2. Covid-19 Pandemic

Our facilities and laws weren't prepared for the new normal that the Covid-19 pandemic has brought about. The need for distancing and remote court hearing means an increased need for digital facilities and extra funds to equip our criminal administration institutions for the digital life which among other things includes virtual hearings and court sessions. The Police Act, Administration of Criminal Justice Act and the Correctional Services Act did not contemplate this new normal; it would then take legislative activism and brilliance to incorporate the much-needed changes.

Nigeria performed poorly in both prevention and response during the 2017 World Health Organization (WHO) Joint External Evaluation (JEE) of IHR core capacities (an independent collaborative multi-sectoral effort to assess a country's capacity to prevent, detect, and respond to public health risks and challenges).[93] This shows that we did not learn the obvious lesson of being ready for medical emergencies. A global pandemic

[92] Aaron O'Neill, 'Nigeria - Total Population 2014-2024 | Statista' (*Statista* 31 May 2022) <https://www.statista.com/statistics/382264/total-population-of-nigeria/> accessed 16 April 2022.

[93] Siddharth Dixit, Yewande Kofoworola Ogundeji and Obinna Onwujekwe, 'How Well Has Nigeria Responded to COVID-19?' (*Brookings*2 July 2020) <https://www.brookings.edu/blog/future-development/2020/07/02/how-well-has-nigeria-responded-to-covid-19/> accessed 16 November 2022.

such as Covid-19 shuts down not just the health sector, but it spills over to the criminal justice administration arena as we have seen already.

3. Palliatives Hoarding and Non-Provision

In every sane democratic state and even in authoritarian regimes during times of crisis the government in power takes deliberate steps to alleviate the hardship on its citizens. The Nigerian government purported to do the same when it imposed the nationwide lockdown. Demographic respondents received palliative measures from the Federal Government of Nigeria to lessen the consequences of the lockdown.[94] However, protests followed the widespread distribution of these palliatives, with citizens complaining that the distribution process had been politically hijacked.[95] In places like Calabar, the coastal city known for its serenity was marred with chaos as teeming youths went on a rampage due to the discovery of palliatives hidden or hoarded for reasons still unknown. It is the author's view that the hoarding of palliative at the time became a direct consequence for an increase in crime rates as looters hijacked the several protests to commit atrocities on innocent citizens. Going forward it would be safer to distribute any such palliatives once they arrive in order to avoid a repeat of the menace witnessed so far. The resultant crisis from hoarding palliatives put more pressure on the security operatives and put a serious burden to an already overloaded criminal justice system.

4. Political Instability

The level of insecurity and instability in Nigeria presently is at an all-time high comparable to the pre-civil war period which witnessed ethnic sectarianism and extra judicial killings from unknown state actors. The next election cycle is close being 2023 yet the problem of political instability does not seem to be going away anytime soon. With no intention to sound like a prophet of doom the catastrophe waiting to happen if we don't get things right may be immense such that can threaten the very fabric of the 'one Nigeria mantra'. The pressure on the criminal justice system is tension level high and requires more attention than the sector is receiving currently. Political instability in the polity is one of the major challenges with non-state actors such as IPOB, herdsmen, Unknown gunmen and kidnappers running riot in the North, south, east and west of Nigeria.

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[94] Isaac Omo-Ehiabhi Eranga, 'COVID-19 Pandemic in Nigeria: Palliative Measures and the Politics of Vulnerability' *International Journal of Maternal and Child Health and AIDS (IJMA)*, (2020), vol. 9, 220.

[95] Ibid.

Other challenges facing the justice administration sector this period include poor government policies and measures, incessant industrial actions affecting access to justice, low budgetary allocation for security, and lack of political will to end insecurity. In the concluding section recommendations are made which we consider pivotal in bolstering the criminal justice administration and phasing out these challenges.

Conclusion

It is regrettable that difficult social and economic circumstances have affected crime and efforts to curb it and to probe, prosecute, and swiftly dispense justice.[96] The lockdowns created new obstacles for criminal justice and crime prevention, allowing some illicit marketplaces to flourish while disrupting others.[97] We have examined the laws and regulations that are supposed to be operational in the criminal justice administration within this period and have found the laws wanting and deficient coupled with the challenges already bedevilling the system. The author is poised to make a few recommendations or suggestions that if taken seriously can help make up for a better application of the instruments for better criminal justice administration.

The use of Executive Orders by the President and state Governors is one very elegant way of making quick changes to the status quo. It is recommended that the executive arm of government subscribe to the use of executive orders and regulations in bridging any noticed gap in criminal justice administration until the national or states houses of assembly can pass a law to cover the field. Secondly, legislation related to criminal justice administration must be amended to make provisions for the modus operandi to be carried on by security operatives during a health emergency. Currently this is lacking in the ACJA, Criminal code and Police Act. It is only the Nigerian Correctional Services Act that has some health provisions highlighted above. There has been an increase in crime that takes advantage of communications technologies, including an increase in fraud and financial crimes.[98] The capacity of the Police should not just be focused on offline securing of lives and properties but also online security strategies to avoid cybercrimes and the incidents of computer fraud. The global impact of the corona virus is so great that new regulations are now

[96] Freedom Chukwudi Onuoha, Gerald Ekenedirichukwu Ezirim and Paul Ani Onuh, 'Extortionate Policing and the Futility of COVID-19 Pandemic Nationwide Lockdown in Nigeria: Insights from the South East Zone' *African Security Review*, (2021), 1.

[97] UN Congress on Crime Prevention and Criminal Justice, 'For Information Only - Not an Official Document' (2021)

<https://unis.unvienna.org/pdf/2021/Crime_Congress/02_COVID_19_FINAL.pdf > accessed 15 November 2022.

[98] Ibid at [2].

in place to limit people's movements, working habits, and lifestyles[99]. Governments must also adjust transition from the previous standard of living to the new standard.[100] The criminal justice administration, police, courts, and other general institutions that are directly or indirectly related to it must adapt to the new normal.

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[99] Ayobami Ademola Akanmu and others, 'The COVID-19 Pandemic and Insecurity: The Furiousness in Nigerian Communities' *Urban, Planning and Transport Research*, (2021) vol. 9, 368.

[100] James Okolie-Osemene, 'Nigeria's Security Governance Dilemmas during the Covid-19 Crisis' *Politikon*, (2021) vol. 1.

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https://unis.unvienna.org/pdf/2021/Crime_Congress/02_COVID_19_FINAL.pdf

STUDIES REGARDING THE NEW PARADIGM OF FIXED CAPITAL DEPRECIATION

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Abstract: *The present research consists in creating the new paradigm design of fixed capital depreciation. The scientific approach summarizes direct and indirect effects regarding the profitability, risk and value of a company, dictated by the investment in fixed assets. The authors' solution to the presented problem is based on a specific research methodology that includes a series of methods and techniques, consequently representing an essential dynamic for a company, based on the new economy of knowledge. The new paradigm substantiated by the authors and defined the depreciation of fixed capital, is the investment in rigid assets, being decisive for the survival of a company under the conditions of economic internationalization.*

Keywords*: paradigm; depreciation; fixed capital; economic activity; financial result.*

JEL Classification: G40, G53

Introduction

In the literature works of great economists we find the term fixed capital. David Ricardo developed this term and was then taken over by a number of thinkers of the time. Fixed capital is in fact an element of architecture built by the total capital of a business, invested in physical

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assets, which remain in activity almost permanently or, more technically, more than one financial year. On the other hand, working capital also appears in construction. Marx considered the distinction between fixed and working capital to be relative, as it refers to the comparative turnover times of different types of physical capital assets. We can say that fixed capital "circulates", except that the duration of turnover is much longer.

A number of authors have been concerned with the situation of fixed capital and the role of amortization, including Pulvino[1], Schlingemann[2] et al, Alderson and Betker, Shleifer e Vishny, Muscettola[3].

In total fixed capital and mobilizations usually occupy the main share. The final results of the company's activity largely depend on the quantity, cost, technical level, efficiency of use: production, its cost price, profit, profitability, financial stability. For the general characteristics of the efficiency of the use of fixed assets, there are indicators of profitability (ratio of profit to average annual value of fixed assets), capital productivity (ratio of value of products manufactured or sold, after deducting VAT, excise duties to average annual value of fixed assets), capital intensity (inverse indicator of capital productivity), specific capital investments per money to increase production. In the economic life, manifested within the exchange economy, all producers work / activate in order to obtain its current amount of money that it provided at the beginning of the economic business, which consists in the production and marketing of production[4].

However, in order to carry out the economic activity within the exchange economy, each producer must involve certain economic resources, which depend on the production capacity and the specificity of the activity or business developed. In this way each undertaking must have certain means of production [2 - T.1.][5], Namely:

➢ *work objects* - what are the means of production or the objects which directly or indirectly participate in the production or performance of the production, are the means which can only be used, and

it is reflected as current / circulating capital → which objective can be used only in a single production process, depending on the loss of its initial-material value and form;

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[1] T.C. Pulvino, *Do Asset Fire Sales Exist? An Empirical Investigation of Commercial Aircraft Transactions*, The Journal of Finance Vol. 53, no. 3: 1998, pp. 939–978.

[2] F.P. Schlingemann, R.M. Stulz, R.A. Walkling, *Divestitures and the liquidity of the market for corporate assets*, Journal of Financial Economics 64, 2002. pp. 117–144.

[3] A. Shleifer, R.W. Vishny, *Asset Sales and Debt Capacity*. NBER Working papers series, 1991.

[4] M. Alderson, B. Betker, Liquidation Costs and Capital Structure. Journal of Financial Economics 39: 1995, pp. 45-69.

[5] A. Smith, translation, Wealth of Nations: Research on Nature and Its Causes, Bucharest, ARRP Publishing House, 1965.

➢ *means of work* - what are the means of production or the objects that directly or indirectly participate in the exercise of the economic process of production, in the development of the economic activity, are the means that can still be used, and it is reflected as fixed capital → which objective can be used for several production processes and a period of time of the order of years, depending on the loss of its value and initial-material form.

Therefore, all these elements are necessary for the exercise of economic activity and, respectively, for the achievement of the ultimate goal of any producer[6], but to achieve them these factors must be modified in current economic quantities in order to form the cost or price of production, provided by producers for marketing to consumers, as it is the basis of all revenues:

- *the current economic size of working capital* - the product of the quantity of materials according to the recipe and according to the consumption norm and the unit price of consumed materials;
- *the current economic size of fixed capital* - is the level of depreciation or wear and tear of fixed capital[7],[8],[9],[10] used by producers according to the nature of the business.

Respectively, we see that the working capital in the company's income is included directly, without transformations, while the fixed one is included in a special way, under the name of depreciation.

The starting point of our approach scientifically consists in reinterpreting the term fixed capital viewed from the perspective of amortization. For this reason, we consider the process of capital amortization it must be given a different essence, a different interpretation, in fact a new paradigm. The authors tried to find answers to some essential questions, namely what is the use of amortization and what kind of indicator it is?

➢ what does the component part refer to and how one must interpret its role in economic life.
➢ what kind of amortization is beneficial
➢ how we subtract completely depreciated assets from management
➢ sinking fund VS non-depreciable,

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[6] J.B. Say, translation into ro., *Treaty of Political Economy*, Bucharest D Publishing House, 2011, 568 pp.

[7] E. von Bohm-Bawerk, translation in ro., Theory of Capital and Interest, The Didactic Publishing House, 2008, 644 pp.

[8] K. Marx, *Capital,* Chisinau, Central Typography, 1980, 860 pp.

[9] P. Samuelson, *Economics,* Bucharest, The Economics Publishing House, 2000, 480 pp.

[10] G. Abraham, *Political Economy,* Paris, The Economics, Publishing House, 1988, 610 pp.

- is the depreciation determined for each fixed capital item or should it have been another depreciation object.
- has the value of determining the monthly depreciation for the accumulation of the annual amount.
- how they are registered expenses incurred in repairing fixed capital items that are subject to deterioration in the process of operation.
- the residual value of fixed capital?.
- it makes sense to change the calculation method in the process.
- which is the fair depreciation calculation methodology and where it needs to be reflected.
- which is the reason for determining the depreciation, after the first year.
- which, however, is the ultimate goal of depreciation.
- does the amortization of fixed capital have a deadline?.

Literature review

The foundation of economic notions represents a doctrinal period in the evolution of the micro-economy. From feudalism to the present, the concept of capital has supported both theoretical-scientific and methodological-practical approaches being found in all economic sciences, and the treatment of the theoretical concept is part of the scope of this concept. Capitating seems like a notion among the three classic factors of production alongside work and earth. Adam Smith in "The Wealth of Nations: Research on Nature and Its Causes" defined capital as a stock of goods that brings or will bring in future revenues, which denotes its function in the present period. Moreover, Smith is the first economist to propose capital accounting, identifying the concept of fixed capital and working capital in 1776. Fixed capital being characterized as a factor producing non-transferable profit and without subsequent conversion that will allow its subsequent accumulation for the purpose of developing entrepreneurial activity, production, expansion and creation of new jobs – hence the wealth of the whole society.

Frenchman Jean Baptiste Say, a follower of classical liberalism, one of the representatives of the French school associated and founded the notion of capital with the theory of distribution in which each factor of production contributing to the production process receives its own reward, in this way demonstrated the direct link between capital and profit in the paper "Treaty of Political Economy" 1803. Eugen von Bohm-Bawerk, one of the neoclassical parents, representative of the Austrian school, in the paper "Capital and Interest Theory" addresses capital as a factor of production obtained from the combination of the other two factors through time. The essence of the theory sums up "that capital increases the productivity of

factors of production", and the contemporary aspect of this theory is the modernization of equipment, machinery, machinery under the conditions of the technical-scientific revolution for a better result.

The capital was a dispute of all doctrinal currents, so the socialist K. Marx in the paper "Capital Theory" deepened the notion of capital with new aspects calling "value containing added value" which allowed the division into two categories "constant" and "variable". Thus, from K. Marx the capital constantly subsequently the fixed capital transmits its value to the goods made and sold to the final consumer.

Highlights of capital are also found in the micro- and macroeconomic thinking approached by the most famous economists of the 19th – 20th centuries such as Samuelson P., Gilbert Abraham, Whitehead G[11]., Didier M.[12], Nordhaus W.[13], Dobson S.[14], Kim, B.[15] etc. which confirm the classical, neoclassical and socialist theories regarding content and destination as a factor of production in obtaining material goods intended for profit-making sale.

Work and land are considered primary or original factors of production, and capital appeared much later in the order of factors of production, in the early 19th century when very quickly the industrialization is being moved and the new economic system is introduced into capitalism. It is in the development of these theories that the economic schools among the first established the relations between the three components, which have not exhausted the actuality even today.

Among the contemporary approaches to capital is mentioned Gavrilash G.[16], "capital represents an economic category of a historical nature being defined as stock of securities or as assets " which can be passed on to any meaning of capital e.g. social, own, financial, economic, etc. At the same time Oprean C. asserts by the definition established the legal tint capital of the concept of capital 'capital comprises all assets possessed by an individual or an entity' which denotes its size or quantitative value.

More recently, as a result of the deepening in terms of the economic areas of professionalization the notion of capital has expanded, and today we have several derivatives such as: capital, statutory capital, capital,

[11] G. Whitehead, *Economics,* Timisoara, Sedona Publishing House, 1997, 460 pp.

[12] M. Didier, *Economy, Rules of the Game,* Bucharest, Humanitas Publishing House, 1994, 380 pp.

[13] W. Nordhaus, *Political Economy*, Bucharest, Teora Publishing House, 2000, 674 pp.

[14] S. Dobson, *Microeconomics,* London, McGraw-Hill Book Company, 1995, 456 pp.

[15] B. Kim, *Manufacturing learning propensity in operations improvement,* Human Factors and Ergonomics in Manufacturing & Service Industries, Vol. 8 (1), 1998, 79–104 pp.

[16] G. Gavrilas, *Cost of Capital,* Bucharest, The Economics Publishing House, (2007), 244 pp.

investment, social capital, commercial capital, advanced capital, natural capital, nominal capital, equity, etc.

In the context of the practical aspect of economic and financial analysis, the approach to the capital structure and the technical modalities of analysis can be found in the works of the authors Saviţcaia G.[17] , Şeremet A.[18] , Melnic M.[19], Grigorenco I., Nederita A.[20], Tiroulnicova N.[21], Cebotareov N.[22], Blanc I.[23] subject to financial source capital. The same is treated in financial-accounting terms in the works of scientists Morellec, E.[24], Helfert Er.[25], Covaneov V.[26], used in the calculation of financial profitability, which reflects ordinary shareholder capital and measures the performance of the holders of shares.

In financial terms, capital is a source for the revolving fund and fixed assets contributing to the development of economic activity under market conditions whose fundamentals are studied by the authors Messer Z.[27], Volcov D.[28], Griaznov A.[29], Koziri I.[30], Rutgaizer V.[31], Krivorotov V.[32], Cobzari L.[33], etc. The financial aspect of the entity summarizes the entity's

[17] G. Saviţcaia, *Economic and Financial Analysis of the enterprise,* Moscow, Infra-M Publishing House, 2011, 536 pp.

[18] A. Sheremet, *Analysis and Diagnosis of the Firm*, Moscow, Infra-M Publishing House, 2011, 367 p.

[19] M.V. Melnic, *Financial Analysis,* Moscow, 2002, 528 p.

[20] A. Nedriţă, *Financial Accounting,* Chisinau Central Printing, 2003, 640 p.

[21] N. Tiriulnicova, *Analysis of Financial Reports,* II Chisinau Publishing House, ACAP, 2011, 400 p.

[22] N. Cebotareov, *Enterprise Assessment,* Moscow, Daşcov and K Publishing House, 2014, 252 p.

[23] I. Blanc, *Capital Formation Management,* Kiev, Nica Publishing House, 2000, 508 p.

[24] E. Morellec, Asset Liquidity, *Capital Structure and Secured Debt,* Journal of Financial Economics, 61, 2001, 173-206 pp.

[25] Er. Helfert, *Financial Analysis Techniques*, Bucharest, BMT, 2006, 560 pp.

[26] V. Covaneov, *Introduction to Financial Management,* Moscow, Finance and Statistics Publishing House, 1999, 768 pp.

[27] Z.K. Messer, *Integrated Business Assessment Theory,* Moscow, 2008, 288 p.

[28] D.L. Volkov, *Company Value Management: The Problem of Choosing an Appropriate Assessment Model,* Moscow, Vestnik, 2004, 348 p.

[29] A.G. Gryaznov, *Business Assessment,* Moscow, M: Finance and Statistics, 2015, 736 p.

[30] I.S. Koziri, *Company value: evaluation and management decisions,* Moscow: "Alfa-Press" Publishing House, 2009, 372 p.

[31] V.M. Rutgaizer, *Business Assessment Guide,* Moscow, Quintto Publishing House, 2000, 371 p.

[32] V.V. Krivorotov, V*alue management: valuation technologies in enterprise management, manual,* Moscow: Uni-Dana, 2011, 111 p.

[33] L. Cobzari, *Company Finances,* Chisinau: ASEM, 2007, 364 p.

need for the renewal of capital for optimal stocks of materials and products being studied and the possibilities of decreased liabilities.

In conclusion, we establish that the concept of capital is both financial and physical, and the main component for economic activity is, however, the technical capital that generates effectiveness and brings income. Technical capital – fixed capital participating in several economic production circuits bringing income but retaining material form loses value gradually anyway. In modern economic conditions, speaking of attrition we present two factors: physical wear and moral wear. In the authors' view, fixed capital being limited to destinations and alternatives as well as very rigid in use, partially replaced which is sooner or later a depreciation factor.

Research methodology

As a theoretical basis were studied a series of scientific papers, the research was conducted by examining the literature in the field of economics, finance and accounting. At the basis of the theoretical substantiation, were the experiences, analysis, synthesis, deduction. Documentary research has led to an understanding of the theoretical aspects of fixed capital depreciation. The theoretical documentation was made by going through a significant number of specialized works, books and articles, both from Romanian literature and from foreign literature. All the information and ideas that emerged from the theoretical documentation led to the realization of an empirical research, using quantitative methods (case study) that contributed to finding the answers to the research by validating the hypotheses. As research methods used, our study is based on the method of data collection, comparative method, analysis and case study.

Results

As a theoretical basis were studied a series of scientific papers, the research was conducted by examining the literature in the field of economics, finance, and accounting. At the basis of the theoretical substantiation, was the experience, analysis, synthesis, deduction. As mentioned, fixed capital is used in developed business for a long period of years, so according to the principle or rule received in economic practice; the value of fixed capital must be converted into annual amount, because it is included in its cost, production price.

- From the study and research, we followed unrelated moments:
- First, what is the amortization for, what kind of indicator is it.
- What it refers to as a component part, how to interpret its role in economic life.

- Another problem is the annual size, why not all the value invested in equity.
- How to put the depreciation then, after the first year of depreciation.
- As we do with the means whose value has been totally depreciated.
- Another question is about depreciable and non-depreciable capital, how to receive such a thing.
- Is the amortization determined for each fixed capital item or should it have been another depreciation object?
- Has the value of monthly determination of depreciation for the accumulation of the annual amount.
- As well as the costs incurred in repairing the elements of fixed capital that are subject to deterioration in the process of operation.
- There is also a question about the residual value of fixed capital.
- It makes sense to change the calculation method in the process.
- How to calculate depreciation and where it should be reflected.
- It makes sense to determine the depreciation in the other years after the first.
- The annual size by capacity may or may not be completely scrapped.
- Likewise, the question arises, which is nevertheless the ultimate purpose of depreciation.
- Has the amortization of the fixed term capital.

Hence, as we can see, there are many questions and ambiguities, so we will start the presentation of the research on this phenomenon.

We believe that the amortization of fixed capital must be given a different essence, a different interpretation, which has always had it.

Discussions

Depreciation is part of the cost of production; it is a calculating article and refers to the category of indirect consumption and expenditure, which is indirectly distributed in the cost of manufacture.

As a cost element, depreciation is the annual amount of the initial (devaluation) amount of fixed capital used in economic activity, depending on the duration of operation and the depreciation ratio[34].

[34] A. Deliu, Labor productivity - and its calculation in essence. InterConf, (49), 2021, 6-28 pp. https://doi.org/10.51582/interconf.07-08.04.2021.001

In economic practice the current amount of depreciation is determined by several methods, which have been divided along the way, according to certain criteria such as:

- depending on how to recover the initial value; two general methods of depreciation are followed:

(1) linear or regular methods - uniform recovery of the initial value during the useful life cycle.

(2) accelerated or irregular methods - rapid recovery of the initial value during the useful life.

- depending on the form of expression of the duration of use, recovery of the initial value carried out on a straight-line basis and follow two linear depreciation methods:

(1) linear method after years of operation and

(2) linear method after manufacture.

- depending on the accelerated recovery of the initial value and two accelerated depreciation methods are pursued:

(1) the accelerated method after productivity and

(2) the accelerated method after years.

Next in tables T.1, T.3, T.5, T.7., We will set out the essence and the indicators used for each method of calculating the depreciation, and

In tables T.2, T.4, T.6, T.8 - we will present examples of application of the exposed methods.

In table T.1, we start with the exposition of the classical method of calculating the depreciation or wear of fixed assets, namely with the linear method or the linear scrapping method.

Thus, in T.2 is shown an application of the linear method after service years. Depreciation was calculated for the current year-20Q5, depending on the "X" machine with an initial value of 40 thousand m.u., which is higher than the unit value established for depreciable fixed assets[35]. A residual value of 10% and a service life of 4 years were expected with the entry into operation in December 20Q1. As we can see, the same size from the initial value is scrapped annually. We note that the remaining value has been forecast, which must be recorded at the end of the last period of the total duration as balance sheet value-MF_{VC} and in summary with the accumulated depreciation value-A_{ac} must reflect the initial value and the difference between the initial value and the accumulated depreciation - accounting.

[35] Catalog of fixed assets, Fiscal monitor, no. 1. 2021, pp. 45-67

Table T.1. Formula for calculating the annual depreciation according to the straight-line method[36]

Formula		Conditions and principle		
0		1		
1	$A_A = (MF_{VA} * n_a)/ 100$ $A_= MF_{VA} / Tn_< MF_{VA} * 1/T_n$	– the amount of annual depreciation/wear, for each period or year of the duration of life cycle, monetary units per year (m.u./year) – is determined for one year and is the same for all the total duration of use		
2		MF_{VA}	= MF_{VI} - MF_{VR} – depreciable value of fixed assets, m.u.	
3			MF_{VI}	–the initial value of fixed assets, m.u.
4			MF_{VR}	= MF_{VI} * %MF_{VR}/100 – residual value, m.u.
5				%MF_{VR} ≤ 10%→MF_{VI} – relative $_{VR\ size,\ \%}$
6		n_a	=1 / T_n * 100 - depreciation norm by linear method, % - weight of depreciable value, determined in proportion to the duration of life cycle, expressed in years:	
7			T_n	– useful operating time set, years
8			1	– one year of use of fixed assets, year

Table T.2 Illustrates an example of proposed application of the linear method.

T.2. Annual depreciation of machine "X" for the current year 20T5 according to the straight-line method[37]

Markers				Marker's value							
				Total	inclusive					*exclusivities*	
					MF_{VA}, mii m.u.	inclusive		n_a, %	inclusive	MF_{VC}, thousand m.u	inclusive
						MF_{VI}	MF_{VR}		Tn,yeras		A_{ac}
0				1	2	3	4	5	6	7	8
1	1. Duration of use, years		T_n	4	-	-	-	-	-	-	-
2	2. Residual value of depreciable asset, %		%MF_{VR}	10	-	-	-	-	-	-	-
3	3. Date of entry into service of the asset „X"		data	01.12. 20T1	-	-	-	-	-	-	-
4	4. Annual depreciation for periods „t", thousands m.u/year:		A_{At}	-	-	-	-	-	-	-	-
5	4.1.	T_1 – 20T_2	A_{A1}	**9** = *36* × *25/100* or 9=*36/4*	36 = 40 - 4	40	4 = 40 × 10/ 100	25 = *1 / 4* × *100*	1	*31=40-9*	*9=9×1*
6	4.2.	T_2– 20T_3	A_{A2}						1	22	18
7	4.3.	T_3 – 20T_4	A_{A3}						1	13	27
8	4.4.	T_4 – 20T_5	A_{A4}						1	*4=40-36*	*36=9×4*
9	5. Total value of aggregated indicators		y_T	-	36	40	4	-	4	4	36

[36] Source: Adapted by the authors according to the sources Fiscal Code, T. II, C.3. Deductions related to entrepreneurial activity, A.26, 1-7. pp.

[37] Note: The values used in the situations in the calculation tables T.2, T.4, T.6, T.8, are conventional but rational - the purpose is to show the calculation methodology.

10	6. Average value of indicators	Ay_i	9	-	-	-	25	-	-	-
11	7. Guaranteed period of use	T_g	10	-	-	-	-	-	-	-
12	8. Capacity of the asset at the end of the service life	-	util fizic and moral	-	-	-	-	-	-	-

***Source**:* Prepared by the authors[38].

These 2-two indicators as balance sheet value and accumulated depreciation → MF_{VC} and A_{ac}, we showed them exclusively in T.2. in columns 7 and 8, to follow the finality of the depreciation process. Next in Table T.3, we will set out the current essence of the linear method after production or the method of production units.

T.3. Depreciation formula according to the combined method of production

Formula		**Conditions and principle**				
0		**1**				
1	**$A_{At} = (MF_{VA} * n_{at}) / 100$** **$A_{At} = MF_{VA} * Q_{it} / Q_{iT}$** **$A_{At}=(MF_{VA}*n_a*K_{ut})/100$**	**- the value of the annual depreciation** - for each year of the term of service life, m.u. / year - is determined for each year of the total duration of use, each year depends on the level of production				
2		MF_{VA}	= MF_{VI} - MF_{VR} - depreciable amount, m.u.			
3			MF_{VI}	- initial value, m.u.		
4			MF_{VR}	= MF_{VI} *%MF_{VR}/ 100 - residual value, m.u.		
5				%MF_{VR} ≤ 10% →MF_{VI} - relative amount of VR,%		
6		n_{at}	= T_t/ T_n × 100	or	= n_{of} × K_{uti}	
			- wear rate according to the production method per year "T" - after the duration of use, as the quantity produced you take the product, %:			
7			T_t	- current use period "t" - annual quantity-Qit of manufacturing "i", production unit – p.u.		
8			T_n	- duration of use - total volume manufactured - QiT produced during service life, p.u		
9			K_{uti}	= Q_{it} / CP_{io} - capacity utilization factor to manufacturing the product "i" in period "t",% / %:		
10				Q_{it}	- production the actual "i" made in "t", up	
11				CP_{io}	= Q_{iT} / T_n - average capacity, p.u. / year	

Source: Adapted by the authors.

In table T.4., we propose an example of the application of the united method of production.

[38] Note: The initial data based on the situation in table T.1., Will be common for the other methods as well.

T.4. Annual depreciation of machine "X" according to the combined method of production

Markers				Marker's value								
				total	inclusive						exclusivities:	
					MF_{VA}, thousands m.u.	n_{at}, %	inclusive				MF_{VC}, mii m.u	inclusion A_{ac}
							n_a, %	Kuti, %/%	inclusive			
									Tn, years	QiT, p.u.		
0				1	2	3	4	5	6	7	8	9
1	1. A_A, mii m.u../year:		A_{At}	-	-	-	-	-	-	-	-	-
2	1.1.	T_1 – 20T2	A_{A1}	*7,5=36 ×20,83/ 100 or =500 * 36/2400*	36	20,833 *=25*0,83*	25	0,833 = *500/ 600*	1	500	32,5 = *40 -7,5*	7,5 = *7,5+0*
3	1.2.	T_2– 20T3	A_{A2}	10,5		29,167		1,167	1	700	22,0	18
4	1.3.	T_3 – 20T4	A_{A3}	12,0		33,333		1,333	1	800	10,0	30
5	1.4.	T_4 – 20T5	A_{A4}	6,0 = *36 * 16,66/1 00*		16,667 = *25*0,667*		0,667 = *400/ 600*	1	400	4 = *40 - 36*	36 = *6+30*
6	2. The total value of the aggregated indicators		y_T	-	36	-	-	-	4	2400	4	36
7	3. Average value		Ay_i	-	-	-	25	-	-	600	-	-

***Source**:* Prepared by the authors.

Therefore, in T.4., we set out the application of the linear method after production, is the method of production units. As we can see, different sizes from the initial value are scrapped annually, which shows that the level of depreciation depends on the level of current production.

Further in Table T.5, we will set out the current essence of the accelerated method after production or the method of reducing the balance of fixed capital.

T.5. Depreciation calculation formula according to the method of reducing the balance[39]

Formula		Conditions and principle	
0		1	
1	$A_{At} = (MF_{VI} * n_{at}) /100$ or $A_{At}=(MF_{VCt-1}*n_a*K_{ino})/100$	- annual amortization of fixed capital for the current year "t "→ n – t	
		- annual depreciation for the last current year "t "from" n	
	$A_{At} = MF_{VCn-1}$	* if no residual value is provided - VR for assets	
	$A_{At} = MF_{VCn-1} - MF_{VR}$	*if it is VR - differences of MF_{VCn-1} at the end of the penultimate year and MF_{VR}	
2		MF_{VCt-1}	- book value at the end of the previous year "t-1"
3		n_{at}	= n_{of} * K_{ut} - wear rate for years "N-1",% = (100-% MFVR) - K_{at-1} - wear rate per year "N",%:
4			K_{ut} = (K_{ino}* K_{ut-1}) * 100 - coefficient of intensive use,%:
5			K_{ino} - intensive acceleration coefficient → 1.5 ÷ 2
6			K_{ut-1} The degree of utility of the asset in "T-1" = MF_{VCt-1} / MF_{VI} * 100
7			K_{at-1} = MF_{act-1} / MF_{VI} * 100- depreciation coefficient "t-1 ",%
8			n - number of years of use - corresponds in number to the last year

Source: Adapted by the authors according to the sources [4-10].

T.6. Annual depreciation of the "X" machine according to the method of reducing the balance[4·]

Markers				The value of the markers							
				total	inclusive					exclusively:	
					$n_{at,\%}$	inclusive				$MF_{VC,}$ thousand m.u	inclusive
						$n_{of,}$ %	Kut, % /%	Inclusive			A_{ac}
								K_{ino}	K_{ut-1}		
0				1	2	3	4	5	6	7	8
1	1. A_A, thousand um / year:		AA_t	-	-	-	-	-	-	-	-
2	1.1.	T_1 - 20T2	AA_1	20 = 40 * 50/100	50 = 25 * 2	25	2 = 2 * 1	2	1 = *40/40*	20 = *40 -20*	20 = *20 + 0*
3	1.2.	T_2– 20T3	AA2	10 = 40 * 25/100 or 10 = 20 * 50/100	25 = 25 * 1		1.0 = *2 * 0.5*		0.5 = *20/40*	10	30
4	1.3.	T_3 - 20T4	AA3	5 = 40 * 12.5 / 100 *or* 5 = 10 * 50/100	12.5 = *25 * 0.5*		0.5 = *2 * 0.25*		0.25 = *10/40*	5	35
5	1.4.	T_4 - 20T5	AA4	1 = 40 * 2.5 / 100 or 1.0 = 5 - 4	2.5 = (100-10) - (35/40 * 100)		0.1		0.05	4	36

[39] Source: Elaborated by the authors according to the sources FISC.md fiscal monitor, no.6 (61) September. 2020

In table T.6 is proposed an example of applying the balance method. Thus, in T.6 we set out the application of the accelerated method after production. As we can see, different sizes from the initial value are scrapped annually, but it is obvious the moment of acceleration where in the first half of the duration more than 50% was recovered. Next in Table T.7, we will set out the current essence of the accelerated method after years or the numbers / cumulative method.

T.7. Depreciation calculation formula according to the cumulative method

Formula		Conditions and principle			
0		1			
1	$A_{At} = (MF_{VA} * n_{at}) / 100$ $A_{At} = MF_{VA} * T_{ut} / \sum T_t$	- annual amortization of fixed capital for the year current "t "			
2		nat	= n_{of} * K_{ext} - fixed capital wear rate,%:		
3			K_{ext}	= (T_{ut} / T_m)* 100 - extensive acceleration coefficient,%:	
4				T_m	= (n + 1) / 2- the average period of the service life
5				T_{ut}	- useful period / number of years, until the expiration of the operating term for each period "i", years
6				ΣT_t	- the direct sum of the figures for the periods of use

Source: Adapted by the authors according to the sources FISC.md fiscal monitor. no.6 (61) September, 2020, pp.1-7

T.8. Annual depreciation of machine "X" according to the method of figures

Indicators				The value of the indicators							
				total	inclusive					exclusively:	
					n_{at},%	inclusive				MFV, thousand m.u	inclusion A_{ac}
						n_{of}, %	Kext, % /%	inclusive			
								T_{ut}	T_m		
0				1	2	3	4	5	6	7	8
1	1. A_A, thousand um / year:		A_{At}	-	-	-	-	-	-	-	-
2	1.1.	T_1 - 20T2	A_{A1}	14.4 = 36 * 40/100 or 14.4 = 36 * 4/10	40 = *25 * 1.6*	25	1.6= *4 / 2.5*	4	2.5 = (4 + 1) / 2	25.6 = *40- 14.4*	14.4
3	1.2.	T_2– 20T3	A_{A2}	10.8 = 36 * 30/100	30 = 25 * 1.2		1.2 = 3 / 2.5	3		14.8	25.2
4	1.3.	T_3 - 20T4	A_{A3}	7.2 = 36 * 20/100	20 = 25 * 0.8		0.8 = 2 / 2.5	2		7.6	32.4
5	1.4.	T_4 - 20T5	A_{A4}	3.6 = 36 * 10/100	10 = 25 * 0.4		0.4 = 1 / 2.5	1		4.0	36.0

6	2. The sum of the digits	ΣT_t	10= 1 + 2 + 3 + 4	-	-	-	-	-	-	-

***Source**:* Produced by the authors according to the sources FISC.md fiscal monitor. no. 6 (61) September. 2020, pp. 1-7.

In table T.8., we propose an example of the application of the cumulative method.

Therefore, in T.8, I set out the application of the accelerated method after years. As we can see, different sizes of the initial value of fixed capital are scrapped annually, and it is also obvious the moment of acceleration where in the first years more than 50% is recovered.

Thus, with table T.8, we finished the exposition of the depreciation calculation methods, which will be the basis of the further discussion.

As we see the depreciation is determined without considering the volume of work submitted, we see that it is easily determined for each period and in the amount for all elements of the company is reflected in the costs of the corresponding management period.

We mentioned that fixed capital is in the category of labor, which requires that its current, annual size be included in the cost or price of production. Respectively, the price of production and its elements are determined at the start of the business or when an increase in economic resources used to manufacture or provide the production is sought, either by the producer-suppliers or by the producer-business [40]. The cost elements, according to the material and human resources, are included according to the production capacity as the maximum production that can be produced according to the technical-material potential.

Thus, what we see is the price does not change in the next period or periods, because the amount of depreciation is different, the price works further, depending on the value of the depreciation included. The exception is the straight-line method after years, only if it is applied to all elements of fixed capital, because here each period has the same size.

However, we follow, that the enterprises reflect the amortization in its annual size according to the current conditions and movements → inflows-outflows, in consumptions and expenses, in the financial situation of profit and loss. Although let us not forget one thing, depreciation is scrapped as an expense, after which it is still movement.

Thus, we consider that the depreciation has no value to be calculated for each period of use:

➢ *depreciation* must be *calculated* only for the first year of use of the fixed capital to identify the current amount or to be received as a useful

[40] A. Deliu, Labor productivity - and its calculation in essence. InterConf, (49), 2021, 6-28 pp. https://doi.org/10.51582/interconf.07-08.04.2021.001

value the year with the highest level, as in the 1st period in T.6., and will characterize the fixed capital requirement for carrying out the current economic activity or will show the necessary means of labor necessary for the natural person who develops commercial activity →

we consider and propose that in the contemporary economy of trade,

i) the method of calculating depreciation must be one of the accelerated methods, which must be one and be the same for all manufacturers, and

ii) the average duration of recovery or use of fixed capital should be 4-5 years, which must also be identical for all producers → these proposals are aimed at protecting producers, at maintaining the business developed over time, of course only if it wants to get the manufacturer to continue the business.

➢ depreciation should not be calculated on capital objects, because neither they nor the machines impose the production capacity, but the enterprise has the capacity →

we consider and propose that in the contemporary economy of trade,

i) the depreciation must be calculated on the immediate undertaking as a function of single business, i.e. on the productive subdivision which directly provides the production „i", provided with all means of work, in economic and social aspect →

ii) and all changes after outputs and inputs to cover decommissioning in the process of carrying out the current activity, does not change the initial value or the cost of entering fixed capital, as they are related to the replacement and replacement of those physically used or damaged → by this principal companies will not have assets that do not specialize or in addition to existing ones → entry has no value, respectively any entry leads to a new amount of equity, which has no value...;

➢ and all fixed capital repair changes, does not change the cost of entry, but will decrease in the current period of repair, the amount of annual depreciation that had to be scrapped for profit - in this way, we see the essence of fixed capital repairs and its reflection within the company - the size of repairs decreases the annual value of fixed capital, and on this basis the level of profit will change, and this amount can be shown when taxing the income of individuals.

As we have shown, depreciation is an element of price, so it is acceptable that through price the company forms and predicts sales revenues. But what is expected is not always achieved. Therefore, we consider that depreciation must be scrapped according to actual sales revenue, this principle requires that depreciation must depend on the volume of work submitted, which is expressed by the degree of utilization of the company's production capacity, which is expressed by the ratio

between the real income from sales and the production capacity or the expected / expected income, which is expressed as the amount of money to be received from the realization of the marketed production in the current period.

Therefore, the price elements, according to material and human resources, are included according to the production capacity or the value of sales expected from the realization of the production, which is rendered by the production manufactured and destined to be realized in the current period or year.

It is also admissible that fixed capital as part of equity [v. T.9.], Must be recovered after the volume of work submitted and removed from the company as profit, as own income, while working capital remains in operation, as part of foreign income or current expenses, which will allow the reproduction [v. T.9.]. This is argued by the fact that working capital is not capitalized, therefore it remains with each production process in the enterprise, while the value of depreciation shows the capitalized value of fixed capital or long-term assets subject to depreciation and therefore it is excluded not to allow duplication. And respectively the scrapping is performed monthly, according to the scrapping of the natural income.

Based on the above, regarding depreciation, it is acceptable that its value in price is conventional, but it is necessary to be known, because its basis is working capital that returns as foreign income, in addition to the labor attracted, and the difference between the price, in aggregate aspect, and the foreign income is the profit, rendered as general natural income or the payment for the work deposited in the exchange economy, which imposes in it the direct natural income, and payment for business support.

Table T.9. The balance sheet for the period 01.01.-31.12.20T5

Item value, thousands um					Item value, thousands um			
of liabilities			of assets		of liabilities		of assets	
at the beginning of the year					at the end of two years			
0			1		2		3	
1	I. Capital:	632500	I. Active:	632500	I. Capital:	464000	I. Active:	464000
2	1. Equity:	632500	I. Materialized assets:	428000	1. Equity:	464000	I. Materialized assets:	428000
3	1.1. Fixed assets - capitalized capital:	428000	I.1. Long-term assets:	394000	1.1. Fixed assets:	428000	I.1. Long-term assets:	394000
4	1.1.1. Investitive - capital	11500	* own sources	382500	1.1.1. foreign capital:	3500	* own sources	390500
5	- loan	8000	- loan	11500	- loan	0	- loan	3500
6	- consumpti	3500	I.2. Current assets:	34000	- consumpti	3500	I.2. Current assets:	34000

	on				on			
7	1.2. Reserves - monetary capital:	204500	- materials ...	34000	1.2. Reservations:	36000	- materials ...	34000
8	* money in the house	0	II. Monetary and financial assets	204500	* money in the house	0	II. Monetary and financial assets	36000
9	* money on account	36000	-	-	* money on account	36000	-	-
10	* income receivables	168500	-	-	-	-	-	-
11	TOTAL LIABILITIES	632500	TOTAL ACTIVE	632500	TOTAL LIABILITIES	464000	TOTAL ACTIVE	464000
12	Annual profit	168500 = 632500 – 464000						

Source: Retrieved and adapted from source Catalog of fixed assets. Fiscal monitor, FISC. md. MO no. 1. 2021 pp 45-67

So, we have shown that depreciation is part of the profit and can only be obtained through sales revenue, which characterizes the actual work submitted by producers. Thus, it appears that it depends on the volume of work submitted:

* if the level of sales revenue will be lower than the value of production intended for sales, then it appears that the level of depreciation for scrapping will be less than the annual amount of the current period. And in this way, it appears that the given difference will not be recovered in the current period and in the given amount the expected profit will be lower than expected.

As we followed in table T.2., The fixed asset subject to depreciation was identified as depreciable asset, for which the useful life and the residual value were established. As mentioned, equity invested in fixed capital must be recovered. Respectively, in order to know which assets, need to be recovered, it is necessary to know which assets are fixed and which are current. Thus, the division of assets or fixed assets into depreciable and non-depreciable assets has no value. All fixed capital must be considered depreciable. But, if they are objects that are considered of unlimited duration of use but necessary for economic activity, then as they are accepted as economic resources, they must acquire a commercial aspect and be amortized.

As for the residual value, like the non-depreciable assets, it has no value, the money invested must be recovered. And in this way, we consider that the fixed capital must be managed in the company according to the initial value or the cost of entry, until its necessary exclusion from the economic activity, either according to the physical wear or the moral wear.

In Q.2, we have shown that the value of the asset was fully depreciated at the end of the current year 20Q5, and according to the proposed conditions the analyzed asset is in normal physical and moral condition, especially that maintenance lasted 10 years, but in terms of physical wear and tear. However, according to the old theory, the asset is no longer depreciated. In this way, we consider that indeed the initial value must lead the asset further and the initial depreciation plays on and in this way the practicality of the residual value is obvious.

Admittedly, depreciation is not the scrapping of fixed expenses, but it shows that the given share of equity must be excluded from the business. The scrapping of objects and means of labor, as well as labor attracted by the current economic size occurs when their value has been reflected in the cost or price of production, ie at the end of the production process, when the given means acquire the status of finished production.

Thus, it is acceptable that depreciation should be received as an indicator of results, it is a conventional quantity, because it is part of the difference between total income and foreign income, ie own income, profit. Price planning is added to the current economic size by capacity relative to foreign income, and then as much as supply and demand allow or depending on market balance, natural income is added, the direct payment for work done in the exchange economy. If the degree of achievement of production capacity by income is less than 100%, then primarily according to the principle of security, the natural income of producers as individuals and what remains - respectively will be depreciation. In this way, it is well followed that the depreciation depends on the volume of work submitted. It is acceptable that the highlighting of depreciation is necessary for producers to know the limit of personal expenses in social life.

Conclusions

The authors tried to reinterpret through a new paradigm the depreciation of fixed capital, answering the questions that were the starting point of our study, namely:

- depreciation is required *for the planning of the current fixed capital, i.e., of the means of labour necessary for a current period in the development of economic activity in the exchange economy*.
- in economic life depreciation is a *result indicator, is conventionally received part of the profit or general natural income of the individual developing business*.
- *returns as a component part of own income, profit or fixed expenses depending on the recovery of resources, i.e., these fixed expenses are the numerator of the dead centre.*

➢ contributes to the correct planning of the price, of the incomes and of the profit respectively and shows the scrapped size of the own capital that must be excluded from the company, from the business.

➢ *in order not to increase the price of production, in order to be attractive, but the basic moment is that* a current level is required, through which the natural person can to some extent maintain the means of work in the developed business → but the total profit obtained must give the producer their current and future maintenance.

➢ *does not include the size of the first year, which must be chosen according to the highest level of methods known for application, especially since accelerated methods must be applied in business, and characterizes all subsequent periods - i.e., the amortization included initially continues to play, until when the producer changes his production capacity*.

➢ *depreciation continues to work through the expected profit → especially since we have determined that it is not determined on each item or object, but on the enterprise* → but if the capital element after the required useful life (4-5 years) is not useful for use, neither physically nor morally, it changes according to outflows from the amortization of the current period, which respectively will decrease the profit,

→ but if the capital element after the required useful life (4-5 years) is useful for use, it is still used, especially since any capital element has its warranty period set by its manufacturer.

➢ *everything is fixed or current, where the fixed capital is the depreciable one*.

➢ depreciation has no value for each element, but is established according to the general object, ie the enterprise → but the records on objects must be to track the company's assets or the size of its own fixed capital.

➢ *it does not make sense as a scrapped expense to accumulate depreciation - but it has value as part of the individual's natural income, which is distributed monthly according to 12 scrapping periods.*

➢ *only if it provides for a larger current size than the previous one and the new method must be common to all producers in different areas of the national economy → this moment will result in price increases and respectively related to the increase of natural income in society - we believe that the change received with the next year or period of activity so that the company can plan its new production capacity and its new work indicators, including prices and profit levels.*

➢ the costs of repairing items of fixed capital which are subject to deterioration in the process of operation may not be *recorded as*

calculation elements - the depreciation must be the one that finances the repair.

➢ *It does not make any sense* - the initial value or the cost of entry leads the capital in the end - but if the object is to be changed, then it must be known that any good goes at a fair or fair price.

➢ *We consider the accelerated calculation method of amortization is reflected as an individual profit between the incumbent producers.*

We consider that the final purpose of depreciation is represented by *natural income planning, definite profit determination.*

We believe that the new paradigm, the new interpretation of fixed capital depreciation proposed by can be successfully implemented in economic practice and life.

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PUBLIC OWNERSHIP OF LAND AND ITS IMPACT ON THE SOCIALIST-ORIENTED MARKET ECONOMY IN VIETNAM

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Abstract: *Vietnam established public ownership of land from the Constitution 1980 in the context of a centrally planned economy. After many changes to the Constitution, the public ownership of land is still maintained, even though the market economy has been officially recognized since the Constitution 1992. In Vietnam, only the State has the right to own land. Other entities only have land use rights through the State granting land use rights or acquiring land use rights by transaction with others. The State can compulsorily acquire the land of any subject to carry out its land planning by an administrative decision. Along with the centralized regime, where only one political party, the communist party, is allowed to operate and lead the country, public ownership of land in Vietnam is seen as a barrier to the development of the country and healthy market economy. Therefore, this article will clarify the nature and relationship between land ownership and Vietnam's market economy to have a more objective view on this issue.*

Keywords*: Public, land, ownership, market, economy, Vietnam.*

Introduction

Vietnam is one of the very few countries in the world that has built a socialist-oriented country, along with China, Cuba, North Korea and Laos. Located in Southeast Asia, the country that has experienced many fierce wars in its more than 4000 years of history[1]. In 1954, the Geneva Agreement divided this country into two nations: the Republic of Vietnam (the South) and the Democratic Republic of Vietnam (the North)[2]. By 1975, Vietnam had been reunified. By 1980, through the Constitution 1980 (adopted on December 19, 1980), the Socialist State of Vietnam nationalized all land, transforming land from many forms of ownership into the entire people ownership (actually state-owned). From this moment, no one in Vietnam but the State has the right to own land. After

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[1] Vietnam Overview, 2021, *History of Vietnam*, https://www.insidevietnamtravel.com/travel-guide/history-of-vietnam.html, accessed 09/11/2022.

[2] See more the Agreement at: https://peacemaker.un.org/sites/peacemaker.un.org/files/KH-LA-VN_540720_GenevaAgreements.pdf, accessed 09/11/2022.

that, due to the inappropriate centrally planned economic policy, not recognizing the market economy, Vietnam's economy had been in extremely difficult situation for more than a decade. It was not until the Constitution 1992 was promulgated (replaced the Constitution 1980) that recognized the market economy, allowing the private economy and foreign investment to operate, that the economy prospered. Land policy since then also has certain changes to suit the new conditions, but the land ownership regime remains unchanged. This makes the land-related rights of many entities still not well guaranteed and not fully and accurately recognized. Vietnam is currently a developing country but faces a lot of land-related social instability[3]. Foreign investors have also expressed their confuses about using land to implement investment projects in Vietnam. Therefore, this article will clarify the legal issues related to ownership and land use rights in Vietnam to assess its effects on the socialist-oriented market economy.

Methodology

The article is based on the theory of property ownership, especially Alchian (1965)[4], theory of market economy and the separation of powers theory. On this basis, the article uses historical method (based on the development of Vietnamese law), legal analysis method, comparative method (between Vietnamese and Chinese laws – a socialist country on the issue of land ownership and other countries'). The article also uses the method of referring to the opinions of experts, such as Peter Ho & Max Spoor (2006), Renee Giovarelli & David Bledsoe (2001),... in their works.

Literature reviews

On the international level, there are two outstanding internal research projects:

- Research project "The mystery of capital" of Hernando de Soto[5], analyzed how each country turns land into an asset and a huge source of domestic capital. The author points out that: In Western countries, land is capitalized very successfully because they have a record of property

[3] See more: Yves Duchère, 2020, *Urbanization and land disputes in vietnam: compromises and protests*,
https://halshs.archives-ouvertes.fr/halshs-02443021/document, accessed 09/11/2022.

[4] Reference source: Phan Thanh Tu, Vu Manh Chien, Pham Van Kiem, Luu Đuc Tuyen, Nguyen Thi Hong Nga, 2019, *Property rights*,
https://hocthuyetdoanhnghiep.edu.vn/dinh-nghia-cau-truc-phan-loai-quyen-so-huu/, accessed 09/11/2022.

[5] Hernando de Soto, 2000, New York, *The Mystery Of Capital: Why Capitalism triumphs in the West and fails everywhereelse*, Basic Books, 198.

ownership of land (registration, registration of ownership and rights related to each plot of land). Therefore, these property rights have an invisible life, parallel with the physical life of the land, which makes property rights form capital, easily transferable.

- Author Robin Rajack in the article "Does Public Ownership and Management of land Matter for Land Market Outcomes?" commneted that: many developing cities have large amounts of suboptimal managed public land that has failed the land market. Transferring use or ownership rights to the private sector will improve land use conditions and increase revenue for the state budget, while reducing corruption[6].

In Vietnam, research works related to land ownership and market economy include:

"Land capitalization in a socialist-oriented market economy in Vietnam" by Tran Thi Minh Chau. The author believes that: clearly delineating the rights of owners, rights of users and rights of the state in the field of land, if not properly institutionalized, will prevent the process of commercializing land and that impedes land capitalization. In order to facilitate the commercialization of land, it is necessary to institutionalize the whole-people ownership regime in the direction that land transactions in the private sector are carried out according to market principles[7].

In the research work "Legal regime of ownership and property rights to land"[8], author Pham Van Vo said that the form of state ownership in the regime of all-people ownership of land was officially recognized. The establishment of the form of state ownership is the method of exercising the people's right to ownership of land. In order to exercise ownership rights over land, the state also has to go through state agencies and through competent individuals to transfer land use rights to individuals and organizations for these entities to directly exploit and use as land users.

Author Luu Quoc Thai in the article "Market factors in land relations between the state and land users in the primary land use rights market"[9] argues that bringing the land relationship into compliance with the market

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[6] Robin Rajack, 2009, *"Does Public Ownership and Management of land Matter for Land Market Outcomes?"*, Somik V.Lall, Mila Freire, Belinda Yuen, Robin Rajack, Jean-Jacques Helluin (2009), *Urban Land Markets, Improving Land Management for Successful Urbanization*, Springer, https://link.springer.com/chapter/10.1007/978-1-4020-8862-9_12, 09/11/2022.

[7] Tran Thi Minh Chau, 2013, Ha Noi, *Land capitalization in the socialist-oriented market economy in Vietnam*, National Politics Publishing House.

[8] Pham Van Vo, 2012, Hochiminh city, *Legal regime on ownership and property rights to land*, Labor Publishing House.

[9] Luu Quoc Thai, 2007, Ha Noi city, "Market factors in land relations between the state and land users in the primary land use rights market", State and legal journal No. 11/2007, p. 68.

principle is objective. The relationship between the State as the owner of land and the land user is the relationship of the primary market, through this relationship the land use right of the land user is established or terminated. The relationship of land allocation and land lease is the relationship aimed at establishing or giving land use rights to land users. These relations arise during the exercise of state ownership of land and can be considered as a part arising in the process of exercising state management rights. Therefore, the land relationship between the state and land users is also a property relationship, even if it is mixed with state power.

In the study of "the Law on the market for land use rights - the current situation and directions for improvement"[10] Author Luu Quoc Thai said that: the recognition of land use right as a commodity shows the compliance with economic laws before the need for land circulation to realize the commodity economy. This circulation is done through the exchange of land use rights as a commodity, generating and forming the market for land use rights. The land use rights market is characterized by being formed on the basis of a special, local land ownership regime, being an imperfect, cyclical, sensitive and intimately related market with other markets.

Authors Dang Hung Vo, Nguyen Van Thang, T&C Consulting in their research on improving land governance in Vietnam said that[11]: Public land in LGAP (Land Governance Assessment Framework) research is understood as all types of land owned by the state. In most countries with multiple forms of land ownership, public land is understood as land that has not yet been transferred to the private sector. In Vietnam, the right to use land when the state recognizes the land use right or allocates land for public use is the ownership of the state like most other countries.

Dang Hung Vo said that the concept of land use rights in Vietnam is equivalent to ownership rights in other countries. With the state mechanism for land recovery, land valuation and compensation, support and resettlement in the period from the Land Law 2003 to the current Land Law 2013, there are many shortcomings and is the cause of corruption in land management that is not under control, and at the same time makes people's complaints about land high. In terms of institutions, there are still unclear points between the authority to decide on public property on land (under the Ministry of Finance) and authority to decide

[10] Luu Quoc Thai, 2009, Ho Chi Minh City, *Law on the market of land use rights - status and direction of improvement*, Doctoral thesis in jurisprudence Ho Chi Minh City University of Law.

[11] Dang Hung Vo, Nguyen Van Thang, T&C Consulting, 2013, *Land Governance Improvement in Vietnam, Implementation of the Land Governance Assessment Framework (LGAF)*, The World Bank.

on land (under the People's Committee of the province), as well as the fact that the People's Committee has both authority to decide on land as a representative of the owner and decision-making authority as a land management agency. Therefore, the legal system on land in Vietnam will certainly be revised to be more suitable with the market mechanism.

In general, through studying the scientific works on land ownership in Vietnam related to the market economy, some general comments can be drawn as follows:

Firstly, due to the specificity of land, whether land is under public or private ownership, the state still plays the role of manager and regulator of land resources for economic development. The land market in any country is very tightly regulated by the state.

Secondly, the land ownership rights are separated between the land use rights already given to the land users and the land use rights not yet given to the land users which are still public property (called public land). Countries with developed market economies have their own legal regulations to manage and regulate public land to participate in business activities according to the market mechanism, ensuring the effective use of land for economic development.

Thirdly, Vietnam needs to research and have appropriate policies to manage this public property flexibly according to the market mechanism, so that land becomes one of the resources to create wealth for the society.

Disscussion and results

Structure of land ownership in Vietnam

In Vietnam, all land is nominally owned by the entire people, and managed by the State on behalf of the owner and uniformly managed (Article 53 of the current Constitution 2013). The State can grant land use rights to land users to use according to the will of the State through the policy of land law. Land use right is an asset and the State gives it to land users in the form of land allocation, land lease and recognition of land use rights.

The State's land ownership under the Vietnamese Land Law 2013, at the State regulatory level, has 8 powers: (i) To decide on land use planning and plans, (ii) To decide on land use purposes, (iii) To prescribe land use quotas and land use durations, (iv) To decide on land acquisition and expropriation of land use rights, (v) Decision on land price, (vi) Decision on granting land use rights to land users, (vii) Decision on financial policies on land, (viii) Regulation on rights and obligations of land users.

The second level is property rights, in terms of economic resources, including "the right to use, the right to enjoy economic benefits of entities

in society and the state".[12] At this level, the land use right is the right to exploit the utility, to enjoy the yields and profits from the property (Article 189 of the current Civil Code 2015). At this level, land use rights are divided into land use rights with a term of use corresponding to the lease term and land use rights with a stable and long term use term. Corresponding to each type of land use right is the content of owning different land use rights. Except for land users who have the form of land use with annual rental payment, the land law establishes the rights of land use right owners including the right to collect yields, profits, the right to transfer, donate, pledge, mortgage, exchange, capital contribution and the right to compensation.

In order to keep up with the rapid changes of the market, it also contributes to making land use rights similar to property rights in other countries, The Civil Code 2015 added two new rights: "use right" separated from land ownership in Article 257 Civil Code 2015 and "surface right" separated from land use rights in Article 267 Civil Code 2015.

Usufruct right is the right to exploit the utility and enjoy the yields and interests of property owned by another subject for a certain period of time. The property subject to the usufruct must be returned to the owner upon termination of the usufruct. The separation of usufruct right from land ownership shows that the property owner still has the right to dispose of the property but must not change the established usufruct right (Article 263 of the Civil Code 2015).

A new structure of land use rights is the "surface right" which is the right of an entity to the land, water surface, space above ground, water surface and subsoil to which that land use right belongs to the other body. The holder of surface rights has the right to exploit and use the ground, water surface, space on the ground, water surface and underground land belonging to other people's land use rights to build works, plant trees, cultivate crops. Surface rights holders have title to the property created. When the surface right ends, the surface right holder must return the ground, water surface, space above ground, water surface and underground to the land use right holder. In case the surface right holder does not handle the property before the surface right terminates, the ownership of such property belongs to the land use right holder from the time the surface right terminates.

The construction of usufruct rights is aimed at the state retaining the ownership of land for the purpose of reallocating future land use, without having to go through the act of expropriation or expropriation or exercise the right of preemption to purchase the land use rights granted to the land

[12] Nguyen Van Suu, 2010, Ha Noi city, *Renovating land policy in Vietnam – From theory to practice*, National Political Publishing House, p. 42.

user as in some countries around the world. The separation of land use rights from land ownership and the separation of property rights from land use rights creates the distinction of land use rights assets between land owners and land use rights owners.

Author Nguyen Ngoc Dien said that Vietnam accepts the French-style ownership concept, but builds private property law on real estate based on land use rights, not land ownership. Land use right is a derivative asset from land ownership. To determine the rights of land users, legislators have used tools of civil law to describe the rights of owners to their property. In that way, land use rights are considered as limited land ownership[13].

Compared with the theory of land ownership, land ownership in Vietnam was built according to a group of rights, when the land was still owned by the entire people. This group of rights is divided into two main groups, One group of the State keeps it for the purpose of State management, the other group can give it to the land users or it can keep it for public uses.

Land ownership and the issue of building and developing a market economy

Since the early 90s of the 20th century, many countries in the world, especially those that are transforming economic models, developing countries have been focusing on building and developing the land markets. This is a central and indispensable element for a developed market economy. An underdeveloped real estate market, whose core is the land market, will pose many obstacles to market-oriented reforms.[14] Under the sponsorship of the World Bank, many research projects on reforming the land management system to build a market economy have been carried out, But so far, fundamental changes in the land markets of many countries have not been achieved.[15] The biggest obstacle today to building a healthy land market is the disagreement in views on the issue of land ownership within countries, which is private or public ownership (most

[13] Nguyen Ngoc Dien, 2007, Ha Noi city, *"Technical structure of the legal system of real estate ownership in Vietnam: A French perspective"*, Journal of Legislative Research No. 6 (101) Jun/2007, pp.19.

[14] Dinh Trong Thang, 2002, *Private ownership of land or land use rights: international experience and some links to Vietnam*, Financial Review No. 7, 2002, p. 47-50.

[15] Examples of studies on land reform in Eastern European countries. See: Renee Giovarelli & David Bledsoe, *Land Reform in Eastern Europe (Western CIS, Transcaucuses, Balkans, and EU Accession Countries)* - Research Paper within FAO'programs, ftp://ftp.fao.org/docrep/fao/007/AD878E/AD878E00.pdf/

commonly state ownership) of land, which is more appropriate for a market economy?.[16]

In the view of liberal neo-economists, privatization is a necessary condition (sine qua non) for a healthy market economy. This view, sanctified in the "Washington Consensus", has become the guiding principle for many reform programs funded by the World Bank and the International Monetary Fund for the former socialist countries of Central, Eastern Europe and the countries of the former Soviet Union.[17]

In fact, in the aforementioned socialist countries, from the view that class conflict and capitalist exploitation can be avoided by socializing the means of production by placing them under public ownership, where these assets are determined by the whole people organized in the form of a collective or state,[18] the privatization of the means of production, including land, took place very quickly. The degree of this publicization varies by socialist economies. For example, East Germany and Hungary practiced collective ownership of most of the arable land, while Poland and (former) Yugoslavia actually maintained private ownership of most of the farmland. Until the fall of the Berlin Wall in 1989, about 70% of arable land in Hungary and 86% of this land in East Germany was collectively owned. In contrast, (former) Yugoslavia and Poland show a completely different picture, with 68% and 76% of agricultural land, respectively, still privately owned.[19] When the system of socialist countries in Central, Eastern Europe and the Soviet Union disintegrated, A very important issue facing politicians is how to balance market pressure and state intervention; and whether privatization of land is a precondition for economic development and maximum functioning of the market as defined by the economists of the "new liberal" doctrine. However, the issue of choosing the ownership regime in the context of economic transition from centralization of subsidies to the market is in fact different depending on each country.

Several former Soviet Union countries such as Albania, Armenia and Kyrgyzstan opted to privatize all land in the early to mid-1990s to promote land markets. Much later, after years of delay in reform, Moldova finally

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[16] In the case of Russia, for example, the land reclamation was at one point a real "war" between the President (then Yeltsin) and the National Assembly (Duma). See: Wegren, Stephen K, Belen'Kiy & Vladimir, 1998, *The political economy of the Russian Land market*, Problem of Post - Communism Magazine.

[17] Peter Ho & Max Spoor, 2006, *"Whose land? The political economy of land titling in transition economies"*, Land use policy Journal, Vol. 23, pp. 580-587.

[18] On the characteristics of property rights and the socialist legal system, see: Zweigert and Kotz, 1993, Oxford, *An Introduction to Comparative Law*, Clarendon Press.

[19] FAO (Ed.), 1994, Rome, *Reorienting the Cooperative Structure in Selected Eastern European Coutries: Summary of Case Studies. Central and Eastern Europe Agriculture in Transition Series*, FAO, tr. 9, 17, 29, 41.

passed its land reform process. In contrast, China, Vietnam, and Uzbekistan are examples of transition economies that do not choose to privatize land but still maintain supreme control over this property for the state. [20] As for Russia Russia, although it is not a slow country to implement land reform and privatization, but the country was rather cautious in "liberalizing" the land market during phases of the reform process throughout the 1990s. The Russian Duma Parliament passed a law allowing the sale of agricultural land in May 2002. However, in order to alleviate concerns about foreign investors' land speculation, President Putin tightened the issue by passing an amendment law not long after. Under this amendment, foreigners are no longer allowed to buy and sell agricultural land, but they can only lease this land for a maximum term of 49 years.[21]

Thus, choosing which land ownership regime is suitable for the conditions of building a market economy in addition to referring to theories and lessons learned through implementation results in transition economies, countries also need to consider their actual conditions.

First of all, it must be acknowledged that private ownership of land has significant advantages. *First, private ownership of land helps to unambiguously define land ownership*. This is a good condition for the formation and development of the land market in particular and the real estate market in general - very important factors for capital market development - an important factor to support investment, increaseexpand production and business. *Second, private land helps ensure basic civil rights related to land, thereby encouraging large and long-term investments in land, creating sustainable development*.

However, the regime of private ownership of land is also likely to cause some limitations and difficulties for the implementation of socio-economic policies. *First, private ownership of land may lead to excessive accumulation and concentration of land*. This factor, although necessary for the production of goods, has a negative impact on society, In particular, the fact that farmers lose their land is inevitable and the "rich - poor" gap in society is increasingly difficult to narrow. *Second, the absolute privatization of land will make it difficult for the state to acquire land to implement land use planning, especially for the construction of public works*. These limitations can be solved by the state ownership of land, in which by its power, combined with the rights of the owner, the state will certainly be able to intervene, eliminate the above limitations.

[20] In fact, North Korea recently had a similar regulations. See: Reuters, A.P., 2002a, *North Korea restricts the old Planning Economy*, NRC Handelsblad.

[21] Peter Ho & Max Spoor, *Ibid*, p. 584.

Moreover, the public ownership of land in which the state is the (representative) owner also has certain limitations. *Firstly,* it creates uncertainty about the owner, which in turn leads to many land disputes that are difficult to resolve. *Secondly,* it is difficult for this land ownership regime to create a formal and efficient land market. The reason is that land use rights are difficult to guarantee absolute safety and the risk of interference in the market from the public side is great..

From the above analysis, it can be seen that any land ownership regime has certain advantages and disadvantages. Therefore, the core problem that needs to be solved is, how can a healthy market be built without disturbing land relations, because it would be very dangerous for social stability and economic development. This risk is very great if rapidly changing the land ownership regime in an impatience and inconsiderate manner. To avoid this situation, first of all, we need to summarize and evaluate the experience of land reform of transition economies with similar conditions and circumstances to Vietnam as well as what Vietnam itself have been doing. It must be recognized that, in addition to the issue of land ownership, political institutions also play a decisive role.

The process of economic mechanism transformation from planned - centralized to market took place quite strongly in the socialist countries of Central and Eastern Europe when this bloc disintegrated. Accompanying this process is also the process of privatizing land as mentioned above. However, not any change in land ownership following this trend has resulted in success, with Belarus being a case in point.[22] To implement the reform process, the country adopted private ownership of land and this private ownership is recognized and protected through the land registry system. Even so, a study of the time showed that Belarus' agricultural output fell by as much as 50% and labor productivity by 30% during the first nine years of privatization. Besides, the average GDP growth rate in the period 1999 - 2001 was only about 0.8%.[23]

Contrary to the image of Belarus are Uzbekistan and China. These two countries have eliminated or minimized private ownership of land, except for small customary land plots that are privately owned. Especially in China now there is no longer private ownership of land. Beyond ideological and practical reasons, fear of land speculation and social conflicts have seen state and collective ownership of land as an important principle enshrined in the Constitution and guaranteed to be thoroughly enforced in other legal documents. At the same time, it can be said that Uzbekistan

[22] See: UNECE, 2000, London, *A Study on Key Aspects of Land Registration and Cadastral Legistration*, United Nations Economic Commision for Europe.

[23] See the 2003 World Resources Institute economic index section at http://earthtrends.wri.org

and China are ranked among the countries with the most successful transition economies in terms of economic growth of the post-socialist period. In 1997, Uzbekistan's agricultural output was higher than that of any former Soviet country and only slightly below the Central and Eastern European averages.[24] In the case of China, according to the World Resources Institute, the Chinese economy has shown the highest rate of economic growth in recent world history, with an average annual GDP from 1991 to 2000 was about 10.1%.[25]

Thus, through the experiences, failures and successes of some of the above transition economies, we see that there cannot be an invariable "recipe" for all reform cases. Lessons learned from the above facts show that private ownership of land has not proven itself effective for all economies and land market development.

In the case of Vietnam, the maintenance of land ownership by the whole people together with the economic reform process shows no significant contradictions or conflicts. The land reform process was marked by Directive 100-CT/TW dated January 13, 1981 of the Party Central Committee on contracting products to labor groups and workers in agricultural cooperatives. This was followed by Resolution 10-NQ/TU of the Politburo dated April 5, 1988 on renovation of agricultural economic management, which created autonomy in production for households and individuals. The reform that can be considered as a breakthrough in the land sector is the recognition of a market for this particular commodity in the Constitution 1992. Since then, the whole people's ownership of land has continued to be maintained, but the agricultural economy has grown steadily. Vietnam has become one of the leading exporters of rice, along with a number of other agricultural products, in the world, with an average economic growth rate of over 8%.[26] Besides, the real estate transaction market, especially housing and residential land, is constantly increasing, showing that the real estate market is still developing well in the condition that the land is owned by the entire people.[27]

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[24] Jerome, Z., *The Uzbek growth puzzle*, 1999, Washington, DC., IMF Staff Paper 46 (3), tr. 274 - 292.

[25] World Resources Institute, 2003, *Earthtrends*, http://earthtrends.wri.org

[26] Quy-Toan Do - Lakshmi Iyer, 2003, *Land Rights And Economic Development: Evidence From Vietnam*,
http://www.williams.edu/Economics/ neudc/papers/do_iyer_july02.pdf

[27] For example, the number of transactions in housing and land in Ho Chi Minh City increased from 5,114 cases in 1994 to 32,856 cases in 2001. See Dr. Tran Du Lich (director), 2005, Hochiminh city, *Mechanism for operation and development of the real estate market in Ho Chi Minh City*, Scientific research project, Institute of Economics HCMC, p.18.

The position and role of the State of Vietnam in land relations and some legal issues

The State of Vietnam participates in land relations with two statuses: both the owner and the subject of land management. With such an advantage, the State of Vietnam has the right to intervene in all land relations it desires to achieve its goals. However, this is the main cause leading to some cases of abuse of power causing injustice to land users. With a centralized power structure, there is no political competition, The judicial system in Vietnam lacks the independence necessary to deal with corrupt land practices by state officials, as well as to protect the legitimate rights and interests of land users.[28] This is the basic cause of reducing the internal resources of the land, causing many limitations for economic development and ensuring social justice.

Since the official establishment of the whole people's ownership of land in the Constitution 1980, land relations in Vietnam have experienced certain ups and downs. In the most difficult period, when economic efficiency in exploitation, land use is weak, socio-economic life is difficult, the whole people's ownership is blamed as the main culprit. However, starting from the time the land use right was officially considered a commodity on October 15, 1993, The economic value obtained from land is constantly increasing, making a very decisive contribution to the economic development of the country even though the land is still "owned by the whole people". This means that, under the system of ownership of the land by the whole people, the economy can still develop normally, the land can be used efficiently. Discussing this issue, author Pham Duy Nghia said that: “Ownership by the whole people does not contradict and hinder private property rights; Legislators can completely increase the rights of land users and minimize or eliminate State interference in that property”.[29] Therefore, it is completely unnecessary to ask the question of changing the current land ownership regime, on the contrary, it can cause instability in land relations, thereby causing instability in socio-political life.

This point of view does not mean that "the whole people's ownership" of the land is completely "innocuous" in the face of difficulties, weaknesses, and negativity in land relations in Vietnam. The vague, abstract generalization of land ownership in the long run has at times transformed land owners from a lot of people into derelict. In such conditions, the land is wasted, torn as a public welfare. The concept of ownership by the whole people is "politicized", causing the economic value

[28] See more: Luu Quoc Thai, 2022, Bucharest, *Legal issues on land coruption in Vietnam*, Cogito, Vol.XIV, no.1/March, p. 91–114.

[29] Pham Duy Nghia, 2004, Ha Noi city, *Land Law 2003 in terms of legal policy*, Legislative Research No. 6/2004, p. 26-29.

of land to be forgotten. An important source of budget revenue for the country is denied and this kind of important input for all production and business activities cannot be accumulated under the market mechanism to realize the production of goods.

The official identification of the State as the representative of the land owner under Articles 1 and 4 of the Land Law 2013 is a decisive step that clearly demonstrates the State's stance on land ownership. From here, the State is officially confirmed to play the role of land owner, not just "unifying management" in a general way as before. It can be said that this is a concrete step to strengthen the land ownership regime in Vietnam, contribute to the stability of land relations to serve the construction and socio-economic development of the country.

However, a long-standing problem in land relations in Vietnam has not yet been resolved well: the position and role of the State in each relationship. As the owner (representative), the State has the rights to possess, use and dispose of land, and has the right to decide who is entitled to use its land. In other words, in this case the State is the supplier of goods in the primary market. As a subject of public power, the State has the right to promulgate laws and use its coercive apparatus to ensure order in land relations, and to orient the exploitation of land use to suit the requirements of the socio-economic life.

The above two statuses of the State complement each other and create favorable conditions for the State to fulfill its "role". Because at the same time as the holder of public power and the rights of land owners, the State has great "power" in participating in and intervening in land relations. This is an advantage for the State in performing its functions, but it is a "disadvantage" for society, in case abuse or confusion in the use of power or representation of the role of the State occurs. In fact, this has happened, which manifests itself in the unfair treatment of the State towards land users. This is the main reason why the state of lawsuits against the cases of land expropriation by the State are increasing and becoming more complicated[30]. Therefore, a very important issue is how the State can properly perform its role in each type of relationship. In particular, the State must not use State power in purely property relations and the State must not neglect its power in performing the function of state management of land.

For property relations, the State is an equal party with land users in establishing, changing and terminating rights and obligations. The state should consider itself only the owner of land - a special commodity, and

[30] Thanh Tung, 2022, *Complicated complaints and denunciations mainly related to land acquisition*, https://baotainguyenmoitruong.vn/cac-vu-khieu-nai-to-cao-phuc-tap-chu-yeu-lien-quan-den-viec-thu-hoi-dat-343646.html, accessed 09/11/2022.

the land user as its customer, in which both sides need each other, not just thinking that only land users need the State. To ensure that market factors promote self-regulation, the State should temporarily "forget" public power in property relations with land users. Only then can the State behave more properly and fairly; The market factor in land relations is respected and that is a prerequisite for a healthy land use right market in particular and a healthy real estate market in general.

For management relations, the State uses administrative decisions to force land users to comply for the common benefit of society. Only this clarity can ensure the normal and healthy operation of land relations in accordance with the requirements of the market economy.

Conclusion

The establishment and implementation of the all-people ownership of land in Vietnam is not a barrier to building a market economy in general, including the market for land use rights. Through the above parameters, we can confirm that the formal land market can still exist and function well in the current land ownership regime. The "stumbling steps" of the Vietnamese economy in the past time do not come from the issue of land ownership, but rather from mechanisms and policies to ensure its healthy operation. The important issue is not who owns the land, but who is entitled to own and use it and how these powers are guaranteed is an important issue for the sustainable development of an economy. In addition, in order for Vietnam to have a healthy market economy, political institutions need to be reformed towards competition in order to have an independent judiciary. This requirement has not been done by Vietnam so far and it is very difficult to fulfill with the current political system when Vietnam does not accept multi-party system and separation of powers.

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ERGOCRITICISM. AN (EVENTUAL) ERGODIC LITERATURE INTERPRETATION INSTRUMENT

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Abstract: *The aim of this research is the advancement of a direction of literary criticism of the ergodic text, named Ergocriticism and the formulation of an applicable instrument in the interpretation of ergodic literature. This reserch is based on the studies of E. Aarseth, R. Ingarden, A. Marino, E.-M. Kontopoulou et other literary theorists. Advancing a theoretical direction of the interpretation of the ergodic text – Ergocriticism, supported by an inventory of critical grids, we facilitate the analysis of this literary phenomenon. The literary forms of ergodic literature (cybertext, hypertext, Interactive Fiction, Hyperfiction, MUDs etc.) evolve Bakhtinian dialogism, permuting the reader in the hypostasis of (co) author, in direct relation to spatodynamic metaphors, whose interpretation can be achieved only by merging critical tracks such as Roman Ingarden's grid (the treated vision of the literary work), the Markov's chain (which analyzes the probability of choice in an ergodic text) and the medium-support of the text which, according to E. Aarseth, is represented by a set of variables with possible values that describe them. This article presents our attempt to structure a possible inventory useful to the critic, a model (pilot) of ergodic criticism.*

Keywords: *literary theory, literary criticism, ergodic literature, Ergocriticism, ergodic text, cybertext*

Introduction

Attempts to theorize the ergodic literary phenomenon have been largely viewed with skepticism as an attack on traditional, canonical literature, and only now is it clear that they are a way out of the crisis of literary theory and criticism in which, more than a century, we are.

If we were to offer a formula for this negative reaction, the right one would be the one in the *The Barbarians. An Essay on the Mutation of*

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Culture of Alessandro Baricco: "people are afraid of what they don't understand"[1], which explains the denial of the ergodic literature.

Outlining a new direction in literary criticism such as Ergocriticism, we want to provide space for the theorizing of the ergodic literary phenomenon and to propose a set of tools that would facilitate the interpretation of ergodic literature.

Our research tends to emphasize the importance of the study of ergodic literature, and through the tools outlined in this article, we want to inspire the academic space in opening to new specialties and faculties, as it does for example University at Buffalo, where it operates a Department of Media Study, which Electronic Literature is one of the specialties[2].

This article probes the territory of literary criticism with reference to ergodic literature, advancing a discipline called Ergocritica (from the analyzed literature, because the ergodic text involves an interaction, not just a reading, so a work "ergon" on one / more paths "hodos" offered by it). The tools described in this research start from the traditional practices of literary theory (such as those of R. Ingarden, A. Marino, M. Bakhtin, etc.) and culminate in updating, supplementing them with those directly related to the ergodic text, the ICT environment , such as those of E. Aarseth, E. Kontopoulou, M. Portela, etc, which demonstrates that the ergodic literary phenomenon requires an interpretation that combines the analysis of the layers of the literary work, according to R. Ingarden, Markov's chains, the values of E. Aarseth's variables and the study of the environment in which the text is produced and "read".

Materials and methods of Ergocriticism

The first formulation and theorizing of the concept of "ergodic literature" is due to the Norwegian researcher Espen Aarseth, who, in his work *Cybertext. Perspectives on Ergodic Literature*, presents ergodic literature and its forms of manifestation: from the oldest texts (I Ching - 770 BC), to today's cybertexts (hypertexts, IF, MUDs), from the virtual space, arguing that they are literature, because they produce an aesthetic effect through their verbal structures, and through their paraverbal ones they offer literature incomparably deep dimensions, opening it to the triviality of spatodynamic metaphors[3].

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[1] Alessandro Baricco, *Barbarians. An essay on the Mutation of Culture*. New York: Rizzoli Ex Libris, 2014, p. 164.

[2] https://arts-sciences.buffalo.edu/media-study/research/electronic-literature.html?fbclid=IwAR1_OtmyXcijfQx256P3CNdVKt9IeyWq7MiNE3859-o3paY16MQVldZyJFc [Accessed 15.01.2022]

[3] Espen J. Aarseth, *Cybertext. Perspectives on Ergodic Literature*. London: The Johns Hopkins University Press Ltd., 1997, p. 202.

The ergodic text exceeds the qualities of the literal, because it does not contain only the letter, the written sign, but combines a lot of other elements, which makes it difficult to analyze from this perspective, but does not make it impossible to qualify in the literary field. The effort made by the reader, presents an ergodic phenomenon, (*ergon* and *hodos* (gr.), meaning *thing* and *way*), the key principle of which is the possibility of choice, from which the reader of traditional texts is deprived. In the ergodic text, the reader has the role of co-author, depending on the choice of which the narrative thread is constructed[4].

Being prevalent in the digital environment, the contemporary ergodic text acquires the characteristics of electronic, interactive and presents various forms of appearance, of which cybertext stands out as an "integrative genre", represented by species such as: hypertext, IF (interactive fiction), hyperfiction, MUDs, etc. These forms of cybertext are part of the ergodic literature, representing a first pragmatic compartmentalization, common in the field of literary theory when a literary phenomenon is presented.

Contemporaneity has confronted us not only with the discovery of literary phenomena, but also with an intense process of digitization, which provides an interface to analog and digital literature, seen by researcher Mihaela Ursa as an integrative system called "Literature 2.0"[5], and later developed by Lidia Kulikovski in "Library 2.0"[6].

Digital literature is a part of ergodic text, rather, a form of it, active in electronic space.

About digital literature and the problems to define and undestandig the genre wrote Rey Rowland and not only defined this fenomena, but also outlined some of its species: Twitterature, Hypertext fiction, Generators, Video Poetry[7]. In this article, he refers to an organization that study and promote this kind of literature: Electronic Literature Organization (ELO).

The study of this organization is necessary in our theoretical-practical course because its archives, conferences and projects offer us not only study material, but also potential interpretive tools, applicable in Ergocriticism.

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[4] Ibidem.

[5] Mihaela Ursa, *Cybernetic Literature*. In *Vatra*, no. 491, 2/2012, p. 29-31.

[6] Lidia Kulikovski. *The Library and the Virtual World*. In *Dialogica. Journal of Cultural Studies and Literature*. No.3, 2019. p. 37-42.

[7] Rey Rowland, *What is Digital Literature? Understanding the Genre*. Book Riot, Jul, 2021. https://bookriot.com/digital-literature/?fbclid=IwAR0_SEjbooTi88m_aSvf6Bll9f6HYuoyozJH7Q3LFd3UMOIInJDIoyK2Lyc [Accessed 01.03.2022].

More about ELO, we found on his website: https://eliterature.org/ and noticed many projects:

- *Electronic Literature Collection* with 3 volumes: Volume 1(October 2006), Volume2 (February 2011) and Volume 3 (February 2016). These are published on the Web and each volume has a physical version.
- *Electronic Literature Directory*, when you can browse featured article, recently added individual works, recently added resources, recently added e-lit antecedents.
- *Electronic Literature Archives* - a repository for Electronic Literature Archives (ELA) of online journals, works of electronic literature, community archives, and other digital material
- *CELL Project*, an international organization, Consortium on Electronic Literature, led and managed by the ELO that currently includes 11 member organizations, research labs, and research centers. Since 2010, their collaborative network has been developing the information architecture needed for making born digital creative works and scholarly criticism findable across databases, world-wide.
- *Publishing Activities* – a list of books and projects arising under the auspices of the ELO, for example: Electronic Literature book series with Bloomsbury Press, eBook Pathfinders: Documenting the Experience of Early Digital Literature, book Electronic Literature: New Horizons for the Literary, essay Electronic Literature: What Is It? etc.
- *Teaching E-literature*- a project making facilitate and promote the teaching of electronic literature in academic settings. In Presentation on *Teaching Electronic Literature*, Jan., 2020, Seattle WA, Katherine Hayles say: "In this website, you will find answers to your questions and resources to meet your pressing needs. First, we offer reasons why electronic literature should be taught in academic settings, from universities to community colleges and secondary schools. These may be useful not only to convince you but also to provide rationales for administrators responsible for approving curricula. We also offer resources for teachers new (and not-so-new) to electronic literature so you can successfully implement courses or modules on electronic literature and integrate them into your classrooms. The site includes sample syllabi to aid in course construction and design, as well as various schema for organizing courses around electronic literature. We also offer useful links to curated collections of electronic literature so that you can easily identify and access high-quality works from an international community of writers in several languages, including Spanish. In addition, we provide links to the history of electronic literature and information on archival works to facilitate a sense of how the field has changed over time and to make available works that may not otherwise be accessible to current platforms and software

packages. Welcome to the world of literature-as-it can-be in the computational era!"[8].

ELO is also presented by David Heckman in their article *Tracing the Development of an International Field through ELO, ELMCIP and CELL*, published in *Electronic Literature as Digital Humanities. Contexts, Forms & Practices,* where he describe this organization founded by Scott Rettberg, Robert Coover and Jeff Ballowe, in 1999 and say that "The scope of the ELC (Electronic Literature Collection) is ambitious, each containing a broad selection of edited work by a rotating cast of artists and scholars active in the field, creating a competitive venue for publication that nevertheless manages to provide a sample of exemplary work in an ever expanding landscape of creative activity."[9].

This evolving landscape represents, de facto, the digital literature - an electronic form of the ergodic text. The analysis of its forms and the study of works that focus on the presentation of national literatures in the digital age is one of the methods used in our research. Besides ELO, we have also identified projects involving the ergodic text, especially digital literature, in the Russian literary space. These are discribed in articles such as *Collection And Analysis Of Data On Publications Of Online Literature For The Period From October 2019 To September 2020*, by K. N. Urban and L. I. Petrova, where is presented the history of the development of online literature in the modern Russian- speacking space[10]. In this research we found the statistical data and analysis, which determined us to outline in the set of tools of Ergocritica the analysis of the environment in which the ergodic text is located.

Another interesting study for our research is *Russian literature in the digital age*, by Vladimir Shunikov because it examines the influence of digital technologies on literature, language renovations and other experiments that form the "digital poetics" of the newer literature in Russian literary space[11].

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[8] https://eliterature.org/ [Accessed 10.01.2022]

[9] David Heckman. *Community, Intitution, Database: Tracing the Development of an International Field through ELO, ELMCIP and CELL*. p. 55- 70. In *Electronic Literature as Digital Humanities. Contexts, Forms & Practices*. Edited by Dene Grigar, James O'Sullivan. USA: Bloomsbury Academic, 2021, p. 382.

[10] K.N. Urban, L.I. Petrova, *Collection and analysis of data on publications of online literature for the period from october 2019 to september 2020*. In Works BGTU, S.4, Nr.2, 2020, pp. 116-121. https://elib.belstu.by/handle/123456789/36562 [Accessed 20.02.2022]

[11] V.L. Shunikov, *Russian literature in the digital age*, RSUH/RGGU Bulletin. *Literary Theory. Linguistics. Cultural Studies*, no. 3, 2021, pp. 102–114, DOI: 10.28995/2686-7249-2021-3-102-114.

The innovation of digital technologies has long marked the literature, but this fenomenon is not developed in a critical way, we ned to develop a new critical paradigm for ergodic literature, for these forms, that are accused of an aggression on the old environment (paper). A study that develops a new critical paradigm for appreciating the innovation of digital literature is the book of Richard Hughes Gibson, *Paper Electronic Literature. An Archaeology of Born- Digital Materials*[12].

The dehumanization that this literature is accused of is hilarious, because, if we are talking in terms of Bakhtinian dialogism, the courts of communication remain the same, as are the aesthetic values of the environment, which did not become technological, but only performed some possibilities, which depend on man. it is realized with and thanks to man, maintaining in close relation the elements of Mihail Bakhtin's dialogical triad: *I-the other / otherness-the environment / the collective opinion*[13].

This literature demands its literary theory, history and critique which could be properly investigated and appreciated, without omitting aspects and fields. The literary theorist is faced with a metamorphosis of literature, which requires the metamorphosis of concepts and methods with which it operates, because it has not only to study new literature, but also to integrate it into the pre-existing literary space, which involves performing Ergocriticism.

Being familiar with the specifics and forms of ergodic literature to a much higher degree than a century ago, the critique is put in the situation where they have to coagulate a strategy of approaching, interpreting and presenting these texts. Thus, the proposal of Ergocriticism, as a field that would study the ergodic literature, is an imminent solution following the attested evolution of the literary phenomenon and its theorizing.

Given that the object of study is ergodic literature, a term launching by Norwegian researcher E. Aarseth, taken from physics, derived from the Greek words *ergon* and *hodos*, meaning "thing" and "way", the name of the discipline concerned with its critical analysis, seems to be fully justified, because Ergocriticism also involves making that "non-private effort to allow the reader to traverse the text"[14], in the case of the critic - and to interpret it.

Emphasizing the idea that emerges from the above sequences, that ergodic literature has a much older tradition and does not involve the

[12] Richard Hughes Gibson, *Paper Electronic Literature. An Archaeology of Born-Digital Materials*. University of Massachusetts Press, 2021, p. 216.

[13] Mikhail Bakhtin, *Question of Literature and Aesthetics*. Paris: Gallimard, 1987, p. 488.

[14] Espen J Aarseth, *Cybertext. Perspectives on Ergodic Literature*. London: The Johns Hopkins University Press Ltd., 1997, p. 202.

demolition of traditional / canonical literature, we note that at the level of literary criticism is the same situation: Ergocriticism does not deny traditional criticism techniques, it capitalizes on and complement them, because the ergodic text is a much broader phenomenon than the traditional text.

The first thing the critic does, being in the immediate area of ergodicity, is the abandonment of stereotypes, such as the one mentioned by A. Marino in *Biography of the Idea of Literature*: the orientation towards a non-literal literature and the acceptance that the written text / word it is not the only form of representation of literature[15]. Another movement is the one mentioned by Gheorghe Crăciun in *Introduction to Literary Theory* - awareness of the difficulty of segregating oral and written literature, due to the impossibility of drawing a rigid boundary between given forms, which is further exacerbated in the study of ergodic literature, where orality merges with the written text[16].

Once the topic of genres is reached, it is inevitable to ask ourselves whether ergodic literature can be differentiated into literary genres (traditional: epic, lyrical and dramatic or a new classification is needed). In this case, in order not to rush things, we update one of the premises presented by E. Aarseth in his study *Cybertext. Perspectives on ergodic literature*, where the Norwegian researcher argues that, being slightly distinct, new and old forms of ergodic literature are not divided into categories or genres according to the environment in which they are (paper or digital) but are studied by him according to the mechanism of operation / reading, and the digital environment, that of the computer remains a direction that still needs to be capitalized in studies. So, first of all we need the inventory of the forms of ergodic literature, the definition and characterization of each one, so that identifying a set of common features, we can submit a hypothetical classification by gender, which at the moment is still an unmitigated or extremely brave and unmotivated act.

What we can say at the moment about cybertexts, namely about text-generating programs, is that they take into account the three traditional literary genres and capitalize on them in a parodic way, but establishing a new grid of genera and species is premeditated.

We remind that R. Schoenbeck, in *Playing with chance: on random generation in playable media and electronic literature*, divides text-

[15] Adrian Marino, *The Biography of the Idea of Literature,* Vol. 6, p. IV. Cluj-Napoca: Dacia, 1991-2000, p. 150.

[16] Gh. Crăciun, *Introduction to the Theory of Literature*.

https://vdocuments.mx/teoria-literaturii-55c60d14800fc.html [Accessed 11.01.2022].

generating programs into three categories: parody of genre, blend and purely generative[17]; this is a testament to the revaluation of traditional genres and the fact that the ground for new genres is untapped.

Some arguments in support of Ergocriticism

In this article we will present our attempt to structure a possible inventory useful to the critic, a model (pilot) of ergodic criticism. Thus, Ergocriticism capitalizes on the features of the ergodic text and presents a critical "point of view" on them.

As we mentioned above, ergodic literature is not a total revolution of literature, but a later stage of its evolution, a completion, extension and updating. Starting from the fact and from the observation of E. Aarseth that the verbal structures of the ergodic text produce aesthetic effect, we update some viable critical approach models in the case of ergodicity and outline their insufficiencies motivated by the differences between the traditional and ergodic text.

An applicable grid is that of Roman Ingarden, who supports the stratified vision of the literary work, and once the operatic feature of the ergodic text is demonstrated, it means that we can try to apply the Ingardenian model[18].

Any ergodic text, such as M. Joyce's work *Afternoon* or any MUD (*Adventure, World of Warcraft*) can be interpreted in terms of the four layers:

1. The sound layer of words, which does not show major differences from the interpretation of the word flattened on the surface of a tab, but performs in the spoken, vociferous, sonorous word for the reader's hearing, which can not only examine the suggestion of vowels and consonants, but can complete its analysis with terms from music: timbre, tonality, tempo, etc.;

2. The layer of semantic units, the interpretation of which the critic does not make much difference between what R. Ingarden assumed, because oral or written, the word is invested with a signification, with a meaning that the critic can decode;

3. The layer of the represented aspects, the "world" of the author is, in the case of ergodic literature, advanced to an extreme degree of materialization, because it involves computational graphics, in which the

[17] Robert Schoenbeck, *Playing with chance: on random generation in playable media and electronic literature*. In *Digital Humanities Quaterly*, Vol.7, Nr. 3, Boston, 2013, http://digitalhumanities.org:8081/dhq/vol/7/3/000165/000165.html [Accessed 02.02.2022].

[18] Roman Ingarden, *The Literary Work of Art*, Translated by George G. Grabowicz. Evanston, Illinois: Northwestern University Press, 1973, p. 415.

word / idea has shape, color, size and therefore transposes the literary critic in the field of visual arts, putting in his hand a new set of tools - those of the art critic (in this case visual). The ergodic text is characterized by the "triviality of space-dynamic metaphors", embodying a broad, logical metaphor, associating concrete images with a much higher degree of illustration than the literature we know can afford. The world of ergodic text is much more credible than that of traditional literature because it is visible, in it the reader is a character, acts and interacts, and the subject moves from the author's subordination to the area of cooperation with the reader, because the ergodic text is related to the interaction between these two, so the visions are no longer authorial, but belong both to the one who created / programmed / launched the work, and to the one who "reads" it following certain steps, opting for certain sequences that lead him to a point different from that of another reader, so the represented world also has multiple versions, it is a mobile one and dependent on the movements of the reader through the text.

5. The layer of metaphysical qualities, where R. Ingarden outlines the aesthetic categories that a literary work can represent, is also valid for the ergodic text, because it is possible to identify the tragic, the sublime and especially the playful in most of the textual forms presented above.

However, the stratified structure of the literary work is not the unique or, rather, complete track that Ergocriticism wants to draw. R. Ingarden's model admits an adaptation of the ergodic text and even seems functional, but does not fully cover the interpretable aspects of this literary form.

Once the ergodic literature presents dynamic texts, open to editing and based on the principle of choice, which is not provided by the traditional text, the critique must be able to characterize this dynamism, to be able to sketch a matrix that would allow conclusions to be drawn about the degree of openness or breadth of the alternative ways of the text. Relevant to this hypothesis is the study *Onomatology and Content Analysis of Ergodic Literature* by researchers from CEID, Patras Rio University in Greece, Eugenia-Maria Kontopoulou, Maria Predari and Efstratios Gallopoulos who states: "If 21st century literature is 'computational', it is natural to look for the application of mathematical techniques, algorithms and the computer to analyze it." [19] Greek researchers apply *Markov's chain* to the analysis of the ergodic text, a concept invented by Russian mathematician Andrei Markov and defined as a stochastic process that has the property of creating an interdependence

[19] Eugenia-Maria Kontopoulou, and Maria Predari, and Efstratios Gallopoulos, *Onomatology and content analysis of ergodic literature*. În *Proceedings of the 3rd Narrative and Hypertext Workshop*. Mai 2013. Article No.: 5.

https://doi.org/10.1145/2462216.2462221. [Accessed 03.09.2021], p. 1-5.

between its present and future states. What is happening at the moment in an ergodic text is the "history" (the sum) of all the evolutionary stages of reading, more simply, the sum of the reader's choices. Using the Markovian chain formula, Greek researchers analyze *Mystery of Maya* (a book from the CYOA collection, abbreviated as CYOA_MM) and demonstrate the applicability of this mathematical algorithm to the study of choice probabilities in an ergodic text. Which determines us to indicate in the model of ergodic criticism the implementation of the Markovian chain, as a next step in the interpretation of the ergodicity of the literary forms of ergodic literature.

Another movement in Ergocriticism is towards the environment in which the ergodic text is read / written. What was not essential in canonical literature - the analysis of the support of the text, becomes a necessity in the interpretation of ergodic literature.

E. Aarseth argues that it is extremely important not only to look at the words we encounter in the ergodic text, analyzing their meanings and form, but also to study the environment from which we read, the mechanism according to which from the multitude of options and ways we go through the text, precisely on the path we are on at the moment and which places us beyond the text, behind its scenes. So, the technical part is also relevant: the software, the environment, the mechanism, the technology that serves as a support for the interpreted text. Its description requires knowledge in the field of ICT, which is vital to the critic, being that "what we read from" is part of "what we read" and does not serve as a writing space, but is a writing environment, which is manipulated by the reader and as a result of this interaction, the text appears in its unique version for each user / reader.[20]

Although the ergodic text involves the theories and practices of traditional literature, the critic cannot rely only on them, but beyond the "zone of interference" and ergodic is the much more complex structure that requires combining theories in other fields, such as ICT , music, visual arts, etc.

However, before interpreting ergodicism from the perspective of technology and studying the "typewriter", the literary approach is paramount, in which the critic, armed with a set of new concepts, will describe the ergodic text from the perspective of those features of the literary work, valid regardless of environment and era and known as a mark of literarity:

[20] Espen J. Aarseth, *Cybertext. Perspectives on Ergodic Literature*. London: The Johns Hopkins University Press Ltd., 1997, p. 202.

✓ They will study the stylistic procedures used in writing, techniques that can be both traditional and inspired by the digital environment.

✓ The emphasis or stake of the critic will be the artistic character, then the mechanical one of the text.

✓ Regardless of its form, the text is the product of the manipulation of language, then of software, so the study of language is also vital in Ergocriticism.

✓ As an aesthetic object, generator of an aesthetic experience, the ergodic text will be studied from the perspective of the political and philosophical impact reflected on the reader.

✓ The way it is organized becomes more than an aspect of the text, but a key to interpretation, in which the description of the component parts and the way of cohesion between them is part of the text.

✓ Given that the ergodic text is dynamic, the change observed in interacting with it also requires the attention of the critic. The connections, relationships, paths and choices offered and exploited require special examination, which would provide a much more complex picture to the critic than a simple track. Here we can implement mathematical formulas and spreadsheets.

✓ Being, however, an artistic object, the ergodic text is an expression of the creative individuality, which requires decoding.

✓ As a literary phenomenon, to a greater or lesser extent it is fictitious, so fiction and the degree of relation to its cultural reality is also a premise in critical study.

✓ Because it is the result of one experience and the generator of another in reading, Ergocriticism distinguishes not only the axiological relation of the reader to those presented in the ergodic text, but also the experience lived by him directly when he is in the text.

✓ The role of the reader is also an immanent aspect of the literary work, which performs in the ergodic literature, because the reader becomes a co-author, being directly involved in the text and determining its structure with the decisions he makes when reading. This directly places the text between the author's experience and the collective one.

The literacy capitalized above is supported by a digital environment, by an interface in which the reader not only browses, but co-writes, interacts with the cybertext provided.

This space of virtuality brings changes in reading, writing and communication, components that occur primarily through text / speech. In their new format - electronic - they are undergoing substantial transformations and innovations, and their study has become a staple for humanities specialists, not just for representatives of the exact sciences.

Technology offers literature a high-performance environment, in which it materializes and exaggerates its features. From a narratological point of view, time, voice and mood are updated from the cybertextual dimensions presented above by Manuela Portela: textual dynamics, determinism, ephemerality, perspective, accessibility, link and user function[21] and described by Espen Aarseth.

The variables that can describe an ergodic text, define the ergocritical analysis model, because they represent the specificity of the given text, its individual and innovative part, whose interpretation allows the assembly of the final picture and offers the possibility to complete the track drawn here.

The set of variables described by E. Aarseth capitalizes on the specificity of the ergodic text, offering to the critic the possibility to interpret the phenomenon of ergodicity, so the variables are:

1. Dynamicity, which involves the analysis of the scriptons of the ergodic text, which varies or not depending on the evolution of the reading;

2. Determinability, which studies the connections and influences of the scriptons, that is, a text is determinate if the adjacent scriptons of each scripton are always the same; if they change their relationship and position, the text is indeterminate;

3. Ephemeris, which divides ergodic texts into transient and intransitive, the first are those in which the scriptons appear by themselves after a time sequence, and the intransitive are those in which they appear if the user activates them;

4. Perspective, which can be personal (when the user has a strategic role, is a direct participant) and impersonal (when it is a simple reader that does not depend on the fate of the character);

5. Access, which can be controlled (as in hypertext, where to get to a certain point, you have to pass a series of other points) and free (when text scripts are available at any time);

6. Linking, which describes the presence of the link with another medium, making a reference that removes the reader from the text (defining feature for hypertexts and less for MUDs or text generators);

7. User functions, which present the idea that the reader is an active part of the text, not just a contemplator, which has only the function of

[21] Manuela Portela, *Theoretical Permutations for Reading Cybertexts: A Review of Markku Eskelinen „Cybertext Poetics: The Critical Landscape of New Media Literary Theory" and C.T. Funkouser „New Directions in Digital Poetry"*. În *Digital Humanities Quaterly*, Vol.7, Nr. 3, Boston, 2013,

http://digitalhumanities.org:8081/dhq/vol/7/3/000162/000162.html [Accessed 16.03.2022].

interpretation. In the ergodic text it can explore, configure, decide, choose, rearrange, (re) write the subject and the real interaction with the text.

The set of variables can be represented, as E. Aarseth suggests, in relation to the values they can have:[22]

Variables	**Possible values**
dynamicity	static, IDT, TDT
determinability	determinate, indeterminated
tranzitivity	transient, intransitive
perspective	permanent, tempory
acces	randomized, controlled
linking	explicit, conditional, missing
user functions	explorative, configurative, interpretative, textonic

The tools presented above are applicable in analyzes such as those of M. Joyce's novel "Afternoon. A Story ”and other epic works, however, the most receptive form to any evolution remains poetry, which has proliferated in various species, marking a fruitful development of digital lyricism. Among the forms of digital poetry studied, we would like to mention a few to outline this genre:

E-poetry- being located in the Internet space, its text works in electronic or digital format, it can take any form, it can omit the rules of punctuation, it can be written anywhere and by anyone, this is both a premise and an impediment in its appearance and promotion. quality poetry and in the interpretation of e-poetry. For the extension of this type of poetry, the literature "Oulipo", the project "Flarf" and the Web itself are open and welcoming domains. The word-image relationship is fully emphasized in visual poetry, which supports the idea of symbiosis of these elements and is highlighted by the proliferation of two types of visual poetry: pictopoetry and concrete poetry.

Pictopoetry - is the one that through the construction of its text takes on the shape, the contour of a certain object / geometric shape. Concrete poetry is a more complex form of visual poetry, because playing with the physical aspect of the text creates pictorial images, such as the poems of E. Gomringer, M. E. Solt, A. Knotek, A. Chira and others.

Digital poems with "visual noise"- combine texts with images, sounds and even digital operations, and for the work to be read the reader

[22] Espen J. Aarseth, *Cybertext. Perspectives on Ergodic Literature*. London: The Johns Hopkins University Press Ltd., 1997, p. 202.

must be directly involved in it. "Visual noise" is a strategy based on hypermedia with poetic features, and this is best revealed by the poems of A. Campbell, A. F. Wysocki and J. Rosenberg.

In **sound poetry**, the pronounced letter - the sound - prevails over the written letter. This type of poetry has seen the rise of the jum. sec. XX, through generations of authors, including H. Chopin, B. Heidsieck, T. Tzara, K. Ladik and others.

Video poetry is a special form of video art, which includes poetry texts elaborated at different acoustic and visual levels; offering the reader / viewer a new poetry experience that can be viewed through electronic applications, or in the Internet space.

Holopoetry is created using holograms, presenting the fluency of the word and semantic interpolation. Among the authors of holopoetry is E. Kac, who coined the term "holopoetry" and preferred the word 3D sensation to the word.

Click-poetry combines text and audio file, which appears at a click on the poem. Impressive are the click-poems of D. Knoebel, who places them in the web space, uses VRML, includes sound readings, random words and animations.

These forms of ergodic literature represent a sufficient degree of maturity in their evolution to be subjected to critical interpretation and to no longer be classified as experiments, avant-garde, anti-literature, etc. An (eventual) ergodic literature interpretation instrument presented in this article is apt to open to the public the splendor and complexity of this type of literature.

Conclusion

What we can observe, along this path, is that Ergocriticism harmoniously combines the practices of traditional literary criticism, the interpretation of other fields of fine arts, algorithms described by mathematical formulas and ways to characterize a process in the ICT environment to capitalize on all the features of the ergodic text, which coagulates forms inspired by such different environments. The polyphony of this critical track is determined by the polyphony of the interpreted object, being intrinsic and highlighting a thread that leads to Bakhtinian dialogism, materialized so concretely by ergodicity.

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