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THE RELATIONSHIP BETWEEN THE BELGIAN CONSTITUTION AND INTERNATIONAL AND EUROPEAN LAW

Pierre Nihoul

The Belgian Constitutional Court takes into account the EU law in her control by using two technics. In this way the case-law of the Constitutional Court is enshrined instead in the dialogue of the courts. By thus reconciling constitutional law and European law, the Constitutional Court avoids conflicts between the highest courts and promotes legal certainty.

I. The Belgian Constitution contains no general and express provision on the relationship between the Constitution and international law. There is just one exception to this rule, namely Article 34 of the Constitution.

This Article provides: 'The exercise of specific powers may be assigned by a treaty or by a law to institutions of public international law'.

This provision was inserted into the Constitution in 1970 to justify the participation of Belgium in, and the transfer of jurisdiction to, the European Communities and to the European Convention on Human Rights.

II. In respect of the relationship between international law and the law, the Court of Cassation has filled this gap.

In a judgment dated 27 May 1971 (Franco-Suisse Le Ski), the Court of Cassation recognised the primacy of an instrument of international law which has direct effects within the domestic legal system over the law. According to the Court of Cassation, 'the supremacy of the instrument of international law results from the very nature of international treaty law'. This is a monistic point of view in line with the case-law of the Court of Justice.

The consequence of this case-law is diffuse control: it is the duty of each ordinary or administrative court to set aside the application of legislative provisions contrary to an instrument of international law which has direct effects within the domestic legal system.

III. On the other hand, regarding the control of constitutionality of legislative instruments, in 1980 the authors of the Constitution chose in favour of centralised control by the Constitutional Court.

This Court, founded outside the judiciary, has exclusive jurisdiction to judge the constitutionality of legislative instruments, ruling either on an action for annulment lodged by the government or the parliament of the Federal State or a federated entity or by any person justifying an interest, or on a question to be referred for a preliminary ruling which must be put forward by each ordinary or administrative court.

IV. The Constitutional Court is therefore invested with the exclusive power of control of constitutionality. On the other hand, it is not authorised to exercise direct control of the legislation with regard to European and international law. In principle therefore it does not exercise any control of conventionality.

The Court has, however, developed two techniques in order to control legislation in respect of European and international instruments. This control is described as 'indirect'.

A) The first technique is based on Articles 10 and 11 of the Constitution which prohibits any discrimination, regardless of the origin thereof.

According to the case-law of the Court from 1989/1990, the constitutional principle of equality and non-discrimination applies in respect of all rights and freedoms, including those resulting from international conventions which are binding on Belgium.

Regarding fundamental rights and freedoms, the link with Articles 10 and 11 of the Constitution is established when a right or a freedom is withdrawn from a category of individuals, while this right or freedom remains valid for all other individuals.

The result of this case-law is that the Court reads the constitutional principle of equality and non-discrimination in combination with the rights and freedoms guaranteed by the treaties, in

particular the European Convention on Human Rights, the United Nations Covenants and the Charter of Fundamental Rights of the European Union.

B) The second technique was developed by the Court after its powers were extended in 2003, and consists of control of the legislative instruments with regard to Title II of the Constitution relating to (almost) all fundamental rights and freedoms.

In a landmark ruling (No. 136/2004, 22 July 2004), the Court found that many fundamental rights guaranteed by Title II of the Constitution have an equivalent in an international treaty binding on Belgium. In this case, the constitutional guarantees and the treaty guarantees constitute an indissociable whole. It follows that, when a violation of a provision of Title II of the Constitution is alleged, the Court takes into account, in its review, the provisions of European or international law guaranteeing similar rights or freedoms.

V. The two techniques cited above have allowed the Constitutional Court to take into account the case-law of the European Court of Human Rights and of the Court of Justice, the judgments of which are widely mentioned and/or cited.

In this way, the Constitutional Court has been able to interpret the constitutional guarantees, the majority of which have not been changed since 1831, in an evolving and contemporary manner.

Other advantages are: 1) the certainty that the principle of the primacy of the broadest protection is respected, whether this protection appears in the Constitution or in the instruments of international or European law; 2) the prevention of conflicts between constitutional case-law and supranational case-law.

VI. Generally, the Court tends to subscribe to a universalistic, and therefore not relative, concept of human rights. It uses all the international sources of human rights ratified by Belgium, regardless of whether they are European or global. The jurisdiction of the Constitutional Court is clearly limited to Belgium and to legal situations that may be attached thereto. Within this scope, the Court interprets and applies human rights uniformly, without regional particularism and without differentiating with regard to the nationality of the person in question.

VII. The two types of control mentioned, i.e., on the one hand centralised control of constitutionality of legislative instruments by the Constitutional Court and, on the other hand, diffuse control of conventionality of legislative instruments by all ordinary and administrative courts, has given rise to the problem of the 'concurrence of fundamental rights': should a court, before which a party invokes that a legislative provision violates a fundamental right guaranteed both by the Constitution and by a similar treaty provision, refer a question for preliminary ruling to the Constitutional Court, in application of the case-law of the latter, or can it itself review the compatibility of the legislative instrument with the treaty provision, in application of the case-law of the Court of Cassation?

The special legislator resolved the question in 2009 by granting priority of control to the Constitutional Court: apart from a few exceptions (of the 'acte clair' or the 'acte éclairé' doctrines), the court is required to refer a question for preliminary ruling to the Constitutional Court on the constitutionality of the legislative instrument and, after a negative response to this question, the court has jurisdiction to verify the compatibility of the legislative instrument with the treaty provision.

The French legislator based its judgement on this (Belgian) legislation to resolve the same problem. This French legislation gave rise to the famous MELKI and ABDELI judgment of the Court of Justice EU of 22 June 2010. In this judgment, the Court of Justice ruled that the procedure complies with European law, provided that the court a quo can refer a question for preliminary ruling to the Court of Justice at any time during the proceedings and, above all, that it remains competent to verify the compatibility of the legislative instrument with European law. We note that the Court of Justice has attempted to reconcile the powers of the Constitutional Courts with the higher principle of the unity and primacy of European law.

Although Belgian legislation relative to the concurrence of fundamental rights has been considered to be compatible with the judgment cited above, the article in question – Article 26, (4), of the special law on the Constitutional Court – was amended in 2014 to make express provision for the possibility for questions for preliminary ruling to be referred in parallel to the Court of Justice and to the Constitutional Court.

VIII. Although the Belgian Constitutional Court is considerate towards European law, it has doubts over the case-law of the Court of Justice EU in the Melloni judgment of 26 February 2013. In this judgment, the Court of Justice held that Article 53 of the Charter of Fundamental Rights of the European Union does not generally allow a Member State to apply the standard of protection of fundamental rights guaranteed by its Constitution when it is higher than that resulting from the Charter and to oppose it to the application of provisions of European Union law. According to the Court of Justice, a national standard for protection of fundamental rights, even when more extensive, cannot compromise the level of protection provided by the Charter, as interpreted by the Court 'nor the primacy, unity and effectiveness of European Union law'.

When we visited other Constitutional Courts, we sensed deep concern and even dissatisfaction on the subject of this case-law. This is understandable in the light of their task: the protection of fundamental rights guaranteed by the Constitution.

Because, as a rule, the level of protection offered by the European instruments is higher than that guaranteed by the Belgian Constitution, the situation which arose in the Melloni ruling is unlikely to exist in Belgian law. And if the Constitutional Court is one day faced with this situation, it will undoubtedly refer preliminary questions to the Court of Justice before ruling.

IX. What about the concept that is commonly referred to as 'the exception of national identity'?

The construction of the European Union and the ever-deepening integration of the legislations of the different Member States lead to a phenomenon of universalization – on a European Union scale – of the standards for controlling fundamental rights. Faced with this phenomenon, several constitutional courts in Europe are mobilising to ward off any infringement deemed to be too great of national sovereignty and the values that the latter is supposed to protect, the concept of 'national identity'. The Belgian Constitutional Court referred to the notion of identity in judgment No. 62/2016, considering that the constitutional provision allowing the transfer of defined powers to institutions of public international law and, in particular, to the Institutions of the European Union, 'does not in any case allow a discriminatory infringement of the national iden-

tity inherent in the fundamental, political and constitutional structures or of the fundamental values of protection that the Constitution confers on subjects of law'. This statement has not, however, been consolidated. It is perhaps an indication that the Court might, one day in the future, decide that a fundamental right recognised by the Belgian Constitution should be interpreted in a particular way in the Belgian constitutional order, which would amount to destabilising the universal nature of the right in question. This is, however, only a supposition and a hypothesis; nothing currently exists to support a claim that the Court will move in this direction.

Furthermore, by repeating the wording of Article 4 of the TEU word for word, the Belgian Constitutional Court is enshrining this exception within the framework of European Union law. It also enables the Court, within this framework, to refer a question to the Court of Justice for preliminary ruling, which opens a dialogue between courts.

X. The latter attitude follows the trend of the Belgian Constitutional Court to regularly refer questions to the Court of Justice for preliminary ruling.

So far, the Constitutional Court has referred 138 questions for preliminary ruling in 40 referrals, the majority handed down in the last fifteen years. The explanation for this large number of questions referred for preliminary ruling is based on the fact that the Constitutional Court uses European law as the indirect reference standard and, at the time of its control, it is sometimes required to ask questions relating to interpretation or validity raised by the parties.

In this manner it also prevents violations of European law in the domestic legal system and adverse judgments by the Court of Justice. An interpretation given by the Court of Justice is moreover binding on all Member States.

XI. It is time to conclude.

Formally, the Constitutional Court is apparently still using hierarchical concepts in respect of the relationship between, on the one hand, the Constitution and, on the other hand, the treaties and secondary European legislation. Upon closer inspection, the Court explicitly takes into account the specific characteristics of the trea-

ties, thus demonstrating extreme care in conducting its control and it places the basis of the 'primacy' of secondary European legislation in Article 34 of the Constitution.

The case-law of the Constitutional Court is enshrined instead in the dialogue of the courts. The reading of fundamental rights guaranteed by the Constitution together with similar international and European instruments and the preliminary dialogue with the Court of Justice is evidence of this. By thus reconciling constitutional law and European law, the Constitutional Court avoids conflicts between the highest courts and promotes legal certainty.

WESTERN-STYLE CONSTITUTIONALISM AGAINST THE COMPLEXITY OF CENTRAL AND EASTERN EUROPE

Angela Di Gregorio

1. The historical and geopolitical position of Central and Eastern Europe

The unfolding of the war on the tormented Ukrainian lands calls for reflections also from a constitutional point of view. Considering that much of the media storytelling on the 'clash of civilizations' flows under the slogan of the contrast between different political systems as well as between different visions of international relations and law, it is worth making some observations on the complex constitutional path the countries of Central and Eastern Europe traversed, both from a historical point of view and, more specifically, with reference to the last 30 years. As recent war events testify, an in-depth historical perspective is required to undo some of the most intricate knots of the long, suffered and uncertain paths of state-building and constitution-building on the European continent.

From a historical point of view, many fracture lines cross the constitutional landscape of Central and Eastern Europe that serves as a terrain of confrontation between different and opposing developments and visions. Institutional and political choices stand at the intersection of different systems of government and political cultures, still affected today by ancient lines of friction. Historically the main problem in these lands has been the nation-state, and hence sovereignty – in fact the history of this part of Europe is a history of empires, even before that of states – which goes hand in hand with the big issue of ethnic homogeneity due to the way borders have been drawn after the various wars. Consequently, these are lands characterized by territorial divisions, displacements of populations, transitions between different political systems, con-

tinuous state restructuring that still account today for the existence of disputed territories or de facto states[1].

Secessionist tendencies have been observed not only in the former Soviet space but also in some regions of the former Yugoslavia. The mixture of populations, and the existence of strong kin-states for ethnic minorities continue to slow down democratisation and constitutionalism. These different populations were able to coexist in the past thanks to a centralized power system at the cost of strongly limited political representation and poor protection of minority rights. National minorities are a strategic problem that concerns on the one hand the issue of political inclusion and on the other the legal issue of fundamental rights. It is the cause of re-emerging historical tensions, which at times 'can lead to the implosion of the political community itself', thus calling into question the very stability of the system[2].

The mixing of populations and the imperial aspirations of the powers in the area constitute one of the major obstacles to the full democratization of the states that emerged following the disintegration of the historical empires (and consequently of the socialist federations), many of which are small.

The political, and therefore constitutional, evolution of these countries is hardly understandable unless one considers history and geopolitics. Furthermore, a correct academic approach must take into account the different constitutional models that these countries followed throughout their history and the persistency of past legacies that determined the implementation of the constitutional choices made after the reconquest of national sovereignty. Another mistake to avoid is to consider the area in an undifferentiated way: the interests and destinies of what today are 29 sovereign countries intertwine and clash unevenly with the destinies of the whole of Europe.

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[1] On this topic, please refer to **M. Minakov, G. Sasse, D. Isachenko (Eds.),** *Post-Soviet Secessionism. Nation-Building and State- Failure After Communism*, ibidem-Verlag, Stuttgart 2021.

[2] **F. Lanchester,** *I successori dell'Impero: un'eredità difficile e una democratizzazione dagli incerti risultati*, in: **F. Lanchester, M. P. Ragionieri,** *I successori dell'Impero. Le Costituzioni degli ordinamenti ex URSS*, Milano, Giuffré, 1998, p. 19.

2. Historical traditions, conceptions of statehood, and past legacies

During the constituent processes of the 1990s in this area, the complexity of constitutional patterns available to the framers clearly emerged, making constitutional 'euphoria' subsequent to the political and national transformations of that time short-lived. As stated, 'the collapse of the socialist regime, characterized by homogeneous ideological and institutional principles, was followed by a differentiated dynamic in which both the cultural tradition and the geopolitical situation played within the common formal acceptance of democratic parameters'[3]. In some cases, the differences immediately appeared at the end of the socialist 'uniformization'. In other cases – precisely with reference to the Western republics of the former USSR – a more nuanced constitutional path emerged later, within an area where for historical and geo-political reasons different political cultures competed and still do to the present day.

The first major division line runs between the former satellites of the USSR and the Baltic countries on the one hand and the republics of the former USSR on the other (even though the Western Balkans countries do not fully fall into the first category)[4]. This division is justified in the light of past experiences and the different constitutional history despite the common imperial past. Therefore, a first major area of interest in the circulation of Western constitutional ideas and models is that of the former satellites. They had already experienced these models in more remote historical moments. This is especially true for the countries subject to the Habsburg domination that gained their independence at the end of the First World War.

As regards the imperial period, it should be remembered that among the empires that dominated Central and Eastern Europe for centuries, the most restrictive from political point of view (including the dynamics of territorial and national autonomy) was the Tsarist one, while the most 'pluralistic' was the Austro-Hungarian (though not entirely regarding the Hungarian part, where it tended

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[3] **F. Lanchester,** *I successori dell'Impero: un'eredità difficile e una democratizzazione dagli incerti risultati*, op. cit., p. 15.

[4] **A. Di Gregorio (Ed.),** *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, Eleven International Publishing, The Hague, 2019.

to assimilate the relevant populations)[5]. The Tsarist empire was succeeded by the Soviet Union alongside a comparable – though not identical – territorial extension (important Western pieces of the empire ceded by the Brest-Litovsk treaty were recovered after the Ribentropp-Molotov pact). The state-imperial formations of the Medieval and Renaissance eras that preceded the formation of historical empires such as the Kingdom of Poland (1385-1569), the Grand Duchy of Lithuania (1238-1569) then the Polish-Lithuanian Confederation (Union of Lublin: 1569-1795)[6] must also be included in this overview. In addition to the historical territorial divisions, which further delayed national unification and the birth of an authentic unitary national spirit, it is noteworthy that constitutional ideas circulated or were even put into practice even within the empires. While the practices of liberal constitutionalism applied in the Habsburg empire are well known[7], one should not forget the legal doctrine of the Russian empire[8], including important albeit limited periods of reforms such as those during the era of Alexander II (not to mention the limited reforms of the last Nicholas II and of the period between February and October 1917; after many decades the very relevant reforms initiated by Gorbachev

[5] Particularly since 1896. Please refer to **M. Mazza,** *La dissoluzione dell'Impero austro-ungarico e la questione delle nazionalità*, in: **R. Orrù, F. F. Gallo, L. G. Sciannella (eds.),** *Tra storia e diritto: dall'Impero austro-ungarico al nation-building del primo dopoguerra. La parabola della Repubblica cecoslovacca (1918-2018)*, Napoli, ESI, 2020, pp. 82 ss. On the residues of the imperial mentality in the construction of the new Ius Publicum Europeum, see **S. Larsen,** *European public law after empires*, in *European Law Open,* Vol. 1, no.1, 2022, 6-25.

[6] On this topic please refer to **M. Waldenberg,** *Le questioni nazionali nell'Europa centro-orientale*, Milano, il Saggiatore, 1994; **P. Grilli Di Cortona,** *Stati, nazioni e nazionalismi in Europa*, Bologna, il Mulino, 2010.

[7] With the birth of the dual monarchy in 1867, the empire became a liberal constitutional monarchy. For example, Article 19 of the Fundamental Law of the Empire of 1867 established equal rights for all ethnic groups (*alle Volksstämme*: synonymous with nation) together with a series of cultural and linguistic rights. Despite the limited practical application and the lack of effective parity, however, it seems that an Austrian model of a multinational state was created. **M. Waldenberg,** *Le questioni nazionali nell'Europa centro-orientale*, cit., pp. 28-31.

[8] We refer to the doctrinal debates in which some ways of reconciling Western ideas with Russian characteristics were hypothesized. See **G. Ajani,** *Diritto dell'Europa orientale*, Torino, Utet, 1996, pp. 73 ss.; **M. Ganino,** *Dallo zar al Presidente*, CUESP, Milano, 1999, **R. Valle,** *Genealogie del costituzionalismo in Russia dal XVIII al XX secolo*, in: *Giornale di storia costituzionale*, Vo. 33, 1, 2017.

will arrive: all this is part of the constitutional doctrine and experimentation[9]). To this one should also add more ancient experiences in Poland and Lithuania, where in medieval times they have even anticipated some developments of the English constitutionalism such as the charters of rights of a noble type[10].

Therefore, considering the size of the area and the large number of countries that were born following the collapse of the empires and subsequently the socialist federations, the constitutional analysis must be inherently complex. At the collapse of communist regimes in the former satellites, and then of the USSR, Western scholars considered the successor states to be almost like 'virgin lands' ready for the implantation of the solutions offered by Western liberal-democratic constitutionalism. This is not very different from the colonial powers' attitude towards their former colonies. The old recipes of federalism or regionalism that were proposed for these divided and inhomogeneous territories is but one case in point. However, political decentralization has never taken root in these lands in the last 30 years, except under fake disguise (for example the Russian federalism, which was born in a promising way with the Federal Pact of 1992 and has seen a parable of progressive centralization to quell separatism[11]) or in an artificial way (Bosnian federalism) for fear of nationalism and separatism and due to the legacy of the past political cultures[12]. The same applies to the countries that later became members of the EU which, despite having territorially concentrated ethnic minorities in some cases, were careful not to give special forms of autonomy to the territories in question precisely in order not to feed secessionist ten-

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[9] As argues **M. Waldenberg,** *Le questioni nazionali nell'Europa centro-orientale*, op. cit., pp. 103-104, Tzarist Russia has been repeatedly called the 'prison of nations', however it should be recognized that the policy towards nations was heterogeneous and varied, changing according to the nation and the historical period.

[10] Please refer to **A. Di Gregorio,** *European and Polish constitutionalism in the aftermath of WW1*, in: *DPCE online*, n. 3/2021, pp. 2969-3004.

[11] Please, refer to **C. Filippini,** *Dall'Impero russo alla Federazione di Russia. Elementi di continuità nell'evoluzione dei rapporti centro-periferia*, Giuffré, Milano, 2004 and Id., *Autonomie e autogoverno locale in Russia. Dall'unità del potere statale all'unità del potere pubblico: ricostruzione di un modello*, Giappichelli, Torino, 2020.

[12] **A. Angeli,** *La circolazione del sistema francese di decentramento territoriale nell'Europa centro-orientale*, Milano, FrancoAngeli, 2018.

dencies (see for example the cases of Romania or Slovakia)[13]. The authoritarian past has also provoked phenomena of resistance, rejection or transformation of models imported or 'recommended' from outside. In the end these dynamics of refusal prevailed over the demands for democratization[14].

Against this background, if at the beginning of the 1990s the model of pluralist democracy seemed to have taken root indisputably throughout the former Soviet space – notwithstanding its purely formal reception in the constitutions of the countries of Central Asia[15] – and in that of the former satellites, the Yugoslav wars soon showed that democratization was a difficult goal in the presence of ethnic inhomogeneities.

The prospects for democratization, Europeanization and constitutionalization changed after 1989 as we move away from the centre of the European continent. The constitutional influences are complex and consist of a differently assorted mix of pre-communist past, legacy of the regime and pushes towards an indistinct Westernization. The different political cultures, expressions of different cultural traditions, should be viewed against the background of the complex ethnic-national situation. These differences hamper the integrity of the political community.

[13] On the theoretical possibility of applying the model conceived by Karl Renner for the Austro-Hungarian empire, i.e. that of non-territorial autonomy (but in a context in which the nations were placed on a level of substantial equality) and on some limited practical experiments in Central-Eastern Europe both before and after the communist regime, please refer to **A. Osipov,** *Non-Territorial Autonomy during and after Communism: In the Wrong or Right Place?,* in *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 12, no. 1, 2013; **M. Costa,** *Il federalismo bosniaco: un'incompleta transizione da "protettorato internazionale" a "democrazia europea",* in federalismi.it, 22 giugno 2018.

[14] On the extensive influence of international conditionality in Eastern Europe, see the articles of *East European Constitutional Review*, published first by the *University of Chicago Law School* (Center for the Study of Constitutionalism in Eastern Europe) and then by *NY Law School* and translated into Russian. Very relevant also the journal of the University of Leiden *Review of Central and East European Law*. See also **S. Bartole,** *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Parliamentary Democracy in Europe), Oxford, Hart Publishing, 2020.

[15] The republics of Central Asia did not initially welcome the dissolution of the USSR since these are countries where national consciousness has always been weak.

This difficult geometry is further complicated by the influence of the democratic conditionality of the Council of Europe and the European Union, whose institutions tend to impose another uniformization on a rather 'magmatic' fabric. As for the countries farther from the Western culture, a progressive 'disconnection' from the European principles and institutions occurred. This, as was the case of Russia, has provoked first a misalignment and later a de facto exit from the Council of Europe since 2010, before reaching the expulsion of Russia shortly after the invasion of Ukraine in March 2022. This disconnection is based on deep cultural roots.

3. The Eurasian space

As regards the second great area of constitutional 'experimentation', that is the republics of the former USSR, the rule according to which 'constitutional innovation is strongly influenced by the drift of the past and in particular by the transformation that the legal mechanisms underwent in the different cultural contexts' is even more valid[16]. Furthermore, the knowledge of these countries is particularly difficult due to the greater geographical and cultural distance, the linguistic barrier, and the closure that had characterized the Soviet world for decades. The former Soviet area, yet, is very diverse, despite the common historical framework stretching from the Russian and then Tsarist empire (officially born in 1721, although the Romanov dynasty dated back to 1613) to the collapse of the USSR. It comprised territories conquered at different times, in different geographic areas and with different political affiliations in history. Languages and cultures, religions and social arrangements are also very multifaceted[17].

Although 'receptive' to Western models (also thanks to the technical assistance provided by Western experts, starting with the American ones), the first constitutions in the post-Soviet space

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[16] **F. Lanchester,** *I successori dell'Impero: un'eredità difficile e una democratizzazione dagli incerti risultati*, op. cit., p. 4.

[17] In Central Asian, the political and institutional system was characterized right from the start by the denial of even minimal democratic requirements and by a strong continuity with the past. Even today these countries form a separate group: if on the one hand they have legal structures similar to those in the rest of the former USSR, on the other hand they express their own cultural characteristics, such as religion, community values, the role of traditional bodies, etc.

showed strong legacies of the Soviet period. In each of these constitutions the framers tended to get away from the Socialist past, sometimes too emphatically, emphasizing the central role of the individual and the defence of their rights while rejecting the leading role of one political party. These assertions, in addition to being disproved in subsequent political practice, were also contradicted by the rest of the constitutional provisions since the sections on principles and rights were refuted by the sections on system of government and territorial organization which immediately demonstrated a different and more nationalistic approach. Furthermore, systems of government that were initially closer to a semi-presidential model characterized by a certain balance of powers shifted over time towards the presidential side. Since the transition the President, who represents the national unity, has been equipped with relevant powers that later reforms further expanded, with the exception of some countries such as Ukraine – which has gone through the most troubled political and constitutional processes among the former USSR countries – and of a fluctuating trend in countries such as Moldova, Georgia, Armenia and Kyrgyzstan. Among the models available there was also that of the former centre of the Empire, namely Russia. In fact, the strong influence of the Russian constitutional pattern was evident, especially as regards the system of government. The Russian model appeared as a complex combination of ideas drawn from the American and French experiences[18] and a decisive adaptation of national solutions in-

[18] As argued by **R. Sharlet,** *Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States*, in *East European Constitutional Review*, Vol. 7, n. 4, fall 1998, p. 60, initially Yeltsin liked the American system because he was in a conflictual relation with the Soviet-style parliament. During 1993, however, attention shifted towards European models, especially the French one. This is because, according to the Author, the conception of a 'minimal' state, like the American one, was not suitable for the Russian context, especially in the difficult phase of the post-Soviet transition. Furthermore, social rights could not be renounced in post-Soviet contexts: 'While anti-statism was initially fashionable in the liberated East, the political classes soon came to realize that a strong state would be indispensable for successful market development and regulation' (p. 61). Sharlet compares the 1993 Russian constitution to the European 'airbus' due to elements drawn from the constitutional experiences of different countries (France and USA for the system of government, Germany for constitutional justice and the electoral system, the US constitution for the procedure of impeachment and for the constitutional amendment, Spain and Belgium

corporating traditional elements and late-Soviet (Gorbachevian) experience[19].

Given the complexity of the transformations that took place, the constitutions had a programmatic tone. However, a new constitution was required to overcome the previous late-Soviet 'patchwork' system of incremental amendments in order to submit to popular approval the founding act of a new political entity. Notwithstanding this, the mechanisms of the division of powers, decentralization, political autonomy, in short, the liberal content of the constitutions, collided with the legacies of the past (both Tsarist and Soviet). Another very relevant element are the problems of the transitional period (when an epochal transformation of the political, economic and social systems took place), to the point that even some Western scholars have considered Western models unsuitable for these contexts, especially as regards the division of powers[20]. In general, the conception of a 'strong' state has remained a distinctive feature of the local political culture, appearing either immediately after the transition from communism or later.

Ultimately, the well-known process of adoption of constitutions 'without constitutionalism' emerged[21]. This is particularly underlined by the Australian scholar William Partlett who, following a long-term analysis, highlights how from the initial competition between two visions of constitutionalism (the first based on the division of powers and checks and balances and the second 'state-cen-

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for unequal federalism). But the Russians had not taken the checks and balances as regards the form of government from the French and US constitution.

[19] On this **M. Ganino,** *Dallo zar al Presidente*, Milano, CUESP, 1999.

[20] **S. Holmes,** *Cultural Legacies or State Collapse? Probing the Postcommunist Dilemma*, in M. Mandelbaum (ed.), *Post-Communism*, New York, 1996. Following **A. Hoeland,** *The Evolution of Law in Eastern and Central Europe: Are We Witnessing a Renaissance al 'Law and Development'*, in: **V. Gessner, A. Hoeland, C. Varga (Eds.),** *European Legal Cultures*, 1996, p. 482, 'a transfer without theory cannot succeed, and a theory which does not take into account the pre-existing social and legal structures is worthless'. Constitutions would have been adopted, according to this Anglo-American doctrine, in the absence of a constitutional culture. This is a rather reductive approach that does not take into account the cultural movements of the past (branding them as simple intellectual receptions without any autonomous stimulus) or the geographical and geo-political aspect that has inevitably conditioned these countries over the centuries.

[21] **R. Sharlet,** *Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States*, op. cit., p. 63.

tric', meaning that unity and centralization prevail due to the needs of the transitional period and the persistence of traditional cultural elements), in the end the latter has consolidated in almost all the countries (consider that some 'color revolutions' failed)[22]. To this we must add the fact that transposition of legal models in the former Soviet space has been chaotic and disorganized.

The failed attempt to transplant European constitutional models (that are the result of revolutions and progressive limitations of power and the awareness of the individual's autonomy from the state) in the former Soviet area is premised on specific historical factors and ignoring these (due to centuries of cultural distancing but also to old ideological prejudices) results in the inability to understand the current dynamics.

The relation between a constitution and cultural heritage is not easy to analyze. The legacies of the past are either direct (see for example some institutions taken up by the Tsarist time such as the trial by jury or the role of the prosecutor's office[23]; then the Soviet elements such as the concept of 'power's unity' and the surveillance of legality by the prosecutor's office) or mediated by the centralizing political culture of Presidents (former leaders or reformist exponents of local communist parties who remained protagonists of the national rebirth until after the first partially pluralist USSR elections of March 1990). Then, as mentioned above, there is the circulation of autochthonous models, such as the Russian one, which has had a wide acceptance through the formula of the 'governing President'. Over time, however, a contrast has emerged, at least in some countries, between a post-Soviet or Eurasian political culture and the European constitutional culture, even if understood in a confused and idealized way. The Eurasian model is built under the flag of centralizing power in favor of control but also with a view to enhancing economic and social development and ensuring the coexistence of different peoples –from a national and cultural but also from a religious point of view – in a sort of

[22] **W. Partlett,** *Post-Soviet constitution making*, in: **D. Landau, H. Lerner (ed.),** *Comparative Constitution Making*, Edward Elgar, 2019, pp. 539 ss.

[23] In the imperial historical traditions we also find medieval city assemblies or *vece* and the experience of the *zemstvo*, that is, enlightened forms of local self-government managed by the nobility and the bourgeoisie (see the liberal reforms of the Tsar Alexander of 1864).

paternalistic constitutionalism[24], possible only thanks to the horizontal and vertical centralization of power. Another 'cryptotype', that is a rooted or hidden cultural element that emerges and is consubstantial with this power's pattern, is that of the inviolability of territory, meaning a Westphalian-style sovereignty. Finally, populism, an ancient political trend in these territories, should be mentioned when speaking about traditional political cultures. Centralization, protection of the territory, populism, paternalism and the strong role of the state and its supreme ruler – confronted with a traditionally passive and atomized society affected by legal nihilism – are cultural elements that have been central to the survival of the state and have united the multiform national mass of Russia over the centuries. These elements are reproduced today in an apparently anachronistic way and cemented by an increasingly instrumental and obsessive cult of history ('mnemonic constitutionalism'[25]).

The disintegration of the USSR, which had provided a unifying framework from a political and economic but also constitutional point of view (the material core of constitutional law consisted of the ideological component, inserted in the long preambles of all Socialist constitutions), was followed by another type of constitutional uniformization. With the well-known exception of the Baltic countries, which had previous experiences of statehood and constitutionality during the 1920' and 1930', and cultural characteristics distinct due to the presence of Western influences, the other successor countries initially followed a similar path, characterized by the will to distance themselves from the previous political system and incorporate the formulas of Western constitutionalism in the first parts of the constitutional text[26]. This evident mixture of

[24] See **A. Di Gregorio,** *Paternalist Constitutionalism and the Emergence of Sovereign Cultural Identity: The Case of Russia*, in: *Int'l J. Const. L. Blog*, Jun. 27, 2021 at: http://www.iconnectblog.com/2021/06/paternalist-constitutionalism-and-the-emergence-of-sovereign-cultural-identity-the-case-of-russia.

[25] **U. Belavusau,** *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, in *Interdisciplinary Journal of Populism*, Volume 1, Issue, 1, 2020.

[26] Just to give an example, please refer to the opinion of the Venice Commission on the first part of the 1993 Russian Constitution, that was quite positive: *Opinion on the Constitution of the Russian Federation as adopted by popular vote on 12 December 1993*, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1994)011-e.

old and new elements characterised the first constitutional phase that lasted until the early 2000s (when a cycle of constitutional amendments began), together with an ambiguity in the forms of ownership stemming from the difficulty in transferring ownership of land and hence of natural resources to the private sector and the circulation of the Russian model of the 'governing President', which is a remnant of the late-Soviet system of government[27]. Over time, the coexistence and dosage of these elements changed and each country took a more autonomous path, sometimes with an evident gap between the constitutional letter and political practice.

Among the available cultural components, pre-Soviet ones could also be included which, however, with regard to the constitutional aspect, do not go much beyond the three Baltic countries (this is different in former USSR satellite countries). Although territories of some of the former USSR republics had been part of various political organizations before being incorporated into the Tsarist empire and then almost seamlessly into the Soviet Union, no constitutional traditions different from the Tsarist and then Soviet ones could ever take root there[28]. However, it should be noted that even within the Tsarist empire, Western liberal constitutional models (especially German and French) were discussed and periodically advocated by limited intellectual elites. Apart from the nineteenth-century Decembrists, one may recall some important currents of Menshevik revolutionary socialism (the Cadets) of which an exponent will later become, in the Diaspora, one of the first scholars of comparative constitutional law in Europe between the two world wars[29].

[27] Being characterized by a certain ambiguity due to the coexistence of a parliament that still held, albeit no longer exclusively, the political stance and a president who tried to be strong but could not free himself until the 'coup' of Yeltsin.

[28] The situation is different for cultural and religious traditions, obviously, see Uniate Catholicism in Ukraine and Belarus or Islam in Central Asia and Azerbaijan.

[29] Boris Mirkine Guetzevich, a Jew who grew up in Kiev and graduated in St. Petersburg (at the time Petrograd), fled Odessa shortly after the Bolshevik revolution. The death penalty had already been issued against him. The eminent scholar then made his career mainly in France but with an important interlude in the USA where he fled again for fear of persecution against Jews in Vichy France. See **B. Mirkine Guetzevitch,** *Les nouvelles tendances du droit constitutionnel*, Giard, Paris, 1931.

Apart from these limited intellectual ambitions, and the timid reforms based on the Prussian model following the war defeat in 1905, and the very brief constitutional experiment of the Kerensky government between February and October 1917[30], the Communist uniformity had dampened any autonomous constitutional development in the bud. Therefore, the wake of a constitutional path based on Western models was resumed not with the collapse of the USSR as is often repeated but before that, namely during the Gorbachevian period[31], a much more pluralist time than the subsequent path of Putinian Russia and other countries in the area.

In the first decade after the collapse of the USSR, the constituent processes and the first implementation of the constitutions of the independent republics, with the well-known Baltic exception, have been characterized by a certain conformism, also considering the similar problems that the respective countries had to go through (privatization, economic reconversion, underdevelopment, difficult coexistence between titular nations and minorities, economic and demographic crisis, etc.; to this we can also add the search for a new national idea to strengthen the political community after communism that is sometimes found in the religious element or in nationalism).

Starting from the 2000s, a more marked differentiation began. Three groups of countries may clearly be outlined in this aspect. In some cases the establishment of an authoritarian regime was almost immediate (Belarus from 1994-1996, Central Asian countries, with the exception of Kyrgyzstan)[32]. In other cases, there was an initial opening to Western constitutionalism also due to the admission of the respective countries to the Council of Europe. Among these, there is also Russia, whose constitutional path was characterized by openings and reforms at least until 2010, the year in which the first conflicts with the Strasbourg Court began in the

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[30] Well described by **M. Ganino,** *Dallo zar al Presidente*, op. cit., pp. 60-64.

[31] The communist regime ended formally with the March 1990 amendments of the Soviet Constitution then in force.

[32] **W. Partlett,** *Reforming centralism and supervision in Armenia e Ukraine*, in: *Annual Review of Constitution-Building Processes*, International Idea, 2015; **H. Kolas,** *New trend in the constitutional law of post-soviet autocracies. Transit of power: to leave without leaving*, Prague Law Working Papers Series, march 2020.

context of constitutional identity[33]. Since then, the descent towards authoritarianism has been progressive, starting first in political practice, in constitutional legislation, and jurisprudence to settle in a precise paternalist-authoritarian constitutional framework with the reform of 2020.

A more troubled path has occurred in some Western republics of the former USSR where a series of 'coloured' revolutions (or attempts at revolutions) have taken place. This is the case of Ukraine, Moldova, Georgia, but also Armenia and Kyrgyzstan. These developments occurred despite the fact that some of them are affected by separatism hosting the so-called de facto states. Thanks to the pressure of the Council of Europe and the conditionality of the association agreements with the European Union[34], some of these countries have undertaken constitutional reforms in limiting, for instance, the role of the head of state, in introducing a greater division of powers and in favouring a greater political and institutional pluralism. But their societies are still divided, which hampers the process of democratization, in addition to the well known geopolitical aspects. The divisions run along ethnic lines (due not only to the presence of Russian-speaking minorities but also of other minorities and enclaves), religious, political and social ones.

From the political and constitutional point of view, we are therefore witnessing the full establishment of an authoritarian system in Russia and Belarus (which are both outside the Council of Europe), Azerbaijan and Central Asian republics (after the recent constitutional reforms in Kyrgyzstan and Kazakhstan)[35]. A more nuanced path, on the other hand, characterizes other successor states which in the last 20 years have, with ups and downs, sought a democratic stabilization in the name of rapprochement with the European Union and the Council of Europe.

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[33] Please refer to **A. Di Gregorio,** *Les divergences entre la Cour constitutionnelle de Russie et la Cour européenne de droit de l'homme: de l'affaire Markin à l'affaire Anchugov et Gladkov*, in: *Lettre de l'Est*, n. 7, 2016, pp. 10-24.

[34] On this, see **B. C. Harzl,** *Beyond Enlargement: Legal and (Geo-) political Landmarks of the EU's Eastern Challenge*, in *Review of Central and East European Law*, Vol. 42, 2017.

[35] **C. Pistan,** *Pseudo Constitutionalism in Central Asia: Curse or Cure*, in *federalismi.it*, 17 aprile 2019; Kazakhstan holds referendum to amend constitution | News | Al Jazeera.

Ukraine therefore stands at the crossroad of this cultural and historical complexity, which also becomes a constitutional complexity. Considering on the one hand the EU constitutional patterns, which however also include a degenerate form of constitutionalism (see the case of Poland, the EU Member State that is historically and physically closest to Ukraine) and on the other hand the authoritarian Eurasian model, from which we imagine that Ukraine has completely distanced itself, what will be the future constitutional path of Ukraine? And what will be the path of democratic conditionality, considering not only the former experience of the other former socialist states but also the recent experience of the Western Balkans, which have emerged from national conflicts of unusual cruelty and were forced to come to terms with their own torturers?

4. The new EU member states between national identity and illiberal deviations and the constitutional situation in the new EU candidates.

Compared to the Eurasian space, the former people's republics of Central and Eastern Europe, whose exposure to Russian political influence has been timely limited, followed a completely different path. In some cases, there has been an important interlude of independence and constitutional democracy between the collapse of the Empires and the subjection to Soviet influence. However, these are nations which, like those included in the Tsarist empire, have seen a belated birth of statehood. One should not forget that the empires that dominated this part of Europe had, as mentioned above, different political characteristics. The Austrian wing of the Austro-Hungarian empire even assumed proto-federal characteristics and taught the component nations parliamentarism and representation[36]. In the rich constitutional cycle following the First World War, some constitutions were at the forefront, despite being little known due to their limited application. But the mere fact that these experiences have resurfaced at the end of what was perceived as 'the Communist parenthesis' leads us to their re-evaluation. These countries have been subjected later to European conditionality.

[36] Please refer to **J. Berenger,** *L'Empire austro-hongrois: 1815-1918*, Paris, Colin, 1994.

With the entry into the European Union, another standardization appeared, followed by a later differentiation with the birth of what is now identified as a specific constitutional pattern referred to as 'illiberal constitutionalism'. As noted on other occasions, the challenge posed to the Union by this atypical constitutional model has led to an evolution in the constitutional system of the Union itself, mainly through European jurisprudence[37].

As far as the former satellite countries of the USSR are concerned, it should be noted that 'democratization, Europeanization and constitutionalization' were objectives to be pursued jointly and under the guidance of international and European institutions. To these trends one should add the difficult transition to market economy which has made these steps very painful. But the constituent processes took place mainly before a formal application for membership to the Council of Europe and the European Communities was made and were inspired, where possible, by the constitutional traditions of the period between the two World Wars (in turn expression of a constitutional culture shared with Western Europe) and even by socialist constitutions[38]. Only several years later, the successful democratization crowned by the entry into the EU has evolved in different pathways with constitutional decays, as in the case of the so-called illiberal democracies.

Concluding on the constitutional models in the new EU candidates (Ukraine, Moldova, with the possibility of Georgia to join later under certain conditions[39]), we must say that the constitutional offer for these lands 'in between' West and East is multifaceted, as a result of opposing cultural and geo-political influences. After a long 'freezing' period, the warming is difficult and painful. The cultural horizon of constitutional scholars must take note of the existence of competing, contiguous and opposing models.

In the East, the wind of 'Eurasian' or state-centric authoritarianism has been blowing vigorously in recent years. It is a different formula from other authoritarian patterns because it has peculiar

[37] Please refer to **A. Di Gregorio,** *Rule of law crisis and the constitutional 'awareness' of the EU*, forthcoming in: **M. Belov (Ed.),** Rule of Law in Crisis Constitutionalism in a State of Flux, Abingdon, Routledge, 2023, pp. 152 – 174.

[38] This is especially true for the former Yugoslav countries.

[39] https://ec.europa.eu/neighbourhood-enlargement/news/european-commission-recommends-council-confirming-ukraine-moldova-and-georgias-perspective-become-2022-06-17_en.

historical traditions that are not comparable with those of the rest of Asia, nor with European authoritarian cultures, from which the Tsarist empire and the Soviet Union had also drawn inspiration (the Prussian model in the early twentieth century, the Jacobin model and Marxist ideology on the occasion of the Bolshevik revolution, just to name a few[40]). By now Russia, Belarus, Azerbaijan and all five Central Asian republics are inspired by this Eurasian system of power. A regime change in these cases seems quite unlikely at the moment, given the lack of commitment of their societies to building Western-style institutions. On the other side, there are the European democratic patterns and conditionality, by which we mean a complex mix of common constitutional traditions as first enucleated in the case-law of the Court of Justice, to whom one can add the recent jurisprudence on principles, but also the soft law of the Council of Europe and the OSCE. There are also the specific requirements of conditionality, and all the suggestions provided for by a myriad of international institutions on the protection of the rule of law, democracy and human rights[41]. Notwithstanding the richness of all these elements, after having witnessed an illiberal degeneration within the Union, this type of conditionality becomes more difficult to implement. Ethnic and territorial problems pose further difficulties in the new candidates, a scenario that the countries of the former USSR share with the Western Balkans. The path in place for some time for the latter, which however is particularly difficult precisely in view of the rule of law, could serve as a model for the new candidate countries from the Eastern Partnership, even though until recently the partnership of association agreements has not been fully comparable to the path of membership.

EU constitutionalism is no longer uniform. The presence of illiberal constitutionalism cannot be considered as a passing anomaly since it seems to have become a counter-model or rather a co-mod-

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[40] Please refer to **T. Taranovski,** *Constitutionalism and political culture in Imperial Russia* (late 19th – early 20th century), *Brics Law Journal*, Vol. VI (2019), Issue 3.

[41] **C. Pinelli,** *The Formation of a Constitutional Tradition in Continental Europe since World War II*, in *European Public Law*, Vol. 22, n. 2, 2016; **S. Bartole,** *The Internationalisation of Constitutional Law: A View from the Venice Commission*, Bloomsbury Publishing Plc, 2020. For Central Asia see the special program of the Council of Europe: https://pjp-eu.coe.int/en/web/central-asia/home.

el that has appeared mid way between the Eurasian one and that of the consolidated European democracies.

Despite all the differences between the countries located on the two external borders of the Union, in fact the problems that the European Union experiences with its Eastern neighbours of the Eastern Partnership – countries that officially applied for EU membership in March 2022 after the outbreak of the conflict in Ukraine – are similar to those already experienced (but still not resolved) with the Western Balkans. These are ethnically inhomogeneous territories with strong ethnic minorities and lacking in consolidated democratic traditions, the result of the arbitrary division of the old empires, where there have been fratricidal wars and where nationalism and secessionism continue to generate concerns for the stability and security of the European continent. These particular political and historical characteristics have made it difficult to implement the reforms required by European conditionality, especially with reference to the rule of law. In post-war contexts that are not completely pacified and are highly inhomogeneous and with assertive kin states for the sizeable national minorities, the relationship between democracy / rule of law / human rights and stability is very precarious (EU institutions, for example, have privileged stability over the rule of law in the Balkans)[42].

The state of democracy in the Eastern Partnership countries is worse not only compared to Hungary and Poland (on which both EU law and their limited democratic past have had an influence) but also compared to the Western Balkans, which have been subject to European conditionality for a long time. Having learnt from past mistakes of previous enlargements and to avoid the necessity to apply new Cooperation and Verifiication Mechanisms, the European Union launched a new approach in 2011[43] which prioritises compliance with the rule of law in candidate countries. In partic-

[42] https://www.oecd-ilibrary.org//sites/0c63e810-en/index.html?itemId=/content/component/0c63e810-en#.

[43] See EU Commission, *Enlargement Strategy and Main Challenges 2011-2012*: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0666&from=IT. With reference to the recent strategy: https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/strategy-and-reports_en; https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-10/eu_accession_process_clusters.pdf; https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-10/18102021_eu_wb_relations.pdf.

ular, the closure of the negotiations on Chapters 23 (judiciary and fundamental rights) and 24 (security and justice), which contain the main rule of law requirements (justice and fundamental rights, fight against corruption, fight against organized crime, terrorism, compliance with Schengen rules, border control, migration, asylum, judicial cooperation in criminal and civil matters, police and customs cooperation, etc.), is considered indispensable for the continuation of the negotiations. However, the path of Europeanization through the promotion of the rule of law in the Balkans fails to go beyond formal compliance due to the lack of clarity and credibility of the conditionality imposed by the Union, as well as due to the obstructive role of past legacies and local political elites' interest in self-preservation[44].

Considering all these contextual problems, hopefully the new candidate countries will not remain long trapped and 'fossilized' mid-way; the fear that this is happening however remains.

[44] See **M. Kmezić,** *EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans?,* in: **S. R. Džankić, M. Kmezić,** *The Europeanisation of the Western Balkans, A failure of EU conditionality?*, Palgrave Macmillan, 2019, p. 93.

THE RIGHT TO WORK UNDER ARTICLE 48 (1) OF THE CONSTITUTION OF THE REPUBLIC OF BULGARIA WITHIN THE CONTEXT OF THE COERCIVE ADMINISTRATIVE MEASURES UNDER ARTICLE 405A OF THE LABOUR CODE

Nina Gevrenova

The simulation of employment relationships by civil-law relationships is an issue whose adverse effects exceed the boundaries of the labour legislation in force. The State is trying to address this issue by various legal methods, with the coercive administrative measures under Article 405a of the Labour Code being foremost in this respect in recent years. The self-imposed purpose of this paper is to analyse the legal conformity and effectiveness of these measures within the context of the right to work as proclaimed in Article 48 (1) of the Constitution of the Republic of Bulgaria.

1. Labour shall b guaranteed and protected by the law

Article 16 of the Constitution proclaims that guaranteeing and protecting labour by a law are the two fundamental principles[1] which, acting in synergy, provide a legal basis for the performance of work as a citizens' constitutional right and value. In order to guarantee labour by a law, the State is required:

(a) to recognise and regulate the various types of legal forms in which work can legally be performed. To date, the catalogue of

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[1] To this effect in **Vassil Mrachkov**, *Konstitutsionalizirane na trudovoto pravo* [Constitutionalisation of Labour Law], Constitutional Studies, Volume I, Constitutional Court of the Republic of Bulgaria, Sofia, 2019, p. 115-117.

The Constitutional Court proclaimed and reasoned its theses, recognising the significance of Article 16 of the Constitution as a "fundamental guiding principle" and a "fundamental constitutional principle" in Decision No. 7 of 2012 in Constitutional Case No. 2 of 2012, Decision No. 7 of 2016 in Constitutional Case No. 8 of 2015 and Decision No. 1 of 2018 in Constitutional Case No. 3 of 2017.

such legal forms includes: various types of civil-law relationships, including under a management contract, an authorised officer contact, etc.; various types of employment relationships; civil-service relationships; relationships in the judiciary; practice of a liberal profession, work as an agricultural producer, etc.;

(b) to develop the various types of legislations regulating the recognised types of legal forms of work on the basis of their specific fundamental principles, method of regulation and freedom of contract. The essential laws regulating the various forms of performing work are: the Obligations and Contracts Act, the Commerce Act, the Labour Code, the Civil Servants Act, the Administration Act, the Judicial System Act, The Bar Act, etc.;

(c) to lay down a specific set of rights and obligations with the help of which work is performed within the framework of the various types of legal forms[2].

In order to protect labour by a law, the State is required:

(a) to lay down the constituent elements of the violations of the specific rights and obligations with the help of which work is performed in the various types of legal forms;

(b) to lay down protection of the same type and effectiveness upon violation of the legislation applicable to the various legal forms and upon violation of the rights and obligations with the help of which work is performed in a particular legal form[3].

Recognising the various forms as legally conforming and therefore equally footed options is only the first aspect of providing the complete range of legal guarantees and protection of labour as conscious and purposeful activity. Undoubtedly, the more forms the State regulates, the wider choice it offers for the performance of work in the form or forms that best serves citizens' interests. The more structured and accurately differentiated the types of legislations, the more effective is the control over their observance

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[2] To a different effect, see **Vassil Mrachkov**, op. cit., p. 115-116.

[3] Cf. ibid.

For the characteristics of the review as to constitutionality/protection of constitutional rights, see **Mariana Karagiozova-Finkova**, *Amerikanskiyat i evropeyskiyat model za sadeben control za konstitutsionnost* [The American and the European Model of Judicial Review as to Constitutionality], Albo, Sofia, 1994, p. 119-126; for the protection of citizens' fundamental political rights, see **Natalia Kiselova**, *Politicheski prava na balgarskite grazhdani* [Bulgarian Citizens' Political Rights], Ciela, Sofia, 2017, p. 213-232.

and, respectively, the protection upon a violation of the specific set of rights and obligations by which work is performed. In this sense, the interdependence between "guarantee", "protection", "law" and "labour" reveals the first aspect of the significance of Article 16 of the Constitution as a founding principle in the process of developing and applying the various types of legislations.

2. The right to work under Article 48 (1) of the Constitution

Article 48 (1) of the Constitution regulates the right to work as a right whose exercise depends on the will and interest of citizens as holders of that right and which comprises two elements. The first element is the right to a free/autonomous choice of a legal form in which to perform work, and the second element is the right to freely form and terminate the chosen type of relationship, as well as to freely determine and exercise the set of rights and obligations which is specific to that relationship. Choice is fundamental to the right to work because it helps citizens to determine:

(a) whether to perform work at all; the specific type of relationship, out of all types available, under which to perform work; whether to perform it under one or concurrently under multiple relationships of the same type or of different types; whether to do so in a single place or in different places, etc.;

(b) the type of legislation to apply and the intensity of the regulatory State intervention to recon with; the existence of a mandatory framework and its correlation with non-mandatory regulation; the existence, number and content of prohibitions and/or restrictions of the freedom of contract, etc.;

(c) whether to be placed on an equal footing with the counterparty or to tolerate and submit to its power; the type, scope and content of that power, etc.;

(d) whether to exercise rights and obligations whose type and content are mandatorily regulated and guaranteed, respectively, rights with mandatorily regulated lowest and highest thresholds, and/or only the ones bargained for, etc.;

(e) the type and content of protection triggered by a violation of the rights and obligations under the relationship;

(f) whether compliance with the applicable legislation should be subject to administrative control and, respectively, whether

non-compliance with this legislation should be subject to coercion and protection by the State, etc.

Once they have chosen a type of relationship, citizens exercise the right to work by enjoying the freedom of contract in order to:

(a) form, modify, and terminate the relationship;

(b) determine the number, type and content of the set of rights and obligations that is specific to the relationship;

(c) exercise the rights and obligations that are bargained for and are therefore guaranteed;

(d) in case the set of rights and obligations as bargained for is violated, pursue the legal remedy whose type, content and intensity has been established by the State, etc.

The two elements interact as a holistic mechanism which is needed for the performance of work as a constitutionally proclaimed right. Hence, implementing Article 16 of the Constitution, the State is obliged in the same degree to guarantee and protect the free choice of a type or types of relationships and the free exercise of the rights and obligations under the selected type or types of relationships. The legislator must:

(a) guarantee the choice and the performance of work under the various types of legal forms[4] by providing for options to terminate an existing relationship and to form a new relationship of the same or of a different type in line with the free will and interest of the citizens and for protection upon its violation;

(b) limit the choice and the performance of work to one and/or to concurrently several relationships only in defence of the public interest and proportionality between such limitations and achieving the legitimate aims;

(c) provide for and grant equivalent and effective protection to/support for the right to work under the various types of relationships consisting in equivalent additional rights and/or facilities in the event of *force majeure*, crisis situations[5], etc.

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[4] To a different effect in: **Velko Valkanov**, *Zashtita na pravata na choveka po vatreshnoto i mezhdunarodnoto pravo* [Protection of Human Rights under Domestic and International Law], Chernorizets Hrabar Varna Free University, Varna, 2002, p. 148-149.

[5] The epidemic emergency in connection with COVID-19 clearly showed the difficulty of the State to provide identical protection and financial support of equal value to all types of legal forms for the exercise of the constitutional right to work which the State itself recognises and regulates.

Certainly, neither the choice of a relationship nor the freedom to exercise it can and must be absolutised because beyond its "legal existence" the right to work depends on a number of factors which directly or indirectly affect its exercise[6]. Such factors include the economic and financial situation, the situation on the labour market, citizens' realistic opportunities to perform work in various forms, etc. Even though they exert a significant influence, these factors cannot justify the "limitative" interpretation of the right to work, and even less so substantiate a "diminution" in the State's obligations in the process of guaranteeing and protecting this right.

The right to work under Article 48 (1) of the Constitution is a composite right and comprises numerous exercise options, by applying a different type of legislation and implementing a specific set of rights and obligations. The constitutional identity and value of that right manifest themselves only within the context of the various legal forms through which citizens exercise it. The variety of these forms precondition the ample and complex nature of that right, their steady development ensures its evolution, and their effective implementation makes it an applicable and "living" right. Its complexity fully rationalises the commitment of the State under Article 16 of the Constitution to develop the various types of legislations as a set of guarantee and protection provisions, taking account of the specificity of the legal form of labour as regulated.

In this sense, reducing and limiting the right to work under Article 48 (1) of the Constitution only to "choice", "work", "job holding", "labour" under an employment relationship[7] is not only false but

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[6] Curiously, in its Decision No. 7 of 2012 in Constitutional Case No. 2 of 2012, the Constitutional Court stated that maintaining that the conduct of both employer and factory and office worker in an equal measure are the product of a free choice, as well as that they are equally footed, implies ignoring the conditions on the labour market as well as the position of each of the parties with a view to protecting its interests. The choice of anyone who provides labour power without concluding an employment contract is not a free choice because their right to refuse to accept the conditions set as a mandatory component of their free will is overridden by the risk of remaining unemployed, even though they are aware of stepping into an area of insecurity.

[7] To this effect in: **Velko Valkanov**, op. cit., p. 148-153; **Krasimira Sredkova**, *Trudovo pravo. Obshta chast. Lektsii* [Labour Law. General Part. Lectures], St Kliment Ohridski University Press, Sofia, 2010, p. 128-130; **Emilia Drumeva**, *Konstitutsionno pravo* [Constitutional Law], Fourth edition, enlarged and revised, Ciela, Sofia, 2013, p. 760-766; **Vassil Mrachkov**, op. cit., p. 119-122; **Georgi Bliznash-**

also comes into conflict with the legislation in force. In my opinion, such treatment alters the conclusions both with regard to the essence and content of the right and with regard to the State's obligations to guarantee and protect that right by a law. A statistical majority of citizens indeed opts, and most probably will continue to opt, to exercise their right to work in the form of an employment relationship, which in itself determines its special place and significance among the rest of the types of legal forms. But this does not justify the "narrowing" and, figuratively speaking, the "robbing" of the right to work under Article 48 (1) of the Constitution by presenting it as a mere opportunity to form and pursue employment relationships.

The right to work offers a large selection of legal opportunities. Seizing these opportunities requires from citizens an awareness of the types of legislations and the rights and obligations of varying type and content that are regulated by these legislations. The formation of a relationship which best serves citizens' specific interest requires a conscious choice between "more freedom" of exercise at the expense of "less guaranteed rights", "more limited" freedom of contract at the expense of greater "legal security and stability" of the relationship, etc. The exercise of the right to work materialises the legal effects of a substantial existential choice which not only accompanies but largely defines the personality expression and social life of each and every citizen[8].

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ki, *Konstitutsionno pravo. Chast parva. Printsipi* [Constitutional Law. Part One. Principles], St Kliment Ohridski University Press, Sofia, 2020, p. 645-647.

[8] For the right to work as citizens' fundamental socio-economic right, see in: **Velko Valkanov**, op. cit., p. 148; **Boris Spasov**, *Konstitutsionno pravo na R. Balgaria. Chast treta* [Constitutional Law of the Republic of Bulgaria. Part Three], YurisPress, St Kliment Ohridski University Press, Sofia, 2004, p. 185 and 187-188; for the right of work as a sole fundamental right to work and occupation, in: **Emilia Drumeva**, op. cit., p. 761-763; for the right to work as a fundamental right, participatory right and acquisitive right, in: **Emilia Drumeva**, *Trudovite prava sa osnovni prava. Yubileen sbornik, posveten na 80-tata godishnina na prof. d.yu.n. Vasil Mrachkov* [Labour Rights are Fundamental Rights. Jubilee Miscellany for the 80th Birth Anniversary of Prof. Vassil Mrachkov, D. Sc. (Law), Trud i Pravo Publishing House, Sofia, 2014, p. 57-70; in the context of "second-generation" fundamental social rights, in: **Natalia Kiselova**, *"Vtoro pokolenie" osnovni sotsialni prava na choveshkata lichnost v Konstitutsiyata na Republika Balgaria* ["Second-Generation" Fundamental Social Rights of the Human Person in the Constitution of the Republic of Bulgaria] in: *Aktualni problemi na trudovoto i osiguritelnoto pravo,*

3. Boundaries to the exercise of the right to work under Article 48 (1) of the Constitution

Citizens exercise the right to work within the boundaries of the legal form which they have chosen, applying the type of legislation that regulates this form and implementing the complete range of rights and obligations regulated in that legislation. The freedom to choose from the various types of legal forms and to implement them does not imply that citizens may concurrently apply a part of one type and a part of another type of legislations; to implement concurrently the rights of one type of relationships and the obligations of another type of relationships, etc. Each and every "performance of work" in breach of the boundaries and "mixing" the different types of legislations, the types or legal forms and, respectively, rights and obligations regulated by these legislations, constitutes a specific situation of abuse of the right to work. In such a situation, citizens do not exercise the right under Article 48 (1) of the Constitution tallying with the public interest and within the boundaries of "what the State permits" but for the purpose of violating or circumventing the application of the relevant type of legislation and evading the complete range of rights and obligations that are due but which they regard as "adverse" and therefore "unwanted". Within this context, the obligations under Article 16 of the Constitution find yet another important manifestation - more specifically, the State must develop a set of legal remedies which should guarantee and protect labour:

(a) upon the application of a type of legislation which differs from the type of relationship that is State-regulated and "permitted" under the type of relationship chosen by citizens, and

(b) upon the implementation of a set of rights and obligations which differs from the type of relationship that is State-regulated and "permitted" under the type of relationship chosen by citizens.

[Topical Issues of Labour and Social-Security Law], Vol. X, St Kliment Ohridski University Press, Sofia, 2018, p. 2018, p. 35-51; as a general right to work, in: **Vassil Mrachkov**, *Sotsialni prava na balgarskite grazhdani* [Social Rights of Bulgarian Citizens], Ciela, Sofia, 2020, p. 80-97; **Vassil Mrachkov**, Constitutionalisation of Labour Law, op. cit., p. 119-127; for the right to work as a composite right incorporating the rights under Article 48 (1), (3) and (5) of the Constitution, in: **Georgi Bliznashki**, *Constitutional Law,* op. cit., p. 645-647.

4. Restriction of the right to work under Article 48 (1) and prohibition of forced labour under Article 48 (4) of the Constitution

The right to work under Article 48 (1) of the Constitution is not absolute and may be restricted if the conditions, as provided for in the law, for coercive intervention and observance of the principle of constitutionality, are fulfilled. Analysing various situations, the Constitutional Court has proclaimed and has consistently maintained that such restriction is admissible where there are legitimate/legal grounds and the principle of commensurability/proportionality between public interest and coercion is observed. The Court has developed a settled case-law to this effect in Decision No. 20 of 1998 in Constitutional Case No. 16 of 1998; Decision No. 2 of 2002 in Constitutional Case No. 2 of 2002; Decision No. 15 of 2010 in Constitutional Case No. 9 of 2010; Decision No. 2 of 2011 in Constitutional Case No. 2 of 2011, etc. The State may restrict or hinder rights under a particular type of relationship as well as the concurrent exercisability of the right under several identical or different types of relationships, as long as the measure attains legitimate aims set by the legislator and does not go beyond what is appropriate and necessary in order to achieve these aims. Accordingly, the restriction is legally non-conforming and inadmissible where the aim pursued is disproportionate or the State intervention is excessive and impairs the essence and identity of the right to work under Article 48 (1) of the Constitution.

Practice abounds in examples of restricting the right to work in the various types of legislations, including: suspension from work under an employment relationship; occupational rehabilitation prescribed by the medical expert evaluation bodies; prohibitions and restrictions on the formation of employment relationships in the State administration; removal from a position under a civil-service relationship; removal from office of a magistrate, etc. There are frequent situations of restriction by law of the possibility to perform work concurrently under two or more types of relationships that are identical or different in type, including: prohibitions of a concurrent implementation of an employment relationship and a civil-service relationship; of an employment or civil-service relationship and a relationship of a magistrate in the judicial sys-

tem; of an employment relationship and practice of a liberal profession, etc. By a steadily increasing number of provisions, the legislator prohibits the formation of employment relationships and/or civil-service relationships with particular parties for a definite period of time after the termination of employment relationship and/or civil-service relationships in various State agencies, State commissions, etc.

Article 48 (4) of the Constitution proclaims that "[n]o one may be compelled to perform forced labour" and prohibits each and every measure that compels citizens to perform work despite and regardless of their will and interest. The coercion is of a such intensity and content that it does not only restrict or impede but denies citizens the right to work by unilaterally "imposing" on them the type of legal form and the set of rights and obligations by which to exercise it. Such coercion entirely takes away the free choice and the free performance of work and replaces them by the "obligation" to "exercise" them in the form of a single State-regulated type of relationship that is laid down as legally conforming. The performance of work as a "free choice" and "self-determination departing from the rule" are no longer elements of a right but constituent elements of a particular violation of the law. As a result of this, unlike the restriction of the right to work, which is a State intervention that is necessary and admissible in order to meet particular needs in the general interest, the coercion to perform work is by definition legally non-conforming and inadmissible.

5. The right to work under Article 48 (1) of the Constitution within the context of an employment and civil-service relationship

Opting to exercise the right to work under Article 48 (1) of the Constitution through an employment relationship, citizens decide:

(a) to apply labour legislation as a complete range of State-made mandatory provisions, non-mandatory provisions with a mandatory element and non-mandatory provisions addressed to citizens in their capacity as factory or office workers/employees and the counterparties in their capacity as their employers;

(b) to apply the non-statutory sources of labour law addressed to citizens in their capacity as employees and the counterparties

in their capacity as their employers. The sources in question are a collective agreement and/or the internal wage rules (internal rules) which, by virtue of the sanction conferred on them, lay down thresholds of labour rights that are higher compared to the State-set thresholds and therefore regulate the employment relationship *in lieu* of the relevant statutory sources. Another such non-statutory source is the internal work rules (the rules) which, by virtue of the sanction conferred on them, lay down essential labour duties of employees and, alongside the statutory sources, regulate the employment relationship;

(c) to perform work within the framework of a constant and systemic legal subordination to the employers who exercise their power as a set of reformative rights when and because their interests so dictate. Employers continuously and systemically "wield power" over employees by unilaterally triggering changes to their legal sphere in terms of fixing the content and assigning the discharge of their labour duties. For their part, employees are in constant "subordination" because they are obliged to incur the changes triggered by the employers and, regardless of their will, to discharge the duties imposed with the help of such changes. Moreover, the State also vests employers with standard-setting power by which to fix and assign duties not only to an individual employee but also to the set of employees, regulating their relations by the rules. A case in point of the mechanism of power and subordination is the employers' right to fix, acting entirely in their own interest, the number, type and content of the labour duties that employees are due to discharge and to determine single-handedly which of these duties to assign, at what frequency and with what intensity; whether to assign such duties for an individual discharge or for a joint discharge with other employees, etc. Employers also single-handedly fix and assign the particular days, the length and the part of the day or night during which employers are obliged to work; employers assign work on public and/or national holidays, on-call duty, stand-by duty, etc. Employers fix the type and sizes of work targets in a piece rate system and assign them for execution; employers select the method of work and oblige employees to follow it, including the use of equipment, technology, materials, etc.; employers constantly control and "adjust" employees' work by giving them binding orders, directions, instructions, etc. Acting

in their own interest, employers oblige employees to work in definite work places and/or places of work; post employees to work in other settlements or abroad, etc. Certainly, employers exercise their power within mandatorily regulated boundaries, including maximum daily, weekly and shift working time, maximum overtime work, maximum extended working time, etc.; minimum meal breaks, daily and weekly rest periods; prohibitions and restrictions on the performance of work in specific conditions and/or in activity requiring a specific workload, etc. Employers have full discretion to decide the extent to which to “subordinate” employees and/or “give them leeway” in the process of work, but the fact that employers do not exercise their power in full measure or do not exercise this power *vis-à-vis* all employees in the same manner does not divest employers of this power. It can be concluded that the peculiarities of work necessitate that it be assigned and provided as essential prestation with the help of “power” and “subordination” between the parties. Their implementation by means of changes that are unilaterally triggered by employers with the help of the reformative rights and are complied with by employees as a set of duties shape the employment relationship and differentiate it from the other types of relationships in which the constitutional right to work materialises;

(d) to perform work “on pain” of incurring the adverse effects of disciplinary liability unilaterally enforced by employers, upon a breach of the duties as assigned. The disciplining power enables employers to establish single-handedly that a disciplinary offence has been committed; to determine its gravity and social danger; to determine the relevant disciplinary sanction and to impose it. Accordingly, employees incur the complete range of the “sanctioning” effects resulting from the exercised reformative right which have been determined and imposed by the employers by means of the relevant disciplinary measure;

(e) to perform work “in exchange for” a large selection of rights, mandatorily regulated and guaranteed by the State in terms of grounds and lowest threshold and implemented through employers’ reciprocal obligations. The following list of fundamental rights that employees exercise under an employment relationship makes no claim to be exhaustive and has been compiled only for the purposes of this paper. The legislator regulates labour remunerations

varying by grounds and amounts which, as a whole, fairly and fully indemnify the activity provided. Employees are entitled to basic labour remuneration of not less than a minimum amount, paid periodically, indemnifying the work done and due in terms of content and amount; employees are entitled to supplementary labour remuneration of not less than a minimum amount, paid periodically, indemnifying the better work as a result of amassed professional experience and skills; employees are entitled to supplementary labour remuneration for overtime work, indemnifying the amount of work performed in excess of the amount due; employees are entitled to supplementary labour remunerations for night work, work on public holidays, stand-by duty and on-call duty, indemnifying work under hazardous and specific conditions, etc. Employees are entitled to a basic, extended and additional paid annual leave whose minimum length varies depending on the specificity of work and the conditions for its performance, for which employers "pay" in full even though they do not receive any work whatsoever for the period of use. Employees have at their disposal and can use an exceedingly large selection of paid or unpaid leaves, including but not limited to: marriage leave, compassionate leave when a relative dies; leave to attend school, compulsory leave and/or trade unionist leave; pregnancy, child-birth and child-care leave, etc. Employees are entitled to health and safety at work which are entirely financed, provided and arranged by employers; employees are entitled to a benefit when their health or life is harmed as a result of an accident at work or an occupational disease, regardless of whether the employers have caused the harm culpably and unlawfully. Employees receive benefits varying by grounds and a minimum guaranteed amount replacing a labour remuneration which has not been earned by work owing to reasons lying with employers and/or harm sustained as a result of the work. Employees are entitled to security and stability of the relationship, which are ensured by restricting employers' right to terminate the relationship only on grounds laid down in a law and whose exercise is subject to a number of prohibitions, etc.;

(f) to perform work "in exchange for" a large selection of rights of a higher threshold compared to the State-established rights, which are regulated in a collective agreement and/or internal rules. In their capacity as addressees of the relevant non-statutory

source, the parties to the relationship apply the regulatory system established in that source which is more favourable to the employees and includes: larger amounts of the basic remuneration and of the supplementary remunerations that are State-regulated in terms of grounds; supplementary remunerations paid on grounds other than the State-established ones, including: bonuses, premiums, cash rewards, incentives, social and welfare allowances, etc.; lengths of the basic, extended and additional paid annual leave which are larger compared to the State-regulated lengths; larger amounts of part of the benefits due by the employers; additional protection upon dismissal compared to the protection afforded by the legislator, etc.;

(g) to perform work with legal remedies "enhanced" by a number of additional rights and facilities, including: cost-free court proceedings; fast-track proceedings for part of the labour disputes; ample protection upon a legally non-conforming termination of the employment relationship, etc.;

(h) to perform work with "amplified" protection provided by the General Labour Inspectorate Executive Agency (the authority), which exercises overall control as to compliance with labour legislation, including by the imposition of coercive administrative measures and the enforcement of administrative penalty liability when labour legislation is violated.

Having opted for an employment relationship, citizens exercise the right to work under Article 48 (1) of the Constitution and, to this end:

(a) acting in their own interest, they form and terminate this relationship;

(b) they do not bargain for basic parameters of work but for the range within which the employer unilaterally fixes these parameters, assigns them, and requires their execution. By way of illustration, this specific correlation between "bargaining" and "unilateral fixing" of the employees' duties finds the following manifestations (making no claim to be exhaustive): The parties bargain for the job title, but the number, content and nature of the duties which filling this job comprises are fixed unilaterally by the employer by the job description, the technological and technical rules, instructions, orders, etc. Through the working time the parties bargain for the amount of labour due in a time rate system, and the employer may

unilaterally increase this amount by assigning overtime work, extending the working time, etc. In a piece rate system, the amount of labour is not bargained for because the employer unilaterally fixes and, respectively, modifies this amount by the work targets. The parties bargain for the place of work within which the employer, acting in its own interest, fixes the workplace where the employee must work; the employer unilaterally assigns work outside the place of work as bargained for, within and/or beyond the limits of that settlement, within and/or outside the territory of the Republic of Bulgaria, etc.;

(c) they do not bargain for clauses derogating from the application of the mandatory rules and the non-mandatory rules with a mandatory lowest threshold as set in the statutory and non-statutory sources. Each and every clause which, regardless of how formulated, aims at the non-application of a particular provision or, respectively, at the non-exercise of the rights and duties regulated in that provision, is invalid and does not produce effects. *In lieu* of any such clause, the relationship is subject to the application of the respective rule derived from a statutory or non-statutory source which guarantees the exercise of the complete range of the employee's labour rights as regulated in the sources;

(d) they do not bargain for lower thresholds of the labour rights compared to the thresholds established in the statutory or non-statutory sources. Each and every clause which fixes a threshold of a right contrary to a mandatory lowest threshold set in a rule derived from a statutory or non-statutory source is invalid and does not produce effects. *In lieu* of any such clause, the relationship is subject to the application of the respective regulating rule which guarantees the exercise of the labour rights at their lowest thresholds as regulated in the sources;

(e) they bargain for thresholds that are higher compared to the thresholds regulated in the sources and/or a larger number of rights compared to the number regulated in the sources, thereby guaranteeing the implementation of labour standards that are more favourable than the commonly applied labour standards.

Therefore, the exercise of the right to work under an employment relationship does not boil down to systemic subordination but also involves citizens' option to exercise a large selection of rights. The freedom of contract is restricted and materialises with-

in a number of mandatory prohibitions and boundaries established by the rules in the statutory and non-statutory sources of labour law. This freedom is constantly controlled and steered towards the establishment of more favourable arrangements, with more numerous and greater rights of employers compared to the rights laid down in the sources. The intensive State intervention deprives citizens of part of their discretion but ensures them a greater stability of the employment relationship and security when exercising the rights incorporated into the content of that relationship. Hence, the guarantee of labour under Article 16 of the Constitution has evolved into protection of labour, which is specific to labour law and materialises as a bundle of employees' duties and rights with a lowest threshold.

Opting for a civil-law relationship as a form for the exercise of the right to work under Article 48 (1) of the Constitution, citizens decide:

(a) to apply the relevant part of civil legislation with a minimum number of mandatory provisions and predominant non-mandatory regulation, which leaves a broad scope for manifestation of the freedom of contract;

(b) to deliver a work outcome while being equally footed in their capacity as contractors with the counterparties in their capacity as clients[9]. Equal footing precludes the possibility of the contractors being under the continuous and systemic "power wielded" by the clients who would single-handedly fix and "impose" the parameters of the prestation due. Clients do not have at their disposal a set of reformative rights with the help of which, despite and regardless of the contractors' will, to fix and, respectively, to modify the content of the contractors' duties; to fix and change the place of performance; unilaterally to assign an outcome that exceeds the outcome as contracted and due in terms of amount; to fix the days and the time during which the outcome is to be achieved; to exert constant control and to give binding directions in the process of performance, etc. This is a guarantee that contractors prestate the

[9] To this effect in: **Vitali Tadzher**, *Grazhdansko pravo na NRB. Obshta chast. Dyal I* [Civil Law of the People's Republic of Bulgaria. General Part. Section I], Nauka i Izkustvo, Sofia, 1972, p. 17-18, 21 and 155-158; **Maria Pavlova**, *Grazhdansko pravo. Obshta chast* [Civil Law. General Part], Second edition, revised and enlarged, Sofi-R, Sofia, 2002, p. 32-33.

work outcome without being placed in legal subordination consisting in the discharge of duties whose number, content and nature are beyond their will;

(c) to deliver a work outcome while remaining "free" in the process of its achievement[10]. The parties agree on the parameters of the final outcome due, but the manner in which this outcome is achieved lies within the single-handed discretion of the contractors who determine on their own the days on which to prestate, the duration of such prestation, the rest breaks in it; the exact location and the conditions, provided by the contractors themselves, to do so; whether to prestate piecemeal or entirely at once; the succession of the separate activities; submitting to control on the part of the clients which may not interfere with the contractors in the process of work;

(d) to deliver a work outcome "on no pain" of incurring any adverse effects of a unilaterally and extrajudicially enforced legal liability if and when the clients determine that the contractors culpably fail to discharge the duties as agreed;

(e) to deliver a work outcome in exchange for a minimum number of mandatorily regulated and State-guaranteed rights. The legislator does not regulate a large selection of rights, nor does it mandatorily fix their lowest thresholds, but gives the parties leeway to fix and exercise them. The legislator does not regulate and does not impose on clients a set of obligations to ensure health and safety at work in order to ensure the protection of contractors' life and health; the legislator does not oblige clients to pay remuneration in situations where contractors "need to rest", "are sick", "are getting married", "take care of a child", etc. by reason of which contractors do not perform the subject-matter of the contract; the legislator does not prohibit clients from terminating the relationship because contractors are permanently disabled, have developed particular diseases, or have children under the age of 3; the legislator does not oblige clients to pay benefits of not less than a minimum amount upon the termination of the relationship, etc.;

(f) to deliver a work outcome without being addressees of other than the statutory sources which, by virtue of the sanction conferred on them, increase the number of contractors' rights and/or

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[10] To this effect in: **Vitali Tadzher**, op. cit., p. 155-158; **Maria Pavlova**, op. cit., p. 46-51.

set higher thresholds of these rights that are more favourable for contractors;

(g) upon violation of the rights, to have access to legal remedies without specific facilities and/or additional "powers".

Having opted for a civil-law relationship, citizens exercise the right to work under Article 48 (1) of the Constitution and, to this end:

(a) acting in their own interest, they form and modify the content of this relationship and terminate it;

(b) they bargain for the parameters of the final outcome due and, within these parameters, their freely determine and implement their "standing" as contractors;

(c) they bargain for the number, content and manner of exercise of their rights as contractors. The lack of a detailed mandatory framework leaves a broad scope for manifestation of the freedom of contract in fixing the contractors' rights which become due and guaranteed on the basis of the reciprocal agreement reached. The lack of lowest thresholds of the rights laid down in the sources does not restrict the freedom of contract but, at the same time, it deprives contractors of the security that, regardless and despite what has been agreed, contractors will enjoy these rights up to the relevant guaranteed thresholds. The equal footing on which the parties are placed legally guarantees the freedom to achieve the outcome as due and agreed at the expense of fewer legal guarantees regarding the rights and the stability of the civil-law bond.

It can be concluded that the profoundly different types of prestation under an employment relationship and a civil-law relationship are objectified in the different types of legal conduct implementing the rights and obligations that differ in type and content. The manifestation of the outward characteristics revealing the provision of labour power as relationships of power and subordination and of the civil-law outcome as relationships of an equal footing are fundamental for classifying relationships as employment or civil-law.

6. Significance of Article 1 (1) and (2) of the Labour Code

Paragraphs (1) and (2) of Article 1 of the Labour Code regulate a specific causal link between the type of prestation, the type of relationship under which this prestation materialises, and the type of legislation that regulates this relationship. Opting for a type of

relationship under which to exercise the right to work under Article 48 (1) of the Constitution, citizens automatically actuate the application of the separate elements as well as the whole chain of legal effects. The significance of the provisions manifests itself in several essential respects.

First, these provisions guarantee that when they provide their labour power for continuous and unilateral use, citizens exercise the right to work under Article 48 (1) of the Constitution solely in their capacity as employees under an employment relationship. Provided that, acting of their own free will, citizens place themselves in legal subordination; continuously discharge a bundle of duties that are unilaterally fixed, assigned and controlled by the other party; incur sanctioning effects imposed unilaterally upon a failure to discharge these duties, citizens do so as employees under an employment relationship as the sole legal form that conforms to the law and is permitted by the State. The formation, modification and termination of citizens' employment relationships are regulated solely and exclusively by labour legislation as a complete set of applicable mandatory rules, non-mandatory rules with a mandatory lowest threshold and/or highest threshold and non-mandatory rules derived from statutory and non-statutory sources. As employees, citizens exercise the complete range of labour rights that are State-regulated in terms of grounds and lowest threshold, as well as labour rights that differ in grounds and with higher thresholds compared to the thresholds of the labour rights laid down by the State.

At the same time, the provisions guarantee that where subjects single-handedly dispose of the labour power placed at their disposal, they do so solely and exclusively in the capacity of employers under an employment relationship. Such subjects are required to apply labour legislation and to fulfil the complete range of obligations by which employees implement their labour rights at levels that are not lower than the lowest thresholds laid down in the sources.

Secondly, the provisions guarantee that when citizens do not provide their labour power for unilateral use, they exercise their right to work under Article 48 (1) of the Constitution without becoming employees under an employment relationship. When citizens do not place themselves in dependence within which to dis-

charge continuously duties that are unilaterally fixed and assigned by another party, citizens do not acquire the capacity of "employees", whereas the counterparties in the legal bond do not acquire the capacity of "their employers". Accordingly, the relationship that is formed and implemented between them is not an employment relationship and is not subject to application of any of the provisions of the labour legislation in force. Article 1 (1) and (2) of the Labour Code guarantee this situation regardless of whether the prestation other than labour power is delivering a civil outcome; performing civil service; functioning as a judge, prosecutor or investigating magistrate; practising a liberal profession, etc., as well as regardless of whether the applicable legislation is the Obligations and Contracts Act, the Commerce Act, the Civil Servants Act, the Judicial System Act, etc.

Paragraphs (1) and (2) of Article 1 of the Labour Code regulate two options for the exercise of the constitutional right to work that are alternative but conform to the law and are therefore equivalent, which do not restrict this right but, on the contrary, guarantee its implementation, specifying the different effects that the choice between an employment relationship and all other types of relationships entails. Certainly, as basic wordings in the Labour Code, these provisions lay an emphasis on labour power as prestation under an employment relationship regulated by labour legislation that provides a large selection of labour rights that is specific to that legislation. In this sense, Paragraphs (1) and (2) of Article 1 of the Labour Code are indisputably significant as fundamental provisions in the system of legal means by which the State guarantees labour within the meaning of Article 16 of the Constitution. These provisions are at the core of the evolution and application of the statutory and non-statutory framework which regulates and characterises the employment relationship as a form of protection of labour in its purest and most comprehensive form.

7. Characteristics of the violation of Article 1 (1) and (2) of the Labour Code

The violation of Article 1 (1) and (2) of the Labour Code comprises the following elements:

(a) the labour power is not provided under an employment relationship as the only legal form that is permitted and legal-

ly conforming but under a civil-law relationship, which is legally non-conforming and is not permitted;

(b) the provision of labour power is regulated by civil legislation and not by labour legislation;

(c) the provision of labour power is implemented with the help of a legally non-conforming set of civil rights and obligations instead of by the exercise of labour rights and duties;

(d) the provision of labour power does produce legally conforming effects in social security law but legally non-conforming effects related to the civil-law relationship[11].

The violation of Article 1 (1) and (2) of the Labour Code poses a high degree of social danger because it does not limit itself to non-applying one or several particular labour provisions or to violating one or several particular labour rights. This violation consists in non-applying the labour legislation *in toto* and deprives citizens of the complete range of labour rights and State protection to which citizens' labour is entitled. Figuratively speaking, citizens place themselves in dependence and fulfil all obligations that are unilaterally fixed and assigned, incur the sanctioning effects of violating these obligations, but do not implement even a single right that is guaranteed by the State and is therefore due. The counterparties under the relationship use, dispose of and control citizens' labour power but do not apply labour legislation and do not fulfil any of the due labour obligations. The counterparties wield their full power, exercising the bundle of reformative rights, but do not incur any of the financial, legal and/or other types of effects that are mandatory for the employment relationship. This is a direct consequence of the

[11] Undoubtedly, the effects in social security law are not an element of the violation of Article 1 (1) and (2) of the Labour Code but are indicated because they are a very important and material consequence of the commission of this violation. Precisely these legal effects often motivate citizens and their employers to simulate an employment relationship by a civil-law relationship and to "evade" the application of the relevant social-security arrangements. The Constitutional Court took account of the specific significance of this issue and stated in Decision No. 7 of 2012 in Constitutional Case No. 2 of 2016 that the provision of labour power without an employment contract having been concluded is a conduct that benefits employers, to the extent that in this way employers "save themselves" the payment of social-security contributions for public social insurance, health insurance, etc.

fact that labour is provided in the “disguise” of a civil-law relationship instead of under an employment relationship.

The violation of Article 1 (1) and (2) of the Labour Code entails supplanting labour law by civil law, it deprives citizens of their labour rights and replaces them by the far “less ample” civil rights. Simulating the employment relationship by a civil-law relationship differs from the simulation of a civil transaction[12] because the effects of the latter occur within the same branch of law. The null transaction and the valid transaction are both civil-law transactions and the effects which they produce have the same civil-law characteristics, based on the subjects' equal footing and freedom of contract. The simulation under Article 1 (1) and (2) of the Labour Code entails far more profound and material changes because the null and valid relationships are phenomena belonging to different branches of law, regulated by different types of legislations: civil, on the one hand, and labour, on the other. This specificity of the simulation under Article 1 (1) and (2) of the Labour Code demonstrates the social significance of the violation and should be reflected in the protection provided by the law with the help of coercive administrative measures.

The violation comprises the above-mentioned elements of an objective breach of the mandatory rule in Article 1 (1) and (2) of the Labour Code, for which the fault of the employee and of the employer have no legal relevance whatsoever. This is only logical because coercive administrative measures focus on the objective breach of the law and aim to prevent it, cease it and/or cure the legally non-conforming effects caused by it[13]. The inclusion of fault in the grounds for the imposition of coercive measure materially curtails their capability of achieving the legal objectives and erodes their “practical value” as effective remedy for the rights. In this sense, the provision in Article 405a (3) of the Labour Code, according to which the relations between the parties before the imposition of the measure are regulated as under a valid employment contract if the factory or office worker has acted in good faith at the beginning of work, prompts a number of objections of which the main ones are discussed briefly below.

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[12] See in **Vitali Tadzher**, op. cit., p. 260-261.

[13] For further details, see in: **Kino Lazarov**, *Prinuditelni administrativni merki* [Coercive Administrative Measures], Nauka i Izkustvo, Sofia, 1981, p. 36-66.

First, "fault" is not an element of the grounds for the imposition of any of the coercive administrative measures laid down in Article 404 of the Labour Code[14], but it is an element of the grounds for the enforcement of administrative penalty liability in each of the situations under Articles 413 to 415c of the Labour Code[15]. As a result, the "deviation" in Article 405a (3) of the Labour Code comes into conflict with the essential benchmarks for the legislative differentiation between coercive measures and administrative penalty liability. With its existing content this deviation does not increase protection against the violation in Article 1 (1) and (2) of the Labour Code but, worse yet, it makes this protection impossible to implement if the employee has acted in bad faith.

Secondly, a strict interpretation and application of the provision leads to a legal absurdity: more specifically, where the employee has acted in bad faith, the simulated employment relationship proves to be invalid while the simulating civil-law relationship proves to be valid. In other words, the offence is vacated and the legally non-conforming effects are cured only if the employee was unaware and did not connive in the simulation or, respectively, these effects "remain in full force" where the employee knowingly connived. It turns out that the State "rewards" the party that exercised the rights of an employer but evaded the fulfilment of the obligations of an employer by simulation while "penalising" citizens

[14] For further details, see in: **Kino Lazarov**, op. cit., p. 55-60; **Tsvetan Sivkov**, *Administrativno pravo i administrativen protses* [Administrative Law and Administrative Procedure], Pleven Medical University, Pleven, 2013, p. 94-101; **Ivan Dermendzhiev, Dimitar Kostov, Doncho Hrusanov**, *Administrativno pravo na Republika Balgaria* [Administrative Law of the Republic of Bulgaria], Fifth edition, revised and enlarged, Sibi, Sofia, 2012, p. 363-376.

[15] For further details about the grounds and the objective of administrative penalty liability, see in: **Tsvetan Sivkov**, *Administrativno nakazvane. Materialnopravni i protsesualni problemi* [Administrative Penalisation. Issues in Substantive and Procedural Law], Sofi-R, Sofia, 1998, p. 44-60; **Tsvetan Sivkov**, Administrative Law and Administrative Procedure, op. cit., p. 102-114; **Ivan Dermendzhiev, Dimitar Kostov, Doncho Hrusanov**, op. cit., p. 300-361 and 308-318. For the distinctions between coercive administrative measures and administrative penalty liability, see in: **Miroslava Chifchieva**, *"Nakazatelniyat potentsial" na nyakoi prinuditelni administrativni merki* [The 'Criminal Potential' of Some Coercive Administrative Measures"] – in: *DE JURE*, No. 2, Faculty of Law, St Cyril and St Methodius University of Veliko Tarnovo, Veliko Tarnovo, 2020, p. 130-133.

who discharged their labour duties without exercising their labour rights.

Thirdly, the nullity affects the simulating civil-law relationship but not the employment relationship simulated by it which, by definition, is valid and, for this reason, the authority declares its existence (in the light of Article 405a (1) of the Labour Code). Therefore, the effects of the simulation must not be associated - if, of course, they can be differentiated at all - with the fault of the subjects as parties to the valid employment relationship but with their fault as parties to the null civil-law relationship. In my opinion, this is a case of mechanical replication and completely wrong transposition of the legislative handling of the complete invalidity of the employment relationship under Articles 74 and 75 of the Labour Code to its simulation by a null civil-law relationship. I therefore believe that applying coercive administrative measures depending on whether the employee acted in good faith or bad faith poses a risk to the protection of the right to work under Article 48 (1) of the Constitution which the State is obliged to provide by virtue of Article 16 of the Constitution.

The violation of Article 1 (1) and (2) of the Labour Code occurs during a definite period of time, from the point at which the simulation has commenced to the point at which the authority has ascertained this simulation or, respectively, the employee has died if the death predates the inspection.

8. Ascertainment of the violation of Article 1 (1) and (2) in conjunction with Article 405a of the Labour Code

Before imposing the coercive administrative measures, the authority ascertains:

(a) simulation of an employment relationship by a civil-law relationship, and

(b) the essential characteristics of the simulated employment relationship. This is a complicated activity of assessing factual circumstances varying in content and components, which is carried out with the help of all means of proof and whose ultimate result is objectified in two separate findings of the authority. The activities are interconnected and interdependent, which is why their differentiation is often underrated and the competence is misdefined as having an identical content and effects.

In the first place, the authority ascertains that the civil-law relationship that has been declared to it is not the relationship that the parties wish and implement in reality but serves to simulate an employment relationship and to evade the application of labour legislation and the rights and duties regulated in it. The conclusions are reached on the basis of a comparison between the mechanism according to which the parties *de facto* implement an employment relationship and the mechanism according to which they should have implemented the declared a civil-law relationship. Within the inspection, the authority ascertains facts which, as a whole, prove that the parties do not implement the relationship as equally footed; contractors do not "act" at their own discretion and without any intervention whatsoever by the clients; the remuneration is not paid after reporting and accepting a partial or complete outcome, etc. Instead, the authority ascertains that the so-called clients systemically fix, assign and oblige the "contractors" to carry out separate recurrent activities of, on the whole, uniform content. For their part, the so-called contractors "without bargaining", "without objection" and "without resistance" execute these activities for which they periodically receive the same sum of money whose amount is not based on an agreed price for a particular outcome reported and accepted in terms of quantity, quality and time limit, etc. The authority must ascertain a sufficient number of facts to prove beyond doubt simulation on the basis of the above-mentioned differences in the outwardly objectified types of conducts revealing the prestations under an employment relationship or a civil-law relationship. The fact that all types of means of proof can be used does not facilitate the activity of assessment and classification that is carried out within the inspection. Practice abounds in examples of simulating employment relationships, and some of them are discussed in brief for the purposes of this paper. A "flawless" civil-law contract, conforming to the legal requirements, is often concluded, but this contract is performed through relations of power and subordination that are typical of employment relationships and not of civil-law relationships. In other cases, the content of a contract "nominally" designated as civil-law contract includes subsequently executed clauses that are typical of an employment relationship, such as: job title; amount of supplementary remuneration for seniority and professional experience; length of a paid

annual leave; disciplinary liability upon breach of duties, etc. This discrepancy between an "outwardly declared" civil-law relationship which, in certain cases, is also "nominally formalised", and an objectively implemented employment relationship underlies the conclusion that this is a case of simulation of an employment relationship by a civil-law relationship.

In the second place, the authority ascertains the characteristics of the simulated employment relationship as follows: parties, period of existence, and content. The authority ascertains the particulars of the employer and employee in accordance with the legal definition in Item 10 of § 1 of the Supplementary Provisions of the Labour Code and the period during which the employment relationship existed. The date of the formation of that relationship is identical with the point in time as from which the simulation is ascertained, and the date of its termination is identical with the point in time of the inspection or the employee's death, if it predates the date of the inspection. Where the authority is unable to ascertain beyond doubt the commencement of the simulation, the employment relationship is declared and exists only on the date of the inspection as conducted (in line with Article 405a (1) and (4) of the Labour Code). The most difficult part is to ascertain the requisite content of the employment relationship because it requires an analysis of the application of a large part of the labour legislation in force. The job title is the element having the nature of requisite core content[16] whose lack makes it impossible to form the employment relationship and, in this case, also makes it impossible to declare the existence of this relationship. For lack of statutory regulation, the authority must indicate the title of the job that the employee performed under the simulated relationship. All other elements under Article 66 (1) of the Labour Code have the nature of requisite non-core content[17] and their lack does not make it impossible for the employment relationship to arise and, respectively, to be declared by the authority. Even though the legislator includes these

[16] For the requisite core content of the employment contract, see in: **Nina Gevrenova**, *Neobhodimo sadarzhanie na trudoviya dogovor* [Requisite Content of the Employment Contract], Ciela, Sofia, 2021, p. 43-51; 68-76 and 83-84.

[17] For the requisite non-core content of the employment contract, see in: **Nina Gevrenova**, Requisite Content of the Employment Contract, op. cit., p. 43-51; 128-131; 170-172; 219-221; 264-267; 280-282 and 332-334.

elements in the requisite content and obliges the parties to bargain for them, the legislator subjects them to a framework which replaces the missing clause and *in lieu* of it complements the content of the employment contract as good grounds for the arisal of an employment relationship. As a result, the authority is substantially relieved and facilitated when, acting within its competence under Article 405a (1) of the Labour Code, it complements the requisite content of the simulated employment relationship. For lack of an explicit agreement about a period, the relationship has been for an indefinite duration (in line with Article 67 (1) of the Labour Code) and the notice period that each party is supposed to give the other upon unilateral termination should be 30 days (in line with Article 326 (1) of the Labour Code).

Where the authority ascertains that the work was performed only when the employee was unilaterally assigned to be in motion, then the place of work was mobile (in line with Article 66 (3) of the Labour Code) with all ensuing effects, including non-application of the posting arrangements; no obligation to pay travel allowance even at its minimum rate, etc. Provided that the work was performed in the same place or in different places but within the limits of the same territory, the place of work was permanent and coextensive with the settlement in which the registered office of the employer is located (in line with Article 66 (3) of the Labour Code). For lack of a stipulation on part-time work, the working time under the simulated employment relationship was for full-time work whose maximum is laid down in the sources. In this sense, the provision of Article 405 (6) of the Labour Code, which introduced full-time work of 8 working hours, is incorrect because, owing to peculiarities of the job filled and/or the working conditions under the simulated employment relationship, the full-time work could have been reduced to 7 working hours, 6.5 working hours, etc. Given the lack of agreement reached regarding the thresholds of the various types of labour rights, the authority indicates the lowest thresholds of these rights as regulated in a source of labour law, whether statutory or non-statutory. The amount of the basic labour remuneration was calculated and paid according to the time rate system rules and equals the national minimum wage; the amount of the supplementary labour remuneration for seniority and professional experience was calculated on the basis of Article 12 of the Or-

dinance on the Wage Structure and Organisation, etc. Where the employer has internal rules regulating larger amounts of the basic labour remuneration and/or the supplementary labour remunerations compared to the State-set amounts, the authority indicates the relevant remunerations at their amounts that are more favourable for the employee. Depending on the intervals applied by the employer for the payment of labour remunerations, the authority indicates whether the labour remunerations were paid to the employee as a lump sum at once or in portions, as well as the frequency of their payment. Considering the ascertained specificity of the job and the working conditions, the authority determines the type of paid annual leave as basic, extended and/or additional and indicates the minimum State-regulated length of that leave.

I do not think that the thresholds of the separate labour rights can be determined in accordance with the collective agreement applied by the employer because there is no indisputable evidence that even if the employment relationship were not simulated, the employer would have been an addressee of the rules of that agreement as a member of a trade union organisation within the meaning of Article 57 (1) of the Labour Code or as an employee who has acceded to that agreement according to the procedure established by Article 57 (2) of the Labour Code.

Despite the differences, the ascertainment of the simulated employment relationship and its characteristics are elements of the same activity of the authority related to ascertaining the violation under Article 1 (1) and (2) of the Labour Code. These elements are significant as a *sine qua non* prerequisite for the imposition of the coercive administrative measures which cure the legally non-conforming effects. These elements themselves, however, do not constitute coercive administrative measures within the meaning of Article 22 of the Administrative Violations and Sanctions Act because they do not exert any outward impact/coercion whatsoever on the offenders in order to apply the rule of conduct laid down in Article 1 (1) and (2) of the Labour Code. These are also the main reasons why I share the opinion that the decree by which the authority ascertains and declares the existence of a simulated employment relationship for a past period of time is not one of the coercive administrative measures under Article 405a of the Labour Code.

9. Coercive administrative measures under Article 405a of the Labour Code

The State must regulate and provide protection of a type and content capable of removing the ensuing legally non-conforming civil-law effects and replacing them by the complete range of unimplemented but due labour rights and obligations. Protection must not restrict the right to work under Article 48 (1) of the Constitution, nor should it compel citizens to "opt" or to "exercise" this right in just a single legal form defined by the legislator. The solution to implement this protection by means of coercive administrative measures which the authority imposes while verifying compliance with labour legislation can easily be explained as this method ascertains the breach of the law and removes the legally non-conforming effects faster than judicial remedies. All the more so that there is an established system of control authorities: territorial directorates of the General Labour Inspectorate which, acting within their competence, have applied coercive administrative measures even before the enactment of Article 405a of the Labour Code[18].

For their part, coercive administrative measures as an outward, psychological impact on the subjects' consciousness/conduct, addressing a particular act of these subjects, could ensure the application of labour legislation and the complete range of labour rights and obligations. If the content of the coercion is properly defined and if it implied in the measure, such coercion could achieve the objectives set by the legislator: cessation of the violation under Article 1 (1) and (2) of the Labour Code, curing the unlawful effects, and restoration of the legally conforming situation[19]. It can reasonably be expected that after the authority has ascertained the existence of a simulated employment relationship, then the State, with the help of coercion, will seek to cure the unlawful effects caused by the simulation. The administrative measure is supposed to oblige the employers to implement the bundle of the employees' labour rights and, respectively, to fulfil their own reciprocal obligations for the entire period of the simulation. The employers must regis-

[18] For further details, see in: **Vassil Mrachkov**, *Trudovo pravo* [Labour Law], Ninth edition, revised and enlarged, Sibi, Sofia, 2018, p. 947-950.

[19] For administrative measures as coercion and the types of administrative measures, see in: **Kino Lazarov**, Coercive Administrative Measures, op. cit., p. 29-36 and 83-128.

ter the employment relationship as formed and terminated with the competent territorial division of the National Revenue Agency and recognise the entire period of its existence as length of employment service; the employers must receive and/or issue, for the first time, an employment record book of the employees, complete it by entering the due facts and circumstances, and immediately return the book to the employees. Based on the national minimum amount or a minimum amount set by virtue of internal rules, the employers must calculate the basic remuneration payable for the entire period of the simulation and, if the amount is less than the amount of the civil-law remunerations paid, the employers must pay the relevant difference.

The employers must calculate the supplementary labour remuneration for seniority and professional experience payable for the entire period of simulation, and if the sum total of that remuneration and the basic labour remuneration amounts to less than the amount of the civil-law remunerations paid, the employers must pay the difference. The employers are supposed to calculate the other types of labour remunerations that were payable on applicable and proven grounds by virtue of the statutory sources or by virtue of the internal rules, and if the sum total of these remunerations, the basic and the supplementary labour remuneration for seniority and professional experience is less than the amount of the civil-law remunerations paid, the employers must pay the difference. The employers must calculate the length of the paid annual leave which has accrued, is unused and has not lapsed and must pay a benefit for that leave on the basis of the last gross monthly labour remuneration, calculated as a sum total of the basic labour remuneration and the supplementary labour remunerations of a permanent nature, etc.

The State lays down two coercive administrative measures whose content is different than expected, as follows:

(a) directing the employers to offer the employees the conclusion of an employment contract, and

(b) issuing a decree replacing *ex nunc* the employment contract unless concluded[20].

[20] To a different effect in: **Vassil Mrachkov**, Labour Law, op. cit., p. 965-968.

The binding direction to employers to offer employees the conclusion of an employment contract raises a number of questions of which the main ones are discussed briefly below.

First, why "direct" the conclusion of an employment contract which obviously cannot play its "typical" role as grounds for the arisal of an employment relationship because its existence during a definite past period of time has already been ascertained by the authority.

Secondly, the direction does not guarantee that the targeted effect will be achieved because even if employers offer the conclusion of an employment contract, employees are under no obligation to do so. If employees decline, this is lawful conduct pursued within the freedom of contract upon the conclusion of an employment contract of content offered by the employer. Moreover, by that point in time employees already have this capacity and are interested in exercising their unimplemented labour rights as parties to the simulated employment relationship as ascertained by the authority.

Thirdly, considering that compliance with the direction is not contingent solely on the conduct of the employees as addressees, the coercion implied in that direction does not guarantee and does not ensure the achievement of the objective to cure the effects of the simulated employment relationship. Therefore, and in view of its capability of achieving its legal objectives, directing the employers to offer the conclusion of an employment contract to the employees qualifies as a debatable and ineffective coercive administrative measure.

The "genuine" significance of that measure manifests itself within the context of Article 405a (6) of the Labour Code, according to which the decree issued by the authority replaces the unconcluded employment contract between the parties as grounds for the continued existence of the employment relationship even *ex nunc*. It turns out that the idea is to retain the operation of the employment relationship *ex nunc* rather than to cure the legally non-conforming effects of the simulation. This conclusion is also borne out by Article 405a (7) and (8) of the Labour Code which regulate express grounds for the termination of the employment relationship as continued *ex nunc*, when the court revokes the decree as legally non-conforming. Consequently, the legislator, without any qualms

and even deliberately lays down a coercive administrative measure with the help of which to continue the operation of the employment relationship and the application of labour legislation *ex nunc*.

As a result, citizens are obliged to perform work *ex nunc*, too, under an employment relationship formed either by an employment contract concluded in compliance with the direction or by virtue of the decree issued by the authority. Employers, too, are obliged, in this capacity, to continue to be parties to an employment relationship formed by virtue of a coercively concluded employment contract or by virtue of the decree replacing this contract. Unlike the direction to conclude an employment contract, here the legislator does a far better job, managing effectively to ensure the achievement of its ultimate objective, namely to continue the employment relationship regulated by labour legislation *ex nunc*.

This State coercion cannot be justified by cessation of the wrongful conduct because such conduct would have existed during a past period of time, strictly defined as commencing on the initial date of the simulation and ending on the date of its ascertainment by the decree issued by the authority. This coercion cannot be justified by curing the legally non-conforming effects caused by the simulation because these effects occurred before the date on which the decree was issued and their curing requires the application of the statutory and/or non-statutory sources and the retroactive implementation of the due labour rights and obligations. Last but not least, the coercion cannot be reasoned by the existence of an immediate, real and significant danger of a future offence being committed in the sense of the same subjects simulating in future an employment relationship by a civil-law relationship. Preventive administrative measures are imposed when the authority ascertains a clear, serious and imminent danger of the law being violated, and the authority makes a case-specific assessment of this danger based on an analysis of the subjects' outward mental and behavioural manifestations[21].

In this case, however, the assessment is made by **the legislator which generalises that once they have simulated the employment relationship by a civil-law relationship, citizens will "by all means" continue to do so *ex nunc*, too.** As far as the legislator

[21] To this effect in: **Kino Lazarov**, Coercive Administrative Measures, op. cit., p. 84-88.

is concerned, the violation of Article 1 (1) and (2) of the Labour Code suffices to conclude that there is a serious, imminent, direct and real danger of its future violation which must be **prevented by the coercive imposition of an "employment relationship" as the "right" form for the exercise of the right to work under Article 48 (1) of the Constitution.**

Conclusions

The above invites reasoned conclusions that the State regulates and coerces on no legitimate grounds, and such coercion not only restricts, hinders or impedes the choice of a legal form and the freedom of contract upon the formation of this form but entirely precludes citizens from exercising this choice and freedom. The coercion is of such content that it frustrates the exercise of these elements whose guarantee and protection, by virtue of Article 16 and Article 48 (1) of the Constitution, is an obligation of the State as a constitutionally proclaimed right to work. The administrative measure laid down in Article 405a of the Labour Code exhibits the characteristics of "forced labour", "obliging" citizens to perform work under an employment relationship as the sole legally conforming and admissible legal form of labour. The existence and application of this measure cannot be justified by the seriousness of the offence or by the gravity of the legal and social problems that this offence causes and should prompt a discussion regarding its unconstitutionality and repeal. The findings reached within the context of Article 405a of the Labour Code reaffirm the need to recognise, guarantee and protect the right to work as a free choice and free exercise by means of the various legal forms as legally conforming and equivalent options available to citizens.

NATIONAL SECURITY MANAGEMENT AND ARMED FORCES CONTROL: AN OVERVIEW OF LEGISLATION AND CONSTITUTIONAL COURT JURISPRUDENCE

Konstantin Pehlivanov

Governing defence and implementing national security is one of the most intricate tasks facing State bodies, and the powers of the three supreme central authorities: parliament, government and head of State, traditionally intersect in this area. This paper will examine briefly the legal framework for the Armed Forces of the Republic of Bulgaria and the topical issues raised in recent years. The intersection of the powers of the supreme public authorities has prompted certain landmark decisions of the Constitutional Court, rendered quite a few years ago, that are worth recalling. As the paper went to press before the National Assembly Resolution on Providing Military and Military-Technological Support to Ukraine and Strengthening the Defence Capabilities of Bulgaria[1], which prompted Constitutional Court Procedural Order No. 2 of 8 March 2023 in Constitutional Court No. 1 of 2023[2], the paper does not discuss the most recent processed in this subject matter that were triggered by that Resolution.

1. Regulatory framework of armed forces control in retrospect

The constitutional regulation of the control of the armed forces has exhibited common features and solutions back since the establishment of the Third Bulgarian State:

In its Article 11, the Constitution of the Bulgarian Principality of 1879 (since 1911 Constitution of the Kingdom of Bulgaria[3]) uniquely identified the monarch as supreme commander-in-chief:

[1] Promulgated in *State Gazette* No. 89 of 2022.
[2] Promulgated in *State Gazette* No. 22 of 2023.
[3] Title amended in *State Gazette* No. 149 of 1911.

"The King shall be the Supreme Chief of all the military forces in the Kingdom *in time of peace as well as in time of war*[4]. He shall confer military ranks in accordance with the law". Article 73 (4) stipulates that "[t]he state of martial law shall be declared by law if the National Assembly is in session or by [royal, K.P.] decree on the joint responsibility of the ministers if the said Assembly is not in session. *In the latter case, the National Assembly shall be convened within five days to approve the decree as issued to this effect*" (the regulation is surprisingly similar to the present one, especially considering that under that Constitution the Council of Ministers did not emanate from the parliamentary majority but was appointed by the monarch at his personal discretion).

The next Constitution of the People's Republic of Bulgaria of 1947[5] placed the armed forces under the supreme authority of the Presidium of the National Assembly, which is a supreme body elected by the representative body and essentially serves as a collective head of State.

According to Item 10 of Article 35, when the National Assembly is not in session, the Presidium, "*acting on a proposal by the Government*, shall declare a state of war in the event of an armed attack against the People's Republic and if there is a need of urgent fulfilment of international obligations for mutual defence against aggression; in such a case, the Presidium shall immediately convene the National Assembly to pronounce on the said measure" (again, there is a notable similarity with the current provisions of the Constitution).

Item 11 of Article 35 of the same Constitution states that the Presidium of the National Assembly, "*acting on a proposal by the Government*, shall order a total and partial mobilisation and shall declare a state of martial law". According to Item 15 of the same article, the Presidium, "acting on a proposal by the Government, shall appoint and release the highest command personnel of the Armed Forces of the People's Republic" and, according to Item 16, the Presidium, "acting on a proposal by the Government, shall appoint and release the Commander-in-Chief of the Armed Forces"

[4] Italics added, K.P., here and hereafter.

[5] Promulgated in *State Gazette* No. 284 of 6 December 1947, repealed in *State Gazette* No. 39 of 18 May 1971.

(this is the first time that a Bulgarian Constitution has established such a position).

As to the role of the Council of Ministers, Article 43 mentions briefly that the Government implements "the overall direction of national defence".

Following up on this statutory evolution, the Constitution of the People's Republic of Bulgaria of 1971 vested the National Assembly with the following powers according to Article 78:

• to resolve the matters concerning the declaration of war and the conclusion of peace (Item 10; transposed *verbatim* in the present Constitution), and

• to appoint and release the Commander-in-Chief of the Armed Forces (Item 11; the position is the same as in the preceding Constitution, but now this power is conferred on the full National Assembly rather than on a body elected by it).

Since the Constitution of 1971 conceives of the State Council, elected by the National Assembly, as a supreme State body and essentially serving as a collective head of State (according to Article 90 (1), "[t]he State Council of the People's Republic of Bulgaria shall be a supreme standing body of State power which shall complement the taking of decisions with the implementation thereof"[6]; according to Paragraph (2), "[t]he State Council, as a supreme body of the National Assembly, shall ensure the complementation of legislative power with executive activities"), that basic law lays down the following rules on the control of the armed forces:

• according to Item 9 of Article 93, the State Council "shall implement an overall direction of national defence and security";

• according to Item 10, the State Council "shall appoint and release the members of the State Defence Committee" (no constitution before that had provided for such a body);

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[6] For this reason, as well as because of the interaction between the two bodies provided for in Article 35, Prof. Stefan Balamezov maintains that the Presidium of the National Assembly (i.e. the predecessor of the State Council) and the Council of Ministers together comprise the government, see **Stefan Balamezov**, *Konstitutsionno pravo, chast parva* [Constitutional Law, Part One], Imprimerie de l'université, Sofia, 1948, p. 249, even though Prof. Boris Spasov criticises this doctrinal conception in **Boris Spasov**, *Izpalnitelnata vlast* [The Executive Branch], Ciela, Sofia, 2001, p. 8.

• according to Item 11, the State Council "shall appoint and release the highest command personnel of the armed forces and shall award general-grade officer ranks".

As a specific power under Article 94, when the National Assembly is not in session, the State Council appoints and releases the Commander-in-Chief of the Armed Forces, but this decision has to be submitted to the National Assembly for approval at its next session (Item 5)[7], orders a total and partial mobilisation and declares a state of martial law or another state of emergency (Item 8) and takes measures for collective defence jointly with other countries (Item 9). As a last resort, the State Council can even declare a state of war in the event of an armed attack against the People's Republic of Bulgaria or if there is a need *of urgent fulfilment of an international obligation for mutual defence* (Item 10); here, too, the State Council is obliged to convene the National Assembly to a session so as to pronounce on these decisions.

The powers of the State Council are increased significantly in wartime according to Article 95 (true, provided that "there is no possibility to convene the National Assembly"):

"1. Shall issue decrees whereby laws may be repealed or amended or legislatively unregulated subject-matter may be regulated. The State Council shall submit the said decrees to the National Assembly for approval at its next session" (in the context of the rule, the reference is presumably to the period after the end of wartime).

"2. Shall adopt the national social and economic development plans and the budget, as well as the reports on the implementation thereof.

3. Shall elect and release the Council of Ministers, the Supreme Court, and the Chief Public Prosecutor."

The present-day constitutional arrangements and apportionment of competences stem from the Constitution of 1971, but only after a substantial revision it underwent in 1990.[8] The structure of

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[7] Implementing the then legal doctrine and governance practice, the State Council was empowered to replace members of the Council of Ministers during the period between National Assembly sessions (Item 4 of Article 94) and even to revise provisions of the laws (Item 2 of Article 94), which strongly eroded the role of parliament. Previously, Item 12 of Article 35 of the Constitution of 1947 vested the Presidium of the National Assembly with a similar power.

[8] Constitution of the People's Republic of Bulgaria, promulgated in *State Gazette* No. 39 of 1971, the principal amendments to it were enacted by promulga-

the supreme public authorities was changed then, the State Council was abolished, and the figure of Chairman (President) of the Republic was institutionalised as a single-person head of State, assisted by a Deputy Chairman (Vice President) of the Republic, both elected by the National Assembly. By an amendment to Item 11 of Article 78, the institution of Commander-in-Chief of the Armed Forces was abolished and these functions were transferred to the President. According to the amended version of Article 92, the President "shall implement an overall direction of national defence and security and shall perform the functions of Commander-in-Chief of the Armed Forces" (Item 10; a new solution, retained to date), "shall appoint and dismiss the members of the National Security Council" (Item 11; that Council is a newly established body and a prototype of the Consultative Council for National Security), the President already "shall appoint and release the highest command personnel of the armed forces and shall award general-grade officer ranks" (Item 12; this provision is retained to date). Lastly, the President "shall order a total and partial mobilisation and shall declare a state of martial law or another state of emergency, acting on a proposal by the Council of Ministers, when the National Assembly is not in session. In such cases the National Assembly shall be convened immediately so as to pronounce on the decision" (Item 13 of Article 92; similar at present) and "shall declare a state of war in the event of an armed attack against the Republic of Bulgaria or if there is a need of urgent fulfilment of an international obligation for mutual defence, when the National Assembly is not in session and cannot be convened. In such case, the National Assembly shall be convened immediately so as to pronounce on the decision" (Item 14, similar to date).

2. Present-day regulation of armed forces control and Constitutional Court jurisprudence

The Constitution of 1991[9] that is currently in force generally reproduced the rules of the Constitution of 1971 as amended in 1990. According to Article 84, the National Assembly is vested with the power "to resolve the matters concerning the declaration of

tion in *State Gazette* No. 29 of 1990.

[9] Promulgated in *State Gazette* No. 56 of 1991.

war and the conclusion of peace" (Item 10), "to authorise the sending and use of Bulgarian armed forces outside the country, as well as the presence of foreign troops within, or the passage of such troops through, the national territory" (Item 11; this provision is a new solution for Bulgarian law, it has given rise to new legislation and Constitutional Court jurisprudence) and, "acting on a motion by the President or by the Council of Ministers, to declare a state of martial law or another state of emergency in all or part of the national territory" (Item 12).

According to Article 100, the President is the Supreme Commander-in-Chief of the Armed Forces (Paragraph (1)), appoints and discharges the highest command personnel of the armed forces, acting on a proposal by the Council of Ministers, awards general-grade officer ranks (Paragraph (2)), orders a total or partial mobilisation, acting on a proposal by the Council of Ministers in accordance with the special law (Paragraph (4)), and is empowered to declare a state of war in the event of an armed attack against Bulgaria or if there is a need of urgent fulfilment of international obligations and to declare a state or martial law or another state of emergency when the National Assembly is not in session, whereupon the National Assembly is convened immediately so as to pronounce on the decision (Paragraph (5)). For its part, the Government is responsible for ensuring public order and national security and for implementing the overall direction of the State administration and the armed forces (Article 105 (2)). As it will be demonstrated below, however, the Government and the President act jointly with regard to defence governance and national security management because the Government initiates actions in these matters whereas the President approves or rejects the Government's proposals, as well as through the institute of the Prime Minister countersigning the presidential decrees according to Article 102 (2).

Notably, there is no uniform understanding of the notions of "national security" and "public order". The Classified Information Protection Act of 2002[10] defined the former notion for the purposes of that law, whereas the latter notion still lacks a legal

[10] Promulgated in *State Gazette* No. 45 of 2002.

definition[11]. The definition of the notion of "national security" contained in Item 13 of § 1 of the Supplementary Provisions of the Classified Information Protection Act stated: "'national security' is a condition of society and the State whereupon the fundamental human and civil rights and freedoms, the territorial integrity, independence and sovereignty of the country are protected, and the democratic functioning of the State and civil institutions is guaranteed, as a result of which the nation retains and augments the prosperity thereof and advances". Subsequently, in 2015 г. Article 2 of the Act on the Management and Functioning of the System of National Security Protection[12] defined national security as a "dynamic condition of society and the State whereupon the territorial integrity, sovereignty and constitutionally established order of the country are protected, where the democratic functioning of institutions and the fundamental rights and freedoms of citizens are guaranteed, as a result of which the nation retains and augments the prosperity thereof and advances, as well as where the country successfully defends the national interests thereof and implements the national priorities thereof", and the rule in the Classified Information Protection Act was amended with reference to Article 2 of the Act on the Management and Functioning of the System of National Security Protection[13].

Regarding national security of the Republic of Bulgaria, the National Assembly has adopted a rather general act: a National Security Concept of the Republic of Bulgaria, passed by the 38th National Assembly by a Resolution of 16 April 1998.[14] According to Point 50

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[11] The principal study of this notion, of which the author is aware, is in **Emanuil Kolarov**, *Garantirane na obshtesvteniya red. Administrativnopraven aspect* [Guaranteeing Public Order. Administrative Law Aspect], Ruse, Angel Kanchev University of Ruse, 2014, p. 17-19.

[12] Promulgated in *State Gazette* No. 61 of 2015.

[13] In the opinion of the author, these definitions are rather scholastic and in practice do not help to clarify the term. Moreover, the Act on the Management and Functioning of the System of National Security Protection practically deals with the security services (exhaustively listed in Item 1 of § 1 the Supplementary Provisions of the Classified Information Protection Act) and does not concern the activity of the armed forces, with the exception of the Military Intelligence Service (until 2020 Defence Information System, the designation was changed by an Act to Amend and Supplement the Military Intelligence Act, promulgated in *State Gazette* No. 69 of 2020).

[14] Promulgated in *State Gazette* No. 46 of 1998.

of the Concept, the President, the National Assembly and the Council of Ministers have responsibilities as far as the country's national security is concerned. More specifically, the Council of Ministers, according to Points 53 and 54, "on the basis of this Concept and implementing the responsibility in the field of security assigned thereto by the Constitution of the Republic of Bulgaria, formulates the risks to the country and assesses the level of protection of national interests by an annual report to the National Assembly". The Council of Ministers is obliged "to allocate the country's resources for an enhancement of the level of protection of national interests". "In the performance of its functions, the Council of Ministers is assisted by a Security Council comprised of the Prime Minister, the Minister of Foreign Affairs, the Minister of Defence, the Minister of Interior, the respective deputy ministers, the Chief of General Staff of the Bulgarian Armed Forces [now the Chief of Defence], and the heads of the intelligence and counter-intelligence services. The President may always participate in the proceedings of the Council either in person or through his or her representatives and at any time may request information from it."

The voting itself of the Concept by the National Assembly as an act with a special status *ipso facto* gave rise to Constitutional Court No. 21 of 1998, in which the Constitutional Court rendered Decision No. 24 of 1998.[15] A group of national representatives argued that the existence of a Security Council was not provided for in the Constitution and it "cannot be established by the National Assembly". The petitioners further pointed out that the functions of the Security Council "are similar to those of the ministries". In its observations as an interested party, the Council of Ministers stated that "the Constitution admits the establishment of various administrative bodies and can assign to them relevant functions in the sphere of State governance, to the extent that these are not constitutionally enshrined powers of other State bodies".

The Constitutional Court held that the establishment of subsidiary bodies may be necessary and is admissible for the implementation of the constitutional obligation of the Council of Ministers to ensure public order and national security according to Article 105 (2) of the Constitution of the Republic of Bulgaria. According to the Court, however, "the Constitution does not rule out the possibility

[15] Promulgated in *State Gazette* No. 113 of 1998.

of the National Assembly establishing, by an act of its own, subsidiary bodies with the Council of Ministers in particular spheres of special significance for State governance", whereas "the importance of administrative activities in the sphere of national security necessitates that these activities be carried out entirely within the framework of bodies which are either provided for by the Constitution or are established by the National Assembly". The Court regarded the fact that the Security Council is a *subsidiary* body with the Council of Ministers as key and especially emphasised that "the functions of the Security Council are limited exclusively to analysing, planning and coordinating governance decisions, but the responsibility for these decisions entirely remains with the body that is constitutionally established to implement an overall direction of the State administration, and namely the Council of Ministers." On these considerations, the Constitutional Court held that the establishment of the Security Council by an act of the National Assembly did not contravene the Constitution of the Republic of Bulgaria.

The Constitution vests the Council of Ministers with the following powers with regard to the armed forces:

- to implement an *overall direction* of the armed forces (Article 105 (2));
- to propose to the President to appoint and release the highest command personnel of the armed forces and to award general-grade officer ranks (Article 100 (2)). The President is moreover empowered to determine the positions to be occupied by service members holding such ranks[16];
- to propose to the President to order a total or partial mobilisation (Article 100 (4));
- to move to the National Assembly to declare a state of martial law or another state of emergency in all or part of the national territory (Item 12 of Article 84; the President, too, may enter such a motion).

The Defence and Armed Forces of the Republic of Bulgaria Act (DAFRBA)[17] that is currently in force elaborated these provisions

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[16] Currently by Decree No. 85 of 28 February 2012 Endorsing the Positions in the Armed Forces of the Republic of Bulgaria and the National Service for Protection Requiring General-Grade Officer Ranks (title amended in *State Gazette* No. 26 of 2016), promulgated in *State Gazette* No. 20 of 2012.

[17] Promulgated in *State Gazette* No. 35 of 2009.

in specific terms and broadened the scope of the Council of Ministers. In addition to the powers of the President specified in Article 100 of the Constitution, Article 19 of the DAFRBA empowers the President, acting on a proposal by the Council of Ministers, to endorse the strategic action plans of the Armed Forces (Item 1) and to raise the combat and operational alert status of the Armed Forces or of a part thereof (Item 2). According to Item 4 of Article 20, if a military conflict has already started, the President, acting on a proposal by the Council of Ministers, will bring into operation the wartime plans. These are the most important functions in this sphere in which the legislator introduces a more elaborate mechanism of powers shared by the Council of Ministers and the President. Owing to the particular significance of matters concerning national security, the legislator adds one more mechanism: according to Article 21 (2) of the Act, the presidential decrees by which functions concerning national defence are performed have to be countersigned by the Prime Minister but not by the Minister of Defence[18]. The application of this mechanism is extended to wartime as well, as Article 20 explicitly provides.

Article 23 of the Act obliges the Council of Ministers to submit a report on the state of defence and the armed forces to the National Assembly annually by 31 March. The National Assembly is expected to pass a resolution on that report.

The question about the command and control of the armed forces is the subject-matter of an interesting case brought before the Constitutional Court: a dispute over competence between the Council of Ministers and the President, in connection with which Constitutional Case No. 26 of 1992 was instituted. The Council of Ministers petitioned the Constitutional Court for an interpretation of the Constitution as to whether the President of the Republic or the Council of Ministers was empowered to direct the armed forces, the National Service for Protection, the National Intelligence Service and the National Police in peacetime. By Decision No. 41 of 1993, however, the Council of Ministers withdrew its petition,

[18] As a traditional peculiarity, the defence and armed forces acts assign the countersigning of presidential decrees in this sphere exclusively to the Prime Minister. That was the case with the first DAFRBA (promulgated in State Gazette No. 112 of 1995) and also with the law of the same title that is currently in force (promulgated in State Gazette No. 35 of 2009).

and the Constitutional Court terminated the case by Procedural Order No. 4 of 1993[19]. Interest in the matter lingered on, however, and it was revisited by a group of national representatives in Constitutional Case No. 14 of 1998 asking the same question: is the President Supreme Commander-in-Chief of the Armed Forces of the Republic of Bulgaria in wartime only or in peacetime, too?

In addition to that, the national representatives asked for an interpretation as to whether any information related to national security which originates from State bodies and institutions must mandatorily be available to the President in his or her capacity as Supreme Commander-in-Chief of the Armed Forces and whether the President, using such information and on the basis of a decision of the Consultative Council for National Security, may take stands and issue recommendations to the executive, legislative and judicial branches when national security is at an imminent risk.

By Decision No. 23 of 1998,[20] the Constitutional Court held that "[t]he Constitution allocates the competences with regard to the armed forces and national security among the President, the National Assembly and the Council of Ministers. They may exercise part of their powers single-handedly. Other powers are contingent on *ex ante* or *ex post* instruments and actions by some of the other bodies of State power, as provided for by the constitutional legislator." "The Council of Ministers is vested with the powers under Article 105 (2) of the Constitution, formulated as 'ensuring public order and national security' and 'an overall direction of the State administration and the armed forces'. These powers, however, are not particularised in

[19] Quoted from the Constitutional Court website, available (in Bulgarian) at https://www.constcourt.bg/bg/act-2061. Judge Lyuben Kornezov came up with an interesting opinion, arguing that the case should have been terminated on different grounds: Article 17 (3) of the Constitutional Court Act. The opinion says: "The dispute about Item 3 of Article 149 (1) of the Constitution is, therefore, not a 'partial dispute' between two institutions of State. When one of the parties refers that dispute for resolution to the Constitutional Court, it may not withdraw it unilaterally after the fact. In this particular case, the Constitutional Court is not just an 'arbitrator' between the disputants but is obliged to put the country's governance in order by its act. The Constitutional Court may determine that the 'disputed competence' does not lie within the powers of either of the two disputing authorities but of another institution of State. In my opinion, once it has been approached, the Constitutional Court is obliged *ex officio* to rule on the matter. It may not relinquish the case at the will of one of the parties because the State issue is not resolved".

[20] Promulgated in *State Gazette* No. 113 of 1998.

the text of the basic law, but it should be presumed that the competence of the Council of Ministers covers everything which the Constitution does not explicitly place in the competence of other State bodies." The Court held, however, that the President is Supreme Commander-in-Chief in both peacetime and wartime, to the extent that the Constitution does not provide for different regimes of governance for peacetime and wartime. The President recognised the right of the President to take stands and to address recommendations to all State bodies, including the executive authorities, "when exercising the powers conferred on him or her by the Constitution with regard to national defence and national security at all times and not just when they are at an imminent risk".

The general provision of Article 105 (2) of the Constitution has been elaborated in extraordinary detail in Article 22 of the DAFRBA. The numerous powers of the Council of Ministers in this sphere notably include adopting strategic action plans of the armed forces and proposing these plans to the President of the Republic for endorsement (Item 7 of Article 22 (2); another instance of a check mechanism implemented by the President and Supreme Commander-in-Chief), adopting the mobilisation plans and implementing the overall direction of armed forces mobilisation and transferring the country from peace to war footing (Item 15), establishing standards, terms and procedure for the build up, storage and use of wartime stocks and other raw and prime materials for wartime and establishing requirements for the transport, energy, communication and warehouse systems, the population centres and the economic facilities for conformity to defence needs (Item 16). According to Item 23, the Council of Ministers, acting on a proposal by the Minister of Defence, assigns wartime tasks related to national defence to the public authorities, the bodies of local self-government and local administration and to legal persons. Article 22 (3) enshrined by law the provision according to which the Council of Ministers is assisted by a Security Council when exercising its powers under Paragraphs (1) and (2).

The Council of Ministers identifies, by a decree, the strategic installations and activities relevant to national security (Item 22 of Article 22 (2))[21].

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[21] Council of Ministers Decree No. 181 of 2009, promulgated in *State Gazette* No. 59 of 2009. It came to public attention recently when the Government added

One particularly important provision is Article 49, which prohibits the establishment of military and other entities outside the complement of the Bulgarian Army which employ a military organisation or use armament and combat equipment or which envisage the performance of military service, except where this is provided for in a law *or in an act of the Council of Ministers.* The possible formation of additional paramilitary forces by an act of government is legitimated in this way. The government faces an important limitation: according to Article 52 (2) of the DAFRBA, the armed forces may not be assigned "tasks of a domestic political nature" in peacetime. This rule introduces the so called *posse comitatus* principle which precludes the use of the armed forces for the enforcement of national legislation in a manner similar to police actions[22]. The application of this principle has been recently undergoing specific modifications which will be discussed below.

Defining the notion of "armed forces" within the meaning of legislation stands out as a particularly important issue. It was not until 2007 that the legislator deemed it appropriate to make a provision in the Constitution according to which the activity of the armed forces is regulated by a law and thus ousted the executive branch from the primary regulation of this subject-matter (a new Paragraph (2) in Article 9, promulgated in *State Gazette* No. 12 of 2007, in force as from 1 January 2008). The legislator, however, apparently took a peculiar approach in regulating this subject-matter: from explicitly defining the notion to gradually narrowing its definition and delegating to the Council of Ministers the power to determine the exact scope by an act of its own, which definitely runs counter to the approach chosen by the legislator in the amendment to the Constitution. Article 48 of the DAFRBA defines the armed forces as "military *and specialised* entities and large units thereof, established by the State, subject to a specific organisation and order of functioning, which possess and apply

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the Kapitan Andreevo Border-Crossing Checkpoint to the list of strategic installations (in *State Gazette* No. 83 of 2022; no other border-crossing checkpoint enjoys such status), and the latest amendment (in *State Gazette* No. 97 of 2022) also supplemented the list by the National Toll Directorate with the Road Infrastructure Agency.

[22] In present-day legal terminology, the name of this principle comes from the *Posse Comitatus Act*, a federal law enacted by the US Congress in 1878 and codified as 18 U.S.C. § 1385, which prohibits such use of the armed forces.

military and specialised means of action in order to ensure the objectives of national defence". In its original version (as promulgated in *State Gazette* No. 35 of 2009), Article 50 provided for a differentiation between the peacetime complement of the armed forces (Bulgarian Army, the Defence Information Service, the Military Police Service, the military academies and military schools, etc.) and a wartime complement, which Paragraph (2) defined explicitly (specialised units of the Ministry of Interior, the National Intelligence Services, the National Service for Protection, the State Agency for National Security, the Ministry of Transport, the State Agency for Information Technology and Communications, which has since been closed down)[23]. In 2010, however, the approach to broaden the wartime complement of the armed forces was abruptly reversed and the current version of Article 50 (2) does not catalogue in detail the institutions whose units qualify as part of the armed forces but states that the wartime complement of the armed forces may include "structures from other forces of the national security system of the Republic of Bulgaria designated by an act of the Council of Ministers" (such an act has not been issued to date). The supreme executive authority was thus vested with a power to alter the notion of armed forces which, as noted above, to a large extent runs counter to the constitutional provision of Article 9 (2) of the Constitution. What is particularly important is that by this approach the legislator left military counterintelligence outside the complement of the armed forces in peacetime and with an indeterminate status in wartime[24].

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[23] For the sake of completeness, it should be noted that the first Ministry of Interior Act, adopted by the Grand National Assembly (promulgated in *State Gazette* No. 57 of 1991), explicitly stated that the Border Guard Troops and the Interior Troops were part of the armed forces (Articles 16 and 17), and they were controlled in conformity with the rules on the armed forces (Article 50), whereas the service relationships in the Ministry of Interior troops followed the rules applicable to the armed forces (Article 8 (3), i.e. in conformity with the then effective military manuals). The next Ministry of Interior Act (promulgated in *State Gazette* No. 122 of 1997) already proceeded with demilitarisation of the Ministry and the troops were transformed into national services. The other existing troops outside the complement of the Bulgarian Army were disbanded in 2000 by the Act to Transform the Construction Corps, the Transport Ministry Troops and the Posts and Telecommunications Committee Troops into State-Owned Enterprises (promulgated in *State Gazette* No. 57 of 2000).

[24] In 2008 the military counterintelligence arm was incorporated into the State Agency for National Security by virtue of § 2 of the Transitional and Final

With regard to the powers of the Council of Ministers, the Constitutional Court rendered the important Decision No. 7 of 1999[25] concerning a Note verbale from NATO No. 99/478 of 28 April 1999 and a Note verbale from the Ministry of Foreign Affairs of the Republic of Bulgaria No. 55-07-310 of 28 April 1999 constituting an Agreement between the Republic of Bulgaria and the North Atlantic Treaty Organization on transit passage through the airspace of the Republic of Bulgaria by aircraft within the framework of Operation Allied Force. That Agreement was concluded between the Council of Ministers and the North Atlantic Treaty Organization during a military operation and is worth recalling in the present-day context. According to the petitioners (a group of national representatives), the Agreement, together with the annexes and appendices, was inconsistent with the Constitution. It allegedly embroiled the Republic of Bulgaria in war without the Government and, respectively, the Ministry of Foreign Affairs, having been mandated to do so by the National Assembly, whereby Item 10 of Article 84 of the Constitution was violated, and that the Agreement was allegedly not about transit passage through the airspace of the Republic of Bulgaria but about making available a territory and, therefore, contravened Item 11 of Article 84 of the Constitution.

The Court referred to its jurisprudence (Decisions No. 6 of 1994 and No. 6 of 1999) and laid a special emphasis on the fact that the Agreement itself stated that Bulgarian airspace was being made available temporarily (until the completion of the military operation). According to the Court, the exact wording ("passage") did not entail an involvement of the Bulgarian Armed Forces in the conflict, which is why the power of the National Assembly to resolve the matters concerning the declaration of war and the conclusion of peace and to ratify treaties of a political and military nature was not usurped. The Court argued that "the constitutional legislator draws a distinction between the authorisation of passage and the conclusion of an international treaty of a political or military nature, of the one part, and the declaration of war and the conclusion of peace, of the other part, which is why it has regulated them as self-contained separate powers of the National Assembly". What is

Provisions of the State Agency for National Security Act (promulgated in *State Gazette* No. 109 of 2007).

[25] Promulgated in *State Gazette* No. 41 of 1999.

practically important for a situation similar to the present one is that the Court held that the Council of Ministers and the Ministry of Foreign Affairs had not concluded the agreement without being mandated to do so by the National Assembly because, as provided for by Article 105 and Article 106 of the Constitution, the Council of Ministers directs and implements the foreign policy of the country, ensures national security, and concludes international treaties. Exercising these powers, the Council of Ministers participates in negotiations on the conclusion of international treaties, and the Court did not find that the agreement as concluded violated the Constitution because the National Assembly remained exclusively competent to ratify by law the international treaty as concluded (Item 1 of Article 85 of the Constitution). In this case the Court adduced an additional argument, referring to the Declaration of the National Assembly (i.e. a formally non-binding act) of 23 October 1998[26], which recommended to the Government to continue the consultations and to conduct negotiations with NATO on the conclusion of an agreement on specific measures of a military-political and military nature, seeking clear guarantees from the North Atlantic Council for the national security of Bulgaria in the context of the peace-keeping operations and the crisis in Kosovo.

Further on, Bulgaria's allied obligations as a member of the North Atlantic Treaty Organization necessitated a substantial change in the original constitutional arrangements. According to Item 11 of Article 84 of the Constitution, the National Assembly was supposed to authorise the sending of Bulgarian military contingents outside Bulgaria and to authorise the presence of foreign military contingents within the national territory. Along with the question about the command and control of the armed forces, which was discussed above, this was another question that has long been of interest to institutions, and in 1994 the Council of Ministers initiated a competence dispute between itself and the National Assembly regarding the ambiguities about the bodies competent to authorise calls by foreign warships in the open ports and roads of the Republic of Bulgaria and the passage of foreign aircraft through the airspace of the Republic of Bulgaria, when used for non-military purposes and, in this connection, the Constitutional Court was

[26] Promulgated in *State Gazette* No. 125 of 1998.

asked to provide a binding interpretation of Item 11 of Article 84 of the Constitution and explicate the notion of "foreign troops".

The Constitutional Court reclassified the proceedings as proceedings for the interpretation of a constitutional provision. In order to render Decision No. 6 of 1994[27], the Court analysed in detail the notion of "foreign troops" and found that "[t]he respective term as used in the Constitution comprehends the personnel of any organised military unit or group whatsoever (from the smallest to the largest one) of whatever service branch and component". "*The organised aspect is very important. There are no troops without it. This aspect finds expression in the military command – in terms of specific relationships and rules – at its various levels or as a comprehensive system.* The reference here is to troops which are under a foreign military command (i.e. not under the military command of the Bulgarian State). The notion of armed forces or troops implies a synthesis of personnel, manpower, on the one hand, and armament, military hardware and requisite supplies, on the other hand. *Therefore, unarmed personnel do not constitute troops. Also, weapons and military hardware without personnel and without relevant attendants and security do not constitute troops*[28]. For these reasons, the notion of 'foreign troops' within the meaning of Item 11 of Article 84 of the Constitution will comprehend the personnel, combat equipment and military supplies together with the organisational link between them."

Other parts of the Decision of the Court can be assessed as objectively obsolete and can be construed as relevant to the time before the Republic of Bulgaria joined a military alliance: "Presence implies a more or less continuous deployment, quartering of troops within the national territory. Foreign troops will be present

[27] Promulgated in *State Gazette* No. 59 of 1994.

[28] I cannot agree with this italicised portion. A military unit of another State, be it temporarily disarmed for some reasons, is still a military unit. It consists of personnel who has taken an oath of allegiance to another State and takes its orders from commanders of another army. Military hardware, even left without human presence, remains the property of another State and the Bulgarian Army does not have any rights to it. In the latter context, the question about the control of the state-of-the-art remotely piloted platforms and their progress is of interest. It is untenable to argue that such platforms can be deployed within Bulgarian territory without this qualifying as stationing of foreign armed forces because they are unmanned. But, as it will be pointed out further down, a year later the Court altered its conclusions.

in the territory when they remain within that territory (in a part or in several separate parts thereof) for a definite period of time and for a specifically defined purpose. Authorising an indefinite presence is precluded. Authorising a presence for a purpose which is unknown to the Bulgarian State or, accordingly, to the National Assembly, is precluded, too." "The National Assembly, by virtue of Item 11 of Article 84 of the Constitution, *is exclusively competent to authorise the presence of foreign troops within the national territory* or their passage through that territory, where any such presence or passage is of *a military or military political nature*"; but "[a]uthorisation for the presence of foreign troops within the national territory or for their passage through that territory, where any such presence or passage is not of a military or military political nature, must be granted by other public authorities designated by a law"[29]. "'Presence' of foreign troops, within the meaning of Item 11 of Article 84 of the Constitution, signifies that such troops remain within the national territory for a specified period of time and under specified conditions", whereas "['p]assage' of foreign troops, within the meaning of Item 11 of Article 84 of the Constitution, signifies that such troops transit the national territory under specified conditions without remaining within that territory."

The findings in this Decision were continued in the above-mentioned Decision No. 6 of 1999.[30] The Constitutional Court arrived at important conclusions in that Decision: "[g]iven the existence of an international treaty of a political or military nature containing the above-mentioned clauses about the presence of foreign troops within, or the passage of such troops through, the national territo-

[29] This left a definite "loophole" for the executive branch. It was not clear, however, how foreign troops could possibly be present in Bulgaria without this being of a military or military political nature. What other nature was possible? According to the dissenting opinion of Judge Neno Nenovski, participation in exercises is of no such nature. I do not share the view of Judge Nenovski, and I believe that any presence of organised units and materiel of foreign armed forces is by all means of a military or military political nature, to the extent that these notions can at all be differentiated. Another observation by Judge Nenovski cannot be concurred with now but curiously illustrates the spirit of the time: "It hardly needs to be said that a question can be raised in the spirit of the Constitution about authorising the presence of foreign troops within the national territory for participation in military exercises *only together, jointly with Bulgarian troops".*

[30] Promulgated in *State Gazette* No. 37 of 1999

ry[31], which has been ratified by Parliament by a law, has been promulgated, and has entered into force for the Republic of Bulgaria, a separate resolution of the National Assembly under Item 11 of Article 84 of the Constitution is not necessary for the performance of any such treaty." Moreover, "[a]n international treaty of a political or military nature, which has been ratified by Parliament by a law, has been promulgated, and has entered into force for the Republic of Bulgaria, may provide for the immediate provision of military support and military defence to this country in the event of an armed attack against it – and if such a treaty regulates the presence within, or the passage through, the national territory of troops of the allied State party or international organisation, a resolution under Item 11 of Article 84 of the Constitution is unnecessary."

Considering the admission of Bulgaria as NATO member, the basic constitutional procedure was obviously becoming rather unwieldy and unjustified, and the Constitutional Court was approached once again on the matter in Constitutional Case No. 1 of 2003, this time by the President, as to whether allied troops can be treated as "foreign troops" within the meaning of Item 11 of Article 84 of the Constitution. By Decision No. 1 of 2003[32], the Constitutional Court ruled that "[t]he troops of a political or military alliance, of any member states of any such alliance, or of allied states under an international treaty of a political or military nature which has been ratified, has been promulgated, and has entered into force for the Republic of Bulgaria, are not foreign troops within the meaning of Item 11 of Article 84 of the Constitution if the passage or presence of the said troops through or within the national territory is related to the fulfilment of allied obligations" and that "[a] National Assembly resolution under Item 11 of Article 84 of the Constitution is unnecessary upon the sending and use of Bulgarian armed forces outside the country, as well as upon the presence of allied troops within the national territory or the passage of any such troops through the said territory, where this is implemented in fulfilment of allied obligations under an international treaty of

[31] The reference is to the purposes, procedure, terms and period of time of the presence of foreign troops within the national territory or their passage through that territory in view of the national security of the Republic of Bulgaria and the fulfillment of its international obligations.

[32] Promulgated in *State Gazette* No. 13 of 2003.

a political or military nature, referred to in Item 1 of Article 85 (1) of the Constitution, which has been ratified, has been promulgated, and has entered into force for the Republic of Bulgaria."

In the last point of its decision, the Court "prompted" a possible new approach to the legislator: "[a] National Assembly resolution for each particular case in the situations referred to in Item 11 of Article 84 of the Constitution is not required if a separate law *exhaustively* defines the purposes, procedure and terms for the fulfilment by Bulgaria of obligations assumed by an international treaty of a military and political nature which has been ratified, has been promulgated, and has entered into force for the Republic of Bulgaria, envisaging the sending of Bulgarian armed forces outside the country as well as the passage and presence of allied troops [through and] within its territory."

Building on these legal rulings of the Court, Parliament adopted an Act on Sending and Use of Bulgarian Armed Forces Outside the Territory of the Republic of Bulgaria[33] and an Act on Passage of Allied and of Foreign Armed Forces through, and Presence within, the Territory of the Republic of Bulgaria. The latter law empowered the Council of Ministers to authorise the passage of allied armed forces through, or the presence thereof within, the territory of the Republic of Bulgaria, if the said passage or presence is of a *politico-military nature*, for the fulfilment of allied obligations arising from an international treaty which has been ratified, has been promulgated, and has entered into force for the Republic of Bulgaria, whereby an alliance of a politico-military nature is created (Item 2 of Article 12); for troop units of a smaller numerical strength, such powers were conferred even on the Minister of Defence (Article 13).

It is striking that the powers of the Minister of Defence in Items 1 and 2 of Article 13 (1) apply to both allied and foreign armed forces, which seems dubious from the point of view of the Constitution and the jurisprudence of the Constitutional Court. True, subject to the specification "of a non-military nature", but in terms of real life it again seems unclear how persons under oath of allegiance and taking orders from their commanders, with armament and equipment (Article 13 covers even surface and underwa-

[33] Both laws were promulgated in *State Gazette* No. 102 of 2005, and the former was subsequently repealed by the DAFRBA.

ter vessels of war and aircraft) can pass through, and be present within, the territory of the Republic of Bulgaria, their passage and presence being of a "non-military nature". Item 14 of Article 84 of the Constitution does not make such hair-splitting specifications, and it would be appropriate for the law to particularise or for the Constitutional Court to interpret what the "non-military nature" of a passage and presence of foreign military forces implies. A case in point is Council of Ministers Decision No. 306 of 2013, which authorised the passage of a non-military nature through, and the presence of a non-military nature into, the territory of the Republic of Bulgaria of aircraft and personnel of the Air Force of the State of Israel in connection with the conduct of a joint Bulgarian-Israeli flight training codenamed Collector's Item 13. A similar "joint flight training" also took place in 2017. It transpired from media coverage that the "training" involved combat aircraft of the Israeli Air Force and Bulgarian air defence assets. What qualified the training as being of a "non-military nature" in these cases: the fact that the Israeli Air Force planes did not carry live ammunition?

Finally, adopting the new Defence and Armed Forces Act in 2009, the legislator replicated the constitutional provision about the cases of sending Bulgarian armed forces abroad in Article 62 of the DAFRBA but indicated in Article 63 that the sending of military contingents and the use of armed forces outside the territory of the Republic of Bulgaria for the fulfilment of allied obligations arising from an international treaty an international treaty which has been ratified, has been promulgated, and has entered into force for the Republic of Bulgaria, whereby an alliance of a politico-military nature is created (Item 1; the only such alliance for the Republic of Bulgaria at present is the North Atlantic Treaty Organization), and for participation in humanitarian missions (Item 2) is authorised by the Council of Ministers. In practice, the legislator apparently relinquished the monopoly of the National Assembly over operational control in cases where foreign and Bulgarian armed forces cross the international border. The only cases left within the powers of the National Assembly were the activation of troop units in pursuit of tasks beyond Bulgaria's commitments to NATO[34]. The

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[34] Since the tasks of the Bulgarian troop contingents in Iraq were not part of NATO missions, the National Assembly authorised the sending of the troop units on each particular occasion. The first such resolution was a Resolution

provisions to this effect were preceded by another Constitutional Court Decision (No. 23 of 1995[35]) which, responding to a petition from the Council of Ministers, interpreted proposition one of Item 11 of Article 84 of the Constitution in order to particularise the powers of the National Assembly to authorise the sending and use of Bulgarian armed forces outside the country. The petition claimed that "there are numerous cases in which doubts arise as to whether the sending and use of Bulgarian armed forces abroad should be approved by a National Assembly resolution or this could be done just on the basis of an act of the Council of Ministers." In its reasons, the Court departed from its Decision No. 6 of 1994: in the instant case "the link between personnel, armament, military hardware and supplies should not be absolutised and perceived in dogmatic terms. Cases are known in practice of personnel leaving the country, say, for participation in an international exercise or operation without armament and even without technical equipment or other supplies. The very existence of a possibility of such armament and/or equipment being issued at the destination necessitates the granting of authorisation by the National Assembly, i.e. in such cases, too, it should be assumed that this constitutes sending of Bulgarian armed forces within the meaning of Item 11 of Article 84 of the Constitution". "Nor should the organised criterion be absolutised, either. Undoubtedly, the notion of 'troops' presupposes a definite organisational structure, including a type

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Authorising the Participation of the Republic of Bulgaria in Phase IV Stabilisation and Reconstruction of the Operation in Iraq and the Sending and Deployment of a Bulgarian Army Infantry Battalion and of Individual Service Members in the Territory of Iraq under the United States Central Command and the Command of the Multi-National Force-Iraq, promulgated in *State Gazette* No. 51 of 2003. That resolution explicitly noted that the Bulgarian unit was under the orders of the United States Central Command. Every time when Parliament approved the sending of a troop contingent, its numerical strength was specified.

[35] Promulgated in *State Gazette* No. 104 of 1995. Evidently, while the constitutional cases in which Decisions No. 6 and No. 7 of 1999 were rendered had been prompted by NATO's military operations in the former Yugoslavia (and more specifically in Kosovo, Operation Allied Force), the cases in which Decisions No. 6 of 1994 and No. 23 of 1995 were clearly influenced by NATO's military operations again in the former Yugoslavia: in Bosnia and Herzegovina (Operation Deliberate Force) in 1994. For the legal aspects of the latter operation, see **Stoyan Memtsov**, *Vaorazhenata humanitarna interventsiya. Mezhdunadronopravni aspekti* [Armed Humanitarian Intervention. Aspects of International Law], Makros Publishers, Plovdiv, 2019, p. 186-194.

of command. It is possible, however, that this organisational structure is not meticulously shaped in line with the law that is in force when the personnel is sent but is subsequently reshaped, within the framework of the international exercise or other event held, and moreover this reshaping need not be nation-specific, i.e. confined to the Bulgarian troop personnel as sent. It is possible that, in organisational terms, this structure is attached to, or even completely incorporated into, an essentially new organised unit under a new command, retaining only a relative autonomy. Nevertheless, the Bulgarian State enjoys sole sovereign competence to address all issues concerning the continued presence or withdrawal of the Bulgarian troop unit concerned (in the sense of element, group). Therefore, these cases, too, should be treated as sending and use of Bulgarian armed forces or Bulgarian troops outside the national territory. Accordingly, such sending and use must be authorised by the National Assembly." The observations of the Court are quite accurate but exhibit a significant departure from the logic of a decision rendered just a year earlier. Next comes a to-the-point and aptly worded operative part: "[a]uthorising the sending and use of Bulgarian armed forces outside the country within the meaning of Item 11 of Article 84 of the Constitution lies within the exclusive competence of the National Assembly where such sending and use is implemented for a military or military political purpose[36]. Where there is any doubt regarding the military or military political nature of the sending, the matter is resolved by the National Assembly."

"'Bulgarian armed forces', within the meaning of Item 11 of Article 84 of the Constitution, are 'the personnel of the elements of the Ministry of Defence, the Ministry of Interior *or of other central-government departments specified by a law*[37], organised by the time of the sending or thereafter, with the appropriate armament, accoutrements and/or materiel, wherewith the said personnel has been issued before or after the sending. The National Assembly may not authorise the sending of Bulgarian armed forces outside the coun-

[36] Here, however, the Court cites an example of sending service members for another purpose: participation in training or in official ceremonies.

[37] Revisiting the question about the structure of the armed forces which, after the amendment to the DAFRBA is already classified to a large extent: what other these units could possibly be.

try *without also fixing the manner of their use and the duration of their presence*. The authorisation of the National Assembly covers the numerical strength and the service component of the Bulgarian armed forces, the location of their presence, the duration and the manner of their use outside the national territory."

Another Constitutional Court decision which clarified, to a certain extent, matters concerning national security, is Decision No. 5 of 2005[38] regarding contested provisions of the Act to Amend and Supplement the Maritime Space, Inland Waterways and Ports of the Republic of Bulgaria Act of 2004. The Court found that Article 105 (2) of the Constitution had been violated because the functions which the Council of Ministers is supposed to perform were transferred to a State-owned enterprise: the National Ports Company, with State functions related to security in the territory of the Republic of Bulgaria having been transferred to economic operators. A State-owned enterprise, which is a State entity and an economic operator, may not be entrusted with functions as public authority where such functions can only be assigned to a State body. According to the Court, "ports in the Republic of Bulgaria are undoubtedly an important part of its territory, a gateway to the country, whose security and defence are included in the powers of the Council of Ministers referred to in Article 105 (2) of the Constitution. In this sense, it is inadmissible to assign State functions related to the security of the State and of the ports thereof"[39].

Not dwelling on the numerous powers of the Council of Ministers under the DAFRBA, one power can be singled out as being topically relevant to the present situation in the context of the "special military operation" declared by the Russian Federation in the territory of Ukraine: the power of the Council of Ministers to ask the National Assembly or (if Parliament is not in session) the President to declare a state of emergency within the meaning of the DAFRBA. According to Article 122 (1), *"[w]here the Republic of Bulgaria becomes exposed to a risk of being embroiled in a military political crisis or in an armed conflict*, in cases other than those referred to

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[38] Promulgated in *State Gazette* No. 45 of 2005.

[39] According to Item 6 of Article 115b (1) and Item 1 of Article 115b (2) of the contested law, the National Ports Company must create conditions for the implementation of the provisions on ensuring failsafe security, defence and civil protection at ports.

in Articles 109 [state of war, K.P.] and 111 [state of martial law, K.P.], a state of emergency may be declared in all or part of the national territory". According to Paragraph (4) of the same article, the terms and procedure for the passage through and presence within the national territory of allied armed forces must be established by the resolution of Parliament or by the decree of the President under Paragraph (2). According to Paragraph (5), "execution of the tasks in line with the strategic plans and the armed forces operations plans shall commence" and "[t]he Minister of Defence, acting on a proposal by the Chief of Defence, shall lay down rules of engagement for the armed forces." I find that, given the broad definition in Article 122 (1) of the DAFRBA, the Council of Ministers at present could easily resort to this provision if it wishes to do so. Unlike the clear definition of a "state of war" (Article 109 of the DAFRBA), a "state of martial law" and a "state of emergency" are vaguely defined, and the latter could be a feasible option.

To sum up, the conclusion is that the present-day legislative framework ever more enables the executive branch to exercise operational control over the armed forces and even usurps powers of the National Assembly. The Council of Ministers is vested with political powers to authorise the passage of armed forces through the territory of Bulgaria and to send Bulgarian military contingents abroad where this is necessitated by allied obligations. At this point in time, the Republic of Bulgaria is member only of the North Atlantic Treaty Organization, but this does not preclude a future membership of other organisations and even of bilateral military alliances.

The next area in which legislation needs improving is apparently a precise definition of the notion of "armed forces" with their components (the approach of leaving this matter to the discretion of the government cannot be considered appropriate) and the status of the intelligence and counterintelligence services as part of the armed forces in peacetime and wartime periods, as well as the statutory addressing by a law of the matters concerning the command and control of the armed forces components.

The acts of the National Assembly are especially significant in the area of armed forces control, and they are worth mentioning briefly. In the first place, these are the acts determining the numerical strength of the armed forces (Item 6 of Article 16 of the DAFRBA): a Resolution on the Adoption of a White Paper on Defence

and the Armed Forces of the Republic of Bulgaria as an Armed Forces Development Programme and on the Determination of the Numerical Strength of the Armed Forces of 2010[40], a Resolution on the Adoption of a National Security Strategy of the Republic of Bulgaria[41], a Resolution on the Repeal of the Military Doctrine of the Republic of Bulgaria[42] (that Doctrine, too, was adopted by a resolution of Parliament) and, finally, the topical Resolution on the Adoption of a Programme for the Development of the Defence Capabilities of the Armed Forces of the Republic of Bulgaria 2032 and on the Determination of the Numerical Strength of the Armed Forces, which determined the currently relevant numerical strength of the armed forces (taking, for the first time, account of the reserve component of the armed forces)[43].

By the system for financial management of armed forces modernisation projects according to financing thresholds, introduced by the Defence and Armed Forces of the Republic of Bulgaria Act as from 2010[44], a rule was laid down according to which a programme and/or projects for investment expenditures for the acquisition and/or modernisation of armament, materiel and equipment must be adopted by Parliament by a resolution on a proposal by the Council of Ministers where the value of each project exceeds BGN 100 million (Item 7a of Article 16, effective 26 February 2010). Important resolutions in the area of armed forces modernisation ensued:

- in the first place, a Resolution on the Adoption of a Project for an Investment Expenditure on the Acquisition of a New Type of Combat Aircraft[45];

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[40] Promulgated in *State Gazette* No. 88 of 2010.

[41] Promulgated in *State Gazette* No. 19 of 2011.

[42] Promulgated in *State Gazette* No. 41 of 2011.

[43] Promulgated in *State Gazette* No. 13 of 2021.

[44] Effective 26 February 2010, under an Act to Amend and Supplement the DAFRBA, promulgated in *State Gazette* No. 16 of 2010, the Minister of Defence single-handedly endorses projects of a value not exceeding BGN 50 million (Item 31a of Article 26 of the DAFRBA), the Council of Ministers does so on a proposal by the Minister of Defence for projects of a value ranging from BGN 50 million to BGN 100 million (Item 11a of Article 22 of the DAFRBA), and the National Assembly endorses projects of a value exceeding BGN 100 million on a proposal by the Council of Ministers (Item 7a of Article 17 of the DAFRBA).

[45] Promulgated in *State Gazette* No. 43 of 2016.

• next, a Resolution on the Adoption of a Project for an Investment Expenditure on the Acquisition of Major Combat Equipment for the Formation of Battalion Battlegroups from the Complement of a Mechanised Brigade and of an Updated Project for an Investment Expenditure on the Acquisition of a New Type of Combat Aircraft[46] with an exceedingly detailed analysis in an annex. Notably, this continued a process started by the previous National Assembly;

• finally, a Resolution on Consideration of the Proposals and the Reasons therefor as Stated in the Report by the Council of Ministers regarding the Results of the Conduct of an Assessment of the Offers Submitted according to Tentative Plan (Roadmap): Annex No. 3 to the Updated Project for an Investment Expenditure on the Acquisition of a New Type of Combat Aircraft Adopted by a Resolution of the National Assembly (*State Gazette* No. 51 of 2018) and on Mandating the Prime Minister to Make Arrangements and Designate a Negotiating Team to Prepare a Draft International Treaty and Hold Negotiations with the Government of the United States of America on the Acquisition of a New Type of Combat Aircraft[47]. That Resolution stated very specifically that the National Assembly:

"1. Mandates the Council of Ministers to prepare a draft international treaty and to hold negotiations with the Government of the United States of America on the acquisition of a new type of combat aircraft by the Republic of Bulgaria.

2. Mandates the Prime Minister to make arrangements and designate a negotiating team to prepare a draft international treaty and hold negotiations with the Government of the United States of America on the acquisition of a new type of combat aircraft F-16V Block 70 by the Republic of Bulgaria."

Point 4 of the Resolution, however, left an unfavourable impression: "The draft of an international treaty under Point 1 *may deviate from the mandatory requirements indicated in the Updated Project for an Investment Expenditure on the Acquisition of a New Type of Combat Aircraft adopted by a Resolution of the National Assembly (State Gazette No. 51 of 2018) on the basis of the offer received from the Government of the United States of America,* subject to subsequent ratification on the basis of Item 4 of Article 85 (1) of the Constitution of the Republic of Bulgaria and Article 15 (1) of the

[46] Promulgated in *State Gazette* No. 51 of 2018.
[47] Promulgated in *State Gazette* No. 6 of 2019.

International Treaties of the Republic of Bulgaria Act". This confirmed apprehensions that the decision-making process had been of a political nature and rendered virtually useless the work of the Air Force experts who had been guided in their choice by pre-set rigorous budgetary constraints.

For the sake of completeness, it should be noted that a constitutional precedent ensued: a suspensory veto imposed by the President with regard to a law ratifying an international treaty that was supposed to formalise the relations between the Republic of Bulgaria and the United States of America in connection with the purchase of new combat equipment[48]. While there is no question that the President's right to return a law for reconsideration extends to an instrument of ratification as well, this was nevertheless the first such instance.

3. New tendencies in legislation concerning the peacetime employment of the armed forces

Considering present-day realities, it is necessary to trace certain recent changes in legislation that introduced peacetime employment of the armed forces in domestic operations. Even the first Defence and Armed Forces of the Republic of Bulgaria Act of 1995 introduced in Article 66 (2) a rule that the armed forces may not be assigned tasks of a domestic political nature (the above-mentioned *posse comitatus* principle). The DAFRBA that is currently in force contains a somewhat different definition in Article 52 (2): the armed forces may not be assigned such tasks *in peacetime*. The notion of "peacetime" initially went undefined, but in 2010 two new provisions were inserted in § 1 of the Supplementary Provisions in 2010: Item 1a, stating that "'[p]eacetime' means the time during which a state of war or a state of martial law is not declared in

[48] Presidential Decree No. 173 of 23 July 2019, promulgated in *State Gazette* No. 59 of 26 July 2019, whereby an Act to Ratify an International Treaty (LOA) BU-D-SAB (F-16 Block 70 aircraft and associated support), an International Treaty (LOA) BU-D-AAA (Munitions in support of the F-16), an International Treaty (LOA) BU-P-AAD (Sidewinder AIM 9X Block II Missiles, associated material and services) and an International Treaty (LOA) BU-P-LAR (Multifunctional Information Distribution System Joint Tactical Radio System (MIDS JTRS) (5), passed by the 44th National Assembly on 19 July 2019, was returned for reconsideration to the National Assembly. The parliamentary majority overrode the veto, and the law was readopted and promulgated in *State Gazette* No. 60 of 30 July 2019.

the country", and Item 1b, stating that " 'wartime' means the time during which a state of war or a state of martial law is declared in the country". The bill amending and supplementing the DAFRBA (Ref. No. 902-01-51, accessible in Bulgarian at https://www.parliament.bg/bg/bills/ID/9747) was moved by the Government, but the reasons did not clarify why the terms needed to be specifically explained.

As pointed out above, Chapter Five of the DAFRB "State of War, State of Martial Law and State of Emergency. Mobilisation" provides, *inter alia*, for a state of emergency which is declared "where the Republic of Bulgaria becomes exposed to a *risk* of being embroiled in a military political crisis or in an armed conflict". The definition of "state of war" in Article 122 is vague and was presumably prompted only by the constitutional provisions containing the term "another state of emergency" (Article 57 (3), Article 64 (2), Item 12 of Article 84 and Article 100 (5) of the Constitution) which necessitate the introduction, in one way or another, of this term, too. It is very important to note, however, that because of the definitions in Items 1a and 1b of § 1 of the Supplementary Provisions of the DAFRBA, the period of a state of emergency is considered to be peacetime. Another nuance is also of legal relevance: according to Article 108 (2) of the DAFRBA, when a state of war or a state of martial law is declared, the act declaring such a state must specify the statutory instruments whose effect is suspended. No such rule applies to the declaration of a state of emergency. Even though Article 113 provides that when a state of martial law is declared, the "ensuring of internal order" passes under the direction of the Supreme Commander-in-Chief, Article 108 (2) of the DAFRBA entails that when a state of emergency is declared, citizens' full rights may not be impaired and restrictions, special jurisdiction, etc. may not be introduced.[49]

[49] For details about the historical and current evolution of the notion of "state of emergency", see **Nikolay Prodanov**, *Izvanrednoto (voennoto) polozhenie – istoricheski i aktualni pravni aspekti* [State of Emergency (State of Martial Law): Historical and Current Legal Aspects] in: *Dvadeset godini ot priemaneto na Konstitutsiyata na Republika Balgaria. Materiali ot nauchnata konferentsiya Veliko Tarnovo, 3 yuni 2011* [Twenty Years since the Adoption of the Constitution of the Republic of Bulgaria. Papers of the Research Conference, Veliko Tarnovo, 3 June 2011], Sofi-R, Sofia, 2011, p. 255-272.

With the passage of time, the legislator became aware of the increased threat of terrorism. Article 68 of the DAFRBA of 1995 provided that "when a state of emergency is declared in peacetime, the armed forces may execute tasks of" "rendering assistance to the security authorities in combating the proliferation of weapons of mass destruction, illegal arms trafficking and international terrorism" and "participation in the protection of strategic installations and in operations for the frustration of terrorist actions". The notion of "terrorism" within the meaning of the DAFRBA was not defined exactly, and it is not defined to date. The DAFRBA of 2008 that is currently in force (Item 1 of Article 57) replicates the previous provision, and participation of the armed forces in the protection of the international border was added in 2016 (Item 3). The legislator obviously did not find that these functions of the armed forces violate the *posse comitatus* principle. Besides this, according to Article 28 (1), the Minister of Defence, acting on a proposal by the Chief of Defence, authorises the use of weapons and combat tools by Bulgarian military entities "in cases where a Bulgarian and/or an allied combat tool has been captured within the territory of the Republic of Bulgaria for the purpose of perpetrating a terrorist act or another act with dangerous consequences for the population and/or for the sovereignty of the country", as well as "in cases where the airspace or the overflight rules for the territory of the Republic of Bulgaria have been violated by an aircraft proceeding in a manner that raises a doubt that the said aircraft may be used as a weapon for terrorist actions." The use of weapons is authorised according to the same procedure "in other cases, where a threat of terrorist actions or a risk of the use of weapons of mass destruction arises within the territory of the Republic of Bulgaria".

Lastly, the legislator adopted two special laws that raised new practical issues about the legal status of the armed forces: the Military Police Act of 2011 and the Counter-Terrorism Act of late 2016. The Military Police Service detects, terminates and frustrates terrorist acts, proliferation of weapons of mass destruction and illegal arms trafficking (Littera (b) of Article 2 (1) of the Military Police Act). The Service carries out anti-terrorist activity at the Ministry of Defence (Article 5). In performing these functions, the Service is vested with powers similar to the powers of the Ministry of Interior with regard to both service members and private individuals:

arrest, detention, establishing identity, search, etc. Military police personnel also have the right to issue binding orders to private individuals (Item 2 of Article 24 (1).

The Counter-Terrorism Act[50] has indeed revolutionised Bulgarian law with respect to the armed forces, empowering them to act within the national territory in peacetime while possessing powers specific to the police: the Government openly stated this in the reasons to its bill (Ref. No. 602-01-42, accessible in Bulgarian at https://www.parliament.bg/bg/bills/ID/42252.

According to Article 9 of the Counter-Terrorism Act (CTA), "[t]he Armed Forces of the Republic of Bulgaria shall participate in counter-terrorism and in the mitigation of the effects of terrorism in accordance with the counter-terrorism plans and this Act", with service members having the right "to carry out checks in order to establish the identity of persons, to detain persons, to carry out searches, to inspect personal belongings and means of transport, to inspect premises without the consent of the owner or occupant or in the absence thereof, to use physical force and restraining devices, to use weapons." Service members may only hold a person they have detained until the arrival of the Ministry of Interior authorities when they must hand over the detainee to these authorities. Unlike the Ministry of Interior Act, the Customs Act, the State Agency for National Security Act and the Military Police Act, however, the CTA does not provide for appellate review of the detention in immediate court proceedings.

The CTA introduced a National Operational Headquarters as a special extraordinary body headed by the Minister of Interior and appointed by the Prime Minister (Article 17). Significantly, though, neither the Minister of Defence nor deputy ministers of defence are expressly listed as mandatory participants in that Headquarters.

The major innovation in the world of law is the legal status of an anti-terrorist operation and state of emergency within the meaning of the CTA (this operation and state of emergency are discussed in Chapter Four of that Act; notably, a state of emergency under the CTA is declared in the presence of completely different prerequisites compared to the DAFRBA). Where such an operation is carried out, the National Operational Headquarters acts as an autonomous public authority vested with extraordinary powers.

[50] Promulgated in *State Gazette* No. 103 of 2016.

Article 38 enables the establishment of an "area of the anti-terrorist operation" within which citizens' rights are restricted, whereas public authorities, including the armed forces, enjoy extended powers under Article 39 of the Act, including temporary requisition of another's property.

Section II of Chapter Four of the CTA provides for a state of emergency upon the perpetration of a terrorist act with significant detrimental effects. Such state of emergency is declared by the National Assembly or the President, but the powers of public authorities are extended up to the limits set in Article 39, including restriction or suspension of civil aircraft flights, establishment of a special regime of navigation in the territorial sea and the internal maritime waters of the country, closing the international border, restriction of traffic on main road arteries, including railway transport, and establishment of control over passengers and freight. Fundamental rights of citizens are affected by restricting or barring access to government institutions and prohibiting the holding of meetings, rallies and demonstrations.

A parallel study of the CTA and the DAFRBA outlines the following legal issues, which also provide guidelines for a future improvement of legislation:

- Article 49 of the DAFRBA prohibits the establishment of military and other entities outside the complement of the Bulgarian Army which employ a military organisation or use armament and combat equipment or which envisage the performance of military service, except where this is provided for in a law *or in an act of the Council of Ministers.* The possible establishment of additional paramilitary forces is legitimated in this way, moreover by an act of the government whose political positions may differ from those of the President who is concurrently Supreme Commander-in-Chief. Defining the notion of "armed forces" within the meaning of legislation stands out as a particularly important issue in this respect. The legislator, though, apparently takes a peculiar approach in regulating this subject-matter, from explicitly defining the notion to its gradual narrowing and ceding to the Council of Ministers the power to determine the exact scope by an act of its own, which to a certain extent runs counter to the approach chosen by the legislator by the amendment to the Constitution. Article 48 of the DAFRBA defines the armed forces as "military and specialised en-

tities and large units thereof, established by the State, subject to a specific organisation and order of functioning, which possess and apply military and specialised means of action in order to ensure the objectives of national defence";

• the CTA does not regulate precisely the command and control of armed forces entities when anti-terrorist operations are carried out in the country. The Minister of Interior and the Chair of the State Agency for National Security are brought to the foreground. Who will determine which entities have the right to exercise the essentially police powers, and who will command them? The CTA does not specify this, nor is this mentioned in the National Counter-Terrorism Plan, adopted by Council of Ministers Decision No. 669 of 2 November 2017. The Plan states unspecifically that "by a decision of the National Operational Headquarters and by an order of the Minister of Defence, certain manpower and equipment of the armed forces are placed in readiness for use and are brought into the area of the anti-terrorist operation, the incident area or the area at risk". Besides this, a Temporary Operational Headquarters is established for control on the ground (see Item 5 of Article 37 (1) of the CTA). According to the Plan, "the commanders of military entities, upon arrival in the area of the anti-terrorist operation/the incident area or the areas at risk, report to the head of the temporary operational headquarters/the head of the operation/the head of the joint operation for addressing the consequences of a terrorist act, coordinating actions, and specifying tasks". The whole regulatory framework does not make clear the chain of command and whether the Minister of Defence may oppose the National Operational Headquarters or alter its plans. It is just as unclear whether the commanders of the particular entities are entirely under the orders of the temporary operational headquarters. And what matters most: where do the powers of the President come in this case, considering his or her capacity as Supreme Commander-in-Chief in both peacetime and wartime, as the Constitutional Court has clarified[51]?

[51] Without elaborating, legislation in this sphere in the 2105-2016 period demonstrated a stand-off between the supreme bodies, curbing the powers of the President. The President used to appoint single-handedly the chiefs of the National Intelligence Service and the National Service for Protection, but after the adoption of the State Intelligence Agency Act and the National Service for Protection Act, the President already appoints the Chair of the State Agency on

Consequently, it is imperative to synchronise the CTA and the DAFRBA: is the state of emergency under the CTA some special form, or does that law supplement the DAFRBA? It would be pertinent to specify whether once the CPA explicitly clarifies the term "terrorism" (according to Item 1 of § 1 of the Supplementary Provision, this is "any criminal offence referred to in Article 108a (1) to (4), (6) and (7), Article 109 (3), proposition six of Article 110 (1) and Article 110 (2), Item 1 of Article 308 (3) and Article 320 (2) of the Criminal Code"), should a state of emergency automatically actuate preventive measures against the persons who and which the State considers to be implicated in terrorism according to Council of Ministers Decision No. 265 of 2003 on the Adoption of a List of Natural Persons, Legal Persons, Groups and Organisations Subject to Application of Measures under the Measures against Terrorist Financing Act as well as the Persons Closely Linked Therewith[52]?

The legislative practice expanded the use of the armed forces in violation of *posse comitatus* by the Act on the Measures and Actions during the State of Emergency Declared by a Resolution of the National Assembly of 13 March 2020 (promulgated in *State Gazette* No. 28 of 2020), whose Article 9 stipulated that "[u]nder terms and according to a procedure established by an act of the Council of Ministers, service members of the armed forces, jointly and/or in coordination with other authorities, may be involved in the enforcement of epidemic-control measures and restrictions within the national territory, within the territory of a particular region or at a checkpoint." According to Article 10, service members of the armed forces have the right "to conduct identification checks of an individual", "to restrain, until the arrival of the authorities of the Ministry of Interior, the movement of an individual who can reasonably be believed to have refused or who fails to comply with the measures referred to in Articles 61 and 63 of the Health Act, with a bilateral memorandum in writing being drawn up on any such restraint", "to restrict the movement of individuals and vehi-

a proposal by the Council of Ministers and the Chief of the National Service for Protection "after consultation" with the Council of Ministers. In the Counter-Terrorism Act, the President is somehow sidestepped, his or her role being limited to receiving information or reports.

[52] *State Gazette* No. 64 of 2003.

cles at a checkpoint" and "to use physical force and restraining devices only in case of absolute necessity."

That law set a precedent by applying the rule of Item 12 of Article 84 of the Constitution to the declaration of "another state of emergency" (other than that within the meaning of the DAFRBA) and continued the tendency of assigning powers to the armed forces in non-military domestic operations. Although perceived as an *ad hoc* law and moreover in a fluid situation, it raised more or less the same issues as the analysis of the CTA, but the law even subordinates armed forces personnel to the Interior Ministry authorities, limiting them to act until the arrival of the latter on site.

Summing up, the conclusion that can be inferred from this analysis is that it is time to reconsider Article 52 (2) of the DAFRBA that is currently in force, according to which "[t]he armed forces may not be assigned tasks of a domestic political nature in peacetime". It seems justifiable to delete the expression "peacetime" and to rephrase the rule as follows: "The armed forces may not be assigned tasks of a domestic political nature except in the event of a war, a state of martial law or a state or emergency within the meaning of this Act [DAFRBA] or of another special law". This would decrease the legal vulnerability of the armed forces and their personnel and would be consistent with the changes in socio-political life which necessitate the use of armed forces in domestic operations. Consideration also needs to be given to at least partial immunity for their personnel in such cases.

Evidently, in the present political situation with short-lived parliaments and shifting majorities, it seems difficult to achieve such an improvement and synchronisation of legislation. This, however, will be a pressing task at least in the medium term, considering that the armed forces are entitled to statesmanlike treatment as, under the Constitution, they are duty-bound to guarantee the sovereignty, security and independence of the country and to defend its territorial integrity (Article 9 (1)) and their growing role in domestic situations is acknowledged in legislative practice.