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# Legal and Administrative Studies

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# Content

# Actional Imposibility, two Interpretations. Interpretation by Ability

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**Abstract**

*The present article continues a previous concern: what does mean that an actional agent does for another agent to become impossible to do something? Last side of the question is related to: can do, to actionaly compel, to actionaly hinder. A tempting interpretation for the impossibility to do comes from modal logic. Previously I approached this interpretation. In the current article we interpret the imposibility of doing something by the idea of cannot do. Distinguish two underlying concepts: 1. can do generic acts, respectively to have the ability to do or know how to do; 2. can do individual acts. The second one is related to succes. Becoming impossible to do stands for an event. Both positive and negative conclusions can be drawn from this. Among positive conclusions, we mention: the event means that the agent can do act-categories first and then cannot do individual acts; can do describes something different in initial state from the end state; the end state could also be a conjunction. Negative conclusions are: the event does not describe a vanish; the parts of the conjunction in end state are nor mutualy oposite, neither neutral; to know how to do does not stand for an epistemic logic over an erotetic one.*

**Keywords**: *to compell, to hinder, can do individual acts, can do generic acts, ability, know how to do, erotetic logic*.

## 1. Motivation and propose

Human action is marked by the pressure of responsibility to do or forbear from something. Action contexts in which this pressure is absent are, probably, rare.

They could be true "paradise islands" of irresponsibility. Or, on the contrary, they could rather be undesirable situations. Such as the case of inmates in a prison.

These contexts are produced by the agents who have the ability to hinder or to compell[2].

In both variant, for the agents of action *became imposible to do something*. The question, to which the purpose of this article to answer is:

*What does it mean for an agent to become imposible in terms of ability?*

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[1] Prof.-asist.

[2] von Wright, Georg, Henrik, *Normă şi Acţiune*, Ştiinţifică şi Enciclopedică Pub. House, Bucharest, 1982, p. 72.

This was a final opening for a previous concern[3].

*Becoming impossible to do* leads to at least *two important ideas* in Logic of Action: *modality* and *event*. The ideea of modality is prezent through the word *possible*. And "*impossible*" is the negation of *possible*. The latter being a *modal operator*. Despite the evidence, the modal interpretation was previously proved to be wrong[4]. We are not dealing with hte vanishing of the possible. We hypotesize that the *other idea*, that of *event*, resists. Even so, in the new interpretation of *possible to do*s, are we dealing with a vanishing?

**2. Compell and hinder are interdefinable**

*Doing to become impossible to do*[5] is part of a chain of equivalents with *compelling to forbear*[6] and *hindering to do*[7]. In turn, *doing to become impossible to forbear* is a part of a chain of equivalents with *compelling to do*[8] and *hindering to forbear*[9].

*Table no.1. A împiedica şi a constringe*

| | |
|---|---|
| 1. hin(x, d(y, e)) | x hinders y from doing the event e. |
| 2. hin(x, f(y, e)) | x hinders y from forbearing from the event e. |
| 3. com(x, d(y, e)) | x compells y from doing the event e. |
| 4. com(x, f(y, e)) | x compells y from forbearing from the event e. |

Previousley I followed the modal interpetation[10]. According to the wrightean text, this proved to be only seemingly justified.

*The new interpretation* we follow is that *the impossibility to do*, is made explicitley by *not being able to do*[11]. Which means that the agent cannot manifest its ability, that the agent is compelled to forbear from exercising it.

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[3] Iliescu, Gabriel, *Deontic-actional constraint as correlative of e-justice*, in vol *Legal and Administrative Studies, E-Governance and E-Justice in the Space of Freedom, Security and Justice of the European Union*, Pro Universitaria Pub. House, Bucharest, 2019, p. 186.
[4] *Idem*.
[5] *Idem*, von Wright.
[6] Hindering or preventing, in von Wright, Georg, Henrik, *Norm and Action*, section12, Routlege and Kegan Paul Pub House, 1963, p. 37. https://www.giffordlecturtes.org/books/norms-and-action
[7] *Idem*.
[8] *Idem*, p. 37. https://www.giffordlecturtes.org/books/norms-and-action
[9] *Idem*.
[10] von Wright, *op. cit*, pp. 72-73.
[11] von Wright, *Ibidem.*, p.72.

In this article we aim to return to this idea. Introducing the distinction between *event/act categories* and *event/act individual*.

**3. The ambivalence of *can do***

In general if an agent does (*d(...)*), than it can do(*can_d(...)*). Which seems analogously to a disjunctive expansion. At least this happens in the axiom *p (p v q)*[12]. Through this, *can do* seems something elementary. However this is not the case. *Can do* is *ambivalent*, meaning: *acts categories* and *acts individuals*.

Syntactically, both *act categories* and *act individuals* are incorporable in broader expression *can_d(y, e)*. Thus becomes ambiguous. That is, *can_ d(y, e)* means *can do* both on *act categories* and *act individuals*.

*Can do*, *can_d(y, e)*, on *act categories* means: ability[13], know how to do[14], *K_h_d(…)*. That is, in most cases, when we set ourselves to do the act we succeed. It happens without many trials and errors[15]. And before the trial there is reasonable assurance of success[16]. All of these: *ability*, *know how*, *reasonable assurance of success* are independent of the existence/non-existence of an opportunity for the act. And *e* from the expression *can_d(y, e)* is specified by $e_g$. And this means that y can do a generic event[17]. Here, it does not matter if the opportunity of doing the act exists. Even in the absence of the opportunity, the agent *can be able*, *knows how to do* an act. *The criterion of the ability is the small number of errors* that precede the success of the act.

*Can do*, *can_ d(y, e)*, on individual acts is a simple success.[18] Here, the opportunity must be present.[19] And the only criterion of *can do* is success. Neither the *ability to do*, nor that the agent *knows how to do* nor any reasonability degree of certainty that he will succeed, is supposed. And *e* from the expression *can_d(y, e)* is specified by $e_i$. So, *can_d(y, e)* referring to *individual acts* is specified by *can_d(y, $e_i$)*. This means that *y can do an individual event.*[20] In this case, the number of trials end errors is not a question either. Simply, the agent manages, or has managed to do on a certain occasion for his act.

The interpretation by generic acts is necessary. This is because the given event is a part of a hindering act. In order for y to be hindered from doing, y must be able to do generical acts.[21]

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[12] Popa, Cornel, *Sisteme Logice şi Metalogice*, vol II, Fundația România de Mâine Pub. House, Bucharest, 2002, p. 36.
[13] von Wright, *op.cit.*, p. 67, p. 68.
[14] *Idem*, p. 68.
[15] *Idem*, pp. 68-69.
[16] *Idem*, p. 68.
[17] *Idem*, p. 67.
[18] *Idem*, p. 68.
[19] *Idem*.
[20] *Idem*, p. 67.
[21] *Idem*, p. 73.

## 4. Event that happens and event that does not happen

### 4.1. A vanishing does not happen

Due to ambivalence of *can do*, the event *can_d(y, e) T ~can_d(y, e)*does not describe a vanishing, however has such a form. If we had a vanishing then *can_d(y, e)* in the initial state and the one in end state should mean the same thing. Specify that end state contains a negation. Or *can_d(y, e)* in end state does not mean the same thing as in the initial state. So we don t have a vanishing.

In the event we are analyzing, *can do* refers both to generical acts and to individual acts. Which is further explained.

*In the initial state*, *can_d(y, e)* means *can do generical acts.In the end state, can_d(y, e)* means *can do individual acts*. Detailing, in the end state, *can_d(y, e)* is part of the sequence "*~can_d(y, e)*". So repeat the sequence "*can_d(y, e)*". And here it should mean the same thing. The only difference being the negation: *y is not able to, does not know how to do*. Which is not the case. In the end state, *can_d(y, e)* means *can(not) do individual acts*, not to succeed doing in a certain occasion.

The event *becoming impossible to do*, *can_d(y, e) T ~can_d(y, e)* is not a vanishing. It is not described that y would lose somehow his ability to do. He may stop knowing how to do. But here is not about *generical acts* first and then. In other words, is possible falls that happens a vanish (down table, left). Instead, as many events of conservation may happen. y can still do e. He may still be able to do e. Finlay, y may continue to know how to do e (down table, right). It is possible that the described end state does not exhaust what can happen. y cannot do the individual act, in such a circumstance. While, he may continue *can do the generical act.*[22]

*Table no. 2. Events that happen/ not happen on generical act*

| *What event may not happen on generical act?* | *What event may happen on generical act?* |
|---|---|
| ~(can_d(y, $e_g$) T ~can_d(y, $e_g$)) | can_d(y, $e_g$) T can_d(y, $e_g$) & ~can_d(y, $e_i$) |
| ~(able_d(y, $e_g$) T ~able_d(y, $e_g$)) | able_d(x, $e_g$) T able_d(x, $e_g$) & ~can_d(y, $e_i$) |
| ~(K_h_d(y, $e_g$) T ~K_h_d(y, $e_g$)) | K_h_d(x, $e_g$) T K_h_d(x, $e_g$) & ~can_d(y, $e_i$) |

Beside this, in end state, notice the pair *can_d(y,* $e_g$*) & ~can_d(y,* $e_c$*)*. Does it describe a contradiction? In the section after the Propozitional Logic interlude we'll give a negative answer to this question.

[22] *Idem.*

### 4.1.1. Propositional interlude

#### 4.1.1.1. Axiomatic foundation

The events in the right of table 3 are particular cases of an event of the kind: *pT (p & ~q)*. We start from the axiom *p T q & r T s ≡ p & rT q & s.*[23] Apply q/p, r/p, s/~q, idempotence *p & p ≡ p* (Idp)[24], rule of extensionality (RE), *{A ≡ B, A} ⊢ B*. At last, eliminating the conjunction[25] (E&) we obtain consequences: *p T p* şi *p T ~q*.

*Table no.3. Axiomatic foundation of the event*

| | |
|---|---|
| 1. pT (p & ~q) | |
| 2. p T q & r T s ≡ p & rT q & s[26] | |
| 3. p T p & p T ~q ≡ p & pT p & ~q | q/p, r/p, s/~q, 2 |
| 4. p T p & p T ~q ≡ pT (p & ~q) | p & p ≡ p, 3 |
| 5. p T p & p T ~q | RE, 1, 4 |
| 6. p T p | E&, 5 |
| 7. p T ~q | E&, 5 |

We apply a particular case of RE: *{(4)A ≡ B, (5)A⊢ C} ⊢ (8)(B⊢ C)*. If from A is deducible any conclsion, say C, then from any equivalent formula echivalentă with A se is deducible C. Here, such a formula equivalent to A, is B.

.

*Table no.4. consequence events*

| | |
|---|---|
| 4. p T p & p T ~q ≡ pT (p & ~q)<br>5. p T p & p T ~q ⊢ (6) p T p<br>8. pT (p & ~q) ⊢ p T p<br><br>8<br>pT (p & ~q)<br>p T p<br><br>It happens p first and then also happens p, but, also q.<br>Therefore p is maintained. | 4. p T p & p T ~q ≡ pT (p & ~q)<br>5. p T p & p T ~q ⊢ (7) p T ~q<br>9. pT (p & ~q) ⊢ p T ~q<br><br>9<br>pT (p & ~q)<br>p T ~q<br><br>It happens p first and then also happens p, but, also q.<br>Therefore happens p first and then q is absent. |

In schemes 8 and 9 we successively substitute: *p/can_d(y,* $e_g$*)*, q/ can_d(*y,* $e_i$); *p/ able_d(y,* $e_g$*)*, q/ can_d(*y,* $e_i$); *p/* K_h_d(*y,* $e_g$), q/ can_d(*y,* $e_i$).

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[23] According to footnote 4, von Wright, Georg, Henrik, *Logica Deontică şi Teoria Generală a Acţiunii*, vol. *Norme, Valori, Acţiune*, Politică Pub House, Bucharest, 1979, p. 144.

[24] Formula 15.1.27, according to Popa, Cornel, *Logică şi Metalogică*, vol. I, Fundația România de Mâine, Pub. House, Bucharest, 2000, p. 117.

[25] Theorem 23, according to Popa, Cornel, *Logică şi Metalogică*, vol. II, Fundația România de Mâine, Pub. House, Bucharest, 2002, p. 44.

[26] According to footnote 4, von Wright, *op.cit*, p. 144.

*Table no.5.1. Inferences derived from schemes 8 and 9 by p/ can_d(...*

| | |
|---|---|
| can_d(y, $e_g$) T can_d(y, e) & ~can_d(y, $e_i$)<br>can_d(y, $e_g$) T can_d(y, $e_g$) | can_d(y, $e_g$) T can_d(y, $e_g$) & ~can_d(y, $e_i$)<br>can_d(y, $e_g$) T ~can_d(y, $e_i$) |

*Table no.5.2. Inferences derived from schemes 8 and 9 by p/able_d(...*

| | |
|---|---|
| able_d(y, $e_g$) T able_d(y, $e_g$) & ~can_d(y, $e_i$)<br>able_d(y, $e_g$) T able_d(y, $e_g$) | able_d(y, $e_g$) T able_d(y, $e_g$) & ~can_d(y, $e_i$)<br>able_d(y, $e_g$)T~can_d(y, $e_i$) |

*Table no.5.3. Inferences derived from schemes 8 and 9 by p/ K_h_d(...*

| | |
|---|---|
| K_h_d(y, $e_g$) T K_h_d(y, $e_g$) & ~can_d(y, $e_i$)<br>K_h_d(y, $e_g$) T K_h_d(y, $e_g$) | K_h_d(y, $e_g$) T K_h_d(y, $e_g$) & ~can_d(y, $e_i$)<br>K_h_d(y, $e_g$) T ~can_d(y, $e_i$) |
| y knows how to do the generic event first and then also knows but cannot do the individual event.<br>Therefore y continues to know how to do the generic event. | y knows how to do the generic event first and then also knows but cannot do the individual event.<br>Therefore y knows to do the generic event first and then cannot do the individual event. |

We note the conclusions: *able_d(*y, $e_g$*) T ~can_d(*y, $e_g$*)* şi *K_h_d(*y, $e_g$*) T ~can_d(*y, $e_i$*)*. Treat them as particular cases of some event of form pT~q. It comes from *pTq* by *q/~q*. Computing, we establish the disjunctive equivalent[27] of this event in the next section.

### 4.1.1.2. Founding by natural computing

Usualy, four events are considered. A fifth event is added: *pTq*. Its equivalent is a disjunction composed of four conjunctions: *both p and q maintain, or only p maintains and appears, or p vanishes and q maintains, or both p vaishes and q appears*.

But we are interested with the event *pT~q*. We have as a purpose to obtain its disjunctive equivalent. Starting from the equivalent of *pTq*. Here replace: q/~q; ~~q ≡ q. Display the result:

$$pT{\sim}q \equiv (pTp \,\&\, {\sim}qT{\sim}q) \vee (pTp \,\&\, qT{\sim}q) \vee (pT{\sim}p \,\&\, {\sim}qT{\sim}q) \vee (pT{\sim}p \,\&\, qT{\sim}q)$$

p maintains its presence and q its absence, or only p maintains and q vanishes, or p vanishes and only q maintains its absence, or both p appears and q vanishes.

The equivalence can be rewritten by two inference schemes. We retain only one of them: in which the premise is disjunctive and *p T ~q* is a conclusion. This

[27] von Wright, G.H., *Normă şi Acţiune*, Ştiinţifică şi Enciclopedică Pub. House, Bucharest, 1982, pp. 47-48.

is decomposable into as many simpler schemes as the disjunction members has. We associate them the natural language interpretation as guidance.

*Table no.6.1. pT~q has a disjunctive premis*

| |
|---|
| (pTp & ~qT~q) v (pTp & qT~q) v (pT~p & ~qT~q) v (pT~p & qT~q)<br>pT~q |

*Table no.6.2. Decomposition of the scheme from 6.1.*

| *6.2.1* | *6.2.2* | *6.2.3* | *6.2.4* |
|---|---|---|---|
| pTp & ~qT~q<br>pT~q | pTp & qT~q<br>pT~q | pT~p & ~qT~q<br>pT~q | pT~p & qT~q<br>pT~q |
| 1. p maintains its presence and q its absence.<br>2.p is present first and then q is absent. | 1. only p mantains and q vanishes.<br>2.p is present first and then q is absent. | 1. p vanishes and only q maintains absent.<br>2.p is present first and then q is absent. | 1.both p and q vanish.<br>2.p is present first and then q is absent. |

The procedure exposes all the list of cases resulted from computation. The most probable, the situation described by von Wright is *pTp & qT~q*. It describes the maintenance of the ability and the vanishing of possibility to do individal acts.

In previous schemes substitute p/able_d(y, $e_g$); q/can_d(y, $e_i$). Thus we specify what maintans and what vanishes:

.

*Table no. 7.1. Substitution p/ able_d(y, $e_g$) în 6.2.1*

| |
|---|
| able_d(y, $e_g$) T able_d(y, $e_g$) & ~can_d(y, $e_i$) T ~can_d(y, $e_i$)<br>able_d(y, $e_g$) T ~can_d(y, $e_i$) |

*Table no. 7.2. Substitution p/ able_d(y, $e_g$) în 6.2.2*

| |
|---|
| able_d(y, $e_g$) T able_d(y, $e_g$) & can_d(y, $e_i$) T~can_d(y, $e_i$)<br>able_d(y, $e_g$) T~can_d(y, $e_i$) |

*Table no. 7.3. Substitution p/ able_d(y, $e_g$) în 7.2.3*

| |
|---|
| able_d(y, $e_g$) T~able_d(y, $e_g$) & ~can_d(y, $e_i$) T ~can_d(y, $e_i$)<br>able_d(y, $e_g$) T~can_d(y, $e_i$) |

*Table no. 7.4. Substitution p/ able_d(y, $e_g$) în 7.2.4*

| |
|---|
| Able_d(y, $e_g$) T~able_d(y, $e_g$) & can_d(y, $e_i$) T ~can_d(y, $e_i$)<br>able_d(y, $e_g$) T~can_d(y, $e_i$) |

We can also substitute by *K_h_d(y,* $e_g$*)*, meaning that *y knows how to do generic event*. Thus obtain an other variant of the same four schemes.

### 4.2. What does not happen in the end state of the event?

#### 4.2.1. Oppositions

Preciously we showed that *can_d(y,* $e_g$*)Tcan_d(y,* $e_g$*) & ~can_d(y,* $e_i$*),* is an event that contains the end state *can_d(y,* $e_g$*) & ~can_d(y,* $e_i$*).* We repet the question if this is a contradiction. Extend this question to other *oppositions*: contrarietaty, subcontrariety.

*Contradiction* is a type of oposition. *can_d(...)* seems to be the contradictory of *~can_d(...).* But *can_d(...)* in initial state is understood in *generical sens, independent* of some *oportunity*. Instead, *~can_d(...*in end state means *failure to do in a given oportunity*. In other words, it refers to something completley different. The semantic conditions of the contradiction[28] do not apply. Also, the presence of one of the elements does not exclude the other one's. So we have no contrariety[29]. Likewise, the absence of one of them does not attract the presence of the other. Such that nore *subcontrariety* can be about.[30]

#### 4.2.2. Assertion or neutrality

*The assertion of p,* expressed as neutrality means: *q is neutral for* $p^{31}$, $p*q^{32}$. Only the vaue of *p* is decisive for hte value of *p*q*. Thus, whatever is the value of q when the value of p is 1, *p*q* has the same value.

*The assertion of q,* expressed as neutrality means: *p is neutral for* $q^{33}$, $p°q^{34}$. In the text that describes the value of *p°q,* replace p/q, q/p, and */°. Obtain semantic characterization of q's assertion. The *ability of doing generical acts* and *can do individual acts* could be in such a neutrality. Replace: *p/able_d(y,* $e_g$*)* şi *q/can_d(y,* $e_i$*).* Apply directly, these substituitions in definitions of the two functions.

##### 4.2.2.1. *Assertion of p* or *q is neutral to p*

This means that *y'success in doing individual acts* is neutral to his *ability to do generical acts* or to his *knowledges on how to do*.

It is ready at hand to read this relation by the word *and.*

*First,* ofer *arguments* for the idea that the relation between ability and succes can be rendered by the *p assertion* truth function, respective *p*q*. Which amounts to interpreting the function itself by actionalist content of natural

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[28] Gheorghiu, Dumitru, *Intuiţionism, paraconsistenţă, contrarietate şi subcontrarietate*, in *Existenţă, Contradicţie, Adevăr*, Trei Pub. House, Bucharest, 2005, p. 110.
[29] Gheorghiu, Dumitru, *op.cit.*, pp. 129-130.
[30] *Idem*, pp. 131-132.
[31] Enescu, Gheorghe, *Dicţionar de Logică*, Ştiinţifică şi Enciclopedică Pub House, Bucharest, 1985, pp. 130-131.
[32] *Idem*.
[33] *Idem*.
[34] *Idem*.

thinking. Thus, according to the *first line* it is true that y is able (or knows how) to do and succeeds to do *individual acts*. According to *the second line* it is true that although *y is able*, he still *does not succeed to do*. The presence of *can_d(y,* $e_i$*)* in the first line and its absence in the second line, while both are true, shows that it is neutral for *able_d(y,* $e_g$*)*.

*Table no.8*

| Cartezian product of the values of the argument of the functions | | Instantiated truth function p/able_d(y, $e_g$), q/ can_d(y, $e_i$) | | | |
|---|---|---|---|---|---|
| | | *Assertion of p*[35] | *q is neutral to p (f4)*[36] | | |
| able_d(y, $e_g$) | can_d(y, $e_i$) | able_d(y, $e_g$) | able_d(y, $e_g$) | * | can_d(y, $e_i$) |
| 1 | 1 | 1 | 1 | 1 | 1 |
| 1 | 0 | 1 | 1 | 1 | 0 |
| 0 | 1 | 0 | 0 | 0 | 1 |
| 0 | 0 | 0 | 0 | 0 | 0 |

Which would be arguments in favour of the idea that the relation between *ability* and *success* is rendered by truth function of *neutrality or assertion of p*.

*Then*, ofer *arguments against* the idea that the relation between the ability and success may be rendered by the same truth function.

*A first argument* is also related to the matrix definition. So, in the third line is false that although *y is not able*, however he manages to do. Or, action theory admits that it is possible that, without *knowing how to do*, without being *able*, however *y manages to do*. Inability and succes can be true toghether. *The second argument* holds of the *conclusions* of this function. Asertion of p/neutrality of p against q[37], has a *set of conclusions*, Con(p):[38] disjunction and replication.[39] Instantiate the set of these conclusions by substitions indicated above.

| *Table no.9. able_d(y,* $e_g$*)'s conclusion* | |
|---|---|
| Con(p): | Con(able_d(y, $e_g$)): |
| p v q | able_d(y, $e_g$) v can_d(y, $e_i$) |
| p ⊂ q | able_d(y, $e_g$) ⊂ can_d(y, $e_i$) |

[35] Iliescu, Gabriel, *Negaţii neclasice, funcţii conclusive, şi funcţii-premise*, in *Probleme de Logică*, vol XVI, Academia Română Pub House, Bucharest, 2013, pp. 129-130.
[36] Enescu, *op.cit*, pp. 130-131.
[37] *Idem*.
[38] *Idem*, Iliescu.
[39] *Idem*, Iliescu, p. 129.

Which means that *the abilty to do* has as consequences:

v. Its disjunction with *can do an individual act*;

⊂. *The ability to do* (a generical act) is implied by *can do an individual act*.

The last conclusion is false in actionalist interpretation. If the agent can do an individual act does not mean that he *is able,* or that he *knows how to do*. And the expressions $p \vee q$ and $p \subset q$ are, indeed, conclusions of *p* and $p * q$ respectively. Which is proved by the truth table[40]. Hence follows the two actionalist expressions are not content appropriate to this form. This is, despite the evidence that the two ones would be in neutral relation.

#### 4.2.2.2. *The assertion of q* or *p is neutral to q*

Interpret by the same content, as in the previous case.

*First,* offer arguments for the idea that the relation between ability and success can be rendered by the truth function o assertion of q, respectively the neutrality of p to q.

The first line means that both *y* is able (or knows how) to do and that he succeeds to do. In the third line, although y succeeds, however is not able to do. Both are valued as true. Both are in accordance with the theory.

*Table no.10*

| Cartezian product of the values of the argument of the functions | | Instantiated truth function p/able_d(y, $e_g$), q/ can_d(y, $e_i$) | | | |
|---|---|---|---|---|---|
| | | *Asertion of q*[41] | *p is neutral to q (f6)*[42] | | |
| able_d(y, $e_g$) | can_d(y, $e_i$) | can_d(y, $e_i$) | able_d(y, $e_g$) | ∘ | can_d(y, $e_i$) |
| 1 | 1 | 1 | 1 | 1 | 1 |
| 1 | 0 | 0 | 1 | 0 | 0 |
| 0 | 1 | 1 | 0 | 1 | 1 |
| 0 | 0 | 0 | 0 | 0 | 0 |

*Then,* we offer unfavorable arguments for the idea that the relation between *ability* and *success* may be rendered by the truth function *assertion of q.*

*A first argument* is also related to the matrix definition. Thus, in the second line it is false that although *y is able,* he still does not succeed *to do*. Or, the theory admits it is posible that *y knows how to do, is able to do,* and yet he fails to do it. In fact, this is the essential idea. Ability and failure can be together true. What this line excludes. *The second argument* relates to the conclusions of this function. Assertions of q[43] respectively neutrality of *p* for *q*, $p \circ q$[44] has a lot of

[40] *Idem*, Iliescu, pp. 129-130.
[41] *Idem*.
[42] Enescu, *op.cit.*, pp.130-131.
[43] *Idem*, Iliescu, p.131.
[44] *Idem*, Enescu.

conclusions, Con(p): disjunction and implication[45]. Instantiate the set of these conclusions using the same substitutions like above:

| *Table no.11. Conclusions of can_d(y, $e_i$)* | |
|---|---|
| Con(q): | Con(able_d(y, $e_g$)): |
| p v q | able_d(y, $e_g$) v can_d(y, $e_i$) |
| p ⊃ q | able_d(y, $e_g$) ⊃ can_d(y, $e_i$) |

Which means that ability to do has consequences:
v. Its disjunction with can do individual acts;
⊃. *The ability to do* implies the *can do individual acts*.

The conclusion of the form $p \supset q$ is more probable than true. If the agent is able, that is he knows how to do, does not mean that he can do an individual act in a certain circumstance. He may be hindered to do now and here. We mention that $p \supset q$ is one of the conclusions of $q$ respectively $p \circ q$. Which is proven at the level of truth table functions[46]. Hence the two contents of natural thinking are not appropriate to the $p \circ q$ form. This, despite the evidence that the two would be in neutral relationship.

### 4.3. *To know how* is an overlap of: epistemic, erotetic and action logics[47]

#### 4.3.1. Erotetic component

One of the meanings of *becoming impossible to do* starts from the initial state of an event: *the agent knows how to do*. Neglect here the end state.

"*y knows how to do e*" may be taken s an epistemic logic overlaped on erotetic one. Which means y *knows* the answer to the *question* "how is it done?". Both logics being applied to the logic of action. There would be arguments both for, and against this interpretation.

*The counter argument* starts from a first brief analysis of the question "how to do e?" The situation is "as if" we are dealing with the next characteristics. There would be o non-empty, finite and exhaustive list of procedures; these would have own names; note this names conventionally by individual constants $\pi_1, \ldots, \pi_n$. The question "how to do e?" could be reformulated as follows: "what is the procedure by which is done e?". The word "what" from the question "what is the procedure by which is done e?" should be replaced with one of the individual constants $\pi_1$, or…, or $\pi_n$; the substitute would be the short answer to the question; and the long is "$\pi_i$ is the procedure by which is done e?"[48].

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[45] *Idem*, Iliescu, p. 131.
[46] *Ibidem.*, pp. 129-130.
[47] von Wright, *op.cit.*, pp. 66-67.
[48] Bieltz, Petre and Gheorghiu, Dumitru, *Logică Juridică*, Pro Transilvania Pub House, Bucharest, 1998, pp. 175-176.

Why would this be the argument against? The state of knowledge would be *exclusively subjectiv*. Because *y* from expression "*y ştie cum să facă e*" would be the holder of a simple subjectiv-mental state about how the event e is done to happen. That is, y only knows. From here would follow that he cannot do or, anyway he does not. And to know is opposed to *can do*.

In addition, this interpretation detaches the expression "y knows how to do e" from the context of the other actionalist interpretations of which it is part. The expression "y knows how to do e" is only one of the interpretations besides "small number of trials and errors", "reasonable degree of certaintity of success", "y is able to do". Or, all of these send to y as an agent of action, not as a mere epistemic agent of the answer to a question, as a holder of a mental state of knowledge.

*The pro argument* is according to ability. There is a small number of trials and errors. So, the agent sometimes fails, but comes back. What justifies his return could be prior knowledge of procedure of the action. Beforehand, the agent knows, has the mental representation of the procedure, possibly failed. At the moment prior to the act, knowledge would be one in epistemic-subjective sense, indeed. Which does not exclude the subjective state should be followed by the repeating of the act. So that epistemic-subjectiv sens and actional one do not exclude each other. State of knowledge could be *inclusiv* a *subjective* one.

### 4.3.2. The epistemic component

We can interpret the axioms specific to epistemic logic through action content.

Distinguish between the idealised epistemic agent and the de-idealised one[49]. The idealised agent is contained in implicit epistemic logic. The de-idealised one is contained in the explicit epistemic logic.

The atomic expression of the first logic is: $K_i\varphi$, *i knows* $\varphi$. the non-atomic expression of the second logic is: $X_i\varphi$, *i knows explicitly* $\varphi$. Which means: *i* is aware that $\varphi$ and *i* knows implicitly $\varphi$. Symbolic, $X_i\varphi = A_i\varphi \,\&\, K_i\varphi$[50].

The action expression *K_h_d(y,* $e_g$*)* may be understood as a result of the substitutions $i/y_0$, $\varphi$/*h_d(y,* $e_g$*)* in $K_i\varphi$. And this is an generical ability[51]. In this interpretation, we try to rewrite the axioms of implicit knowledge.

The interpretation of $K_i\varphi$ through *K_h_d(y,* $e_g$*)* does not pose problems. But when it is contained in longer expressions then difficulties arise. Such an expression is the axiom of knowledge $K_i\varphi \supset \varphi$[52]. We see *two ways* of interpreting in terms of logic of action.

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[49] Gheorghiu, Dumitru, *Cunoaştere implicită şi cunoaştere explicită*, in *Existenţă,* in *Contradicţie, Adevăr*, Trei Pub. House, Bucharest, 2005, pp. 46-47.

[50] *Idem*, Gheorghiu D., p. 50.

[51] von Wright, Georg, Henrik, *Explicaţie şi Înţelegere*, Serie coordonată de Mircea Flonta şi Ilie Pârvu, Notă Introductivă de Mircea Flonta, Traducere de Mihai D. Vasile, Humanitas Pub. House, Bucharest, 1982, p. 121.

[52] Gheorghiu D., *op.cit.*, p. 46.

*a) Uniform Substitution*. Axiom becames:

K_h_d(y, $e_g$) ⊃ h_d(y, $e_g$)
If y knows how to do to happen $e_g$ then y how to do to happen $e_g$.

The upper consequent *y how to do to happen* $e_g$ is meaningless. It was detached from the expression *y knows how to do to happen* $e_g$. Only together it makes sense Loss of the meaning is the price of uniform substitution. Which means that *h_d(y,* $e_g$*)* is not detachable from *K_h_d(y,* $e_g$*)*. And *h_d(y,* $e_g$*)* means something only if it is preceded by the idea of knowledge. If *y does an event* then this it is an individual, $e_i$, not a generical one, $e_g$. And if *y knows to do an event* then this is a generical $e_g$ not an individual one $e_i$.

*b) We give actional meaning*. Then the uniformity of substitution is violated. Axiom becomes:

K_h_d(y, $e_g$) ⊃ d(y, $e_i$)
If y knows how to do to $e_g$ then y do $e_i$.

The consequent: *y does* $e_i$ make sense But then φ from the antecedent of the axiom and φ from the consequent n longer have the same substituent. That is substitution is no longer uniform. In fact it is debatable how true is that: if someone knows how to do then he does.

The rule of generalising knowledge: *from* $\varphi$ *results* $K_i\varphi$[53] has the same problems.

Other problematic expression is the distribution axiom: $(K_i\varphi \,\&\, K_i(\varphi \supset \psi)) \supset K_i\psi$[54].

Remember that $K_i(\varphi \supset \psi)$ means: *i knows that if* $\varphi$ *then* $\psi$. Consider the two approaches.

a) Apply the same substitution as above. Obtain *K(y, h_d(y,* $e_g$*)* ⊃ $\psi$*)*. The interpretation is obviously meaningless: *y knows that if how to do* $e_g$ *then* $\psi$. We didn't interpret it either $\psi$ because anyway is $\varphi$ problematically. We obtain: *K(y, h_d(y,* $e_g$*)* ⊃ $\psi$*)*. The interpretation is obviously meaningless: *y knows that if how to do* $e_g$ *then* $\psi$. We didn't interpret also $\psi$ because it is problematic anyway. As in the previous case, the substitute of $\varphi$, that is *h_d(y,* $e_g$*)*, cannot be separated from K.

[53] *Idem*, p. 47.
[54] *Idem*, Gheorghiu D., p. 46.

b) We use the substitute $d(y, e_g)$. This means *y does* $e_g$.

Then $K_i(\varphi \supset \psi)$ becomes $K(y, d(y, e_g) \supset \psi)$. Interpretation is: *y* knows that if *he does* e *then* $\psi$. Or, the human agents do not properly generic events, but individual ones. And $\psi$ cannot replaced by *can_d(y, $e_i$)*. Because *ability to do generical acts* does not imply *can do individual acts.* And the antecedent, is just about this generical ability[55].

There are two more axioms of the same logic. The axiom of positive introspection, $K_i\varphi \supset K_iK_i\varphi$[56], means *if i knows that* $\varphi$ *then he knows that he knows that* $\varphi$. The axiom of negative introspection, $\sim K_i\varphi \supset K_i \supset K_i\ \varphi$, means *if i does not know then he knows that he does not know*. More naturalised he the limits of his knowledge. In both cases, the uniform substitution of $\varphi$ can be correctly applied. But if we interpret them actionalist, both axioms mean that the agents know their abilities and limits. Which is debatable.

Epistemic Logic, at least the Implicit Logic one, does not seem to be a suitable domain for interpreting of actional impossibility.

If *being able to do* is an alternative for *to know how to do* and this can be interpreted in epistemic logic, then epistemic logic could implicitly be a logic of the ability, so a fragment in logic of action. As it was seen, is not the case.

**5. Conclusions and openings**

The intention of the article was to clarify the idea of *becoming impossible to do*. This being included in the *act*: *do to become impossible to do*.

Two ideas caught the attention: the term *possible* and *becoming as impossible*. In author's intention on *possible* does not stand for the modal operator with the same name. It is about *can do* with reference to *generical acts* or *individual acts*. However, admitted that term *becoming* stands for an *event*. This means: *can do first and then cannot do*. It is very strong the appearance that this describes the *vanishing of the possible.* As the *possible* does not stand for *modality*, nor for *the becoming as impossible* does not stand for *vanishing of possible*.

But the event does not even stand for a *vanishing in general*. This is because *can do* does not stand for the same meaning in the initial and in the end state. In initial state *can do* stands for *generical acts*. In the end state, *can do* stands for *individual acts*. What is denied in the end state is something else than what is stated in the initial state. Therefore, *becoming impossible to do,* does not describe even a vanishing. And this happens even if it is a very strong appearance.

In fact, the event could have a conjunctive end state. The agent could continue *can do generical acts* (table 5.1) or continue *know how to do* (table 5.3). But, in all these cases, we are told that, he cannot do an individual act of the

[55] von Wright, *op.cit.*, p. 121.
[56] *Idem*, Gheorghiu D., p. 47.

generical kind one, on ascertain opportunity. That is, his ability, his *know how to do* are only hindered to manifest.

Some negative conclusions can be drawn. They refer to the members of the conjunctions from the end state of he event $can\_d(y, e_g)$ *T* $can\_d(y, e_g)$ & $\sim can\_d(y, e_i)$.

There is no kind of opposition among these members. *We have no contradiction* in the end state: $can\_d(y, e_g)$ & $\sim can\_d(y, e_i)$ (right side, table no2). Because, the agent can do a generical act but not a individual one. Which is not a contradiction. *We have no contrariety*. It does not mean that: if the agent can do generical acts, then he can do individual acts. *We have no subcontrarariety*. It does not mean that: if the agent cannot do generical acts, then he can do individual acts. So are excluded both contrariety and subcontrariety.

*Neutrality is also absent* between *can do generical act* and *can do individual acts*. Thus, *can do individual acts* is not neutral to *ability for doing generical acts*. This neutrality has as a conclusion a truth function that says: the action agent is able to do generical act if he is able to do individual acts (table no9). But this is false. Likewise, the revers neutrality does not work. The *ability to do generical acts* is not neutral to the *can do indivdual acts* of the same agent. A conclusive function falsifies this hypothesis: if the action agent is able to do generical acts then he an do individual acts. (table no13). Both conclusive truth functions are false. So both hypotheses concerning to neutrality are false.

*We have no epistemic logic superimposed on an erotetic logic*. The presence of *to know* may send to the hypothesis of the epistemic logic. And the presence of *how* may send to the hypothesis of the erotetic logic. *"know"* describes a mental state. Remains unclear whether this state is, inclusively mental and actional, or exclusively mental and non-actional. A test of the hypohthesis, that we have a epistemic logic, is the interpretation of the axioms of epistemic logic by actional content. If we interpret through actionalist content the knowledge axiom then obtain either a meaningless expression or a false one: *if an agent knows how to do something then he does*. Which is false. Because of the same reason, the rule of generalizing the knowledge is false: if an agent does something then he knows how to do. The axiom of the distribution of the operator K is also problematic. Within it there is the premise *i knows that: if* $\varphi$ *then* $\psi$. If we introduce the shown actionalist content, obtain a meaningless expression. If we want to have an meaningful expression then we must eliminate the erotetic particle *how*. Thus, must be excluded the hypothesis of a epistemic logic superposed on an erotetical one.

In all these situations it is about words corresponding to elements of logic symbolism. However the hypothesis are refuted.

We can mention some delimitations of the concept of ability, from *skill* and *capacity* ones. Both of them are tempting substitutes for *ability*. But both of them are just as different from this concept.

Also retain attention concepts that are below the concept of ability: *trying*, *error, reasonable degree of safety*, *success*. All of these may constitute openings for as many future research.

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# Ensuring a fair justice - Comparative law elements in the matter of the magistrate's institution

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**Abstract**

*The legal system is a benchmark in the implementation of fair justice in any democratic society. The statute of magistrates, whether in the body of judges or in the body of prosecutors, is constitutionally unreasonable in relation to the general principles of law. The fairness of each judicial decision is reflected in the essence of strengthening democracy.*

**Keywords**: *Judicial system, justice, judge, magistrate, democracy*

## 1. General considerations on the legal system

The legal system is a benchmark in the judiciary, knowing that, for the achievement of a fair justice, the professional and moral probity of those who practice justice are priority criteria for the performance of any magistrate's conduct. It is known that the Roman-German system, originated in Roman law, exists in states that formerly belonged to the Roman Empire, such as France, Germany, Italy, Spain, etc. and the common-law system, originating in the UK, existing in the former British colonies; The United States of America, Canada, Australia etc.) are two systems that operate with different notions and institutions, making differences between them.

Thus, for a better understanding, we exemplify: the judicial precedent that component of English law which consists in the application by judges of consecrated habits to concrete cases, deduced from judgment.[2] The sense in which the judge follows the example or precedent existing in each case.

It is known that judgments given by a court become mandatory not only for the parties but also for other tribunals. [3]

As far as the Roman-German legal system is concerned, it is distinguished by the written character of the rule of law. Thus, the text of the law is the work

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[2] Ioan Leş, *Organization of the Judiciary in Comparative Law*, All Beck Publishing House, Bucharest, 2003, p. 9.

[3] V.D. Zlateşcu, *Contemporary Legal Geography*, Scientific and Enciclopedic Publishing House, Bucharest, 1981, pp. 127-129.

of those bodies of the state with specific attributions to the legislative component, and the judge applies the legal provisions preconstituted to the concrete situation deducted from the judgment. It is known that in the present case the judge cannot use the judicial precedent as a source of law but can interpret the rule of law.

The specialized literature, in this case the Romanian-German legal system, is established through two different approaches to judicial organization and legislative competence according to the national or federal character of that state. Thus, in France, Italy, Romania, the legislative attributions belong to those institutions that have a general competence, recognized at national level.

As far as the situation of the federal states of Germany or Switzerland, the implementation of justice is considered a matter that falls within the competence of the cantons or the Länder. It is known that in Switzerland only civil and criminal law is in the competence of the Confederation, while the rules of procedure are set by the legislator of each canton and these are very different.[4]

(Thus, in some cantons there are constitutional courts, but also commercial courts, labor tribunals and peace judges, and at federal level there is the Federal Court and the Federal Insurance Tribunal.)

**2. Comparative Law Elements in the Status of Judges**

The specialized literature is based on the view that the magistrate is the "key character in a democratic and lawful state" and that "the issue of responsibility is not only important but also complex."[5]

Due to the fact that ensuring the impartiality and independence of judges in all democratic states takes precedence in the field of justice, we advocate supporting a fair, just and strictly lawful act of justice.

It is well known that judges are recruited in Europe either by competition (in Austria, Bulgaria, the Czech Republic, Italy, Lithuania, Portugal, Spain) or by professional experience (in England, Ireland, Cyprus, Slovakia) a combination of the two above-mentioned modes, Belgium, Denmark, France, Germany, the Netherlands, Poland.[6]

As far as the Romanian-German law system is concerned, the conditions for the recruitment of judges differ from one state to another.

In Switzerland, for example, the law does not impose special conditions for access to magistracy, and the graduation of a faculty of law is not a requirement for designating a person as a judge. Cantonal judges are elected by the local parliament, whether by the people, for periods ranging from 4 to 6 years, and

[4] Ioan Leş, *Organization of the Judiciary in Comparative Law*, All Beck Publishing House, Bucharest, 2003, p. 26.

[5] Ioan Leş, *Organization of the Judiciary in Comparative Law*, AII Beck Publishing House, Bucharest, 2005, p. 211.

[6] Mircea Munteanu, *Comparative Data Relevant to the Functioning of the Judiciary in the Member States of the European Union*, in the journal "Current Justice", no. 2-3 / 2009, p. 89.

federal judges to the Federal Parliament for a period of 6 years. But there is also the situation of those judges who work only partially in court, while they also occupy other positions, such as university professors or lawyers.[7]

In France, there are two categories of judges because of the two systems of jurisdiction: common law jurisdiction and administrative jurisdiction. In the case of judges working in common law courts, recruitment is usually conducted through a competition, and they will undergo a training course within the National School of Magistracy for 31 months. But there is also an exception when it comes to the direct recruitment of persons to judicial functions, in accordance with the provisions of the law on judicial organization.

In Germany, however, an essential requirement must be met, namely the graduation of a faculty of law, and in order to take up the position of judge, the graduate of a law faculty must undergo a three-year training course and promote the graduation exam good.[8]

In Spain, access to the magistracy is also carried out on the basis of a competition, to which only graduates of a faculty of law can participate. But there is also a category of peace judges, but who are not obliged to be licensed in law, their mandate is limited to 4 years, and during this period, the peace judge enjoys immunity.[9] But in Europe there are other situations; for example Hungary where law graduates can apply directly to courts or Finland and Sweden, where judges are appointed after a training period at the courts[10]. As regards the common law system, judges may, during their first nomination, continue to work as lawyers. In which sense, the English judge can exercise both the role of the arbitrator, without being paid, as well as the consultant.

### 3. Comparative law elements on the status of prosecutors

In accordance with Recommendation 200 (19), the prosecutor is "the authority responsible for overseeing the application of criminal law on behalf of society and the general interest, taking into account individual rights and, on the other hand, the need to streamline the criminal justice system"[11]

Thus, in Italy, Greece, Poland, Bulgaria, Sweden, Spain, Portugal, the principle of prosecutors' independence is imposed on the executive power in

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[7] Ioan Leş, *Organization of the Judiciary in Comparative Law*, All Beck Publishing House, Bucharest, 2005, p. 30.

[8] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 546.

[9] Ioan Leş, *Organization of the Judiciary in Comparative Law*, All Beck Publishing House, Bucharest, 2005, p. 153.

[10] Mircea Munteanu, *Date Comparative relevante pentru funcţionarea sistemului judiciar în statele membre ale Uniunii Europene*, în revista „Justiția în actualitate", nr .2-3/2009, p. 90.

[11] Recommendation 2000 (19) on the role of the prosecutor in the criminal justice system adopted by the Committee of Ministers of the Council of Europe is available at www.coe.int/t/dghl/cooperation/.../Rec(2000)19Romania.pdf

general and the Ministry of Justice in particular. As regards: France, Germany, Denmark, the Netherlands, the Czech Republic, prosecutors are subordinated to the Minister of Justice.[12]

In Italy the prosecutor's offices are part of the judiciary system, the prosecutors are supervised in the activity carried out by the Ministry of Justice. In Italy, prosecutors are appointed for life, they are irremovable and independent. The career of prosecutors and judges is similar; the two categories of magistrates differ only in the function, and the remuneration is not related to the appointment or the position in the hierarchy, but only by age.[13]

As regards Greece, the Constitution establishes the independence of judges and prosecutors. Prosecutors cannot look at instructions from political authorities or from the Chief Prosecutor of the Court of Cassation. [14]

In Spain, prosecutors are part of the judiciary and have an obligation to contribute to guaranteeing the independence of the judiciary.[15]

In Finland, although the Constitution of the country governs the fact that the Prosecutor General operates and directs the Prosecutor's Office independent of the Government and the Ministry of Justice, the prosecutors' statute states that the General Prosecutor's Office is subordinated to the Minister of Justice and that prosecutors are appointed by the Government, at the proposal of the Prosecutor General.[16]

According to German law, prosecutors are civil servants, not magistrates, and are subordinated to the Minister of Justice in absolute terms.

The General Prosecutor's Office does not manage the activity of the regional prosecutor's offices, which operate under the authority of the Ministries of Justice at the level of the region. Prosecutors in each region are appointed by the Minister of Justice of that region.[17]

As regards the French legislation on the status of magistrates, it expressly states that both prosecutors and judges are part of the body of magistrates and are subject to common rules on their careers.[18]

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[12] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 590-610.

[13] Constantin Sima, *Statute of Prosecutor in Europe - Italy*, in the "Pro lege" magazine, no. 1/2005, p. 130.

[14] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 596.

[15] Gilles Charbonnier, *Panorama of Judicial Systems in the European Union*, Bryland Publishing House, 2008, p. 413.

[16] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 596.

[17] Constantin Sima, *Public Ministry in Germany*, in the "Pro lege" magazine, no. 1/2005, p. 246.

[18] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 599.

In the Czech Republic, prosecutors are part of the executive power, and prosecutors may even be members of the parliament.[19]

In the Netherlands, the prosecutor's office is also subordinated to the Minister of Justice, who can give prosecutors instructions on the exercise of their duties, including on individual cases.[20]

As regards Belgian law, prosecutors are at the same time representatives of the executive power and members of the judiciary, the minister of justice can address general instructions to the prosecutor general.[21]

In the common-law system, we find a different case, in the sense that the equivalent of the Public Ministry is called the Crown Prosecutors Service, an independent organization of courts and police, which has a structure composed of 42 territorial units each headed by a prosecutor head.

The independence of Crown Prosecutors is of constitutional importance, and the decisions taken by prosecutors with fairness, impartiality and integrity help to achieve the act of justice.[22]

However, UK prosecutors are civil servants and are not part of the judiciary.[23]

In order not to raise suspicions about professional decisions, the international papers recommend that the prosecutor not exercise another profession.

**4. Statute of the magistrate in national law**

The Romanian judiciary is one of the three authorities that ensure the consolidation of the Romanian rule of law by observing the rule of law and its application with independence, impartiality, responsibility and efficiency in all phases of the procedure.[24]

Admission to judges and prosecutors in magistracy is done through competition, based on professional competence, aptitude and good repute.[25]

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[19] Ion Popa, *Treaty on the Magistrates' Profession in Romania*, Publishing House Universul Juridic, Bucharest, 2007, p. 601.

[20] Sima Constantin, *Statute of the Public Prosecutor in the European Union*, in the journal "Pro lege", no.4 / 2006, p. 184.

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[22] Diana Minca, *Relevant Aspects of the British Legal System*, Magazine Justice in the News, No. 4/2009, p. 110.

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[24] Interprofessional Charter of Judges, Prosecutors and Romanian Lawyers dated September 23, 2015, developed by the Superior Council of Magistracy, the CCJE and the National Union of Romanian Bar Associations.

[25] Article 12 of Law no. 303/2004, on the status of judges and prosecutors, republished, as subsequently amended and supplemented.

The admission to the magistracy and the initial professional training for the office of judge and prosecutor is performed through the National Institute of Magistracy.[26]

The judges, appointed by the President of Romania, are independent, any person, organization, authority or institution being obliged to respect their independence.

Independence and impartiality of judges are fundamental constitutional principles of the functioning of Justice.[27]

Thus, we can point out that judges are subject only to the law and are obliged to be impartial in their work in performing the act of justice under optimum conditions.

In carrying out judicial proceedings, it is necessary for judges to ensure the observance of the principle of equality of arms in criminal trials, but also in the civil processes of impartial interprofessional dialogue with prosecutors and lawyers, observing their specific attributions, by establishing calendars regarding the conduct judicial activities necessary for criminal and civil cases, in order to ensure the fulfillment of procedural guarantees of the legal persons.[28]

Prosecutor's appointment is made by the President of Romania. They enjoy stability, being independent, under the law.

In the Romanian rule of law, prosecutors enjoy independence but also stability in ensuring their specific attributions, these principles representing guarantees for impartial and effective justice, which ensures the protection of the public and private interests of those concerned.[29]

The training of Romanian judges, prosecutors and lawyers presupposes not only the acquisition and development of professional skills necessary for access to the professions, but also permanent training throughout their careers.[30]

Organizing and conducting joint training for Romanian judges, prosecutors and lawyers on issues of common interest contributes to the achievement of the highest quality justice.[31]

Romanian judges and prosecutors ensure the protection and observance of the fundamental rights and freedoms of citizens, enshrined not only by national

[26] Article 13 of Law no. 303/2004, on the status of judges and prosecutors, republished, as subsequently amended and supplemented.

[27] Interprofessional Charter of Judges, Prosecutors and Romanian Lawyers dated September 23, 2015, developed by the Superior Council of Magistracy, the CCJE and the National Union of Romanian Bar Associations.

[28] Interprofessional Charter of Judges, Prosecutors and Romanian Lawyers dated September 23, 2015, developed by the Superior Council of Magistracy, the CCJE and the National Union of Romanian Bar Associations.

[29] *Idem*, 27.

[30] *Idem*, 27.

[31] *Idem*, 27.

laws but also by the European Convention for the Protection of Human Rights and Fundamental Freedoms or Community Treaties.

That is why the action and conduct of the Romanian judge, prosecutor and lawyer must ensure, undoubtedly, the confidence of the person in charge of the objectivity of the act of justice.

Judges, prosecutors are independent in the work they each exercise, so that in the eyes of the justices and the society there should be no suspicion of any interference between them or any confusion between the two professions.

In our country, the status of judges, prosecutors is guaranteed by law, which creates similar requirements and guarantees in terms of recruitment, training and career development conditions.

Obligations of judges and prosecutors are, not only to ensure the rule of law, but also to respect the rights and freedoms of individuals. Through their entire activity, they must also ensure equality before the law through non-discriminatory legal treatment during court proceedings.

Due to the independence enshrined in the status of judges and enjoyed by them, the leadership of the court can not intervene in their work, imposing a term other than the legal one that is to undertake the work.

Also, the president of the court cannot determine the content of the works, thus, in relation to the particularities of the relation between the management and the judge, the judge's legal employment relationship is different from that of the employees, or the service report underlying the activity of civil servants .

The full independence of the judge in the work he carries out at personal, individual level must be emphasized.

The existing national legal provisions ensure the independence of judges, excluding any action for damages against them for their acts or omissions in the performance of their duties. However, there are also some limits, which refer to disciplinary, criminal actions against the judge or claims for damages against the state.

Thus, Resolution no. 1989/60, in the content of art. 16, regarding the independence of the magistrates, is fully respected by the magistrates in Romania in the execution of the act of justice.

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# Considerations regarding the maintenance contract, with special regard to the notion, legal characteristics, delimitations of other contracts and replacement of maintenance by rent

*Vlad-Teodor FLOREA*[1]

**Abstract**

*This scientific approach seeks to contribute to the clarification of the main legal features of the institutions related to the maintenance contract, as regulated by Law no. 287/2009 on the Civil Code, in force since October 1, 2011 by Law no. 71/2011.*

*The legal definition of the maintenance contract was critically analysed, by referring to the opinions expressed in the legal literature, mentioning the gaps in the field and formulated proposals of lege ferenda meant to correct the reported deficiencies.*

*A special place of the study takes the extensive treatment of the legal characteristics of the maintenance contract, which allows, the author hopes, a deeper knowledge of the physiognomy of this contract and how legal rules are interpreted and applied in the field.*

*The article provides answers to the practical problem of establishing the legal nature of this type of contract, when a good transferred in exchange for a price and the performance of the maintenance obligation, as well as in the situation of donating a good in exchange for the performance of such an obligation.*

*Assuming that this contract frequently used in conjunction with the life annuity contract, the author examined cases of replacement of the maintenance obligation by the payment of a sum of money.*

**Keywords**: *maintenance contract; maintainer; maintained; maintenance obligation; the contract with atypical successive execution; irrevocable character; intuitive-personal character; transforming maintenance into rent*

**1. The maintenance contract**. Regulated for the first time by Law no. 287/2009 on the Civil Code, the maintenance contract frequently encountered in the practice of civil relations and in the specialized literature.

Moreover, the current maintenance regulations generally take into account the features given to this contract by the relevant legal practice and doctrine.

In accordance with the norms of art.2254 paragraph (1) of the Civil Code, through the maintenance contract, a party undertakes to perform for the benefit

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of the other party or a certain third party, the services necessary for maintenance and care, for a certain period.

In addition, paragraph (2) of the same article of law, provides that if the contract did not provide for the duration of maintenance and specified only its lifetime, then the maintenance is valid for the entire life of the creditor.

From the examination of the legal definition of the maintenance contract, some critical remarks can be made.

First, it should be emphasized, as the doctrine has shown[2], that the legal notion of the maintenance contract does not specify the name of the parties concluding it. Even if the subsequent texts of the Civil Code use the notions of creditor and debtor, they are not specific to maintenance, but to the parties that give rise to a mandatory legal relationship.

Therefore, we adhere to the proposed law ferenda formulated by the aforementioned author, according to which the parts of the maintenance contract should be named in its definition, with the notions of maintainer (debtor) and respectively maintained (creditor).

At the same time, we complete this proposal with the idea of amending all the texts of the law dedicated to the regulation of the maintenance contract, in the sense of replacing the terms creditor and debtor, with those of maintenance, respectively maintenance.

Second, the legal definition of the maintenance contract does not show the obligations that the maintenance (creditor) assumes towards the maintainer (debtor). It is about the obligation that the maintenance person assumes to transfer from his patrimony a good or a sum of money, called capital, in the patrimony of the maintainer.

Third, with regard to the period of time for which the maintenance worker assumes the maintenance obligation, the legislature established that this coincides with the life of the maintenance worker.

However, the parties have the possibility to conclude a maintenance contract for an agreed duration (a number of years or for the life of the maintainer etc.).

If the parties stipulate in the contract only the lifelong nature of the maintenance, this circumstance is equivalent to the validity of the contract during the life of the maintained.[3]

[2] See, B. Florea, *Drept civil. Contractele speciale*, Editura Universul Juridic, Bucharest, 2013, p. 207.

[3] See, C. Macovei, M.C. Dobrilă, *Contractul de întreţinere*", in F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei "Noul Cod Civil". Commentary on articles, Editura C.H. Beck, Bucharest, 2012, p. 2207.

**2. Legal characteristics of the maintenance contract.** Examination of the legal definition, case law and doctrine of the maintenance contract[4] shows the following legal features of that type of contract.

a) Solemn character. It is expressly formulated by law (art. 2555 Civil Code), which states that this contract is concluded in authentic form, under the sanction of nullity. Therefore, with the regulation of the maintenance agreement, the rule of mutualism of forms has an exception, namely, the expression of the agreement of the parties in a solemn form, namely that of the authentic document.

The exception to which we refer offers the parties a number of advantages such as to cover the financial and time-consuming efforts involved in covering the authentic form of the contract in question. The advantages are that the parties who conclude a maintenance contract in the form required by law, benefit from the legal advice of specialists in the field, who will write the real will of the parties, in a clear legal language, unambiguous or multiple interpretations.

For example, the authentic document of the maintenance contract will show precisely the maintenance obligation assumed by the maintainer: procurement of food, care, purchase of clothing, footwear, housekeeping, provision of necessary medicines, provision of adequate housing, sanitation of the home, ensuring the holiday under certain conditions, participation in certain cultural, scientific or artistic events, bearing funeral expenses, etc.

We propose, by *lege ferenda*, that the legislator in regulating the content of the maintenance obligation [art.2257 para. (2) Of the Civil Code], also include ensuring the spiritual needs of the maintenance.

Failure to comply with the authentic form, as an *ad validitatem* condition at the conclusion of the maintenance contract entails the application of the sanction of its absolute nullity.

The nullity of the maintenance concluded in violation of the solemn form can be invoked by any interested person, mainly or exceptionally, or even ex officio, by the court.

The effects of the nullity of the maintenance contract for the lack of the authentic form can be removed by restoring the contract, in compliance with all legal conditions regarding its form. In this case, the effects of the reinstated maintenance contract will occur only *ex nunc* (for the future), not *ex tunc* (for the past).

b) The character, in principle, random. The random character of the maintenance contract derives from the circumstance that the extent of

[4] See, M.G. Berindei, *Contribuţia practicii judecătoreşti la configurarea caracterelor juridice ale contractului de întreţinere şi a efectelor acestuia"*, in Legal Studies and Research no. 2/2014, Editura Academiei Românei, pp. Ionescu171-181

the maintenance of the maintenance related, as a rule, to an uncertain future event (those), i.e. to the date of death of the maintenance.

The random character of the maintenance contract does not take into account the provisions of art. 2257 paragraph (1) of the Civil Code, according to which the maintenance of the maintenance must be fair in relation to the value of the transferred capital and to the previous social condition of the maintenance.

These provisions constitute criteria for determining the maintenance of the maintenance. However, once this benefit established, the maintainer is obliged to perform it, without being able to invoke the lack of onerousness or a possible decrease in the maintenance consumption because the value of the maintenance provided would have exceeded the value of capital provided by the maintenance.

The maintainer may not remove the random nature of the maintenance contract and request his release from the performance of the maintenance service established at the conclusion of the contract, even if he waives the right to a refund of the value of the services he has performed.

The release of the maintainer from the obligation to perform the maintenance can occur only with the express consent of the maintainer.[5]

c) Commutative character, by way of exception. In the event that the maintenance contract concluded for a certain period, determined, or when concluded, free of charge, then it will be commutative, because in such a situation the parties know, at the time of concluding the contract, the existence and extent of obligations, which he assumes.

d) Translational character of real rights. When the creditor's obligation is the transfer of a real right, (of property or usufruct), over a good, individually determined or of gender, movable or immovable, (if the good is in the civil circuit, to be determinable or determined, possibly, lawful and moral), then the maintenance contract has a translational character of real rights.

If the right transmitted by the maintenance contract concerns a determined individual good, then the maintenance must hold all the rights. The *nemo dat quam non habet* rule thus applies.[6]

In this sense, art.2257 paragraph (5) of the Civil Code stipulates that it does not produce any legal obligations under the contractor, which consists in providing services to the maintainer or a third party.

Such a clause "... is considered unwritten". The doctrine[7] has pointed out that the translational ownership effect of the maintenance contract occurs in the same way as in the case of the sales contract.

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[5]See, C. Macovei, M.C. Dobrilă, *op.cit*., p. 2210.

[6] Latin expression meaning "Nimeni nu dă, cine nu are".

[7] See, M. Marinescu, *Contracte civile speciale, vol. II*, Editura Cordial Law, Cluj-Napoca, 1999, p. 129.

e) Generating the character of debt rights. In the situation where the maintainer, in exchange for the maintenance obligation he has assumed, acquires a claim, we are dealing with the debt-generating character of the maintenance contract. In this case, the maintenance party enjoys a privilege over the maintenance claim.

f) Synallagmatic character. When the maintenance party transmits capital to the maintainer in exchange for the maintenance obligation that the latter assumes, the maintenance contract has a synallagmaticcharacter, because it gives rise to mutual and interdependent rights and obligations. The synallagmatic character given to the maintenance contract by the fact that the performance of one party is the cause of the obligation assumed by the other party.

The rule, according to which the synallagmatic character determines the application of the norms regarding the termination of the contract for non-execution of the obligations by one of the parties, applies according to the specific regulations regarding the termination of the maintenance contract [art. 2263 par.].

In essence, the resolution on the maintenance contract can be invoked in two cases, namely:

I. In the event that any of the parties to the contract has, a behaviour that makes the maintenance obligation to no longer be performed according to good morals.

II. In the event that an unjustified non-performance of the maintenance obligation is invoked.

g) Atypical character of a contract with successive execution.

First, the maintenance contract is performed successively because the obligation to perform maintenance is performed by the maintainer successively, over time, for the duration of the contract.

Second, maintenance is an atypical contract because only the obligation to perform maintenance, assumed by the maintainer is performed successively, while the obligation assumed by the maintenance is usually performed *uno ictu*. For this reason, the literature[8] has pointed out that in the case of the maintenance contract, the cancellation can be made by resolution, and not by termination. Termination by resolution applies to this type of contract because it produces effects only for the future (*ex nunc*).

The maintainer is obliged to return the good or real right received, as an exception to the effects of the resolution, resulting from the random nature of the maintenance contract.

[8] See, Fr. Deak, *Tratat de drept civil, Contracte speciale*, Editura Actami, Bucharest, 1999, p. 587; D. Chirică, *Drept civil.Contracte speciale*, Editura Lumina Lex, Bucharest, 1997, p. 132; B. Florea, *op.cit*., p. 208.

The resolution is specific to the maintenance contract because it does not involve the successive execution of services by both parties, but only the maintenance of the maintenance is successive.

h) Irrevocable character, in certain cases. According to art. 2260 Civil Code, the maintenance contract is revocable for the benefit of the persons to whom the maintenance owes, under the law, food.

In order to cancel the maintenance, the maintenance must have lacked the means necessary to fulfil the legal obligation to provide food to the persons established by law.

A legal maintenance obligation, regulated by art.516 Civil Code, may exist between husband and wife, relatives in a straight line, between brothers and sisters, ex-spouses, as well as between the other persons provided by law.

The creditors of a legal maintenance obligation that is executed in kind (having as object the food insurance) have the possibility to initiate a special revocation action (Paulian), the effect of which is the non-enforceability of the maintenance contract towards the holders of the action.

The holder of the revocation action (the claimant) can have it any natural person to whom the maintenance of the maintenance contract owes legal maintenance.

Passive procedural quality can have both the maintenance and the maintenance of conventional maintenance.

The person who has the active procedural capacity (the holder of the action) must not prove that by concluding the maintenance contract the defendant would have sought to create or extend a state of insolvency in his patrimony.

In order for the action to be admissible, the applicant must prove only that, by means of the maintenance contract, his legal debtor was knowingly left without the material means necessary to ensure the applicant's legal maintenance.

The revocation action may require either the nullity of the maintenance contract or its unenforceability against the claimant.

The revocation can be requested to the court even if there is no fraud on the part of the legal maintenance debtor, and regardless of the moment when the maintenance contract was concluded, before or after the establishment of the legal maintenance obligation.

The legislator regulated [art.2260 paragraph (3) Civil Code] the possibility for the court invested with the resolution of the revocation action, even ex officio, but with the consent of the contract holder, to oblige him to provide, instead of the legal debtor (contract maintenance), the necessary food to the persons against whom the creditor has such of legal obligation.

This solution must not result in a reduction in the service provider's performance compared to the maintenance in the contract.

In this situation, we are talking about the existence of two maintenance obligations: one, decided by the court, which replaces the legal obligation that

the maintenance (debtor) had towards third parties, and another, which has its source in the maintenance contract, the one that the maintainer has assumed towards the maintainer.

The first concerns the maintenance of food for the persons to whom the maintenance had such a legal obligation, and the second, the conventional maintenance obligation, has as its object the maintenance benefit agreed by the parties in the maintenance contract.

i) Character of intuitive-personal contract. The intuitive-personae character conferred by the fact that this type of contract negotiated concluded and executed taking into account the trust and personal qualities of the parties.

*Mainly*, the maintenance obligation assumed by the maintainer cannot be performed by the maintainer on behalf of the maintainer or by a third party, disregarding the will of the maintainer.[9]

Likewise, considering the intuitive-personae character of the maintenance contract, if the maintainer does not guiltily fulfil his maintenance obligation, the maintenance can only turn it into damages.[10]

Therefore, the trust in the qualities of the maintainer represents the determining element, the premise taken into account at the birth of the obligatory legal relationship arising from the conclusion of the maintenance contract.

Third, the termination of the maintenance contract [art. 2263 para. (1), last sentence, Civil Code], As a result of the death of the maintenance person before the expiry of the established term, or of the fact that the parties did not establish the duration of the maintenance, is another argument that qualifies this contract as intuitive-personae.

Fourth, the intuitive-personae character of the maintenance contract also derives from the provisions of art. 2258 of the Civil Code, according to which the maintenance is incessant and imperceptible.

The inaccessibility of maintenance also depends on the personal connection that exists between the maintainer and the maintainer, a connection that "... could not be replicated with respect to other persons".[11]

In addition, fifthly, the intuitive-personae character of the maintenance contract results from the fact that the maintenance cannot be subject to forced pursuit by the maintenance creditors. They opened, in accordance with art. 2259 Civil Code, the way of the action in the revocation of the contract or of the exercise of the oblique action.

Sixth, the *intuiti-personae* character also follows from the provisions of art. 226 par. (1) Civil Code, according to which the maintenance obligation in

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[9] See, B. Florea, *op.cit*., p. 209.

[10]See, M.M. Pivniceru, *Principalele acţiuni izvorâte din contractul de întreţinere şi prescripţia extinctivă privitoare la acestea*, in Law no. 8/2003, p. 76-84.

[11] See, C. Macovei, M.C. Dobrilă, *op.cit*., p. 2211.

kind cannot be transmitted to the heirs of the maintenance at his death, if parts of the maintenance contract. In such a situation, the court may replace the maintenance in kind with an appropriate amount of money.

The reason for this regulation, which is a novelty, lies in the intuitive-personae character of the maintenance contract, being possible that the successors of the maintainer lack the skills (qualities) of the deceased maintainer, considered at the conclusion of the maintenance contract.

**3. Delimitation of the maintenance contract from other contracts**

In practice, there might be situations where a person may alienate or sell a good. The person acquiring the good is obliged to offer him a part of the price and to perform a maintenance service in favour of the sender of the good (in case of sale) or only to perform a maintenance service in favour of the transmitter (in case of donation).

In both cases, it is necessary to establish the legal nature of the legal act concluded, in order to be able to determine the legal regime and the rules that apply to it. Thus, the part that means half of the value of the good is compared with the price paid (in the first case, of the sale), or with the estimated value of the maintenance to be provided (in the second case, of the donation).

If the price paid is more than half the value of the good, then the legal act has the nature of the contract of sale.

On the other hand, if the price is less than half the value of the good, we are in the case of the maintenance contract.

Similarly, when the estimated value of the maintenance is greater than half the value of the good, the legal act is a maintenance contract.

However, when the estimated value of the maintenance is less than half the value of the good, the legal act has the legal nature of the donation contract.

**4. The replacement of maintenance by rent or the transformation of maintenance into rent** (art. 2261 Civil Code), takes place both judicially and extra judicially (contractually).

The judicial transformation of maintenance into annuity may be ordered by the court invested with such a request, either by the maintenance person, or by the maintainer, or by the heirs of the maintenance provider.

When the detainee notifies the court, he must prove that the maintenance in kind can no longer be performed for reasons attributable to the maintainer: manifestations that do not comply with moral norms and social coexistence, manifestations that create a state of stress, uncertainty for the maintenance or fears for his life and/or health.[12]

[12] See, C. Macovei, M.C. Dobrilă, *op.cit*., p. 2213.

If the maintainer, with a request to convert the maintenance into rent, invests the court, then the maintainer must prove that the maintenance party refuses to receive maintenance in kind, without any grounds, therefore having a guilty conduct.

If the heir's, invest the court with a claim for conversion of maintenance into annuity after his death, the request for replacement no longer needs to be reasoned, but only proved the death of the plaintiffs' predecessor.

In relation to the concrete circumstances of the case, the court may decide only a temporary replacement of the maintenance with the payment of a sum of money, paid in the form of periodic benefits, as equivalent compensation.

According to art. 2261 paragraph (2) of the Civil Code, when the provision or receipt in kind of maintenance can no longer contain through the fault of one of the parties, the court may increase or, as appropriate, reduce the amount of money that replaces maintenance in the nature.

The maintenance obligation in kind may be replaced by the obligation to pay a sum of money periodically and extra judicially, based on the principle of autonomy of will.

The agreement thus concluded is an objective novation, which extinguishes the old, maintenance obligation and replaces it with a new one, consisting in the periodic payment of a sum of money.

The replacement of the maintenance obligation by the annuity, pronounced by the court, entails the application of the provisions relating to the life annuity contract.

## 5. Conclusions.

The present study tried to highlight the main legal features that give a specific physiognomy to the maintenance contract.

The regulations in force as well as the relevant doctrine and jurisprudence have been taken into account, which have been examined from the perspective of scientific criteria, which will hopefully allow a clearer outline of how the rules governing this contract are interpreted and applied.

# Reflections on the best interests of the child

*Roxana IONESCU*[1]

**Abstract**

*The best interests of the child is a principle that governs relationships within the family. In judicial practice, this principle is understood, abstractly and theoretically, and applied as a template. The court does not refer to the factual situation, i.e. the situation of each individual child. In these circumstances, the child's superior principle remains a myth.*

*In following this principle, what is more important is the harmonious development of the child or maintaining the relationship with the non-resident parent.*

*In applying the best interests of the child, judges must look at the social and moral profile of the parents, how they exercise their obligations to provide for the growth and raising of their children.*

**Keywords:** *The best interests of the child, judicial practice, obligations, children, relationships*

Any regulation adopted in the field of observance and promotion of the rights of the child, as well as any legal act issued or as the case may be, concluded in this field shall be subordinated with priority to the best interests of the child.

Both the Romanian law, through the provisions provided in the Civil Code (art. 263 paragraph 1, art. 397, and art. 483) and in the law no. 272/2004, as well as the international legislation on the protection of minors, respectively the jurisprudence of the ECHR have as starting point the principle of the superior interest of the child. This implies the obligation of the parents to watch over the upbringing and education of the child effectively. If the parents are separated, the person to whom the minor has not been entrusted must maintain personal ties with him, these ties being able to be limited only in strictly determined situations.

The best interests of the child has to be considered in relation to each child and cannot be defined as a rule for all children. The content also differs from the same child who has several stages of development, but also different situational contexts in which he is at a given time. Therefore, measures on children may change over time, risking affecting the stability of those legal relationships.[2]

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[2] Aurora Ciuca, *Interesul superior al copilului. Noi sensuri ale unei formule magice*. Universul Juridic Premium 10 din 2020, sintact.ro

The legislator did not give a clear definition to this dynamic and flexible concept that follows the child's evolution, leaving the judge free to determine its content according to several generic criteria.

The doctrine noted a duality of the content of this principle, seen, on one hand, as aiming at a general social interest, according to which parents must raise and educate the child according to moral norms and public social order. On the other hand, it involves a personal and individual child, meaning parents or other authorized persons are obliged to raise and educate a child according to the qualities and their skills with specific aspects of health, physical development and training matching each child.[3]

According to art. 2 par. 6 of Law no. 272/2004, in determining the superior interest of the child, at least the following are taken into account:

a) The needs of physical, psychological, education and health development, security and stability and belonging to a family;
b) The child's opinion, depending on the age and degree of maturity;
c) The child's history, taking into account in particular the situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future;
d) The capacity of the parents or of the persons who are to take care of the upbringing and care of the child to respond to his concrete needs;
e) Maintaining personal relationships with the persons to whom the child has developed attachment relationships.

In judicial practice, we find a series of criteria according to which the best interest of the child can be determined, such as:

1) The opinion of the child, to the extent that it can be reasonably determined, in which case the guardianship court should relate to the age and emotional development of the child;
2) The age and sex of the child, according to which his physical, emotional and psychological needs can be established;
3) History of child care;
4) The ability of parents or other persons to care for the child and to respond to his needs;
5) The attachment and stability of the relationship between the child and each of his parents;
6) The cultural, linguistic, religious and spiritual identity of the child, including belonging to a certain ethnic group.

[3] Cercel Sevastian, Ghita Oana, *Interesul superior al copilului*, Universul Juridic Premium 9 din 2020 sintact.ro

In summary, there are three categories of criteria according to which decisions must be taken on children: child's needs opinion, age and maturity, and the ability of parents to meet the child's needs.

In order to determine the best interests of the child, the court should take into account the needs of the child whom must be provided with harmonious physical, moral and intellectual development, and not the needs of the parents. The needs of parents to exercise their parental rights may mask an open conflict between them.

**In these circumstances, the judge's freedom of interpretation in applying the principle of the best interests of the child is fundamental.**

The Civil Code provides for the priority application of the best interests of the child in relation to the interests of the parents or any other adult. Given this aspect, we can conclude that the interest of a subject of law under 18 will prevail in relation to the interest of another subject of major law.

In most cases, the principle of the best interests of the child is applied in practice when the guardianship court must rule on the exercise of parental authority, establishing the domicile of minors, establishing the visiting schedule, establishing the maintenance pension.

However, not always exercise parental rights or duties can be performed in harmony by parents together best interest of the child. Thus, for the situations in which the parents do not understand each other, the court decides on the misunderstandings between them. Solving the cases regarding the parental rights and obligations involves listening to the parents, drawing up the psychosocial investigation report and with the obligatory listening of the child, if he has turned 10 years old. In its decision, the court seeks, with priority, the observance of the best interests of the child.[4]

The principle of the best interests of the minor also has a sanctioning character; the violation of this principle can lead to the exclusive exercise of parental authority or even to the forfeiture of parental rights.

In this sense, the judicial practice considered that the *disinterest shown by the parent towards the fulfilment of the component rights and obligations of the parental authority regarding the minor, during a long period, corroborated with the establishment of the defendant for an indefinite period abroad. Considerable by the other holder of parental authority in Romania, in the event of the joint exercise of parental authority by both parents would be likely to constitute a risk to the minor, caused by the impossibility of making easy decisions regarding his upbringing and education, which are limited to the scope of the notion of parental authority. The non-resident parent must undertake and maintain continuous and regular personal connections with the minor, not sporadic or almost non-existent.*

[4] Cristiana-Mihaela Craciunescu, *O masura in interesul copiilor?*, Universul Juridic Premium 8 din 2017, sintact.ro

*This should happen in order to know and understand him or her as well as possible, in order to have a continuous dialogue with the minor and thus be able to exercise, knowingly, the rights and perform the duties that make up the content of parental authority.*[5]

The European Court of Human Rights reinforces the idea that children's interests take precedence over any other consideration, showing that this interest must guarantee children an evolution in a healthy environment. It must also maintain their ties with the family, unless it proves to be the unworthy, due to the fact that the loss of this connection means infringement child to privacy under Article. 8 of the European Convention on Human Rights, in this case the breaking of the child from its roots. Thus, it was established that only exceptional circumstances could lead to a rupture of the family relationship, while maintaining the child's personal relationships with it, being in the best interest of the child to reconstitute the family at the right time, if possible. Within a family, children are distinct individuals with their own rights and needs, and whenever a break occurs, the interest of the child is in danger, because the first family is the nucleus for the development of its harmonious. The family means the child's first contact with the world around him, but also the first models for the child in the beginning period, when they outline his character.[6]

Parental alienation is, on the one hand, a very dangerous phenomenon that leads to the poisoning of the child's soul and, on the other hand, it can only be an apparent parental alienation.

It is a dangerous phenomenon if the parents manipulate or, worse, instigate their child against the other parent. At the same time, parental alienation can be a trap in the conditions in which the non-resident parent shows disinterest in the child and in these conditions, the child living anchored in a normality notices the differences between his parent's behaviour and the attitude of a father in a one parental family.

Under the above conditions, the child alone is alienated from the parent. Moreover, there have been many cases in which children were subjected to abuse by one parent, in such situations, it is obvious the cause of alienation of the child from the aggressive parent and channelling all feelings of love for the other parent.

In such situations, both the public authorities whose objective is the protection of the child and the court should sanction the guilty parent from the order of the exclusive exercise of parental authority until the revocation of parental rights.

The court applies the principle of the best interests of the child by administering as evidence, in the case of children under 10, documents, witnesses, like the social investigation report. The last one mentions the statements of the child, resident parent, non-resident parent (some may be

[5] Jud. Constanța, s.civ, sent. Civ. no. 13665/2017.
[6] Recommendation 874/1979 of the Parliamentary Assembly of the Council of Europe.

untrue), maybe also the interrogation of the parents, witnesses, and in the case of the child over 10 years old and his hearing.

All this evidence is insufficient to establish concretely what the best interest of the minor is. The court must also consider whether there are attitudes of parents who take forms of parental alienation.

If at a theoretical level, the establishment of the best interests of the child seems to have coherence and clarity, in practice, the principle is an abstract notion that becomes an automatism in favour of both parents, by virtue of which court makes decisions. Often, decisions are made in the name of the best interests of the child that do not benefit (or do not fully benefit) the children, the courts using this principle motivating their decisions.[7]

Applied correctly, the principle of the best interests of the child can overturn this automatism encountered in judicial practice, which ultimately leads to the salvation of children's souls.

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# Protection of Personal Data of Citizens from the EU Member States in the Context of the Amplification of the Effects of Cross-Border Organized Crime

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**Abstract**

*The concept of personal data protection represents the right of the natural person to have defended those features that lead to his identification and the obligation of the Romanian state to adopt adequate measures to ensure an effective protection. The organization of judicial cooperation in civil and criminal matters within the European Union is necessary to combat cross-border crime and terrorism amid emerging threats, but cannot be ensured in the absence of real protection of fundamental rights and freedoms as enshrined in international treaties.*

**Keywords:** *data protection, data subject, cross-border threats, GDPR, Law Enforcement Data Protection Directive, Schengen Information System*

Societal development amid intensified cross-border economic exchanges in the early 1970s was a milestone in the systemic approach, at the international level, to the protection of personal data.

The concept of personal data protection represents the right of the natural person to have defended those characteristics that lead to his identification and the correlative obligation of the state to adopt adequate measures to ensure an effective protection. Personal data means information that may be directly or indirectly linked to an identified or identifiable natural person. If data on such a person is processed, that person is referred to as the "data subject".

The right to data protection derives from the right to respect for privacy[3].

The legal definitions of personal data do not clarify when a person is considered identified[4]. Identification involves elements that describe a person in a way that distinguishes him from all other people and can be recognized as a natural person. A person's name is a prime example of a descriptive element.

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[3] Directive 95/46 / EC on data protection, Article 2 (a); Convention 108, Article 2 (a).
[4] CEDO judgment of 13 February 2003 in the case of Odičvre v. France [T], no. 42326/98; and CEDO Judgment of 25 September 2012 in Godelli v. Italy, no. 33783/09.

The development of the IT field and the telecommunications segment has allowed public institutions and large, multinational enterprises to form extensive databases. This has created considerable benefits in terms of efficiency and productivity. On the other hand, it has raised concerns about the negative impact on the privacy of individuals in the event of a security breach with an impact on the compromise of personal data.

Under these conditions, within the national legal systems, certain instruments have been created for the protection of personal information. In the European Union, the right to privacy and associated freedoms are fundamental human rights, an aspect that emphasizes the importance of regulations in the data protection segment. As a point of reference in ensuring these standards, we must mention the adoption of the Universal Declaration of Human Rights on December 10, 1948 by the United Nations General Assembly. The declaration also influenced the development of other human rights instruments in Europe.

In 1950, in Rome, the Council of Europe invited states to sign the European Convention on Human Rights, an international treaty for the protection of human rights and fundamental freedoms. The document entered into force on September 3, 1953. All member states of the Council of Europe have integrated the provisions of the Convention into their national law, which obliges them to act on them in accordance with its provisions. The Convention established the European Court of Human Rights, which aims to protect individuals against human rights violations. Judgments finding infringements shall be binding on the countries concerned. The Committee of Ministers of the Council of Europe monitors the implementation of decisions.

The jurisprudence of the European Court of Human Rights (CEDO) has examined numerous situations in which data protection issues have arisen, in particular situations regarding the interception of communications[5], of various forms of surveillance,[6] as well as protection against the storage of personal data by national public authorities.[7]

Consequently, both the CEDO and the CJEU have repeatedly stated that a balancing exercise with other rights is necessary when applying and interpreting Article 8 of the European Convention on Human Rights and Article 8 of the Charter.[8] CEDO case law on Article 8 of the European Convention on Human

[5] CEDO judgment of 2 August 1984 in Malone v. The United Kingdom, no. 8691/79; CEDO judgment of 3 April 2007 in Copland v. The United Kingdom, no. 62617/00.

[6] CEDO judgment of 6 September 1978 in the case of Klass and Others v Germany, no. 5029/71; CEDO decision of September 2, 2010 in the case of Uzun / Germany, no. 35623/05.

[7] CEDO judgment of 6 September 1978 in the case of Klass and Others v Germany, no. 5029/71; CEDO decision of September 2, 2010 in the case of Uzun / Germany, no. 35623/05.

[8] CEDO judgment of 7 February 2012 in the case of Von Hannover v. Germany (no. 2) [T], no. 40660/08 and 60641/08; Judgment of the CJEU of 24 November 2011 in related cases C-468/10 and C-469/10, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) / Administración del

Rights shows that the complete separation of aspects of private and professional life can be difficult.[9]

Against this background, holds the attention a passage from a 1968 recommendation of the Council of Europe according to which the newly developed techniques used to obtain private information, subliminal advertising and propaganda, pose a threat to the rights and freedoms of individuals, especially affecting the right to privacy. In this context, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) emerged as the first international legislative instrument in the field of data protection.

Between November 1976 and April 1980, several commissions of governmental experts on the data protection segment from Austria, Belgium, France, the Federal Republic of Germany, Italy, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom tried to determine the general approach and details of the draft convention the final text of which was submitted for signature on 28 January 1981. Convention 108 was a defining moment for the development of European data protection law.

Convention 108 applies to all data processing carried out in both the public and private sectors, such as data processing by the judiciary and law enforcement authorities.

It protects individuals against the abuse that may accompany the collection and processing of personal data and also aims to regulate the cross-border flow of personal data.

With regard to the collection and processing of personal data, the principles set out in the Convention apply, in particular, to the correct and lawful automated collection and processing of data, storage for specified and legitimate purposes, use only for compatible purposes and storage - a form allowing the identification of the persons concerned for a period not exceeding that necessary for the purposes for which the data are recorded. The principles also concern the quality of the data, in particular that they must be adequate, relevant and not excessive (the principle of proportionality) as well as accurate.[10]

The Convention prohibits, in the absence of sound legal guarantees, the processing of "sensitive" data, those relating to racial origin, health status, political opinions, religious beliefs, sexual life or criminal convictions. It also enshrines the right of a natural person to be informed about the storage of his or her personal

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Estado, paragraph 48; Judgment of the CJEU of 29 January 2008 in Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU, paragraph 68

[9] see CEDO Decision of 4 May 2000 in the case of Rotaru v. Romania [T], no. 28341/95, paragraph 43; CEDO judgment of 16 December 1992 in Case 13710/88 Niemietz v. Germany, paragraph 29.

[10] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, CETS no. 108, 1981.

information. Limitation of the rights provided for in the convention is possible only when priority national interests are at stake, such as state security or defense.

These insurance provisions were strengthened by the treaty signed by seven EU Member States on 27 May 2005 in the German city of Prüm. The signatory countries are Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria.

The aim of the treaty is to "*further develop European cooperation, to play a pioneering role in setting the highest possible standards*" of cooperation through the exchange of information, in particular to combat terrorism, cross-border crime and illegal migration.

The Prüm Treaty introduces several security measures regarding the transfer of collected data:

- "*the reference data will include only the DNA profile created from parts of the DNA in which no genetic code is found, as well as a reference. The latter must not contain information enabling the data holder to be directly identified*";
- *"the data owner will have the right to obtain the correction of inaccurate information and the deletion of illegally processed data"*;
- "*the contracting parties will also ensure, in the event of a dispute over the legal rights of personal data protection, the possibility of their holder to submit a complaint to an independent court, in the interest of art. 6 paragraph 1 of the European Convention on Human Rights, or to an independent supervisory authority, in the interest of art. 28 of European Council Directive 95/46*".[11]

In 1990, the European Commission proposed a new data protection decision amid difficulties in implementing Convention 108, which was ratified in national law by a small number of states. The formal proposal of the European Commission was also a significant message that marked the beginning of the European Union on the line of data protection coordination at European level. Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data were formally adopted on 24 October 1995.[12]

Since the introduction of the directive, the main aim of the Commission has been to improve implementation in the Member States and to reach a more consistent national application and interpretation of this directive. "[…] The

[11] The Prüm Treaty, on May 27, 2005, published in the Official Gazette no. 590, August 6, 2008
[12] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

harmonization of these national regulations is not limited to a minimum of concordance, but means complete harmonization."[13]

Given that the Data Protection Directive is addressed exclusively to EU Member States, it was necessary to create an additional legal instrument for the protection and processing of personal data by the EU institutions.

Thus, the adoption of Regulation (EC) no. 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Regulation on data protection by the European institutions) fulfills this attribution[14].

In 2000, the EU adopted the Charter of Fundamental Rights of the European Union, reiterating the inalienability of the civil, political, economic and social rights of European citizens, summarizing the constitutional traditions and international obligations common to the Member States. The rights described in the Charter are divided into six sections: dignity, freedom, equality, solidarity, citizens' rights and justice.

Although originally only a political document, the Charter has become legally binding[15] with the entry into force of the Treaty of Lisbon on 1 December 2009.[16]

In January 2012, the Commission published a set of proposals for an extended reform of Directive 95/46/EC on data protection, including two legislative proposals, namely a Regulation establishing the general data protection framework at EU level (GDPR)[17] and a Directive for the protection of personal data processed for the purpose of preventing, identifying, investigating, and criminalizing criminal activities and associated legal proceedings (LEDP Directive – "Law Enforcement Data Protection Directive")[18].

The Commission's proposals have been forwarded to the European Parliament and to the Member States of the European Union for evaluation and

[13] Judgment of the CJEU of 24 November 2011 in joint cases C-468/10 and C469 / 10, Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) / Administración del Estado, paragraphs 28-29.

[14] Regulation (EC) no. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8.

[15] Charter of Fundamental Rights of the European Union, OJ 2012 C 326.

[16] Treaty on European Union, OJ 2012 C 326 and consolidated version of the European Communities (2012), TFEU, OJ 2012 C 326.

[17] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM (2012) 11 final, Brussels, 25 January 2012.

[18] Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, identifying, investigating or prosecuting criminal offenses or the execution of penalties on data protection), COM (2012) 10 final, Brussels, 25 January 2012.

amendment. On 4 May 2016, the official texts of the Regulation and the Directive were published in the Official Journal of the European Union.

The Regulation officially entered into force on May 24, 2016 with applicability from May 25, 2018, and the LEDP Directive entered into force on May 5, 2016 with the obligation of Member States to transpose into national legislation until May 6, 2018.

The regulations provided by the LEDP directive are characterized by three main objectives as follows:

- better cooperation between law enforcement authorities provided that the institutions of the EU Member States will be able to exchange information needed in investigations in a more efficient way, resulting in a development of cooperation in the fight against terrorism and other criminal activities important, with cross-border component;
- special attention to the management of information in the conditions in which the LEDP Directive aims at ensuring the protection of personal data when they are processed in law enforcement situations regardless of the legal status of the person;
- clear rules for international data flows in situations of transfer of these categories of information between law enforcement authorities outside the European Union, the purpose being to guarantee individual protection as ensured in the European Union.

Notes that the Regulation is seen by the Commission as an essential step in the process of strengthening the fundamental rights of citizens in the digital age, given that it is a complex legal regulation capable of transforming the way of collection, distribution and transport at the level of global personal information.

According to the Regulation, both *data controllers* and *data processors* have the obligation to implement adequate technical and organizational measures to protect the personal data they manage. The Regulation also introduces the obligation to report Security breaches on data protection to the relevant authority within 72 hours of identification, unless the breach does not have the potential to become a risk to the address of a person's rights and freedoms, to the extent that the risk of harm to individuals is high and they have the right to be notified.

The regulation establishes the right of persons to claim compensation in the event of security breaches that have caused them damage. Moreover, the severity of the sanctions was increased, going up to fines of 20,000,000 euros or up to 4% of the turnover.

The LEDP Directive is complemented by other legal instruments including specific regulations for the protection of personal data in the framework of judicial and police cooperation in criminal matters (Framework Decision 2008/909 JAI).[19]

[19] Council Framework Decision 2008/909 / JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters OJ L 327, 5.12.2008, pp. 27-46.

Another tool that supports the LEDP Directive is the Directive on private and electronic communications („ePrivacy Directive")[20] which contains regulations specific to the communications sector.

This Directive was imposed as a regulation at European level with the development of the Internet and the information society with advanced digital technologies that created vulnerabilities in the segment of privacy that could not be anticipated in the previous period.

Directive 2002/58 / EC of the European Parliament and of the Council ("ePrivacy Directive") stipulates its purpose in art. 1 aiming at harmonizing the provisions of the Member States necessary to ensure an equivalent level of protection of fundamental rights and freedoms and in particular the right to privacy taking into account the processing of personal data in the electronic communications sector and to ensure the free movement of this data between electronic communication equipment and community services. The Directive was published in the Official Journal of the European Union on 31 July 2002 with the obligation for Member States to implement it in their national legislation by 31 October 2003. This ePrivacy Directive was amended on 24 November 2009 as part of a broader reform process in the European Union's telecommunications sector.

As main provisions of the ePrivacy Directive we mention the fact that:

- providers of public electronic communications services are obliged to implement appropriate organizational and technical measures to protect the security of their services, together with the network service provider;
- Member States are obliged to ensure the confidentiality of communications and data traffic generated by such communications with certain specially regulated exceptions. Data traffic processing is subject to certain restrictions;
- location data can only be processed if they are anonymized or there is user consent and for a limited time, users must be informed prior to inclusion in databases.[21]

European law establishes three elements necessary for a consent to be valid:

- the data subject must not be subjected to any pressure when giving his or her consent;
- the data subject must be properly informed of the purpose and consequences of consent;
- the scope of the consent must be reasonably concrete.

[20] Directive 2002/58 / EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the public communications sector (Directive on privacy and electronic communications) OJ L 201, 31.7.2002, pp. 37-47.
[21] Regulation 679/27-Apr-2016 art 4 paragraph 11.

Only if all three of these conditions are met will the consent be valid for the purposes of data protection law.[22]

Consent can be given either explicitly or implicitly. The first type leaves no doubt as to the intentions of the data subject and can be given orally or in writing; the second type is deduced from the circumstances, but any consent is given unequivocally. In July 2015, the European Commission published a study on the effectiveness of the ePrivacy Directive proposing certain changes that materialized on January 10, 2017 in a legislative proposal for a new ePrivacy Regulation to replace the ePrivacy Directive.

With regard to the implementation of regulations issued at European Union level, the European Commission may take steps to oblige Member States to transpose directives.

For example, in 2010 the commission announced its intention to sue the UK in the European Court of Justice over the poor implementation of the provisions of the Data Protection Directive and the ePrivacy Directive. Also in 2010, the Commission sued 6 Member States, Denmark, France, Germany, Ireland, Luxembourg and the Netherlands, for failing to implement the Personal Data Protection Directive on time.

On the basis of the above, it should be noted that unlike the European Union Directives, the Regulations are directly applicable in the Member States, so that, starting with May 25, 2018, the GDPR Regulation began to take direct effect.

In this context, it is relevant to define personal data as it appears from the Regulation if:

- a natural person is identified by this information
- if a natural person, although unidentified, is described in this information in a way that makes it possible to identify the data subject by carrying out further research.

Article 1 (2) of the Payment Data Recommendation Articolul[23], stipulates that a person will not be considered "identifiable" if the identification involves excessive time, cost or labor. Personal data includes information pertaining to a

[22] Judgment of the Court (Grand Chamber) of 1 October 2019, 'Reference for a preliminary ruling - Directive 95/46 / EC - Directive 2002/58 / EC - Regulation (EU) 2016/679 - Processing of personal data and protection of confidentiality in the electronic communications sector - concept of consent of the data subject - Declaration of consent by means of a previously ticked box " In Case C-673/17.

[23] Committee of Ministers (1990), Recommendation no. R Rec (90) 19 on the protection of personal data used for payments and other related transactions, 13 September 1990. This recommendation clarifies the field of legal collection and use of data in the context of payments, in particular through cards. The Recommendation also proposes to national legislators detailed rules on the limits of communication of payment data to third parties, data retention deadlines, transparency, data security and cross-border data flows and, finally, surveillance and remedies.

person's private life, as well as information relating to his or her professional or public life.

In the Amann[24] case, CEDO interpreted that the notion of "personal data" is not limited to aspects of a person's private sphere.

In addition, some data of a public nature may relate to privacy when they are systematically collected and entered into files kept by public authorities, all the more so as they relate to a person's distant past. The form in which personal data are stored or used is not relevant to the applicability of data protection legislation. Written or verbal communications may contain personal data as well as images[25], including TVCI[26] video recordings or sounds[27]. Information recorded on electronic media, as well as information on paper, may be given in a personal capacity. The Internet has transformed our ability to collect, transmit and share information globally.

The potential of the Internet has been exploited by a multitude of new technologies, which have fundamentally changed almost every dimension of society.

*Cloud computing*[28] refers to the provision of data technology services via the Internet. These services can be provided by a company to its users in a "private cloud" or by another provider. The service may include software, infrastructure (i.e., servers), web hosting, and platforms (i.e., operating systems).

Cloud computing is used in many ways, from personal webmail to corporate data storage, and can be divided into different types of service models:

- Infrastructure as a service: the provider provides remote access to physical computing resources, the user being responsible for the implementation and maintenance of both the operating platform and applications.
- Platform as a service: the provider provides access to an operating platform as well as the hardware part, but the user is responsible for the implementation and maintenance of applications.

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[24] CEDO judgment of 16 February 2000 in the case of Amann v. Switzerland, no. 27798/95, point 65. CEDO judgment of 4 May 2000 in the case of Rotaru v. Romania no. 28341/95 published in M O no. 19 of 11 January 2001, point 43.

[25] CEDO judgment of 24 June 2004 in the case of Von Hannover v. Germany, no. 59320/00; CEDO decision of 11 January 2005 in the case of Sciacca / Italy, no. 50774/99.

[26] CEDO judgment of 28 January 2003 in Peck v. The United Kingdom, no. 44647/98; CEDO judgment of 5 October 2010 in the case of Köpke v. Germany, no. 420/07

[27] The CEDO judgment of September 25, 2001 in the case of P.G. and J.H./United Kingdom, no. 44787/98, paragraphs 59 and 60; CEDO judgment of 20 December 2005 in the case of Wisse v. France, no. 71611/01.

[28] In free translation "computerization in the clouds", the concept does not yet have an official version in Romanian. It refers to a set of computing services (such as applications, access to information, data storage, etc.) without the user needing to know the location and physical configuration of the systems that provide these services.

- Software as a service: the provider provides the infrastructure, platform and application.

All of these types of cloud services share the following features:

- The provider's customers share the same service infrastructure, which can be located in several countries.
- Customer data is transferred through the infrastructure depending on capacity.
- The provider sets the location, security measures and service standards applicable to data processing.

In traditional computerization, an organization's operating system, programs, and information were stored on its own computer or server. Cloud services have significantly changed practice: systems, programs and / or information are now stored in multiple locations around the globe and are managed either privately by an organization for its own users or by a service provider. Although there is no specific legislative instrument governing cloud computing, the Technology Neutral Regulation (RGPD, or Regulation), which is technologically neutral, is applicable in setting the obligations of the controller. Under European law, the controller is defined as the person who "alone or together with others, establishes the purposes and means of the processing of personal data"[29].

The controller or the authorized person is legally responsible for compliance with the obligations in accordance with data protection legislation. In the private sector, it is usually a natural or legal person, in the public sector, it is an authority.

Cloud computing will almost certainly involve international data transfer. The customer, as operator, is responsible for compliance with the Regulation regarding the transfer of own data.Broadly speaking, the Regulation stipulates that operators must be able to prove the protection of the transfer of personal data. Operators in a cloud environment have several options to demonstrate this capability:

- Geographic limitation of the cloud;
- Choose suppliers from the United States certified Privacy Shield;
- Standardized contracts authorized by the European Commission.

Automatic data processing is defined as "operations performed on personal data, in whole or in part, by automatic means"[30]**.** As regards the nature of the processing operations included, the concept of processing is comprehensive both under European law and under CoE law: "«Processing of personal data» […]

[29] Directive 95/46 / EC Art. 2 (d).
[30] Directive 95/46 / EC Art. 2 (b).

means any operation […] such as the collection, registration, organization, storage, adaptation or modification, extraction, consultation, use, disclosure by transmission, dissemination or otherwise or the combination, blocking, deletion or destruction" which is carried out on personal data. The term "processing" also includes actions by which data is no longer under the responsibility of an operator and is transferred under the responsibility of another operator.

The difference between the recipients and third parties (these two entities, introduced by Directive 95/46/EC) consists mainly in their relationship with the controller and, consequently, in their authorization to access the personal data held by the controller. Therefore, a "third party" is a legally different operator. Therefore, disclosing the data to a third party will always require a specific legal basis. According to Article 2 (f) of the Directive, "a third party is' a natural or legal person, public authority, agency or anybody other than the data subject, the controller, the authorized person and persons who, under the direct authority of the controller or the authorized person, are authorized to process data".

„Recipient" is a term with a broader meaning than "third party". For the purposes of Article 2 (g) of Directive 95/46 / EC, addressee means "natural or legal person, public authority, agency or any other body to whom data are transmitted, whether or not it is a third party".

When a user visits a site it is sent to the user's search engine, by the website or by a third party, a cookie with which the site operator has a relationship. The cookie stores information about the user's visit, which may include content viewed, language preferences, time and duration for each visit, and advertisements accessed.

Normally, cookies and similar technologies are related to information that does not fall within the scope of personal data (time of accessing the site). However, because they identify a unique computer through the search engine, their information can be used to track a computer's online activity and to form a profile of search habits for that computer.

An IP address can reveal an internet service provider and the physical location of a computer. A device will receive either a static IP address (the device uses the same IP address each time it is turned on) or a dynamic IP address (the device receives a different IP address each time it is turned on). However, the ability to identify a user by obtaining information from an internet service provider is relevant for both static and dynamic IP addresses. In the case of Breyer v. Germany,[31]CJUE considered precisely this issue in the context of the dynamic IP address used by the German state. The decision was based on the interpretation of recital 26 of the Directive (which is replicated by recital 26 of the Regulation), stating that "in determining whether a person is identifiable, all possible means to be used by the operator or identify that person". Applying this

[31] CEDO judgment of 19 October 2016 Patrick Breyer v Bundesrepublik Deutschland, C-582/14.

principle, the CJEU decided that dynamic IP addresses would be given in the personal possession of the German state because, "in the event of a cyber attack", German law would allow the German state to obtain additional identifying information from service providers, to determine the specific individual to whom a particular IP address is linked.

This decision makes it clear that both static and dynamic IP addresses may constitute personal data held by organizations other than internet service providers. While the German legislation referred to by the CJEU in the Breyer case concerned situations of criminal law, there are a wide variety of situations in which courts will decide that third parties provide information to government agencies or private individuals for commercial purposes or for a civil lawsuit. The Breyer case suggests that this may be sufficient to satisfy the condition of recital 26 and to even include the dynamic IP address in the field of personal data in many cases. It is clear that search engines set the purposes and means of processing user data, therefore they are operators of that personal data.

In the case of Google v. Spain, CJUE[32] decided that search engines are also operators of personal data contained in third-party websites. This conclusion is partly based on the fact that search engines play a decisive role in the overall dissemination of personal data. Following the decision in Google v. Spain and pursuant to Article 3 (1) of the Regulation, search engines outside the EEA are also subject to the Regulation as regards their activity of processing personal data contained on third party websites if they are based in the EU, whose activities are economically linked to the core business of the search engine. In the case of Google v. Spain, the CJEU concluded that the personal data processing activity of Google Inc. in order to conduct their search engine business, it was subject to European data protection law because the processing took place in the context of the activity of Google Spain, which promoted and sold advertising space for the search engine of Google Inc. Google has argued that this is not the case, as the processing of personal data for the purpose of operationalizing the search engine was done exclusively by Google Inc. in the United States. However, the CJEU ruled that the activity of Google Spain and that of Google Inc. were inextricably linked, because the role of Google Spain in selling advertising space was necessary to make the search engine of Google Inc. to become economically viable.

The Convention of 19 June 1990 on the Implementation of the Schengen Agreement (CAS) of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the phasing out of controls at common borders provided for common computer system, called the Schengen Information System (SIS). The purpose of the Schengen Information System is to maintain law and order and security, including State security, and to enforce the provisions of the Schengen

[32] CEDO judgment of 13 May 2014 in the case of Google v. Spain, CJEU C 131/12.

Convention on the Movement of Persons in the States Parties using the information transmitted through that system.

The Schengen Information System is a common information system containing personal data used for investigative purposes. It facilitates the exchange of important information, using IT devices, on people and objects that raise reasonable suspicions of being involved in potentially criminal activities. The Schengen Information System shall comprise exclusively the categories of data, defined as Schengen data, which are provided by each State Party and which are required in the cases provided for by the Schengen Convention.

These cases are:

- persons wanted for arrest for extradition;
- foreigners reported as undesirable (against whom the measure of prohibition of entry or prohibition of stay on the national territory was ordered);
- missing persons or persons who, in the interests of their own protection or for the prevention of threats, must be placed provisionally in a safe place, witnesses, persons summoned to appear before the judicial authorities in criminal proceedings have been prosecuted or persons to whom a criminal judgment or a request to appear must be communicated in order to serve a custodial sentence; persons and vehicles reported for the purpose of discreet surveillance, for combating crime and for preventing threats to public security; goods sought to be confiscated or used as evidence in criminal proceedings.

The category of data related to the reported persons are the information regarding the identity, particular, objective and unalterable physical signs, indications regarding the degree of dangerous behavior, if the persons concerned are armed, the reason for the request and the measure to be taken in accordance with legal provisions.

The protection of personal data and the security of data within the Schengen Information System are particularly important issues and are precisely regulated in Articles 102-108 of the Convention implementing the Schengen Agreement.

The signatories to the agreement may use the data obtained in the SIS only for the purposes stated for each type of signaling regulated in the document.

With regard to the types of alerts provided for in Articles 95 to 100 of the Convention, "in order to move from one type of alert to another, it must be justified by the need to prevent a serious and imminent threat to public policy state security or the prevention of a serious punishable act. For this purpose it is necessary to obtain the prior authorization of the reporting Contracting Party".[33]

[33] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic

Any use of data which does not comply with the provisions of the Agreement shall be considered an abusive use from the perspective of the domestic law of each Contracting Party. The Schengen Information System is composed of the Central Information System (C. SIS), located in Strasbourg, and the National Information Systems (N. SIS) of the Contracting Parties, connected to the C. SIS. According to the CAAS, Member States may not search other Member States' databases, but only the C.SIS (Strasbourg Central SIS database), in order to have access to alerts issued by all Schengen Member States. Each Member State shall decide whether an alert in relation to a good or a person should be entered in the SIS. An alert may be modified or withdrawn only by the State which introduced it. The most important performances of the system are:

- **C. SIS:**
  - daily updating of an application in all N. SIS databases in less than 5 minutes;
  - the ability to create / modify a record in no more than one second;
  - average repair time of less than one hour;
  - permanent availability.
- **N. SIS:**
  - permanent availability;
  - responds to user requests in seconds.

The legal basis of Romaniel's accession to the Schengen Information System has its origin in the Government Emergency Ordinance no. 128/2005 regarding the establishment, organization and functioning of the National Signaling Information System[34]. In 2006, the Government Decision no. 1411 on the rules of application of the O.U.G. no. 128/2005.[35] In order to update the national legislative framework and harmonize with the legal basis at European level, in 2010 Law no. 141 on the establishment, organization and functioning of the National Information System for Alerts and Romania's participation in the Schengen Information System (published in the Official Gazette of Romania No. 498 of July 19, 2010).[36]

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concerning the gradual abolition of checks at common borders Official Journal of the European Union L 239/19.

[34] Government Emergency Ordinance no. 128/2005 regarding the establishment, organization and functioning of the National Informatics System for Alerts Text published in the Official Gazette, Part I no. 866 of September 26, 2005.

[35] Decision no. 1411/2006 for the approval of the Norms for the application of the Government Emergency Ordinance no. 128/2005 regarding the establishment, organization and functioning of the National Informatics System for Alerts Text published in the Official Gazette, Part I no. 856 of October 19, 2006.

[36] Law no. 141 on the establishment, organization and functioning of the National Information System for Alerts and Romania's participation in the Schengen Information System (published in the Official Gazette of Romania no. 498 of July 19, 2010).

Another important legislative regulation is the Order of the Minister of Internal Affairs no. 150 of October 28, 2013 for the approval of the Regulation on the organization and functioning of the National Center SIS[37] which expressly establishes the working procedures for the activities of the competent national authorities within the M.A.I. related to alerts in SINS or SIS.

Also, the MIA Order no. 8 of February 1, 2018 for the amendment and completion of the Regulation on the organization and functioning of the SIS National Center, approved by the Order of the Minister of Internal Affairs no. 150/2013[38] harmonizes the regulations in force and the evolution of the SIS II system.

In accordance with Article 7 (2) of the SIS II legal instruments, each Member State has set up a national "SIRENE Bureau". It is a single point of contact made available to the Member States with a view to exchanging additional information. The SIRENE (Supplementary Information Request at National Entry) office is practically the human interface of the SIS and is the only point of contact with the other Member States.

The exchange of information between the SIRENE Bureaux shall take place through a work-flow system, developed by each Member State. This system also contains a mail messaging service with the central server in Strasbourg, France. The SIRENE bureau has as main specific role the responsibility of providing real-time information to the end user, with the possibility to complete the information with additional data, in the shortest time.

According to Law no. 141/2010, the attributions of the SIRENE Romania Office are the following:

a) ensures the exchange of additional information according to the provisions contained in the SIRENE Manual;
b) performs the necessary activities in order to add or raise a validity indicator to the SIS alerts;
c) carries out activities for the introduction of alerts on wanted persons for surrender on the basis of a European arrest warrant or for extradition;
d) carries out the necessary activities in order to implement the decisions taken at the level of the European Union in the field of activity of the SIRENE bureaux;
e) compile statistics on its activity and transmit them periodically to the General Secretariat of the Council;

[37] MIA Order no. 150 of October 28, 2013 for the approval of the Regulation on the organization and functioning of the SIS National Center Published in MO. no. 675 of November 4, 2013.
[38] OMAI no. 8 of February 1, 2018 for the amendment and completion of the Regulation on the organization and functioning of the SIS National Center, approved by the Order of the Minister of Internal Affairs no. 150/2013. Published in M.O. no. 137 of February 13, 2018.

f) coordinates the activity of verifying the quality of the information contained in the N.SIS alerts, in accordance with the provisions of the SIRENE Manual;
g) forward to the competent authority, at Central SIS level, the list of competent national authorities and any subsequent amendments thereto;
h) ensures the organization and development of the missions of handing over / taking over or extraditing the arrested persons, based on the European arrest warrant or the international pursuit warrant issued by the Romanian judicial authorities, after achieving a positive result, in collaboration with the competent national authorities.

Pursuant to Article 11 of the SIS II legal instruments, national rules on professional secrecy or other equivalent obligations of confidentiality shall apply to all SIRENE staff. This obligation shall continue to apply even after the termination of the term of office or the employment contract of the persons concerned.[39]

Amid escalating international crises, increasing cross-border threats, cooperation between law enforcement systems is vital to ensuring an area of freedom, security and justice (AFSJ) of major importance in the functioning of the Community institutions, in order to ensure the free movement of persons, protection of the fundamental rights of citizens and solving problems related to immigration and asylum. The organization of judicial cooperation in civil and criminal matters within the European Union is necessary against crime and terrorism, as well as for the management of the Union's common borders. Ensuring a climate of global security cannot be a solid argument in violation of human rights. That is why the European Union's risk management policies must be censored by specific regulations to protect the privacy of EU citizens.

[39] COMMISSION DECISION of 4 March 2008 adopting the SIRENE Manual and other provisions implementing the Second Generation Schengendin Information System (SIS II) (2008/334 / JHA).

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# Participation in scientific conferences - between quantity and quality

*Bujorel FLOREA*[1]

**Abstract**

*The study contains reflections related to the obligation of university teachers to participate annually with scientific articles, at a minimum number of scientific conferences.*

*The author analyses this obligation from the perspective of the quality of studies that university professors are forced, under the pressure of complying with the established norms, to register for conferences and to embed, sometimes in a hurry, the required communications.*

*The study examines the factors that may cause the studies presented under the reported conditions not to rise to the expected value levels.*

*The author also proposes some solutions to contribute to changing the observed situation, in order to ensure the priority of scientific quality studies, in parallel with the obligation of university teachers to have a certain level of concern in terms of scientific research.*

**Keywords**: *scientific research; scientific conferences; quality of legal studies: non multa, sed multum; the vice of legal interpretation*

1. The issue we refer to in this study, namely the quality of articles presented by authors at various scientific conferences is, we believe, an effective topic for highlighting the names and contributions of legal specialists, through their scientific value and the perspective of assertion personalities in the university environment.

The materials exhibited at scientific conferences constitute should constitute, the crucible in which the creations resulting from extensive and deep readings and analyses, from the professional experience gained in the legal perimeter, take place.

Decision-making forums require that lawyers who have embraced university careers take part, by presenting studies, in national or international scientific conferences at scientific conferences. It is usually announced, shortly before, the organization of the conference, which you must register with a scientific topic, if you are part of the university professional body of that faculty.

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It does not interest the organizers, the rules being already established, if the so-called scientific studies have something to communicate, or, on the contrary, they represent known things, resulting from normative acts or works of other authors.

It does not matter if you have the necessary time to research, to identify and treat a certain topic.

The great thinker Petre Pandea said, "Ideas do not fall from the sky"[2], which means that, if we share this point of view, it is not possible, to order, to design scientific studies. Scientific articles are the result of research based on diligent intellectual effort, inspiration, thinking, talent, thorough training, dedication and book science.

Thus, truly scientific studies are not born overnight, as you clap your hands; they outlined in connection with reading rooms, legal libraries, databases, the practice of legal institutions and bodies, etc., all of which have as their main characteristic the atmosphere, the nature of a creative workshop.

Our opinion would be that the creation of a scientific study is made with many reservations, with mistakes sometimes, with the conviction that the ideas presented are not immutable, valid forever, but on the contrary, can be criticized and even rejected.

Therefore, there is no doubt that the requirement to participate in any kind of article, in scientific conferences to ensure quantity, probably does not reflect anything other than a blind obedience to wrong rules, with lamentable significance. Studies written in a hurry are subject to the risk of becoming unscientific, of not having the gift to provoke any comment or to give rise to any conclusion.

The real legal world does not take into account the futility, even the elegant ones slipped into the speeches with the role of conclusions presented by those appointed to draw the conclusions after the scientific conferences.

If we continue on the same path, we will probably cut our own trousers from under our feet.

Far be it from us to claim the authorship of these considerations: mentioned at every step by academics recognized in the industry as having value. We brought them into discussion not with the intention of triggering a specific conflict, but with the intention of reviving the innovative attitude according to which the quality, not the quantity of studies, should be at the forefront of legal scientific research.

After all, the real prestige of university teachers is built over time, with care, and draws its juice from the content of the scientific spirit of published works, and not from teaching titles or administrative positions held in the absence of competition or a contest of circumstances, lacking sometimes of minimal morality.

[2] See, P. Pandea, *Atitudini şi controverse*, Minerva Publishing House, 1982, p. 11.

Usually, in the university world, the brilliance of a certain higher education institution is associated with the reputation of those at its head. The reputation of the latter teachers stems from the content of the courses and scientific studies they have signed. However, if they were of no value, books would remain unread, not even by students who had to pass the exams in those subjects.

Something more: the quality of courses and legal studies brought to public knowledge by teachers of any faculty is the main factor in the paralysis of mediocrity and professional dilettantism that could infiltrate, willingly or unwillingly, in today's university environment.

Once again, we repeat, without decreeing final verdicts: as far as we are concerned, raising the bar of the quality of books and legal articles to the rank of principle would be a keystone. A magical formula of Aladdin (with which he opened his curses barns), may be necessary to revive the prestige of the university institution, but without being the only solution.

„Non multa, sed multum!" says a Latin proverb, which would fit perfectly in this case. Respecting him, perhaps we contribute to the honour and restoration of the legal faculties of the brilliance they deserve.

Perhaps the formula of online education, which is shaping up to be practiced for a period, we hope as low as possible, would need, above all, quality-teaching materials.

2. The distinguished Professor T. Butoi, whose seductive personality in the field of forensic psychology[3] no longer needs recommendations, actively advocates, including on media channels, especially to emphasize the quality of education and scientific research and throwing overboard the idea of generalizing the online method of information communication.

There is a suspicion that this method of transmitting and verifying knowledge would inevitably lead to falsity of results, distortion of the truth. Do all those who skilfully handle IT have scientific value that is undeniable or creates an artificial image that has nothing in common with reality?

The famous teacher I mentioned, making fun of trouble, said bitterly that he connects us to the educational institution in which we operate only two digits of the calendar month. Obviously, the professor said it with regret and sadness, his revolt against the current state of affairs being as clear as possible, expressed with crystal clarity: have university professional dignity. Dignity reflects in

[3] We list some reference works signed as sole author or co-author of prof. univ. dr. Tudorel Severin Butoi: *Psihologie judiciară. Tratat universitar*, Pinguin Book Publishing House, 2008; *Analiza comportamentală din perspectiva psihologiei judiciare, victimologiei şi tacticii criminaliste*, (co-author), Pro Universitaria Publishing House, 2019; *Sinuciderea. Subtila enigmă a unui sumbru paradox*, (co-author), Pro Universitaria Publishing House, 2019; Serial criminals. Crime psychoanalysis, Pro Universitaria Publishing House, 2019; Criminali în duplicitare (simulate), (co-author), Pro Universitaria Publishing House, 2019.

everything we do in the field of education and scientific research, but especially in the quality of scientific communications.

We believe that we have a duty to restore the reputation of the university institution in the internal legal spiritual landscape, and more than that. Of course, this is not easy, but not too difficult if we look at the essence, the substance and not the form in the approach taken for the interpretation and implementation of legal rules. We must highlight our opinions openly, without confining ourselves to the platitudes encountered today at every step, without murmured or whispered allusions that can be interpreted in any direction, even in opposite directions.

In the university, scientific perimeter, to say things by name, to be continuously dissatisfied with the quality of the works created because of research, is not only a normality, but also a necessary condition for progress in this space.

3. We hope that putting these critical reflections on the wallpaper, which in turn can be criticized, will not trigger any number of measures to stamp and silence their author as a face, coloured with defamatory epithets and nailed to the pole of infamy.

We like to think that the vast majority of university professors and scientific researchers think this way, that they realize that if we let things drag on, we will end up in a dead end.

Obviously, presenting these considerations, we also expect disagreements from some colleagues who, without a doubt, may have other opinions. If they are to be expressed convincingly and argued, it means that the purpose of these thoughts, namely to provoke debates on this subject, has been achieved. Otherwise, the attempt to demand that teachers do more so that their scientific works rise above mediocrity and dilettantism will remain in the area of naivety.

In fact, there are many cases when the aspiration towards a certain ideal is extinguished before being born. However, I learned from the sacred monsters that any approach to scientific research must contain doubt, the fear that it can collapse like a castle of books, but also that enthusiasm comes not from tired spirits, but from confidence, tenacity and stubbornness to stay in the front line, on an alignment that can be confirmed by the future.

We need legal rebels in this area. We have named law professors and researchers who are not satisfied with conducting complacency studies. On the contrary, they must be determined that specialized studies be scientific, based on doctrinal opinions, enshrined in both domestic and international law.

4. In the end, we do nothing but express a desideratum, which should be a common denominator in the area of books and legal studies. They should be valuable, readable, recommend us intellectual creations. If, on the opposite side, those would be bathed in banality and lack of scientific substance, then-oh my! - would cause painful assessments and negative repercussions on universities.

In this context, there is something more to say. Many other faculties, including law, have ceased to function. They have succumbed, mainly due to the lack of students. Moreover, they bypassed those faculties because they had a bad reputation, especially in terms of the quality of university courses. So, learning from the mistakes of others, we believe that it will be necessary, before it is too late, to offer study materials of a high academic level.

They say that you cannot stand idly by when your neighbour's house is on fire. You take measures so that they do not reach your house, in our case the student house.

On the other hand, in the fire of competition, scientific creations are born that have the gift to remove the university twilight.

5. On the other hand, the prestige of some faculties conferred by the scientific personality of those in charge of them.

The reality, which we know and recognize, is that few faculties still have famous names in the legal university world, to whom their prestige can be linked. Not many institutions of legal university education are under the star of the sacred monsters in the field of law, of legal sciences medalists.

Nevertheless, maybe this situation does not matter much nowadays. The absence of university personalities can be counterbalanced, in the sense of establishing the balance in the given situation, by responsibility in writing university courses and on participating in teaching activities, either online. Especially since almost all teachers have a rich legal career behind them, being renowned practitioners in various legal specialties.

As far as we know, there is in each faculty a group of teachers, higher or lower, who have a common note, in addition to seriousness and legal vocation, namely, that he is mastered by a vice for which he cannot be employed liability or sanction, neither legal nor moral. It is a vice of reading, a vice that usually is accompanied by the incurable habit of splitting the thread in four, of examining, in all respects, controversial legal problems, and of identifying solutions, even if they do not always prove to be the most suitable.

6. Returning to the subject, we also emphasize that the measure of the value of each teacher lies in the quality of the published works and not in their number. We believe that it would not be advisable to force teachers and scientific researchers to write in series production, to publish books on the conveyor belt.

We are not a legal factory!

We are a creative workshop!

„What he could not accomplish with the sword, I will accomplish with the pen", Honore de Balzac wrote on the sword of Emperor Napoleon from his statuette in the creative office of the great writer.

Does anyone question the power of the word, of the writing? Not! Only one simple condition must be met: the expression must be consistent, clear, and the conclusions based on deep and extensive studies.

The noble mission of the teacher and the scientific researcher is to discover the meaning and reason of legal norms, to understand them, to expose their analysis and explain.

Scientific legal communications are a complex phenomenon, in which there are ideas from the author's personality, with others, which belong to the doctrinal school of which he is part, to which are added values and principles specific to the time in which he expressed himself.

7. What would be the solution today to the question of what should be done for a university teacher to participate, annually, with quality studies in the number of scientific conferences required by the leading forums?

The difficulty of answering this problem lies in the fact that in some periods the evoked imperative cannot be reached for various reasons.

Either because the legislation on the teacher is unchanged, or because the legal practice in the field has not been pronounced, or simply because there are times when any specialist may be affected by a crisis of inspiration and go through more difficult moments, which do not allow them to focus on the act of creation. All these factors can cause intellectual anemia and temporarily stop the normal development of the creative personality.

In such a situation, we propose that the evaluation of the degree of participation with studies of university teachers in scientific conferences, in scientific research in general, to be carried out over a longer period of time, for example for the last 5 years.

Such a way of appreciation would be much more correct, more equitable and would give teachers time to research under normal conditions topical issues, without having over his head the sword of Damocles, embodied in the case of the time factor.

This would remove the negative effects configured by popular wisdom in the proverb “Hurry spoils the job!”. Legal studies carried out without the pressure of time, would stand out, more than in other circumstances, through clarity, measure, book science, balance and depth.

And one more thing: beyond the thorough and leisurely examination of the legal subjects treated, the authors could use their real intellectual potential in close connection with the overall and topical legal issues, which have a grip on both theorists and of law practitioners.

A high-class legal scientific work stands out, if not at the time of public presentation, in the next period, provided that it have a strong echo in the area of merits of construction and legal analysis.

8. In conclusion, we believe that if we will not have more time to think, giving the authors the possibility to spend more time in from of the computer, in front of the writing and reading table, in libraries and bookstores, than their studies will not have any kind of positive impact over the specialists. An accentuated note of monotony will characterize their studies.

Under the pressure of time, teachers can no longer fully express their creative personality, can no longer devote themselves to maximum capacity for scientific research and deciphering the meanings of the application of legal rules.

We do not expect all participants in scientific conferences on legal issues to produce valuable scientific works, but to accept any article in its entirety, no matter how presented, means, in fact, to carry out rescue work.

# Some legal comments on the definition, invalidity, termination and revocation of the maintenance contract in the current regulations

*Vlad Teodor FLOREA*[1]

**Abstract**

*In the present study, the author discusses some aspects of interest, in his opinion, related to the definition, nullity, termination and revocation of the maintenance contract, as regulated by Law no. 287/2009 on the Civil Code, applicable from October 1, 2011.*

*The article highlights some deficient or incomplete regulations in the matter and formulates solutions, including proposals of lex ferenda or future law to remedy the reported situations.*

**Keywords:** *maintenance contract; nullity; rescission; revocation; maintenance and care obligation*

## 1. Definition of the maintenance contract.

The maintenance contract is regulated by the current Civil Code through Book V, („On obligations"), Title IX („Various special contracts"), art. 2254-2263.

According to art. 2254 para. (1) Civil Code, under a maintenance contract, a party undertakes to perform for the benefit of the other party or a particular third party the maintenance and care services required for a certain period.

In the event that the contract did not foreseen the duration of the maintenance or provided only its lifetime, then the maintenance is due for the entire life of the maintenance creditor [art.2554 para. (2)].

In addition to the relevant observations made in the doctrine concerning the notion of maintenance contract, as far as we are concerned, a number of other observations have been made about the definition of this type of contract.

A first observation is that in the legal definition of the maintenance contract indicate only the name of one party, namely the maintenance creditor. The maintenance debtor, which appears in the following legal texts, is deducted, being provided with the phrase "the party that undertakes to perform the services necessary for maintenance and care".

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However, a rigorous definition implies, as we have shown, the exact specification of the name of this part, namely the debtor, or even more correctly the maintainer, if the other party had been called the maintained party.

The second observation refers to the fact that the legal definition of the maintenance contract does not explicitly reflect the periodic nature of the services required for the maintenance and care provided by the maintainer. The periodicity of the services performed by the maintainer depends on the essence of the maintenance contract.

If we admit that maintenance and care services are immediately enforceable ("uno ictu"), we would no longer be in the presence of the maintenance contract, as long as the maintenance and care of a person is a claim that requires periodic benefits.

**2. Nullity of the maintenance contract.**

From the examination of the content of art. 2256 paragraph (1) of the Civil Code, it results that the provisions of art.2246 of the Civil Code. also apply accordingly to the maintenance contract.

According to this last text of the law, the contract stipulating an annuity established during the life of a third party who was deceased on the day of concluding the contract is struck by absolute nullity.

Obviously, the application of these rules to the case of the maintenance contract means its invalidity if it stipulates maintenance and care services during the life of a third party who was deceased on the day of the conclusion of the contract.

It was rightly observed in the doctrine that the mentioned regulation is not superior to the previous one (contained in the Civil Code of 1864), which referred to the "moment" of concluding the contract, and not to the "day" of concluding it.

The notion of "the moment" of concluding the contract makes it easier to establish, by any means of proof, the event that occurred first: that of concluding the contract or the termination of the third party during whose life the validity of the contract was established.

Consequently, we propose by lex ferenda, that art.2246 Civil Code, to be modified, in the sense of replacing the expression "the day of concluding the contract", with the phrase "the moment of concluding the contract".

The same article, namely art.2256 paragraph (1) of the Civil Code, mentions that also art. 2247 of the Civil Code also applies accordingly to the maintenance contract.

In accordance with this text of law (art.2247 of the Civil Code), the contract by which an annuity (in our case a maintenance and care benefit) was established for consideration during the life of a person who, at the date of conclusion of the contract, he was suffering from an illness due to which he died within a maximum of 30 days from that date.

Failure to produce any effect under those conditions is equivalent to the absolute nullity of the maintenance contract.

Since the rules on the latter situation of nullity are mandatory, the parties cannot, by their agreement of will, withdraw their application.

As such, if the conditions provided by law are cumulatively met (art. 2247 Civil Code), then the concluded maintenance contract will be struck by absolute nullity.

Instead, the contract may be valid if any of the legal conditions are not met, namely:

- if the maintenance contract is not onerous;
- if, on the date of conclusion of the contract, the person during whose lifetime the maintenance and care obligation was established did not suffer from the disease which caused his death, the death being caused by an illness which occurred after the conclusion of the contract;
- if the death of the person during the life of which the contract was concluded occurred after a period of more than 30 days from the date of conclusion of the contract;
- if the maintenance and care obligation has been established during the life of several persons and not all of them die under the conditions shown, meaning within 30 days of the date of conclusion of the contract, due to the disease from which they were suffering at that time.

**3. Termination of the maintenance contract.**

According to art. 2263 para. (2) of the Civil Code, in the event that the behaviour of the other party makes it impossible to execute the contract under conditions in accordance with good morals (sbl.ns. FVT), the interested party may request the resolution.

At the same time, in accordance with the provisions of art. 2263 paragraph (3), 2nd sentence, Civil Code, the termination of the maintenance contract may be based on the non-execution without justification of the maintenance obligation. (Sbl.ns. FVT) .

In addition to the two reasons for termination of the maintenance contract, the Civil Code also regulates the termination of the contract at the request of the maintained, by referring to art. 2256 paragraph (1) to the provisions of art. 2251 paragraph (1) Civil Code, which also applies to the maintenance contract, accordingly.

Thus, applying the provisions evoked [art. 2251 para. (1) Civil Code] to the case of the maintenance contract, it results that the maintenance of the contract constituted for consideration may require the termination of the contract, if the maintainer does not submit the promised guarantee in order to fulfil the obligation or it diminish it.

This type of resolution can be invoked by the stipulator, in the case of the stipulation for another, or by the maintenance, when the maintenance obligation benefits himself.

Unlike the common law [art. 1551 par. (1) Civil Code], the maintenance party has the right of termination, even if the non-execution is of small significance, but has a repeated character.

As the maintenance contract has the atypical character of contracts with atypical successive execution (only the maintenance and care maintenance service being successive, not the maintenance service, which is executed uno ictu), the resolution for non-performance of small significance, even repeated, cannot be invoked by the maintained.

**4. Revocation of the maintenance contract.**

If the maintenance who owes food under the law of some persons, lacked the necessary means to fulfil the obligation to provide food, the maintenance contract is revocable for the benefit of those persons [art. 2260 para. (1) Civil Code].

The revocation action can be exercised either in the nullity or in the non-enforceability of the maintenance contract.

Revocation may be requested even if there is no fraud on the part of the maintainer and regardless of the time of conclusion of the maintenance contract. This last sentence can mean that the revocation of the contract can be requested both in case the legal obligation of the maintained was born before the conclusion of the contract, and in the situation where it was established at a later date after the conclusion of the maintenance contract.

**5. Conclusions**

At the end of the observations made in connection with some aspects specific to the maintenance contract, we consider that this type of special contract, as well as other contracts in this category, requires doctrinal examinations and jurisprudential solutions to clarify controversies in this legal area.

It is important that the legal institutions subject to debate be so identified that the solutions expressed can be applied in legal relations and not constitute mere theoretical opinions, broken by the current legal and social reality.

# The Principles of Law. Historical Perspectives, Their Modernization and Application

*Ion FLĂMÎNZEANU*[1]

**Abstract**

*When we talk about principles in a broad sense, in addition to the legal, religious, economic, medical field, they have applicability in other fields such as mechanics, physics, chemistry, geodesy, and so on. The principles of law are heterogeneous. As a source of philosophy, social policy.*

**Keywords:** *principle, criteria, society, legal technique, legal system*

Before beginning our presentation of both general and the particular principles, those specific to law, let us first see what is meant by the principle?

By principle we understand both a primary cause, a beginning, origin, but also what makes up material things or any natural force, which works on bodies[2].

In a newer edition of the dictionary, principle-principles is define as *Fundamental element, idea, basic law on which a scientific theory, a political, legal system, a norm of conduct is based on*[3]. When we talk about the etymology of the word principle, the application, the areas where it is used differ a lot. In society, the rules of morality are based on their existence and development of certain principles. The same can be said about religion where we meet certain canons, rules and principles related to Christian morality.

When we talk about principles in a broad sense, in addition to the mentioned fields, respectively legal, religious, economic, medical one, they have applicability in other fields such as mechanics, physics, anthropology, chemistry, geodesy etc.

Examining the concept of principles of law involves researching classification criteria and classes of principles. Among the Romanian and foreign authors of interest as far as the general principles of law are concerned, we cannot omit I.L. Bergel, N. Popa, Romulus P. Vonica, Sofia Popescu, Mark von Hoecke.

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[1] Lector dr.

[2] Romanian Explanatory Dictionary, Romanian Academy Publishing House,1958, p. 1003.

[3] Romanian Explanatory Dictionary, Second Edition, Encyclopedic Universal Publishing House, "Iorgu Iordan" Institute of Linguistics, Romanian Academy, 1996, p. 850.

According to I.L. Bergel the general principles of law can be classified according to three criteria: the function of the principles, the authority of the principles, and, of course, the source of inspiration of the principles.

The famous author distinguishes between fundamental and general technical principles, and from the category of fundamental ones he lists those that guide the elaboration of legal norms, as well as their evolution, the general ones dealing with ensuring both the cohesion of the rule of law, interpretation and proper application of the law, being those guiding or corrective principles, in this category including the technical ones.

Principles are the most general, most synthetic expression of human knowledge and experience settled in a field on which their existence and evolution are based on[4].

Law principles are heterogenic and their sources are philosophy, politics, sociology[5].

The general principles of law are an integral part of society. They reflect the objective requirements regarding the evolution of society. They must be observed, and only in this situation we can discuss about unity, coherence, balance.

We can say, without any doubt, that the general principles give the measure of the legal system, subordinating the entire legal technique with the activities of standardization, interpretation and implementation of the law. The concrete principles derive from the general principles and constitute the support for their materialization. In order to make a first delimitation, we do so both in terms of domestic law, in terms of general principles, common or specific to a branch of law principles, and internationally principles, all of them outlined throughout history and mutually accepted in international relations. For example, the principle of "*lex loci*", the law of the place, the principle of good neighborliness, general and specific principles of law outlined at the level of the European Union, those principles of community law among which the principle of integration, the principle of subsidiarity, and so on.

The role of legal principles comes first in the process of legislative creation. The legislator takes into account the general principles when constructing legal solutions designed to meet the necessities of life.

However, the principles of law also make a decisive contribution to the knowledge of the legal system. The principles are established both in time and conceptually, in this way gaining balance and homogeneity[6].

Even a goal or a path to follow. We can say that to a large extent that in principles we find the ideal of justice society, and this role continues in the

[4] Veronica Rebreanu, *General Theory of Law*, Argonaut Publishing House, Cluj-Napoca, 2009.
[5] Andrei Sida, *Introduction in Law*, Vasile Goldiş University Press, Arad, 2004, p. 24-40.
[6] Djuvara Mircea, *Law and Sociology*, I.S.D, Bucharest, 1936, p. 11.

elaboration of law where the legislator must respect two elements: the first related to tradition, the second one to the idea of innovation, the element of novelty.

It is clear that tradition fulfills the binding role of the law to ensure national unity and continuity[7].

As for its second characteristic element, that is the imposition of other models, totally different from the first one, based mainly on the maintenance of the old models. Any principle is therefore an ideal beginning, being able to be both a source and a cause of action.

In Kant the principles[8] are either in the form of axioms or postulates, what we call principles of pure intellect on ideas (pure reason).

A principle can take many forms, deductions, axioms, expressing itself practically through experimental facts, a general principle existing in the situation of some experimental facts in their entirety. The general principles of law meet in particular in the form of definitions.

So, these principles cannot be eternal, they are a specific part of the needs of society. That is why there can be no principles of law that are valid for any time and any place[9].

We cannot minimize the role of legal principles, especially in the legislative process.

We take into account those principles existing in society at a given time, and based on them we develop, build legal solutions according to social needs. The major role of the principles is also overwhelming, and by knowing the legal system, they ensure its coherence and unity, but also the homogeneity and capacity to develop a force to ensure permanent change.

The speed of social and economic transformations, the mobility of social relations, the characteristics of the evolution of legal systems in today's world impose on them features of suppleness and dynamism, which determines a rethinking of guiding ideas. If the Law appears as a total of mandatory social norms, the unity of this totality is due to the consistency of all norms towards a minimum number of fundamental principles, themselves presenting a maximum logical affinity among them[10].

There must be a permanent symmetry between rights and obligations in society, an understanding as deep as possible. An analysis of principles can only be done by delimiting, separating them from legal axioms, rules or concepts.

However, we cannot completely exclude the correlation among fundamental principles and concepts, legal categories, the latter being only an element of mediation for the principles of law.

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[7] Ion Corbeanu, Maria Corbeanu, *General Theory of Law*, Bucharest, 2002, p. 35-45.
[8] E. Kant, *Critique of Pure Reason*, Scientific Publishing House, Bucharest, 1969, p. 630-632.
[9] E. Kant, *Quoted Works*, p. 631.
[10] E. Speranția, *Fundamental Principles of Legal Philosophy*, Cluj, 1936, p. 8.

The unity of legal thought cannot be in existence and cannot be anchored only in its categories and concepts, the categories of law being taken from one legal system to another, and being valid as long as there are the social relations they synthesize.

The general principles differ from maxims, legal axioms as well as positive rules of law.

As far as the origin of the principles of law is concerned, this has been and is a permanent concern especially for schools and currents of legal thought.

It differs greatly depending on the legal system, in some legal systems, the existence and significance of general principles of law this being done with some difficulty, especially in Muslim law, where the eternal, universal and immutable nature of the norms of the Sharia is at the place of honor, sometimes these divine norms being considered as sources of law.

In Anglo-Saxon law, equity is invoked to fill legislative gaps, and the concept has been fixed in the practice of the Council of State in France, with reference to the sources of administrative law.

Regarding the concept of the two schools, of natural law where it was considered that the principles are valid for any type and any place, the historical school of law having among its founders Puchta and Savigny opens a new era in explaining the origin of law and its principles, among its followers being Kant, Stammler, Fr. Geny or J. Dabin, the last promoters of what has been called "given" and built in law, considering law as an instrument of ensuring the freedom and equality of people both in the relations among them, or between them and the state. We cannot ignore the dependence on the general principles of other spheres of activity of human society.

However, even if there have been and still are certain historical variations, law, in particular, and its principles have guaranteed and guarantee the practical realization of freedom and equality, so we cannot dissociate law from social aspects. The general principles of law are the fundamental prescriptions that channel the creation of law and its application, by virtue of a double both internal and external dialectic. In the last case we consider interdependence both in terms of social condition and the structure of society.

In the first case, we cannot omit the internal connections characteristic of the legal system, the interferences of its component parts. We cannot minimize the practical utility of the study of the principles of law, both from a constructive aspect orienting the activity of the legislator, and from the aspect of the general direction for the legal system.

The major role in the administration of justice cannot be neglected, both the "letter of the law" but especially "its spirit" must be known.

From a strictly historical point of view, we can talk about the supreme good (*summum bonum*) or rather what this first form of the legal ideal represented, in

the sense that we can discuss the higher purpose of law. However, the pace of transformation is slow[11].

We also have the situations in which the law is silent in the case of civil law norms, the judge solving the case appealing to the general principles of law. In that case, we can say that well positioned law principles take the place of regulatory norm.

The action of the principles of law results in conferring the certainty of the law as well as the congruence of the legislative system, the principles of law. We find them inserted in the constitutional norms or as a result of interpretation methods, as an aspect of scientific academic research. And in these cases we cannot deny their subjective role, although we have in their content objective needs that are essentially imposed on the legislator.

We will continue to present the main principles, their presentation being exhaustive. We will start by presenting the principle of fairness and justice, the major role of which is to give security to social life. When we talk about equity, we cannot omit its meaning, which specifically means justice but also impartiality. Aristotle was the one who understood social justice primarily through equity which has the role of straightening things out.

In both the Romans and the Greeks, the principle of fairness was generally regarded as both the activity of the legislator and the interpretation and application of law.

Using over time the phrases known by all "*ius civile*", equal rights for all citizens, the law is the art of good and equity, the well-known "*honeste vivere*", to live honestly. In addition to Aristotle, a special contribution had Plato, Cicero, Celsus, Justinian, Paul, but also those of the modern Christian period including St. Augustine and Thomas Aquinas, Hugo, Grotius, F. Geny, Montesquieu, Giorgio del Vecchio. Another principle concerns responsibility, a social phenomenon practically expressing an act of engaging the individual in the process of social integration. Responsibility is an essentially psychological concept, while liability is a legal concept. Life in primitive communities follows a system of rules accepted and respected by their members[12]. Acquiring the dimension of responsibility, we can no longer speak of a blind or misunderstood submission to existing norms, but we are in the position in which individuals or individuals in society actively and consciously relate to the norms and values of a society[13].

The responsibility appears as being correlated with the normative system, its measure being appreciated depending on the degree and content of the process of conscious transposition into practice of the provisions of the social norms.

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[11] R. David, J. Brierly, *Major Legal Systems in the World Today*, Collier- Marmilian Lmt, London, 1968, p. I, titlul III, Cap.VI.

[12] Ion Flămâzneanu, *Legal Liability*, Pro Universitaria Publishing House, Bucharest, 2010, p. 23.

[13] M. Florea, *Social Action Responsibility*, Scientific and Encyclopedic Publishing House, Bucharest, 1976.

Mircea Djuvara wrote about primitive societies, about private sanctions, and the fact that they were applied by each individual, having their foundation in the need of each of us to go unpunished.

To that end, there was the very developed instinct of retaliation, of revenge at any cost, violence being thus a reflexively response without proportions to violence[14].

Antoanela Genoveva Vrabie and Sofia Popescu specify that, in the legal literature, the concept of responsibility was considered as a reaction of repression coming from society towards a certain human action[15], mainly attributable to the individual. Henri Capitant stated that liability derives from the Latin verb *respondere* which means at the same time to answer, but also to pay, and Rene Savatier, referring to liability in general and civil liability in particular, showed that it is the obligation of a person to repair the damage caused to another by his deed or to the persons or things that depend on that person[16].

We deduce that these definitions apply both to liability and to the obligation to bear the sanction when the rule of law is violated. So, there is a clear difference between legal sanction and legal liability. As these notions are distinct, they should not be confused, the legal basis for assigning legal responsibility being much broader. This aspect was appreciated among others by M. Eliescu, Ion Oancea, Narcis Giurgiu etc.

In Article 1, Paragraph 1, the new Civil Code provides as sources of civil law, along with law, customs and general principles of law[17].

The general principles of law are fundamentally the specific principles of different branches of law[18].

In the contemporary era, the formation of an international legislation is also outlined. International regulations over time have lost more and more their contractual character, and today we are talking in all corners of the world about the growing role of the legislative character. And within international organizations, which are usually advisory bodies, this role has decreased, today many of them being entitled to adopt binding decisions. We cannot omit as institutions the International Court of Justice, the UN Charter, the European Convention on Human Rights[19].

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[14] Ion Craiovan, *General Law Theory Elementary Treaty*, All Beck Publishing House, Bucharest, 2001, p .283.

[15] Genoveva Vrabie, Sofia Popescu, *General Theory of Law*, Ştefan Procopiu Publishing House, Iasi, 1993, p. 142.

[16] Rene Savatier, *Traite de la responsabilite civile dans le droit francais*, Dalloz, Paris, 1937, p. 1.

[17] Gheorghe Boroş, Corina Buzdugan, Veronica Rebreanu, *General Theory of State and Law*, Argonaut Publishing House, Cluj-Napoca, 2008, pp. 255-275. Also Corina Dumitrescu, *Introduction to the Theory of the Sources of the Law*, Paideia Publishing House, Bucharest, 1999.

[18] Ioan Santai, *Introduction in the General Law Theory*, Risoprint Publishing House, Cluj-Napoca, 2007, pp. 71-81.

[19] Sofia Popescu, *Quoted Works*, pp. 170-173.

Within these conventions we meet the principle of inadmissibility, discrimination, the principle of legality of incrimination and punishment, as a fundamental principle of international law, as enshrined in Article.7 of the European Convention on Human Rights, that stipulates that no person will be found guilty of a criminal act if its action or omission does not constitute an offense under domestic or international law at the time of the commission. We find similar provisions in Article 15 of the International Covenant on Political and Civil Rights.

The principles set out above create a complex system that defines the criteria according to which society and justice are governed, including all principles that have the same status whether we are talking about branch, general, interbranch, or domestic or international ones.

We can observe the same purpose, namely to use the balance of consciousness and to make the right choice in certain existential situations.

Among the general principles, the author Ionaşcu Titu[20], after defining them as "a set of guiding ideas" which, without having a precise and specific character, guides the application of law and its evolution[21], refers to the principle of non-retroactivity of law, contradiction of separation of powers in the state, equality all before the law, equality of incrimination and punishment, autonomy of will, equality of rights and non-discrimination, the burden of proof on the one who makes a statement in court (*actors incubit probatio*), the right to a fair trial, autonomy of will, good faith, presumption, the possession worthing the title that cannot be derogated by particular conventions from the public order laws and from the good morals etc. In the work "The law of the sea in time of peace and war", Constantin Manea and Marian Moşneagu.

The general principles constitute the foundation of the branch principles, from the general framework being formed, as usual, a category of specific principles, for example - Procedural law with the principle of hearing other parties, the civil law with its principle of reparation of the prejudice, the public international law with its compliance with the treaties or the criminal law with the principle of legality of incrimination.

In the work "Church and law"[22] are included[23] the fundamental canonical principles with dogmatic content, among which there are: the hierarchical principle, the principle of ecumenism, the synodal principle, the principle of loyalty to the state, and among the fundamental canonical principles with legal or canonical foundation- the principle of internal autonomy, the autocephaly

[20] Ionaşcu Titu, *General Theory of Law. Course Notes. Handbook for Student Use*, Constantin Brâncuşi University, Târgu-Jiu, pp. 14-15.
[21] Ionaşcu Titu, *Quoted Works*, p. 14.
[22] Prof. univ. dr. Liviu Stan, *The Church and the Law. Principles of the Orthodox Canon Lawx*, Andreiana Publishing House, Sibiu, 2012, pp. 3-5.
[23] The Church and the Law, Quoted Works, p. 4.

principle, the territorial principle. These principles have become so well known that only their utterance is apt to arouse sufficient knowledge of the parishioners or rather of all those interested in the religious phenomenon, in this case the followers of the Orthodox Church. As we have already mentioned, the primitive period principles exist and will exist in consensus with the existence of society. Although the Romans were a practical people, theorizing having a secondary role among Ulpian's principles, we note the principle according to which "we must live honorably, not harm another, and give each one his own".

Celsus: "*Law is the art of good and equity*"[24].

Today we have new disciplines with some regulations in the vast field of application of principles, rules imposed for the normal and good development of social relations norms. So, in the field of constructions[25] in addition to the principle of authorization provided in art.1 and 2 of the Law[26], we also meet the principle of legality of the authorization procedure, local autonomy, simplification of the authorization procedure, transparency of the authorization procedure, strengthening of the discipline in the authorization, and execution of the construction works.

In reviewing the main principles, we cannot omit those that govern the parliamentary regime, namely the prominent position of the Parliament, the collaboration between the Government and the Parliament, the political responsibility of the Government and its dissolution with the help of the censure motion, the state of dissolution in the event that a new government is not formed, in a period of usually between 45 and 60 days[27].

[24] Ştefan Cocoş, *Roman Law*, Lumina Lex, Bucharest, 1995, p. 25.
[25] In the construction legislation, the main normative act or the Framework Law in the field is Law 50/1991 on the authorization, execution of construction works.
[26] *Quoted Works*, pp. 7-8.
[27] Ion Corbeanu, Maria Corneanu, *General Theory of Law*, *Quoted Works*, p. 63.

# Aspects of Legality and Legal Considerations Regarding the Correct Application of the Provisions Referring to the Monthly Allowance for Holding the Title of Ph.D., According to the Law 153/2017 Regarding the Remuneration of the Staff Paid from the Public Fund[1]

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**Abstract**
*This approach addresses the legal provisions regarding the granting of the monthly allowance for the scientific title of Ph.D. to the staff paid from the public funds, mainly from the perspective of the situation in which the potential beneficiary cumulates two functions, one in the public/budgetary sector and one in the private sector.*

**Keywords**: *salary, monthly allowance, scientific title of Ph.D., public funds, individual employment, contract, cumulation of positions*

In order to perform the analysis we propose, it is necessary to identify/establish the applicable legal framework, in this sense we show that the headquarters of the matter, in terms of establishing the right *to grant the monthly allowance for the scientific title of Ph.D.*, is the Law no. 153/2017 on the staff payment paid from public funds.

The provisions of Law no. 153/2017, to which we referred previously, are to be analyzed in a systemic approach, in connection/collaboration with the provisions of the other normative acts in the field, such as no. 53/2003- The Labour Code[4], the National Education Law no. 1/2011[5] and the Law no. 24/2000 concerning the norms of legislative technique for the issuing of the normative acts[6].

[1] Published in Romania's Official Journal, Part I, no. 492 from June 28, 2017, further changed and completed.
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[4] Republished in Romania's Official Journal, Part I, no. 345 from May 18, 2011, further changed and completed.
[5] Published in Romania's Official Journal, Part I, no. 18 from January 10, 2011, further changed and completed.
[6] Republished in Romania's Official Journal, Part I, no. 260 from April 21, 2010, further changed and completed.

A first aspect on which we stop in the present analysis regarding the correct interpretation and application of the provisions of art. 14 of the Framework – Law no. 153/2017, regarding the monthly allowance for the scientific title of Ph.D., is the provisions of the art. 162 paragraph (3) in the Labour Code. According to these legal provisions, *the salary system of the staff from the public authorities and institutions financed entirely or mostly from the state budget, the state social insurance budget, the local budgets and the budgets of the special funds* **is established by law**. Therefore, it is obvious that the Framework – Law no. 153/2017 on the remuneration of the staff paid from public funds is not only in agreement, but in expression of the provisions of the Labour Code that we have presented. For this reason, respecting the provisions of art. 40 paragraph (1) of **Law no. 24 on the norms of the normative acts, the title is also synthetically expressed the object of regulation of the law as "the remuneration of staff paid from public funds"**.

In the same sense, of exactly determining the regulatory object of Law no. 153/2017 are also the provisions of art. 1 paragraph (1) and art. 2 paragraphs (1) and (3) in the law, **which concretely establish the scope/limits of law enforcement, thus**:

"**Art. 1 paragraph (1)** This law has object of regulation the establishment of a salary system **for the staff from the budgetary sector paid from the consolidated general budget of the state**."

"**Art. 2 (1)** The provisions of this law apply to:

a) **the staff from public authorities and institutions**, respectively the Parliament, The Presidential Administration, the judicial authority, the government ministries, the other specialized bodies of the central public administration, the territorial units, the local public administration authorities, other public authorities, the autonomous administrative authorities, as well as the institutions subordinated to them, financed entirely from the state budget, the local budgets, the state social insurance budget and the special funds budgets;
b) **the staff from public authorities and institutions** financed from own revenues and subsidies granted from the state budget, local budgets, state social insurance budget and special funds budgets;
c) **the staff from public authorities and institutions** financed entirely from their own revenues;
d) **the persons who are heads of public institutions** under a contract other than the individual employment contract;
e) **the persons holding positions of public dignity**."

"**Art. 2 paragraph (3) The staff from the budgetary sector includes** the staff employed on the basis of the contract and individual work, the staff holding

positions of public dignity, magistrates, as well as, the staff benefiting from special statutes, including civil servants and civil servants with a special status."

**A first conclusion** that emerges from the analysis of **the legal provisions presented above is that the provisions of the Law no. 153/2017 produce effects only for the remuneration of the staff from budgetary sector expressly provided by the norms that regulate the object and the regulatory field of the law**. *Per a contrario (On the contrary)*, The Law no. 153/2017 **does not produce effects in the private sector, private employers**, regardless of whether they are commercial companies or higher education institutions, **are not required to comply with the provisions of this law**.

For this reason, **we consider that** the support from a response of The Salary Policy Directorate from The Minister of Labour and Social Justice[7] **is obviously unfounded**, according to which the monthly allowance for the scientific title of Ph.D. is granted "**only** by the employer where the beneficiary has **the declared basic position**, *irrespective of the category to which the other employer belongs*"(**n.n. from the budgetary or private sector**).

The second aspect that must be presented in this analysis is that the provisions of art. 14 par. (1) and (2) in the Law no. 153/2017 must be interpreted and applied in accordance with the rule enshrined in the theory of law *subiectam materiam*, in accordance with the normative framework of which they are part, **i.e.**, in this case, **in accordance with the provisions of the Law no. 153/2017 establishing the object and scope of the law** – *the remuneration of the staff in the budgetary sector*. Consequently, the salary right consisting in **the monthly allowance provided in art. 14 par. (1) in The Law no. 153/2017 is due to eligible employees** (i.e. those who hold the scientific title of Ph.D. and work in the field for which they hold the title) **only by the employers in the budgetary sector**.

It is also important to point out that **in art. 14 par. (1) of Law 153/2017, there is no distinction between the staff working on the basis of an individual full-time employment contract and the one with ½ of the norm (individual part-time contract)**. Therefore, *according to another rule enshrined in the theory of law according to which where the law does not distinguish, nor the one who applies it is not allowed to distinguish*, **the employee who works on the basis of an individual employment contract in a budgeted unit, holds the scientific title of Ph.D. and carries out his/her activity in the field for which he/she holds the title is entitled to receive the monthly allowance provided in art. 14 par. (1) in the law, regardless of whether he/she works full-time or part-time**.

Regarding the provisions of art. 14 par. (2) of Law no 153/2017, further complying with the stated rule of interpretation – *subiectam materiam*, in the

[7] Response no. 48361/RG/3549/DPS/03.08.2018.

sense of interpreting and applying the provisions of this paragraph in full accordance with the object and scope of the law, **we consider that, clearly, the hypothesis regulated in art. 14 par. (2) concerns the situation of accumulation of budgetary functions**. **Only in this situation** *the problem arises that the entitled employee to receive a single indemnity from the employer where he/she has the declared basic position*. Or, in the case of employees who combine a position in the public sector with one in the private sector, it is obvious that they are not in the situation regulated by art. 14 par. (2) of the Law 153/2017, nor do they receive this allowance, **because the law does not produce effects in the private sector, which obviously exceeds its object and scope of regulation**.

In conclusion, clearly, the hypothesis regulated in art. 14 par. (2) of Law no. 153/2017, further complying with the enacted rule of interpretation – *subiectam materiam*, in the sense of interpreting and applying the provisions of this paragraph in full accordance with the object and basis of law regulation, we appreciate that it concerns exclusively the situation of the accumulation of budgetary functions. Only in this situation, there is the problem that an employee is entitled by law (art. 14 par. (1)) to receive two monthly allowances, imposing the regulation of art. 14 par. (2), in the sense of specifying that he/she receives a single allowance from the employer where he/she has the declared basic position.

By comparison, employees who combine a position in the budget sector with one in the private sector, are not in the situation/hypothesis regulated in art.14 par. (2) of Law no. 153/2017 because they hold a single position in the budget sector, for which they are entitled to receive the monthly allowance for the scientific title of Ph.D. (art. 14 par (1) in The Law). In the private sector *they are not entitled to receive this allowance*. We consider that the salary in the private sector exceeds the object/scope of regulation of Law no. 153/2017, being applicable the provisions of art. 162 par. (2) of the Labour Code, according to which "*the individual salary is established by individual negotiations between employer and employee*". Consequently, one cannot speak of an employee's right expressly provided by law, as in the budgetary sector.

Moreover, in the case of some professional categories, such as university teachers (except for the position of university lecturer, for which the quality of doctoral student is required by law), having a scientific Ph.D. is a *sine qua non* condition for participating in the competition for occupying a teaching position[8]. Therefore, if a graduate in architecture or law holds a position corresponding to the bachelor's degree, *in the budget sector and holds the scientific title of Ph.D. in the field in which he/she works*, he/she is entitled by law to receive the monthly allowance provided by art. 14 part. (1) of Law no. 153/2017, *ratio logis*

[8] Art. 294 and art. 301 in the National Education Law no. 1/2011, with the subsequent amendments and completions.

consisting in the fact that he/she is recognized a professional training/higher professional status, *not required by the job description* and which is rewarded by granting the monthly allowance in question.

If, however, the same graduates also hold, by cumulation a position of university teacher (e.g. a lecturer) within a private sector university, the possession of the scientific title Ph.D. *is only a mandatory condition for the respective position*. In conclusion, obviously, there is no longer "*ratio logis*" for granting the monthly allowance provided in art. 14 par. (1) of Law no. 153/2017.

At the end of the present approach, it is necessary to show that, in the jurisprudence of which we have taken note, two decisions[9] were pronounced contrary to the point of view and the claims from the present analysis. In essence, in both cases, the decisions pronounced are supported/motivated on the grounds that *the text of art.14 par. (2) of Law no. 153/2017* (according to which in the case of cumulation of positions the monthly allowance for the scientific title of Ph.D. is granted, upon request, only by the employer where the beneficiary has the declared basic position) *does not make any distinction between public positions and those in the private sector, being applicable the interpretation rule ubi lex non distinguit, nec nos distinguere debemus, according to which in situations where the legislator does not distinguish, the interpreter cannot do it either*.

With regard to this reasoning, we consider that the court decisions *are unfounded*, as the distinction between *public sector* employers obliged to comply with the provisions of Law no. 165/2017 and those in the *private sector*, to which this normative act does not apply, *was made explicitly and unequivocally by the provisions of art. 1 and art. 2 in the law*. To interpret in this way, represents an obvious elusion/disregard of the rule of interpretation "subiectam materiam". In conclusion, we are not far from the situation erroneously/falsely presented, in which the legislator does not distinguish between employers in the public sector and those in the private sector. Therefore, the rule of interpretation, according to which in situations where the legislator does not distinguish nor the interpreter can do so is not applicable in this case, as the legislator has distinguished (by the express and imperative provisions in art. 1 and art. 2 from the Law no. 153/2017).

[9] The Civil Sentence no. 11173/2019 of the Bucharest Court and the Civil Decision no.4098/2019 of the Bucharest Court of Appeal.

## References


***I.*** *Legislation*

1. The framework law no. 153/2017 on the remuneration of the staff paid from public funds, with subsequent amendments and completions.
2. Law no. 53/2003 on The Labour Code, with subsequent amendments and completions.
3. The Law of national education no.1/2011, with subsequent amendments and completions.
4. The Law no. 24/2000 on the norms of legislative technique for the issuing of the normative acts, with subsequent amendments and completions.

***II.*** *Case law*

1. The Civil sentence no. 1173/2019 of the Bucharest Court.
2. The Civil decision no. 4098/2019 of the Bucharest Court of Appeal.

# Brief Considerations on the Logic of Legal Fiction

*Cristian NEACŞIU*

**Abstract**

*Considering fiction as an integral part of our lives, in order to understand its role, we must value the logical dimension of the latter. Thus, we are obliged to undertake into consideration a conceptual element that is with the title of foundation behind a fictional conceptuality. In other words, in terms of the logic of legal fiction, we are indebted to the cognitivization of a conceptual element behind conceptuality.*

***Keywords:*** *fiction, cognitivization, conceptual, logic*

Having overcome the interrogative statement about the possibility of the existence of fiction in the field of law[1], without being a reiteration or circularity

[1] This overcoming takes place not only through legal reality as a specialized reality of law, but also by undertaking a reasoning to cognitivize the idea of incidence in the legal system of some if not elements of falsity, at least some of the distorted truth. By this last consideration, as far as the legal fiction is concerned, in an own attempt to define it, we could consider that *without totally repressing the idea of falsity, it represents, in the system of law, a truth distorted in different forms of particularization*. The central element of the latter definition is represented by the phrase "distorted truth". Since a definition of legal fiction must generically frame all particular situations in which the truth is deliberately axiological "flawed", it follows that the phrase in question can only have a conceptual meaning. Thus, the latter should reside in the form of distorted conceptual truth. But, through the rules of semantic morphology, this form would reveal two possible meanings, namely: a truth that is modeled by a distorted conceptuality, respectively a conceptual truth that undergoes a modeling through an instrument. As regards the first meaning, given the purpose of the law, it appears that any distorted conceptuality cannot be accepted especially as a functionalism within the law. On the other hand, regarding the second meaning, the way of deformation is adequately illustrated, but the object of the latter is retained as an effect - conceptual truth - and not as a premise - physical truth. Last but not least, the solution is offered by the "descent" to the part of physical reality that is the object of a legal fiction. Through the latter, we become aware that the essence of the definition subject to its own examination is represented by *the idea of distorted physical truth*. Therefore, following this self-critical examination, the definition in question must be reformulated in the sense that *without completely repressing the idea of falsity, in the legal system legal fiction represents a physically distorted conceptual truth, necessary to achieve a legal goal*. Returning to the idea of interrogation on the possibility of the existence of legal fiction in the field of law, even through the latter subject to definition analysis, took place the validation of the possibility of the existence of this fictional and abstract construct in the legal system.
Thus, we can consider that the definition in question is a cognitive reasoning validating the possibility of legal fiction in the legal system, which is why we must first call it as *the definition*

on the existence of this abstract construct of legal order, it is necessary to investigate the logic that underlies the legal fiction.

As a first step of this research, we consider legal fiction as a part of the universe represented by the legal system and, corroborating it with the possibility of its existence in law, it turns out that "[...] possible worlds are no longer seen as abstract structures, empty of any interpretive materiality[2] ..., but they must be considered as "[...] cultural constructs (which) depend on knowledge and conceptual [...] schemes ..." [3] Thus, once the possibility of its existence in law is overcome by *eo ipso* legitimization, the legal fiction demands a *pars logicae propriam* eligible to integrate the latter in the conceptuality and, first of all, in the mainly methodological schematism of the law. In other words, self-legitimizing itself as a legal reality existence, legal fiction not only goes beyond the question of the possibility of its existence in the legal system, but it subsumes a special logic that substantiates it. Therefore, any approach to researching a particular form of legal fiction involves investigating the logic of this fictional construct[4]. Thus, it appears that any methodology of research of different legal fictions[5] belonging to a branch of law[6] *sine qua non* requires research, or at least the consideration of the legal fiction logic primarily as a conceptual unitary whole, as well as the logicalization of its first in the different legal fictions hypotheses[7].

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*as an eo ipso way to validate the possibility of legal fiction in the legal system*. In this way, through this definition, we realize the aspect that the legal fiction not only overcomes the interrogation of the possibility of its own existence in the legal system, but in an *eo ipso* way realizes its legitimization, as a legal construction of *sine qua non* methodological of this previous-mentioned system.

[2] Alvin Plantinga, *The Nature of Neccessity*, TREI Publishing House, Bucharest, 1998, p. 48.

[3] Alvin Plantinga, *The Nature of Neccessity*, TREI Publishing House, Bucharest, 1998, p. 49.

[4] As an in-depth study, we have to mention that the legal fiction logic is a unitary logic that applies and thus brings together all the features of the entire particular forms in which legal fiction resides as an abstract concept of law. This aspect excludes the idea of particular and different ways of the legal fiction logic. In other words, the logic of legal fiction would not be composed of an accumulation of particular logical parts that are subsumed to the different particular forms of legal fiction contained by the legal system, but this is a unitary logic that is applied by conceptual sublimation in the case of every legal fiction that exists in the legal system. The latter aspect does not exclude, however, the possibility that such a logical part that is subsumed to a particular legal fiction differs by an element of specificity, compared to another logical part that is subsumed to another legal fiction (for example: the logic underlying a legal fiction of public law must present an element of specificity as a difference from the logic underlying a legal fiction of public law, since the first legal fiction is related to a part of physical reality that is the object of regulation of public law, and the latter is a legal fiction that is related to a part of physical reality that is the object of regulation of private law. etc.).

[5] Whether it is a legal legal fiction, a jurisprudential legal fiction or a doctrinal legal fiction.

[6] Public or private one.

[7] This is the correct term for a fictional situation in law. More precisely, the investigation of any fictional situation in the legal system must assign to the situation in question, the title of fictionalist hypothesis, so that after verifying the hypothesis in the fictional sense, its first

Since "the philosophy of law comprises three ways of research: logical, phenomenological and deontological [...]"[8], as a truism it follows that "the first research, the logical ones [...] defines what is implied in any research of a nature legal"[9]. Through this Trinitarian dimension of the philosophy of law, we deduce that the author made an enumeration whose topic of sequence is given by the importance of the dimensions of this previously specified specialized philosophy. In accordance with this hierarchy, the fundamental logic of the different institutions, notions, concepts or even ideas of law as parts of legal reality is valued as a priority.

The second dimension as a phenomenological dimension of law must be understood in the sense of permanent elements of law by the simple nature of its applicability, which values the application of various legal rules under the irreversible flow of time. In other words, the phenomenological dimension of law brings together all its permanence cultivated and developed in the legal field, without the action of a methodical tool, a theory or action in this regard, but only by simply applying the legal norms and under the irreversibility of time. The last Trinitarian dimension of the philosophy of law, in its proper sense, would exclude from its area the abstract construct represented by legal fiction. More precisely, by the fact that it presupposes the validation of an action or notion in an *eo ipso* way related to the nativity of the action or notion and less to the morality of their effects and since the essence of legal fiction is represented by a distorted veracity or even fictionality, one should consider that this abstract construct of law would not be found in the deontological part of the system of law philosophy. However,

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qualification will take place as a particular case of legal fiction. In this way, we can consider that the methodology of researching a possible legal fiction in the legal system begins with a relative presumption of fictionality, so that later, after conducting research on the situation in question, the presumption is refuted or completely covered. As such, we are entitled to consider that *from the perspective of our own research methodology in order to validate as such, any legal fiction begins with a relative conceptual presumption* (primary idea). The presumption in question arises from the report by "descent" to the part of reality in the plane of physical reality as a part that is the object of legal fiction, so that later in the idea of finding in front of a true legal fiction, this report by descent, overlaps faithfully with the function of continuous reporting to the plane of the physical reality of the legal-fiction - function that is realized through the fictional mechanism. Considering succinctly, we can say that *the itinerary of qualifying a fictional hypothesis as true legal fiction begins in a sine qua non way, through a relative ideation presumption*. This outlines the only situation of methodological essence, through which the legal fiction is on the border with the relative legal presumption. The situation is uniquely legal-logical, since legal fiction is located close and even diametrically opposed to the relative legal presumption in the event of its reversal, respectively it is located close to or even overlaps with the irrefutable legal presumption. In conclusion, it must be considered that by researching a fictional hypothesis in order to qualify it as legal fiction, the only situation of methodical essence is when legal fiction is close and thus is joined to the relative legal presumption q.e.d.

[8] Giorgio del Vecchio, *Legal Philosophy Lessons*, Europa Nova Publishing House, p. 30.

[9] Giorgio del Vecchio, *Legal Philosophy Lessons*, Europa Nova Publishing House, p. 30.

corroborating the latter idea, the previous consideration regarding the ideational self-legitimization of legal fiction as a necessity[10] in the field of the legal system would show that this abstract construct of law also belongs to the deontological dimension contained in the philosophy of law. Thus, disregarding the ideational self-legitimization as existence in the field of law, legal fiction seems a construct of law which, although abstract, is not found in the deontological picture that is retained by the philosophy of the latter regulatory domains of establishing and re-establishing social balance[11]. Nevertheless, considering the latter ideational self-legitimization, validation through its own beneficial effect for the legal system with regard to legal fiction no longer needs to be achieved. Whereas "fiction derives, therefore, from a comparative apperception: *quasi, sicut, comme si, que si, als ob, wie wenn*, and so one" [12], putting in a pseudo-antithetical situation as terms of a comparison, this ideational self-legitimization and validation through the generated own effect turns out that the latter would be more opportune. But this aspect would be valid and fully justified in an ideal legal situation. However, as not every agent who perceives legal fiction becomes aware of its role and effect in the field of law, it turns out that the legitimization of this abstract construct of law must take place in another general valid way in any such situation. Therefore, it follows that such a general valid method must be independent of any agent of perception of legal fiction as an abstract construct of law. The latter consideration is the reason why legal fiction realizes its own legitimization in the field of law, based on the idea of possibility conjugated with the notion of existence, both placed conceptually on the ideational pedestal of logical rules of this abstract construct of law. Therefore, the decryption and understanding of the effect, as well as of the role of legal fiction within the legal system represents, more precisely, a consolidation of the validation of this abstract construct of law in the field of the latter domain. Through the last considerations, we are entitled to state that the validation of legal fiction within the legal system brings together two aspects, namely: first the ideational self-legitimization, followed by the consolidation of the first[13]. *The two validating parts are interdependent, in the sense that the existence of the former determines*

[10] Resulting in an existential theoretical form.

[11] Thus, in relation to this consideration, we could define Law as *a specialized domain with a regulatory role, establishing and re-establishing the social balance - a sine qua non condition for ensuring the evolution and existence of the social environment and, implicitly, for the uninterrupted succession of sequences of social reality.*

[12] Ion Deleanu, *Legal Fiction*, All Beck Publishing House, Bucharest, 2005, p. 6.

[13] We underline that the first of these aspects is a notion related exclusively to conceptuality, while the second aspect is a notion that involves some active materiality, as the decryption and understanding of the effect and legal fiction role in the legal system are made by an agent of perception (such as an addressee of the legal norm containing a legal-legal fiction; a member of the judiciary representing the court as the body issuing in a court decision, a jurisprudential legal fiction, and a litigant; a doctrinaire theorist-of-law, regarding a doctrinal-legal fiction).

*the latter, and in turn, the existence of the latter presupposes the former*[14]. The first of these validating parts, being the one that exists in all situations, has the value of potentiality that is conjugated by the second part that values the actuality[15]. Corroborating the previous considerations, we conclude that the validation of the legal fiction is an operation that implies both conceptuality and actuality, both positioned in their native succession, namely: potentiality → actuality. This last consideration strengthens the idea of the adhesion of the abstract construct of legal fiction to a philosophy of its own. More precisely, in addition to the three Trinitarian dimensions of the philosophy of law[16], legal fiction adheres to it by observing axial logical forms, even in their native topic. Summing up, we can consider that *the logic of legal fiction, in a generic way, respects the three Trinitarian dimensions of the philosophy of law, and in particular respects the two axial logical forms of becoming, even in their native succession*[17].

As far as the form in which legal fiction logic should reside, we consider that this is given by the degree of perfection of this abstract construct of law in relation to the legal desideratum achieved.

In turn, the perfection of legal fiction[18] is given by the degree of its usefulness in the field of law. Thus, paradoxically, although the latter is a conceptual entity that in relation to the physical reality plane manages to erode the fundamental axiological value of truth, it still proves to be a useful necessity of law, precisely by the fact that certain legal desideratum can be achieved only by the effect of this abstract construct of law.

Summarizing the above, we can briefly consider that in terms of legal fiction, a legal desideratum is the *ab initio* point that determines the necessary nature of this abstract construct of law, which in turn outlines the usefulness of the latter construct, utility that suggests the perfection of legal fiction regarding the legal desideratum achieved. Last but not least, the logical form of legal fiction is given by the degree of perfection of this abstract construct of law[19].

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[14] Primary value idea for legitimization of the legal fiction in the field of law.

[15] With the mention that the ideational self-legitimization has the value of potentiality in all situations of legal fiction, and its consolidation has the topical value in all situations in which the agent of perception is the author of the legal fiction in question. In all other situations where the agent of perception is different from the author of the legal fiction, the consolidation in question acquires the actual value, if and only if, this agent performs the decryption and understanding of the generated effect, as well as the role of the legal fiction in question.

[16] The logical, phenomenological, respectively deontological dimension.

[17] Primary value idea for a general theory of legal fiction.

[18] Perfection that has a referential-approximate value.

[19] The idea in question can be presented in the following schematic-brief way: legal desideratum → the necessity of legal fiction → the usefulness of legal fiction → the degree of perfection of legal fiction → the logical form of legal fiction. From the interpretation of this sequence, we deduce that the itinerary that represents the shaping of the legal fiction logical form is in fact the itinerary of achieving the desideratum subsumed to the purpose and raison d'être of legal fiction, but traveled in the opposite direction. In other words, in order to formally outline the logic proper

However, paradoxically, the following question arises: how is it possible for a construct related to the abstract[20] to possess a degree of perfection? The question is fully legitimate, as a well-known rule of classical logic tells us that *what is abstract cannot be considered perfect, because by abstracting the perception of some features of the abstract entity, from total and totalizing, it becomes partial and dismembered*! Subsequently, the answer is given by the utility of legal fiction in the system of law, a utility by which the latter abstract construct of law makes the particular application of the rule of classical logic that "any perfect knowledge always has a possible utility, which, even if not we still know it, it will probably be discovered by posterity"**[21]** , which is equivalent to a logical perfection after quality.

## References


1. Ion Deleanu, *Legal Fiction*, All Beck Publishing House, Bucharest, 2005.
2. Immanuel Kant, *General Logic*, Scientific and Technological Publishing House, Bucharest, 1985.
3. Giorgio del Vecchio, *Legal Philosophy Lessons*, Europa Nova Publishing House.
4. Alvin Plantinga, *The Nature of Neccesssity*, TREI Publishing House, Bucharest, 1998.


of the legal fiction, the itinerary of fulfilling the legal desideratum that is subsumed to this abstract construct of law must be followed in the opposite direction. q.e.d.

[20] Or rather of abstraction, since all categories of legal fictions belong to a process of existence, which performs a function of abstraction.

[21] Immanuel Kant, *General Logic*, Scientific and Technological Publishing House, Bucharest, 1985, p. 95.

# Considerations regarding the civil service in the context of the adoption of the Administrative Code

*Constantin ZANFIR*[1]

***Abstract***

*The administrative code, adopted by Government Emergency Ordinance no. 57/2019, brings important clarifications and amendments regarding the public function and the status of civil servants.*

*In the new legislative context, the public function has a broader approach and a wider scope.*

*The regime of public power is defined and the activities of general character and those of special character through which the prerogatives of public power are exercised are legislated in detail.*

*Important changes are made to the status of civil servants, which mainly concern aspects related to: equivalence of civil servants, recruitment and career of civil servants, modification, suspension and termination of employment, liability of civil servants.*

*A novelty in the matter is the introduction of the national electronic system for recording employment in the public sector, with major implications in the management of the public function.*

**Keywords:** *public function, civil servant, service report, public power regime*

**1.** The civil service and the civil servant represent institutions of constitutional rank. The provisions of art. 73 paragraph (3) letter j) of the Romanian Constitution list, among the areas of regulation reserved for organic laws, the status of civil servants.

The same article, at letter p), stipulates that another organic law will regulate the general regime regarding labor relations, trade unions, employers and labor protection.

These two constitutional provisions lead to the conclusion of the consecration of the statutory legal regime for civil servants, respectively of the contractual regime for the "rest of the employees" (V. Vedinaș, 2020, pg.307).

Other constitutional texts relating to the civil service and civil servants are as follows:

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a. art. 16 paragraph (3), which provides that public positions and dignities may be held by persons who have Romanian citizenship and domicile in the country;
b. art. 54 paragraph (2), which provides that the citizens to whom public functions are entrusted, as well as the military, are responsible for the faithful fulfillment of their obligations and, for this purpose, will take the oath required by law;
c. art. 105, which regulates the legal regime of incompatibilities of members of the Government.

Obviously, the above-mentioned constitutional provisions are transposed into the primary and secondary legislation governing the civil service and civil servants in Romania.

**2.** The law referred to in the Constitution for the regulation of the legal status of civil servants is the Administrative Code, Title II, of Part VI, entitled - The status of civil servants

The status of civil servants provided by the Administrative Code constitutes the general framework in the matter, it applies to civil servants with special status only insofar as the special law does not provide otherwise. It is completed with the provisions of the labor legislation, as well as with the regulations of common civil, administrative or criminal law, as the case may be.

This way of supplementing the legal norms represents the application in legislative matters of the principle of law specialia generalibus derogante, according to which where the special norms given by the legislation on civil service and civil servants are missing or do not contain contrary provisions, the norms in the fields of labor legislation apply. , which thus become norms with general applicability (V.Vedinaș, 2020, pg.308).

**3.** The Status of civil servants provided for in the Administrative Code shall not apply to the following categories of budgetary personnel:

a. contract personnel employed in the own apparatus of public authorities and institutions, which carry out secretarial, administrative, protocol, management, maintenance-repair and service activities, security, as well as other categories of staff who do not exercise public power prerogatives;
b. the employed personnel employed at the dignitary's office;
c. magistrates, their assimilated staff and, as the case may be, categories of auxiliary staff within the courts;
d. teachers and other categories of staff from educational units and institutions;
e. persons appointed or elected to positions of public dignity;
f. the personnel from the sanitary units;

g. staff of autonomous utilities, companies and national companies, as well as public sector companies;
h. military personnel;
i. the members of the Romanian Diplomatic and Consular Corps and the contractual staff assigned to specific positions of the ministry with attributions in the field of foreign affairs.

These clarifications brought by the Administrative Code aim to eliminate non-unitary and inconsistent practices regarding the statutes of certain categories of personnel (military, doctors, etc.), with major implications on their rights and obligations.

We mention in this context the doctrinal and jurisprudential controversy regarding the status of military personnel. The military, in the opinion of some authors / courts, were qualified as civil servants with special status, which obviously attracts legal consequences different from those provided in the statute of military personnel, respectively, the status of soldiers and professional ranks. As far as we are concerned, we have constantly emphasized that military personnel have an autonomous constitutional status even if they are in the service of the status and are paid from budgetary funds (C.Zanfir, 2018, pg.266-271).

**4.** In the context of the new legislative framework, the public function is defined by the provisions of art. public.

A comparative analysis with the definition in Law 188/1999 highlights the fact that, although they seem similar, the approach in the Administrative Code is broader, in the sense that the scope of application of public power prerogatives is extended from "central public administration, administration local public and autonomous administrative authorities" (as provided by Law188/1999) to "public authorities and institutions" - according to the Administrative Code.

The public authorities and institutions in which public positions are established, according to art. 369 of the Administrative Code, are:

a) public authorities and institutions of the central public administration, including autonomous administrative authorities provided by the Constitution or established by organic law;
b) public authorities and institutions of the local public administration;
c) the specialized structures of the Presidential Administration;
d) the specialized structures of the Romanian Parliament;
e) the structures of the judicial authority

**5.** From the definition given by law, it results that one of the elements that give identity to the public office is the fact that through it the prerogatives of public power are exercised (V. Vedinaş, 2020, p.308).

The Administrative Code defines the regime of public power, at art. 5 letter j), as - the set of prerogatives and constraints provided by law in order to exercise the powers of public administration authorities and institutions and which gives them the opportunity to impose legally binding force in their relations with natural or legal persons, for the defense of the public interest.

With the widening of the scope of application of the prerogatives of public power through the provisions of the Administrative Code, naturally, the area of activities covered by them has increased, so that the legislator felt the need to detail them.

We specify the fact that the strict legislation of the activities through which the prerogatives of public power must be exercised will lead to the elimination of abuses committed under the auspices of Law no. 188/1999, when public positions were established even if the respective positions did not have such attributes. The cases when secretarial positions, typing, etc. are notorious were transformed into public positions.

Thus, according to art.370 of the Administrative Code, the prerogatives of public power are exercised through general activities and through special activities.

The general activities that involve the exercise of the prerogatives of public power, by the public authorities and institutions provided by the provisions of art. 369 and detailed by us in point 4, are the following:

a) elaboration of draft normative acts and other regulations specific to the public authority or institution, as well as ensuring their approval;
b) elaboration of public policy proposals and strategies, of programs, studies, analyzes and statistics necessary for the substantiation and implementation of public policies, as well as of acts necessary for the execution of laws, in order to achieve the competence of the public authority or institution;
c) authorization, inspection, control and public audit;
d) management of human resources and public funds;
e) representation of the interests of the public authority or institution in its relations with natural or legal persons of public or private law, from the country and abroad, within the competences established by the head of the public authority or institution, as well as legal representation of the public authority or institution. within which it carries out its activity;
f) carrying out activities in accordance with the strategies in the field of information society, except for the situation in which they aim at monitoring and maintenance of information equipment.

The special activities that involve the exercise of the prerogatives of public power are the following:

a) specialized activities necessary for the realization of the constitutional prerogatives of the Parliament;

b) specialized activities necessary to achieve the constitutional prerogatives of the President of Romania;
c) activities for approving the draft normative acts in order to systematize, unify, coordinate the entire legislation and keep the official record of the Romanian legislation;
d) specialized activities necessary for the realization of the foreign policy of the state;
e) specialized activities and ensuring the necessary support for the defense of the fundamental rights and freedoms of the person, of private and public property, prevention and discovery of crimes, observance of public order and peace;
f) specialized activities necessary for the application of the legal regime of the execution of sentences and measures of deprivation of liberty pronounced by the courts;
g) customs activities;
h) other activities of a special nature regarding the exercise of public authority in areas of exclusive competence of the state, pursuant to and in the execution of laws and other normative acts.

From the economy of the provisions of art. 370 of the Administrative Code we retain the following two rules:

A) The establishment of positions in the civil service regime is mandatory, insofar as the general and / or special activities listed in art. 370 are performed, except for the positions related to the personnel from the following categories:

a) magistrates, their assimilated staff, and, as the case may be, the categories of auxiliary staff within the courts;
b) military personnel;
c) the members of the Romanian diplomatic and consular corps and the contractual staff assigned to specific functions of the ministry with attributions in the field of foreign affairs;
d) the personnel occupying the positions within the autonomous authorities, for which the statute is regulated by special laws.

In other words, the positions occupied by the personnel listed above, even if they also involve the exercise of the prerogatives of public power, do not fall under the civil service regime.

B) Public positions are established by law.

This rule is also a way of manifesting the principle of legality of exercising public office.

**6.** The Administrative Code clarifies the issue of special statutes as well as the relationship between them and the general status of civil servants.

Civil servants who perform activities of a special nature that involve the exercise of the prerogatives of public power, provided by art. 370 paragraph (3) within the framework of:

a) the specialized structures of the Romanian Parliament;
b) the specialized structures of the Presidential Administration;
c) the specialized structures of the Legislative Council;
d) diplomatic and consular services;
e) institutions from the system of public order and national security.

Within these structures, civil servants who perform general activities involving the exercise of the prerogatives of public power provided by art. 370 para. 2 may also benefit from special statutes.

Also, the persons from the educational and sanitary units that belong to the system of public order and national security can be civil servants and can benefit from special statutes if they carry out general activities that involve the exercise of the prerogatives of public power.

f) customs structures;
g) other public services established by law, which carry out activities of a special nature regarding the exercise of public authority in areas of exclusive competence of the state.

It benefits from special statutes, for example:

- parliamentary civil servants (Law no. 7/2006);
- the personnel within the Presidential Administration (Law no. 47/1994);
- the personnel of the Legislative Council (Law no. 73/1993, the Regulation on the organization and functioning of the Legislative Council);
- the police (Law no. 360/2002);
- penitentiary police officers (Law no. 145/2019);
- customs personnel (GEO no. 10/2004).

**7.** The holder of a public function is the civil servant.

According to the provisions of art. 371 paragraph (1) of the Administrative Code, the civil servant is defined as representing the person appointed, under the law, in a public position. Such a status is also recognized for the person who has ceased to be a civil servant and continues to be part of the reserve corps of civil servants (art. 525 Administrative Code).

The activity of the civil servant is carried out on the basis of a service report established unilaterally by an administrative act.

The provisions of art. 374 of the Administrative Code expressly provide that "service relations are born and exercised on the basis of the administrative act of appointment issued under the law".

The service relationship is defined in the doctrine as that complex of social relations, legally determined, established between the natural person, holder of public function, the public authority in whose structure the public office is part and the subjects of law in connection with which this competence is realized public authorities (V. Vedinaş, 2020, p. 309; D. Apostol Tofan, 2008, p, 326).

**8.** The appointment to public function, the modification, suspension and termination of service relations, as well as the disciplinary sanctioning of civil servants are made by administrative act issued within the terms and conditions of the law by the head of the public authority or institution or, as the case may be, by the person the legal competence to appoint under the conditions of specific normative acts (art. 528 Administrative Code).

The provisions of the Administrative Code, unlike Law no. 188/1999, regulates in detail the legal regime of these administrative acts:

- are legal acts, is expressions of will made for the purpose of giving rise to, amending or extinguishing rights and obligations;
- have a formal character, are concluded in written form;
- produce legal effects:
  a) from the date expressly specified in the administrative act, provided that it is communicated to the civil servant;
  b) from the date of communication of the administrative act, in case the administrative act does not expressly provide the date from which it produces legal effects or if the communication is made after the date expressly provided in the administrative act;
  c) within the specific terms expressly provided by law;
  d) from the date of finding the intervention of the situation provided by law based on the proving documents.

The administrative documents are communicated by the human resources departments within a maximum of 5 working days from the date of issue.

- The administrative acts of appointment to public office, modification, suspension and termination of service relations, as well as those of disciplinary sanctioning of civil servants must contain the mandatory clauses provided by the provisions of art. 528-533 Administrative Code.

The above-mentioned administrative acts drawn up in breach of these provisions are null and void. The nullity is established by the competent administrative contentious court under the law.

- The administrative acts have a personal character, intuitu personae, being issued in consideration of a determined natural person.

- The issuer of the administrative act is always a public authority / institution.

**9.** The rights of civil servants provided by the Administrative Code are similar to those stipulated in Law no. 188/1999 with one exception: there is in addition the right of the civil servant to carry out remunerated activities in the public and private sector. However, the civil servant has the obligation to comply with the legal provisions regarding incompatibilities and conflicts of interest in the exercise of this right (art. 429 Administrative Code).

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**Legislation**

1) Constituția României, revizuită;
2) Legea nr.188/1999 privind statutul funcționarilor publici;
3) Codul administrativ, aprobat prin Ordonanța de urgență a Guvernului nr. 57/2019.

**Doctrine**

4) Dana Apostol Tofan, *Drept administrativ*, vol. I, ediția 2, Editura CH Beck, București, 2008;
5) Verginia Vedinaș, *Drept administrativ*, ediția a XII-a, revăzută și actualizată, Editura Universul Juridic, București, 2020;
6) Constantin Zanfir, *Study on the military framework status reported to public function*, in *Legal and Administrative Studies*, vol. I, 2018, Editura Pro Universitaria, București, 2018.

# The Rohingya's and the Covid 19

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**Abstract**

*In the face of the COVID-19 crisis, we are all vulnerable. The virus has shown that it does not discriminate - but many refugees, those forcibly displaced, the stateless and migrants are at heightened risk. Three-quarters of the world's refugees and many migrants are hosted in developing regions where health systems are already overwhelmed and under-capacitated. Many live in overcrowded camps, settlements, makeshift shelters or reception centers, where they lack adequate access to health services, clean water and sanitation. Millions of refugees worldwide are exposed to violence, family separation, culture loss and exile. The coronavirus disease 2019 (COVID-19) exposes these populations to a new threat, one that could prove to be more devastating than the events forcing them to flee their homelands.*

**Keywords:** *Rohigya, pandemic, Covid 19*

## Introduction

In 2017, a huge number of Rohigya's run away from Myanmar, to face the persecution that they have been subjected to by the government of Myanmar and the budist priests. The closest country that they could run to was Bangladesh, so they have settled into the camp there.

In 2020 when the pandemic started to spared a lot of countries have been affected, raising health concerns to a major socio-economic impact and a variety of side effects. The escalation of the pandemic has affected many marginalized communities, including the poor, migrants and refugees. For refugees, the COVID-19 effect, such as blocking, has lifted their misery both in life and in their livelihoods.

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## 1. International Human Right's that have been violated by Myanmar

The World Summit Outcome from 2005, established the commitment of the countries to intervene and protect, the population against genocide and ethnic cleasing.

In the article 138 of the Summit is stated that "*Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means* "

In 2012, after the outbreak of deadly violence against the Rohingya, the United Nations General Assembly (Which has raised its theory of responsibility to protect), was adopted a resolution in relation to Myanmar that it was raised its serious concern about the situation in the Rakhine state.[3]

Based on the article 138 of the World Summit from 2005, Myanmar, was requested to perform actions in relation with: "The individual arbitrary arrest, the individual return to their main communities, property return, integration policy and peaceful coexistence", which was accepted but had an objection related to the use of word Rohingya.[4]

Another point that we can relate in the Myanmar genocide is the Rome Statute of the International Criminal Court, that can investigate crimes against humanity and according to Article 7, they are defined as " any one of the below enumerated acts, when it is occurred in the context of a widespread or systematic attack against a civilian population with knowledge towards to those attack: Murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, sexual violence, persecution, forced disappearances, racial discrimination and similar inhumane acts".

The Myanmar government based on its regulatory perspective of the Nationality Law (The citizenship Act of 1982), did not recognize the ethnic population of Rohingya, which is a form of the discrimination and goes against article 2 and 7 of Universal Declaration of Human Rights, which states that "Everyone has the right to all rights and freedoms contained in this Declaration with no exceptions whatsoever, such as the distinction of race, color, gender, language, religion, politics or other views, national origin or Rights, births, or other positions."[5] and "All people are alike in front of the law and are entitled to the same legal protection without discrimination. All are entitled to the same

[3] Alireza Arashpuor, Alireza Roustaei, *The investigation of committed crimes against "Myanmar's Rohingya" and the invoke necessity to" The theory of responsibility to protect"*, Judicial Tribune, volume 6, 2016, p. 389.

[4] Zawacki, Benjamin, *Defining Myanmar's "Rohingya Problem"*, 2013, p 18-25. Available from: http://digitalcommons.wcl. american.edu/hrbrief/vol20/iss3/2, accesed 03.02.2021.

[5] Art. 2 of Universal Declaration of Human Rights.

protection against any form of discrimination contrary to this declaration, and to any incitement which leads to such discrimination."[6]

The ethnic distinction made by the Burmese government, is a form of racial discrimination which can be seen that the Burmese government does ethnic distinction in order to reduce and eliminate recognition of its ethnic Rohingya In the country of Myanmar, it is also appropriate as stated in the ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) Convention.[7]

## 2. Why are the Rohingya's persecuted?

The Rohingya population is a Muslim minority group in Myanmar, and they are persecuted by the Myanmar Government which is mostly budist. Over time they have been persecuted, they faced the denial of citizenship and faced numerous restrictions.

The persecution started basically in the 1978, when the Burmese army started to commit crimes, arson and rapes against the Rohingya's, which led to the migration of them to Bangladesh. In 1982, The Myanmar government passes the Myanmar Citizenship Act officially, abolishing the citizenship of the Rohingya population, which led to the depravation of certain rights, including: free movement, free access to education, inability to hold public office and property.[8]

Between 1991 and 1992, about 250.000, escaped the prosecution by going in Bangladesh, but the government from this country announced that they would have to go back, and began forced repatriation, which was a violation of United Nations anti-refoulment protocol[9]..The violences against the Rohingya population escalated in 2012, when the budhist population from the Rakhine state (populated by the Rohingya's), started a campaign against them. The campaign joint the official forces of political parties, Budhist monks and security forces, and aim to destroy the entire muslim population. Following this ancient treatment, about 5,000 houses and buildings were demolished, and 150,000 members of the Rohyngia population were left homeless, and about 100,000 of them fled to Malaysia with the help of boats.[10]

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[6] Art. 7 of Universal Declaration of Human Rights.

[7] Fithriatus Shalihah, Muhammad Raka Fiqri, *Overview of Human Rights Violations Against Rohingya Ethnicity in Burma and Uighur Tribe in China in International Law Perspectives*, INCLAR, 2019, p. 49.

[8] https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims, accesat 25.01.2021.

[9] https://www.hrw.org/reports/2000/burma/burm005-01.htm , accesed 25.01.2021.

[10] https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-ready-to-provide-temporary-shelter-for-rohingya-fleeing-violence-idUSKCN1BJ0G7?il=0, accesed 25.01.2021.

According to the United Nations High Commissioner for Refugees, in 2015, 140,000 Rohigya's were present in camps for internally displaced persons after the 2012 riots.[11]

The prosecutions against Rohingyas's, continued and were even worse started 2017, even a vast majority of them fled away and are now in refugees camp in Bangladesh.

### 3. Bangladesh refugee camps

The Rohingya population is settled in 2 refugee camps in Bangladesh : Nayapara and Kutupalong.

The Nayapara refugee camp is setled in the Teknaf Cox's Bazar and is located near the village of Dhumdumia, being government run and being populated by around 23,065 refugees in 2018.[12]

The second refugee camp in Bangladesh is Kutupalong, which is the world's biggest refugee camp is Kutupalong and is located in Ukhia Cox's Bazar. This camp is supported by seven international entities: the governments of the European Union, the United States, Canada, Japan, Finland, Sweden and the IKEA Foundation.[13]

The Kutupalong, started to function in 1991, after Rohingya people started to come from Myanmar, and in 2017 around 30.000 refugees were registered.[14]

The uprising conflict in Myanmar, in 2017, made the number of Rohingyas that fled in Bangladesh to rise, which drove to the swelling of the camp. It was estimated by the United Nations High Commissioner for Refugees, that the number of people that where settled in the two provided camps was over 77.000.[15]

Starting 2018, Kutupalong have begun the world's largest refugee camp.[16] The camp site which is built on hillside steep is prone to flooding and landslides,

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[11] Head, Jonathan (1 July 2013), *The Endless Situation of Unwanted Rohingya in Burma*, https://www.bbc.com/news/world-asia-23077537, accesed 27.01.2021.

[12] *How Suu Kyi sees the Rohingya crisis*, BBC News. 25 January 2018, accessed 27 January 2021

[13] Tatiana Marra, Journal - May 12, 2014 - *Our work in the refugee camps near the Cox bazaar*. Ikea Foundation Blog, https://ikeafoundation.org/blog/our-diary-book/ , accessed 27 January 2021.

[14] *Emergency shelter for Rohingya fleeing violence in Myanmar*, United Nations High Commissioner for Refugees", https://www.unhcr.org/news/latest/2017/9/59ad27d74/shelter-urgently-needed-rohingya-fleeing-myanmar-violence.html , accessed 27.01.2021.

[15] Jacob Judah, *The flow of the Rohingya puts pressure on the resources of the Bangladeshi camp*, the United Nations High Commissioner for Refugees, 15 september 2017, accessed 27 January 2021, https://www.unhcr.org/news/latest/2017/9/59ba9b7b4/rohingya-influx-strains-camp-resources-bangladesh.html

[16] *Kites, Prayers, a Snake Show: Reporting from Rohingya Camps; Finding Human Stories in the World's Largest Refugee Camp*, https://www.npr.org/sections/goatsandsoda/2018/02/18/586083314/kites-prayers-a-snake-show-reporting-from-the-rohingya-camps?t=1611753286951, accessed 27 january 2021.

which make the infrastructures build on it, not stable, which made the Human Rigts Watch, to urge Bangladesh on relocating on a safer ground.[17]

The number of refugee that have been settled in not very proper condition in the camp of Kutupalong , was estimated at 860.356 people, on an 13 square kilometres.[18]

### 4. Covid 19 and the refugee camps in Bangladesh

The Coronavirus can be transmitted to Rohingya refugee camps from one person to another very easily, in two ways, one through direct physical contact and the other through close indirect contact with patients with COVID-19 (through drops caused by coughing or sneezing from a person who has been infected).

Given the general life characteristics of refugee camps, where there is no hygiene or adequate hygiene, and where people are forced to share toilets with their neighbors, they are followed by tight living conditions, the ubiquity of disease and lack of access to medical care; clean water, leads to difficult survival and fight against threats COVID-19 becomes a significant threat.

Given the large number of Rohingya refugees in Bangladesh, about 860,000, the COVID-19 virus could easily kill more than 1,600 people. The first case of Coronavirus in Bangladesh, where most Rohingya refugees are located, was reported in the Cox Bazar by a local community, followed by the recoding of the first COVID-19 death in March.

In the thick camps of Cox's Bazaar, alternatives to social separation or self-disconnection are removed, with many displaced people living in cramped conditions in makeshift bamboo and cloth shelters.

Cleaning practices are not practical when standard hand washing becomes a luxury, as access to clean water is severely restricted. On average, 40,000 people live in every square kilometer in the camps, if a refugee is infected with this virus, many refugees will die in a short time. There are concerns about overcrowded Rohingya camps where the virus can spread and become an outbreak in no time.

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[17] *Bangladeshi Rohingya refugees on 'precarious ground' before monsoon season,* CBC News (Canada), 21 April 2018, https://www.cbc.ca/news/world/rohingya-refugee-camps-bangladesh-monsoon-rains-1.4629958, accessed 27 january 2021; *Bangladesh: Rohingya Endures Floods, Landslides; Refugees Waiting for Future Return to Myanmar Need Safer Camps*, Human Rights Watch, 5 August 2018, accesed 27 january 2021, https://www.hrw.org/news/2018/08/05/bangladesh-rohingya-endure-floods-landslides

[18] *ROHINGYA REFUGEE RESPONSE BANGLADESH Refugee Population by Location*. UNHCR. United Nations High Commissioner for Refugees, accesed 27 january 2021; Kutupalong refugee camp, home to more than 600,000 Rohingya, faces daily challenges; https://www.abc.net.au/news/2019-11-15/the-biggest-refugee-camp-in-the-world-rohingya-in-bangladesh/11703816 , accessed 27 january 2021.

The Bangladeshi government has imposed a blockade on a southern district, housing more than a million Rohingya Muslims fleeing Myanmar to prevent the spread of the coronavirus. Recent news reports in BBC News Asia say about 350,000 people displaced from Myanmar are "on the verge of a public health catastrophe," says human rights group Human Rights Watch (HRW).

The Government of Bangladesh and humanitarian agencies are trying to create the inclusion of Rohingya refugees in the Bangladesh Government's national response plan to COVID-19. However, there is a constant fear of allowing foreign distributors to enter refugee camps. Food distribution agencies are thus developing new ways to eliminate contact from one person to another. The United Nations High Commissioner for Human Rights (UNHCR) has established isolated camp areas for refugees infected with COVID-19 in temporarily isolated areas until they can be transferred to specially designated isolation units.[19]

## 5. The International reaction to the Rohingya genocide

One of the first response against the Genocide of Rohingya was the United Nations, which described it ethnic cleasing.[20] The United Nations High Commissioner for Refugees, Zeid Ra'ad Al Hussein, said "decades of persistent and systematic human rights violations, including the very violent security responses to the attacks since October 2016, have almost certainly contributed to the nurturing of violent extremism, with everyone ultimately losing."[21]

Another response came from European Union, who condemn the "past and present human rights violations and the systematic and widespread attacks, including killings, harassment, rape and the destruction of property which, according to the records of the UNIFFM and the Office of the UN High Commissioner for Human Rights, amount to genocide, war crimes and crimes against humanity perpetrated by the armed forces against the Rohingya population; strongly condemns the disproportionate response of the military and the security forces; stresses that the military has constantly failed to respect

[19] Rescue,, The response to coronavirus, which is most at risk from coronavirus, 2020, https://www.rescue.org/topic/coronavirus-response#who-is-most-at-risk-from-the-coronavirus , accessed 27.01.2021.

[20] Stephanie Nebehay and Simon Lewis, *U.N. brands Myanmar violence a 'textbook' example of ethnic cleansing*, 11 September 2017, https://www.reuters.com/article/us-myanmar-rohingya/u-n-brands-myanmar-violence-a-textbook-example-of-ethnic-cleansing-idUSKCN1BM0QF, accessed 05.02.2021.

[21] *UN chief calls on Myanmar to end Rohingya violence | Myanmar News*, Al Jazeera, https://www.aljazeera.com/news/2017/9/5/un-chief-calls-on-myanmar-to-end-rohingya-violence, accessed 05.02.2021; *United Nations News Centre - Myanmar: UN rights chief says violence in Rakhine state predictable and preventable*, https://news.un.org/en/story/2017/ 08/564032-myanmar-un-rights-chief-says-violence-rakhine-state-predictable-and-preventable#. WblLl8gjHIU , accessed 05.02.2021.

international human rights law and international humanitarian law"[22]and is imposing sanction against Myanmar and is reiterating the call to the "UN Security Council to impose a comprehensive arms embargo on Myanmar and to adopt targeted sanctions against those natural and legal persons who appear to be responsible for serious human rights violations."[23]

And in the end we can present one of the most important international response to the Rohingya genocide, which is the International Criminal Court, which on 14 november 2019, decided to open an investigation related to what is happening in Myanmar. The ICC accepted to open the investigation, based on the "reasonable basis to believe widespread and/or systematic acts of violence may have been committed that could qualify as the crimes against humanity of deportation across the Myanmar-Bangladesh border and persecution on grounds of ethnicity and/or religion against the Rohingya population."[24]

**Conclusions**

What is happening is Myanmar related to the Rohigya population, is affecting deep all the entire world? We could face a new Holocaust, if the competent authorities are not going to take more serious actions soon. Even though the United Nations and European Union imposed sanctions to Myanmar and that International Court of Justice opened and investigation, the crimes did not stopped and the genocide is still on going. The Myanmar Government those not fear the sanctions based on the fact that is not part of the Rome treaty that goes against the crimes against humanity, so it is ongoing against the Rohingya. When all this it is going to stop? Hopefully soon, because the world could not face another Holocaust and the consequences are not of those that the world would want. Already the crisis that is ongoing because of huge number of Rohingya refugee, has catastrophic consequences, for the country of Bangladesh, that is overwhelmed.

[22] *Joint Motion for a Resolution*, European Parliament, 2019, https://www.europarl.europa.eu/doceo/document/RC-9-2019-0050_EN.html, accessed 05.02.2021.
[23] *Ibidem.*
[24] https://www.icc-cpi.int/Pages/item.aspx?name=pr1495, accessed 05.02.2021.

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3. https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-ready-to-provide-temporary-shelter-for-rohingya-fleeing-violence-idUSKCN1BJ0G7?il=0
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18. https://www.icc-cpi.int/Pages/item.aspx?name=pr1495