Universitatea "SPIRU HARET"
Facultatea de Ştiinţe Juridice şi Ştiinţe Administrative
Centrul de Cercetări Juridice

Legal and Administrative Studies

E-Governance and E-Justice in the Space of Freedom, Security and Justice of the European Union

- Fourth Edition -

BUCUREŞTI, 2021

ISSN: 2601-0836

Content

Rule of Law and State of Emergency Management
Armand MACIU,
Florin MACIU 5

The State of Emergency Management and the Rule of Law
Armand MACIU 17

Considerations Regarding the Annulment of Administrative Acts, Both in Administrative Litigation and in Criminal Law
Roxana IONESCU,
Diana Anca ARTENE.....24

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
Cosmin Adrian ŞERBAN,
Constantin IORDACHE.....30

Instruments and Fundamental Rights used in the Area of Freedom, Security and Justice
Eugenia ŞTEFĂNESCU 48

The Principles of Law. Historical Perspectives, their Modernization and Application
Ion FLĂMÎNZEANU 58

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 66

Danger of Deontic Inconsistency
Gabriel ILIESCU 75

Brief Considerations on the Logic of Legal Fiction
Cristian NEACȘIU,
Mircea DUȚU 94

Mihail Kogălniceanu – A Personality of European Diplomacy in the 19th Century
Constantin IORDACHE,
Cosmin Adrian ŞERBAN 101

Legal Aspects and Legal Considerations Regarding the Application of the Correct Relevant Legal Provisions Regarding the Length of Service and the Period of Contribution to be Taken into Account in the Case of Individual Part-Time Work Contracts
Dimitrie-Dan RAICIU,
Anca RAICIU 109

Reasons for Unconstitutionality of Some Provisions of the Emergency Ordinance of the Government of Romania No. 130 Of December 17, 2021 Regarding some Fiscal-Budgetary Measures, the Extension of Some Deadlines, as Well as for the Modification and Completion of Some Normative Acts
Constantin ZANFIR.....112

Short Viewpoints Regarding the Abuse of Procedural Law
Adela Maria CERCHEZ 123

Ethical Values Specific to the Public Office in the Field of Structural Funds. Theoretical and Practical Aspects
Andrei Marian-Lucian BACIU 129

Brief Considerations Regarding the Influence of the Free Movement of Capital on the Digital Single Market
Roxana-Daniela PAUN.....141

Rule of law and state of emergency management

Armand MACIU[1]
Florin MACIU[2]

Abstract

The pandemic could be fought based on the provisions of an existent law which regulates constitutional dictatorship. If this law had not existed, now we would have been in a pathetic state, especially when we speak about constitutional democracy. Anyway, this act has been never used, and, in the meantime, 20 years have passed, besides a review of the fundamental law. It was cvasinormal that, after a constitutional test, some shortcomings to be revealed by the Constitutional Court especially under the circumstances when this institution has an extremely dense activity, acquiring a vast expertise, consolidated, also, on the principles promoted by European Union. In our state, we build democracy on experimental basis, rather than on lessons offered by others. Perhaps this way provides an advantage to some people, in the detriment of much more others. Anyway, e-governance is a modern method that could evolve parallelly to the basic principles of democracy. However, it would be better to know what we want, and, only after that, to begin working to e-governance. The main idea is to decide fast, as a nation not as a group of people with a certain interest.

Keywords: *constitution, democracy, state of emergency, fundamental rights and freedoms, legality, proportionality, nondiscrimination*

In fundamental law, at articles 22 – 53, there are presented regulations regarding citizen's fundamental rights and freedoms. Some of them are untouchable, for some others the exercise can be restricted under some circumstances. Let's see what are the provisions of article 53 from Romanian Constitution: **„(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.**

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it,

[1] armandmaciu@yahoo.ro
[2] fmaciu@yahoo.com

applied without discrimination, and without infringing on the existence of such right or freedom."

Taking into account those enunciated upper, briefly, we mention the principles that have to be followed when an exceptional state are declared/proclaimed/established.

The first one is **to respect the superior level of regulation**. Talking about fundamental rights and freedoms, their restriction of exercise can be done only through constitutional or organic law provisions. Thus, for exemple, the Constitution of Romania, at article 73, stipulates: "…(3) Organic laws shall regulate: …f) the state of partial or total mobilization of the armed forces and the state of war; g) the state of siege and emergency;…"These laws are in force. **The fundamental law does not allow the Government to regulate such restrictions, even if they are done by normative acts with the force of the law (e.g. emergency ordinances):** „Article 115 …(6) Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly."

Another principle is **the legality**. This is about the coherence between establishing an execeptional state and special and specific measures, taken in order to manage this state, on one hand, and the existence of a real danger, on the other hand. Of course, the idea can be elaborated – there are many opinions supported by a variety of arguments.

A consistency or compatibility has to be done, also, between the provisions of internal law and those belonging to international treaties where Romania is a party (this is the principle of consistency, included by us in the principle of legality). A relevant appearance which comes from respecting the legality principle is that the Parliament is the fundamental institution called to watch over the measures taken by the Government to manage the crisis.

The third principle is the proclamation of the exceptional state. In Romania, the emergency state was officially proclaimed, we say, regardless a deep and systematic analysis, and, so far, there is no reason to insist in this field.

The next principle mentioned is **the notification**. It is about the obligation of the state to inform the other states and international bodies on the exceptional and derogatory measures internally imposed. Nothing to comment or to criticize on this principle.

The fifth principle is the intangibility. In a nutshell, there is a core of rights where the exercise cannot be restricted (e.g. free access to justice, right to life – the debate could be amplified). We do not believe that it is necessary to examine if, in Romania, this principle was respected during the state of

emergency, plainly and simply, because nobody complained in this respect (except the free access to justice, as the Constitutional Court stated).

The next principle tackled is the **proportionality**. According to this principle, they cannot adopt measures tougher than the severity of the managed crisis. Here, during the emergency state and the measures imposed in order to restrict the exercise of some rights in Romania, there were debates at the level of fundamental institution of the state, of mass media and the citizens, the opinions regarding the way this principle was followed being divided in pros and cons.

Another principle is **the temporality**. It refers to the limited duration of the exceptional state, it was debated and decided in the Parliament and, so far, it did not give birth to serious discussion in doctrine, in spite of the fact that people had different opinions on how long this duration should have been. We have no comments.

Besides of what was enumerated before, we mention the **principle of nondiscrimination**, stipulated, together with the proportionality, in the Constitution of Romania and in international treaties, too. It appears that this principle, also, suffered some distortions during the state of emergency, in Romania.

The last but not least principle is the existence of a real peril to national security, including a pandemic or an epidemic. This principle was tested when the Parliament approved the decrees on this theme, issued by the President of Romania.

The exceptional state has two components. The first one is the **legal frame**, and the second one is the **operational frame**. The first one addresses to constitutional and legislative basis, the Parliament and Constitutional Court or other democratic bodies control, and to the subordination to the principles described above. The operational frame includes organizational structure and the strategic plans which are necessary to manage the exceptional state.

Lower, we will approach, briefly, details regarding the legal frame, and, with less knowledge, the operational frame.

The establishment of the exceptional state was not only timely, but also necessary from the legal and democratic point of view. It was a decision made after the study of national and international situation regarding the pandemic, and the principles enunciated were considered. The restriction of some fundamental rights and freedom could be done only during the state of emergency. **Otherwise, the measures would have been fully unconstitutional.**

Fencing the exercise of some rights and freedoms, according to the principles shown before was beneficial for citizens' health, system of health functioning, and a large variety of other systems connected to it, including public order, national economy etc.

However, in some fields, the taken measures, besides unconditional support from some parties and citizens, generated, at some levels, adverse reactions more or less legitimate. We emphasize some of the measures suspected to affect the principles that were described, with the mention that our debate could have been

vast. Our discussion is rather a challenge in order to start a profound and much more extensive analysis.

1. Medical assistance supply was not given to persons who needed that, because they did not suffer from the pandemic, although their diseases were, maybe, more dangerous than COVID 19. **This measure could contravene to the principles of proportionality, nondiscrimination and even to legality**.

2. The establishment of some measures that affect the exercise of the fundamental rights and freedom through emergency ordinance. Taking into account the provisions of article 115 paragraph (6) from Constitution of Romania, about which we discussed before, it is obvious that **such normative acts were not consistent with the fundamental law**. In these cases, the Constitutional Court must perform only an extrinsic analysis to find unconstitutionality.

3. The indulgence regarding some actions of leaving the quarantine zone. Naturally, this is not permitted. It appears that this situation, proved that it was real, it would not have been possible without the approval of the authorities. **It was infringed the principle of nondiscrimination** (some people were allowed, some not), **and, more severe, the legality.**

4. The establishment of some measures in the education field that sounds as being forced or disconnected from reality. The work of some students was evaluated at random. The rules in this field were unjust. Also, besides the fact that many students do not have access to internet, many teachers, otherwise very appreciated, did not have the necessary endowment and proper skills to instruct their students on-line. **Again, we can talk about distortion of nondiscrimination and legality.**

More or less, we will comment what we enunciated at the four bullets situated above, reminding to the reader that our analysis does not reach the completeness, from many points of view.

1. Therefore, we tackle medical assistance supply matters. The state of emergency started, in the third decade of march, with a measure that upset not only the hospitals' activity, but created injustice for a lot of persons who were suffering from different illness, and were in need for treatment and rapid intervention. In a few words, the minister of interior, Marcel Vela, authorized by the law with special powers to manage the state of emergency, approved an order stipulating the evacuation, in two days, of all the patients who did not need urgent intervention, and, besides that, the suspension, for fourteen days, of all surgical interventions that could be rescheduled[3]. Focusing on the best measures to

[3] https://romania.europalibera.org/a/pacientii-care-nu-sunt-cazuri-de-urgenta-vor-fi-externati-in-termen-de-48-de-ore/30504288.html. March 23, 2020 Free Europe Radio. The patients who did not need urgent intervention will be evacuated in 48 hours. The measures implemented by the minister

diminish the danger generated by the spread of new coronavirus, the authorities neglected or even ignored numerous persons with other diseases different than Covid 19, even if these were more severe.

Obviously, a discrimination, a thing described by mass media, as well as medical personnel or nongovernamental organizations[4]. The error was seen and recognized by the authorities, too, but they started adopting correction measures only at the beginning of June[5].

The representatives of Patients with Chronic Disease Organizations Coalition (COPAC is the abbreviation in Romanian) have shown, also, the infringement of some patients' rights, and their action has contributed crucially in the deciders' attitude[6]. Discrimination is suggestively emphasized by the

---

of the interior are applied in both, public and private hospitals. "Today, the 23rd of March, the order of the action commander was issued, approved by the minister of interior, Ion Marcel Vela, for the establishment of measures necessary to stop the spread of SARS-COV-2 (new coronavirus), at the level of public and private hospitals. Thus, beginning with 24th of March, tomorrow, for fourteen days, surgical interventions, other treatments, and medical investigations, in hospitals, private or public, are suspended, if they can be rescheduled because they are not urgent. Also, the scheduled and potentially scheduled consultations are suspended. In 48 hours, from the time the order come into force, all the patients who did not need urgent intervention will be evacuated from the hospitals.

[4] Also, to be seen https://www.zf.ro/eveniment/consultatiile-si-internarile-pentru-afectiunile-care-nu-sunt-urgente-suspendate-in-spitalele-publice-si-private-19012198 Financial dailypaper Georgiana Mihalache 23.03.2020, 14:28. The consultations and the hospitalizations for not urgent cases, suspended in private and public hospitals. The minister of interior, Macel Vela, issued an order to suspend for 14 days the interments for surgical interventions, other treatments and medical investigations, which are not urgent and can be rescheduled. The measure is applied to private and public hospitals and comes into force tomorrow, on the 24th of march, for the next two weeks.
„They suspended, also, scheduled or potentially scheduled consultation. In 48 hours, from the time the order come into force, all the patients who did not need urgent intervention will be evacuated from the hospitals. The command of the hospitals can decide on the work schedule of the personnel, by inserting shifts or permanent guards, not influencing the employees' salary." informed the Strategic Communication Group.

[5] https://www.digi24.ro/stiri/actualitate/sanatate/nelu-tataru-cere-redeschiderea-spitalelor-pentru-pacientii-care-nu-sunt-bolnavi-de-covid-19-1320290 Nelu Tataru asks for reopening of the hospitals for the patients not suffering from COVID 19 the 9th of June 2020 14:51. The minister of health asked on Tuesday to public health directorates to evaluate quickly the situation in hospitals that treat coronavirus, in order to make possible the access to medical care for non COVID patients. "Today, I asked public health directorates to make at the local level an analysis of the patients, of the way of how the functional tracks for infected and uninfected people are separated and to identify all the necessary measures to restart the activity in phase 1, 2 and support hospitals. Personally, I will begin an evaluation of this situation in these units, because I receive complains from uninfected with coronavirus patients who do not benefit from medical care they need. We are in a new epidemiological phase and must reopen the hospitals for people with diseases, even if we keep on the measures to prevent and diminish the spread of SARS-CoV-2" declared Nelu Tataru, the minister of health, according to a communiqué of the ministry.

[6] https://www.edumedical.ro/copac-incetati-sa-incalcati-drepturile-pacientilor/

sentence: "The authorities must understand, at this moment, that they have to manage all the health system not only COVID patients."

2. We go now to the constitutionality matters. It was obvious that a large part of the emergency ordinance adopted to complete and modify the older law, regarding the state of siege and the state of emergency, affecting some fundamental rights and freedoms would be declared as unconstitutional[7]. Earlier, we recalled, together, the provisions of article 115 paragraph 6 of the Constitution. The text of the fundamental law is crystal clear, so that cannot generate confusions or variants of interpretation. Logically, is inexplicable how it was possible for Government to issue such a normative act.

The Government, according to the regulations adopted by itself, before voting that ordinance, was obliged to take into account the advice of The Juridical Directorate of the General Secretariat, The Ministry of Justice, The Departament for the Parliament Relationship and The Legislative Council, all these bodies being specialized in juridical matters regarding emergency ordinances. It was impossible that at least a professional belonging to these entities to not notice and show the trespass, under the circumstances where this kind of event happened more times in

---

Even if, in other fields, the things were relaxed, in the health field, it does not happen the same, say the representatives of COPAC who show the "continuously infringement of the patients' rights". COPAC says that they made a list in this respect: only the patients with urgent need are hospitalized; patients are postponed after the 15th of June; patients' relatives are not permitted to enter hospitals, even if there are special cases which can be justified (persons who cannot walk, births etc.) Fathers are not allowed to see their children even if they passed the COVID test, and some mothers must desperately wait the test result in order to see their kids; patients are obliged to go personally to take the treatment, because their families are not allowed; patients with infectious diseases (tuberculosis, HIV, hepatitis) may not go to the hospitals where they were treated before, because these hospitals are established as COVID or COVID support hospitals; …If, in march, we did not know the scope of this pandemic and these types of measures seemed to be justified, in present, we have to cease them. "**The authorities must understand, at this moment, that they have to manage all the health system not only COVID patients**. As always, we, Romanians, place ourselves in an extreme situation: we infringe all the rights and refuse to think of the patients' good. It seems that they lost common sense and all the humanity and this is unacceptable. We do not tolerate this situation anymore and ask for corrective actions. In June, these measures are not justified at all." declared Radu Ganescu, the president of COPAC.

[7] *The Government Emergency Ordinance 34/2020 to modify and complete The Government Emergency Ordinance 1/1999 regarding the regime of siege and emergency state* published in the Official Monitor 268/the 31st of March 2020

1. The article 28 is modified and will have the following content:

"The article 28 – (1) The failure of the provisions of article 9 is contravention and it is sanctioned with fine from 2,000 RON up to 20,000 RON, for individuals, and from 10,000 RON up to 70,000 RON for legal persons.

(2) Besides the main contraventional sanction, mentioned at the first paragraph, according to the nature and the severity of the deed, they can add some other complementary sanctions, as provided in military ordinances:"

the past and the Constitutional Court accomplished its duty each time. Maybe the reason why this occurred could be found in the shadow of some political vanities that cannot be tolerated in a democracy, and, also, of some wrong ideas conforming to which a generous end justifies the unconstitutional means.

The Constitutional Court, also, has withheld that even the older article 28 from *The Government Emergency Ordinance 1/1999 regarding the regime of siege and emergency state* is unconstitutional: "The failure of the provisions of article 9 is contravention and it is sanctioned with fine from 100 RON up to 5,000 RON, for individuals, and from 1,000 RON up to 70,000 RON for legal persons". In fact, from the state of emergency beginning, in Romania, the police had applied over 300,000 contraventional sanctions, adding up 120 million euro, for the infringement of the restrictions provided by military ordinances[8]. This performance placed our country in a leading position, if we make a top of the states that adopted tough measures to impede the spread of the new coronavirus. It is necessary to emphasize the fact the fines were applied in substantial quantum's to citizens, but they have relatively small incomes.

The Constitutional Court was intransigent and adopted The Decision 152/2020[9] regarding the exception of unconstitutionality for the provisions of article 9, 14 c^1) – f) and 28 from *The Government Emergency Ordinance 1/1999 regarding the regime of siege and emergency state*, entirely, as well as *The Emergency Ordinance 34/2020 to modify and complete The Government Emergency Ordinance 1/1999 regarding the regime of siege and emergency state,* entirely. The Court noticed some elements relevant enough in constitutional and contraventional law. Further, we will replicate passages from this decision, without serious intervention on the text, avoiding in this way to alter their meaning.

An element is that the decree of the President of Romania, by which the state of emergency was established, can only to organize the fulfillment of the provisions of the law that regulates the juridical regime of the state of emergency, at primary level (*the Government Emergency Ordinance 1/1999*). With other words, the decree that establish the state of emergency is an administrative document, subsequently to the law, through which they can enumerate concrete measures to be taken, as well as the rights and freedoms to be restricted. Taking into consideration its juridical force that is inferior to the law, the decree of the President cannot derogate, to replace or to add to the law, so that it cannot contain primary provisions. Therefore, the decree can include only measures to organize the fulfillment of law and to customize and adapt the law provisions to the existent concrete situation, in the essential fields, to manage the situation that

[8] https://www.digi24.ro/stiri/actualitate/amenzile-pentru-incalcarea-ordonantelor-militare-sunt-neconstitutionale-1302981 06.05.2020 16:46

[9] To be seen the Official Monitor 387/the 13th of May 2020.

generated the establishment of the state of emergency, without deviations (by modification or completions) from the legal frame.

Thus, considering its constitutional value, the decree for state of emergency establishment – an administrative document issued to exercise some constitutional tasks and to accomplish the provisions of a law regarding some fundamental rights and freedoms restriction and the damage of some fundamental institution of the state – can be controlled in two steps: the first one, ex officio, by the Parliament, based on article 93 paragraph 1 from Constitution, and the second one, by the Constitutional Court, based on article 146 letter l) from Constitution, after the decision of the Parliament approves or not the state of emergency.

After all these conclusions which convince us that the President of Romania exceeded his legal tasks, the Constitutional Court affirms that the Parliament only approved the measure, without the verification of the way the decree followed the provisions of the law and the Constitution. The Parliament should sanction the President *ultra vires* (beyond his legal powers) behavior. The Court noticed that the President, on one hand, suspended or eliminated some legal provisions, and, on the other hand, he modified or added to some other provisions. By his decisions some fundamental rights and freedoms were affected (the right to labour, the free access to justice, the economic freedom etc.).

Therefore, we have some things that are good to know and remember, especially by those who, ignoring the law, believe that the President of Romania is the most important institution of the state, while, in fact, he is an element of the executive power. It is possible that this deformed and harmful perception was created by our socialist past, when we were ruled by a dictator, and the Parliament was substituted by the Great National Gathering, a body that used to work sporadically, especially to approve the decrees issued by a little group of persons that led the country. The fact that the President of Romania, in present, is elected by vote by all the citizens who have this right confers him an undeniable legitimacy, but he does not have increased powers that exceed the law.

Looking at contraventional aspects, we mention some arguments that we think that must be known by all the persons who study this field. The Court pronounced that "the application of contraventional sanctions…, takes place according to some principles similar to those pertaining to criminal law. In this respect, through the *Decision 197/the 9th of April 2019*, paragraph 31, the Court mentioned the principle of legality, principle of proportionality, and the principle of uniqueness (*non bis in idem*), regarding contaventional sanctions. According to proportionality principle, all the main or complementary sanctions must be dosed depending on the severity of the deed. This principle is reflected by article 5 paragraphs (5) and (6) from *Government Ordinance 2/2001*. There it is stipulated that "the established sanction must be proportional to the social danger degree of the deed", and "the complementary sanctions are applied depending on

the nature and the gravity of the deed". The principle of proportionality is close to the principle of opportunity, the last one meaning that main and complementary sanctions have to be applied to accomplish the repressive and preventive aim of the contraventional sanction.

At the same time, the Court mentioned that, as referred at article 21 from *Government Ordinance 2/2001,* some criteria have to be respected when we speak about the proportionality: the circumstances of the offense, the way and the means, the purpose and consequence, personal situation of the trespasser, as well as the other information written in the official document that shows how the deed was noticed and sanctioned.

With other words, the investigating agent who decides on the proportionality between sanction and the offense, must look at the general criteria from article 21 from *Government Ordinance 2/2001,* as well as at some special criteria, if they exist. Otherwise, if the proportionality is neglected, the court of justice will adapt the sanction to the legal provisions.

So, we have just seen a good summary (including pertinent arguments) of the theory of proportionality as a principle in contraventional law. This principle is also known as the principle of individualization.

More, the Constitutional Court says that contraventional law, as criminal law, has a subsidiary character, intervening only in the situation where other juridical means are not enough to protect some social values. On these conditions, the normative acts with law power and the normative administrative acts that establish and sanction contraventions must meet certain conditions regarding the quality: accessibility, clarity, precision and predictability. The Court ascertained that the provisions of article 28 paragraph 1 by the phrase "the violation of article 9 is contravention" describe as contravention the violation of a general obligation to comply with all the measures established by the *Government Ordinance 2/2001,* by normative acts connected to this ordinance, as well as military ordinances or other orders, specific to the state of emergency, without showing explicitly the facts or the omissions which can be punished. Hence, the establishment of the facts that are contravention is arbitrarily let to the investigative agent and it is not done by the lawmaker who should determine the criteria and the conditions necessary to find and discover contraventions. At the same time, missing a clear picture of the elements that create a contravention, even the judge lacks the references needed to solve the complaint against the administrative document where the contravention is described.

Regarding the military ordinances, it is distinguished that these do not show clearly and unambiguously the type of juridical liability. Limiting itself to make reference only to the article 27 from the *Government Emergency Ordinance 1/1999,* where they speak about all the types of juridical liability, military ordinance fails to indicate what kind of behavior leads to contraventional

liability. This sentence is valid for all the military ordinances issued until the constitutionality control was performed.

Concluding, **the Constitutional Court ascertained that the analized provisions infringe the legality and proportionality principles that govern the contraventional law, because they make reference to a general obligation to comply with an undefined number of norms, difficult to be identified, and establish contraventions without describing concrete facts.**

Obviously, those who have education and training in this field do not have another choice but to fully agree or even applaud the comments and the arguments of the Constitutional Court. Unfortunately, some persons who enjoy a great publicity, due to the position they occupy or due to their speaking skills, used the freedom of opinion and expression condemning the decision or making fun. In fact, that is the reason why, often, some of us complain that we do not live in a democratic and normal society, but, sometimes, they are not able to understand that, first of all, we have to respect and comply with the fundamental law. We cannot reach some important goals endlessly repeating notorious mistakes and then blaming those who explain to us when and how we err.

Also, we must know that, in spite of the Constitutional Court Decision, from which we drew some ideas and conclusions, the fines can be cancelled only by a qualified court of justice.[10]

After this decision of Constitutional Court, the number and the amount of the fines decreased dramatically. While, before the decision, the police applied 3,500 fines a day, sometimes even over 5,500, after the decision, the number was diminished under 1,000. Also, the amount of a fine went to a half.[11]

---

[10] To be seen https://romania.europalibera.org/a/amenzi-neconstitutionale-ccr-stergere-in-instanta-prin-contestare/30597461.html ACTUALITATEA ROMÂNEASCĂ 6-May, 2020 Adelina Radulescu "The Constitutional Court declares unconstitutional the fine for violation of the state of emergency. The fine can be erased only by a court of justice decision.
The Constitutional Court admitted the notification of The People' Advocate regarding the fines applied during the state of emergency. This means that those who were fined have the chance to contest the penalties in the court and to get rid of them. The penalties are not erased ex officio. The decision of the Constitutional Court is about the fines applied by the police for violations of the restrictions of the state of emergency. The judges said that these fines were let in the hands of the police, and the law did not provide exactly what are the facts and the conditions. So, the regulation was too general. Also, the Court decided that the size of the fines was too big in comparison to the people's incomes. There were fines between 2,000 and 20,000 RON, while, on average, the pension is 1,200 RON and the salary a little above 3,000 RON. In March, the authorities announced that, for the violation of the restriction, the fines will be increased between 2.000 RON and 20.000 RON. The argument was to have tougher fines for the deterrence of persons to spread the virus. Initially, the fines were between 1,000 RON and 10,000 RON…"

[11] https://www.digi24.ro/stiri/actualitate/evenimente/cu-cat-a-scazut-numarul-amenzilor-dupa-ce-au-fost-declarate-neconstitutionale-cum-se-reflecta-decizia-ccr-in-activitatea-politiei-1304358 Bogdan Pacurar 09.05.2020 17:10

Even if, after the Constitutional Court Decision, the number and the amount of the fines decrised, it is easy to anticipate that a huge wave of fined persons will go to courts of justice to claim that the sanctions have to be annulled or shrunk down. The sentence is based, too, on the minister Vela public declaration according to which the police (his subordinates) abused and this fact was obvious.[12]

The General Prosecutor had a very interesting comment, too. From this comment, we can draw some conclusions belonging to contraventional law, regarding the difference between criminal deeds and contraventional ones, the abolishment of contraventional prison, but, also, about the predicted tempest that will burst in the courts to cancell the fines.[13]

Even the mayor of Bucharest sector 3 could not avoid a scathing fine, when he was seen in a park, together with his girlfriend, traveling by bicycle, although, during the state of emergency, the park was closed. We feel sorry for him only a little, but we fully regret that poor but respectable persons suffered because they did not fill with accuracy the forms justifying the leaving of home or that people above 65 years were not rapid enough to solve their daily problems only in two hours, as it was regulated.

To prevent courts of justice to become blocked, and, also, to exonerate some innocent people to pay exorbitant fines, some parliamentarians thought to initiate a project to cancel abusive fines.[14] The draft does not make reference to

---

[12] https://romania.europalibera.org/a/amenzi-neconstitutionale-ccr-stergere-in-instanta-prin-contestare/30597461.html "It is obvious that these abuses are made, because there are many persons, many young persons who, after a six month school, were sent in the field. We were in need in order to cover all the missions. Those who made mistakes will be evaluated professionally and disciplinary" said Vela.

[13] "Criminal sanctions are separated from contraventional sanctions. Basically, from 2002, the contraventional fine cannot be transformed in contraventional prison. I am convinced that, after the state of emergency will cease and the activities in courts will restart, there will be this giant wave of complains against contraventional fines documents.", declared Gabriela Scutea for Europa FM.
Asked if she expects a massive mass of people to attack the fines in the courts of justice, Gabriela Scutea said: "Maybe, the citizens will do that because the fines' quantum is bigger than for another kinds of fines, and you realize that to each person 2,000 RON means an important loss"

[14] https://romania.europalibera.org/a/proiect-de-lege-pentru-stergerea-amenzilor-in-baza-ordonantelor-militare/30607853.html the 12th of May 2020 Draft of law to erase the fines applied on the base of military ordinances PSD, ALDE and Pro Romania presented to the Parliament a draft of law in order to erase the fines applied based on military ordinances during the state of emergency. The opposition motivates the necessity of this act with the fact that Constitutional Court Decision will make the courts overcrowded when hundreds of thousands of citizens will claim the erase of the fines. „The Constitutional Court Decision abolished the abusive fines applied to Romanians. As a consequence of that, to avoid blocking the courts of justice and to help the citizens who were abusively fined we submitted to other parties to be consulted the draft written by the specialists of PSD, ALDE and Pro Romania. By this draft, we intend to erase the fines applied based on military ordinances during the state of emergency.", wrote Calin Popescu Tariceanu on Facebook. The head

the severe deeds that can be qualified as crimes. Although the intention was laudable, it has not come to reality, yet. We have been still waiting and watching.

of ALDE mentioned that „the draft is not about the perpetrators who fled from isolation or quarantine or disturbed the public order".

„Can you imagine what means another 300,000 cases brought to courts? Their already swamped activity will be blocked. And these cases can increase the danger of spreding the virus when people storm the courts.", said Calin Popescu Tariceanu. According to him, the justice will be made for those abusively fined. „The value of all the fines during the state of emergency is the biggest in the world, probably. Who thought that a retired person who has 1,000 RON a month as pension must pay 5,000 RON because the two hours permited out of the home were exceded was insane", added he.

The state of emergency management and the rule of law

Armand Maciu[1]

Abstract

The pandemic could be fought based on the provisions of an existent law which regulates constitutional dictatorship. It could be worse, but, also, it could be better. We are not too vehement with those who made mistakes, because the situation was unprecedented and they did not have the necessary guidance. It could be affirmed that, anyway they had acted, some principles would have been violated. When the financial resources are, apparently, insufficient, we have, always, some room for reproaches. Nevertheless, some errors could have been easily avoided, if the decision makers had taken into account clear texts of the law and the abundant jurisprudence in the emergency ordinances adoption field.

E-governance is a modern method which can evolve parallel to the strengthening of the democracy basic principles. Yet, it should be better to not be too optimistic. Only if we have a look at the way we managed the implementation of on-line education, overnight, we realize that we still have a long way to travel. If, to the financial and material impediments, we add, also, the mistakes made by authorities, we can deduce that the way to e-governance is not only long, but difficult, and punctuated with obstacles.

Keywords: *democracy, state of emergency, fundamental rights and freedoms, legality, proportionality, nondiscrimination*

We carry on the description of some lacks regarding the way the authorities managed the state of emergency and fought the pandemic, started in the article which was entitled "Rule of law and state of emergency management". Thus, we go to the lack of rigor and failure to apply the quarantine rules.

1. The illegal desertion of the quarantine zone can encompass another topic that belongs to the management errors during the emergency state. The mistake is related to the violation of legality and nondiscrimination principles. Mass media commented largely how citizens who lived in zones declared as being under quarantine illegally left the location traveling hundreds of kilometers to reach an airport where they crowded themselves, scorning all the rules about social interspacing, with the intention to go to a foreign country to work for a better salary. Risking their lives, those citizens signed contracts with foreign

[1] armandmaciu@yahoo.ro

firms, intermediated by Romanian firms, while the Romanian state, meaning the competent authorities, did not involve itself too much.

Obliged to watch the accomplishment to the letter of restriction measures established by the state, this one comes with some explanations.[2] The justification can make some readers to smile and to remember Robin Hood, born in Loxley, an ex-crusader, who became later an outlaw, and the rebels (the merry men) who joined him and who were, always, more ingenious and intrepid than the subordinates of the sheriff of Nottingham, the authorities' representative. Then, the adventures took place in Sherwood Forest, now, it happened in Patrauti village, Suceava county.

As good citizens, we unconditionally trust the authorities who declared with pathos how special was their mental, material, technological and personnel effort, to annihilate that thing that even they premeditated: to allow Romanians to work hard abroad, during the pandemic, there where the citizens of those countries do not humble themselves to perform this type of labour. Unfortunately, a substantial part of press and fellow countrymen did not agree with this opinion. Believe me or not, we have our cavilers, too![3] Were the authorities of the state accomplices to illegal desertion of quarantine zones? Your decision.

---

[2] https://www.mai.gov.ro/verificari-ale-structurilor-mai-cu-privire-la-deplasarea-unor-cetateni-din-zona-carantinata-din-jud-suceava-catre-jud-cluj/
Verifications of the Ministry of Interior bodies regarding the travel of some people from Suceava quarantine zone to Cluj county. The 17th of April 2020.
During last week, after the verifications of the Ministry of Interior bodies regarding the travel of some people from Suceava quarantine zone to Cluj county, we found out that 21 citizens illegally left Patrauti village. To avoid the guards situated on public roads, these people crossed the agricultural area to the nearest location with no quarantine, and there they were expected by two vans to take them to a coach that was meant to transport them to Cluj airport. After the investigations, sanctions were applied and a penal dossier was prepared for the crime of annihilation of fight against diseases, according to article 352 from the Criminal code, as well as for the violation of provisions of the Military Ordinance 6 that established restrictions during the state of emergency.
To avoid the reiteration of these deeds, the minister of interior ordered to back-up the means and forces who monitor the quarantine zones, mobilizing personnel and assets from central level (Special Brigade of Intervention) that is endowed even with air surveillance devices. Thus, in the night between Thursday and Friday (around 01 00) outside Patrauti they discovered that 16 persons trespassed the quarantine restrictions and were out of the bounds. 15 were fined, and the 16th one, a minor who was 15 years old, was admonished.
We remind you that we are on duty and in this period we will watch that the restrictions to stop the spread of the virus will be complied with.
Also to be seen https://www.capital.ro/video-ca-in-filme-tineri-evadati-din-carantina-in-suceava-capturati-cu-elicopterul-si-camere-cu-termoviziune.html

[3] https://www.digi24.ro/stiri/actualitate/sanatate/ctp-despre-oamenii-din-suceava-inghesuiti-la-cluj-incepusem-sa-imi-fac-probleme-cu-dictatura-militara-uitand-ca-suntem-in-romania-1290118

The 10th of April 2020, 21:19 Cristian Tudor Popescu commented at Digi24 the Thursday situation, from Cluj-Napoca airport. There, approximately 2,000 people ready to leave to work in Germany crowded and nobody complied with minim social interspacing which is about 1.5 meters. But the journalist says that the problem is not in Cluj. The problem is in the place where those people came from, many of them pertaining to Suceava, a town and a zone in quarantine, according to a military ordinance. "I was thinking, in the beginning, to «military dictatorship», forgetting, at that time, that we are in Romania, where nothing is as it should be. Even the owls, as it was a saying in the past." said CTP. On one hand, we try to impose order in hospitals (…), and, on the other hand, people go loose." added the journalist. Cristian Tudor Popescu: People there could try to not stay one glued to another. They did not even try that. I did not see in the images that somebody tried to do that. Many of them did not have any kind of facemask.

The problem is not in Cluj. Until we arrived at Cluj, the problem is where these persons came from. They left Suceava, where apparently is quarantine. I was telling you before that more dangerous than COVID is the loss of trust in authorities. This happens now.

Let us take all logically. How many people were in that parking? 2,000, I understood. So, 2,000 people traveled more than 300 kilometers from Suceava, Botosani, Neamt to Cluj by coaches. They left the quarantine zone. Nobody put the submachine gun in their chest. Nobody stopped those coaches where people were already crowded. So, until the airport they were as we know it is in a coach. There you are glued to the person next to you. No way to talk about one meter and a half. All the persons in a closed place, as we saw in China, an environment proper to spread the virus, with the air-conditioner working, moving all kinds of particles.

This travel lasting more than 4 hours in a coach. Nobody stopped them. I was worried about the future... "My God, the fact that we solve our problems with the military… in Suceava and Deva and anywhere possible, to not head to the idea that military dictatorship is better than democracy!..." No? "It is OK…" I was thinking, in the beginning, to «military dictatorship», forgetting, at that time, that we are in Romania, where nothing is as it should be. Even the owls, as it was a saying in the past. So, where is that military dictatorship? They traveled by coach like in no man's land… What papers? The paper was signed by a mayor. What power does he have? Military or the police should have thrown it in the face. What mayor? "Here is total quarantine, established by military ordinance." What mayor?

If I am at the limit of the quarantine area with my submachine gun in my hand, are we still discussing about papers signed by mayors?

In professional interest… Maybe there are many people in this country who want to travel in professional interest, meaning to go to work not to stay home. That one goes to work in Germany, maybe I want the same – generally speaking – I want to go to my job, but I am not allowed. I am not allowed, I am stopped and the police ask me "Where are you going?" "I want to work." "They do not work, your firm is closed by the Government, you do not have where to go". But the Government does not close the way of the coaches that crossed 300 or 400 kilometers of the territory of our country, in 4 or 5 hours. During a 5 hour way they stopped at the gas station, did not they? They used the toilet, the store and they had "n" contacts until Cluj.

And, after that, in Cluj, they were left in that parking, where all the people were illegal. Everybody should have received a fine, according to the law.

Then I ask myself: from the parking they were taken to the plane. How did they seat in the plane? I do not believe that they had the necessary distance, meaning that the plane was not fully occupied. We have to reason… The situation was the same as in the coach. And remained to be tested by the German Government, I hope so, because they are serious people. (…)

We should have a press event presenting how these persons with their coaches wanted to get out from the quarantine zones, how they were not allowed and now they protest, or they get down

We view the number 3 matter and, now, we pass to some deficiencies in pupils' education process, in their training.

2. We all know that this year of education, that ends this summer, was affected by the pandemic. The students and the pupils had to stay home and to continue to learn, under the teachers' surveillance, on-line. The idea seems to be correct, but, when you go deeper studying the way this was implemented, you find out how difficult is to govern and to make become true a theory that ignores the reality and it is founded on a premise that force the facts, the veracity. Hence, we, again, can discuss about the violation of some principles enunciated above: legality and nondiscrimination.

We will tackle two aspects that can be seen even by an observer tired of or bored with remarking the shortages from our leader's decisions.

The first one. The decision to move the school at home seems to be logical, since you desire to protect the health of the pupils, teachers, as well as of the families and the friends of them. If you go profoundly in the phenomenon, without much intellectual effort, you realize that the scenario is not realistic. In juridical terms, the situation described below is named discrimination, and that was so evident that it was not hidden by the responsible factors. A large part of the pupils does not have the material technical endowment to participate in on-line education.[4] In the same situation are the teachers, who, besides that, cannot easily accustom themselves with these new methods of instructing[5].

from the coaches, lay on the soil and yell to let them through, while the police and military counteract them. This should be the news.. If we have military, police and state of emergency… No? Not the reverse situation, when the people left the quarantine zone with a paper issued from the mayor. From the mayor, the mayor from Patrauti. He gave the approval, during the state of emergency. In fact, it was needed a document from the Ministry of Interior, from responsible factors, maybe from Arafat, from Emergency Situations. How is it possible that a large number of people travels and the authorities do not stop them? This is the question…" On one hand, we try to impose order in hospitals (…), and, on the other hand, people go loose." Editor web: Liviu Cojan.

[4] https://romania.europalibera.org/a/misiune-imposibila-educatie-cum-muti-peste-noapte-scoala-online/30592445.html the 4th of May 2020 Andrei Luca Popescu Mission impossible in Education: how do you move school overnight in on-line. "The coronavirus pandemic moved the school home and on the internet. But not all the pupils have access to internet and the necessary technology. There are 250,000 in this situation, and the responsible persons from education do not have concrete solutions for them. **The pupils started to denounce discrimination in the education access**. The measures that Ministry of Education should find, after Monica Anisie, the minister, officially inserted the obligatory participation in on-line school, are postponed. The biggest problem is the lack of material possibility of many children and even teachers to run this activity, situation that determined four pupil associations to denounce discrimination in education access, because of material discrepancies."

[5] *Ibidem* The problems exceed the material shortcomings of the pupils and teachers, explains to Free Europe Liliana Romaniuc, education science expert and ex general inspector in Iasi town. "The crisis we cross has its positive aspects. One of them is that the crisis showed realistically

So, on one hand, *volens nolens*, for different reasons, in on-line training, participated less than a half of pupils. On the other hand, hard-working teachers, but with no knowledge in IT domain, daily exhausted the power of their cell-phones and got a hoarse voice talking for hours to each pupil, separately. It seems that this way was the most efficient because the pupil benefited from a personal teacher to learn, without individual effort, asking an endless row of questions, until the professor was finishing the day feeling demolished.

Aware of this facts, the employees from the ministry took a measure that, joking, the Romanians called it, like in sport – throwing weight… on the others 'shoulders. Thus, the task to fulfill this „impossible mission" was not given to the fictitious character Ethan Matthew Hunt, played in movies by Tom Cruise, but to the school inspectorates, education units and local authorities. We can add on the list even some pupils' parents who felt responsible to make a financial effort and to buy for their child a laptop or a tablet, as they could afford. We do not discuss here about unlucky guys who have more children. Let us give up the sarcasm and be sincere: when 30% from the citizens have their toilet in the courtyard, do we want to make quality on-line education, overnight? Anyway, if we carry on the reasoning, we cannot ignore an undesirable but inexorable outcome: the growth of school abandon and of functional illiteracy.

The second objectionable aspect in the education field, flows from the first one. When they practice on-line education, they must make an evaluation of the learnt knowledge in the same way. This necessity gave birth to a bizarre enough order[6].

It is the Order 4,249/the 13th o May 2020 meant to modify and complete The Frame- Regulations of school and high school organization and functioning, approved by order 5,079/2016, published in The Official Monitor 399/the 15th of May 2020. Let us have a look on a provision that intrigued us: „…8. If the average grade on the first semester is less than 5 and the on-line activity can be harnessed, then the average grade on the second semester can be calculated based on two grades, at least;

---

where we are. We are very low", says Liliana Romaniuc. And a prime obstacle for the on-line education pertains to the teachers, not to the pupils without access.

"We, the teachers, were not prepared to run on-line education. There is a big difference between education in classroom, face to face, and that undertaken in virtual space. Even if we have certificates, diplomas, we have to make a major change of the paradigm. And we notice that we do not have the necessary skills. If, ten years ago, since we have started to talk about IT, about its insertion in the training process, we had really started to practice, it would have been better now, probably" explains to us the teacher.

[6] https://www.edupedu.ro/oficial-incheierea-mediilor-pentru-anul-scolar-2019-2020-introdusa-in-rofuip-reglementata-prin-ordin-de-ministru/ OFFICIALLY the calculation of the average grades for the year 2019-2020, regulated by minister order, in the Regulations of the school organizations. Mihai Peticila the 16th of May 2020.

d) the harness of the on-line activity by grade is made **with the pupil or the parent's pupil agreement**;…"

The first thing that shocks us is the fact that the grade is plainly and simply „negotiated" with the pupil or/and the parent, if the on-line activity is harnessed. The second one is that any sane and rational teacher will not dare to grade too low on the second semester in case of a pupil who was graded under 5 in the first semester. This system of grading has not become classical and can be easily denied. The teacher, even if he is famous and well prepared in his area, is not able to demonstrate that a pupil even with a bad reputation, could not have obtained much beter grades, under normal circumstances.

So, we encounter, again, matters that make us think of legality and nondiscrimination. Since all the pupils are gratuated, no matter if they were hard working or they did not open at all the manual of the respective discipline, can we talk about justice? The egalitarianism is not the same thing as equality before the law. The pupils learn more because, in the future, they want higher positions in society, not because they want to uselessly work more, sacrificing their time and intellectual forces. Their results are consecrated in official documents, which, later, are taken into account for promotions, admittances, prizes. We stop here, despite the fact that there are more details to be said. We only add that, this summer, the exams, were extremely easy. The pandemic has its advantages, too!

This theme could approach easily issues about the weird acquisitions made at the shadow of the state of emergency. We did not desire something like that because we are fervent supporters of the presumptions of innocence and, besides that, we do not have ambitions as crime investigators or prosecutors who have in their concern the crime, organized or not. Probably, many other fields could be searched, revealing more aspects and details. We are waiting for critics, completions, disagreements or convergent opinions from other authors.

What we have done was to emphasize that it was a good thing the pandemic could be fought on legal basis, establishing the so called „constitutional dictatorship". If we did not have that emergency ordinance, now, from the constitutional democracy point of view, we would have been in a pathetic situation. Anyway, this act has been never used, and, in the meantime, 20 years have passed, besides a review of the fundamental law. It was cvasinormal that, after a constitutional test, some shortcomings to be revealed by the Constitutional Court especially under the circumstances when this institution has had a extremely dense activity, acquiring a vast expertise, consolidated, also, on the principles promoted by European Union to which Romania had adhered after the modifications made by the law that approved the respective emergency ordinance.

The bottom line: It could be worse, but, also, it could be better. We are not too vehement with those who made mistakes, because the situation was unprecedented and they did not have the necessary guidance. It could be affirmed

that, anyway they had acted, some principles would have been violated. When the financial resources are, apparently, insufficient, we have, always, some room for reproaches. Nevertheless, some errors could have been easily avoided, if the decision makers had taken into account clear texts of the law and the abundant jurisprudence in the emergency ordinances adoption field.

And a final conclusion: In our state, we build democracy on experimental basis, rather than lessons offered by others. Perhaps this way provides an advantage to some people, in the detriment of much more others. Anyway, e-governance is a modern method that could evolve parallelly to the basic principles of democracy. However, it would be better to know what we want, and, only after that, to begin working to e-governance. The main idea is to decide fast, as a nation not as a group of people with a certain interest.

Considerations regarding the annulment of administrative acts, both in administrative litigation and in criminal law

Roxana IONESCU[1]
Diana Anca ARTENE[2]

Abstract

The administrative act enjoys the presumption of legality, which in turn is based on the presumption of authenticity and veracity, being itself an enforceable title.

However, the principle of legality of administrative acts presupposes that both the administrative authorities do not violate the law and that all their decisions are based on the law. It also requires that the authorities effectively ensure that these requirements are met. The cancelling of administrative acts may be ordered by both the administrative court and the criminal court.

The administrative court examines whether there are grounds for illegality, while the criminal court examines whether an offense provided for by the criminal law has been committed.

Keywords: *administrative acts, presumption of legality, the administrative court, the cancelling of administrative, the administrative authorities*

In the sense of Law no. 554/2004 of the administrative contentious, the administrative act has the meaning of a unilateral act with individual or normative character, issued by a public authority in order to execute or organize the execution of the law, giving rise, modifying or extinguishing the legal relations. The central element of the legal regime of administrative acts is legality, understood as their compliance with the laws adopted by Parliament, as well as with administrative acts with a higher legal force, the principle of legality in the current constitutional system being one of the fundamental principles of public administration.

The administrative act enjoys the presumption of legality, which in turn is based on the presumption of authenticity and veracity, being itself an enforceable title.

At the time of issuance, is presume that it complies with all the substantive and formal conditions provided by law, the obligation to comply with it being

[1] Assoc. Prof. PhD., Spiru Haret University.
[2] Assoc. Prof. PhD. Spiru Haret University.

detached from that of compliance with the law. However, this presumption has a relative character, the administrative acts being subject to the principal control of the legality of the courts.[3]

The legality of the administrative act is assessed strictly against the content of the administrative act and not the way in which it is executed.

In conclusion, the elements regarding the execution of the administrative act exceed the scope of the administrative contentious. The alleged damage should be determined by the issuance of the administrative act in question and not by the manner of enforcement of its provisions.

"Art.8 of the law of administrative contentious, was an important step towards the procedural delimitation of the objective contentious from the subjective contentious, clarifying some of the aspects regarding which the way in which art.1 regulates the subjects of notification of the court could produce confusions. In essence, by the norms contained in art.1 par. 1 and 2 and art. 8 par. 1 of the law of administrative contentious it offers to the subjects of private law a subjective administrative contentious mechanism, within which the legal sanction of annulment of an illegal administrative act can be applied only if the act in question has detrimental effects on the subjective right or legitimate interest asserted by the applicant.

According to art. 1 (1) - any person who considers himself injured in his right or in a legitimate interest, by a public authority, by an administrative act or by not resolving a request within the legal term, may address the contentious court competent administrative authorities. They can request for the annulment of the act, the recognition of the claimed right or the legitimate interest and the reparation of the damage caused to it. The legitimate interest can be both private and public.

Paragraph 1 of art. 8 states this regulation, in the sense that individuals and legal entities under private law may file claims invoking the defence of a legitimate public interest only in the subsidiary, insofar as the damage to the legitimate public interest legally arises from the encumbrance subjective law or legitimate private interest.

The legitimate private interest defined in art. 2 paragraph 1 letter p of law 554/2004 as the possibility to claim a certain conduct in consideration of the realization of a future foreseeable and foreseeable subjective right. In addition, the notion of legitimate public interest has a legal definition in art. 2 paragraph 1 letter r interest that concerns the rule of law and constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of citizens, meeting community needs, realizing the competence of public authorities.

[3] Denes Adriana, administrative act – "Momentul în raport cu care se examinează îndeplinirea condiţiilor de legalitate" - Revista Romana de Jurisprudenta 1 din 2009, sintact.ro

Also, art.8 paragraph 1 (2) expressly establishes for the actions based on the violation of a legitimate public interest, a derogation from the common law regime of the action in administrative contentious. That is deduced from art.1 paragraph 1 and art.8 paragraph 1, in the sense that the actions in this category may have as object only the annulment of the act or the obligation of the defendant authority to issue an act or another document. Moreover, it has to carry out a certain administrative operation, under penalty of delay or fine, provided by art. 24 par. 3 therefore, in the contentious objective, in annulment, no compensations requested."[4]

A common problem in practice is the confusion between the legal effects of the annulment of an individual administrative act and the admission of the exception of illegality of such an act.

"The effects of admitting the exception of illegality consist in not taking into account the individual administrative act on the occasion of resolving the dispute in which it was invoked. However, the administrative act, not annulled by direct action, is supposed to continue to produce legal effects, except for those that should have occurred in the legal situation brought before the court. Accepting this argument would mean that the individual act would be devoid of legal effect precisely in relation to the particular person to whom it is opposable. This person did not challenge by direct action, but in respect of which he will be able to apply to the court, at any time and possibly successively, by way of the exception of illegality, the removal of the legal effects produced by that act, which presumed to remain in force. The possibility of the repetitive deprivation of the legal effects of the individual administrative act is similar to the possibility of definitively annulling a final timetable, with regard to which the European Court of Human Rights held in Sovtransavto Holding v. Ukraine that it is incompatible with the principle of security of legal relations..6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms".[5]

The obligation of the defendant institution to pay compensation is an end of demand often encountered in practice and which poses real problems for practitioners.

The request for material and moral compensation is an accessory request to the main petition, which establishes whether an administrative act is harmful to the person claiming it. Only in the situation when the court establishes that the administrative act is illegal, the liability for damages can also occur.

In this regard, we also cite the case of Plaumann v. The EEC Commission, Case C-25/62, settled by judgment of 15 July 1963, the Court of First Instance

[4] Gabriela Bogasiu, *Legea contenciosului administrative, comentată și adnotată, ediție a IV-a, revăzută și adăugită*, Editura Universul Juridic, 2018, p. 283-284.

[5] G.V. Bîrsan, B.Georgescu, *Scurte concluzii asupra invocării excepției de nelegalitate cu privire la actele administrative unilaterale cu caracter individual*, R.D.P. nr. 2/2006, pp. 56-66.

ruled that the action for damages sought in fact to remove the legal effects of the contested decision produced on the applicant. However, an administrative act still active is not liable to cause damage to the persons to whom addressed, and the latter cannot claim appropriate damages. Consequently, the Court could not remove the legal effects of such a decision, by resolving an action for damages, which is still active.

According to the provisions of art. 1357 of the Civil Code, in order to engage civil liability, the following conditions must be met cumulatively: the existence of an illicit deed, the existence of a prejudice, the existence of a causal link between the illicit deed and the damage, the existence of the guilt of the perpetrator.

The action to oblige the payment of compensations formulated pursuant to art. 19 of Law no. 554/2004 must be based on an illegal administrative act producing damages for the plaintiff. The non-existence of the illicit deed no longer requires the analysis of the other conditions for incurring liability, respectively the existence of a prejudice, the causal link and the guilt.

II. Crime is the most serious form of harm to society.

The criminal action cannot be solved before the court - as there are impediments among those provided by art in numerous situations. 16 C. pr. pen. In this situation in which the court is obliged to order the restoration of legality and the removal of prejudicial situations, such as those regarding the annulment of certain documents, such as administrative acts issued by public authorities. In such situations, the sanction applied to administrative acts issued by committing offenses is their annulment.

In practice, we often encounter cases in which the prescription of criminal liability lacks the object of the criminal action, but not the legal basis. Thus, the criminal act exists in its materiality, but the consequences of the crime must also be removed. For example, in order to issue building permits or a Detailed Urban Plan, offenses have been committed, the limitation period of which has been met.

In such situations, the legislator provided a special procedure, such as the one provided by art. 549/1Code of criminal procedure generically called “The procedure of confiscation or abolition of a document in case of dismissal”.

We notice that the criminal legislator uses the name of annulment of a document, without bringing any clarification regarding the legal nature of the act, thus leaving to the court the qualification of the document that is required to be annulled.

The doctrine[6] considers that in order to avoid confusions, between the notions of document versus legal act, annulment versus annulment, these notions

[6] Trandafir Andra-Roxana, Kuglay Irina, Toma Dauceanu Laura, *Desființarea înscrisurilor şi anularea actelor juridice în procesul penal*, Revista Romana de Drept Privat 4 din 2018, sintact.ro

should have the following meanings: inscribed, with the meaning of means of proof, instrumentum probationis, act, with the meaning of legal act, negotium iuris, annulment, for the measure applied to a document, annulment, for the sanction applied to legal acts.

"Proceeding at the trial of the prosecutor's proposal, the judge of the preliminary chamber may admit it, ordering the annulment of the document object of the procedure, lacking such legal effects, in whole or in part, with the consequence of ceasing the consequences of the operation or legal situation found by the annulled document, as the case. The annulment of the document may have other consequences depending on the nature and character of the revoked document. Thus, proceeding to the annulment of the document and leaving without effects the legal operation that finds it, the judge can analyse the cause of annulment of the document and in terms of material rules specific to the causes of ineffectiveness of legal acts, according to the field to which it belongs. For example, if he finds the falsity of signing a legal act, he may consider the lack of consent at the conclusion of the respective act, as a cause of nullity of the legal act with all the consequences deriving from it. In the case of the creation of the entire document for purposes contrary to the law, it may retain the fraud in law as a distinct cause of nullity of the legal act. The situation of the administrative or fiscal acts issued in violation of the law can be initiated by applying the sanctions specific to the causes of ineffectiveness of these legal acts".[7]

In the trial phase, according to art. 25 para. (3) C. pr. pen, "The court, even if there is no constitution of a civil party, decides on the total or partial annulment of a document or on the restoration of the situation prior to the commission of the crime.

Administrative acts can be annulled both by the administrative contentious court when they perform their legality control, but also by the criminal court when the administrative acts represent the result of some crimes.

Criminal law protects values that also form the object of subjective civil rights, but also other values belonging to other branches of law such as constitutional, administrative, fiscal law, etc.

[7] Neagoe Vlad, Ghigheci Cristinel, *Desfiinţarea înscrisurilor în procesul penal - Procedura specială în cazul soluţiilor de netrimitere în judecată*, Revista Dreptul 7 din 2020, sintact.ro

Bibliography

1. Denes Adriana, Administrative Act, "Momentul în raport cu care se examinează îndeplinirea condiţiilor de legalitate", *Romanian Journal of Jurisprudence*, 1 from 2009.
2. Gabriela Bogasiu, *Legea contenciosului administrative, comentată și adnotată*, ediție a IV-a, revăzută și adăugită", Universul Juridic Publishing House, 2018.
3. G.V. Bîrsan, B. Georgescu, "Scurte concluzii asupra invocării excepției de nelegalitate cu privire la actele administrative unilaterale cu caracter individual", *R.D.P.* nr. 2/2006.
4. Trandafir Andra-Roxana, Kuglay Irina, Toma Dauceanu Laura, "Desfiinţarea înscrisurilor și anularea actelor juridice în procesul penal", *Romanian Journal of Private Law* 4 of 2018, sintact.ro
5. Neagoe Vlad, Ghigheci Cristinel, "Desfiinţarea înscrisurilor în procesul penal - Procedura specială în cazul soluţiilor de netrimitere în judecată", *Dreptul* 7 magazine from 2020.

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

Cosmin *Adrian ŞERBAN*[1]
Constantin IORDACHE[2]

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

[1] PhD student, e-mail: cosmin.serban81@yahoo.com

[2] Prof. PhD., e-mail: jordache_constantin@yahoo.com

[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.

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.

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

[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.

Charter.[8] CEDO case law on Article 8 of the European Convention on Human 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]

[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 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.

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 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]

[11] The Prüm Treaty, on May 27, 2005, published in the Official Gazette no. 590, dated 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).

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 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].

[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

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

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.

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].

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]

[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.
[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.

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.

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 Article[23], stipulates that a person will not be considered "identifiable" if the identification involves

[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

excessive time, cost or labor. Personal data includes information pertaining to a 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.

---

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.

[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 MO 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.

- 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.
- 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

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

processing operations included, the concept of processing is comprehensive both under European law and under CoE law: „«Processing of personal data» […] 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 any body 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

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

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 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

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

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 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]

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

[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 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.

Schengen Information System (published in the Official Gazette of Romania No. 498 of July 19, 2010).[36]

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;

[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).
[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 M O 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

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;
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)

Bibliography

1. The Prüm Treaty, on May 27, 2005, published in the Official Journal no. 590, dated August 6, 2008.
2. Treaty on European Union, OJ 2012 C 326 and consolidated version of the European Communities (2012), TFUE, OJ 2012 C 326.
3. Charter of Fundamental Rights of the European Union, OJ 2012 C 326.
4. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to processing of personal data and on the free movement of such data, Official Journal of the European Union L 281/31/23.11.1995 – repealed.
5. Directive 2002/58/EC of the European Parliament and of the Concil of 12 July 2002 on the processing of personal data and the protection of confidentiality in the field of public communications (Directive on privacy and electronic communications) *OJ L 201, 31.7.2002*.
6. 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 and the free movement of such data (General Data Protection Directive), COM (2012) 10 final, Brussels, 25 January 2012.
7. Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted in Strasbourg on 28 January 1981, published in the Official Journal no. 830/21 dec. 2001.
8. 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 concerning the gradual abolition of checks at common borders, Official Journal of the European Union L 239/19.
9. Additional Protocol to Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data concerning Supervisory Authorities and Transboundary Data Flows, CETS no. 181, 2001.
10. Regulation (EC) no. 45/2001 of the European Parliament and of the Concil 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.
11. Regulation 679/27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).
12. *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*.
13. Commission Decision of 4 March 2008 adopting the SIRENE Manual and other provisions implementing the Second Generation Schengen Information System (SIS II) (2008/334/JHA).
14. 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).

15. 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.
16. 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.
17. Order of the Ministry of Internal Affairs no. 150 of October 28, 2013 for the approval of the Regulation on the organization and functioning of the SIS National Center, published in the Official Gazette no. 675 of November 4, 2013.
18. Order of the Ministry of Internal Affairs 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 the Official Gazette no. 137 of February 13, 2018.
19. https://www.dataprotection.ro/
20. http://www.monitoruljuridic.ro/
21. https://www.mai.gov.ro/
22. http://www.schengen.mai.gov.ro/

Instruments and fundamental rights used in the Area of Freedom, Security and Justice

Eugenia ŞTEFĂNESCU[1]

Abstract

The article aims to offer an overview of the instruments by which policies are enforced in the Area of Freedom, Security and Justice's (AFSJ) various policy areas. In this context, the interaction with fundamental rights is seen both as regards general EU actions and as regards the particular legislative regime of individual policy areas.

The European Union's Area of Freedom, Security and Justice was established to ensure the free movement of persons and to offer a high level of protection to citizens, and the common values reflecting the objective of an AFSJ are long-standing principles of the European Union's modern democracies.

The area includes policies related to the management of the external borders of the European Union, judicial cooperation in civil and criminal matters, and police cooperation, in a range. In addition to these, it includes asylum and immigration policies and the fight against crime (terrorism, organised crime, cybercrime, sexual exploitation of children, trafficking in human beings, illegal drugs, etc.). The creation of the Area of Freedom, Security and Justice is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes.

Keywords: *Area of Freedom, Security and Justice; European Union; Lisbon Treaty; fundamental rights; instruments; immigration*

1. Introduction

Concerning the types of instruments used in the AFSJ, Monar has observed that:

Prior to the 2009 Lisbon Treaty reforms, the legal division of the AFSJ were separated between four policy areas based on Title IV TEC (asylum, migration, border controls and judicial cooperation in civil matters) and two policy areas which were based on Title VI TEU (judicial cooperation in criminal matters and police cooperation). This had the consequence not only of the need for different legal instruments and procedures to be used for internal measures, but also for external relations to be governed by substantially different rules

[1] Lecturer PhD, Spiru Haret University.

depending on whether 'first pillar' (Title IV TEC) or 'third pillar' (Title VI TEU) matters were concerned.[2]

As a result of the Lisbon's Treaty's entry into force, there is no longer a third pillar of special instruments and procedures. The key instruments within the internal AFSJ are nowadays regulations, directives and decisions,[3] and in relation to external action international agreements. However, there are still some old third pillar instruments which continue to have legal impact according to the transitional rules.[4]

The aim of this article is to map the regulatory and policy instruments used within the AFSG, especially from a perspective of fundamental rights. This is done mainly from a significant point of view. It is considered to what degree concerns regarding fundamental rights have been found in the different policy fields and how/if these issues have been expressed in the adoption of new secondary legislation. In this regard, the fundamental rights issues listed in the Stockholm Programme and the Human Rights Action Plan are given special attention. The question of where one can find provisions with a fundamental/ human rights law dimension in EU law is also considered. Finally, on certain occasions, the adopted instruments are often discussed from a more procedural or instrument-oriented point of view, with the goal of showing how the type of instrument used will influence the achievement of fundamental rights.[5] Attention is also given to the manner in which the Union retains protection for fundamental/human rights as new instruments are enforced.

2. Types of instruments used in the various AFSJ policy fields

a. Management of the external borders

The goal of the EU'S border controls policy is to abolish the EU's internal border controls and establish a common external border at which different controls are carried out. On this point, Article 67(2) TFEU specifies that the Union shall ensure that individuals are not subject to internal border controls. The Union shall formulate a policy[6] as well as adopt measures[7] to ensure this. Similarly, the TFEU stipulates that the Union should frame a common external

---

[2] Jörg Monar, *The EU's growing external role in the AFSJ domain: Factors, framework and forms of action* [2014] Cambridge Review of International Affair 147, 150.

[3] Article 288 TFEU.

[4] See further Steve Peers, *Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?* in Diego Acosta Arcarazo and Cian C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014) 17, 29-30.

[5] Special attention is given in Section IV.C to the question of mutual recognition.

[6] Article 77(1)(a) TFEU.

[7] Article 77(2)(e) TFEU.

border control policy[8] and adopt policies and measures on external border controls as well as develop a policy with a view to the effective monitoring of external border crossing.[9] The Lisbon Treaty gave the EU new powers to gradually implement an integrated external border control system and to follow provisions relating to passports, identity cards, residence permits or any other document.[10] The latter type of secondary legislation must be adopted according to a special legislative procedure.[11]

Control over external borders has always been seen as a key feature of State sovereignty and as such it is not surprising that the integration has not always been without controversy in this field. Initially, under the so-called Schengen cooperation (1985), the border control cooperation took place outside the EU. However, after the entry into force of the Amsterdam Treaty, Schengen cooperation has become part of the EU legal framework, not all EU Member States are part of the Schengen area (the United Kingdom and Ireland have the option of participating in some or all of the Schengen arrangements, while Denmark can decide whether or not to apply certain measures. In addition, the cooperation includes non-EU Member States (Iceland, Norway, Switzerland and Lichtenstein). Modifications to the Schengen cooperation are now being rendered by introducing new EU legislation.[12]

b. Immigration policy

Therefore, the issue of work permits, the right to study/train/research within the Union, and family reunification and integration have become key questions in connection with immigration. The TFEU provides for the Union to define a common immigration policy based on solidarity between Member States that is equitable towards third-country nationals in relation to these matters.[13] The TFEU also stipulates that the Union shall adopt a common immigration policy to ensure efficient control of migration flows at all levels, and equal treatment of third-country nationals legally residing in Member States.[14] More precisely, the TFEU provides for steps to be taken by the European Parliament and the Council concerning: (a) the conditions of entry and residency, and the requirements on

[8] Article 67(2) TFEU.

[9] Articles 77(1)-(2) TFEU.

[10] Article 77 TFEU. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 147-148.

[11] Article 77(3) TFEU.

[12] On the Schengen cooperation, see further e.g., Jean-Claude Piris, The Lisbon Treaty: A Legal and Political Analysis (Cambridge University Press 2010) 192-203.

[13] Article 67(2) TFEU.

[14] Article 79(1) TFEU.

long-term visas and residence permits granted by Member States, including those for family reunification purposes; (b) the definition of the rights of third-country nationals legally residing in a Member State, including the conditions regulating freedom of movement and of residence in other Member States.[15] In relation to integration, the TFEU also confers powers on the institutions to "provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States".[16]

In 2008, the European Council adopted a ′European Pact on Immigration and Asylum′, a policy document aimed at influencing the development of immigration and asylum policies of the Union. However, there are also several other immigration policy programmes, such as the Communication from the Commission on Migration (2011),[17] and a Communication from the Commission entitled "A Common Immigration Policy for Europe: Principles, actions and tools" (2008).[18] Also, the Stockholm Programme contains many proposals on how to develop the Union's immigration policy.

c. Asylum policy

Although EU policy on border checks, visas, etc. has as its aim to decide who is eligible to join the Union, EU asylum policy raises the issue of whether such third-country nationals within the Union have a right to international protection. As regards asylum, the Union's founding treaties stipulate that the Union shall establish a common asylum policy, based on unity between Member States, which is equitable to third-country nationals.[19] In addition, the TFEU stipulates that the Union shall develop a common asylum, subsidiary protection and temporary protection policy with a view to providing appropriate status for any third-country national requiring international protection and ensuring compliance with the non-refoulement principle.[20] The TFEU continues by requiring the Parliament and Council to adopt measures for a common European asylum system that includes:

- a constant asylum status for third-country citizens, available throughout the Union;

---

[15] Article 79(2) TFEU.

[16] Article 79(4) TFEU.

[17] European Commission, Commission Communication: Communication on migration [2011] COM(2011) 248 final.

[18] European Commission, Commission Communication: *A Common Immigration Policy for Europe: Principles, actions and tools* [2008] COM(2008) 359 final. See also European Commission, Commission Communication: *Policy Plan on Legal Migration* [2005] COM(2005) 669 final.

[19] Article 67(2) TFEU.

[20] Article 78(1) TFEU.

- a constant subsidiary security status for citizens of third countries who seek international protection without obtaining European asylum;
- a common temporary security system for displaced persons in the event of a major influx;
- common procedures for the granting and removal of constant asylum or subsidiary security status;
- requirements and procedures for deciding which Member State is responsible for accepting an asylum application or a subsidiary security application;
- requirements relating to conditions of reception for asylum applicants or subsidiary security;
- partnership and cooperation with third countries to handle the inflows of people seeking asylum or subsidiary or temporary protection.[21]

With the Treaty of Amsterdam coming into effect, EU institutions have acquired new powers in the Area of asylum. The Treaty of Nice subsequently made the Council responsible for adopting measures relating to asylum mechanisms and for deciding the responsibility of Member States. In addition, the Treaty of Nice includes unanimity in the Council, in compliance with Parliament's guidance, in the case of governing common rules and basic principles relating to asylum issues. The Council may prefer the usual codecision procedure, as a result of this process. But, the Treaty of Lisbon has transformed asylum decisions into a common policy. The policy goal has been to establish a common system that defines uniform status and procedures rather than aiming for minimum standards. As a judicial body, the position of the European Union's Court of Justice expanded, the Court of Justice can now extend its preliminary jurisdiction to any court within a Member State. This provides Court of Justice with a greater unit of case law in the Area of asylum.

The initiatives of the European Council, as an executive body, represented important effects on the implementation of asylum policies. The Tampere Programme and the Hague Programme have provided funding for the implementation of phases of the common European system. The European Council adopted the Stockholm Programme in 2009, and accepted that "the objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection".[22] The Stockholm Programme stresses the unity for pressures of Member States and new European Asylum Support Office. In 2014, the European Council also established the strategic guidelines for legislative and organizational

[21] Article 78(2) TFEU.

[22] Directive 2013/32/EU of the European Parliament of the Council.

plan within the Area of Freedom, Security and Justice[23] for the next years, regarding the successful process of the Stockholm Programme. As a priority, they determined the Common European Asylum System (CEAS).

d. Criminal law and police cooperation

Criminal law is traditionally considered a national branch of law and was initially met with opposition to its Europeanization. However, the transnational character of certain forms of crime has led towards the development and cooperation of both regional (European) and international criminal law.

With regard to criminal law, the TFEU firstly specifies that the Union shall try to maintain a high degree of protection through measures to prevent and combat crime, racism and xenophobia, and by coordinating and cooperating initiatives between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.[24] The TFEU also stipulates that the Union shall take steps to lay down rules and procedures to ensure that all types of judgments and judicial decisions are respected in the Union.[25] Secondly, the TFEU provides that, to the extent required to promote mutual recognition of judgments and judicial decisions and cross-border police and judicial cooperation in criminal matters, the European Parliament and the Council may by means of directives lay down minimum rules, concerning: a) common admissibility of evidence between Member States; b) the rights of persons in criminal procedure; c) the rights of victims of crime; d) any other particular aspects of criminal procedure defined in advance by a decision of the Council.[26] Thirdly, in respect of certain crimes, the Union may adopt rules on the definition of criminal offences and sanctions by directives.[27]

As regards compliance cooperation, the EU shall adopt measures to avoid and settle conflicts of jurisdiction between Member States, promote training of judiciary and judicial staff, and encourage cooperation between Member States' judicial or similar authorities in criminal proceedings and enforcement of decisions.[28] The TFEU governs both Europol and Eurojust's main tasks and allows for the formation of an EPPO.[29] Concerning Police cooperation, the TFEU provides that the Parliament and the Council may implement legislation relating

[23] Article 68 TFEU.
[24] Article 67(3) TFEU.
[25] Article 82(1) TFEU.
[26] Article 82(2) TFEU.
[27] Article 83 TFEU.
[28] Article 82(1) TFEU.
[29] See further Chapter II.

to: a) the collection, storage, processing, analysis and exchange of relevant information; b) support for staff training and cooperation on staff exchange, equipment and crime detection research; c) common investigative methods for detecting serious types of organized crime.[30] The Treaty also provides that the Council may, in some cases, provide for measures relating to operational police cooperation between the authorities.[31] The TFEU also establishes that the Parliament and the Council may develop mechanisms to facilitate and support Member States' acts in the field of crime prevention, except any harmonisation of Member States' laws and regulations.[32] With regard to the prevention and fight against terrorism and related activities, the TFEU stipulates that the Union shall, by means of regulations, establish a structure for administrative measures relating to capital movements and payments such as the freezing of funds, financial assets or economic profits belonging to, or owned or held by, natural or legal persons, groups or non-State entities.[33]

e) Civil law cooperation

The aim of civil justice cooperation within the EU is, first and foremost, to ensure the free movement of individuals or, to put it another way, to "facilitate the everyday life of citizens".[34] The cooperation applies to civil and commercial matters as well as to family law matters. Another purpose of the cooperation is to make it easier for companies in various EU States to do business.

With regard to cooperation in civil law, the TFEU specifies that the Union shall facilitate access to justice, especially through the concept of mutual recognition of judicial and extrajudicial decisions in civil matters.[35] The treaty also provides for the EU to establish judicial cooperation in civil matters with cross-border implications, according to the principle of mutual recognition of judgments and of decisions in extrajudicial cases.[36] This cooperation may involve

[30] Article 87(2) TFEU.

[31] See further Article 87(3) TFEU. On the difficulty to distinguish operational and non-operational police cooperation, see, however, further Anna Jonsson Cornell, 'EU Police Cooperation Post-Lisbon', in Maria Bergström and Anna Jonsson Cornell (eds), European Police and Criminal Law Co-operation (Hart Publishing 2014) 147, 149-151.

[32] Article 84 TFEU. Regarding crime prevention, framework decisions were not adopted in the pre-Lisbon era. See further Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011) 870.

[33] Article 75 TFEU.

[34] European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.

[35] Article 67(4) TFEU.

[36] Article 81(1) TFEU.

getting the laws of the Member States into line.[37] The TFEU further stipulates that steps shall be taken by the Union to ensure:

- the mutual recognition and enforcement of judgments and of decisions in extrajudicial cases between Member States;
- the cross-border service of judicial and extrajudicial documents;
- the compatibility of the rules applicable in the Member States relating to conflict of laws and of jurisdiction;
- cooperation in the taking of evidence;
- efficient access to justice;
- the removal of barriers to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the civil procedure rules applicable in the Member States;
- the development of alternative methods of dispute settlement;
- support for the training of the judiciary and judicial staff.[38]

3. Conclusions

The aim of this article has been to offer an analysis of AFSJ institutional decision-making. Special attention has been given to the manner in which EU institutions which are participating in the AFSJ interact with fundamental rights and the instruments by which AFSJ cooperation is conducted. The article has tried to place the basis for creating a connection between the AFSJ's institutional features, the available legal and policy tools, and the issues of fundamental rights that may be of concern when acting in the AFSJ.

An important characteristic of the AFSJ is the use of instruments and integration mechanisms that give some or even considerable freedom of action to Member States (such as manuals on mutual recognition and mutual trust and best practices). A Member State's inability to seek further legislative integration also governs the use of these instruments and mechanisms. Although the use of policy tools rather than legislative measures may be the only means available to promote and improve cooperation in a highly sensitive field of politics, such methods may also cause concerns in cases where individual States do not respect fundamental rights. As stated in Section IV.C, however, recent case law from both the CJEU and the ECtHR indicates that Member States cannot avoid liability in cases where they should have been aware of the fact that the other Member State is not behaving according to fundamental/human rights. The recent EIO directive is also focused on a reprehensible belief that all Member States are complying with fundamental rights. Therefore, in order to ensure better protection, it is not always necessary to deepen and extend integration from a

[37] Article 81(1) TFEU.

[38] Article 81(2) TFEU.

fundamental/human rights perspective. Rather, it is important to ensure that there is no blind trust in the protection of fundamental/human rights of other actors, and that everyone consider and respect their obligations in cases where many actors are involved.

Bibliography

1. Jonsson Cornell, Anna, 'EU Police Cooperation Post-Lisbon', in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Hart Publishing 2014).
2. Monar, Jörg, *The EU's growing external role in the AFSJ domain: Factors, framework and forms of action* [2014] Cambridge Review of International Affair 147.
3. Peers, Steve, *Justice and Home Affairs Law since the Treaty of Lisbon: A Fairy-Tale Ending?* in Diego Acosta Arcaranco and Cian C. Murphy (eds), EU Security and Justice Law: After Lisbon and Stockholm (Hart Publishing 2014) 17.
4. Peers, Steve, *EU Justice and Home Affairs Law* (3rd edn, Oxford University Press 2011).
5. Piris, Jean-Claude, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).
6. Wiesbrock, Anja, 'Sources of Law, Regulatory Processes and Enforcement Mechanisms in EU Migration Policy: The Slow Decline of National Sovereignty' [2013] Maastricht Journal of European and Comparative Law 423.
7. European Commission, Commission Communication: *Communication on migration* [2011] COM(2011) 248 final.
8. European Commission, Commission Communication: *A Common Immigration Policy for Europe: Principles, actions and tools* [2008] COM(2008) 359 final.
9. European Commission, Commission Communication: *Policy Plan on Legal Migration* [2005] COM(2005) 669 final.
10. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.
11. European Council: The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1, 4.
12. FRA, Annual Report, 'Fundamental Rights: challenges and achievements in 2013' [2014], http://fra.europa.eu/sites/default/files/fra-2014-annual-report-2013-0_en.pdf
13. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [1985] OJ L 187/45.
14. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343/1.

15. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.
16. JHA Council: Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union [2013] 6 and 7 June 2013.
17. European Parliament: European Parliament resolution of 10 October 2013 on strengthening cross-border law-enforcement cooperation in the EU: the implementation of the 'Prüm Decision' and the European Information Exchange Model (EIXM)' [2013].
18. JHA Council: Council conclusions on setting the EU's priorities for the fight against organised crime between 2011 and 2013 [2011] 9 and 10 June 2011.

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

[1] Lecturer PhD., Spiru Haret University.

[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.

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.

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].

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

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 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.

[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.

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.

The unity of legal thought cannot be in existence and can not 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

[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.

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.

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].

---

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

[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*, Ștefan 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 Boroș, Corina Buzdugan, Veronica Rebreanu, *General Theory of State and Law*, Argonaut Publishing House, Cluj-Napoca, 2008, p. 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, p. 71-81.

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].

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 Ionașcu 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 Moșneagu.

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

[19] Sofia Popescu, *Quoted Works.*, p. 170-173.
[20] Ionașcu Titu, *General Theory of Law. Course Notes. Handbook for Student Use*, Constantin Brâncuși University, Târgu-Jiu, p. 14-15.
[21] Ionașcu Titu, *Quoted Works.*, p. 14.

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 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].

[22] Prof. univ. dr. Liviu Stan, *The Church and the Law. Principles of the Orthodox Canon Lawx*, Andreiana Publishing House, Sibiu, 2012, p. 3-5.
[23] The Church and the Law, *Quoted Works*., p. 4.
[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.*, p. 7-8.
[27] Ion Corbeanu, Maria Corneanu, *General Theory of Law*, *Quoted Works.*, p. 63.

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

[1] Dr., Assist. Prof., Spiru Haret University.

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

[3] C. Macovei, M.C. Dobrilă, *Contractul de intretinere*, 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 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.

[4] M.G. Berindei, Contribuția practicii judecătorești la configurarea caracterelor juridice ale contractului de întreținere și a efectelor acestuia, in *Legal Studies and Research* no. 2 / 2014, Editura Academiei Românei, p. 171-181.

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.

a) 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

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

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

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

contract. In this case, the maintenance party enjoys a privilege over the maintenance claim.

b) 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 synallagmatic character, 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:

a) 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.

b) 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.

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.

[8] 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.

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 kind cannot be transmitted to the heirs of the maintenance at his death, if parts of

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

[10] M.M. Pivniceru, "*Principalele acțiuni izvorâte din contractul de întreținere și prescripția extinctivă privitoare la acestea"*, in Law no. 8/2003, p. 76-84.

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

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] 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.

Danger of Deontic Inconsistency

Gabriel ILIESCU[1]

Abstract

The hypothesis of the present article, implicitly, refers to the possibility of the inconsistency of a body of laws. Some major consequences could be the decision making and action impossibility for the person obliged to make an event to happen. Highlighting these consequences is the concern of this article. Romania's accession to UE means changes in the field of law. From the point of view of a previous article on this topic, it would be about deontic events. The final states of such deontic events could consist of explicitly or implicitly mutually inconsistent deontic expressions. Whether inconsistencies are contradictions or contrarieties, they cause decision-making difficulties for those who use law as a tool. Inconsistencies could also be qualified as predominantly logical deficiences. The aim is to highlight such an inconsistency and its consequences. For this we used the language of Deontic Logic superimposed over the Logic of Action, operating with acts and events.

Keywords: *event, deontic event, contradiction, contrariety, implicitly inconsistency, explicitly inconsistency, Deontic Logic, Logic of Action*

1. Hypothesis

The hypothesis taken into account might seem rather a rhetorical idea. In other words the answer would have known In advance. And the hypothesis is:

> *If a set of sentences containing a body of laws and some state of facts is inconsistent then, this set can generate decision-making and actional impossibilities.*

We distinguish between explicit and implicit inconsistency. The first is visible, the second is not. We verify the hypothesis based on an invented example. We hypothetically admit such a set of sentences, as the one in the hypothesis. We highlight, logically, its latent inconsistency.

2. Motivation. Contradiction, world, event, human act

One of the motivations is, so-called, "friendship for the consistency"[2]. A second motivation is a prophecy for which Wittgenstein is quoted. According

[1] Lecturer PhD, Spiru Haret University.

[2] Priest Graham, Routley Richard, *Semnificația filosofică și inevitabilitatea paraconsistenței,* in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnica Pub. House, Bucharest, 2004, p268.

to it, people will reach a state of thinking, in which, not only they will emancipate themselves from consistency, but they will be proud of this emancipation[3]. We can admit that he implicitly considered consistency as something that people should emancipate themselves from.

Within the limits of consistency, it is logically false that *p & ~p*. Which is logically false is both factually false, and actional false. Factually false means that does not happen any time that a fact is both present and absent in the same time and under the same angle.

Suppose that we are in the state of things in which happens *p & ~p*. That is p is both present and absent. What would a possible world look like if included *p & ~p* (1, table 1)? Would it be privileged - unique world (3, table 1) or, on the contrary, in any circumstance does happen such such a state of things (2, table 1)?

Table 1. How does a w that includes the contradiction look like?

1	2	3
$?w \{p, \sim p\} \subset w$	$\forall w \{p, \sim p\} \subset w$	$\{p, \sim p\} \subset w_0 \ \& \ \forall w(w_0 \neq w \supset \{p, \sim p\} \not\subset w)$

We hypothetically admit that: we are in a consistent world, in which *p* fact is either present, *p*, or absent, *~p*; that a initial state world is followed by end state world in which happens *p & ~p*. How would this initial state world look like, such that it would be followed by an other of the form *p & ~p* (1, table 2)? Similar to the previous case: this initial state is a privileged-unique one (3, table 2) or any state of things can be the antechamber of an end state *p & ~p* (2, table 2)?

Table 2. How does a state of things priori to a contradictory one look like?

1	2	3
$?w(w\ T\ (p \ \& \sim p))$	$\forall w\ w \subset \{p, \sim p\}$	$w_0 T\ (p \ \& \sim p) \ \& \ \forall w(w_0 \neq w \supset \sim(w\ T\ (p \ \& \sim p))$

von Wright has a negative axiom: it is false that one could pass from factual and logical possible state of facts t a logically impossible one (1, table 3). Wwe mean the universal quantification of p (2, table 3). Until here it is about human agent independent events. We can extend this axiom to the Logic of Action Language. This would expand the quantification for agent of action as well (3, table 3).

[3] "Indeed, even at this stage, I predict a time when there will be mathematical investigations of calculi containing contradictions, and people will actually be proud of having emancipated themselves from `consistency". Ludwig Wittgenstein, 1930, according to Priest, Graham, *Paraconsistent Logic*, in Gabbay, M. Dov and Guenthner, Franz (ed), *Handbook of Philosophical Logic*, vol VI, Kluwer Academic Publishers, 2002, p. 287.

Tabel 3. Negative axiom

1	2	3
~(pTq & ~q)[4]	∀p ~(pTq & ~q)	∀x∀p ∀q ~d(x, pTq & ~q)

The shown axiom implicitly denies the existence of such an agent and of such an initial state where the agent can do appear a logic impossible state of things (3). Which could mean the already announced actional false. It is debatable if consistency arouses a simple friendship, that is something subjective. It is admitted that we could imagine situations that could violate the laws of physics, but not the geometry ones[5]. The questions outlined above refer to how a possible world that contains, or precedes inconsistency could physically or factually look like. But can be added the question about how representable a situation would be that would violate the principle of non contradiction.

3. Inconsistency

Naturally, inconsistency means that two statements cannot together true[6]. It means that a well formed formula and its negation have not the same truth; their conjunction is false ever. We distinguish two types of consistency. Inconsistency-contradiction and inconsistency-contrariety. Inconsistency is a common component of both. The difference is on the background of different senses of negation. We distinguish between negation-contradiction and negation-contrariety. Semantic conditions and matrix definitions of the two ones are:

Table 4: ***Semantic conditions***

Negation in classical logic	*Negtion contrariety*
v(~p) = iff v(p) = 0 V(~p) = 0 iff v(p) = 1[7]	If v(p) = 1 then v(ꟷ p) = 0 If v(~p) = 0 then v(ꟷ p) = 1 or v(ꟷ p) = 1[8]

[4] von Wright, Georg, Henrik, *Logica Deontică și Teoria Generală a Acțiunii*, in vol *Norme, Valori, Acțiune,* Analiză logică a discursului practice, cu aplicații în etică și în drept, selecția textelor, traducere, și studiu introductiv, de Sorin Vieru și Drăgan Stoianovici, Politică Pub. House, Bucharest, 1979, p. 144.

[5] Wittgenstein, Ludwig, *Jurnale 1914-1916*, in Wittgenstein, Ludwig, *Jurnale 1914-1916, Câteva remarci filosofice*, traducători Cătălin Cioabă și Gheorghe Ștefanov, Humanitas Pub. House, Bucharest, 2010, p. 119.

[6] Gheorghiu, Dumitru, *Introducere în Filosofia Minții, Curs Universitar*, vol. I, 3 Pub. House, Bucharest, 2001, p. 51.

[7] Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, în *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005, p. 134.

[8] Gheorghiu, D, *op.cit.*, p. 129.

Table 5: Negations and conjunctions

P	~p	⫟ p[9]
1	0	0
0	1	1
		0

p	&	~p[10]
1	0	0
0	0	1

p	&	⫟ p[11]
1	0	0
0	0	1
		0

Negation-contradiction has only two lines. There is not any line where p and its negation-contradiction should have the same value true or false. Negation –contrariety has three lines. There is not any line where p and its the negation-contrariety have both the value true. But there is a line where *p* and its negation-contrariety have both the value false.

3.1. Paradox

A kind of inconsistency is contradiction. And some of the contradictions are contained in a paradox[12]. It is about the contradiction between sentences that involve each other.[13]. So it is impossible for both to be true[14]. Such a definition of the paradox is given by Gh. Enescu[15]. We understand that the implication is a deductive one. The same author presents the bellow paradox as a circularity[16] by definition. So, the paradox is a source of contradictions. End still, unsolvable with means available at some moment[17].

The history of paradoxes is extensive. We retain for here only the paradox the set of all normal sets, R. The mentioned paradox is present in the russellian theory of sets[18]. The question is if R is normal or abnormal. In other words: R belongs to itself or does not? *Hypothesis 1*: *R belongs to itself*. Then it is included among it's elements. But it's elements are sets do not belong themselves. Therefore, *R does not self belong*. *Hypothesis 2: R does not belong to itself*. But it's elements are sets that also do not belong to themselves. That is, R is the same to its elements. Therefore, *R belongs to it self*. Priest, presenting

[9] Gheorghiu, Dumitru, *Logică generală,* vol II, Fundația România de mâine Pub. House, Bucharest, 2001, p. 83.
[10] Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, în *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005, p. 110.
[11] Gheorghiu, D, *Logică generală,* vol II, Fundația România de mâine Pub. House, Bucharest, 2001, p. 84.
[12] Enescu, Gheorghe, *Teoria sistemelor logice*, Științifică și Enciclopedică Pub. House, Bucharest, p. 106.
[13] Enescu, *op.cit.*, p. 107.
[14] *Idem*, Enescu, p. 99.
[15] *Idem*, Enescu, p. 105.
[16] *Idem*, Enescu, p. 112.
[17] *Idem*, Enescu, p. 107.
[18] Priest, Graham, *Logica, O foarte scurtă introducere*, Litera Pub. House, Bucharest, 2020, pp.48 - 51.

this paradox, shows a gap between him and himself. *On the one hand*, Priest presents it rather than a deduction between a thesis and its contradictory[19]. A and ~A are mutual contradictories. The author shows that deduction revolves in a circle: from A deduce ~A and vice versa. *On the other hand*, Priest concludes that the set of all normal sets is and is not its own member, that is would be about a simple contradiction[20]. Synthetically, on the one hand Priest presents this paradox as a *deduction between two mutual contradictories* but concludes by reducing it to a simple *contradiction*. So the paradoxes may be treated as a simple *contradictions: explosive deduction*.

A hilbertian idea was that, for axiomatic systems, consistence[21] is desirable, besides the completitude, decidability. But Hilbert said this, thinking of Russell. He was trying to build a system that would ground mathematics[22]. Did not mean that system could be that way. On the other hand, Kurt Gödel, this is exactly what he shows: mathematical systems cannot be both complete and consistent[23]. If the system is consistent then it excludes completeness. Thus, consistency is a heavy tribute paid trough the absence of completeness. Conversely, completeness, means that any true statement expressed in the language of the system is provable. But this makes the system inconsistent[24]. What maintains us in the area of explosive deduction. By transitivity, completitude makes the system to allow explosive thinking.

4. "Explosion"

Some logicians use the term "Explosion". They signify the idea that from false is deducible any conclusions. A very hard case of false is inconsistent-false. Inconsistency has two variants, as showed. Do both inconsistencies work explosive? We anticipate the affirmative answer.

4.1. "Explosion" and contradiction

Inconsistence-contradiction works as explosion: $\{A, \sim A\} \vdash B$. Rewriting in the form $(p \ \& \ \sim p) \supset q$ we have material implication. But this renders valid implication[25]. Which means that if: resort to the definition of negation-contradiction

[19] Priest, G, *op.cit.*, p. 51.
[20] *Idem*, Priest, p. 51.
[21] Odifredi, Piergiorgio, *Dumnezeul Logicii, Viața genială a lui Kurt Gödel, matematicianul Filosofiei*, traducere din Limba Italiană și note de Liviu Ornea, Polirom Pub. House, Iași, 2020, p. 15.
[22] *Idem*.
[23] *Idem*.
[24] *Idem*, p. 16.
[25] Priest, Graham, *Cuvânt înainte*, in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004, p. V.

of the conjunction and of the material implication and we make the truth table of this formula then we obtain, as a result, on the column ⊃, only the value 1.

We must firs admit that *p & ~p*[26] has already been obtained from a system. Un may use theorems such as *T23.(p & q) ⊃ p*[27]. From T23, by q/*~p*, we deduce *p & ~p) ⊃ p*. From *(p & ~p) ⊃ p* by p/*~p* we obtain *(~p & p) ⊃ ~p*. Consider axiom 2: *p⊃(p v q)*[28]. Also we use the principle of resolution, in the degenerated form of a hypothetical disjunctive syllogism[29]: *p v q, ~p ⊢ q*[30]. Displaying of the calculus is like this:

Table 6: „explosion" of the contradiction

1. ⊢ p, ~p	4. p ⊢ p v q	6. ~p ⊢ ~p v q
2. {p, ~p} ⊢ p	5. {p v q, ~p} ⊢ q[31]	7. {~p v q, p} ⊢ q[32]
3. {p, ~p} ⊢ ~p	8. {p, ~p} ⊢ q	

What is shown in the table 6 is that {p, ~p} is deducible from a any set (1). Once deduced {p, ~p}, from it is deduced both p (2) and ~p (3). The consequents of both calculations expand disjunctively with q (4, 6). From both expandations and the unexpanded opposite is deduced q (5, 7). As a sequel, from both follows every formula. So, including something unrelated to the content of thinking in the premises (8). The only limitation is that q should be expressed in the same language as premises p and ~p. In this sense, any well formed formula in the same language with the premises as p and as ~p can be deduced[33]. On this background nothing prevents us to deduce even *~q*.

Medievals warned about this. Thus,3 as exemplified by: "Socrates exists and Socrates does not exist. Therefore Socrates does not exist"[34]. Then 2 is exemplified by the same premises with the conclusion „Socrate exists"[35]. The expansion by q is illustrate by „a men is an donkey"[36]. Such that conclusion is q (8), on both ways, 5 and 7 above[37].

[26] Lucica Iancu, *Logica și Filosofia contradicției. Incursiune în problematica paraconsistenței. Studiu introductiv*, in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004, p. 3.
[27] Popa, Cornel, *Logică și Metalogică*, vol II, Fundația România de Mâine Pub. House, Bucharest, 2002, p. 44.
[28] Popa, C., *op. cit.*, p. 36.
[29] *Idem*, Popa, p. 132.
[30] *Idem*, p. 131.
[31] *Idem*. Lucica, I.
[32] *Idem*.
[33] *Idem*.
[34] Kneale, William și Kneale, Martha, *Dezvoltarea Logicii*, vol I, Dacia Pub. House, Cluj-Napoca, 1974, p. 302.
[35] *Idem*.
[36] *Idem*.
[37] *Idem*.

4.2. "Explosion" and contrariety

From the grid above, we repeat schemes 2 and 3. Replace "⊢" with "⊃" and "~" with "¬". Ceea ce verificăm în tabelele de adevăr mai jos. Which we check in the truth tables bellow.

Semantic testing of the explosion for conjunction and contrariety

p	q	p	&	~p	⊃	~p	⊃	p	p	**&**	¬ p	⊃	p	⊃	¬ p
1	1	1	0	0	1	0	1	1	1	**0**	0	1	1	1	0
1	0	1	0	0	1	0	1	1	1	**0**	0	1	1	1	0
0	1	0	0	1	1	1	1	0	0	**0**	1 0	1	0	1	1 0
0	0	0	0	1	1	1	1	0	0	**0**	1 0	1	0	1	1 0

Semantic testing of the disjunctive syllogism and contrariety

p	q	p	v	q	&	¬ p	⊃	q	¬ p	**v**	q	&	p	⊃	q
1	1	1	*1*	1	0	*0*	**1**	1	0	1	1	1	1	**1**	1
1	0	1	*1*	0	0	*0*	**1**	0	0	0	0	0	1	**0**	0
0	1	0	*1*	1	1 0	*1* *0*	**1**	1	1 0	1	1	0	0	**1**	1
0	0	0	*0*	0	0	*1* *0*	**1**	0	1 0	0	0	0	0	**1**	0

The columns containing ⊃ show that we are dealing with a tautology. The explosion also works for the negation of the contrariety.

Tabel 7: „Explosion" of the contrariety

1. ⊢ p, ¬ p
2. {p, ¬ p} ⊢ p
3. {p, ¬ p} ⊢ ¬ p
4. p ⊢ p v q
5. {p v q, ¬ p} ⊢ q[38]
6. ¬ p ⊢ ¬ p v q
7. {¬ p v q, p} ⊢ q[39]
8. {p, ¬ p} ⊢ q

Not only from p and ~p is deduced q. But also from p and ¬ p is deduced q. Not only *mutually contradictory* formulas expload deductively, but also *mutual contraries*. And q is a sentence that has nothing to do with the premises in terms from natural thinking content.

In section 6.1.3 we will have both contradictory and contrary expressions. Both have in common explosive deduction. In previous sections, 3.1 and 4 the background of inconsistency is a formal one: axiomatic and: axiomatic and

[38] *Idem*, Lucica I.
[39] *Idem*.

logical-mathematical. Here, deduction can be kept under an incomparable better control than in natural language expressed systems. However, inconsistency appears. It propagates also in physics as mentioned. As a result, the more it can appear in the systems of the non-formal sciences, that is, where reasoning cannot be controlled as in logic or mathematics. Such a field could be even he Law.

5. Authentic versus inauthentic inconsistency

For the natural language thinking contexts, an additional difficulty is added: the claim that inconsistency is inauthentic. What generated a debating concerning authenticity/inauthenticity of the inconsistency.

A first point of view is that *inconsistency is inauthentic*. The idea belongs to "friends of consistency". Thus, in Law would be implicit assumptions that invalidate inconsistency. Among them can be enumerated: (i) Lex superior derogat legi inferiori, (ii) Lex posterior derogat legi priori; (iii) Lex specialis derogat legi generali[40]. This way, sometimes, can prove that inconsistencies found are only apparent and inauthentic. The opposite point of view claims that *inconsistency is authentic*. There would be no implicit assumption. Because, sometimes the above principle are not applicable. Thus both laws can be of the same rank[41]. And no other implicit assumptions are contained. Such that a body of laws is really inconsistent[42].

Constitutions and other legal documents contain inconsistencies[43]. It is argued that it is not difficult to find authentic inconsistent body of laws[44]. However, the author of the idea does not give an example of such body of laws, but generic situations are commented[45]. Moreover, it is even emphasized that it does not happen to the legislator[46]. It is only suggested to consider such a constitution or state of things[47]. That is why, examples of inconsistency are

[40] Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, în *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005, p. 174.
[41] Priest, Graham, Routley Richard, *Semnificația filosofică și inevitabilitatea paraconsistenței,* in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004, p. 268.
[42] *Idem*, p. 269.
[43] Priest, Graham, *Paraconsistent Logic*, in Gabbay, M. Dov and Guenthner, Franz (ed), *Handbook of Philosophical Logic*, vol VI, Kluwer Academic Publishers, 2002, p. 268.
[44] Priest Graham, Routley Richard, *Semnificația filosofică și inevitabilitatea paraconsistenței,* in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004, p. 268.
[45] *Idem,* p. 269.
[46] "….(We may assume that it had never occurred to the legislators that there might be such a person.)" conform cu Priest, Graham, *op.cit.*, p. 290.
[47] "…just consider a constitution that gives persons of kind A the right to do something, x, and forbids persons of kind B from doing x. Suppose, then, that a person in both categories turns up, conform cu *Idem*, Priest.

sometimes invented[48]. However, Law[49] is an area where we have genuine inconsistencies. And it's just one of these areas.

There are plenty of areas like this, as Graham Priest shows[50]. What is desired is to draw conclusions in a controlled way from such kind of premises[51], that is non-explosive. Understand that from {p, ~p} no more be deduced q. From "Socrates exists and Socrates does not exists"[52] not to deduce any more „A men is a donkey"[53]. One of the rules that allows the „explosion" seems genuine: the elimination of the conjunction (E&). This will be exposed in section 6.1.1. Not to allow such a thing, means not to use any longer this rule. Which is possible, according to the relevant logic. On the other hand it is unintuitive to value as true a conjunction and not to value also every part of it as true [54].

6. Genuin inconsistency. Double membership

Here the inconsistency, is supposed to be authentical, nu just apparent. D. Gheorghiu mentioned the next example. Some group say A that has the right to do, which the group B is forbidden. At one moment appears someone, say z, who belongs to both groups[55]. Which generates inconsistency.[56].

In our case, the group A is obliged to do e [57] which B is obliged not to do[58]. Initially and by default, $A \cap B = \varnothing$. In other words, there is no x, such that $x \in A \cap B$:

---

[48] *Idem*, Gheorghiu, p. 170.

[49] *Ibidem*., Priest, p. 290.

[50] "Numerous examples of inconsistent information/theories …. have been offered by paraconsistent logicians. For example: *1. information in a computer data base; 2. various scientific theories;3. constitutions and other legal documents; 4. description of fictional (and other non-existent) objects; 5. descriptions of counterfactual situations"*, conform cu *Ibidem*., Priest, p. 290.

[51] "…. inconsistent information/theories from which one might *want to draw inferences in a controlled way*…conform cu Priest, Graham, *Paraconsistent Logic*, in Gabbay, M. Dov and Guenthner, Franz (ed), in *Handbook of Philosophical Logic*, vol VI, Kluwer Academic Publishers, 2002, p. 290.

[52] Kneale, William and Kneale, Martha, *op.cit.*, p. 302.

[53] *Idem*.

[54] Gheorghiu, Dumitru, *Logică generală,* vol II, Fundației România de mâine Pub. House, Bucharest, 2001, p. 106.

[55] "…just consider a constitution that gives persons of kind A the right to do something, x, and forbids persons of kind B from doing x. Suppose, then, that a person in both categories turns up…." conform cu Priest, Graham, *Paraconsistent Logic*, in Gabbay, M. Dov and Guenthner, Franz (ed), *Handbook of Philosophical Logic*, vol VI, Kluwer Academic Publishers, 2002, p. 290.

[56] Footnote 4, p173, according to Gheorghiu, D, *op. cit.*, p. 173.

[57] "are dreptul" conform cu Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, în *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005, p. 172.

[58] *Idem*.

$\sim\exists x\ x \in A \cap B$. Subsequently, appears c, belonging to both groups: $A \cap B \neq \varnothing$[59]. That is $\sim\exists x\ x \in A \cap B$ becomes false: $\exists z\ z \in A \cap B$. The intersection becomes non-empty. We render the idea of becoming trough the write an operator T, "…first and then …"

$$A \cap B = \varnothing \ T\ A \cap B \neq \varnothing.$$
$$\sim\exists x\ x \in A \cap B \ T\ \exists x\ x \in A \cap B$$

It follows that *c* is both obliged to do e and obliged not to do e. We highlight the inconsistency using some reasoning schemes in symbolic language. We expose in a preamble some notation conventions and rational schemes used.

6.1. Interlude: some inference scheme and notation conventions

6.1.1. Inference scheme

In this example will be used some inference scheme. We present them together with their names and abbreviations.

Tabel 8: Inference schemes

Specification of the universal, S∀	*The rule of extensionality*, RE		Modus ponens, MP	*Elimination of the conjunction*, E&	
1. ∀x F(x) 2. F(a)	1. p ≡ q 2. p 3. q	1. p ≡ q 2. ~p 3. ~q	1. p ⊃ q 2. p 3. q	1. p & q 2. p	1. p & q 2. q

Specification of the universal, (S∀) allows elimination of this quantifier, and the variable quantified specified as an individual constant. This is chosen from the set of values of x. It is supposed that every object has the characteristic F[60]. *The rule of extensionality*, (RE) allows changing/replacing a formula with another equivalent one. The change operation must not be done in all the appearances, just because of the equivalence of the two ones. The first premise says that p and q have the same logical value. The second premise specifies this value for *p*. The conclusion is that, also *q* has the same value. In the left variant, the specified premise has the value 1 by hypothesis. In right variant, the second premise is false. *Modus ponens*, (MP) consists of an implication $p \supset q$, and specifying its antecedent, p, is true. The conclusion is that the consequent q is also true. The schema is mentioned by Diogene Laertios. And is one the stoic unprovable[61]. Reasoning is allowed by the definition of $p \supset q$[62]. If $p \supset q$ belongs

[59] *Ibidem*, pp. 172-173.
[60] Priest, Graham, *Logica, O foarte scurtă introducere*, Litera Pub. House, Bucharest, 2020, p. 35.
[61] Laertios, Diogene, *Despre viețile și doctrinele filosofilor*, traducere din limba greacă de acad. Prof. C. I. Balmuș, cu Studiu introductiv și comentarii de Prof. Aram M. Frenkian, Academia Republicii Populare Române Pub. House, Bucharest, 1963, p. 352.
[62] *Ibidem*., Priest, pp. 67-68, p. 75.

to Predicate Logic and it is universal quantified then it is applied S∀. In a symbolic version it is repeated by different authors. *Elimination of the conjunction*, (E&) could be the most inoffensive of the rules. From the truth of the conjunction is deduced the truth of every one of its variables. Of course for all of these rules one can easily guess the more general forms. The same rules are used bellow. They are neither very many not at all spectacular. Which does not stop them from drawing inconsistent conclusions. Hence, the premises themselves, from which they were deduced are inconsistent, but latent.

6.1.2. Notation conventions

It is supposed to be known that $x \in A$ means that *x belongs to A*. e is an ordinary event. The set of all this events is: $e = \{e_1, e_2, e_3, e_4\}$. Iar: $e_1 = pTp$, $e_2 = pT{\sim}p$, $e_3 = {\sim}pTp$, $e_4 = {\sim}pT{\sim}p$, according to von Wright. In the same order, the events are: maintaining of the presence, vanishing, appear and maintaining of the absence [63]. α is a generic symbol for an actional operator: $\alpha = \{d, f\}$. In which d[64] and f[65] are operators for *to do* and *to forbear*.

A special case of act is: *d(x, e)*, x does an event e to happen. And e stands for any of the announced events. A cartesian product between α and *e* shows that we have four acts and four forbearances. That is, eight actions. Also, have a set of deontic operators is $\Delta = \{O, F, P\}$. The three ones are: obligation, O; forbiddance, F; permission, P. Distribute *O* besides the eight actions. Obtain eight obligations. The same proceed in other cases. We obtain eight forbearances and eight permissions. A particular case of obligation is *Od(x, e)*. Which means that *x is obliged to do happen the event e*. We can have negative obligations. It is about the obligation not to do, *O~d(x, e)*. The idea that the *act d(x, e) is conform to the obligation Od(x, e)* is symbolically rendered like this: $d(x, e) \approx Od(x, e)$. Obviously, "$\not\approx$" stand for non-conformity. For the term *Judge* introduce only the symbol J. Based on this we may introduce te predicate: *J sanctions the non-conformity of the act with obligation not to do*. Symbolical: $san(J, d(y, e) \not\approx O{\sim}d(y, e))$. In other cases the idea is: J sanctions the non-conformity of the absence of the act to the obligation to do, $san(J, {\sim}d(x, e) \not\approx Od(x, e))$.

[63] von Wright, Georg, Henrik, *Normă și Acțiune*, traducere, postfață și note de Drăgan Stoianovici și Sorin Vieru, Științifică și Enciclopedică Pub. House, Bucharest, 1982, p. 54.
[64] *Ibidem*., pp. 59-62.
[65] *Idem*., pp. 62-65.

6.1.3. Oposite obligations[66]

We expose the premises and the inferential approach mentioned. Distinguish between generical and factual clauses. The generical ones contain universal quantifiers and conditionals. The 1 and 2 Clauses address explicitly to the groups A and B. s they may be coupled with factual clauses 14 and 15. In a first step specify the universals from 1-10. Obtain thus the consequences 23-34. We couple these ones with factual clauses 11-19. We derive through modus ponens final conclusions.

The pairs of factual clauses are contradictories: 14 and 16; 15 and 17; 18 and 19. However, not all of them are blamable for the conclusions of the kind *sanctions.../does not sanctions*...from the points 39-46. And nor results conclusions of the kind: *sanctions.../does not sanctions*...about *a* or about *b.* In addition, we may consider different actional contexts, that split the factual contradictories.

Table 9: Development of the reasoning

generical clauses	*factual clauses*
1. $\forall x(x \in A \supset Od(x, e))$	11.$a \in A$
2. $\forall y(y \in B \supset O{\sim}d(y, e))$	12.$b \in B$
3. $\forall x\ (Od(x, e)\ \&\ d(x, e)) \supset {\sim}san(J, d(x, e) \approx Od(x, e))$	13. $c \in A \cap B$
4. $\forall x\ (Od(x, e)\ \&\ {\sim}d(x, e)) \supset san(J, {\sim}d(x, e) \not\approx Od(x, e))$	14. d(a, e)
5. $\forall y(O{\sim}d(y, e)\ \&\ d(y, e)) \supset san(J, d(y, e) \not\approx O{\sim}d(y, e))$	15.~d(b, e)
6. $\forall y(O{\sim}d(y, e)\ \&\ {\sim}d(y, e)) \supset {\sim}san(J, {\sim}d(y, e) \approx O{\sim}d(y, e))$	16. ~d(a, e)
7. $\forall z(Od(z, e)\ \&\ d(z, e)) \supset {\sim}san(J, d(z, e) \approx Od(z, e))$	17.d(b, e)
8.$\forall z\ (Od(z, e)\ \&\ {\sim}d(z, e)) \supset san(J, {\sim}d(z, e) \not\approx Od(z, e))$	18. d(c, e)
9.$\forall z\ (O{\sim}d(z, e)\ \&\ d(z, e)) \supset san(J, d(z, e) \not\approx O{\sim}d(z, e))$	19. ~d(c, e)
10.$\forall z\ (O{\sim}d(z, e)\ \&\ {\sim}d(z, e)) \supset {\sim}san(J, {\sim}d(z, e) \approx Od(z, e))$	

[66] Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, in *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005, p. 171.

Deriving conclusions

Extensionality, Elimination of the conjunctions, specification of the universal

20. c∈A & c∈B	RE, 13
21. c∈A	E&, 20
22. c∈B	E&, 20
23. a∈A ⊃ Od(a, e)	S∀, 1
24. b∈B ⊃ O~d(b, e)	S∀, 2
25. c∈A ⊃ Od(c, e))	S∀, 1
26. c∈B ⊃ O~d(c, e))	S∀, 2
27. (Od(a, e) & d(a, e)) ⊃ ~san(J, d(a, e) ≈ Od(a, e))	S∀, 3
28. (Od(a, e) & ~d(a, e)) ⊃ san(J, ~d(a, e) ≉ Od(a, e))	S∀, 4
29. (O~d(b, e) & d(b, e)) ⊃ san(J, d(b, e) ≉ O~d(b, e))	S∀, 5
30.(O~d(b, e) & ~d(b, e)) ⊃ ~san(J, ~d(b, e) ≈ O~d(b, e))	S∀, 6
31. (Od(c, e) & d(c, e)) ⊃ ~san(J, d(c, e) ≈ Od(c, e))	S∀, 7
32. (Od(c, e) & ~d(c, e)) ⊃ san(J, ~d(c, e) ≉ Od(c, e))	S∀, 8
33. (O~d(c, e) & d(c, e)) ⊃ san(J, d(c, e) ≉ O~d(c, e))	S∀, 9
34. (O~d(c, e) & ~d(c, e)) ⊃ ~san(J, ~d(c, e) ≈ O~d(c, e))	S∀, 10

Modus ponens

35. Od(a, e)	MP 11, 23
36. O~d(b, e)	MP 12, 24
37. Od(c, e)	MP 21, 25
38. O~d(c, e)	MP 22, 26
39. ~san(J, d(a, e) ≈ Od(a, e))	MP 14, 27, 35
40. san(J, ~d(a, e) ≉ Od(a, e))	MP 16, 28, 35
41. san(J, d(b, e) ≉ O~d(b, e))	MP 17, 29, 36
42. ~san(J, ~d(b, e) ≈ O~d(b, e))	MP 15, 30, 36
43.~san(J, d(c, e) ≈ Od(c, e))	MP 18, 31, 37
44. san(J, ~d(c, e) ≉ Od(c, e))	MP 19, 32, 37
45. san(J, d(c, e) ≉ O~d(c, e))	MP 18, 33, 38
46. ~san(J, ~d(c, e) ≈ O~d(c, e))	MP 19, 34, 38

7. Splitting into actional contexts: obligations, compliances and sanctions

Scoring conventions make possible to interpret all the clauses and conclusions. Of these, choose to interpret only the last conclusions. The scope is to highlight dangerous situations. These situations refer to obligations, sanctions and the actional impossibility. Successively, we will split the set of premise–clauses and of their conclusions in actional contexts. A row of contexts is the one for the agents *a* and *b.* Thus, neglect the clauses referring to agent *c.* The second row of actional of contexts is for the agent *c.* This one neglects clauses for *a* and *b.*

7.1. Actional contexts for agents *a* and *b*

From the point of view of *a* and *b* we split all in two action contexts. A first action context is the one in which *a does* (d) *e* (14). Abreviate by *da*. In the same context, *b* does not (~d) *e*, (15). Abreviate by *~db*. We call this context *da~db*. A second action context is the one in which *a does not* (~d) *e* (16). Abreviate, *~da*. In te same context, *b* do (d) e (17). Abreviate, db. We call this context *~dadb*. The two actional contexts are described by the formulas:

da~db: {1, 2, 3, 6, 11, 12, 14, 15, 23, 24, 27, 30, 35, 36, 39, 42}
~dadb: {1, 2, 4, 5, 11, 12, 16, 17, 23, 24, 28, 29, 35, 36, 40, 41}

Let the action context *da~db*. *a's obligation* is consistent. *a* is obliged to do e (35). Also consistent is the *b's* obligation. *b* is obliged to do (36). *Compliance is complete* for both agents. In the actional context *~dadb*, *a* may be in accordance with his obligation of doing e (14). Likewise, *b* may be in accordance to his obligations not doing e (15). None of them faces to any opposite obligation to the shown ones. *The sanction*. *a's* act (14) is not sanctioned for the conformity with the obligation *to do* (39). Likewise, *b's* act, is not sanctioned for the conformity with the obligation *not to do* (42). The sanction is obviously, consistent, in both cases. *The one should apply the sanction* is not required in this case. None must be sanctioned.

Let the action context *~dadb*. *a's obligation* is consistent. *a* is obliged to do e (35). Also consistent is the *b's* obligation. *b* is obliged *not to do* (36). *The noncompliance is complete* for both agents. In the actional context *~dadb*, *a* is not compliant to his obligation. *a* does not e (16). Likewise, *b* is not compliant to his obligation. *b* does e (17). None of them faces opposite obligation, to the shown ones. *The sanction.* The absence of *a'*s act (16) is sanctioned for the non-conformity with the obligation to do (40). *b'*s act is sanctioned for the non-conformity with the obligation not to do (41). The sanction is obvious consistent, in both cases. *The one who should apply the sanction* has no logical difficulty to apply the sanction.

7.2. Actional contexts for the agent *c*

From *c*'s the point of view, we split everything in two actional contexts. One first context is the one in which *c does e,* abbreviated, dc, that contains (18). A second context is the one in which *c does not* (~d) *e,* abbreviated, ~dc, that contains (19). Around 18 and 19 build the two actional contexts:

dc = {1, 2, 7, 9,13, 18, 20 – 22, 25, 26, 31, 33, 37, 38, 43, 45}
~dc: {1,2, 8, 10,13, 19, 20 – 22, 25, 26, 32, 34, 37, 38, 44, 46}

Let the actional context *dc.Obligations* apply *inconsistently* to *c*. He is obliged both to do (37), and not to do (38). *The Compliance is incomplete*. We suppose that in the actional context *cd*, *c* wants to be compliant to both obligations, simultaneously. And in dc, *c* does *e*. Thus *c* is compliant only to the obligation to do (37). Exactly by this, *c* is non-compliant to obligation of not to do (38). *The sanction. c*'s act (18) is not sanctioned for the compliance to the obligation to do (43). But the same act is sanctioned for non-compliance to the obligation not to do so (45). The sanction is inconsistent-contradictory, apparently. We have the expressions *~san(...)*, (43) și *san(...)*, (45). These are mutual contradictories, so inconsistent. But, within them there are different terms. For *~san* notice compliance between *act and the obligation*, $d(c, e) \approx Od(c, e)$. And for *san*, find non-compliance between the same *act and the obligation not to do*, $d(c, e) \not\approx O\sim d(c, e)$. And for *san* we find the non-conformity between the same act and the obligation *not to do*, $d(c, e) \not\approx O\sim d(c, e)$. The sanction and non sanction of the same act would be mutual contradictories if both refer to the same obligation. Even so, comparing to opposing laws, opposite decision are problematic, at least in appearance. Such decisions are compelling consequences for J. *The one who has to apply the sanction* would be in an actional impossibility. And this would not be due to natural, mechanical, physical causes. Directly, actional impossibility would be due to the court decision.

Let the actional context *~dc. The obligations* are applied inconsistently to *c*. This is obliged both to do, (37), and not to do (38). *Compliance is incomplete*. Suppose that in the *actional context ~dc, c* would like to be compliant to both obligations, simultaneously. But in *~dc, c* does not e. Thus, *c* is compliant with the obligation not to do e (38). Exactly by this *c* is non-compliant to the obligation to do (37). *The sanction. c*'s act absence (19) is sanctioned for non-compliance to the obligation of do (44). But the same absence of the act is not sanctioned for the compliance to obligation not to do (46). Also here the sanction is inconsistent-contradictory, apparently. We have the expressions *san(...)*, (44) and *~san(...)*, (46). Within these, the used terms are different. For *san* notice non-compliance between absence of the act and obligation. And for *~san* find compliance between the absence of the same act and the *obligation not to do*. Even so, opposing laws compel J to make opposite decisions. *The one who has to apply the sanction* would be in the actional impossibility. The cause is the decision to which the Judge is forced, by inconsistent laws.

In both actional contexts, *c* cannot evade neither from action, nor from sanction. The agent *c* cannot evade from action, because some way or another is obliged to act. Both action and non-action are sanctioned. The relationship of one and the same act is: non-compliant to the obligation no to do, but it is compliant to the obligation to do. The obligation for which the Judge sanctions and the one

for which he does not sanction are opposite, therefore different. The Judge is in a logical and decisional impossible situation. The obligation not to do is the one on he basis of which he should sanction. But this is countered by the obligation to do. Based on this the Judge should not sanction.

7.3. The principle of explosion revisited in actional context for the agent *c*

However *c*'s obligations are mutual *contraries*: *c* is obliged to do (37) and is obliged not to do (36). So we can reason "explosively" according to the table 7. We show that from Od(c, e) and O~d(c, e) is deducible some formula Q. Eventually we write *O~d(c, e)* as ¬ *Od(c, e)*. Obtain two "explosive" deductions, according to table 7 section 4, which we rearrange.

Table 10: „The explosion" of the contrariety of obligations

1. ⊢ Od(c, e), ¬ Od(c, e)	
2.{Od(c, e), ¬ Od(c, e)} ⊢ Od(c, e)	
3. {Od(c, e), ¬ Od(c, e)} ⊢ ¬ Od(c, e)	
4. Od(-c, e) ⊢ Od(c, e) v q	6. ¬ Od(c, e) ⊢ ¬ Od(c, e) v Q
5.{Od(c, e) v q, ¬ Od(c, e)} ⊢ Q	7. {¬ Od(c, e) v Q, Od(c, e)} ⊢ Q
8. {Od(c, e), ¬ Od(c, e)} ⊢ Q	

Where q can be an arbitrary sentence. This can mean anything.

8. Conclusions and openings

Initially the here inconsistency is implicitly, according to the model[67] that inspired the extended construction here.

Weak mutual contradictory obligations. Deontic contradiction between obligations is *x is obliged to do* and *is not obliged to do. To do* is compliant to *the obligation to,* so not sanctionable. But *non-obligation to do* is equal to *permission not to do*. If *x does not,* then he benefits from this permission *not to do* and is compliant to the norm. It would be debatable if *to do,* while is permitted *not to do* is non-compliable and therefore sanctionable. Thus, although the *obligation* and *its absence* is a contradiction, however the opposition between them seems to be weak.

Stronger opposing obligations. While *x is obliged to do* and *is obliged not to do,* although is not a contradiction, it is a stronger opposition. Thus, *x does not* is compliant to *obligation not to do*. And *x does not e* is opposed to *x does e* that is compliant to *the obligation to do.* The two compliant acts are contradictories. And *to do* is non-compliant to *the obligation not to do*. And *to do* is opposing to

[67] *Ibidem*., p. 171.

not to do that is non-compliant to *the obligation to do*. Thus, *what is compliant* to *Od(x, e)* is contradictory to *what is non-compliant* to *O~d(x, e)*. But also, *what is non-compliant* to *Od(x, e)* is contradictory to *what is non-compliant* to *O~d(x, e)*. The actional compliance to *the obligation to do* and to *the obligation not to do* are mutual contradictories, although the two obligations are not contradictories.

Actional difficulties for some agents of action. The pair composed of {obligation to do, obligation not to do} puts some subject of the action in difficulty. *The actional subject c* is unable to evade the action. Both *the act* and its *absence* are compliances to some obligation. But *c* cannot escape the sanction either. Whatever the norm he complies to, *c* is sanctioned due to the opposite norm. *The Judge* is in a kind of decision-make impossibility. He will sanction and will not sanction one and the same act, but basing on opposite laws. *Those ones who apply to c* the *sanction* decided by the Judge are, also, in actional impossibility. What they should do to *c*, according to the sanction decided by the Judge, they should not do to *c* according to the non-sanction by the same Judge.

The absence of any exception leaves place for the contradiction. This occurs if: both obligations are present explicitly/implicitly in the same law system and no one of the two obligations is accompanied by any exception[68]. von Wright qualifies such norms as being inconsistent or contradictory[69]. Although, they may be missing together[70]. Which means such obligations are, in fact, mutual contrary. However they generate contradictory consequences for the agents of the action.

The form and the content of the event. We return to two expressions from the section 5: *1.* $A \cap B = \varnothing\ T\ A \cap B \neq \varnothing$; *2.* $\sim\exists x\ x \in A \cap B\ T\ \exists x\ x \in A \cap B$. The expression 1 is of the same form as the event e_2: $pT\sim p$[71]. *Its form* describes *a vanishing*. However, initial state is an empty intersection. Which means an absence, so something negative. And the end state is a non-empty intersection. Which means a presence, so something affirmative. *The content would describe an appearance*. Expression 2 is in style of Predicate Logic, by the existence of the quantifier. And it is of the same form with the event e_3: $\sim pTp$[72]. Its form describes an appearance. The initial state describes the absence of any element in the intersection of the two sets. The end state describes the existence of some element in the intersection between A and B. Therefore the analyzed content describes also an *appearance*. Thus, in case of 1 we have an opposition between

[68] *Idem*., p. 172.
[69] von Wright, Georg, Henrik, *op. cit.*, p. 174.
[70] *Ibidem*., p. 173.
[71] *Ibidem*., p. 46.
[72] *Idem*.

form and content. In case two we have an agreement between the two ones. Moreover, the shape of 2 seems to express the content more appropriately. Finally, 2 expresses more appropriately even the content of 1. Or exactly this sentence generates the inconsistency.

We consider things ascending. The normality of same sets does not seem to be a strong enough property. That is, it cannot rise to the set of all normal sets, so make it normal constantly. On the contrary, the set of all normal sets is paradoxical. Which results if we customize the set-in section 5

Considering things descending. Paradoxicality is a property of the set of all normal sets. But is it present only at this level? In other words, the question would be if it propagates down, to the element-sets, and specially to the elements of the basical sets. The answer is negative. Element-sets are normal and stable. Then is this felt over elements of this sets? Are any elements of the basical sets both existent and non-existent, in the same time and under the same ratio? As we shown in 4.2. In formal systems the deduction can be controlled. However, deducing of the inconsistency cannot be prevented. Rather its deducing can be better outlooked. Consider a set of all laws Λ, supposed to be normal. We ask ourselves if the paradoxicality of the super–set to which Λ belongs se spread descending to Λ. Has this over-set any effect on Λ? Is Λ a body of laws actually inconsistent because of this cause? Is Λ (only) potentially inconsistent? The invoked authors show that inconsistency is present even inside the mathematical theories. If this is the case in formal systems, then not all the more will they be the same in informal systems or domains? The question that rises is if Law could be an exception. Even so, the example from Law shown here, is recognized as invented, but possible.

Thinking and consistence. For a possible question: "is human thinking consistent?" we believe that, remain opened (at least) two variants. Consistence could be a real property of our general thinking, of the legal one in this case, like a state of facts. This is how our thinking would actually work: consistent. Or, consistency might be just a norm. In this sens, it would be just a standard, a model follow, a way our thinking should be. That is, it is not a current state of our mind. Human thinking could be fundamentally inconsistent in fact. And only fluctuating could be according to a standard. Thinking would just claim to be consistent. And this is because, for example, it cannot accept itself as inconsistent.

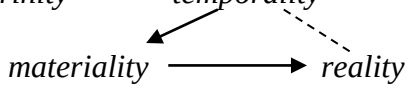
Bibliography

1. Enescu, Gheorghe, *Teoria sistemelor logice*, Științifică și Enciclopedică Pub. House, Bucharest, 1976.
2. Gheorghiu, Dumitru, *Exigențe logice privind sistemele de norme juridice și discursul juridice*, în *Existență, Contradicție și Adevăr*, 3 Pub. House, Bucharest, 2005. file:///C:/Users/gabi/Downloads/Dumitru_Gheorghiu_Existenta_ contradictie%20(1).pdf
3. Gheorghiu, Dumitru, *Introducere în Filosofia Minții, Curs Universitar*, vol I, 3 Pub. House, Bucharest, 2015.
4. Gheorghiu, Dumitru, *Logică generală,* vol II, Fundației România de mâine Pub. House, Bucharest, 2001.
5. Kneale, William și Kneale, Martha, *Dezvoltarea Logicii*, vol I, Dacia Pub. House, Cluj-Napoca, 1974.
6. Lucica Iancu, *Logica și Filosofia contradicției. Incursiune în problematica paraconsistenței. Studiu introductiv*, in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004.
7. Popa, Cornel, *Logică și Metalogică*, vol II, Fundației România de Mâine Pub. House, Bucharest, 2002.
8. Popa, Cornel, *Logică și Metalogică*, vol I, Fundației România de Mâine Pub. House, Bucharest, 2000.
9. Priest Graham, Routley Richard, *Semnificația filosofică și inevitabilitatea paraconsistenței,* in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004.
10. Priest, Graham, *Cuvânt înainte*, in Lucica Iancu, Gheorghiu Dumitru, Chirilă Roman (coordonatori), *Ex falsum quodlibet, Studii de Logică Paraconsistentă*, Tehnică Pub. House, Bucharest, 2004.
11. Priest, Graham, *Logica, O foarte scurtă introducere*, Litera Pub. House, Bucharest, 2020.
12. Priest, Graham, *Paraconsistent Logic*, în Gabbay, M. Dov and Guenthner, Franz (ed), *Handbook of Philosophical Logic*, vol VI, Kluwer Academic Publishers, 2002.
13. von Wright, Georg, Henrik, *Logica Deontică și Teoria Generală a Acțiunii*, in vol *Norme, Valori, Acțiune,* Analiză logică a discursului practice, cu aplicații în etică și în drept, selecția textelor, traducere, și studiu introductiv, de Sorin Vieru și Drăgan Stoianovici, Politică Pub. House, Bucharest, 1979.
14. von Wright, Georg, Henrik, *Normă și Acțiune*, traducere, postfață și note de Drăgan Stoianovici și Sorin Vieru, Științifică și Enciclopedică Pub. House, Bucharest, 1982.s
15. Wittgenstein, Ludwig, *Jurnale 1914 – 1916*, in Wittgenstein, Ludwig, *Jurnale 1914 – 1916, Câteva remarci filosofice*, traducători Cătălin Cioabă și Gheorghe Ștefanov, Humanitas Pub. House, Bucharest, 2010.

Brief Considerations on the Logic of Legal Fiction

Cristian NEACȘIU
Mircea DUȚU[1]

***Giving logical value to the sequences of physical reality that follow one another in the uninterrupted sequence of temporal materiality**, we realize that the trinity*



represents in fact the triptych of existence. In this way, it turns out that existence is a Trinitarian form that imperatively subsumes its own logic. It is precisely this existentia propriam pars logicae that is the necessary element to be researched whenever we are faced with a way of existence, regardless of whether the latter is related to materiality or is confined to the plane of conceptuality.

Keywords: *reality, materiality, conceptual, existence, logic*

***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[2], without being a reiteration or circularity

[1] Professor, PhD., UEB.

[2] 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

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[3]..., but they must be considered as "[...] cultural constructs (which) depend on knowledge and conceptual [...] schemes..."[4]. 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[5].

---

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 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.

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

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

[5] 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

Thus, it appears that any methodology of research of different legal fictions[6] belonging to a branch of law[7] *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[8].

Since "the philosophy of law comprises three ways of research: logical, phenomenological and deontological [...]"[9], as a truism it follows that "the first research, the logical ones [...] defines what is implied in any research of a nature legal"[10]. 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.

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.).

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

[7] Public or private one.

[8] 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 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.

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

[10] *Idem.*

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, corroborating the latter idea, the previous consideration regarding the ideational self-legitimization of legal fiction as a necessity[11] 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[12]. 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" [13], 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

[11] Resulting in an existential theoretical form.

[12] 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.*

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

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[14]. *The two validating parts are interdependent, in the sense that the existence of the former determines the latter, and in turn, the existence of the latter presupposes the former*[15]. 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[16]. 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[17], 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*[18].

[14] 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).

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

[16] 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.

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

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

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[19] 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[20].

However, paradoxically, the following question arises: how is it possible for a construct related to the abstract[21] 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"[22], which is equivalent to a logical perfection after quality.

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

[20] 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 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.

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

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

Bibliography

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.

Mihail Kogălniceanu – A Personality of European Diplomacy in the 19th Century

Constantin IORDACHE[1]
Cosmin Adrian ŞERBAN[2]

Abstract

Mihail Kogălniceanu was a Foreign Minister in 1876 between April 28 and July 24[3]*, and between April 3, 1877 until 25 November 1878. Between April 1, 1880 and November 12, 1881, he represented Romania as a Plenipotentiary Minister to the French Government. The chronological milestones of his work in the field of external relations include a long period of time, from the revolutionary year 1848 to the last period of his life.*

Keywords: *Mihail Kogălniceanu, Carol I, Treaty of Paris (1856), diplomacy politics, Revolution of 1848*

Mihail Kogălniceanu was a leading figure in the field of Romanian political and social life, **a successor of the political-diplomatic ideas affirmed by Dimitrie Cantemir**, getting involved in the major events of national history **between 1848 and 1890**.

He pursued the achievement of some primary objectives: the formation of the national state, the development of cooperation relations on equal and dignified terms with the other States.

He was Minister of Foreign Affairs in 1876, from April 28 to July 24[4], from April 3, 1877 to November 25, 1878. Between April 1, 1880 and November 12, 1881, **he represented Romania as a Plenipotentiary Minister to the French Government**.

Mihail Kogălniceanu considered that the foreign policy of each state must take into account the own interests of that state: "*We must have a Romanian policy"*, he pointed out in the Chamber of Deputies on January 27, 1883. This

[1] Professor, PhD., Spiru Haret University, Member of the European Association "Dimitrie Cantemir", jordache_constantin@yahoo.com
[2] PhD. student, National Defense University "CAROL I", cosmin.serban81@yahoo.com
[3] Old style
[4] Mihai Kogălniceanu, *Selected social-political texts,* Bucharest, Political Publishing House, 1967, pp. 348-349.

statement represents the conclusion of the statesman who had been present in all the great political and diplomatic battles of his time.

Kogălniceanu claimed, in statements, memoirs or diplomatic documents intended for European governments, the idea **that the Romanian Country and Moldova were from their beginnings sovereign States,** fully exercising their prerogatives and that this sovereignty was preserved even after the end of the **capitulations**[5] with the Ottoman Empire in the 15th and 16th centuries. He considered the aim of the foreign policy of the modern state to be the restoration and full recognition of national sovereignty.

In the revolutionary year 1848, refugeed in Cernăuți after the uprising organized in Iasi against Mihail Sturza, **Mihail Kogălniceanu drafted** *The wishes of the national party in Moldova*. The text summarized the action program of all patriots with democratic, European views in the middle of the 19th century. **Among the new principles** and institutions of government, meant to ensure the progress of Romanian society, **were listed**: full internal state autonomy, non-interference of a foreign power; equality of civil and political rights for the people; legislative assembly representative for all social categories; ministerial responsibility of the executive power; freedom of the press; inviolability of the person and home; free and compulsory general education; judicial and administrative reform; agrarian reform; abolition of slavery.

The texts on Moldova's position, concerning all interEuropean relations, are significant; they defined the **philosophy of diplomat Kogălniceanu** and the main objectives of the future Romanian foreign policy. Some expressed general principles that should underpin relations between States: international legality, mutual respect for the rights of each state, sovereign rights and the independence of the two Principalities.

Since 1856, when the European powers, after the conclusion of the Paris Peace Treaty, discussed the situation of the Principalities (**Romanian Country, Moldova**), **Kogălniceanu has imposed himself through an intense European diplomatic activity, through political-social dynamism, through an authentic patriotism.**

The Romanian diplomacy had to appeal to the support of the European States and convince them that the claims for the full exercise of national sovereignty demanded the recognition of essential rights, prerogatives that the two States kept without interruption.

By the vote of January 5 and 24, 1859, Alexandru Ioan Cuza was elected Lord of Muntenia and Moldavia; the will of the nation was irrevocably

[5] The capitulation represents a "*Convention between a Christian state and the Ottoman Gate, which regulates the situation of Christian subjects in the Turkish Empire from an administrative, fiscal and judicial point of view*.", according *to the Romanian language dictionary* of the Romanian Academy, Tom II: C. p. 108.

manifested for full Union, passing over the half measures of the Paris Convention elaborated by the ambassadors of the great powers[6]. The stage of intense European diplomatic action was beginning to achieve the major goals expressed by the ad hoc assemblies, by the entire generation of the 1848 revolution. **Mihail Kogălniceanu participated with abnegation in the realization of the foreign policy of modern Romania.**

During the works of the Central Commission in Focsani, where the draft constitution was being discussed, he asked for the amendment of the article concerning the presence of a foreign army on the territory of the country, the text proposed being: "*No foreign troops can be admitted to the service of the state, nor can they occupy Romania's land or pass on it."* **Kogălniceanu explained the importance of his amendment***: "If the old wording were to be maintained, I might fear that it would be understood that, by a law, a foreign troop would come to our service*"[7].

On 30 April 1860 Mihail Kogălniceanu became Prime Minister. The program of the Government presented to the Assembly of Deputies in Iasi included: supporting the country's autonomy "as an expensive and undescribable legacy"; "developing and strengthening the Romanian nationality", first of all by realizing and recognizing the full Union of the two principalities; a foreign policy based on dignity, pursuing the rights and interests of the country; strengthening the armed forces "capable of defending our borders and autonomy"; examining the problem of the venerated monasteries. As a Prime Minister he pursued these objectives, although his short government allowed him to act only in a few political directions. Important was the memo submitted to Prince Cuza, in which he emphasizes that the real estate domains belonging to the monasteries constitute a national patrimony and, as such, they must cease to represent "a state in the state"[8].

Significant was his attitude toward the Hungarian emigration to Moldova, which in 1860 aimed at the formation of armed volunteer corps to fight against Habsburg domination[9]. He waned not to create diplomatic differences with Austria, so as not to undermine the personal situation of the Hungarian

[6] Dan Berindei, *Ad hoc assemblies; Struggle for Union in 1856-1858,* in the *History of Romania*, vol. IV, pp. 291-293 and 301-311.

[7] On 1/13 October 1859, in *the Protocols of the Central Commission of the United Principalities*, Protocol LXIV, p. 7, col. 2 and p. 8, col. 1. Kogălniceanu makes 218 interventions and amendments to the work of the Central Commission between May 23, 1859 and January 27, 1860 8st. Veche) and subscribes to other 22, *parliamentary Speeches from the era of the Union*, Vladimir Diculescu edition, pp. 87-195 and 358-378.

[8] M Kogălniceanu, *Letters, travel Notes*, Augustin Z.N. Popp edition and Dan Simonescu, pp. 121-122.

[9] Dan Berindei, *Mihail Kogălniceanu, Prime Minister of Moldova, and Hungarian emigration* (1860-1861), in *Studies and materials of modern history*, volume II, 1960, pp. 223+244.

refugees: "*We want to be masters in our land; so that we do not give foreigners the power to interfere in our affairs, we will not interfere in the affairs of others. We want the Romanian land to be a land of hospitality*...."[10]. On a note of protest, submitted by Austria's representative, Godel-Lannoy, Kogălniceanu stated that the Principalities understood to respect the Convention for the extradition of deserters and delinquents, but could not violate "the always respected principle of non-extradition of political refugees".

Mihail Kogălniceanu and Alexandru Ioan Cuza have not forgotten the Romanians in Transylvania. The Convention concluded in May 1859 by Vasile Alecsandri, on behalf of Prince Cuza, with General G. Klapka, representing the Hungarian revolutionaries, provided for the granting of rights and freedoms to all inhabitants of Hungary, regardless of race and religion, complete independence of cults and instruction, autonomy of communes and counties, in case of a successful insurrection.

During Kogălniceanu's government, as Prime Minister, a telegraphic Convention was signed with Russia on December 3, 1860. It was the first international agreement concluded by the United Principalities.

Invited to form the government (the complete administrative Union had been recognized by the European powers since then), Mihail Kogălniceanu was sworn in on 11/23 October 1863 and remained in this position until 26 January/6 February 1865. **Among the reforms adopted during this period** – we mention: the establishment of the Court of accounts; the retirements law; the communal law; the county councils; the Criminal and Criminal procedure Code; the judicial organization; the rural law of 1864 under which 511 896 peasant families received land through which they achieve the secularization of monastic wealth.

By the vote of the Chamber of Deputies of Bucharest (as of December 13/25, 1863) passed into the state patrimony all the monastic wealth (venerated and unvenerated), amounting to no less than 25,26%, that is, more than a quarter of the territory of the country. The report of the Council of Ministers to Prince Cuza reveals that the problem was the exclusive competence of the Romanian authorities. The protest of the Greek monks, the beneficiaries until then of the income of the expropriated estates, as well as the support granted to them by some European States, resulted in diplomatic negotiations in which Cuza and the government chaired by Kogălniceanu acted to allow secularization.

After Cuza's abdication, Mihail Kogălniceanu continued to participate in political life, defending the democratic principles and reforms he had contributed to. As an Interior Minister (November 1868 – January 1870) he supported the cause of Bulgarians, refugees in Romania, who were calling for the freedom of

[10] Dan Berindei, *op. cit.*, p. 233 and Kogălniceanu's interpellation in the Chamber on February 11, 1886, in *Elected social-political texts*, pp. 357-360.

their country. In a speech to the Assembly of Deputies, he said: "*We are in a constitutional state, with all freedom of speech, with all freedom of printing; but the Romanian administration cannot impose on Bulgarians in our country the silence of the tomb, it cannot suppress the cry of the heart*"[11].

The Oriental issue[12] reopened with the revolution in Bosnia and Herzegovina in 1875, followed by that of Bulgaria (April 1876). As the crisis continued, it became more and more urgent to amend the provisions of the Paris Peace Treaty of 1856. In his note to General Ghica, Romania's diplomatic agent in Istanbul, Mihail Kogălniceanu stressed the desire to maintain and develop relations with the Gate based on full harmony. On the tenth anniversary of Prince Carol's accession to the throne, Kogălniceanu telegraph of the country's diplomatic agent in Istanbul that Ottoman officials could use the opportunity to recognize "our country's historical and national name of Romania"[13].

The Ottoman authorities constantly refused to accept the official acts of the Romanian institutions in which the name of the state was Romania (the Gate claimed as a name the United Principalities or the Vassal Principalities), and its citizens were "obedient Romanians". Such a "war of words" continued in all acts of political correspondence and had entirely negative consequences in solving the commercial affairs. This situation is all the more unnatural as the Romanian state was recognized by the Treaty of Paris in 1856, **and its historical name of Romania was accepted by the vast majority of the guaranteeing powers.**

Turkish authorities applied discrimination or restrictions on the import of Romanian products. It was necessary to sign an agreement on the mutual extradition of common criminals; also to conclude special postal and telegraphic conventions. Romania and Turkey ratified the Bern Postal Convention (1874) and acceded "with equal rights" to the Petersburg International telegraph Convention (1875).

The Romanian passport was not recognized by the Ottoman authorities. Romanian citizens, in order to be able to travel to Turkey, had to procure Turkish teschers (passports).

The Conference of Ambassadors, meeting in Istanbul between December 1876 and January 1877, did not discuss the proposal made by the Romanian

[11] *Selected Social-political texts*, Introduction, p. 55.

[12] (**The Oriental issue (the Oriental matter)** is a period in European history characterized by attempts to solve the diplomatic and political problems generated by the fall of the Ottoman Empire. The phrase is not applied to a particular problem, but includes a variety of issues arising between the 18th and 20th centuries, especially those that generated instability in European regions under Turkish domination. The "Oriental matter" ceased to exist at the end of the first World War, which had, among other things, the effect of the dismantling of the Ottoman Empire.

[13] Telegram of May 10/22, 1876, Archive M.A.E., fond. Constantinople, volume 33.

government to manifest a strict neutrality guaranteed by the European powers in case of a military conflict.

The message certifies that Tsar Alexandru declared that he is not in his will to strike at the rights, institutions and autonomy of Romania; as a proof of these intentions, no foreign troops will enter the capital, in Bucharest.

After the major political events of 1877-1878, **Mihail Kogălniceanu revealed the importance of Romania's economic relations with other countries and aimed to provide them with an appropriate legal framework.**

The Assembly of Deputies approved a draft law that, under the condition of reciprocity, for a maximum term of 9 months, extended **the most favored nation clause**,[14] similar to that granted to Austria-Hungary, to all countries that had negotiations for trade conventions with Romania.

During his diplomatic mission in Paris, in addition to solving current affairs, several aspects are to be noted. **In January 1881 he made steps for the signing of a consular Convention between Romania and France**, a Convention that the Paris government wanted to conclude simultaneously with the approval by the French Parliament of the general law on customs costs in favor of Romania.

In March 1881, Mihail Kogălniceanu was transmitting in „Le Soir" two news stories about Romania's near ascension to the rank of Kingdom.

From the activity of the illustrious diplomat we note: the formalities for the decoration with Romanian orders of some personalities of French political and cultural life; the transmission to the Chinese imperial government of the official notification on Romania's independence; the reactions regarding the assassination of Tsar Alexander II. He was in charge of organizing the Romanian connection in Paris, signaling in Bucharest the difficulties he is facing; he proposed differentiated organizational arrangements, according to the real volume of work of each tie, not the importance of the country where it is located, he was concerned about promoting and affirming the young diplomats.

The central issue, during his mission as an extraordinary envoy and plenipotentiary minister in Paris, was the legal regime of the Danube. His concern to ensure Romania's legitimate rights and interests on this important artery of European river circulation has been constant. In 1880, the Austrian diplomacy made persistent efforts to create a "mixed" commission to draft the navigation regulations and supervise navigation between the Iron Gates and Galati. The commission was to include Serbia, Romania and Bulgaria, coastal

[14] **The most favored nation clause** granted by one state to another means that the first state grants the second state the same status in trade relations as the most favorable status of all other States with which it has trade relations. This principle applies both to the import of goods and to their export, and the scope covers customs duties, other border duties, import-export arrangements, customs formalities, international trade regulations.

States, and Austria-Hungary. The analysis of the whole problem, with all its implications, Kogălniceanu carried it out in a memorandum that remains today among the classical works in Romanian literature.

Dated - Paris, August 10, 1880, the memorandum, later printed in Bucharest (1882)[15], presented **the history of the Danube navigation regime, politically-legally founded by international conventions, starting with the Paris Treaty of 1856.**

The right to draw up regulations for sailing between the Iron Gates and Galati belonged, according to the provisions of the Congress of Berlin, to the European Commission. The Romanian diplomacy had an interest in strongly supporting the international regulations in force. Maintaining this legal state, defending it with all our powers, was important.

Remarkable by its clarity and documentation, the text of the memorandum, dated 10 August 1880, reveals the debates and decisions on the navigation on the Danube at the preliminary Peace Conference in Vienna and the Paris Congress in 1856, at the Paris Conference in 1858 and at the Berlin Congress in June-July 1878. The decisions of all these important international meetings confirmed the essential principle of freedom of navigation on the Danube for all States, whether riparian or not, without reserving any of them an exceptional or privileged position.

Mihail Kogălniceanu completed his mission in Paris on November 24, 1881, when he presented his letters of recall. This was his last official post as a diplomat.

On April 1/13, 1891, he expressed his views in public, for the last time, in the solemn session of the Romanian Academy. The evocation of the main moments of his life and political activity meant, in fact, the presentation of the main stages of Romanian history in the 19th century – the revolution of 1848, the Union of 1859, the full independence of 1877 – these are significant moments of Romania's social development.

In conclusion, Mihail Kogălniceanu, a remarkable successor of the diplomacy consecrated by Dimitrie Cantemir at the beginning of the 18th century, consistently pursued the achievement of the objectives that ensured the country's progress. **He was a historian with a real vocation, a literary talent, a high-vibrational speaker, a diplomat of European stature, a great patriot concerned with ensuring national sovereignty.**

[15] M. Kogălniceanu, *Danube Cesion*, revised edition, Bucharest, 1882.

Bibliography

1. Dan Berindei, *Istoria României,* Editura Academiei Române Bucureşti, 1964, vol. IV.
2. Dan Berindei, *Studii şi materiale de istorie modernă,* Editura Academiei Române Bucureşti vol. II, 1960.
3. M. Kogălniceanu, *Scrisori, Note de călătorie,* ediţia Augustin Z.N. Popp şi Dan Simonescu, Editura pentru literatură, Bucureşti, 1967.
4. Mihai Kogălniceanu, *Texte social-politice alese*, Bucureşti, Editura Politică, 1967.
5. M. Kogălniceanu, *Cestiunea Dunării*, ediţie revăzută, Tipografia Academiei Române Bucureşti, 1882.

Legal Aspects and Legal Considerations Regarding the Application of the Correct Relevant Legal Provisions Regarding the Length of Service and the Period of Contribution to be Taken into Account in the Case of Individual Part-Time Work Contracts

Dimitrie-Dan RAICIU[1]
Anca RAICIU[2]

Abstract
The present approach addresses the legal provisions regarding seniority and the contribution period that are taken into account, in the case of employees under individual employment contracts with part-time, for the stipulation of salary rights in the budgetary sector, respectively the contribution period in the public person system.

Keywords: *individual part-time work contract, seniority in work, contribution stage, social insurance system, employee rights, salary rights*

The analysis we propose presents a theoretical and practical importance, at least from the point of view of age in work and the contribution stage that are taken into consideration, in the case of **employees under individual labor contracts of part-time work**, *for the establishment of salary rights, in the budgetary sector, in relation to their work age,* **respectively** *of the contribution stage that are taken into account in the public pension system.*

I. *The first* aspect on which we stop, refers to the length of work that is taken into account, **in the case of employees under individual labor contracts with part-time,** *for the establishment of wage rights in the budgetary sector*.

Taking into consideration that according to the previsions in art. 104 paragraph (1) in the Law no. 53/2003 – The Labor code:[3] "*The employer may hire employees with a fraction of norm through individual employment contracts for an indefinite or determined duration, called individual contracts of part-time*

[1] Lawyer lecturer PhD.
[2] Legal expert, The Ministry of Finances.
[3] Published in Romania's Official Journal, Part 1, no. 345 from May 18, 2011, further changed and completed.

work". According to the previsions of art. 106 paragraph (2) in the same normative act: "*The salary rights are granted in proportion to the actual time worked, in relation to the rights established for the normal working hours".*

According to the previsions of art. 10 paragraph (1) of the framework Law no. 153/2017 on the remuneration of the personnel paid from public funds:[4] "*the basic salaries are differentiated by functions, grades/steps", and gradations*", and grades and gradations in paragraphs 4-6 of the same article, are provided for the seniority paths in work depending on which the 5 graduations are granted, provided by law no. 153/2017, within each degree/ professional steps, aiming for the next graduation to be granted with the ate of the first day in the month following the one when the conditions for granting have been fulfilled, and in the case of new staff, the graduation is granted corresponding to the seniority held in the work.

Taking into account the legal previsions presented, **two possible ways of applying them are separated,** in the case of employees who have worked with individual contracts of part-time**, for granting a higher grade, in relation to their seniority**, *during the execution of the individual labor contract* **or** at the hiring as new staff:

a) an interpretation/ method of application is that when calculating the seniority periods stipulate by the law for grating the graduation, the period worked on the basis of the individual labor contract with part-time, to be taken into account **in proportion to the actual time worked, relative to the normal working hours** (full-time);
b) another interpretation/ application method is that when calculating the seniority periods stipulated by the law for granting the graduation, the period worked on the basis of the individual labor contract with the basis of the individual labor contract with part-time, **to be taken into account in full.**

We appreciate as correct the second way of applying the law, from the following legal considerations:

- according to the previsions of art. 16 paragraph (5) of the Labor code **"the work performed under an individual labor contract constitutes seniority in work".** Therefore, by applying the argument of legal logic according to which where the law does not distinguish even the one applying it is not allowed to distinguish, the work performed under an individual labor contract constitutes seniority in work, regardless of the type of contract (full-time or part-time);

- according to the previsions in art. 106 paragraph (1) in the labor code "*The employee with a part-time individual labor contract* **enjoys the rights of full-**

[4] Published in Romania's Official Journal, Part 1, no. 492 from June 28, 2017, further changed and completed.

time employee, under the conditions provided by the law and the applicable collective labor contracts ". Therefore, *all rights* **(seniority in work,** rest leave, sick leaves, etc.). From this rule, **by way of exception**, in paragraph (2) of the same article, it is stipulated that the salary rights are granted in proportion to the actual working time related to the salary rights established by the normal work program. Since the exception is a structural interpretation, this prevision cannot be extended, for example, by analogy, to other rights, such as the calculation of seniority in work.

We conclude, showing that the legal dispositions invoked establish that the employee with a part-time individual employment contract enjoys the same rights as a full-time employee from the same unit, who performs the same or similar activity, with the same professional qualification, **in terms of length of work**.

II. The second aspect concerns the way to take into account the period worked under an individual employment contract with part-time when determining the contribution period in the public social security system - in whole or in proportion to the actual time worked?

According to the previsions in art. 6 paragraph (1) n the Law no. 263/2010 concerning the unitary *public pension system*[5], in the public pension system, **the persons who carry out activities on an individual labor contract** are necessarily insured. We note that even in this case, it does not distinguish in relation to the type of individual labor contract (full-time or part-time). Consequently, it is due and withheld, according to the previsions mentioned in Law no. 263/2010 and Law no. 227/2015 – The tax code,[6] the contribution of social insurances from all persons working under an individual labor contract, throughout the period during which the contract is in performance, regardless of the type of contract – full-time or part-time.

According to the previsions in art. 3, paragraph (1) letter p in the Law no.263/2010, *the contribution period represents the period for which the social security contributions in the public pension system were due.*

Therefore, since the employees with individual labor contract with part-time necessarily contribute to the public pension system, during the period of the contract, **this period constitutes a full contribution stage**, regardless of the amount of the contribution.

[5] Published in Romania's Official Journal, Part 1, no. 852 from December 20, 2010, further changed and completed.

[6] Published in Romania's Official Journal, Part1, no. 688, from September 10,2015, further changed and completed.

Reasons for Unconstitutionality of Some Provisions of the Emergency Ordinance of the Government of Romania no. 130 of December 17, 2021 Regarding some Fiscal-Budgetary Measures, the Extension of Some Deadlines, as Well as for the Modification and Completion of Some Normative Acts

Constantin ZANFIR[1]

Abstract

The provisions of art. XXIV, pt. 12 and 13 of the Government Emergency Ordinance no. 130/2021 introduce the obligation to contribute to social health insurance for retirees with income from pensions greater than 4000 lei and, at the same time, maintain the exemption from this obligation of those with incomes below this value threshold.

The application of these measures to military pensioners who, according to the Statute of military personnel, benefit from free medical assistance and medicines, but also the method of rationing chosen by the Government raises, in our opinion, serious question marks regarding the constitutionality of these provisions.

The study analyzes the extensive and intrinsic reasons for the unconstitutionality of the provisions of art. XXIV, pt. 12 and 13 of the Government's Emergency Ordinance no. 130/2021 regarding some fiscal-budgetary measures, the extension of some terms, as well as for the modification and completion of some normative acts.

Keywords: *social health insurance contribution, discrimination, military pensioners, the principle of equal rights, unconstitutionality*

The legal provisions that fall under the scope of our study are those of art. XXIV, point 12 and point 13 of the *Emergency Ordinance of the Government of Romania no. 130 of December 17, 2021 regarding some fiscal-budgetary measures, the extension of some deadlines, as well as for the modification and completion of some normative acts*, articles that have the following content:

Art. XXIV

"Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015, with subsequent amendments and supplements, is amended and supplemented as follows:

[1] Lecturer PhD., Spiru Haret University, Bucharest, e-mail: constantin.zanfir@spiruharet.ro

12. Article 154 paragraph (1), letter h) is amended and will have the following content:

h) natural persons who have the status of pensioners, for income from pensions up to the amount of 4,000 lei per month inclusive, as well as for income from intellectual property rights;

13. In Article 155 paragraph (1), after letter a), a new letter is inserted, letter a^1) with the following content:

a^1) income from pensions, defined according to art. 99, for the part that exceeds the monthly amount of 4,000 lei,,.

1. Extrinsic reasons for the unconstitutionality of the provisions of art. XXIV, point 12 and point 13

1.1. The provisions of art. XXIV, point 12 and point 13 of the *Emergency Ordinance of the Government of Romania no. 130 of December 17, 2021 regarding some fiscal-budgetary measures, the extension of some deadlines, as well as for the modification and completion of some normative acts*, amends the *Fiscal Code*, introducing the obligation to pay the social health insurance contribution (SHIC) for some pensioners and maintaining, at the same time, the exemption from paying this contribution for another category of pensioners.

The amendment and completion of the *Fiscal Code* through the aforementioned provisions violates the provisions of art. 1 paragraph (5) of the *Romanian Constitution* according to which:

"(5) In Romania, compliance with the Constitution, its supremacy and laws is mandatory".

According to the provisions of art. 220 of *Law no. 95* of April 14, 2006 *regarding the health reform*, republished, SHIC represents the main source for establishing the unique National Social Health Insurance Fund, a special fund established for the financing of healthcare services in Romania, managed in accordance with the law through National Health Insurance House (NHIH).

As a consequence, we appreciate that the introduction of the obligation to pay SHIC for a large category of the population-pensioners with a pension higher than 4,000 lei per month, has a major impact on the unique national health social insurance fund.

As a result, according to the provisions of art. 220 paragraph (4) of Law no. 95/2006 regarding health reform, obtaining the NHIH's approval for the adoption of *Government Emergency Ordinance. no. 130/2021* was mandatory, we quote the cited text:

"(4)....For the projects of normative acts that have an impact on the fund, developed by the ministries and other specialized bodies of the central public administration, it is mandatory to obtain the appropriate opinion of the NHIH".

The statement of reasons does not show the fulfillment of this imperative condition imposed by the law, so that, in our opinion, the provisions of article 1 paragraph (5) of the Romanian Constitution are violated.

1.2. The way in which the amendment to the *Fiscal Code* was adopted, in order to introduce, starting from 01.01.2022, the obligation to pay SHIC by retirees with pensions higher than 4,000 lei, violates the principle of legal security enshrined in art. 1 paragraph (5) of the *Constitution Romania*, by reference to the principle of fiscal predictability, established by the provisions of art. 4 of the *Fiscal Code*, according to which we quote:

"*Modification and completion of the Fiscal Code*

(1) This code is amended and supplemented by law, which enters into force within at least 6 months after its publication in the Official Gazette of Romania, Part I.

(2) If new taxes, fees or mandatory contributions are introduced by law, existing ones are increased, existing facilities are eliminated or reduced, they will enter into force on January 1 of each year and will remain unchanged on little during that year.

(3) In the situation where the changes and/or additions are adopted by ordinances, shorter terms of entry into force may be provided, but not less than 15 days from the date of publication, except for the situations provided for in paragraph (2).

(4) I make an exception from the provisions of para. (1) and (2) the changes arising from Romania's international commitments".

From the interpretation of the provisions of art. 4 mentioned above, it follows that the amendment and completion of the Fiscal Code for the introduction of new taxes, fees or mandatory contributions, the increase of existing ones, the elimination or reduction of existing facilities, such as those provided by the provisions of art. XXIV, point 12 and point 13, could have been adopted by ordinance with applicability from 01.01.2022, only if the deadline for the entry into force of the measures ordered of at least 6 months from publication in The Official Gazette, Part I.

Only the changes and/or additions that do not concern the situations mentioned above (provided by art. 4 par. (2)), could have had shorter terms of entry into force (compared to the general term of 6 months), but not less of 15 days from the date of publication.

The logical and systemic interpretation of the provisions of art. 3 and 4 of the Fiscal Code lead to the conclusion that the measures of the type provided by art. 4 para. (2), which also include those provided by the provisions of art. XXIV, point 12 and point 13, although theoretically possible, practically, they cannot be

adopted by emergency ordinance, if we consider the characteristics of this type of normative act, without violating the principle of predictability of the tax law.

The Constitutional Court of Romania, in Decision no. 900 of December 15, 2020 published in the Official Gazette no. 1274 of December 22, 2020, considers that according to the provisions of art. 3 Fiscal Code, which establish the principles of taxation in Romania, the taxes, contributions and charges regulated by the code is based, among other things, on the principle of certainty of taxation, which requires "the development of clear legal rules, which do not lead to arbitrary interpretations, and that the terms, method and amounts of payment are precisely established for each payer, respectively that they can follow and understand their fiscal burden, as well as being able to determine the influence of their financial management decisions on their fiscal burden (art.3 letter b)) and the principle of tax predictability which "ensures the stability of taxes, fees and mandatory contributions, for a period for a period of at least one year, in which no changes can occur in the sense of increasing or introducing n taxes, fees and mandatory contributions (art. 3, letter e)).

The legislator who codified the tax legislation emphasizes the aspect of the predictability of taxation, establishing the task of the ordinary legislator who intends to modify the fiscal framework, through measures that introduce new taxes, fees or mandatory contributions, increase the existing ones, eliminate or reduce existing facilities (art.4, paragraph (2)), the following cumulative obligations:

a) the changes enter into force within a period of at least 6 months from the date of publication in the Official Gazette (art. 4 paragraph (1));

b) the new regulations enter into force starting on January 1 of each year (art. 4 para. (2));

c) for the changes and additions that refer to the situations listed in art. 4 paragraph (2) shorter terms cannot be provided than the one stipulated in art. 4 paragraph (1) - 6 months from the date of publication (art. 4 paragraph.(3)).

The Constitutional Court of Romania in the previously mentioned Decision, considers that the provisions of art. 4 of the *Fiscal Code* represent imperative rules aimed at the entry into force of normative acts, an aspect related to legislative activity, which, according to *Law no. 24/2000 regarding the rules of legislative technique for the elaboration of normative acts*, is carried out in compliance with the general principles of legislation specific to the Romanian law system. However, the Constitutional Court held in its jurisprudence that, although technical legislative norms do not have constitutional value, by regulating them, the legislator imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act. Thus, compliance with

these rules contributes to ensuring a legislation that respects the principle of security of legal relations, having the necessary clarity and predictability.

Considering the above, we consider that the amendments to the *Fiscal Code* through the provisions of art. XXIV, point 12 and point 13, violate the principle of legal security enshrined in art. 1 paragraph (5) of the Constitution as well as the principle of predictability of taxation, as it results from the interpretation of the provisions of art. 4 of the *Fiscal Code*.

2. Intrinsic reasons for the unconstitutionality of the provisions of art. XXIV, point 12 and point 13

2.1. The provisions of art. XXIV, point.12 and point.13, which amend the Fiscal Code in the sense that they introduce SHIC of 10% for income from pensions greater than 4,000 lei while maintaining, at the same time, the exemption from paying this contribution for pensions less than 4,000 lei, are unconstitutional by applying them to the state military pension system, regulated by *Law no. 223/2015*.

In other words, the introduction of SHIC for state military pensions that exceed the monthly value of 4,000 lei violates the constitutional principle of equal rights provided by art. 16 para. (1) of the *Romanian Constitution*, according to which:

***"(1) Citizens are equal before the law and public authorities, without privileges and without discrimination*".**

Argument

The army, and, implicitly, the military have a constitutional status provided by:

- art. 118 para. (1) and (2):

"(1) The army is subordinated exclusively to the will of the people to guarantee the sovereignty, independence and unity of the state, the territorial integrity of the country and constitutional democracy. Under the terms of the law and international treaties to which Romania is a party, the army contributes to collective defense in military alliance systems and participates in actions related to maintaining or restoring peace.

(2) The structure of the national defense system, the preparation of the population, the economy and the territory for defense, as well as the status of military personnel, are established by organic law.

- art. 54 para. (1) and (2):

"(1) Loyalty to the country is sacred.

(2) Citizens who are entrusted with public functions, as well as military personnel, are responsible for faithfully fulfilling their obligations and, for this purpose, will take the oath required by law.

- art. 42 para. (1) and (2), letter a):

"(1) Forced labor is prohibited.

(2) It does not constitute forced labor:

a) activities for the fulfillment of military duties, as well as those carried out, according to the law, instead of them, for religious or conscience

- art. 40 paragraph (3):

"(3) Constitutional Court judges, people's advocates, magistrates, active members of the army, policemen and other categories of civil servants established by organic law cannot be part of political parties".

In order to fulfill the constitutional missions, the legislator also adopted the necessary legal instruments, including Law no. 80/1995 regarding the status of military personnel with subsequent amendments and additions, and Law no. 384 no. 384/2006 regarding the status of soldiers and professional graduates.

Through these statutes, the aforementioned constitutional provisions are put into practice. Thus the main duties of the military, cadres, soldiers and professional ranks, prohibitions and privations of military service were established.

We quote in this regard the provisions of art. 7 of *Law no. 80/1995*

"The duties, rights and freedoms of military personnel are those established by the Romanian Constitution, the laws of the country and the present statute.

The profession of officer, military foreman or non-commissioned officer entails additional duties, as well as the prohibition or restriction of the exercise of certain rights and freedoms, according to the law".

In proportion to the constitutional missions, duties and privations imposed by the military activity, the two statutes also established the rights of active or reserve and retired military personnel (cadres, soldiers and professional ranks).

Among these rights, the two statutes provide, without any conditions, the right to free medical assistance and medicines within the health network of M.Ap.N. or in other health networks, with the settlement of expenses by this ministry.

We quote in this regard:

- the provisions of art. 26 paragraph (1) of *Law no. 80/1995*:

"Officers, military foremen and non-commissioned officers in reserve and retirement, military pensioners, have the right to free medical assistance and medicines under the conditions of art. 23 para. 1 lit. a)".

- the provisions of art. 19 paragraph (1) of *Law no. 384/2006*:

"(1) *Soldiers and professional ranks who have been transferred to the reserve or removed from military records based on the provisions of art. 45 para. (1) lit. a)-e), g), h) and m) benefit from the measures of social protection and professional reconversion, under the conditions provided by the legislation in force for military personnel."*

So, according to the law, all military retirees, military personnel, rank and file professionals have the right to free healthcare and medicine, equally, unconditionally, without discrimination.

By the provisions of *Government Emergency Ordinance* no. 130/2021, art. XXIV, pt. 12 and pt. 13, the Executive violates the constitutional principle of equality of rights provided by the provisions of art. 16 of the Romanian Constitution.

Thus, for military retirees with a monthly pension of more than 4,000 lei, the obligation to pay SHIC is introduced as a percentage of 10% of the pension, while for other military retirees the exemption from paying this contribution is maintained.

The legal nature of SHIC is established by Law no. 95/2006 on health reform with subsequent amendments and additions. According to this normative act, social health insurance represents the main system of financing the health protection of the population that ensures access to a package of basic services for the insured (art. 219 paragraph (1)). SHIC is borne by the insured from the amounts distributed to the National Single Social Insurance Fund according to the Fiscal Code.

Therefore, according to the law, but also the doctrine and jurisprudence of the CCR, SHIC aims to cover a professional or social risk, it is established in such a way as to cover the cost of benefits and services for the insured cases, the expenses for the prevention of work accidents and occupational diseases, depending of tariffs and risk classes, the contribution rates applying to the monthly basis of calculation respectively to the income obtained by the insured (see CCR Decision no. 900 of December 15, 2020 published in the Official Gazette no. 1274 of December 22, 2020).

Against these considerations, the criticized provisions of *Government Emergency Ordinance* no. 130/2021 implicitly create two categories of military pensioners:

a) military pensioners with monthly pension income of less than 4,000 lei, who do not pay SHIC and who thus benefit from the right to free medical assistance and medicines, the provisions of art. 26 paragraph (1) of Law no. 80 being incidental /1995 and, respectively, art. 19 paragraph (1) of Law 384/2006;

b) military pensioners with monthly pension income of more than 4,000 lei, who pay SHIC and who do not benefit from the right to free medical assistance and medicines.

In other words, this last category benefits from medical assistance and medicines on the condition of the mandatory payment of SHIC (the SHIC payment covers, as I previously emphasized, the costs of medical benefits and services, as a consequence, by paying 10% of the monthly pension value, this category of pensioners the military basically pays for their healthcare and medicine).

It should not be overlooked that during the activity this category of military personnel paid, in absolute value, a much higher social health insurance contribution than those who had balances lower than 4,000 lei (SHIC calculated as a percentage of the monthly value of the balance).

Such conditioning of the provision of medical assistance services for some of the military retirees is obviously discriminatory, violating the provisions of art. 16 of the Romanian Constitution regarding equal rights.

With regard to the principle of equal rights, the Constitutional Court held in a constant jurisprudence, starting with the Plenary Decision no. 1 of February 8, 1994, published in the Official Gazette of Romania, Part I, no. 69 of March 16, 1994, that this implies the establishment of equal treatment for situations which, depending on the purpose pursued, are not different.

As a result, the situations in which certain categories of persons find themselves must differ in essence in order to justify the difference in legal treatment, and this difference in treatment must be based on an objective and rational criterion (see, in this sense, with the exemplary title, Decision no. 86 of February 27, 2003, published in the Official Gazette of Romania, Part I, no. 207 of March 31, 2003, Decision no. 476 of June 8, 2006, published in the Official Gazette of Romania, Part I, no. 599 of July 11, 2006, Decision no. 573 of May 3, 2011, published in the Official Gazette of Romania, Part I, no. 363 of May 25, 2011 or Decision no. 366 of June 25, 2014, published in the Official Gazette of Romania, Part I, no. 644 of September 2, 2014, paragraph 55, Decision no. 755 of December 16, 2014, published in the Official Gazette of Romania, Part I, no. 101 of February 9, 2015, paragraph 23).

The principle of equal rights does not mean uniformity, the violation of the principle of equality and non-discrimination exists when differential treatment is applied to equal cases, without an objective and reasonable motivation, or if there is a disproportion between the aim pursued by the unequal treatment and the means used (see, in this sense, Decision no. 20 of January 24, 2002, published in the Official Gazette of Romania, Part I, no. 243 of April 10, 2002, Decision no. 156 of May 15, 2001, published in the Official Gazette of Romania, Part I,

no. 339 of June 26, 2001, Decision no. 310 of May 7, 2019, published in the Official Gazette of Romania, Part I, no. 663 of August 9, 2019).

Disregarding the principle of equality results in the unconstitutionality of discrimination, which determined, from a normative point of view, the violation of the principle. The Court also established that discrimination is based on the notion of "exclusion from a right" (Decision of the Constitutional Court no. 62 of October 21, 1993, published in the Official Gazette of Romania, Part I, no. 19 of February 25, 1994), and the specific constitutional remedy, in case the unconstitutionality of discrimination is established, is the granting or access to the benefit of the right (see Decision no. 685 of June 28, 2012, published in the Official Gazette of Romania, Part I, no. 470 of July 11, 2012, Decision no. 164 of 12 March 2013, published in the Official Gazette of Romania, Part I, no. 296 of 23 May 2013, or Decision no. 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, no. 889 from December 8, 2014).

In the same sense is the constant jurisprudence of the European Court of Human Rights, which ruled, in application of the provisions of art. 14 of the *Convention on the Protection of Human Rights and Fundamental Freedoms* regarding the prohibition of discrimination, that any difference in treatment committed by state between individuals in similar situations, without objective and reasonable justification (for example, by the Judgment of 13 June 1979 in the Case of Marckx v. Belgium, the Judgment of 13 November 2007 in the Case of D.H. and others v. the Czech Republic, para. 175, Judgment of 29 April 2008 in Burden v. United Kingdom, para. 60, Judgment of 16 March 2010 in Carson v. United Kingdom, para. 61).

Applying these rulings to the situation created by the adoption of *Government Emergency Ordinance* no. 130/2021, point 12 and point 13, we can easily find that, although the legislator did not establish any distinction within the category of protected persons, so that, theoretically, all military pensioners have the free right to medical assistance and medicines, introduced a condition that actually determines that people in the same category, therefore in the same legal situation, namely military pensioners, are treated differently.

Thus, although all military pensioners are entitled to the benefit granted by the legislator, namely the right to free medical assistance and medicines, in reality only military pensioners with a monthly pension of less than 4,000 lei benefit from this right. The other military pensioners have medical assistance conditional on the payment of SHIC; non-payment of this contribution entails the loss of the insured status and, implicitly, the rights to medical assistance provided by the two statutes (*Law no. 80/1995, Law no. 384/2006*).

As a consequence, the condition imposed by the criticized texts is likely to introduce a difference in legal treatment, based on criteria independent of the will of the beneficiaries of the norm and which does not find an objective and

reasonable justification. However, "a different treatment cannot only be the expression of the legislator's exclusive appreciation, but must be rationally justified, in accordance with the principle of equality of citizens before the law and public authorities," states the CCR in Decision no. 1/1994.

The monthly value of the state military pension is not an objective and rational reason to introduce such discrimination through the "exclusion from law" of an important category of military pensioners, in the conditions where the constitutional principle of equal rights is taken over and of the *Law on state military pensions no 223/2015*, art. 2 letter b), as one of the fundamental principles of the state military pension system, "*by which non-discriminatory treatment is ensured to all participants in the state military pension system between persons in the same legal situation, in terms of the rights and obligations provided for by law*."

The application of the principle of equality of the state military pension system does not imply egalitarianism.

The army is a strongly hierarchical organization based on ranks and functions, it is the way of being of the military institution, otherwise it would not be able to fulfill its constitutional purpose - guaranteeing the sovereignty, independence and unity of the state, the territorial integrity of the country and constitutional democracy.

The application of the principle of equality of rights to the state military pension system legally and objectively leads to a hierarchy of the system (a fact not specific to the public pension system), hierarchy generated by the ranks and functions performed at the time of the transfer to the military reserve with the right to a pension. Practically, the military pension system is a copy of the army hierarchy.

Under these conditions, to arbitrarily establish a value threshold of the military pension that is subject to the payment or non-payment of SHIC in order to benefit from the right provided equally by law and thus to separate military pensioners has no objective and reasonable justification.

These legislative measures bring individual damages to military pensioners (basically the net value of military pensions decreases by a percentage of 10%, so the introduction of SHIC seems to sanction the fact that some pensioners had positions and degrees, obtained, otherwise legally, under the conditions of the statute, which allowed them a pension higher than 4,000 lei) but also the military pension system as a whole - the value hierarchy of military pensions, objectively imposed by the rank and position held when entering the reserve, is strongly unbalanced, the principle of equality, proclaimed at art.2, letter b) remaining without substance.

Finally, we note that the practice of the C.C.R. evolved in the sense of establishing and developing increased constitutional requirements to ensure

effective protection of fundamental rights and freedoms. The jurisprudence of the C.C.R. is in accordance with the practice of the ECHR, which ruled that the purpose of the Convention for the Protection of Human Rights and Fundamental Freedoms is to protect concrete and effective rights, not theoretical or illusory. (CCR decision no. 657 of October 17, 2019, published in the Official Gazette no. 882 of 01.11.2019).

In accordance with these interpretations, the realization of the equal right of military pensioners to free medical assistance and medicine becomes illusory if, in order to benefit from it for some of the military pensioners, the condition of paying SHIC is imposed, without an objective and reasonable justification.

In conclusion, the provisions of art. XXIV, point 12 and point 13, by applying to the state military pension system, are unconstitutional and affect the fundamental right to equal rights, provided for by the provisions of art. 16 of the *Romanian Constitution*.

Short viewpoints regarding the abuse of procedural law

Adela Maria CERCHEZ[1]

Abstract

The parts of the civil process must develop their processual activity by respecting the procedural obligations prosecuted by the law entirely, thus in the limits of the procedural rights recognized by the law.

The code of the civil procedure highlights truthfulness as a fundamental principle of the civil process, not just concerning the practice of the procedural rights, but also concerning their observance.

The practice of the procedural rights and the fulfillment of the procedural obligations both with truth lessness represents abuse of rights penalized by assuming the responsibility for rectifying the material or the moral damages that were caused and, at the same time, by being obliged to pay a judicial fee according to the law.

Keywords: *procedural obligation, abuse of right, truthfulness, civil process*

According to the dispositions of art.12 from the Code of the civil procedure "(1) The processual rights must be accomplished with truthfulness according to the purpose in which each of it are recognized by the law and without infringing the processual rights of the other part. (2) The part that bears the processual rights in an abusive way has to justify for the material and moral damages that were created. According to the law, she could be obliged to pay a judicial fee. (3) Moreover, the part that does not accomplish the processual obligation with truthfulness is responsible according to par. (2)"[2].

The law identifies a number of procedural rights to the parts of the civil process, but it also imposes to respect some correlative procedural obligations. As far as the area of the procedural rights recognized for the parts of the civil process are concerned, we can mention the following: the right to recourse the court with requests, the right to participate to a process, the right of defense, the right to be represented or assisted by a lawyer, the right to propose and administrate evidences, the right to consult an interpret, the right to organize the

[1] lecturer PhD, Spiru Haret University.

[2] Law nr. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no. 247 from 10th of April 2015.

documents personally or through an agent that can act on your behalf, if the law allows this, the right to request to move the process to another court, the right to reject the judges, the actuaries, the trier assistants, the judicial assistants, the prosecuting attorneys, the experts, the interprets, the translators only under the conditions and only in those cases approved by the law, the right to recede from an instance or to the right inferred by that judgement, the right to adhere to the requirements of the other part or to an established judgement, the right to establish a transaction, the right to bear the effective remedy, mentioned in the law, the right to trigger the forced execution, etc. As far as the parts of the civil process are concerned, the law recognizes a list of procedural rights, but it also imposes to respect some correlative procedural obligations.

Regarding the procedural obligations, more opinions concerning their number and content have been presented. Thus, in the case of one opinion it was established that there is one single procedural obligation imposed by the law concerning the parts of a civil process, respectively the pursuit of the procedural rights with truthfulness.According to other opinions, this obligation must be completed through a series of other obligations such as the obligation to be in front of the court, of respecting the procedural deadlines, to prove the pretentions and defences, to pay the court expenses in case if the part is obliged to pay the cost of the proceedings, etc, and, nonetheless to have the obligation to say only the truth, even if this obligation lacks an adequate legal basis and also a possible penalty, in case of its violation by the litigants.[3]

Having the dispositions of art 10 par. (1) in Civil Procedural Code related to obligations of both parts in the evolution of the process "both parts are obliged to accomplish the procedural documents under the conditions, order and the deadlines established by the law or by the judge, to simulate the pretentions and the defense, to contribute to the evolution of the process without any delay, by following its ending"[4].

From the perspective of the dispositions of art. 12 par. (1) Code of civil procedure "the procedural rights must be exercised with truthfulness, according to the purpose in which it was recognized by the law and without infringing the procedural rights of other part"[5].

With respect to these legal dispositions we can state that the parts of the civil process have the following procedural obligations: the obligation to bear all the procedural rights with truthfulness related to the purpose for which it was

[3] Boroi G., Stancu M., *Civil procedural law*. 5th edition reviewed and adjusted, Hamangiu publishing, 2020, p. 102.

[4] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.

[5] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.

recognized by the law and without infringing the procedural rights of the other part, to accomplish the procedural documents under the conditions, order and the deadlines established by the law or the judge, to simulate the pretentions and the defense, to contribute to the evolution of the process without any delay and following its ending under the sanction of existing other sanctions, the payment of some fees or even the loss of the process.

The diversion of the procedural rights from the purpose on which they were recognized by the law, the bear of the procedural rights and the accomplishment of the procedural obligations with truthlessness represents an abuse of right penalized with the liability for redressing the caused material or the moral lesions and, at the same time, with the obligation to pay a judicial fee, according to the law.

The abuse of right is established in the actual regulation through provisions art. 15 Civil code according to which "no right can be born with the purpose of injuring or to impair someone in an exceeding and unreasonable, opposite truthfulness"[6].

In a procedural way, the abuse of procedural right is highlighted through provisions of art 12 in the Code of civil procedure according to which "(1) the procedural rights must be born with truthfulness related to the purpose for which it was recognized by the law and without infringing the procedural rights of the other part"[7].

From the corroboration of the provisions art. 15 Civil code and the provisions 12 par. (1) the Code of civil procedure is concluded that the procedural right claims two elements: a subjective and an objective one.

The subjective element of the abuse of the procedural right supposes the bear of the procedural rights with truth lessness in order to tease the other person, with the intention to injure her, to baffle her possibility to value the procedural rights, without any justification of a legal interest and also the violation of the procedural rights of the other person.

The objective element of the abuse of the procedural right supposes the diversion of the procedural rights from the purpose on which they were recognized by the law or the prosecution of the procedural rights in an excessive without justification of a legitimate interest.

A procedural document can be characterized as being abusive if the following conditions are respected[8]:

[6] Law no. 287 from 17th of July 2009 concerning the Civil code, republished in Official Gazette of Romania no 505 from 15th July 2011.

[7] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.

[8] Boroi G., Stancu M., *Civil procedural law*. 5th edition reviewed and adjusted, Hamangiu publishing, 2020, p. 104.

- the author of the abusive procedural document must be the owner of the borne procedural right and be able to bear it;
- the procedural right should be borne in its external limits established by the law, with a material or judicial nature, respectively to respect the legal provisions concerning the form, the conditions and the deadlines in which it should be borne, so the abusive procedural document supposes only the overcoming of its internal limits and it should not be confused with the document of illegal procedure which supposes the overcoming of its external limits, established by the law;
- the procedural right must be borne by overcoming its internal limits, so the availability of the right should not be confused with the way of bearing the existing right;
- the procedural right should be borne on the contrary of the purpose for which it was recognized by the law or to be borne in an excessive and unreasonable way, without the validity of a legal interest;
- the procedural right which is borne with truth lessness in a carping way, its tutor purpose being to injure the other part through the bearing of the respective procedural document.

The abuse of the procedural right can be evident through multiple forms such as: the introducing of an unfounded address in court, with truthlessness, in a carping way, to obtain undeserved interests ; acting in court of a borrower even if the debt has been already paid so that the debtee can obtain a new payment; the promotion of some displacement requests or of challenge with truthlessness; the promotion of some requests of judicial public help with truthlessness; the specifications of some requests in order to postpone the judgement; the execution of a procedural action in order to delay the evolution of the process; the request of some excessive assurance measures that overcome the area of the legal interest concerning the preservation of the claim through the number and their importance; the promotion of the appeal to the execution exclusively to carp the debtee or to delay the execution of a court order, the prosecution of the right to promote ways to attack with truthlessness through reinforcing a way of attack; the resistance of the respondent towards a clear pretention with a clear truthlessness.[9]

Concerning the penalty of the abuse of the procedural law, regarding the provisions of art. 12 par. (2) The code of civil procedure "the part that bears the procedural law in an abusive way argues for the caused material and moral damages. According to the law, she can be obliged to the payment of a particular judicial fee."[10]

[9] Boroi G., Stancu M., *Civil procedural law*. 5th edition reviewed and adjusted, Hamangiu publishing, 2020, p. 104-105.

[10] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.

The abuse of the procedural right is penalized with the obligation of the one who bore the procedural rights in ana abusive way to recoveries in order to compensate for the caused material and moral damages. Taking the principle of the availability into consideration, specific to the civil process, the recoveries will not be paid by the office, but at the request of the injured one. In the lack of some specific rules concerning the conditions of taking the responsibility for the caused damage through abusive borne of a procedural right, the rules of the civil responsibility become available wrong for your own case established through the provisions of the art. 1357 Civil Code according to which " the one who causes a prejudice to the other person through an illegal action, realized in a transgressive way, is obliged to repair it." The remedies for reclaiming the material and moral damages caused as a consequence of the abusive prosecution of the procedural rights can be requested within a process in which one of the parts bore the procedural rights abusively, by having a separate process, in this case the limit of prescription being of three years that start from the date on which the injured part knew or should have known the damage and the one who must argue for its realization, regarding the provisions of the art. 2528 par. (1) Civil Code.[11]

The code of the civil procedure readjusts, including the obligation to pay damages and the penalty of the part who bore the procedural rights with truthlessness with a judicial fee, in this way being the provisions of art. 187 Code of civil procedure related to the penalties regarding the violation of the obligation concerning the evolution of the process, but also of art. 188 Code of civil procedure concerning other penalties cases.

As an example title, according to the provisions of art. 187 Code of civil procedure are executed with judicial fee: the introduction of some main requests accessories- auxiliaries or incidental- through truthlessness, but also the introduction of a new useless trial, the formulating with truthlessness of a challenge or displacement; the obtaining with truthlessness of a citation through publicity of any parts; the obtaining with truthlessness by the claimer whose request of new assurance ways were rejected in which the accused one was injured; the disproof with truthlessness from its author of the piece of writing or a document or the authenticity of a video or audio recording.[12]

At the same time, in accordance with the provisions of art 189 Code of civil procedure related to the recoveries for the postponing the process " the one, with intention or by fault, caused the postponing of the trial or the forced execution, through one of the facts stipulated in art. 187 or 188, at the request of the interested part, can be obliged by the judge or, in some cases, by the president of

[11] Law no. 287 from 17th of July 2009 concerning the Civil code, republished in Official Gazette of Romania no 505 from 15th July 2011.

[12] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.

the execution place to pay a recovery for the material or moral prejudice caused by the postponing."[13] The before mentioned text applies even if the part is guilty or not of accomplishing an abuse of right.

Also, the abusive procedural document will be penalized with the lack of the effects that are on the contrary of the purpose in which the abusive borne right was acknowledged by the law. On the hypothesis in which the document of abusive procedure has a stative availability, the penalty will be available only for this document, but if the document of abusive procedure is the base for other procedure documents, the abusive one but also the other that followed it will be useless.

In accordance with the provisions of art. 12 par. (3) Code of civil procedure and the part who does not accomplish the procedural obligations with truthfulness is responsible for the caused material and moral damages. Moreover, she could be obliged to pay a judicial fee, according to the law.

Bibliography

1. Boroi G., Stancu M., *Civil procedural law*. 5th edition reviewed and adjusted, Hamangiu publishing, 2020.
2. Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015.
3. Law no. 287 from 17th of July 2009 concerning the Civil code, republished in Official Gazette of Romania no 505 from 15th July 2011.

[13] Law no. 134 from 1st of July 2010 concerning the Code of civil procedure, republished in Official Gazette of Romania no 247 from 10th April 2015

ETHICAL VALUES SPECIFIC TO THE PUBLIC OFFICE IN THE FIELD OF STRUCTURAL FUNDS. THEORETICAL AND PRACTICAL ASPECTS

Andrei Marian- Lucian BACIU[1]

Abstract

Civil servants operating in the European Union are obliged to respect the moral and deontological values of the profession, which are highlighted by a behavior appropriate to the purpose of this profession, namely: satisfying the needs of the citizen and by the efficiency with which the administrative act is completed.

The activity in the departments / directions for attracting and implementing structural funds represents a special activity in the central and local public administration, since the efficiency of work is observed through the financial resources attracted through various operational programs and projects implemented on time. To achieve maximum efficiency, the official, in addition to the ability to effectively organize the administrative activity, must have a high degree of conscientiousness towards the service he provides, doubled by professionalism, and the employer must ensure him appropriate working conditions, with all legal and salary rights related to rank and position. These will have the direct result of ensuring an optimal standard of living and will allow specific activities to be carried out in good conditions, and his desire will be to achieve results.

Attracting European funds by local public authorities is a challenge because the excessive bureaucracy required to complete the process of approving funding requests is arduous and cumbersome, and nevertheless, in my view, the departments implementing the funds, by involving and the desire to achieve results, complete this procedure brilliantly, which will create suitable living conditions for the citizens, direct beneficiaries of the projects.

Keywords: *Structural founds / civil servants / moral and deontological values*

Research motivation and methodology

"*Sustainable development is development that seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs*[2]*".*

The structural funds represent an important opportunity for economic development of all the member states of the European Union, and at the same time we have the obligation that, through the investments we will implement at

[1] Second year at Master Program – PUBLIC ADMISTRATION AND MANAGEMENT IN THE EUROPEAN CONTEXT- "Spiru Haret" University, Faculty of Legal and Administrative Sciences, Scientific coordinator, Associate professor PhD. Roxana-Daniela Păun.

[2] Lester Brown, *State of the World*, Plan B 4.0, Washington, 2000.

the level of central and local public authorities, although they will have as their main purpose the economic development of communities, they will not have to affect the future of our children.

In the context of the concern for a real openness and transparency of the local public authorities, from the continuous desire for the development of the communities they lead, the leaders of the local authorities propose to capitalize on their potential, financing opportunities and all availability for economic - social development and creating a competitive and stimulating business environment, designed to attract private investments, which will create new jobs and implicitly increase the standard of living of citizens.

In order to achieve these prerogatives, local public authorities must create a mechanism of their own to identify, apply, request, implement and complete the procedures for accessing European funds and structural funds applicable at the national level. The ability to attract funding sources of each applicant differs from case to case, as a public authority has management departments - implementation of European funds with many specialized civil servants, and other authorities do not have any employees specialized in this branch in their organizational charts. Thus we can speak here of different capacities for attracting and implementing European and structural funds.

Their professional conduct and deontological values must be irreproachable, as through the way of fulfilling their duties, the results of their work can be seen in local communities by increasing the quality of life as a result of the completion of projects in different fields (infrastructure, economy, health, culture, education, etc.). Thus, general local budgets will have a substantial increase. At the same time, the professionalism and way of working must be at a high level, as they attract financial resources to the communities they represent, bureaucratic procedures are difficult, and non-compliance with procedures and deadlines can lead to the loss of funding, and in the worst case, the amounts used will have to be returned to the project management units.

The general objective of this research paper is to contribute to the clarification of the importance of the ethical values of civil servants in the process of attracting European, structural and other funds for local public authorities based on funding standards and procedures.

The specific objective of this research paper is:

- The ethical values of civil servants responsible for the implementation of projects at the level of local authorities. Case study – Vâlcele town hall, Covasna county.

Any scientific work is based on specific research of the chosen topic to ensure the achievement of the proposed objectives. The entire research process is based on bibliographic documentation from various sources (specialist books, scientific works, publications, etc.) on the basis of which the author can prepare

a complex work, which will concretely and coherently transpose the proposed general and specific objectives.

The work proposed for the research "*Ethical values specific to the public function in the field of structural funds. Theoretical and practical aspects*" will be structured on several levels, namely the conceptual - theoretical part, the conceptual - practical part and practical aspects analyzed through an applied case study.

The importance of the chosen theme

The science that studies the obligations and behavior of those who practice a certain profession is called Deontology, which is a branch of Ethics. The difference between Deontology and Ethics is applicability, while ethics studies the philosophy of moral duties, deontology is the applicable science.

The term deontology comes from the Greek words deon, deontos and logos meaning what is right and logos meaning science.

In the analyzed situation, respectively, the deontology of the public official is characterized by satisfying the needs of the citizen in whose interest the public office is exercised and achieving the effectiveness of the public service by gradually increasing the results in the general public interest. The effectiveness of the civil servant varies according to his procedural capacity, memory, personality and thinking.

Deontological values are represented by achieving the efficiency of the public service and satisfying the needs of the citizen, and the civil servant in order to exercise the public function must serve the society and the interests of the citizens

An organization becomes efficient if it consists of efficient and effective staff. The value of the public sector is not only given by the material or financial means at its disposal, but especially by the value found in its human potential[3]. We observe here the fact that a mayor must know the capacity of each subordinate employee in terms of the efficiency of the performance of their duties and stimulate the capacity of self-improvement of each individual, in order to become more efficient and at the same time, the institution will become more efficient in meeting the needs of citizens.

The obligation of every civil servant, regardless of the institution where he works, is to serve the general interest of the citizen, as it emerges from the Latin administer, which means servant. So, the moral obligations of the civil servant are to serve the society and the citizens without going beyond the legal framework provided by the normative acts.

[3] Sorina Dana Veiss, *Efficiency and effectiveness of the public service*, Publishing house. Recent, Vol. 13 no. 3(36), page. 375.

Current data of the proposed objective

The quality of public administration and governance of a country is an essential factor for its economic performance, but also for the well-being of the citizens of that country. Effective public administrations are at the service of citizens and businesses. It is essential that public authorities can adapt to changing circumstances[4].

The local public administration represents a distinct part of the public administration which, on December 31, 2021, totals 454,756 employees, civil servants, contractual staff and other categories of staff, representing 36.02% of the total number of employees in the public system. We observe here, the fact that more than a third of the employees paid from public funds are in direct contact with the citizen serving his general interests as a priority.

In the content of this paper, we will focus on the Vâlcele Administrative-Territorial Unit from Covasna County. On December 31, 2021, it had 5739 inhabitants in its 4 villages (Araci, Vâlcele, Ariușd and Hetea), being the largest rural locality in Covasna County. In order to solve administrative and local interest problems, the specialized apparatus of the Mayor of the commune has a total of 28 employees, civil servants, contractual staff and other types of public personnel. This number represents 0.00061 of the total number of employees in the local public administration. I wanted to mention here the fact that, although it is the largest commune of a county, it is simply insignificant at the national level.

Out of the total of 28 employees, only 4 people have duties in this sense, namely the mayor, the deputy mayor, the mayor's advisor and an advisor from the office of public procurement and project implementation, and in percentage terms it is about 14.28%.

Talking about these 4 people, we will research applied these people with attributions in the application and implementation of European funds at the local level. Although the bureaucracy in this area is very large, the local public authority is doing remarkably well in terms of how it manages structural funds. Following this research, it was found that there is a close, open and success-oriented collaboration between these people, having primarily the desire to carry out projects in the local public interest of the citizens and to strengthen the purpose for which they exercise their public authority.

The main question of scientific research

Considering the fact that the purpose of this scientific research is the deontological values and the place of research, we ask ourselves the question, Are the deontological values of the personnel dealing with the implementation of European funds respected within the Vâlcele town hall?

[4] https://reform-support.ec.europa.eu/what-we-do/public-administration-and-governance_ro

This query creates the premises of new questions such as, For whom is this research important?, What will be the positive implications of doing this research?

The scientific and practical consequences of the research

Following this research carried out on this segment of civil servants, in the near future the research may be extended to other similar localities, respectively municipalities, or it may expand vertically to the level of cities, municipalities, counties and even to the capital.

New perspectives can be addressed, such as the identification of common problems faced by civil servants in this sector, proposals to improve the legal spectrum that applies in this field and, implicitly, the modification of work procedures.

Another very important thing is the feedback that the citizens of the town will give to these people.

The scientific research used in this project is APPLIED RESEARCH – EMPIRICAL, original, having as its main purpose the accumulation of new information that is oriented towards the specific practical objective.

To carry out this research, I decided to use the Interview as a research technique. With this method, I wanted to make direct contact with the citizen, to be able to see the reaction, the way of response, etc.

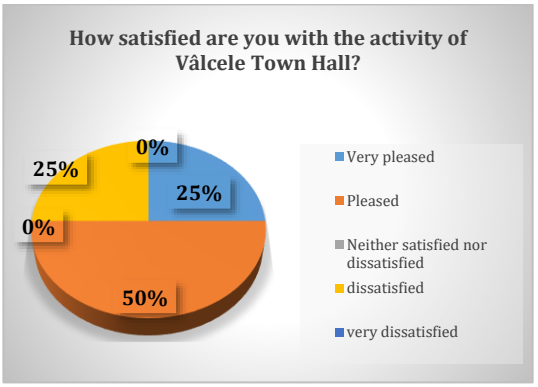
I wanted the target group to be a complex group, which could provide an overview of the scientific research carried out and result in conclusive information on the civil servants in the town hall of Vâlcele municipality responsible for the implementation of European funds. Thus, I interviewed the 4 (four) persons targeted by the scientific research, I randomly chose 6 (six) colleagues from the other departments within the institution (financial, civil status, social, agricultural), and later I chose 10 (ten) citizens living in Vâlcele commune who were kind enough to answer my questions.

The random interview took place at the institution's headquarters in Araci Village, Vâlcele commune, no. 464, Covasna County during the period 10.11.2022 – 15.11.2022.

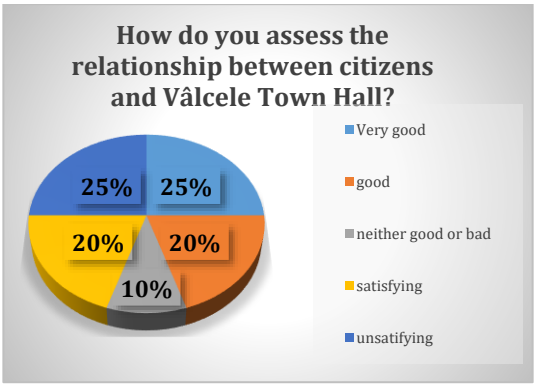
The questions used

1. **How satisfied are you with the activity of Vâlcele Town Hall?**
2. **How do you assess the relationship between citizens and Vâlcele Town Hall?**
3. **How do you assess the way in which projects are submitted to obtain funding from different sources?**
4. **Do you appreciate the way in which the City Hall supports access to funds by individuals or legal entities?**

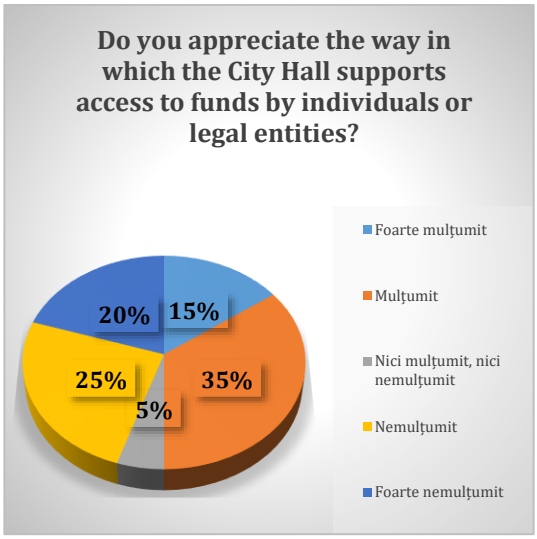
5. **Do you consider Vâlcele Town Hall responsible for all citizens' complaints?**
6. **Does the municipality of Vâlcele effectively monitor and implement the ongoing projects?**
7. **Are civil servants responsible for structural funds professionals?**
8. **What is your opinion about the Local Development Strategy 2021-2027 of Vâlcele Municipality?**
9. **How satisfied are you with the attitude of civil servants specialized in European funds?**
10. **Are the civil servants working in the department of European funds credible?**



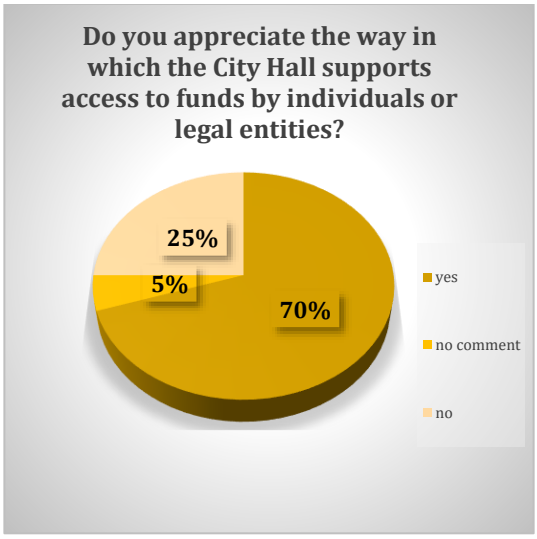
To this question, half of the people interviewed declared themselves satisfied with the institution's activity, a quarter even very satisfied, and a quarter declared themselves dissatisfied.



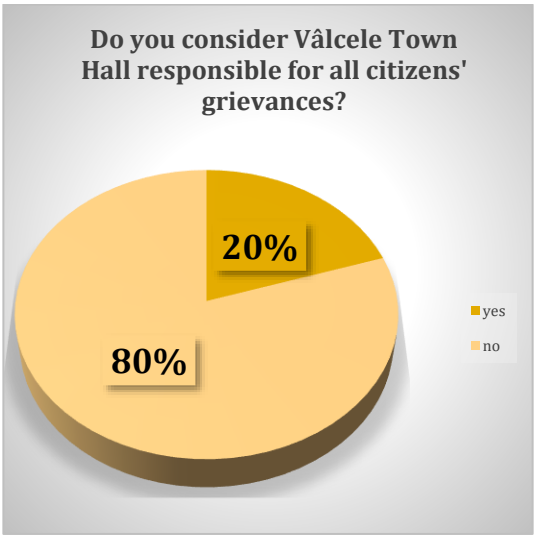
Question number 2 aimed to ascertain the relationship between citizens and the institution, the answers were not conclusive, people's opinions were divided, but overall the relationship between citizens and the town hall is a good one.



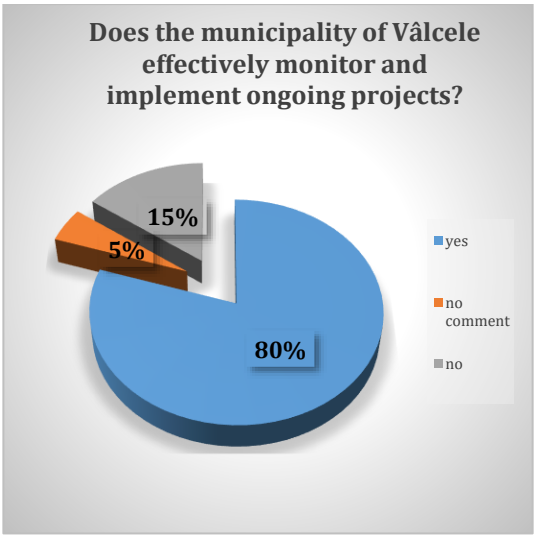
To this question, the method of submitting the projects is very satisfactory or satisfactory from the point of view of half of the people interviewed, while the other half declares neither satisfied nor dissatisfied, dissatisfied and very dissatisfied.



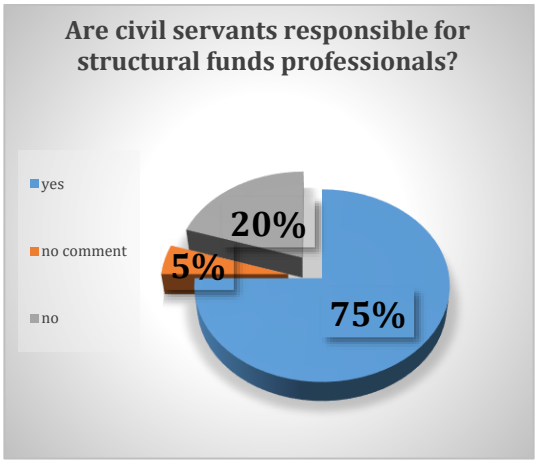
We conclude from this question that the Institution provides support to both individuals and legal entities in the consulting procedure regarding accessing European funds or other funding sources.



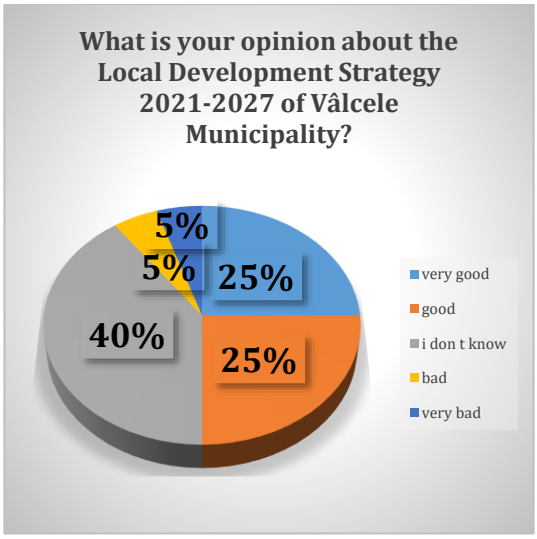
From these answers it is obvious that the institution is not responsible for all citizens' complaints, regardless of their nature.



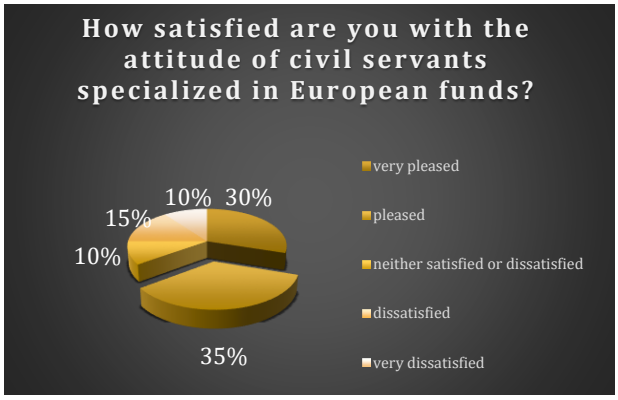
Although there are many ongoing projects at the level of the Vâlcele commune, the administration effectively monitors the ongoing projects.



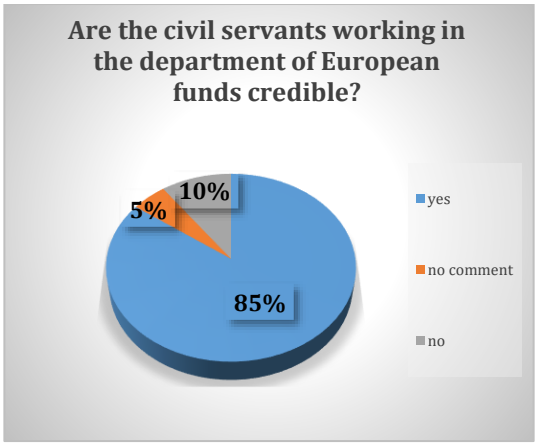
Considering the fact that civil servants responsible for the implementation of structural funds participate in continuous training programs in this field, the citizens of the commune consider that they are professionals.



It seems that many citizens do not know this document, but those who know it have a good opinion.



Most of the people interviewed mentioned that they are satisfied with the attitude of civil servants specialized in European funds.



To this question, we conclude that the civil servants working in this department are credible in front of the citizens.

Projects - structural funds in Vâlcele commune

- ✓ Rehabilitation and modernization of cultural homes in the villages of Araci, Vâlcele and Ariușd, Vâlcele commune, Covasna County – 840,727.47 Euros
- ✓ The Cadastre and Tabulation Program through the Covasna Real Estate Cadastre and Publicity Office – 34042.55 Euros
- ✓ Kindergarten construction in Hetea Village, Vâlcele commune, Covasna County – 313,689.99 Euros
- ✓ Rehabilitation and modernization of internal streets in Araci Village, Vâlcele commune, Covasna County – 1065755.67 Euro

- ✓ Rehabilitation and modernization of ditches, pavements, gutters and sidewalks along DJ 103 in Araci Village, Vâlcele commune, Covasna County - 572540, 45 Euros
- ✓ Construction of a water and wastewater network in the village of Araci, Vâlcele commune, Covasna County – 3321923.78 Euros
- ✓ Rehabilitation and modernization of the human dispensary in the village of Araci, Vâlcele commune, Covasna county – 240,821.67 Euros
- ✓ Establishment of human dispensary and dental office in Vâlcele Village, Vâlcele commune, Covasna county – 590245, 26 Euros
- ✓ Construction of a multifunctional sports field in Vâlcele Village, Vâlcele commune, Covasna County – 82,237.07 Euros
- ✓ Rehabilitation and modernization of ditches, pavements, gutters and sidewalks along DN 13E in Araci Village, Vâlcele commune, Covasna County - 1,191,131.91 Euros
- ✓ Rehabilitation and modernization of the inner street related to the tourist area in Vâlcele village, Vâlcele commune, Covasna County - 464,439.19 Euros
- ✓ Modernization of the bridge over the Olt river on DC33A Ariușd village, Vâlcele commune, Covasna county – 2348361.20 Euro
- ✓ Extension of water and waste water in the village of Araci, Vâlcele commune, Covasna county – 3400000 Euro

The total investments currently underway in the Vâlcele Territorial Administrative Area amount to approximately 15 Million Euros. In addition to these, 3 more projects with a total value of approximately 6 million Euros are submitted for approval. All these projects were submitted through a lot of work, perseverance and above all through ambition, even if the implementation and access procedures are difficult and the bureaucracy is high**.**

Conclusions

The research project addressed a topic of great topicality and at the same time very interesting for the local public administration in Romania, namely the European funds and especially the civil servants who deal with their attraction and implementation.

The *general objective* was to show the importance of respecting ethical values by the civil servants who manage the structural funds, and as a *specific objective* it was to verify the way in which the officials from the Town Hall of Vâlcele commune, Covasna county respect these values.

The questionnaire was addressed both to citizens who deal directly with specialized civil servants and by their colleagues, and sought to answer the question *ARE THE ETHICAL VALUES OF THE STAFF DEALING WITH THE*

IMPLEMENTATION OF EUROPEAN FUNDS IN THE FRAMEWORK OF VÁLCELE TOWN HALL RESPECTED?

The logic of this research in the overall plan of the evaluation is to follow to what extent the deontological values are respected within the institution of the Municipality of Vâlcele commune.

Following the interviews used, it was concluded that they are respected and applied correctly both in the interaction with citizens and in the institutional framework.

At the same time, this evaluation tool will be supplemented with others, of a qualitative nature that will be applied both to this target group, citizens of the commune, and employees from other advisory institutions.

In conclusion, considering the implementation procedures, government policy and the fact that this subject represents an economic hub, European funds represent a research topic of great importance both nationally and internationally. Thus, I believe that the approach of this topic by professional researchers will have a positive impact on the one hand creating a correct perception of these officials by civil society on the one hand, and on the other hand the institutions / management authorities that manage these structural funds.

Considering the objective of this stage and taking into account the data above, we consider that our goal has been achieved and the ethical values are respected.

The importance of the ethical values of civil servants involved in the development of the process of accessing European and structural funds, both in our case, the Vâlcele town hall, and in the case of other institutions, from the perspective of the efficiency and optimization of the work performed, is a very important aspect, since through this, a finality is ensured in the service and interest of the citizen.

Bibliography

a) Articles in specialized magazines

1. Lester Brown, *State of the World*, Plan B 4.0, Washington, 2000.
2. Sorina Dana Veiss, *Efficiency and effectiveness of the public service*, Ed. Recent, Vol. 13 no. 3(36), p. 375.

b) Relevant national and European legislation

1. Emergency Ordinance no. 57 of July 3, 2019 regarding the Administrative Code**.**
2. Law no. 188 of December 8, 1999 regarding the Statute of Civil Servants.

c) Web adress

1. https://reform-support.ec.europa.eu/what-we-do/public-administration-and-governance_ro

Brief considerations regarding the influence of the free movement of capital on the digital single market

Roxana-Daniela PAUN[1]

Motto: *When you focus on an idea or a thought, it becomes the substance of what you hope for, proof of the existence of the unseen.*
Herbert Harris in "The 12 Universal Laws of Success"

Abstract

In the last period of time, a lot has changed in the life of the population of this planet. Some changes were forcibly imposed, see the drastic lock down measures at the global level, which generated changes in the way fundamental freedoms are achieved; some changes occurred from the inside of the human being to the outside and were realized in some out of fear, in others out of prudence, in others simply out of habit that gives birth to habits.

Paradoxically, man, willingly, rarely recognizes that change is needed, that the routine is not beneficial. Any change has its constructive role, as long as it simplifies the life of earthlings, and technology is used to support people and not against them. These brief considerations are intended to draw the reader's attention to some aspects that are at the beginning of regulation and which, depending on the reaction of the states, will be modified in the future, we hope in favor of the development of human civilization and not the limitation of fundamental human rights and freedoms.

The free movement of capital, one of the fundamental human liberties, has gone through a series of changes generated by the digitization of our lives, forcefully imposed by the pandemic period that marked everyone's destinies. How can you still be competitive and how does European solidarity between EU member states still manifest itself in the context of the European and global lockdown, but also in the context of ensuring the money necessary for the good functioning of societies at different stages of development, constituted and constitutes a challenge for specialists, economists, but also brokers.

Keywords: *capital, digital single market, lockdown, fundamental freedoms, free movement of capital, the Treaty of Lisbon, the Treaty on the Functioning of the European Union (TFEU), fintech, digital economy, competitiveness.*

[1] Associate professor PhD, Faculty of Legal Sciences and Administrative Sciences., Spiru Haret University, roxana.paun@spiruharet.ro

Introductory issues

The commercial and investment policy changes over time, in order to respond to the acute demands of global markets to face external pressures and stimuli, especially after a period of crisis, be it the health crisis. If in the previous crises, each state responded differently depending on its own level of development, after the health crisis, the reactions were even more different. In order to understand the functioning mechanisms of the capital market and the digital single market, but especially the interconnectivity between the two markets, it is necessary to know the headquarters of the matter, the regulation of the two types of markets which, if they function harmoniously, will be able to generate prosperity and abundance of goods, services, values for Europeans, but also for those who carry out commercial activities with them, in mutual interest.

"The free movement of capital is one of the four fundamental freedoms of the EU single market. This is not only the latest freedom, but also the broadest, given its unique dimension that includes third countries. The liberalization of capital flows has evolved gradually. The application of restrictions on the movement of capital and payments, both between member states and between them and third countries, has been prohibited by the Maastricht Treaty since 2004, although there are still some exceptions."[2]

The seat of the matter for the free movement of capital

Chapter 4 entitled "Capitals and payments" from the Treaty of Lisbon (TFEU) art. 63 (ex-Article 56 TCE) expressly regulates *"all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.",* even in paragraph 1.

The following paragraph provides: "all restrictions on payments between Member States and between Member States and third countries shall be prohibited." and to confirm as if once more the decision to fully liberalize the capitals, a strict procedure is regulated in art 64, (ex-Article 57 TCE).

Thus, paragraph 2 confirms the total involvement of the European institutions: "Whilst endeavoring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets."

[2] https://www.europarl.europa.eu/factsheets/ro/sheet/39/libera-circulatie-a-capitalurilor

The procedure for achieving this objective is detailed in paragraph 3 of Article 64 TFEU, giving the Council the power to decide.", ”Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries.”

Article 65 (ex-Article 58 TEC): The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation regarding their place of residence or with regard to the place where their capital is invested.

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

Completing the procedure, paragraph 3 of art. 65, (ex-Article 58 TCE) specifies: ”The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.”

And the last regulation regarding the free movement of capital, from art. 66, (ex-Article 59 TCE) regulates the situation in which: *”in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.”*

The essence of regulation, the current challenge related to the digital market:

Simplifying the essence of the regulation of the liberalization of the capital market and implicitly the free movement of capital for ordinary citizens, but also

for the business environment, with the entry into force of the Maastricht Treaty (TEU) in 1994, all restrictions on the movement of capital and payments are prohibited cross-border. The aim of this liberalization is to create integrated, open and efficient European financial markets.

The advantages of this liberalization simplify the ability to carry out various operations, such as: opening a bank account abroad, purchasing shares in foreign companies, making investments where the best return can be obtained, purchasing real estate in another country.

For companies, this means the possibility to own and invest in other European companies, but also to attract funds where it is more profitable.[3]

In the category of cross-border payments, since the TEU does not define the movement of capital, another definition was used[4],, cross-border movements of capital include: foreign direct investments (FDI), real estate investments or acquisitions, investments in securities (e.g. shares, bonds, treasury bills, unit trusts), granting loans and credits, other operations involving financial institutions, including capital operations such as dowries, legacies, donations, etc.[5]

The seat of the matter regarding the digital single market.

Article 4 paragraph (2) letter (a) and articles 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU) constitute the legal basis and establish the objectives of the digital single market, indicating the purpose which "is, in essence, to remove national barriers to online transactions. Moreover, in the definition of the notion, the previous notions that are applicable in the member states are mentioned, namely the common market, which in turn was created for the elimination of trade, tariff and non-tariff barriers between the member states, for the development of intra-community trade, generating prosperity, the abundance of quality goods and services in a competitive Europe on par with the rest of the world!

Starting from the basic concept of the common market, an internal market was later developed defined as "a space without internal borders, in which the free movement of goods, people, services and capital is ensured".

The programmatic document that generated fulminant developments is the one that, in continuation of the Lisbon Strategy, the Europe 2020 Strategy introduced the Digital Agenda for Europe as one of the seven emblematic initiatives, recognizing the key catalytic role that the use of information and communication technology (ICT).

[3] https://finance.ec.europa.eu/regulation-and-supervision/capital-movements_ro

[4] The Treaty on the Functioning of the EU does not define the notion of "capital movement". In the absence of a definition, the Court of Justice of the European Union ruled that the definitions included in the nomenclature annexed to Directive 88/361/EEC can be used to define this notion.

[5] https://finance.ec.europa.eu/regulation-and-supervision/capital-movements_ro

"In its Digital Single Market Strategy (COM(2015)0192) and subsequently in the Commission President's Agenda for Europe 2019-2024, the Commission recognized the priority nature of the Digital Single Market. The Digital Single Market has the potential to improve access to information, increase efficiency through lower transaction costs, dematerialized consumption and a reduced ecological footprint, as well as introduce improved administrative and business models.

The development of e-commerce generates tangible benefits for consumers, such as new products with rapid development, lower prices, a more varied offer and better quality of goods and services, as it leads to increased cross-border trade and easier comparison of offers. In addition, the development of e-government services facilitates online compliance and access to jobs and business opportunities for both EU residents and businesses."[6]

What are the challenges from the point of view of the single digital market?

The desire to simplify the way of doing business in the modern system has nothing dangerous, especially when the intentions have been the same for thousands of years, of mutual gain, to the advantage of the parties involved. The consumer is the sole beneficiary of quality services, products, goods, the legislation being developed here as well, depending on the practical aspects that appear in the process of production, supply, distribution, from the producer/importer to the consumer.

However, prudence and specialists in the field are needed in order not to damage a single functional common market, which has self-regulated itself in times of economic crisis.

The interdisciplinary approach has become a reality in everyday life, and the use of research methods from other fields prove their applicability in the economic and legal life of a community. The need to know and overcome the inherent difficulties that arise when using new technologies is an obligation of those who manage the fate of the European peoples and beyond.

Just as risks and vulnerabilities are discussed on the capital market and beyond, in the same way operating in an unsecured virtual system generates even more risks in destabilizing the financial markets. This is already a reality regarding the fluctuations in the cryptocurrency markets. However, at a declarative level, "Digitalisation has the potential to provide solutions for many of the challenges facing Europe and European citizens. Digital technologies are changing not only the way people communicate, but also the way they live and work. The situation created by the COVID-19 pandemic has given the EU a new

[6] https://www.europarl.europa.eu/factsheets/ro/sheet/43/piata-unica-digitala-ubicua

impetus to make efforts to accelerate the technological transition. Digital solutions help create jobs, advance education, boost competitiveness and innovation and can improve citizens' lives. Digital technology plays a key role in transforming the European economy and society to achieve a climate-neutral EU by 2050, a goal agreed by EU leaders. Protecting EU values, as well as citizens' fundamental rights and security, is a key element of the digital transition. The EU is aiming for a human-centered approach."[7]

On May 6, 2015, the European Commission adopted the Digital Single Market Strategy, built on three pillars[8]:

1. Access: better access for consumers and businesses to digital goods and services across Europe;
2. Environment: creating the right and fair conditions for digital networks and innovative services to flourish;
3. Economy and society: maximizing the growth potential of the digital economy.

"At a time when the internet and digital technologies are transforming our world, a Europe that corresponds to the digital age is one of the 6 political priorities of the European Commission, which aims to empower people with a new generation of technologies. For the single market of the European Union to correspond to the digital age, it is necessary to eliminate unnecessary regulatory barriers and move from individual national markets to a single regulatory framework at the level of the entire EU. This could contribute €415 billion a year to economic growth, boosting jobs, competition, investment, and innovation in the EU."[9]

Making the most of the growth potential of the digital economy is an objective declared and demonstrated by the launch on February 19, 2020, by the European Commission, of the "Digital Package", containing the Communication on Shaping Europe's Digital Future, the European Data Strategy and the Charter White Paper on Artificial Intelligence, focused on a complex, horizontal and cross-sectoral approach to Europe's major digitalization priorities. "The Commission is placing digitization at the heart of all its policies and priorities, through a very ambitious approach with many challenges for Member States. The aim is thus to achieve concrete results regarding the use of digital solutions to support the decarbonisation of all sectors and reduce the social and environmental footprint of products introduced on the EU market. Digital solutions and in particular data will enable a fully integrated approach to the life cycle, from design to the supply of energy, raw materials and other inputs to final products. Special attention is paid

[7] https://www.mae.ro/node/55119 - Current topics on the EU agenda, Digital transition / Digital single market
[8] https://eufordigital.eu/ro/discover-eu/eu-digital-single-market/
[9] Idem 8.

to investments in high-impact European projects regarding European data spaces and reliable and energy-efficient cloud infrastructures. The development of digital skills remains a priority, especially in the context of increasingly ambitious European measures regarding digitization and data."[10]

Digital transformation of society is not easy, especially when technology does not help you, when there are still less developed European societies, when there are differences and discrepancies between statements and reality, which cannot be resolved without involvement and without financial resources.

"The White Paper on artificial intelligence presents policy options to enable the rapid and ethical development of artificial intelligence in Europe, respecting the values and rights of European citizens. In partnership with the private and public sectors, the Commission wants to mobilize resources along the entire value chain and generate appropriate incentives to accelerate the implementation of artificial intelligence solutions, including by small and medium-sized enterprises. The main objective is to mobilize resources to achieve an "ecosystem of excellence" along the entire value chain, starting with research and innovation, and creating the right incentives to accelerate the adoption of AI-based solutions, including by small and medium-sized enterprises.

Following the request of the European Council from December 1-2, 2020, the European Commission published – on March 9, 2021, "**The Compass for the digital dimension"** through which the digital ambitions of the EU for 2030 are transposed into concrete provisions, focused on four essential elements:

1) **citizens with digital skills and highly qualified professionals in the digital field**; by 2030, at least 80% of adults should have basic digital skills and there should be 20 million specialists employed in the ICT sector in the EU; also, more women should occupy such positions;

2) **secure, efficient and sustainable digital infrastructures**; by 2030, all EU households should have gigabit connectivity and all populated areas should be covered by 5G technology; production of cutting-edge and sustainable semiconductors in Europe should represent 20% of world production; 10,000 highly secure, climate-neutral edge computing nodes should be deployed in the EU, and Europe should have its first quantum computer;

3) **digital transformation of enterprises**; by 2030, three out of four companies should use cloud computing services, big data systems and artificial intelligence, more than 90% of SMEs should reach at least a basic level of adoption of digital technologies, and the number of unicorn start-ups in the EU should double;

[10] Current topics on the EU agenda, Digital transition / Digital single market, https://www.mae.ro/node/55119, https://www.consilium.europa.eu/ro/policies/digital-single-market/

4) **digitization of public services**; by 2030, all essential public services should be available online, all citizens will have access to their electronic health records, and 80% of citizens should use an electronic identification solution."[11]

This programming document talks about the first quantum computer!, deadlines are given and requirements are set that will store, for example, all the medical information regarding the health status of European citizens, in a single database. (e-health)[12]

"Through the EU4Digital initiative, the European Union supports the development of harmonized national frameworks for e-Health, both among the PaE[13] partner countries and with the EU.

The "EU4Digital: supporting the digital economy and society in the Eastern Partnership" program will:

- Develop e-Health harmonization guidelines and standards for the PaE region
- Create a cross-border e-Health platform in the EaP region
- Involve the region in relevant EU projects, programs, and initiatives

The program supports the actions of the e-Health network of EU4Digital, the main objectives of which include:

- Creation of a platform for the exchange of information and experience regarding e-Health
- Strengthening the capacities of e-Health institutions, communities, and professionals in EaP countries
- Elaboration of recommendations for the harmonization of e-Health policies
- Cross-border e-Health piloting within partner countries and with EU member states

By supporting efforts to develop eHealth systems and ensure cross-border and EU collaboration, EU4Digital will deliver benefits for patients as well as health systems and professionals. Ultimately, improvements in eHealth will result in healthier citizens, increased efficiency in care delivery, more responsive insurers and better regulation."[14]

The question is, however, does anyone guarantee that the information on the wealth of a country, all the data on the companies listed on the stock

[11] https://www.consilium.europa.eu/ro/policies/digital-single-market/, https://www.mae.ro/node/55119
[12] https://eufordigital.eu/ro/thematic-area/ehealth/
[13] The Eastern Partnership (EaP) was officially launched on May 7, 2009, during the EaP Summit in Prague and represents an initiative to strengthen and deepen EU cooperation with six partner countries in Eastern Europe and the South Caucasus: Armenia, Azerbaijan , Belarus (participation suspended as of June 28, 2021).
[14] https://eufordigital.eu/ro/thematic-area/ehealth/

exchange, are not diverted, manipulated, etc.? Who guarantees that the intentions of those who will manage these databases on a global level cannot or will not use the information, cannot "play with the stock exchanges and capital markets" to create crises, change governments, etc???

The use of new technologies is part of the progress necessary for the evolution of human civilization, but the question remains open if man, or those who will be in control of these technologies, will use them STRICTLY for the benefit of the great masses of people, to live together on this planet without destroying us between us!

From Romania's point of view, since the preparation of Romania's accession to the EU, all the technical and legislative steps have been taken so that our country, together with its EU membership status, also benefits from free access to the financial markets.

"From the perspective of current account and capital account transactions, the National Bank of Romania was directly involved in achieving the objectives of this negotiation chapter. Commitments in this area were included in the Position Document and in the three Complementary Position Documents related to Chapter 4 - Free movement of capital. Chapter 4 accession negotiations were initiated by drafting the Position Document approved at the Romanian Government meeting in February 2001. Later, it was updated in several stages, and Chapter 4 negotiations were provisionally closed on the occasion of the Intergovernmental Conference on Accession of Romania to the EU held on April 7, 2003.

The liberalization of capital operations took place in accordance with the following principles: (i) inputs before outputs; (ii) medium and long-term flows before short-term ones; (iii) direct investments before portfolio investments; (iv) respecting the sequence banks - enterprises - population. The currency regime in Romania is regulated by the National Bank of Romania Regulation no. 4/2005 with subsequent additions and amendments, which enshrines the complete liberalization of capital operations starting from September 1, 2006."[15]

Later, things evolved quite quickly, studies, strategies, forecasts, estimates, reports, statistics were carried out, and they all certify one thing for sure: digitization is the future, the disappearance of cash money being the finality, the effect of the use of technologies for the total control of resources in the hands of those who own the information and technology, the databases.

In the BNR report on inflation from 2017, regarding the labor market in the digital age, it is recognized that "in the long term, human capital - made up of the knowledge and skills of individuals, which allow them to bring added value to the economy - is considered to be the most important resource of a country."

[15] https://www.bnro.ro/Capitolul-4---Libera-circulatie-a-capitalurilor-1256-Mobile.aspx

In a five pages document, a careful x-ray is made of the actual situation regarding the human component of the labor force in Romania.

"The tasks of the labor factor are gradually being taken over by machines, and the requirements regarding the training and skills of the staff are becoming more and more demanding. It is therefore essential that investments in human resources are effective and addressed to the needs of an economy in constant motion, the probability that the types of skills currently required in the labor market will no longer exist at the end of the traditional training cycle is increasingly high.[16]

The conclusions of the report demonstrate the developments, but also the delays generated by the lack of financial resources, trainers, educators prepared to face the expansion of the IT&C sector:

"Until now, the influence of technological progress has been felt on the labor market in Romania, especially by increasing the demand for highly qualified labor force, relevant in this regard being the expansion of the IT&C sector. The risk of some professions disappearing due to automation is counterbalanced, for now, by the fact that wages are still at a level where hiring staff with medium or low training is profitable; in the next period, however, the mitigation of the compensation effect is predictable, given the sharp increase in wages in recent years and the probability of the continuation of the trend in the near future. At the same time, the fields of activity with the largest labor force absorption rates are the very ones considered to have the highest risk of automation, namely commerce and support services. In the case of Romania, this category can also include a good part of the automotive industry (including associated branches), which carries out operations with low complexity, using mainly the human factor - probably due to the cost advantage it offers. However, there are signals regarding the erosion of the latter, at the level of manufacturers of road transport means[17] being already visible moves to relocate production and measures to increase the degree of automation of manufacturing lines".[18]

In order to support the global and national efforts to implement digitization at the level of society as a whole, another strategy was drawn up, a laborious document of 81 pages entitled: "National Strategy for the Development of the Capital Market 2022 - 2026", where one of the objectives general and specific for the development of the capital market is entitled: "General objective VII: Supporting digitization and financial innovation"

Extract from the strategy: "As defined by the European Central Bank, fintech is "technology-based financial innovation that could result in new

[16] file:///C:/Users/roxan/Downloads/RaI%20august%202017-Caseta.pdf

[17] See the Box "Price competitiveness of the main industrial groups and branches", included in the Inflation Report, May 2017.

[18] *Idem* 17.

business models, applications, processes or products with an associated material effect on financial markets and institutions and the provision of financial services". Fintech has the ability to improve access to financial services for individuals and businesses, as well as lead to new financial products that better serve the needs of financial market participants. Fintech activity can be divided into two main directions – financial service providers and technology and support service providers.

On 24 September 2020, the European Commission (EC) adopted a digital finance package, which includes the digital finance strategy and legislative proposals on crypto-assets and digital resilience. Through this package, the EC aims to support the competitive development of the EU's financial sector and provide consumers with access to innovative financial products, while ensuring consumer protection and market stability.

In the case of non-banking financial markets, the current state of the markets leads to the idea that there is an opportunity to drive digitization and innovation in the financial field, and the authority can play an important role in this direction.

In line with international best practices, ASF encourages financial markets that provide consumers with competitive and safe financial services. To this end, the authority is actively involved in supporting technological innovation in the financial field, with the aim of driving an enabling environment and modern regulation, while maintaining the stability of the markets and protecting the rights of consumers. "

Beyond the content of the strategy, the support of the European institutions for the consumers of banking and financial services, for a competitive development of this sector, but without offering the guarantees of the protection of these transactions in the virtual, global digital space, is re-interviewed. The risk remains on the account of the one who uses the technology, without which, however, he can no longer make transactions in the global system also called metaverse!

Conclusions

Concluding this brief foray into the future of financial transactions in the metaverse, in the digital age we have all entered, consciously or not, which does not change habits, work, life, whether we want to or not, we must consider the part of competent, since computer software and any digital program is also made by HUMANS!

Within the program "EU4Digital: supporting the digital economy and society in the Eastern Partnership", the European Union supports the implementation of digital skills strategies in the EaP countries, acting to create national coalitions for jobs in the digital sector and a competence framework for small businesses.

The "EU4Digital: supporting the digital economy and society in the Eastern Partnership" program defines: a methodology for measuring and forecasting deficiencies in the field of national digital skills, a common competence framework for SMEs and micro-enterprises, but also creates national coalitions for skills and jobs, conducts training seminars and workshops, implements promotion campaigns in partner countries.

The program supports the activity of the e-Skills network of EU4Digital, which has the following priorities:

- Digital skills for citizens
- Digital skills for ICT professionals
- Digital skills for the non-ICT workforce, including SMEs
- Digital competences in education (digital competences for educators, young people and students)

Even if digital skills are vital for increasingly digitized economies and societies, we must not forget that man is the creator of technology, which must help man in simplifying everyday work, in taking over standardized, automated activities by equipment. Thus, freed from certain activities that the robot can do in his place, man will have time to create added value, to research, to discover new horizons still unexplored, to use technology for the progress of the human race and not for enslavement, colonization through the use of new forms of imperialism, which concentrate the entire knowledge and wealth of the planet in the hands of an elite installed at the top, without merit, but only by manipulating the sleeping majority, as in the time of C Negruzzi in "History of a Pie, December 1847": "With yogurt, with gugoses, You made yourself warm, misle!"[19]

It is unequivocal that the development of digital skills is urgent and mandatory, regardless of our membership in the EU, the globalized world is based on these skills that make work more efficient, which can contribute to the creation of jobs, the development of the private sector, as well as to dynamic economic growth, but at the same time it also leads to the disappearance of some professions, traditional activities and to the opening of the private sector and to new vulnerable areas, which can close certain economic, commercial activities, etc.

The e-Commerce component carried out through the EU4Digital initiative is the way in which the European Union supports the facilitation and harmonization of trade within the EaP countries and with the EU, promoting common frameworks for e-Commerce, e-Customs and e-Logistics, and acting in the direction of establishing Digital Transport Corridors.

[19] https://www.costachenegruzzi.eu/opere/scrisori_la_un_prieten/scrisoarea_XXII_istoria_unei_placinte.html#.Y7wD6nZBy5c

The "EU4Digital: supporting the digital economy and society in the Eastern Partnership" program will coordinate cross-border e-Commerce components within the EaP partner countries and with EU member states, promoting the relationship between e-Commerce partners in the region.[20]

At the same time, the coordination of cross-border e-Commerce components within the EaP partner countries and with the EU and information exchange mechanisms between cross-border customs offices will in time generate the possibility of creating a Multi-modal Digital Transport Corridor (sea and land) between the Baltic Sea and the Black.

The e-Commerce network of the EU4Digital initiative managed the digital aspects of the full import-export cycle, aiming to achieve harmonized legislation for e-Commerce, e-Customs and e-Logistics systems between partners and with the EU, where import-export processes were redesigned for e-Commerce, in all partner countries, where a pilot was created from 2020 for cross-border e-Commerce between partners and with the EU, but also for a Digital Transport Corridor between the Baltic Sea and the Black Sea

EU support for cross-border e-Commerce simplifies export procedures through IT and e-commerce logistics, reduces delays at borders, increases security and transparency of operations, reduces administrative costs and revenue losses through fraud, as well as improves the competitiveness of the digital economy.

All these are the concrete ways in which Europe is preparing to face digitalized global trade, subject to the pressures of various types of crises that contemporary society has been going through in recent years, especially from 2008 to the present, and the near future that it also does not show too pink! Let us all hope, wish and act, each from his own position, so that "from crisis to crisis we move towards human progress and not towards the extinction of the human race!"

Herbert Harris said in "The 12 Universal Laws of Success": "(...)[21] Whether it's the fear of failure or the fear of success, it doesn't matter as long as the result is the same: procrastination, inaction, and finally failure."

Inaction, passivity makes us partakers of what the future will offer us, either for good or for bad!

You must be willing to change your life completely. Make your life suitable, compatible, in harmony with your idea of success... and happiness will belong to you. But above all, make your passage through this universe useful, everyone in the historical moment they live!

[20] https://eufordigital.eu/ro/thematic-area/etrade/

[21] "What is it that prevents you from taking action when faced with a problem? Afraid you won't do the right thing? Or the fear of a success that would contradict what you feel about yourself? Whether it's the fear of failure or the fear of success, it doesn't matter as long as the result is the same: procrastination, inaction, and ultimately failure." Herbert Harris - "The 12 Universal Laws of Success".

Bibliography

1. https://www.europarl.europa.eu/factsheets/ro/sheet/39/libera-circulatie-a-capitalurilor
2. https://finance.ec.europa.eu/regulation-and-supervision/capital-movements_ro
3. https://www.europarl.europa.eu/factsheets/ro/sheet/43/piata-unica-digitala-ubicua
4. https://www.consilium.europa.eu/ro/policies/digital-single-market/
5. https://www.mae.ro/node/55119
6. https://eufordigital.eu/ro/thematic-area/ehealth/
7. https://eufordigital.eu/ro/discover-eu/eu-digital-single-market/
8. https://www.bnro.ro/Capitolul-4---Libera-circulatie-a-capitalurilor-1256-Mobile.aspx
9. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF
10. https://ccir.ro/2021/02/23/rolul-politicii-comerciale-si-de-investitii-uniunii-europene-redresarea-economica-post-pandemie/
11. file:///C:/Users/roxan/Downloads/RaI%20august%202017-Caseta.pdf
12. https://www.costachenegruzzi.eu/opere/scrisori_la_un_prieten/scrisoarea_XXII_istoria_unei_placinte.html#.Y7wD6nZBy5c
13. European Commission – Digital Economy and Society Index, Country Profile Romania, 2016.
14. European Commission – Digitizing European Industry, April 2016.
15. Eurofound - "Drivers of Recent Job Polarization and Upgrading in Europe", European Jobs, Monitor, 2014.
16. International Monetary Fund – Emigration and Its Economic Impact on Eastern Europe, July 2016.
17. World Economic Forum – Matching Skills and Labor Market Needs: Building Social Partnerships for Better Skills and Better Jobs, 2014.
18. World Economic Forum – The Human Capital Report, 2016.
19. Frey, C. B. and Osborne, M. - *The Future of Employment: How Susceptible are Jobs to Computerisation?*, Oxford Martin School, University of Oxford, 2013.
20. Goos, M. and Manning, A., "Lousy and Lovely Jobs: The Rising Polarization of Work in Britain", *The Review of Economics and Statistics*, Vol. 89, No. 1, 2007, pp. 118-133.