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MODALITIES OF APPLYING THE LAW

Abstract

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The paper entitled “MODALITIES OF APPLYING THE LAW” has a structure divided into six chapters.

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Chapter I. INTRODUCTORY CONSIDERATIONS ON THE IMPLEMENTATION AND APPLICATION OF THE LAW

The first chapter of the paper details a series of introductory notions about the process of applying the law, the relationship between the realization and the application of the law, the forms of realization of the law, the stages of the law enforcement activity, the fulfillment of the functions of the law through the acts of enforcement, the relation between the acts of law enforcement and normative acts.

In order to define the concept of “application of the law”, closely linked to the process of drafting legal norms, the starting point from which we started was their purpose in society - the maintenance of social order, as well as macro-social factors (for example, governmental structure, the structure of the state, the type of economic relations, the degree of culture and civilization, the political context, etc.) and factors dependent on the human nature (personality, education and consciousness of each individual) involved in the work of realizing the law.

Starting from the above-mentioned aspects, we have attempted to elaborate a definition of the realization of the law, considering that this is the complex process of implementing the provisions of legal norms in social life, a process in which, on the one hand, the members of the society accept them, respects and executes them, and the competent state bodies apply them.

The elaborated definition helps us to identify the most common forms of realization of the law, consisting in observance of the prohibitive legal norms and the realization of the permissive legal norms by the citizens, respectively in the application of the norms by the state authorities.

Realization of the law by free will presupposes either the fact that the citizens respect the provisions of a prohibitive rule, refraining from committing the forbidden

deed / deeds or the fact that they choose to benefit from the permissive norm exercising their rights recognized by the law.

The application of the rules by the state authorities is translated into practice by the intervention of state bodies either in the case of a violation of the prohibitive rule or in the case of an appeal to the permissive norm, because any norm is accompanied by a set of methodological elements that come to the aid of those who apply it.

The two ways in which the realization of the law (the individual application, willingly, and the enforcement of the law by the state organs) are in a complementarity report, even if the former has a “non-legal” coat – i.e. it does not involve the intervention of the coercive force of the state - and the other has a juridical nature - that means that it is carried out through the state organs, according to their competencies afforded by the law. The realization of the law by free will of the lawful subjects can be ensured by other non-juridical instruments and methods: cultural and sports activities, family education, volunteering, school education, mass-media, etc.

A whole-part relationship is established between the realization and the application of the law, since the first notion - the realization - involves two forms: the realization of the law through the acts of execution and the observance of the provisions of the normative acts, willingly, by the legal subjects (natural persons and legal persons - public or private, state bodies and institutions, non-state bodies, organizations and associations of the civil society, etc.) and the realization of law through law enforcement acts (in all its forms) by state bodies and other social organisms, which appears as a corollary of the state's prerogative to regulate social relations.

As a form of realization of the law, the application of the law consists in a complex process of implementing the provisions of legal norms in the practice of social relations involving the intervention of a competent state body which, after a predetermined procedure, elaborates a legal act in certain specific forms - the act of application.

The stages of the application of the legal norms are: establishment of the state of fact, choice of the rule of law applicable to the concrete situation (phase in which the question of interpretation of the legal norm is also raised), drafting and issuing of the enforcement act, its execution, control of the law enforcement activity.

By establishing the state of fact, the law enforcement body finds in which part of the legislative spectrum an action is taken (violation of the prohibitive norm or the requirement to benefit from the permissive norm). Once the state of facts has been established, the applicable legal rule is selected. After determining which rule applies, the law enforcement authority issues an enforcement act based on an already established model (e.g. verbatim report, communication, summons, sentence) or regulates a new one, which it executes. The last step in the application of legal norms is control, as enforcement acts are subject to control. Any person who considers his interests to be prejudiced as a result of a law enforcement action may appeal to a court or, in the case of a legal act of an administrative nature, may challenge him in administrative litigation.

An issue dealt with in the first chapter is also that of exercising the functions of the law through enforcement acts, taking into account the fact that the attainment of the law's aim can be achieved both by its voluntary application by the legal subjects and by the application of the legal norms by state bodies. In principle, enforcement of the law falls on the persons / bodies specially empowered by law in this respect. To this end, the legislator has established rules that expressly regulate the quality and attributions of those able to apply the law, as well as the limits of these duties and the responsibility of those who overtake them. Public administration bodies and courts are mainly the authorities that can issue and interpret acts of applying the law, but any lawful subject may choose willingly to abide by the rigors of the prohibitive rule or to take advantage of the permissive rule as it can (either alone or under the guidance of a specialist), to create and submit acts of applying the law to the competent bodies, such as a legal action, an appeal, a complaint, a suspension request, a request for re-judgment, forced execution, inheritance, debit recovery, claim of compensation,

contesting a report of contravention, conditional release, suspension of the execution of punishment, etc.

Regarding the report of the law enforcement acts with normative acts, it should be pointed out that there are fundamental differences between the creation of legal norms and their implementation. The first and most important thing is that normative acts have a general, impersonal and atypical character, while the acts of applying the law are concrete and strictly determined individual acts, the purpose of which is to translate into reality the concrete provisions of the legal norms. Another difference is that normative acts are elaborated according to principles and methodological rules of legislative technique, whereas the procedure for drafting the law enforcement acts differs from one branch to another and even within the same branch of law, from one institution to another. From the point of view of the effects they produce, we note that the normative act acts continuously until its expiration, while any act of application exhausts its effects when it is adopted by the authorized body. Regarding the control procedure, it should be stressed that normative acts are subject to parliamentary and judicial control, while control over the legality of law enforcement acts is exercised hierarchically (hierarchical control) or judicially (judicial control).

The application of the law does not consist only in the drafting of acts of enforcement of the law by the authorities of public administration and in the settlement of disputes by the courts, but also in the application of the law by other state bodies or institutions, as well as autonomous administrative authorities or other bodies with jurisdictional powers (eg disciplinary colleges and commissions, arbitration boards, etc.). All these topics will be dealt with extensively in Chapters III and IV of this paper. It should be emphasized that the activity of the bodies mentioned in the last category transposes mainly the sanctioning of deviant conduct by engaging the legal liability. In all cases, sanctions have a particularly important role to play within the set of legal safeguards designed to ensure good administration of justice. The legal settlement of some rights and obligations would remain formal only if there were no measures of coercion or restoration of the violated legal situations.

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Chapter. II. DELIMITATION OF THE FIELD OF APPLICATION OF THE LAW

In the second chapter of the thesis we have analyzed, in relation to the relevant legal provisions, doctrine and jurisprudence, the issues that are aimed at the delimitation of the field of applying the law, the structure of this chapter comprising four sections dealing with the application of law in time, law enforcement in space, the application of legal norms on individuals and the application of law in the system order.

The field of applying the law depends on the moment of coding, the time, the space and the persons to whom the rules of law apply.

Of great importance in the enforcement of the law is the time factor so that, in the first section of the second chapter, we put a special emphasis on the problems resulting from the sequence of laws over time. In a first situation, changing a political system, a type of social relationship, or simply changing the legislator's view of an aspect of already regulated social relationships entails changing the legal norm and, implicitly, the way it is applied, putting the question of the expiration of the old law and the coming into force of the new law, problems that are closely related to the concept of the temporality of the law. For example, in the first case - the change of the political system – it can intervene both the express repeal and the tacit repeal of a law and we can even speak of falling into disuse.

From the point of view of temporality, a legal norm is conditioned by an initial moment - the entry into force - and by the final one - the exiting of force.

Regarding the initial moment, the applicable rule in Romania is that the legal norm comes into force three days after its publication in the Official Gazette or at a later date stipulated in its text (Article 78 of the Constitution). In practice, some legal norms expressly state in their text that they will enter into force within a defined time period from their publication, either after a specified period (for example one month, 6 months, one year) or at a fixed date expressly mentioned in the text. As a rule, the

law should also benefit from methodological norms of application, which are developed after publication of the norm in the “Official Gazette”, the time needed to elaborate these implementing rules explaining, to a certain extent, why the moment of publishing the law does not coincide with that of its entry into action. In fact, Article 6 of the Civil Code provides for the fact that the law addresses situations that have occurred as long as it is in force, without retroactive action. This rule makes exception to situations where the legal norm takes effect in the period prior to its effective entry into force - the exception of retroactivity.

As for the final moment of application of a law, it occurs by abrogation (express or tacit), reaching the deadline or falling into disuse.

Express abrogation occurs when the new law explicitly states that a part of an old law or the entire law ceases to have effect (is repealed) after the entry into force of the new law.

Tacit abrogation occurs when it results from the application of a new law that has come into force that the old norms are no longer up to date, although the new law does not explicitly state that the old law has been abrogated.

Reaching the deadline is a way by which the temporary laws come out of the force, that is those laws that in their very own text stipulate that their action ceases at a certain time. Exit from the force operates lawfully by reaching the deadline. We can exemplify through the Government's empowerment laws for issuing ordinances which are temporary by their nature because the duration of the empowerment and the term of application of the ordinance are among the conditions of the legal delegation provided by Article 115 of the Constitution.

Coming out of force of a law can also arise through the force of circumstances, when a normative act, formally in force, is totally outdated by socio-economic and political reality. Thus, in the case of a regime change (for example, the fall of the communist regime in December 1989), a series of laws cease de facto to produce effects because the type of social relations since their adoption no longer exists.

Another situation encountered in practice is that of caducity, which only some specialists admit as a way of ending the effects of a law, while other authors speak of

"the disappearance of the object of regulation"[1] or of "decay"[2] as modalities of coming out of force of the legal norm. Embracing the opinion of the reputable Romanian professors Ion Dogaru, Dan Claudiu Dănişor and Gheorghe Dănişor[3], we defined the caducity of the law as the way to cease the action of a normative act, formally in force, due to the disappearance of some factual circumstances essential for its application, to an unpredictable event, alien to the will of the legislator.

The problem of the succession of laws in time seems to be solved by the principles governing the entry and exit of force of laws: since its entry into force, the new law abolishes the application of the old law, which ceases to apply. However, things are not so simple in the case of legal situations that begin their formation under the rule of a law, in order to end them under the authority of another. It is thus a question of knowing which aspects of such a situation are governed by the old law or by the new law.

The period of interference of the provisions of the old law with the provisions of the new law is called a transitional period. This period may sometimes be quite long, but the difficulty this period of passage from the old to the new norm can raise can be prevented if the legislator stipulates in the very text of the law how to solve the transitory problems. This is the case of the transitional provisions inserted in the final provisions of certain laws.

The solution of the conflict resulting from the inevitable change of regulations, from the introduction of successive regulations, is given by the constitutional provisions (Article 15 paragraph 2 of the Basic Law) and those of the new Civil Code (Article 6) and, respectively, Criminal Code (Article 4), which establishes, in addition to the principle of nonretroactivity, another principle of settling the conflict of laws in time: the principle of the immediate effect of the new law. From the correlation of the two principles, it follows that, on the one hand, the new law regulates all legal

[1] R. P. Vonica, *Introducere generală în drept*, Editura Lumina Lex, Bucureşti, 2000, p. 264-268.

[2] C. Popa, *Teoria generală a dreptului*, Editura Lumina Lex, Bucureşti, 2002, p. 111.

[3] D.C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, Editura C.H. Beck, Bucureşti, 2006, p. 333.

situations born under its empire, that is, from the moment it enters into force, without applying to legal situations wholly consumed under the rule of old law whereas, on the other hand, the old law does not become ultra-active, ie it no longer produces legal effects after its expiration.

The exception of retroactivity can be provided even in the text of a law. According to the Constitution, the principle of non-retroactivity of the law has two exceptions: the more favorable criminal law and contravention law. These exceptions are provided by art. 15 par. 2 of the Constitution, stemming from the will directly expressed by the constitutional legislator, under its right to legislate. The Criminal Code also sets out two exceptions to the principle of non-retroactivity of the law: 1. the more favorable criminal law, which will apply to acts committed before its entry into force for reasons of equity and humanitarian treatment; 2. the temporary criminal law, which applies to the offense committed while it is in force, even if the deed was not prosecuted or judged during that time.

Another exception concerns the imperative nature of certain laws which are intended to explain the provisions of previous laws - interpretative laws, which have effect since the date of entry into force of the interpreted law, with which it makes a common body, although an opinion more and more contrition in the literature is that interpretative law is a new, distinct law, which should produce its effects only for the future.

The jurisdictional and procedural laws are another apparent exception to the principle of non-retroactivity of the law, establishing rules applicable not only to future causes but also to cases already pending before their entry into force. The case of these laws does not constitute a true exception to the principle of non-retroactivity of the law because the new law does not apply to the substance of the case, that is to say, the facts and acts produced before it enters into force, but only to the future procedural acts without affecting, in principle, procedural acts already fulfilled under the old law.

The question of the principle of the immediate application of the new law raises the question of the extent to which the new law may affect preliminary legal

situations or rights in training or legal acts concluded under the old regulation whose effects have not been concluded under the conditions the new law changes their consequences. The principle of non-retroactivity of the new law excludes its intervention on the effects already produced. Regarding the future effects of acts and deeds produced under the old rules, in order to justify the survival of the old law after its abrogation (or vice versa), in the doctrine and jurisprudence two theories emerged over time: classical theory and modern theory, which I have presented in the final section of Section I of this chapter.

As regards the application of the law in space, it should be emphasized that the law is territorial, which means the exercise of its action throughout the national territory of the issuing state, excluding the rules of other states (the principle of territoriality). In practice, however, conflicts of law arise when it comes to legal relationships that attach to one or the other of several legal systems - the legal relationship with an element of foreign affairs. These conflicts are solved by the principle of territoriality. In the federal states, where two legal systems are juxtaposed - federal law, applicable throughout the federation, and federal law, in the case of several normative acts affecting the same field within the same territorial state framework, in case of contradiction applies the normative act with superior legal force (federal law), and if there are legal rules located on the same level in the hierarchy, the one that is adopted more recently is applicable.

The determination of the law applicable to relations with a foreign element is accomplished by means of conflicting rules, ie those legal rules that do not regulate the substance of the case, but only determine the law applicable to the juridical relationship with a foreign element.

There are also exceptions to the application of the rule of law in the national territory. The extraterritoriality of the legal norm can occur either as a result of the autonomy of the will of the parties to a legal act or independently of their will. Under private international law, the principle of the parties' autonomy of will allows them to determine the law applicable to their relations subject to compliance with the mandatory provisions of the law, which will oblige the judge, in the event of a

dispute, to apply the law chosen by the parties even outside the territory of the state that had edited it. Situations in which the extraterritoriality of national law may occur independently of the will of the parties are those expressly provided for by law, such as embassy buildings, diplomatic staff who benefit from immunity and their property. The exception of territoriality applies in all legal systems on the principle of reciprocity.

Regarding the action of legal norms on individuals, a way closely linked to the application of the law in space, we mention that it is organically related to the principle of sovereignty of state power manifested especially in the aspect of territorial sovereignty and the connection that is formed between state and persons through citizenship. Under the sovereignty principle, laws and other normative acts are binding on the citizens of that State and on all bodies, professional organizations, institutions and other legal persons within its territory. Naturally, this rule implies the exclusion of action of the laws of other foreign states on the people in that territory.

However, there are some exceptions to this rule: individuals who, by virtue of their function, enjoy immunity, foreigners and persons without citizenship, Romanian citizens living abroad.

Foreign citizens and stateless persons in the territory of a state have a legal regime different from that of nationals, which can take three forms: the national regime in which foreigners have the same civil rights as nationals of the state of residence; the special regime, according to which the rights of aliens are established in particular by international laws or treaties; most-favored-nation regime, under which the state of residence grants to nationals of another state within its territory certain rights which can not be more restricted than those granted to nationals of any third country.

In Romania, foreign citizens and stateless persons have the fundamental rights of Romanian citizens - except for political rights, civil rights and any other rights recognized by law or by international agreements to which Romania is a party.

Romanian citizens living abroad enjoy the protection of the Romanian state and are kept to fulfill their debts, except for those incompatible with their absence

from the country. During their stay abroad, the Romanian citizens must also abide by the laws of the respective state. As required by the Civil Code, the laws on civil status and capacity of persons apply to Romanian citizens, even if they reside abroad. Also, the provisions of the Romanian Criminal Code also apply to crimes committed outside the territory of the country by a Romanian citizen.

One aspect to be emphasized with regard to the action field of legal norms on individuals is that it is governed by the principle of equality before the law, regardless of gender, nationality, religion, language, wealth, social origin, political affiliation and so on. It is obvious, however, that not all laws and other normative acts automatically concern all citizens as a whole. In this case, the exception is given by those normative acts which, by their nature, are addressed to distinct well-defined categories of individuals, such as magistrates, teachers, dignitaries, public servants, doctors, etc.

A last aspect of Chapter II is the application of the law in the systemic order, in which case we have presented the applicable principle - the principle of hierarchy of norms (according to which any legal norm that contradicts the rule in a higher position loses its legal basis, leading to its exclusion from legal order), as well as combining this principle with the rules of applying the law in time.

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Chapter III. APPLICATION OF THE LAW BY PUBLIC ADMINISTRATION BODIES

In Chapter III, we addressed the subject of the application of the law by the central and local public administration bodies and by the autonomous administrative authorities, emphasizing, in the last section, the control of administrative acts and the administrative tutelage, which we dealt with both from the perspective of applicable law and from the doctrine conceptions.

The actors responsible for the enforcement of the law are, first of all, the administrative authorities, irrespective of their level, and the courts (High Court of

Cassation and Justice, Court of Appeal, Tribunal, Court of First Instance), adding to the legislative authority - subject we chose not to detail it in this work, since the main task of the latter is to create the law, not to apply it. It is true that normative acts are drafted by special categories of state organs under the conditions and limits of competence determined by the law, so also because of the application of the law, but there are fundamental differences between the creation of legal norms and the application of the law, which we have emphasized in the first chapter of the paper.

Applying the law does not mean only issuing acts of punishment for those who have violated the prescriptions of legal norms. The bodies of public administration - central or local - issue individual acts of law enforcement on the basis of the attributes of state power organs, acts imposing sanctions on natural or legal persons who disregard their obligations under the legal norms or through which recognize the rights of the subjects involved in social life.

A law enforcement body may also develop regulatory acts on the basis of regulatory powers recognized by law. Thus, the Government elaborates both individual decisions, considered acts of applying the law, as well as decisions and ordinances, which are normative acts.

The content of executive activity varies depending on the role and position of different organs in the administrative system. Thus, the executive organs located on the bottom of the system and having no other subordinate bodies carry out executive activity by concrete application of the law to real cases. Upper administration authorities, in addition to applying the law to concrete cases, have the right to give directions or binding provisions to subordinate bodies or institutions, or in other words, they have the right to issue administrative acts of a normative nature. The existence of a governmental authority guarantees the application or enforcement of the general rules developed by the body that has the legislative function. The executive power is usually represented by the head of state and government, including the ministries. Sometimes the delimitation between powers, especially between the legislature and the executive, is conventional because the Parliament can also apply or enforce the law (the Constitution by issuing ordinary laws), and the

executive branch of state bodies can often carry out a normative activity. We can not speak in absolute terms either of the existing balance between the executive function and the legislative function, because the execution of the law is, by definition, subordinated to the law creation. At the same time, it must be stressed that there is no absolute independence between the powers, because the problems that need to be solved in a community sometimes require interaction and subordination.

Through the central and local public administration, the executive function of the state is executed, namely the organization of the execution and the concrete execution of the laws.

The government has the role of guiding national action by guiding the legislative initiative, defining general policy, drawing action programs. It is not just about initiating the laws passed by parliament but it is actively participating in their drafting. The laws that the government is running are, in fact, its own program.

The analysis of the application of the law must be shifted from the government level to the whole executive power mechanism; the functions performed by each public administration body, public institution, or autonomous administrative authority in the field of applying the law must be well defined in relation to all the forces that compete in their exercise, and not only with the organs of the state which formally exercise them. Secondly, it should be stressed that at institutional level each function is exercised by a plurality of organs. In practice, all state bodies compete in exercising the law enforcement: those belonging to the legislative power, those belonging to the executive power, and those belonging to the jurisdictional power. A broad analysis is enjoyed by the bodies of the executive power in Chapter III because the executive function by its nature is that activity aimed at ensuring the functioning of the state within the laws by applying the principles contained in the normative acts. Thus, after the general presentation of the system of public administration and of the administrative acts of law enforcement, made in the first section of this chapter, in the second section entitled “The application of the law by the central public administration bodies” are analyzed, from the perspective of competences they have in applying the law, the institution of the President of Romania, the Government, the

Prime Minister, the ministries and the ministers. The focus has been on governmental activity because, even though the Constitution emphasizes Parliament, the Government is perceived by citizens as the true center of power, because it is the one that acts directly on the population, mainly through its attributions in the field of law enforcement.

The third section of this chapter is devoted to the application of the law by the public administration bodies in the territory, autonomous or subordinated to the Government: the prefect and the sub-prefect, the local and county councils, the mayor. In order to establish the framework for the law enforcement process by the local public administration bodies, we considered that it is absolutely necessary to highlight the context in which local communities are managed, the configuration of the local public administration authorities, the level of executive power fragmentation and the territorial distribution of this power, the attributions of its institutions, the relations between the various intergovernmental levels, the way of adopting different types of administrative acts and their implementation in organizational terms.

The application of the legal norms, as a form of realization of law by the state organs, involves two types of actions: stimulating and repressive. Together with the courts and the central and local public administration authorities, the autonomous administrative authorities and the governmental institutions with administrative-judicial powers play an important role in the achievement of the law, which is the subject of the research undertaken in the elaboration of the penultimate section of this chapter.

According to O.G. no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination, the National Council for Combating Discrimination is the autonomous state authority with juridical personality, under parliamentary control, and at the same time guarantor of observance and application of the principle of non-discrimination.

Another body with administrative-judicial activity is the National Council for Solving Complaints, which solves the complaints formulated in the procedure of

awarding the public procurement contracts, the public works concession contracts and the service concession contracts.

Other authorities subject to analysis in Section IV of Chapter III are: the Competition Council, an autonomous administrative authority exercising its powers under the provisions of the Competition Law no. 21/1996, as amended and supplemented; The National Authority for Consumer Protection, a specialized body of the central public administration established under the Government Decision no. 700/2012; The National Council of Audiovisual, an autonomous public institution under parliamentary control, the sole regulator in the field of audiovisual programs. Thus, the orders, the methodologies, the norms, the instructions, the regulations that these bodies elaborate for applying the provisions of the laws are, in fact, normative acts of applying the law. Also, individual acts of applying the law are considered to be the decisions made by any of these bodies towards a strictly determined natural or legal person.

The last section of Chapter III is entitled "Control of administrative acts and administrative tutelage". The issue of control over administrative acts has been approached with particular attention given that the acts of the public administration bodies enter the civil circuit from the date of communication or publication, which is why the Romanian system is among the legal systems in which the application of the principle of administrative acts revocation is impossible. From this perspective, the control of administrative acts becomes a kind of "barometer" that shows how the law enforcement body acts and the extent to which the act of applying the law corresponds to the purpose for which it was issued[4].

In this section we have dealt with the two forms of control over the legality of the administrative acts encountered in the Romanian system, namely the administrative control (a control carried out by the public administration, according

[4] M. Preda, *Drept administrativ. Partea generală*, IV[th] edition, Bucureşti, Editura Lumina Lex, 2006, p. 236 and following.

to the law, on its own activity) and the judicial control (control carried out by the courts).

Regarding the first form of control - the administrative control - we have presented the two aspects under which it can be manifested: the internal administrative control, carried out by the persons or departments of the administrative body in question, even within it, by virtue of the management function, and the external administrative control, which refers to the subordination relations between the different authorities of the public administration.

Without insisting too much on the internal control exercised by the secretary of the territorial-administrative unit, which is responsible for verifying the legality of the acts issued by the mayor, the president of the county council, the local council and the county council, according to its duties under Article 117 of the Law no. 215/2001 on Local Public Administration, we moved to the second stage of controlling the legality of administrative acts issued by local administration authorities - external control. According to the constitutional provisions and those of the Law no. 215/2001 and of Law no. 340/2004 on prefect and prefect institution, the activity of controlling the legality of the acts of the local public administration authorities is carried out on two levels, involving two public authorities: the prefect as a representative of the Government in the territory and a guarantor of respecting the law and public order at the local level, and administrative litigation courts.

In exercising the control attribution, the prefect has at his disposal certain legal instruments, such as: the notification of the court of administrative litigation; the decision by which he may order the suspension of a councilor, mayor, local council secretary; the proposal to the Government to dissolve local councils or to organize new elections for the County Council (Article 111, paragraph 2, of Law no. 215/2001). Regarding the categories of the acts under the prefect's control, the provisions of Article 115 par. (2), (3), (4) and (7) of the Local Public Administration Law require that the mayor’s acts, the decisions of the local council and the decisions of the county council be submitted to the prefect. Regarding the nature of acts subject to legality control, from the constitutional provisions and the ones of the local public

administration law it is concluded that the object of control consists of the administrative acts adopted by the local and county administrative authorities, except for the management ones.

In order to understand the system of control of administrative acts promoted by the Romanian Constitution, it should be emphasized that administrative tutelage can not be seen as an obsolete institution, especially in a unitary, democratic state, based on the principle of the separation of powers. The organization and functioning of the administrative tutelage is closely related to the principles of organization and functioning of the public administration, in particular those of the local autonomy and the decentralization of the public services, enshrined in the present Constitution of Romania, ensuring a good management of the public administration in its whole.

The judicial control over the public administration is the most important form of control - the administrative contentious. Understanding the notion of administrative litigation must start from the fact that this is an essential and indispensable element for the functioning of the state ruled by law as it provides a necessary balance between the three powers of the state, between which there must be relations of permanent cooperation but also of mutual control. Administrative litigation is a way of exercising control by the judiciary power over the activity carried out by the authorities of another state power, respectively the executive power. In this context, it is shown the role and importance of the administrative litigation courts in the settlement of legal disputes between the public administration and the administrated, as a result of an arbitrary application of the laws.

One last point that we have referred to in Chapter III is the control exercised over the public administration by the People's Advocate. The special attention given to this form of control is justified on the one hand by the fact that certain issues are insufficiently addressed in the specialised literature and, on the other hand, by the role of this institution in defending the rights and freedoms of the individual vis-à-vis the public authorities. It should be stressed that the scope of the People's Advocate is quite extensive because it concerns all petitions formulated as a result of violation of the rights and freedoms of individuals through acts issued or acts committed by

public administration authorities, including the central and local public administration authorities, public institutions, public services under the authority of administrative authorities and autonomous regies. The People's Advocate may start the investigation either ex officio or at the request of natural persons, commercial companies of those regulated by the Companies Law no. 31/1990, associations, organizations or other legal entities, either unexpectedly, by visits made to places of detention, according to the competencies established by the law. In this context, we have put forward a *lege ferenda proposal* that we consider extremely important in the sense that the opportunity of the People's Advocate to defend citizens' rights and freedoms in relation to justice should be regulated, a possibility that would prevent and sanction abuses and violations by judges of the rules that they must enforce.

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Chapter IV. APPLICATION OF THE LAW BY JUDGING INSTITUTIONS

In the fourth chapter devoted to the activity of applying the law by the courts, we dealt with the realization of the act of justice from the point of view of the first instance judgment, but also the control activity of the judging institutions - the appeal procedure and the extraordinary ways of attack, from the perspective of the applicable law, of the doctrine, but also by analyzing the control activity of the Constitutional Court, we focused especially on examining the judgments handed down by this court in the judicial practice.

In the first part of this chapter we have discussed the terminological aspects of the notions of justice, judgement, trial, litigation, emphasizing the purpose of the trial and its stages.

The legal basis of justice functioning and the organization of its institutions, dealt with at the beginning of this chapter, is found in constitutional texts, in the special laws regulating the activity of judges and in a series of principles governing the judicial activity and the organization of the institutions of the judiciary power.

Judicial activity has a specific content that differentiates it from the activity of executive and legislative power, but also integrates it into the overall activities of the state. As a component part of the state organization entrusted with a first-rate objective - the implementation of justice - the judicial power must benefit from a series of safeguards. Firstly, we considered: the autonomy of the courts, which is why they have their own organizational structures and a distinct budget; judges' independence in applying the law; the irremovability of judges, which ensures their stability in function, they can not be revoked, transferred or suspended from office only under exceptional circumstances; the principle of immediacy and continuity, which expresses the requirement that the case be dealt with directly and immediatiously by a panel of judges that must not change from the beginning to the end of the trial, in a single sitting ending with deliberation of judges and the final judgment. All these principles of organization and functioning of the judicial activity were analyzed in the debut section of Chapter IV, insisting on the independence of the judge, understood not as an absolute, unlimited concept, but as a guarantee that the judge resolves the cause of the judgment and pronounces the solution that he sees fit freely, without interference from the outside and without being subjected to any other form of influence, constraint, condition or limitation of its prerogatives.

Since giving the judgement is an integral part of the “trial”, in the first section of this chapter we approached the jurisdictional act - the judicial decision/ the judgement - in terms of its characteristic traits and its structure.

The act of justice is carried out through the courts organized by jurisdiction degrees, starting with the first instance courts of each city and Bucharest and continuing with the tribunals - the next level of jurisdiction, functioning at the level of each county, the courts of appeal - organized by groups of counties and the High Court of Cassation and Justice - the supreme court at the national level. All these courts form the judicial power, one of the three powers of the state, together with the legislative and the executive.

However, there are also institutions with jurisdictional powers outside the judicial system. These include the Constitutional Court, the guarantor of the

supremacy of the Romanian Constitution, which ensures the control of constitutionality of the laws, the international treaties, the Parliament's regulations and the ordinances of the Government. Thus, in the second section of Chapter IV, entitled “Control Activity of the Courts”, after dealing with the issue of the judicial control through ways of attack, we have carried out a detailed analysis of the control exercised by the Constitutional Court. In the scientific approach undertaken, we wanted to make a brief incursion into the history of constitutionality control in Romania, the specialists showing that in the period before 1912 in Romania there was an incipient and accidental form of constitutionality control exercised by the Court of Cassation. Between 1912 and 1923, it was exercised by judges from all courts, regardless of degree, while the Constitutions of 1923 and 1938 provided that only the Court of Cassation and Justice, in united units, had competence to judge the constitutionality of laws. The Socialist Constitutions provided for a political control over the constitutionality of the laws, control enforced by the Grand National Assembly, and since 1991 the Romanian constituent lawmaker has for the first time implemented in Romania the institution of the constitutionality control of the laws exercised by an independent and specialized judicial body called the Constitutional Court. It is worth mentioning that, by studying the evolution of the post-December legal regulations in the field, three stages of evolution can be observed in the activity of the Romanian Constitutional Court, depending on the competences relied upon by the law and the developed jurisprudence, as well as two forms of control: *a priori* control of constitutionality and *a posteriori* control of constitutionality (abstract and concrete).

When we refer to the application of the law, we mainly refer to all the structures with jurisdictional powers, who work together to carry out the act of justice. In principle, this system incorporates the courts. But when we talk about justice, we can not ignore other bodies with jurisdictional powers such as the National College of Physicians, the National College of Pharmacists, the Superior Council of Magistracy, the disciplinary commissions within the educational units, the public authorities and institutions.

Disciplinary boards and committees established within these institutions are competent to investigate and punish disciplinary offenses committed by employees in a particular field or area, working în specialties (functions) of their activity domain (doctors, pharmacists, magistrates, teachers etc). For staff who occupies positions of leadership, guidance and control, special laws and disciplinary statutes may establish general or exclusive jurisdiction for the heads of ministries in the exercise of disciplinary action or the application of any disciplinary sanction. Settlement of complaints or appeals against disciplinary sanctions applied to those practising in certain fields of activity also enters in the competence of disciplinary committees and colleges of discipline. These structures are working in the concrete administration of justice having a role in the process of applying the law.

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Chapter. V. DEVELOPMENT OF LAW THROUGH THE ACTS OF APPLICATION

In the elaboration of this chapter it was taken into account that jurisprudence, which represents a great collective work, allowed, over time, the legislative system to have an important evolution allowing for the improvement of the legal framework of the various juridical institutions in several ways, respectively by means of covering the shortcomings of the normative acts through the judicial precedent, the appeal in the interest of the law, the notification of the High Court of Cassation and Justice with a view to pronouncement of a preliminary judgement on issues of law, suppletive and interpretative jurisprudence of the Constitutional Court, judicial presumptions and fictions, processes of law creation.

The specific role of the judge in all state activities must be reflected in a position of independence from the state, civil or political society, public opinion and the media. However, the way in which the judge acts to perform his or her duties in the process of applying the law can not be a simplest one, reduced in a general and impersonal way to enforce the law, almost an automatism. Social reality and legal

practice have shown that judging is more than just a syllogism, it means "uttering the right"[5]. During the settlement of a case, the judge chooses the applicable rule, which is often not enough for solving the problem, since it can not be a single and clear text, but a multitude of legal texts to be correlated and interpreted, which is the responsibility of the judge. Except where the rule is unclear or incomplete, situations may arise where the rule required to resolve the concrete conflict is not expressly formulated in a law, which is why the judge is under an obligation to interpret the law and to deduce the rule from the notions, the institutions and general principles of positive law. Firstly, the interpretation of a law must be made on the basis of the application of the general principle to the particular case, bearing in mind also the existing relationship between the principle and the fundamental concepts of law.

Given the judge's role in applying the law, in the first section of this chapter we addressed the issue of law development by covering the gaps in normative acts. Thus, we started from the notion of "loophole" (gap), from the classification into real and false loopholes or in voluntary or, on the contrary, involuntary loopholes, from the causes of a gap in the legislative system, as well as from the obligation of the judge, expressly enshrined in law, to judge even if the law is silent, is unclear or incomplete.

As stated in Article 5 paragraph (3) of the Code of Civil Procedure, the absence of an express legal provision or a customary act can be remedied by applying at least one general principle of law in order to obtain a fair solution. The legal text does not give the judge the ability to create the law, but only to find the silence / insufficiency / ambiguity of the law. In making this finding, the judge must discover the implications contained in the spirit of the entire system of legal rules in force and express as a general rule "something" that already exists, but has not been explicitly stated previously. All this turns the judge into a creator of law, even when, at least at the theoretical level, he is only called to interpret the laws. We must not forget, however, that the judge has the creative power only in the case he is judging.

[5] M. Albici, *Despre drept şi ştiinţa dreptului*, II[nd] edition, Editura Universul Juridic, Bucureşti, 2010, p. 202.

As regards the methods by which the judge covers the gaps and imperfections of the law, we have analyzed the application of the law by analogy, recourse to usages and appeal to the principles of law, in connection with this latter aspect trying to answer the question of whether the judge has the possibility to determine and formulate principles of law and their relationship with the law.

In approaching the second section of this chapter, entitled "Developing the positive law by way of jurisprudence", wishing that the research undertaken to elaborate this work be as complex and in-depth as possible, we sought, based on legal regulations in force, doctrine and an examination of practice, to highlight the creative role of the jurisprudence. Thus, a detailed analysis was made on issues such as: creation of the law through the judicial precedent, recourse in the interest of the law, referral to the High Court of Cassation and Justice for a preliminary judgement on issues of law, judicial presomptions - the creation of courts in the process of applying the law and fictions, a law creation method.

Judicial practice of the Constitutional Court is particularly important from the point of view of law enforcement and development. This jurisprudence can be of two kinds: interpretive and suppletive jurisprudence. When certain constitutional or legal rules give rise to several interpretations, the court which performs control of constitutionality is trying to give a fair and uniform interpretation of these legal texts, in which case the interpretation becomes part of the norm (interpretative jurisprudence). The Constitutional Court of Romania has contributed to the clarification of the meaning of certain terms (public property, freedom of contract, discrimination, autonomy, etc.) and to the explanation and development of the principles of law. On the other hand, if the constitutional text is incomplete or ignores certain institutions which are absolutely necessary, it is judicially it is completed through court order (suppletive jurisprudence). For example, in this way, in Romania, even before there was a settlement of the constitutional review, the judgment of the Ilfov Court in the famous „trams affair" in 1912 resulted subsequently in filling, judicially, the Constitution of the 1866 with rules on the control of laws' constitutionality. Another issue addressed in this article refers to the Constitutional

Court's jurisprudence concerning the relationship national law - Community/European law. In some cases, the Constitutional Court considered itself competent to analyze compliance of national law with the Community norms; in others, however, the Court interpreted Community law in order to be able to exercise the control of compliance. As a methodology, in the elaboration of this section I used the comparative method and the interpretative method, aiming to achieve an overview of the jurisprudence of the Constitutional Court of Romania.

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Chapter VI. CONCLUSIONS AND LEGE FERENDA PROPOSALS is the one who concludes the paper, presenting a synthesis of the research undertaken, of personal observations related to the subject - MODALITIES OF APPLYING THE LAW, as well as the *lege ferenda* proposals included in the thesis.

Thus, even in the theme context and considering that certain legal norm either raises problems of interpretation, either does not have sufficient accuracy or requires correlation with other legal provisions or certain additions / modifications, we have formulated the following *lege ferenda* proposals:

1) In connection with the attribution of the President of Romania to submit to Parliament the proposals for the appointment of the directors of the intelligence services, given the lack of correlation between the provisions of Article 65, letter h, of the Constitution revised in 2003 and the provisions of Law no. 1/1998 on the organization and functioning of the Foreign Intelligence Service (SIE), which violates the provisions of the fundamental law, *de lege ferenda* we considered that it is necessary to amend the provisions of this law which stipulate that the appointment of the SIE director is made by the Supreme Council of Country Defense at the proposal submitted by the President of Romania in accordance with the constitutional provisions according to which the appointment of the directors of the intelligence services falls within the

attributions of the chambers of the Parliament, at the proposal of the President of Romania.

2) Another *lege ferenda* proposal regards the text of the Article 123 paragraph (5) of the Constitution which could induce the notion of the prefect's obligation to bring a legal action in front of the administrative litigation court even when it finds the illegality of the controlled act and that, in the absence of such an obligation, he may choose not to bring legal action. For reasons we consider to be well founded, *de lege ferenda* we consider it necessary to amend Article 123 paragraph (5) of the Basic Law and Article 20 of Law no. 304/2004 in the sense of expressly mentioning the prefect's obligation to notify the court of administrative litigation in the event of the finding of illegality of the administrative act issued by the local public authority.
3) Starting from the regulation of the People's Advocate Institution and considering its purpose, we mention that within its sphere of competence there are not all the relations of the citizens with the public authorities. Thus, Article 15 paragraphs (2) and (4) of the same law limits the scope of the Ombudsman's jurisdiction, excluding anonymous complaints or civil rights damages if more than one year has elapsed since the person became aware of the facts which are the subject of the complaint, as well as petitions concerning certain public authorities. If the restriction appears to be justified in the case of anonymous complaints, in the matter of petitions concerning violations of citizenship rights older than one year, the measure adopted by the legislator appears to be too severe. *De lege ferenda* we consider that the text of Article 15 paragraph (2) of the Law of the People's Advocate no. 35/1997 should be amended, giving citizens the right to submit complaints concerning violations of citizens' rights to the ombudsman within a period of 3 years calculated from the moment the person concerned becomes aware of the facts which are the subject of the complaint.
4) In the case of courts, form the jurisdiction of the People's Advocate are exempt only acts issued in their capacity as public authorities with jurisdictional

powers. Although it is not apparent from the legal provisions that there is any relationship between the People's Advocate and justice and that it is competent to exercise control over the application of law by the judiciary power, as in other European states, *de lege ferenda* we believe that law should explicitly provide for the possibility of the People's Advocate to defend the rights and freedoms of citizens in relation to justice, a possibility by which the judges' violations of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are prevented and sanctioned, according to which any person has the right to obtain an examination of his case in a fair, public, independent and impartial manner and within a reasonable time-limit laid down by law.

5) Another *lege ferenda* proposal is to regulate a mechanism for verifying judgments in terms of their compliance with the Constitution and the Constitutional Court's decisions, as is the case with the constitutional complaint in the law of other states. Thus, for the reasons outlined in the paper, *de lege ferenda* we consider that the Romanian legislator should expressly confer such competence on the Constitutional Court.

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The work ends with the bibliographic list, which includes books and treatises as well as studies and articles from various fields and branches of law, which denotes the multidisciplinary character of the research carried out in the elaboration of this thesis. We also used as documentation sources the Romanian legislation and European Union norms, the judgments of the Romanian courts of all grades, the decisions of the Constitutional Court of Romania, as well as the decisions of the Constitutional Council of France and of the European Court of Human Rights.