Current Issues in Administrative Law

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Edited by

Cătălin-Silviu Săraru

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PREFACE

ASSOCIATE PROFESSOR CĂTĂLIN-SILVIU SĂRARU, EDITOR

DEPARTMENT OF LAW, BUCHAREST UNIVERSITY OF ECONOMIC STUDIES

This volume contains a selection of scientific papers presented at the Ninth International Conference on Perspectives of Business Law in the Third Millennium. This conference was held on 8 November 2019 at Bucharest University of Economic Studies, Romania. Each year, the conference is organized by the Department of Law at Bucharest University of Economic Studies together with the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.businesslawconference.ro.

The scientific studies included in this volume are grouped into three parts:

- *Reconfiguration of administrative law from the perspective of redefining social action and public interest in the "state of law".* The papers in this chapter deal with the "state of law" in theory and reality, focusing on social action in legal perspective, in terms of its relationship and public interest, and the challenges and possibilities in identifying the content of this notion.
- *Administrative codification in comparative law.* This chapter includes papers on: deconcentrated public services according to the Administrative Code and legal aspects of electronic communication according to its regulation in the Administrative Procedure Code.
- *Contemporary challenges in European and comparative administrative law.* The papers in this chapter deal with a number of issues. These include: the principle of revocation in Romanian administrative law, being an exception regarding administrative acts that have entered the civil circuit and produced legal effects;

the validity of tender proposals and of guaranteeing participation in terms of the will of the contracting authority and that of the bidder with a synthesis of the relevant case law in public procurement; challenges and perspectives on the evolution of Romanian administrative litigation; identifying the right of petition in the Romanian Constitution, the Moldovan Constitution, and in comparative law; a comparative analysis of the concepts of personal data and protection in the context of border procedures (Ukraine, European Union); and the historic decision of the Court of Justice of the European Union on the obligation of member states to recognize university degrees obtained through simultaneous study.

This volume is aimed at practitioners, researchers, students, and PhD candidates in juridical sciences who are interested in recent developments and prospects for development in the field of administrative law at the national and international levels.

We gratefully acknowledge the support of the *Society of Juridical and Administrative Sciences (Societatea de Stiinte Juridice si Administrative)*, Bucharest.

We thank all contributors and partners and are confident that this volume will meet the growing need for documentation and information among readers in the context of globalization and contemporary administrative law.

ABOUT THE EDITOR
CĂTĂLIN-SILVIU SĂRARU

Activity

Cătălin-Silviu Săraru, PhD, is an associate professor in the Law Department of Bucharest University of Economic Studies, specializing in national and European administrative law and administrative contract law. He is an arbitrator at the Court of International Commercial Arbitration (Romania); a lawyer of the Bucharest Bar Association; and the editor in chief of the journal *Juridical Tribune: Tribuna Juridica* (indexed in Clarivate Analytics) and *Perspectives of Law and Public Administration*. He is also a member of the editorial board of several scientific journals, including: *International Law Research (ILR)* (Toronto, Canada), *the Journal of Legal Studies*, *the Journal of Law and Administrative Sciences*, *Dreptul*, and *Acta Universitatis Danubius. Juridica, Reflecţii Academice*. He is president of the *Society of Juridical and Administrative Sciences* and a member of the *Société de législation comparée*, the *Research Network on EU Administrative Law* (ReNEUAL), the *Union of Jurists of Romania*, and the *Institute of Administrative Sciences "Paul Negulescu"*.

Publications

Cătălin-Silviu Săraru is the editor of two volumes: *Contemporary Challenges in Business Law* (ADJURIS International Academic Publisher, 2016); *Studies in Business Law—Recent Developments and Perspectives* (Peter Lang International Academic Publishers, 2013). He is the sole author of ten books including: *Drept administrativ. Probleme fundamentale ale dreptului public* (*Administrative law. Fundamental issues of public law*, C. H. Beck Publishing House, Bucharest, 2016); *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curtii Constitutionale* (*Administrative Litigation Law no. 554/2004. Critical examination of Constitutional Court decisions*, C. H. Beck Publishing House, Bucharest, 2015); *Contractele administrative. Reglementare, doctrină, jurisprudenţă* (*Administrative agreements. Regulatory, doctrine, jurisprudence*, C. H. Beck Publishing House, Bucharest, 2009). He is coauthor of two books, including *Drept administrativ European* (*European Administrative Law*, Lumina Lex Publishing House, Bucharest, 2005) and the author of more

than 100 journal articles published in: *Juridical Tribune: Tribuna Juridica*, *the Transylvanian Review of Administrative Sciences*, *Acta Juridica Hungarica*, *Dreptul*, *Juridical Current*, *Acta Universitatis Danubius. Juridica*, *Revista de Drept Public*, *Pandectele române*, *Curierul Judiciar*, *Notebooks of international law*, and *Tribuna Economică, Economie și Administrație locală*.

Prizes

He was awarded the "Anibal Teodorescu" Prize by the Union of Jurists of Romania in 2014 for the work "Cartea de contracte administrative: modele, comentarii, explicații" (The Book of administrative contracts: models, comments, explanations, C. H. Beck Publishing House, Bucharest, 2013).

PART I.

RECONFIGURATION OF ADMINISTRATIVE LAW FROM THE PERSPECTIVE OF REDEFINING SOCIAL ACTION AND PUBLIC INTEREST IN THE "STATE OF LAW"

THE STATE OF LAW: BETWEEN THEORY AND REALITY

PHD. STUDENT RALUCA TOMESCU[1]

Abstract: *Not just a creation of the modern world, such phrases as the "rule of law" or the "state of law" are found in post-December Revolution (1989) law dictionaries and give us a new conceptual perspective on the institution of the state. These concepts have been transposed into the phrase the "rule of law", as evident in article 1 paragraph 3 of the Constitution of Romania, establishing that "Romania is a democratic and social state, governed by the rule of law". Among the 130 paradigms of the word "right" offered by The Explanatory Dictionary of the Romanian Language, we may consider adding one more—the one that defines a state whose legal system is based on the four validated principles of the concept of the "rule of law". These are: the supremacy of the constitution; the guarantee of the security and constitutional rights of citizens; civil society as an equal partner of the state; and the separation of state powers. State power is shared between different institutional compartments (legislative, executive, and judiciary) with separate and independent powers and responsibilities. Legislative power, as well as democracy itself, is related to a country's recognition of its constitutional rights and principles, developing from a simple institutional basis and becoming a "state" under the "rule of law". This article proposes a debate on the meaning that the legislature wished to give to the notion of the "rule of law", in terms of the principles of its underlying concept as expressed in the articles of the Romanian Constitution. As such, The Explanatory Dictionary of the Romanian Language may be lacking a new paradigm of the word "right", seeing rather the presence of a pleonasm.*

Keywords: *state of law, constitution, law, state.*

JEL Classification: K00, K10

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1. Introductory considerations

The phrase "state of law" is becoming more and more commonplace. It is heard in the speeches of authority figures and debates in the media; in the speeches of human rights defenders; and especially in the fight against corruption. Yet, looking for a well-defined definition of this phrase, one may easily come to the conclusion that it does not exist. The doctrine provides us with enough material to understand the concept, but what we call a lawful state is still awaiting confirmation.

On the one hand, we have the state, which presents itself as a notion with a double meaning, and on the other hand we have the term *drept* (law). *Drept* is a word with more than a hundred paradigms, but we have some questions, prompting us to make a closer analysis of this term as it is found in the Romanian Constitution.

Romania's Basic Law states in art. 1 paragraph 3 that "*Romania is a democratic and social state, governed by the rule of law*". To this premise, the legislature has added a number of features of the Romanian state, being a state: "*in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed. (4) The State shall be organized based on the principle of the separation and balance of powers—legislative, executive and judicial—within the framework of constitutional democracy. (5) In Romania, the supremacy of the Constitution and the observance of the Constitution and the laws shall be mandatory*". Further, article 16 (1) states "*Citizens are equal before the law and the public authorities, with no privileges and with no discrimination. (2) No one is above the law*".

Clearly, the legislature's vision of a "state of law" is not sufficient to grasp that democratic, social, and human dignity, the rights and freedoms of citizens, the free development of one's personality, and human justice and political pluralism stand for supreme values guaranteed to all. The State has to be organized on the principle of the separation and balance of powers so that citizens enjoy equality in the face of the law and the public authorities and no one is above the law. Individually listing each of these characteristics constitutes a pleonasm and it is clear that they are not included in the vision of the legislature as key parts of the "state of law", otherwise there is no reason to repeat them.

Apparently a simple utterance, the phrase "state of law" leads to extensive arguments about its doctrine. The problem of how to define "the state of law" has been the subject of a number of approaches, especially

since it has often proved to express a wish, rather than be a reality.

On the one hand, "the state of law" can be regarded as a legal ideology, since the creation of this phrase may suppose that "law" is not considered essential to the state. On the other hand, "*it has been shown that it is difficult, if not impossible to set a boundary between the state and the law, because only a state can be "lawful*"[2]. Starting from these aspects, we aim to analyze and interpret each term individually, in terms of the complete phrase itself, but also in terms of the conceptual character that is at the basis of this lexical creation.

2. The state of law

Firstly, it should be noted that the phrase "state of law" has no etymology in Romanian, this association being incorporated in a complicated doctrinal fashion and representing, in fact, a translation of a concept already established in other states. In this phrase, there are two aspects to be noted: on the one hand, "the law" as a normative concept and on the other, "the state" as an ideological concept. These two aspects have always formed an assemblage combining the part and the whole: "*the state and the law are widely connected, and mutually supportive. They appeared at the same time and for the same reasons and can be explained much better when taken together. The state creates the law and paradoxically, the law delimits the configuration and the actions of the state*"[3].

The normative term "of law" can be presumed to refer primarily to "*all the rules provided and guaranteed by the state, aimed at organizing and disciplining human behavior in major relationships in society in a specific climate manifesting the coexistence of freedoms, defending essential human rights and social justice*"[4].

In the field of ideology, the state can be seen as a product of human society, being "*the legal formula for the organization and existence of a society, people or nation*"[5]. Thus, we may naturally ask the question as to whether the "rule of law" represents "*a legal formula for the organization and existence of a society, people or nation, in which a set of rules, aimed at organizing and disciplining human behavior in the main relations of society, in a specific climate of manifesting the coexistence of freedoms, the*

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[2] Steluța Ionescu, *Justiția și marile doctrine privind statul de drept*, "Studii de Drept Românesc", Year 20 (53), No. 1–2, 2008, p. 107–126.
[3] Muraru I, E. S. Tănăsescu, *Drept constituțional și instituții politice*, XIII edition, vol.1, C.H. Beck Publishing House, Bucharest, 2008, p.11
[4] Nicolae Popa, *Teoria generală a dreptului*, Bucharest, 1993.
[5] *Idem*, p. 3.

defense of the essential human rights and social justice are assured and guaranteed by the state".

In order to answer this question, and seeking especially to understand the meaning of this phrase, I consider it appropriate to investigate how the notion of state of law is presented in the specialized literature on jurisprudence.

Representing a doctrine in continental European legal thinking, "the state of law" has its roots in German jurisprudence. Opinions of theoreticians on this concept are divided. Some hold that "the state of law" has purely formal features and that, despite its widespread use, the state of law remains "a very elusive concept"[6], being a pleonasm and a legal nonsense. But, on the other hand, there are contrary opinions holding that the state of law corresponds to an anthropological necessity or postulate, and perhaps even an axiom.

In the juridical literature, it is stated that the concept of the state of law might represent "*a constitutional reality whose foundation is to be found within the mechanisms of exercising state power, in the relations between power and the freedom of every individual of the society and the principle of legality in the entire business of the state, but also in the behaviour of each member of society*"[7].

Beyond such polemics, however, the origins of this concept are assumed to be found in ancient principles, similar to those they represent today, and in the diverse contexts of ancient Greece and China, Mesopotamia, India, and Rome. Aristotle famously stated that between a king ruling at his discretion and a king led by the law, the latter would prove to be superior. Cicero is also often quoted, having stated at one point that: "*We are all servants of the law in order to be free*"[8].

As an ideology, the identity of this concept began to take shape in the seventeenth and eighteenth centuries with revolutions in Western countries directed against feudal arbitrariness, "*the idea of the ruling law, another foundation of the issuance of the written constitution, was born also*

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[6] Tamanaha, Brian Z., *As for the rule of law*, Cambridge University Press, 2004, p. 3.

[7] Marius Andreescu, Claudia Andreescu, *Statul de drept. Semnificații constituționale și jurisprudențiale contemporane*, "Revista Universul Juridic", June 2019.

[8] This is extended: "The magistrates who administer the law, the judges who act as its spokesmen, all those who live as its servants, grant it our loyalty as a guarantee of our freedom." Cicero, *Procese de crimă*, Penguin Classics, Michael Grant. 1975, Harmondsworthp, p. 217. Latin original: "Legum ministri magistratus, legum interpretes iudices, legum denique idcirco omnes servi sumus ut liberi esse possimus", "Pro Cluentio".

in English constitutional practice, considering that the state authorities must respect the pre-established rule of law and consider it, as long as it is not repealed, as sacred"[9].

Albert Dicey theorized the character of Britain in the Victorian age. Conceptually, this had its origins deeply rooted in the past and foreign scholars such as Voltaire, de Lome, de Tocquville, and Gneist all admired the United Kingdom for its respect of the supremacy of law. In 1885, Dicey stated that the *rule of law* was a fundamental pillar of a modern society, based on the equality of law for everyone, with no one punished unless they breached a law, and the individual leaned on the constitution[10].

Jaques Chevallier defines the "state of law", in a very pragmatic and clear manner, as "the *kind of political regime in which the power of the state is framed and limited by the law*".

At the end of the nineteenth century, the German juridical doctrine "*Rechtsstaat*" or "state of law" appeared. Its source, from which the development of this juridical theory departed, was the Kantian approach to civil society[11]. The "state of law" appears similar to that of the "constitutional state" in which the exercise of governmental power is constrained by the law. Thus the "state of law" appears conceptually opposed to *Obrigkeitsstaat* or *Nichtrechtsstaat* (a state based on the arbitrary use of power) and *Unrechtsstaat* (a non-*Rechtsstaat* with the possibility of developing into one after a period of historical development).

Later, this complicated doctrine was adopted into the French doctrine of "était et droit", gradually becoming a general term across the entire continent, but with various terminologies—"Estado of derecho" in Spanish, "Stato di dirito" in Italian, etc.

In modern times, the concept has been updated and the state of law has come to be identified with the liberal-democratic state. The Declaration of the Rights of the Man and of the Citizen (1789), taking John Locke's ideas of social philosophy as the true "bible of liberalism and individualism",

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[9] Idem, p. 69.

[10] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, LF ed., 1915, p. 44.

[11] "German authors are accustomed to acknowledging the German philosopher Immanuel Kant (1724–1804) at the forefront of their comments on the evolution of the rule of law. The rule of law was introduced with the sense of a 'constitutional state' by Kant, in later work after the American and French Constitutions had been adopted and towards the end of the eighteenth century. Kant's approach is based on the supremacy of the written constitution of a state", Geissler, Thorsten, The Konrad Adenauer Foundation, 2015, speech at the launch of the program "The values of the rule of law in the school curricula".

stated in art. 2 that "*The goal of any political association is the conservation of the natural and imprescriptible rights of man*" while art. 16 sharply asserts that "*Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution*".

The main principles of the rule of law are[12]:

- The state is based on the supremacy of the constitution and guarantees the security and constitutional rights of its citizens.
- Civil society is an equal partner with the state.
- State powers are separated into different compartments (legislative, executive and judicial) with separate and independent powers and responsibilities.
- Legislative power and democracy itself are related to the protection of these constitutional rights and principles.

It is therefore evident that the phrase "state of law" cannot be reduced to a simple logical concept. It gives expression to a fundamental constitutional need, according to which, as we mentioned earlier, the law is indispensable to the state and validates the purpose and effectiveness of the legal norms created; and the state is indispensable to the law to exercise and express power through the system of rules created.

Professor Tudor Drăganu, in "Introduction to the Theory and Practice of the State of Law", proposes an interesting and comprehensive definition of the concept of constitutional law: "*The state of law is considered such a State organized on the principle of the separation of state powers in the application of which justice acquires real independence and following through its legislation the promotion of the rights and freedoms inherent to human nature, ensures the strict observance of its regulations by the whole of its organs, in all their activity*".

The rule of law, which supposedly has its roots in antiquity, today defines "the supremacy of law" or, in legally specific terms, the preeminence of law. The preface to the European Convention on Human Rights and Fundamental Freedoms, states that "*the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law*". According to article 2 of the Treaty on European Union, the state of law is one of the fundamental values of the European Union. These regulations have come to emphasize that both the European Union as an institution itself, and

[12] Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland,* I, 2nd edition, § 20, Munich 1984; Reinhold Zippelius, *Allgemeine Staatslehre/Politikwissenschaft*, 16th edition, §§ 8 II, 30-34, Munich 2010.

individual member states, have to adopt the concept of a "state of law", because it is one of the key political criteria that countries wishing to join the union must meet, including a system of laws (codes and other regulations) that are to be adopted under established procedures and not by discretionary decisions, thus guaranteeing the existence of functioning democracy and the respect of human rights, including the rights of persons belonging to minority groups.

The UN definition afforded to the "state of law" supports a similar ideology, stating that it is "*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards*"[13].

3. The state

Man, as a superior being, cannot live alone, in isolation, but must relate to his peers to evolve and survive. Humans are social by nature, each of us having primary instincts for forming communities, perhaps the oldest human need being the need to integrate into a society[14]. The dynamics of such a human need materialize in the interpersonal component and have led, throughout human evolution, to the formation of communities and been perfected in the establishment of rules of coexistence within them.

The evolution of the development of forms of social organization led to the emergence of a well-organized structural form of society, i.e. the emergence of the state.

The state, without benefiting from a well-defined definition, is therefore a superstructural institution. It is a primary instrument of political and administrative organization through which the functionality of the social system is exercised, relations between people, and the territory and population over which this organization exercises authority are regulated[15].

The totality of the legal rules and norms that regulate the conduct of people in social relations in a given community, which can be imposed by the coercive force of the state, represents **the legal system of the respective community.**

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[13] United Nations, *Rule of Law*, online: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/, consulted on 1.10.2019.

[14] The word "society" derives from the French word societé, with the Latin origin *societas*, meaning a friendly association with others and associate, comrade or business partner.

[15] https://dexonline.ro/definitie/stat, consulted on 12 September 2019.

4. The meanings of the notion of law

In the dictionary of the Romanian language, the word *drept* (law/right) has more than 138 paradigms, ranging from "*to get (or stay, take in) position perfectly vertical, standing still*" to the sense "*represent therefore, the shortest distance between two points, bluntly*" and "*corresponding to the right side of the body*" none of which validate the meaning of the term "right" in the phrase *stat de drept* (rule of law). In analyzing this term from a strictly juridical perspective, where the paradigm of the term of *drept* (law) has a broad meaning, this word points generically to a particular direction[16], related to the science concerned with the study of the norms of law, as summed up in the phrase "legal sciences".

The word *drept* (law) also references the "legal system" of a state, speaking of all legal norms developed or recognized by the state as aimed at organizing and ensuring discipline in the behaviour of its citizens within important social relationships, according to the social values of the respective society, and establishing rights and obligations whose compliance is ensured, if necessary, by the coercive power of the state. In the contemporary legal literature, law is defined as: "the *set of rules ensured and guaranteed by the state, which aim to organize and discipline human behavior in the main relations of society, in a specific climate of manifesting the coexistence of liberties, defending the essential rights of man and social justice*"[17].

In the present study, I primarily seek to emphasize the meaning that English gives to the word "law", especially in the phrase "rule of law", since a mere literary translation "of law" is not only insufficient, but also limited, in my opinion. This has not been very easy, since there have been multiple attempts to give a universally accepted definition of the word "law" in foreign legal doctrines. In fact, according to some theorists, such a definition cannot be given[18].

The English theorists McCoubrey and White[19], in trying to answer

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[16] Voicu Costică, *Teoria Generală a Dreptului, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2008, p. 7.

[17] Nicolae Popa, *Teoria generală a dreptului*, All Beck Publishing House, Bucharest, 1997, p. 97.

[18] Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, third edition, Stevens & Sons, London, 1975, p. 39.

[19] Hilaire McCoubrey was a professor of law and director of postgraduate affairs at Hull University School of Law. He taught in areas such as legal theory, public international law, international law and armed conflict, and air and maritime law. Nigel D. White is Professor of Law in International Organizations at the University

the question "what is law", stated that the answer is one of the most difficult ones to give[20]. Glanville Williams[21] stated, more pragmatically, that the meaning of the word "law" depends on the context in which it is used[22]; Thurman Arnold[23] said that it is obviously impossible to define the word "law" and that it is equally obvious that the struggle to define this word will never be abandoned.

Although, in the foreign juridical literature, the meaning of "law" remains an intensely debated term, accepting the difficulty of limiting its meaning, we can observe that "law" primarily designates a system of rules, created and applied by social institutions or the government, to regulate the behavior of citizens in society—what we call "the system of law".

The Third New International Dictionary from Merriam-Webster[24] defines law as: "*a custom or a compulsory practice of a community; a rule or mode of conduct or action that is formally prescribed or recognized as mandatory by a controlling authority or is made compulsory by a sanction (as edict, decree, rescission, order, ordinance, statute, resolution, rule, judicial decision or use) applied, recognized or executed by the controlling authority*", equating to the "system of laws" in Romanian.

The Dictionary of the History of Ideas, published by Scribner in 1973, in the same way, defined the concept of "law" as being "*an explicit legal system, institutionalized and complex way of regulating human*

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of Nottingham and teaches in the fields of jurisprudence and public international law.

[20] McCoubrey, Hilaire and White, Nigel D., *Textbook on Jurisprudence*, second edition, Blackstone Press Limited, 1996, p. 2.

[21] Glanville Llewelyn Williams, Welsh scholar, professor of law at the University of Cambridge and professor of jurisprudence at University College, London, was considered the most important scholar of criminal law in the United Kingdom.

[22] Williams Glanville (ed.), *International Law and the Controversy Concerning the Meaning of the Word "Law"*, revised version published in Laslett, "Philosophy, Politics and Society", 1956, p. 134.

[23] Thurman Wesley Arnold (June 2, 1891-November 7, 1969), a lawyer, social theorist and government official, an American and graduate of Princeton University in 1911 and a graduate of law at Harvard in 1914. In 1927, he was appointed dean of the Faculty of Law, the University of West Virginia, and taught at Yale Law School. His activities included the publication of two books—Symbols of Government (1935) and the Folklore of Capitalism (1937)—which enjoyed widespread national acclaim.

[24] Third New International Dictionary, Merriam-Webster, Inc., Springfield, Massachusetts.

behavior"[25].

The Oxford English Dictionary has, with direct reference to the "rule of law", defined the phrase as follows: "*The authority and influence of law in society, especially when seen as a constraint to individual and institutional behaviour; the principle that all members of companies (including those in the government) are also considered subject to publicly disclosed codes and legal processes*"[26], thus referring to the legal system of the state, which all citizens are subject to regardless of their social position.

5. Conclusions

In Romanian the phrase "state of law" is often used and it is obvious that it refers to a superstructural institution, a primary instrument of political and administrative organization, whose functioning is based on a system of laws that regulate relations between humans, with respect to four established principles: *the supremacy of the constitution and ensuring the safety and constitutional rights of citizens; civil society as an equal partner with the state; the separation of state powers and their division into different sections (legislative, executive and judiciary) with separate and independent powers and responsibilities; and where legislative power, as well as democracy itself, are linked to constitutional rights and principles.*

By the very use of this phrase, these principles have become misunderstood, adding a new paradigm to the word *drept* (law) in the dictionary of the Romanian language. But, by using the phrase "Romania is a state of law" followed by these principles, as detailed in other articles of fundamental law (the enumeration in the contents of art. 1 paragraph 3, respectively art. 16), this lexical construction can only be deemed a pleonasm.

Therefore, in conclusion, I hold that Romania is: a **democratic and social state**, whose system of laws ensures that "human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the

[25] Philip P. Weiner (ed.)*, Dictionary of the History of Ideas*, Charles Scribner's Sons, 1973.

[26] Oxford English Dictionary online (consulted on 13 September 2019). The term "rule of law" is sometimes used in other ways as well see Garner, Bryan A., *Black's Law Dictionary*, IX edition, Thomson Reuters, 2009, p. 1448. This source offers five definitions of the "rule of law": the main definition is "A legal principle of substance" and the second is "the supremacy of regulations through normative acts, as opposed to arbitrary power".

Revolution of December 1989", "law" being only a generic term for the notion of a "system of law", which is the basis of the functioning of the state as an institution.

Since a state institution cannot be democratic or social without a legal system based on these two principles, and the state as an institution cannot impinge on human dignity, the rights and freedoms of its citizens, the free development of human personality, and justice and political pluralism, these are all to be guaranteed on the sense of honour or arising from the conscience of society. I therefore suggest that the term "law", in the phrase "state of law", can only make a generic reference to the system of laws of the state, respecting the principles listed in the Romanian Constitution and the content of article 1 paragraph 3, as added to by article 16 on the "Equality of rights" (i.e. citizens are equal before the law and the authorities, without privilege or discrimination and that no one is above the law), thus sparing The Explanatory Dictionary of the Romanian Language the incorporation of a new paradigm of the word *drept* (law).

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11. Steluţa Ionescu, *Justiţia şi marile doctrine privind statul de drept*, "Studii de Drept Românesc", Year 20 (53), No. 1–2, 2008, p. 107–126.
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SOCIAL ACTION IN THE PERSPECTIVE OF THE LAW-STATE RELATIONSHIP

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Abstract: *We begin with the purpose of human activity and some of the realities both in Romania and elsewhere, which can be summarized in terms of: politics without healthy principles; market without morality; systemic pollution; science without humanism; inhuman inequalities; and legalism without soul etc. These all lead further and further away from the imperatives of human life in society, in terms of life, work and love. Using concepts that go beyond the field of law, such as social action, the author aims to find solutions derived from a holistic (systemic) vision in an economic interpretation, such as "integrated live integers". Thus, understanding the social action of the law, and especially understanding state social action, in terms of the demands of the "health of the live integer", can help identify some healthy solutions, beneficial for all parties and laying the foundation for an exchange of meaning in society. To that end, we believe that the implementation of these proposals can herald the beginning of a process of human and institutional re-spiritualization; something that is of great importance for the "Romania of Tomorrow".*

Keywords: *social action, the health of the live integer, the state loving people and truth, human and institutional respiritualization.*

JEL Classification*:* K00, K10, K30

> *"A state wishing to be respected abroad and being strong and unshaken inside its borders has no other more precious treasure to preserve and cultivate than the feeling of national law. In the healthy and strong feeling of law in each individual, the state possesses the richest source of its power and the safest guarantee of its existence inside and outside the borders"*
> —Rudolf von Ihering

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1. The concept of social action

All human beings systematically perform actions by which they pursue certain purposes, which are both acceptable and accepted by themselves and by the society where they're born, live, work, love and ultimately die. The individual uses specific means in order to achieve his/her purpose. As these actions take place in a certain social context generated by society, which influences and is influenced by the individual, they are essentially social actions.

In social action theory, we find: the author of the action, also referred to as the *agent*; the *purpose* of the social action; the *means* by which the agent realizes his/her purpose; the object of the human action, referred to as the *patient*; and the *product of the action*, as an object that he/she builds.

Human actions can be seen as "causal-productive relationships between the agent and the patient of the action"[2]. They are self-aware and generate goods and values, in terms of those products necessary for human accomplishment. It is obvious that if we compare the world of today with that of the past, we will find great differences and visible progress since then: from the behaviour of people who worshipped natural phenomena, considering those phenomena to have divine powers, and small, isolated localities that were vulnerable to predation; and from the total disregard of the rights of individuals to modern-day society, "in which, according to fixed laws, everyone must benefit from the heat of the sun of justice and equality, great progress has been made"[3]. All these advancements were possible only as a result of conscious, creative, and transformative human action. Of course, not all of these human actions took place simultaneously, but gradually, according to need, condition, and environment etc.

Contributions to the development of a philosophy and theory of action throughout known human history have appeared since ancient times in the work of several authors. Of these we may note the contribution of the Greek philosopher Aristotle who purportedly stated that "the basis of the state organization is the Constitution, which originates in the social nature of people"[4], of the theologians and philosophers of the Middle Ages such as Thomas Aquinas, and the "later philosophers of practice, Kant and Hegel",

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[2] Tudosescu Ion, *Sistem social și acțiune umană. Expozeu de filosofie umană*, Fundația Romania de Mâine Publishing House Bucharest, 2008, p. 47.

[3] Ioan St. C., *Omul de doctrină și omul de acțiune*, Institutul de Arte Grafice "Eminescu", Bucharest, 1906, p. 3.

[4] Bădescu Mihai, *Socrate, Platon și Aristotel-promotori ai filosofiei dreptului în Grecia Antică*, "Pro Patria Lex", vol. 16, issue 1, 2016, pp. 17-31.

especially in terms of the *purpose-means* relationship within human action.

The German philosopher Friedrich Hegel raised the matter of the role of *means* in determining social life (seen as tools/instruments of work) and defining *purpose* as an activity that requires the use of tools, sometimes involving deceit and violence against society and nature.

The German philosopher, sociologist, and historian, Karl Marx, going further, tried to explain the dynamics of social life through the concept of *practice* and the implications of the *meaning of work* in the birth and development of human society.

After Marx, other philosophers continued to explain the concept of social actions. Thus, the Italian philosopher and politician Antonio Gramsci defined society as a system of social actions and referred to a *historical bloc*[5], while the Hungarian philosopher, aesthetician, literary historian, and critic, Georg Lukacs, placed the fundamental concept of work at the base of the social ontology.

The first half of the twentieth century saw the development of actionist thinking in what was termed *pragmatism*, having as its representatives the American scholars Charles Sanders Peirce (logician, mathematician and scientist), William James (a psychologist holding a degree in medicine who served as a professor at Harvard), and John Dewey (a philosopher, psychologist and educational reformer)[6].

To these authors, considered followers of the Marxist philosophy of praxis, other thinkers from the field of social and economic sciences can be added. These included the neo-Marxists of the Frankfurt School, with the prominent German scholars Max Horkheimer, the leader of The Frankfurt School and director of the Institute of Social Studies, who argued for humanity's desire to overcome personal suffering through social change[7], and Theodor Adorno, who advocated that action must come from consciousness[8]. To these we can further add the German-American philosopher, sociologist and political theoretician, Herbert Marcuse; the German philosopher and sociologist Jurgen Habermas; and the Canadian economist and diplomat John Kenneth Galbraith. The representatives of the Frankfurt School wanted, as part of a general plan, "to balance the State

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[5] Boothman, Derek, *Gramsci's Historical Bloc: Structure, Hegemony and Dialectical Interactions*, "Movimento-revista de educação", Niterói, ano 4, n.6, pp. 131-150, Jan./Jun. 2017.

[6] https://www.iep.utm.edu/pragmati/#H1, accessed on 20.10.2019.

[7] Stanford Encyclopedia of Philosophy, *Max Horkheimer*, https://plato.stanford.edu/entries/horkheimer/, accessed on 20.10.2019.

[8] Encyclopedia of Philosophy, *Theodor Adorno*, https://www.iep.utm.edu/adorno/, accessed on 20.10.2019.

with the help of society and power with the help of law"[9].

Obviously, the problem of human (social) action has preoccupied sociology, and has been a subject of study of this scientific discipline and of others that derive from it. The study of human social action is probably very ancient, because, for example, in order for an individual or social group to avoid disrupting the positive activity of the community to which they belong through their actions, they must conform to the various norms, rules, general interests, and social values of that community. Moreover, this results in such social norms taking on a coercive role, obliging the individual to obey the demands of social life.

The German sociologist Max Weber studied the relationship between human action and social order, beginning with the fundamental features of action in his era and the methodological possibilities of the social sciences, utilizing the various methods and concepts, *means*, which he held distinct from those of the natural sciences.

The Italian sociologist and economist Vilfredo Pareto believed that the synthesis of human actions forms *social life*[10]. Analysing human actions, he concluded that there are two major categories of action: logical and non-logical. These include: non-experimental and logical actions; non-experimental and non-logical actions; experimental and logical actions; and experimental and non-logical actions. Pareto proposed that there is no connection between purpose and means, therefore non-logical actions are the foundation of social determinism, while logical actions have a limited role and the most important motivations of human actions are psychological ones related to human feelings.

Beginning with the definition of the global system of society, the American sociologist Talcott Parsons, in his social action analysis, focused on the existing interrelationships between the action systems made possible by an artificial language, namely that of science, taking a semiotic approach to human action.

The center of the action system structure conceived by Parsons is the correlation between the actions of individuals and their collective cooperation, and the cooperation of their action subsystems in the accomplishment of each stage or moment that forms general social action.

The *deontic logics* of the Finno-Swedish philosopher and Cambridge University professor, Georg Henrik von Wright, analysed human action through norms that generate rights and duties, specifically in disciplines of normative character (political and legal ethics etc.). He classified these

[9] Domenach, Jean-Marie, *Anchetă despre ideile contemporane*, French translation of Laura Mina, Humanitas Publishing House, Bucharest, 1991, p. 80.
[10] Pareto, Vilfredo, *Traité de sociologie générale*, Lausanne, Paris, 1917-1919.

norms (albeit, not very rigorously) into six categories, which he further divided into two[11]: the *major category*, including the rules of the game (assimilating also mathematical and logical aspects), the directives (the technical norms), and the prescriptions; and the *minor category*, divided into ideal rules, customs, and moral principles.

According to von Wright, *to act*, which does not have the same general explanation, is to deliberately *produce* or *prevent* a change in the world, the consequence being that *refraining from action* leads to *not changing anything* or to *not letting anything happen*. Therefore, we have two types of action: a productive one and a preventive one, to which two types of refrainment correspond. More specifically, examples of actions are things such as: closing a window, opening a door, or signing an application etc.

A clear distinction is made between action and activity, the first one assuming a change and the second one a process. However, each change takes place through a process and the performance of an action involves an activity such as writing, translating, talking etc. In other words, the action and the activity are often complementary and the concept of *conduct* can be used to show both aspects. Obviously, there are rules on the prohibition of certain activities (no talking) or certain actions.

The Polish researcher, philosopher, and logician, Tadeusz Kotarbiński, analysed human action in terms of its efficiency, elaborating the theory of efficient action, known as *praxiology*, and integrating concepts of sociology, psycho-sociology, the efficient organization of work and production, and social philosophy etc.

In terms of efficient human action theory, Kotarbiński considered that it is: "the right place for introducing the distinction between the simple act, the multitude of acts, the composite act, the positive cooperation, the negative cooperation (fight or conflict), the assistance relationship, the obstruction, the facilitation, the generation of difficulties, the preparation, the planning, the execution, the control, the command and leadership, organization, etc."[12].

Furthermore, "the root cause of social actions is external to the subject, being, first of all, economic"[13], even if the impulse towards action is born within him/her, in his/her psyche. And in order for the individual not

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[11] Von Wright Georg Henrick, *Norm and Action: A Logical Enquiry*, Routledge and Kegan Paul, London 1963.

[12] Kotarbinski, Tadeusz, *Praxiological Propositions and their Proof*, in Logic, Methodology and Philosophy of Science, Stanford University, 1962, p. 228.

[13] Muraru, Ion, *Acțiune socială și comportamentul individual*, Politică Publishing House, Bucharest, 1986, p. 37.

to affect any of his/her peers through his/her actions, a norm must be established to regulate any of his/her antisocial attitudes.

In this context, we agree with the statement made about a hundred years ago by Mircea Georgescu, a doctor of laws, who stated that "the law does not tend to suppress the internal predispositions or tendencies for injustice [of individuals]; it concerns only the *act that occurred* in connection to the birth of any infringement of other people's rights"[14].

Therefore, the social need to ensure order and a good standard of coexistence among individuals, and to create the necessary framework for the smooth running of happenings within society is imposed through certain behavioural rules in society, "without which coexistence would have been impossible"[15].

In the same spirit, the Romanian researcher Professor Ion Craiovan, notes that: "no form of human association can function properly without establishing a minimum of rules of conduct, concluding that society is born at the same time with the genesis of the norm"[16].

Basically, people accomplish things exclusively by their "transformative action upon their own extant environment, which ends with the production (or facilitation of production) of goods and values necessary for their material and spiritual living"[17]; these are not offered to them by the natural environment, but must be produced by people.

Through creative human participation in the production/transformation objectified in work, people become successful on multiple planes. Being in relationships with other people (maintaining rapport) and in order to live together, it is necessary to establish certain conducts that are accepted by society in different areas of social life that it regulates, in political, familial, and economic terms etc.

2. The social action of law

People cannot be separated from the community in which they live, work, and love, and considering that the meaning of the human need for social belonging can be expressed by the phrase "people, as social beings,

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[14] Georgescu, Mircea, *Criteriul biologic în Drept*, Imprimeria Fondul Cărților Funduare, Cluj, 1932, p. 31.

[15] Paraschiv, Elena, *Izvoarele formale ale dreptului,* C. H. Beck Publishing House, Bucharest, 2007, p. 1.

[16] Craiovan, Ion, *Filosofia dreptului sau dreptul ca filosofie*, 2nd ed., ProUniversitaria Publishing House, Bucharest, 2019, p. 33.

[17] Tudosescu, Ion, *Acțiune umană și existență*, Fundația România de Mâine Publishing House, Bucharest, 2018, p. 61.

feel the need to live in a community"[18], it is natural for human beings to enter into different social relationships with their peers. These relationships can be "political, economic, cultural, familial etc."[19] and take place within human society, about which the Romanian sociologist Dimitrie Gusti noted: "it is in fact the synthetic totality of those four manifestations, of the economic, spiritual, legal and political manifestations"[20].

The German sociologist, philosopher and essayist Georg Simmel emphasized that: "a society exists where more individuals enter into interaction relationships (...) due to certain instincts or to the desire to achieve certain goals"[21].

However, these rapports in interaction, as Simmel called them, based on the continuous and mutual influence of human beings, take place in pre-established settings where they socialize (society) and in which some rules, prescriptions, and obligations etc. must be established. As such, each individual must observe these in order to maintain social order and "contribute to establishing a relative state of balance and harmony, but never definitive"[22], because of the impact of disturbing actions, events, phenomena, and social relations etc.

Therefore, human action, understood as deliberately producing or preventing change in the outside world, implies that human beings refrain from taking an action whose possible consequence is the leaving of something unchanged or letting something happen[23].

The rules that organize human action, in other words the regulation of the rational mode of living in social life, are established through social norms. Basically, the norms provide people with the opportunity to anticipate the actions of others and to prepare appropriate responses, in line with the culture of the respective community, thus being a kind of "guide to

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[18] Niemesch, Mihail, *Reglementările sociale între tabuuri antice și internet ca factor de configurare a dreptului* in "Impactul transformărilor socio-economice și tehnologice la nivel național, european și mondial", vol.6, no.6, 2015, pp. 68-72.

[19] Penculescu, Gheorghe, *Principii de drept*, Științifica Publishing House, Bucharest, 1958, p. 9.

[20] Gusti, Dimitrie, *Cunoaștere și acțiune în serviciul națiunii,* vol. II, Cartea Echipelor, Fundația Culturală Regală "Principele Carol", Bucharest, 1946, p. 18.

[21] Simmel, Georg, *Sociologie. Studii privind formele socializării*, German translation: Ion Nastasia and Maria Nastasia, Sigma IG, Publishing House, Chișinău, 2000, p. 12.

[22] Craiovan, Ion, *op. cit*., 2019, p. 34.

[23] Von Wright, Georg Henrik*, Logica deontică și teoria generală a acțiunii* in *Norme, valori, acțiune. Analiza logică a discursului practic, cu aplicații în etică și în drept*, Text selection, translation and introductory study: Sorin Vieru, Dragan Stoianovici, Politică Publishing House, Bucharest, 1979, pp. 140-141.