

# THE MILITARY COMMAND ACT IN THE LIGHT OF THE CONSTITUTIONAL PROVISIONS AND OF THE LAW ON ADMINISTRATIVE LITIGATION

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## Abstract

*The military authorities are empowered to carry out a form of public administration, respectively to provide a public service called national defense, in exceptional circumstances, being at the same time the holders of the means of armed violence authorized by the state. At the same time, the discretion with which the military authority is legally determined to issue military command documents, exempted from forms of judicial control, must not lead to the violation of fundamental human rights, the whole activity being subordinated to the principle of legality. Not all acts of military authority concerning military relations are also acts of military command, especially those concerning military careers (promotions, promotions, secondments, appointments, transfers or retirements, etc.) or related to human resources management (recruitment competitions, holding positions, participation in competitions, change of profile, etc.). The acts of military command are those issued for the needs of the war and justified by it, both in time of peace and in time of war. The military command is endowed with absolute state force, the non-observance of its dispositions attracting the criminal responsibility reserved for the crimes of insubordination.*

**Keywords:** *military authorities, military command act, end of inadmissibility, military actions, troop leadership, sanctioning decisions, decisions and decisions of appointment, annual evaluations, administrative contracts concluded by military structures.*

## 1. Introduction

The military authorities are empowered to carry out a form of public administration, respectively to provide a public service called "national defense" in exceptional circumstances, being at the same time the holders of the means of armed violence authorized by the state. The discretion with which the military authority is legally determined to issue military command documents, exempted from forms of judicial control, must not lead to the violation of fundamental human rights, the whole activity being subordinated to the principle of legality.

Being introduced for the first time in the Romanian Constitution of 1923, the formula "*military command documents*" has kept its form until today, being found under the same structure in the Law of Administrative Litigation of 1925.

Subsequently, despite the doctrinal controversies, famous specialists<sup>1</sup> from the interwar period stressed the need to distinguish the documents issued by the military authorities according to the criteria of relations between different entities:

- acts of military authority of a purely administrative nature, which intervene between the military authority and civilian pollution and which can be challenged through administrative litigation;
- acts of the military authority that intervene within the military hierarchy which includes the acts aimed at commanding the troop (*in time of peace or war*) and for which control in administrative litigation was not allowed.

In order to overcome the terminological inaccuracy of the interwar period, we will note that not all acts of military authority concerning military relations are also acts of military command, especially those concerning military career (*promotions, promotions, secondments, appointments, transfers or retirement etc.*) or related to human resources management (*recruitment competitions, employment, participation in competitions, change of profile etc.*).

## 2. Military command act. Constitutional and legal foundations

In order to identify the place of military command acts among administrative legal acts (administrative acts - according to the school in Bucharest, having as representative Prof. Romulus Ionescu; acts of administrative law, through Prof. Tudor Dragan) we can report to the applicable administrative legal regime, which in its current version regulated in Romania is known in two forms<sup>2</sup>:

- The judicial administrative contentious, **the typical form**, being the common law, having in center the Law no. 554/2004 of the administrative contentious, together with other specific regulations;
- **atypical forms** that do not allow the control of the courts.

From this point of view, military command documents are administrative acts to which the atypical form is applied, meaning that the control of the courts over their legality or opportunity is not allowed.

The exception to the judicial control exercised by the administrative contentious courts and the lack of

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<sup>1</sup> Constantin Rarincescu, *Contenciosul administrativ român*, Ed. Universală Alcalay&Co., București, 1936, p.311.

<sup>2</sup> Marta Claudia Cliza, *Drept Administrativ*, Partea a II-a, Editura Pro Universitaria, București, 2011.

typicality do not allow the evasion of the obligations regarding the written requirements when issuing or adopting military command acts (internal and external structure of a content, the organization of the elements from which is composed<sup>3</sup>) in conjunction with those related to their motivation<sup>4</sup>. The mandatory nature of the requirements for motivation and written form has as a consequence the prevention of abuses, ensuring the guarantee of compliance with the law and the protection of citizens' rights.

Delimited from a historical point of view, the exemption of administrative acts finds its constitutional consecration for the first time in the Romanian Constitution of 1923, where at art. 7, last paragraph, it was specified that "the judiciary does not have the power to judge acts of government, as well as acts of command of a military nature".

The idea of exempting certain administrative acts from the control exercised by the administrative courts, which influenced the legal way of thinking in Europe, has its origins in nineteenth-century France, where the appeal for annulment for excess of public power had begun to take shape<sup>5</sup>.

The exceptions concern two broad categories of acts, namely: administrative acts of the public authority concerning their relations with the Parliament, respectively military command documents. For the two categories of administrative acts, it is indicated to us by the legislator that we are in the presence of **absolute exceptions**, having constitutional rank<sup>6</sup>, being resumed in the Law on Administrative Litigation<sup>7</sup>.

For the authors of administrative law, the causes or conditions that determine the evasion of administrative acts from the control exercised by the administrative contentious courts are called **finés**<sup>8</sup>, which were traditionally categorized<sup>9</sup> as fines deducted from the nature of the act, respectively inadmissibility caused by the existence of a parallel appeal.

From the jurisprudence of the Constanța Court of Appeal (case no. 307/2015<sup>10</sup>) having as object of the file "Cancellation of administrative act", in the appeal, the court considered that the hypothesis according to

which the military command acts cannot be challenged in administrative contentious and not to determine the jurisdiction of the court, since the solution of the admissibility / inadmissibility of the action can be pronounced only by the competent court, in this case the administrative contentious court.

The jurisprudence has held that certain administrative acts are acts of command of a military nature depending on the nature of the content. We consider case no. 2941/2014<sup>11</sup> pending before the Bucharest Tribunal, Administrative and Fiscal Litigation Section having as object Litigation regarding Civil Servants (Law no. 188/1999), where the plaintiff, as a military cadre, requested the annulment of the Order of the Minister of National Defense MP621 / 15.12.2011 ordering his recall from the international mission carried out in Afghanistan, where he served as 3rd Platoon Commander in the 1st Infantry Company of the 1st Maneuver Battalion, as well as all the documents that were the basis for issuing the contested act, annul the provision no. A142 issued by the competent military unit, deletion from the personal memorandum of the mentions related to the premature cessation of its secondment, etc. The competent court, in this case the Bucharest Tribunal, correctly considered that the act challenged by the applicant was a military command act that evaded control in administrative litigation, intended to ensure and maintain the discipline and order of military units and formations over time. The applicant was seconded to the Afghanistan Operations Theater, and the reasons for its issuance were in violation of the rules on the handling of weapons, which were indispensable for the performance of military missions.

It should be noted that art. 5 of the Law on administrative litigation was amended by Law no. 212 of July 25, 2018. In **the initial form** it was specified what are the limits of control before the administrative contentious court, in aliis verbis it was specified that certain administrative acts could be challenged only for excess of public power, as follows: administrative acts issued for the application of war, the state of siege or

<sup>3</sup> Verginia Vedinaș, *Drept administrativ, Ediția a X-a, revăzută și actualizată*, Editura Universul Juridic, București, 2017, p. 339.

<sup>4</sup> Vasilica Negruț, *The Europeanization of Public Administration through the General Principles of Good Administration*, nr. 2/2011 (vol. VII), Acta Universitatis Danubius. Juridica, p.8.

<sup>5</sup> Constantin Gheorghe Rarincescu, *Contenciosul administrativ român*, București, Editura „Alcalay&Co”, 1937, p. 267.

<sup>6</sup> Art. 126 alin. (6) din Constituție. În Constituția României modificată și completată prin Legea de revizuire nr. 429/2003, aprobată prin referendumul național din 18-19 octombrie 2003, publicată în Monitorul Oficial al României, Partea I, nr. 758 din octombrie 2003, art. 126 consființește prin alin. (6) excepțiile de la controlul judecătoresc al actelor administrative ale autorității publice pe calea contenciosului administrativ. La nivel conceptual regăsim soluția prevăzută în Constituția din 1923, art. 107, ultimul paragraf.

<sup>7</sup> Art. 5 alin. (1) din Legea nr. 554/2004. Problematika actelor nesupuse controlului instanțelor specializate în contencios administrativ este prevăzută în Legea contenciosului administrativ nr. 554 din 2 decembrie 2004, publicată în Monitorul Oficial al României nr. 1154 din 7 decembrie 2004, unde art. 5 delimitează sfera actelor administrative exceptate ori nesupuse controlului și descrie limitele controlului.

<sup>8</sup> Finele de neprimire fac cererea adversarului inadmisibilă, fiind în fapt niște obstacole definitive pentru acțiunea în care au fost invocate, nepurtându-se asupra fondului dreptului.

<sup>9</sup> Julian Vincent, Serge Guinchard, *Procédure Civile*, 24eme edition, Dalloz, 1996, p. 134.

<sup>10</sup> <http://www.rolii.ro/hotarari/589a2a72e49009ac3500022e>. În cauza respectivă demersul reclamantului este justificat de luarea la cunoștință a conținutului ca urmare a declanșării procedurilor privitoare la accesul la propriul dosar întocmit în perioada comunistă de către organe ale fostei securități a statului, iar judecarea acestora este de competența instanței de contencios administrativ, actele administrative invocate nefiind acte de comandament cu caracter militar (*actele și mapele conținute de propriul dosar, notele ulterioare, etc.*). De asemenea, chiar dacă actele respective anterior menționate au fost emise de o autoritate publică militară, nu îndeplinesc condițiile aprecierii lor ca acte de comandament cu caracter militar.

<sup>11</sup> <http://www.rolii.ro/hotarari/587c051de49009940b001a4f>.

the state of emergency, those concerning defense and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics.

The legislator thus opted for the elimination of the limited control situations previously provided in the law and extended the rules established by the Decision of the Constitutional Court no. 302 of March 1, 2011 on all categories of documents listed in art. 5 para. (3) of the Law on Administrative Litigation.

The constitutional exceptions from the judicial control of administrative acts are also mentioned in the Decision of the Constitutional Court no. 302 of 2011<sup>12</sup>, previously stated, by which it was noted that absolutely the exceptions refer only to the acts of military command and to the administrative acts of the public authorities regarding their relations with the Parliament. By their nature, these acts are not subject to any form of judicial control. However, this does not preclude the fact that military command documents may be subject to higher hierarchical control as provided for in the internal military regulations.

From the findings of the Constitutional Court it appears that the previously mentioned provisions, respectively art. 126 para. (6) of the Constitution and art. 5 para. 2 of Law no. 554/2004 are exceptions of strict interpretation, no other situations being allowed<sup>13</sup>.

Under functional aspect, based on the new provisions of art. 5 para. (3) of Law no. 554/2004, it can be concluded that the administrative acts issued for the application of the state of war, state of siege or emergency, those concerning defense and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and episodes are subject to judicial control under the same conditions as for administrative acts, general conditions regulated by the relevant law. The only applicable derogation refers to the inapplicability of art. 14 regarding the suspension of the execution of the act in the phase of the preliminary administrative procedure.

The current amendment that we mentioned earlier in the form of a change brought by an organic law, portrays the same picture of administrative acts, but for which the regime of suspension of the execution of the act no longer applies, regime provided in art. 14 of the Law on administrative litigation in its consolidated form. In other words, this restrictive table of administrative acts is not liable to suspend enforcement for reasons which are easy to understand, which are related to the consequences which would result from the temporary cessation of the effects of these categories of acts and which are seriously disturbed. the

functioning of public administrative services essential for the proper functioning of the company, in exceptional conditions.

The late Professor Antonie Iorgovan, referring to Anibal Teodorescu's assessments<sup>14</sup> of the needs generated by the First World War, explains the reasons behind the concerns of the legislator to create the premises for censorship of such administrative acts by the judiciary, invoking historical conditions and the effects that the First World War had on Romania.

In post-war legal doctrine<sup>15</sup>, the commander is described as a holder of relatively limited power by the state and the relevant minister, and of all the civil, political and military powers conferred, only the latter are outside the administrative contentious. The legitimacy of the military command derives from its feature of state command and from its recognition as obligatory for society and those to whom it is addressed, without which social efficiency would not be achieved.

The interwar specialty doctrine made the distinction between military command acts that emerge within the military hierarchy and military command acts that intervene between the military and the civilian population. Those who intervene between the military authority and the civilian population are subject to judicial control exercised in administrative litigation<sup>16</sup>.

Consequently, under the scope of the notion of military command, the doctrine retained those administrative acts whose purpose was to respond to a military command, understood as the prerogative to command or issue orders from a strictly military point of view<sup>17</sup>.

The reference for the mentioned period, as examples of military command documents **issued during the war**, we find: the modification of the composition of the troops in the sense of diminishing, dividing, completing etc.; concentrating the troops on the lines of attack or defense, advancing or withdrawing the troops.

From the period of the First World War we can mention some military command documents, as follows: Operation Order no. 214 for the day of 23.11.1916 of Division IV of the III Army Corps of the Second Army, which describes the mission of the Division to occupy a defensive position meant to stop the advance of the enemy<sup>18</sup>; Operation order no. 212 for the night of 21/22 November 1916 of Division IV of the 3rd Army Corps of the Second Army, ordering the

<sup>12</sup> Publicată în M.O. nr. 316 din 09 mai 2011.

<sup>13</sup> Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, Editura Universul Juridic, București, 2018, p. 181.

<sup>14</sup> Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, Editura All Beck, București, 2005, p. 651.

<sup>15</sup> Antonie Iorgovan, op.cit. 652.

<sup>16</sup> Constantin Rarincescu, *Contenciosul administrativ român*, Ed. Universală Alcalay&Co., București, 1936, p.314.

<sup>17</sup> Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, Editura All Beck, București, 2005, p. 617.

<sup>18</sup> [http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301457.xml&dvs=1606738461999-69&locale=ro\\_RO&search\\_terms=&adjacency=&VIEWER\\_URL=/view/action/nmets.do?&DELIVERY\\_RULE\\_ID=4&usePid1=true&usePid2=true](http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301457.xml&dvs=1606738461999-69&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true).

withdrawal to a new position of resistance<sup>19</sup>; Ordinance no. 468 of August 26, 1916 of the commander of the Northern Army regarding the exclusive spoken and written use of the Romanian language, in public and in private<sup>20</sup>; The high agenda of King Ferdinand no. 3, p. 51 of October 7, 1916, ordering the maintenance of positions and the resumption of the attack in case of territorial losses<sup>21</sup>; Order of the General Headquarters no. 2420 in conjunction with the Order of the General Inspectorate of the Army no. 32 of 1916 regarding the obligations of the officers to transit or remain in the Bucharest garrison, under the sanction of immediate sending to the front<sup>22</sup>.

In peacetime examples include: setting up, reorganizing, dismantling and relocating units; maneuvers and exercises performed with troops and other components, etc.

By jurisprudence (case no. 349 of 2010 pending before the Timișoara Court of Appeal, the object brought to trial being the exception of illegality of an administrative act) it was ruled that **we are not in the presence of military command acts in the following situations**: acts concerning the status military personnel; acts concerning the organization and functioning of public authorities in the field of defense; acts concluded by the armed structures in the exercise of their activities<sup>23</sup>.

We agree with other authors<sup>24</sup> that not all administrative acts issued during the war are exempted from the control indicated by the Law on Administrative Litigation, because placing an administrative body above the law, even in exceptional situations, would lead to freedom to violate, non-restrictive, the fundamental rights and freedoms of citizens.

As a main idea it can be noted that any acts issued by military authorities, foreign to the necessities of war, including orders to enter the reserve, advancement orders, sanctioning decisions, etc., are not acts of military command within the meaning of the law, but true administrative acts and are subject to censorship or control by way of administrative contentious, in this sense the supreme court ruling by the decision of the ICCJ, the administrative and fiscal contentious section, no. 532 of February 15, 2006. In the jurisprudence of the Sibiu Tribunal, it was retained on the merits, in case no. 307/2018<sup>25</sup> having as object the refusal to solve the

request, that the sanctioning act with Warning of a military cadre, provided in art. 60 para. (2) of Order M64 / 2013 does not represent a military command act, the disciplinary procedure being foreign to the needs of the war.

In another case, respectively no. 169/2020<sup>26</sup> pending before the Bucharest Court of Appeal, having as object of the file the annulment of the administrative act, the defendant active military cadre in the corps of non-commissioned officers erroneously motivated his action claiming that the Order of the Ministry of National Defense no. MP53 / 2009 promotion to the rank of major lieutenant is an act of military command, which led to the inadmissibility of the lawsuit.

From a literary point of view, the command is an order that is imposed in front of certain categories of persons obliged in the indicated sense. By extrapolation, the military command, contained in a norm of positive law, emanates directly from a state body, in our case the military bodies, by which the observance of its content is ordered. The military command is endowed with absolute state force, the non-observance of its provisions attracting, in certain situations, the criminal liability indicated by art. 417 of the New Criminal Code reserved for the crime of insubordination.

We are in the presence of a military command whenever we are dealing with a legal relationship of public law between the military that meets the condition to oblige regarding purely military matters and that are related to the organization and leadership of the forces. The imperative of the rules of military command is always manifested in the form of an order, thereby understanding an obligation that can be executed relatively unconditionally.

Moreover, R.G.-1 Regulation of internal order in the unit approved by the Order of the Minister of National Defense no. M 38 of 15.03.2016<sup>27</sup> defines at art. 10 the order as an “imperative requirement transmitted by the commander in accordance with the normative acts in force, the customs of the war, the conventions and treaties to which Romania is a party and is the basis of any military action / activity”. Ensuring the command of a military structure is carried out through this military command, called an order, which systematizes the legal relations between the military through coordination and subordination. The

<sup>19</sup> [http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301536.xml&dvs=1606739403113945&locale=ro\\_RO&search\\_terms=&adjacency=&VIEWER\\_URL=/view/action/nmets.do?DELIVERY\\_RULE\\_ID=4&usePid1=true&usePid2=true](http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301536.xml&dvs=1606739403113945&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?DELIVERY_RULE_ID=4&usePid1=true&usePid2=true).

<sup>20</sup> [http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1380225.xml&dvs=1606740339759~279&locale=ro\\_RO&search\\_terms=&adjacency=&VIEWER\\_URL=/view/action/nmets.do?DELIVERY\\_RULE\\_ID=4&usePid1=true&usePid2=true](http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1380225.xml&dvs=1606740339759~279&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?DELIVERY_RULE_ID=4&usePid1=true&usePid2=true).

<sup>21</sup> [http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1319363.xml&dvs=1606740645030~630&locale=ro\\_RO&search\\_terms=&adjacency=&VIEWER\\_URL=/view/action/nmets.do?DELIVERY\\_RULE\\_ID=4&usePid1=true&usePid2=true](http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1319363.xml&dvs=1606740645030~630&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?DELIVERY_RULE_ID=4&usePid1=true&usePid2=true).

<sup>22</sup> [http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1318693.xml&dvs=1606741223559~224&locale=ro\\_RO&search\\_terms=&adjacency=&VIEWER\\_URL=/view/action/nmets.do?DELIVERY\\_RULE\\_ID=4&usePid1=true&usePid2=true](http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1318693.xml&dvs=1606741223559~224&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?DELIVERY_RULE_ID=4&usePid1=true&usePid2=true).

<sup>23</sup> <http://www.rolii.ro/hotarari/5894c96be49009c0330025db>. Hotărârea atacată, respectiv H.G. nr. 576/1998, privind vânzarea unor imobile din patrimoniul Ministerului Apărării Naționale, cu destinația de locuință, nu are caracter militar, iar reglementările cuprinse în hotărâre au legătură cu modul de administrare a locuințelor de serviciu de către MAPN în calitate de autoritate publică.

<sup>24</sup> Verginia Vedinaș, *Drept Administrativ*, Ed. a XII-a, revăzută și actualizată.

<sup>25</sup> <http://www.rolii.ro/hotarari/5af79f8ae490091c0f000033>.

<sup>26</sup> <http://www.rolii.ro/hotarari/5f0d0bd7e49009bc00000032>.

<sup>27</sup> publicat în Monitorul Oficial nr. 214 din 23 martie 2016.

desideratum of the imperative requirements imposed by the military command is limited to ensuring victory in battle, the key element of the success of military actions being discipline, recognized by legal doctrine as a defining feature of military forces.

The military commands, both from an organizational-functional point of view and *stricto sensu*, regardless of the level at which they are (battalion, brigade, division, staff, etc.) are meant to lead the armed troops, along with the other components of the force. to ensure victory in time of war, and in time of peace to prepare / train military forces in order to maintain or increase combat capability (combat capability of the troop, improve combat techniques and tactics, improve methods used, etc.). At the base of the idea of command we have the organizational, coordination and command foundation of the troops, which leads to the idea that not all acts issued by a military authority are also acts of command of a military nature.

The Supreme Court, by Decision no. 1937 of 2019 of the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section<sup>28</sup>, pronounced on appeal, having as object of the action the suspension of the execution of Decree no. 1131 of December 28, 2018 on the extension of the term of office of the Chief of Defense Staff issued by the President of Romania and the Presidential Administration, invoking its own jurisprudence on the complex nature of presidential decrees, not being competent to rule, resumes the reasoning of the Bucharest Court of Appeal. 79 of March 29, 2019 regarding the qualification of the decree as an act of military command, subscribed to the consecrated fines of non-receipt found in art. 126 para. (6) of the Romanian Constitution. According to our assessments, Decree no. 1131/2018 cannot be a substitute for a military command act, being foreign to the objective needs of war, missions or armed operations, essentially representing a complex administrative act with autonomous existence, not being able, according to some authors, to be assimilated to administrative acts normative or individual<sup>29</sup>. The decree regulates the situation of the highest military civil servant with regard to his own career, without any causal link with the war.

Among the acts of military authorities that may be the subject of an action in administrative litigation, we list, non-exhaustively:

- sanctioning decisions issued by the unit commander on the basis of proposals in the minutes drawn up by the disciplinary investigation commission or the honorary council;

- failure to resolve within the legal time limit or unjustified refusal of a military authority to resolve a request regarding a right or a legitimate interest, issued by the military;

- decisions and decisions of appointment, transfer to reserve or retirement, transfer to another garrison etc.;

- imputation decisions in case of recovery of material damages;

- the decisions of the commission of jurisdiction of the accused

- annual, stage and final evaluations;

- *administrative contracts concluded by military structures*<sup>30</sup>.

The right of commanders to give order in the leadership of troops does not lie only in aspects related to the necessities of war in the classical sense, as the legislator uses in the regulations in the field formulas such as *military actions, operations, missions*, etc. As is well known, with Romania's entry into NATO, our country has assumed, according to Article 118 of the Romanian Constitution, the obligation of collective defense, being stated to participate in actions on maintaining or restoring peace in military alliance systems. By reference to Law no. 121 of 15 June 2011 on the participation of the armed forces in missions and operations outside the territory of the Romanian state<sup>31</sup>, Article 2 describes the types of military actions in which Romania participates under the mandate of the UN - United Nations, OSCE - Organization for Security and Cooperation in Europe, under NATO leadership - the North Atlantic Treaty Organization or the European Union, respectively in coalitions or at the request of an affected state.

Pursuant to art. 118 in the Constitution, the prerogative of the participation of the armed forces in military actions in theaters of war lies in the international commitments assumed by the Romanian state, which together with the actions of maintaining or restoring peace must be compatible and compliant with the fundamental principles of the rule of law<sup>32</sup>.

Military doctrine and literature argue that war is governed by a series of specific principles, its conduct and execution related to military science proper, military normative acts in force, objective realities and ways of action specific to the art of war<sup>33</sup>. Specialized military works also use the formula of *actions other than war*<sup>34</sup>, defined as post-war actions, adjacent to or complementary to the war, whose characteristics aim to protect the heritage in general and reduce the impact on social, economic and cultural life, during which issue military command documents.

<sup>28</sup> <http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=155709>.

<sup>29</sup> Radu Carp, *Reflecții pe marginea statutului juridic al decretelor emise de Președintele României*, în RDP nr. 4/2004, pp.13-24.

<sup>30</sup> Oliviu Puie, *Tratat teoretic și practic de contencios administrativ*, Volumul I, Editura Universul Juridic, București, 2015, p. 607.

<sup>31</sup> Publicată în Monitorul Oficial nr. 427 din 17 iunie 2011.

<sup>32</sup> Cristian Ionescu, Corina Adriana Dumitrescu, *Constituția României*, Comentarii și explicații, Editura C.H. Beck, București, 2017, p. 1267.

<sup>33</sup> Ferdinand Foch, *Principiile războiului. Conducerea războiului*. Editura Militară, București, 1975, p. 35.

<sup>34</sup> Gheorghe Văduva, *Principii ale războiului și luptei armate, realități și tendințe*, Curs, Universitatea Națională de Apărare, București, 2003, p. 23.

While the war is declared based on Law no. 355 of November 20, 2009 regarding the regime of the state of partial or total mobilization of the armed forces and of the state of war, where at art. 6 describes the procedure for declaring by decision of the Parliament, the armed struggle, which is the core of any war, takes place on the basis of a military decision, so an atypical administrative act, unanimously called by law and jurisprudence as a military command.

### 3. Conclusions

The military command act, provided for the first time in the Romanian Constitution of 1923, which maintained its exceptional status from the control exercised by the administrative contentious courts, arising from the objective needs and consequences of the First World War, still exists today. The conditions for the fulfillment by the Romanian state of the constitutional obligations of collective defense provided in article 118 of the Romanian Constitution,

respectively art. 2 of Law no. 121 of June 15, 2011 on the participation of the armed forces in missions and operations outside the territory of the Romanian state.

Although we are in the presence of an absolute exception, the legislator did not allow that by establishing the fines of non-receipt to be violated at their issuance, the conditions related to form, content or motivation.

The legal doctrine has distinguished between military acts of command that arise within the military hierarchy and military acts of command that intervene between the military and the civilian population. Those who intervene between the military authority and the civilian population are subject to judicial control exercised in administrative litigation.

Consequently, in the sphere of the notion of a military command act, those administrative acts were retained in the doctrine whose purpose is to respond to a military command, understood as the prerogative to command or issue orders from the point of view. strictly military.

### References

- Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, Editura All Beck, București, 2005;
- Constantin Gheorghe Rarincescu, *Contenciosul administrativ român*, București, Editura „Alcalay&Co”, 1937, p. 267;
- Cristian Ionescu, Corina Adriana Dumitrescu, *Constituția României*, comentarii și explicații, Editura C.H. Beck, București, 2017;
- Ferdinand Foch, *Principiile războiului. Conducerea războiului*, Editura Militară, București, 1975;
- Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, Editura Universul Juridic, București, 2018;
- Gheorghe Văduva, *Principii ale războiului și luptei armate, realități și tendințe*, Curs, Universitatea Națională de apărare, București, 2003;
- Julian Vincent, Serge Guinchard, *Procedure Civile, 24eme edition*, Dalloz, 1996;
- Marta Claudia Cliza, *Drept Administrativ*, Partea a II-a, Editura Pro Universitaria, București, 2011;
- Oliviu Puie, *Tratat teoretic și practic de contencios administrativ*, Volumul I, Editura Universul Juridic, București, 2015;
- Radu Carp, *Reflecții pe marginea statutului juridic al decretelor emise de Președintele României*, în RDP nr. 4/2004;
- Verginia Vedinaș, *Drept administrativ, Ediția a X-a, revăzută și actualizată*, Editura Universul Juridic, București, 2017;
- Vasilica Negruț, *The Europeanization of Public Administration through the General Principles of Good Administration*, nr. 2/2011 (vol. VII), Acta Universitatis Danubius. Juridica.