

# THE LIMITS OF STATE POWER IN A DEMOCRATIC SOCIETY

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## Abstract

*The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economic, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensable both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.*

*In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.*

**Keywords:** *Constitutional norms, constitutional norm establishing criterions, technical - juridical structure, supremacy of Constitution, normative content.*

## I Introduction

From the beginning up to the present the human society is marked by two constants that have ontological value: *the struggle for power* and on the other hand *the fight against the power*, both in situations where it is illegitimate because it takes the form of dictatorship or tyranny, also in the versions of apparent legitimacy, especially in democratic societies, such as for example the legitimate political activity of the opposition to come to power or the actions of civil society and individuals against abuse of power.

These ontological constants of any human society are inevitable no matter of the social form of organization or characteristics of political regimes, including in democratic societies because the existential and functioning essence of any social system is the expression of the contradictory difference between governors and the governed, between society as a whole and on the other hand, the man in his concrete and personality, between the normative order and moral values, between law and liberty, between public interest and private interest and of course between the vocation of human intangible fundamental rights, and on the other hand the public interest of the state to condition, limit and restrict their exercise.

These contradictions, if they remain in their absolute form, by antagonist excellence can be destructive to an organized state society, as history has shown. History shows the political and legal solutions which, especially in the modern period, were devoted to avoid dictatorial forms of power

exercising. Here are some of them established since the first written constitution in the world - the US Constitution, adopted in 1787 - Declaration (French) of human and citizen rights on 1789, up to the internal and international contemporary political and legal instruments: supremacy of the Law and Constitution, separation and balance of powers within the state, proclamation and guarantee of the fundamental rights and freedoms, constitutional and judicial control.

Incontestable these principles in fact and the features of the lawful right materialized and guaranteed constitutionally define the contemporary democratic societies and virtually eliminates totalitarian, dictatorial forms of state power.

However the differences and contradictions mentioned above, because they are ontological constants of society, they exist in any democratic society. In addition there is a subtle situation, namely the difference between the legality of state decisions and on the other hand the state legitimacy. These realities may cause or encourage excess of the power of authorities in societies built upon the principles of modern constitutionalism.

In this context remains a problem of essence, not only theoretical but also practical to determine the limits of state power in a democratic society in concrete in România and to find solutions in cases of excessive form of manifestation of state authority.

## II. Paper content

The doctrine, in its majority reveals an insurmountable contradiction that exists between the

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democratic political regimes and, on the other hand those considered to be dictatorial, or simply between dictatorship and democracy.

Dictatorship means centralization and concentration of power, denial of pluralism in all its forms, absolute or discretionary power of the governors, coercion and excessive limitations of individual liberties, rigid separation of the governors from the governed, inexistence or formal existence of constitutional guarantees of human rights, inexistence or fictitious, formal character of principles essential to the state organization of society, such as principle of supremacy of law and constitution. For a synthetic manner of speech, dictatorship represents the annulment, dissolution or in the best case, the minimizing of the individuality of the singular, of diversity and affirmation of unity as abstract and constraining generality.

Unlike this, democracy is associated with the idea of a lawful state, focused on the principle becoming real and applicable of the supremacy of law and constitution. The centralization and concentration of power is replaced, as a modality of organizing of state powers, with the principle for their separation and balance. Pluralism in all its forms is institutionalized and guaranteed. The individual freedoms are also consecrated and guaranteed, while their exercise is governed by the rule according to which: the limit of any individual freedom is the need to respect others' similar freedoms. The legitimacy of state power involves the distinction between the being or essence of power and on the other hand, its exercise. In a democratic regime is not necessary to demonstrate the legitimacy of power as such because the axiom according to which "the holder of power is the people or nation" does not require demonstration, being a prerequisite for the entire political and legal construction of the state organized society. Instead, any democratic government must find ways through which the exercising of power, in other words, the phenomenality of power be legitimate and lawful. Such a legitimacy is achieved when between essence (power in itself owned by the people) and forms of exercising (the phenomenon of power) there are no irreconcilable contradictions. The legitimacy of the exercise of power in case of democratic political regimes means reflecting the essence of power in its phenomenality, respectively in the organizing and exercising manner. Therefore, in case of democracy there is always a conceptual distinction, and a real one between the legitimacy of the essence of power that requires no demonstration, this results as such by the mere proclamation of the principle that the power has as its holder the people and on the other hand, the phenomenal legitimacy of organizing and exercising of power, that is not a "given" but a construction, firstly constitutional, realized in the concrete forms of institutional organization and

exercising of state power. The legitimacy of the organizing and exercising of power is outside the power's phenomenality, in the meaning that the phenomenality is not the source of its legitimacy, but this is constructed in a relation whose content is the correspondence between the essence of power and the manifestation forms.

The power, in its essence, can be considered a "thing in itself", in the Kantian sense, because the full knowledge of the essence will never be possible. Reality of the state power considered in the relationship between essence and phenomenon reveals another aspect: the phenomenality of power can never fully correspond to the essence of power. The object of knowledge for the legal or political science is the phenomenon of power and not its essence. Therefore, the legitimacy of power phenomenal manifestation represents an ideal of which, the concrete forms of organization and exercising of power, get closer without ever touching it.

The legitimacy of power's phenomenality lies among others in achieving the principle of representation. This principle highlights very well the distinction between the being or essence of power and on the other hand the phenomenon of power. The holder of power cannot exercise it directly, only in exceptional circumstances. The essence is not the manifestation of power. The exercise of power reflects the being of power without containing it. Thus, the state institutions exercise the power without holding it, therefore, they need a recognition of the legitimacy of the acts of power, actually conferred mainly by applying the principle of representation.

The power and its phenomenality are undoubtedly at the heart of democracy. If the phenomenal legitimacy of power is an ideal of which the concrete forms of institutional embodiment through the principle of representation can get closer, results thus that democracy in its essence is still an ideal related to which the social and political reality is constructed and manifested, without letting the democratic ideal to coincide with the social and political reality. It is relevant in this regard the statement of Professor Ion Deleanu: "Democracy is a form of moral perfection. It dimensions the organization and operation of a power to humanize it and also the way of life of citizens to shape it."

It is necessary to distinguish between the *ideal democracy* that is a purely speculative construction based on the possible coincidence between the essence and the phenomenality of power, but also an ethical imperative that should mean the unity of will between the individual and society, and on the other hand, the *real democracy*, characterized through the contradictory dichotomy between the essence and the phenomenality of power, between the individual and society. Real democracy takes concrete forms,

multiple manifestations (such as the form of "parliamentary or representative democracy"), is not an immutable given, but is in a continuous evolutionary process, in considering the historical progress as a finality, never possible to be achieved, the ideal democracy. The science of law has as a study topic the real democracy, or more precisely its forms of manifestation and for its implementation. Paradoxically, however, the legitimacy of any form of real democracy is conferred by the values and principles of ideal democracy, the latter forming mainly the studying topic for metaphysics.

Unlike dictatorship, democracy involves the rehabilitation of the individual, of the particular that is no longer absorbed and dissolved into the social abstract general or of the concentrated power. In democracy the individual has ontological value and manifests into existential coexistence with the social general. In other words, the individual has the meaning and power of the general, the latter being legitimate, precisely because it recognizes to the individual the existential and ontological dimension. The power, even in its concrete manifestations is the expression of the general as such, reflected for example in the notion of "public interest". In a democratic society the legitimacy of the act of power lies not in reflecting own generality (of public interest) but in respecting the individuality of diversity in all forms specific to existential pluralism. In constitutional terms, this evokes the relation between "majority and opposition".

The issue of democracy cannot be reduced to the phenomenon of power as it seems to result from the constitutional definition of democracy that we find in Article 2 of the Constitution of French Republic: "government of the people by the people and for the people". The essence of democracy, in our opinion, is the forms and content of the concrete relation between society and individual. The relation expresses a unilateral contradiction because the society can contradict the individual (particularity and diversity), which is proper to dictatorship, but the individual does not contradict the society, situation particular to democracy. Furthermore, the dialectic report between the individual and society specific to democracy is an affirmative one, not containing a negation, such as Hegel argued. It is proper to democracy so that society asserts the individual (individuality and diversity), not to deny, therefore, to consecrate and guarantee the individuality and diversity. Any further analysis of the phenomenon of democracy involves references to the concepts of civilization and culture, the relationship between civilization, society and the individual.

In our opinion between dictatorship and democracy is obviously a contradiction, but one-sided: dictatorship is inconsistent and excludes democracy, yet democracy does not exclude the

forms of dictatorship. The space and scope of this study do not allow further analysis of this interesting problem. However we mention that in doctrine are made referrals to forms of dictatorship that can characterize any democratic regime: parliamentary dictatorship, dictatorship of masses or the dictatorship of the majority. In all these situations the democratic reality, contradictions highlighted above become negative (majority excluded or ignoring the minority). Consequently, it gets to the exercising of authority in discretionary forms, which obviously contradicts the essential values of ideal democracy.

John Stuart Mill, in his works "Civilization," published in 1836 believes that civilization is contrary to the nature status or barbarism. A nation is civilized when the social conditions in which lives gives sufficient safety guarantees, so that social peace be a reality. Among consequences of higher civilization the most striking one, is the philosopher's opinion that the power tends to move from individuals and small communities to the masses. The importance of masses increases when that of individuals decreases. With the decreasing of individual's role, decreases the power of individual beliefs and the public opinion acquires supremacy. In this ideational context Stuart Mill pointed out that "the drawbacks of democracy lie precisely in this tyranny exercised by the masses, the majority of public opinion. Therefore, the political organization of representative governing must contain all guarantees for the individual against the tyranny of the masses. Among other measures, Stuart Mill suggested the representation of opinions minority in the Parliament.

The great philosopher findings are, in our opinion, fully valid also for the contemporary forms of real democracy or representative. That's why the realization of the principle of representation in any of the types of electoral system should allow as much as possible, the reduction or even elimination of the forms of dictatorship in a real democracy through enhancement of individualities, of the political minorities or otherwise. In this way, the progress of a democratic society becomes a balanced one based on a unilateral affirmative contradiction in which the masses affirm and do not deny individual, and the majority affirm the minorities. Thus, the *famous parliamentary principle "the minorities express and the majority decides"* should become: *legitimacy of the decision is given by the representativeness and power to express of minorities.*

Legality, as a feature that must characterize the legal acts of public authorities, has as central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers after deliberation, entailing direct or indirect

acceptance of the governors<sup>1</sup>. Ion Deleanu defines just the "document that contains general and mandatory rules sanctioned through the coercive force of the state, when its application is not done out of conviction and is prone to produce application whenever arise the conditions foreseen in its hypothesis<sup>2</sup>."

In a broader meaning, the concept of law includes all legal acts that contain legal norms. The law in its restricted sense is the legal act of parliament drawn up in accordance with the constitution, according to an established procedure and which regulates the most important and general social rules. A special place in the legal system administered has the constitution defined as fundamental law, located on the top of legislative system, which includes legal rules of a higher legal force, which regulates fundamental and essential social relations, especially those concerning the establishment and exercising of state power.

The state of legality in the work of public authorities is based on the concepts of supremacy of the constitution and supremacy of law. The supremacy of constitution is a quality of the fundamental law that basically expresses its supreme legal force in the legal system. An important consequence of fundamental law supremacy is the compliance of entire law with the constitutional norms<sup>3</sup>. The notion of juridical supremacy of law is defined as "its feature that finds expression in the fact that the norms it establishes must not meet either of other norms, apart from the constitutional ones and the other legal acts issued by state bodies are subordinated to it in terms of their legal effectiveness<sup>4</sup>". Therefore, the supremacy of law in the sense above is subsequent to the principle of supremacy of constitution. Important is that the legality, as a feature of the legal acts of state authorities involves the observance of the principle of supremacy of the constitution and law. The observance of these two principles is a fundamental constitutional obligation consecrated by the provisions of article 1 paragraph 5 of the Constitution. Failure to observe this obligation attracts the appropriate sanction of unconstitutionality or illegality of legal documents.

The legality of the legal acts of public authorities involves the following requirements: legal document to be issued in compliance with the competence prescribed by law; legal act to be issued in accordance with the procedure prescribed by law; legal act to respect the rules of law as superior legal force.

The "Legitimacy" is a complex category with multiple meanings and which is the topic for research for the general theory of law, philosophy of law, sociology and other disciplines. There are multiple meanings of this concept. We mention a few: legitimacy of power; the legitimacy of the political regime; legitimacy of governance; the legitimacy of the political system, etc. Referring to this concept Jean Leca said: "The term legitimacy designates the quality which enables the holder to a power to order or prohibit the ability to be heard without resorting to physical violence explicit or, what is meaning the same thing, an option recognized as normal to successfully use coercion if necessary<sup>5</sup>". The concept of legitimacy can be applied in case of legal acts issued by public authorities being related to the "margin of appreciation" recognized to them in the exercise of their prerogatives.

The application and observance of the principle of legality in the work of state authorities is a complex issue, because the exercise of state functions assumes the discretionary powers with which state bodies are invested or otherwise said, the right for appreciation of authorities regarding the moment of adoption and the contents of the measures ordered. What is important to note is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In our opinion, the legality represents a particular aspect of the legitimacy of the public authorities' legal acts. Thus, a legitimate legal act is a lawful legal act, issued within the margin of appreciation recognized by the public authorities, which does not generate discriminations, unjustified privileges or restrictions of the subjective rights and is appropriate to the situation in fact that determines its legal purpose. The legitimacy distinguishes between the discretionary power recognized by the state authorities, and on the other hand, the excess of power.

Not all legal documents which satisfy the legality conditions are legitimate. A legal act that complies with the formal legality, but is generating discriminations or privileges or unduly restricts the exercising of some subjective rights, or is not appropriate to the situation in fact, or to the purpose pursued by the law, is an illegitimate legal act. The legitimacy, as a feature of the legal acts of public administration authorities must be understood and applied in relation to the principle of supremacy of the Constitution.

<sup>1</sup> André Hauriou, *Droit constitutionnel et institution politiques* (Paris: Montchrestien, 1972), 137.

<sup>2</sup> Ion Deleanu, *Drept constituțional și instituții politice* (Bucharest: Europa Nova, 1996), 509.

<sup>3</sup> For developments see Marius Andreescu and Florina Mitrofan, *Drept constituțional. Teoria generală* (Pitești: Publishing House of Pitești University, 2006), 61-68.

<sup>4</sup> Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 362.

<sup>5</sup> Dictionary of Sociological thinking, Bucharest: Polirom, 431.

Antonie Iorgovan says that a problem of the essence of the lawful state is to answer the question: "where ends the discretionary power and where starts the abuse of law, where ends the legal behavior of administration, materialized through its right of appreciation and where it begins the infringement of a subjective right or a legitimate interest of the citizen?"<sup>6</sup>

Addressing the same issue, Leon Duguit in 1900 is doing an interesting distinction between the "normal powers and the exceptional powers" conferred by the Constitution and laws to the administration, and on the other hand the situations where state authorities act outside the legal framework. The latest situations, are divided by the author into three categories: 1) the excess of power (when the state authorities go beyond the legal powers); 2) misappropriation of power (when the state authority accomplishes an act which falls within its jurisdiction following another purpose, other than the one prescribed by law); 3) the abuse of power (when the state authorities act outside their powers, but through acts that have no legal character)<sup>7</sup>.

Therefore, the application and observance of the principle of legality in the work of state authorities is a complex issue because the performance of the state's functions assumes the discretionary power with which the state bodies are invested, in other words "the right of appreciation" of the authorities regarding the moment of adoption and the contents of the measures ordered. What is important to highlight is that discretionary power cannot be opposed to the principle of legality, as a dimension of the lawful state.

In the administrative doctrine, that is primarily studying the issue of discretionary power, it was emphasized that the opportunity of administrative acts may not hinder their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on expediency<sup>8</sup>. Consequently, the legality is the corollary of validity conditions, and the opportunity is a requirement (size) of legality<sup>9</sup>. However, the right of appreciation is not recognized by the state authorities in exercising all the prerogatives they have. One needs to remember the difference between the *competence* of state authorities that exist when the law imposes on them a certain strict behavioral decision, on the other hand the *discretionary power*,

in which situation the state authorities may choose the means for achieving a legitimate aim or in general, when the state body can choose between several decisions, within the law and its jurisdiction limits. We will remember the definition proposed in the literature to the discretionary powers: "there is a margin of freedom at the discretion of the authorities, so in order to achieve the purpose indicated by the law maker to have the possibility of use any means of action within its jurisdiction."<sup>10</sup>

Although the problematic of the discretionary power is studied mainly in the administrative law, the right of appreciation in exercising some prerogatives represents a reality that is encountered in the work of all state authorities.<sup>11</sup> The Parliament, as the supreme representative body and the sole legislative authority, has the broadest limits to manifest discretionary power, which identifies itself through the characterization of the legislative act. Since the period between the two world wars I.V. Gruia pointed out: "The need to legislate in a particular matter, the choosing of enactment timing, the choosing of the timing for implementation of the law by fixing by the legislator of the date of application of the law, revising of previous legislation, which may not restrict and compel the activity of future Parliament, limitations of the social activities from the free and uncontrolled way of carrying out and their subjecting to law rules and sanctions, the contents of the legislative act etc, prove the sovereign and discretionary appreciation of the legislative body's function."<sup>12</sup>

That is the case today, because every Parliament has the freedom to exercise its powers almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable to the legislative activity and the mechanism for controlling the constitutionality of laws.

The discretionary power exists also in court's activity. The judge is required to decide only when it is noticed, within the referral's limits. Beyond that is manifested *the sovereign right of assessment* of the facts, the right to interpret the law, the right to set a minimum or a maximum punishment, to grant or not extenuating circumstances to determine the amount of compensation etc. The exercise of these powers means nothing else but discretionary power.

Exceeding the limits of the discretionary powers means breaching of the principle of legality

<sup>6</sup> Antonie Iorgovan. *Forward to: Dana Apostol Tofan, Puterea discreționară și excesul de putere al autorităților publice* (Bucharest: All Beck, 1999).

<sup>7</sup> Leon Duguit, *Manuel de Droit Constitutionnel* (Paris, 1907), 445-446.

<sup>8</sup> Antonie Iorgovan, *Tratat de drept administrativ* (Bucharest: Nemira, 1996), 301.

<sup>9</sup> *Ibidem*, pg.292.

<sup>10</sup> Dana Apostol Tofan, *quoted works*, 22.

<sup>11</sup> In doctrine, Jellinek and Fleiner claimed the thesis according to which the discretionary power is not specific only to the administrative function, but it appears in the activity of other functions of the state, under the form of a liberty of appreciation on the contents, on the opportunity and covering of the juridical act. (see Dana Apostol Tofan, *quoted works*, 26).

<sup>12</sup> I.V. Gruia, "Puterea discreționară în funcțiunile Statului", *Weekly Pandectales* (1934): 489.

or what in legislation, doctrine and jurisprudence is called to be "abuse of power". The excess of power in the activity of state bodies is equivalent to the abuse of rights, as it means the exercising of some legal competences without any reasonable motivation or without any appropriate relation between the imposed measure, situation in fact and the legitimate aim pursued.

The problematic of the excess of power forms mainly the subject of the law doctrine and administrative jurisprudence. Thus, the jurisprudence of the administrative prosecution courts in other countries delimited the freedom of decision of the administration from the excess of power. French State Council uses the concept of "appreciation manifest error" to describe situations where the administration exceeds, by legal acts adopted, the discretionary power. German administrative courts can annul the administrative acts for abuse of power or "wrong use of power". In such cases the legal acts of the administration have the appearance of legality, since they are adopted within the scope prescribed by law, but the excess of power consists in the fact that the administrative acts are contrary to the purpose of the law.

The Romanian<sup>13</sup> Administrative Litigation Law uses the concept of "abuse of power of the administrative authorities", which it defines as "the exercise of the appreciation right belonging to public authorities, through the violation of the fundamental rights and freedoms of citizens consecrated in the constitution or by the law" (Article 2, paragraph 1, letter m). For the first time the Romanian legislator uses and defines the concept of abuse of power and also recognizes the competence of the administrative prosecution courts to sanction the exceeding of the limits of the discretionary powers through administrative acts.

The exceptional situations represent a particular case in which the state authorities, and especially administrative ones, may exercise their discretionary power, with existence of the obvious dangers of power excess.

In the doctrine there is no unanimous agreement on the legal significance of the exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the liberty of decision of the administration within the law permitted framework, and the opportunity evokes an action in fact of the public administration, under exceptional circumstances, action not necessary (therefore advisable) but contrary to the law<sup>14</sup>. Jean Rivero believes that through exceptional circumstances means certain factual circumstances that have a double effect: suspending of the

application of the ordinary legal system and triggering of the application of a particular law to which the judge defines the requirements. Another author identifies three specific elements for exceptional situations: 1) the existence of some abnormal and exorbitant situations or serious and unforeseen events; 2) inability or difficulty to act in accordance with the natural regulations; 3) the need to intervene quickly to protect a considerable interest, gravely threatened<sup>15</sup>.

The excess of power can manifest itself in these circumstances at least by three aspects: a) an appreciation of a factual situation as being an exceptional case, although it has not this meaning (lack of a reasonable and objective motivation); b) the measures taken by the competent state authorities, by the virtue of the discretionary powers, exceed what is necessary for the protection of the public interest seriously threatened; c) if these measures restrict excessively, unjustified the exercise of the rights and freedoms constitutionally recognized.

The existence of an economic, social, political or constitutional - crisis does not justify the abuse of power. In this respect Professor Tudor Drăganu said: "the idea of the lawful state requires that they (the exceptional circumstances) to find adequate regulations in the constitution texts, whenever they have a rigid character. Such constitutional regulation is needed to determine the limits of the areas of social relations, in which the transfer of competence from the Parliament to the government may take place, to highlight the temporary character, by setting deadlines for application and by specifying the purposes in view of which it is carried out."<sup>16</sup>

Of course, the excess of power is not only a phenomenon manifesting itself in the practice of the executive bodies, it can also be found in the work of Parliament or of the courts.

We appreciate that discretionary power recognized by the state authorities is exceeded, and the measures ordered represent an abuse of power, wherever the following situations occur:

1. The measures decided do not pursue a legitimate aim;
2. The decisions of public authorities are not adequate to the factual situations or the legitimate aim pursued, as they go beyond what is necessary to achieve that purpose;
3. There is no rational justification of the measures imposed, including the situations in which is established a different legal treatment for identical situations, or an identical legal treatment for different situations;

<sup>13</sup> Law nr.554/2004, published in Official Gazette. no.1154/2004.

<sup>14</sup> Antonie Iorgovan, *quoted works*, vol. I, 294.

<sup>15</sup> Dana Apostol Tofan, *quoted works*, 81.

<sup>16</sup> Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Bucharest: Lumina Lex, 1999), 131-132.

4. Through the measures ordered the state authorities restrict the exercise of fundamental rights and freedoms, without any rational justification to represent, in particular the existence of an appropriate relation between these measures, the situation in fact and the legitimate aim pursued.

In the final part of this study we will refer to some issues that we believe that need to be considered in a future proceeding for revising the Constitution.

As shown above in regard to the excessive politicianism and the power discretionary manifestations of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of violation of fundamental rights and freedoms, manifested throughout the last two democracy decades in Romania, we consider that the scientific approach and not only in reviewing matters of the basic law should be directed to find solutions to guarantee the values of the lawful state, to limit the violation of the constitutional provisions in view of some particular interests and to avoid the excess of power by state authorities.

The provisions of art. 114, paragraph 1 of the current drafting state: "The Government may assume responsibility before the Chamber of Deputies and the Senate in joint session on a program of general policy statement or a bill."

The engagement of Government liability has a political nature and is a procedural instrument which avoids the phenomenon of "*dissociation of majorities*"<sup>17</sup> where the Parliament could not meet the required majority to adopt a certain action initiated by the Government. To determine the Legislative forum to adopt the measure, the government through the accountability procedure, conditions to continue its work requiring a vote of confidence. This constitutional process ensures that the majority required for the government dismissal, in case of submitting a motion of censure to dismiss to coincide with that for rejecting the law, program or political statement of which the government binds its existence.

The adapting of the laws as a result of the political liability engagement of the Government has as an important consequence the absence of any discussions or parliamentary deliberations on the bill. If the government is supported by a comfortable majority in the Parliament, through this procedure one can achieve the adoption of the laws by "bypassing the Parliament", which can have negative consequences on the principle of separation of powers in the State, but also in regard to the role of Parliament, as defined of Article 61 of the Constitution.

Consequently, the use of this constitutional procedure by government for adopting a law must be exceptional, justified by a political situation and a social imperative, well defined.

This particularly important aspect for respecting the democratic principles of the lawful state by the Government was well highlighted by the Constitutional Court of Romania: "To this simplified form of regulation one must reach *in Extremus*, when the adopting of bill in the ordinary procedure or emergency procedure is no longer possible or when the Parliament's political structure does not allow the adopting of the bill in the current or emergency procedure."<sup>18</sup> The political practice of the Government in recent years is contrary to these rules and principles. The Executive frequently used the assuming of responsibility not only for a single law, but for packages of laws without a justification in the sense shown by the Constitutional Court.

The politicianism of the government clearly expressed by the high frequency of assuming such a constitutional decision seriously harms the principle of political pluralism which is an important value of the lawful system as consecrated in the provisions of article 1, par. (3) of the Constitution but also of the principle of parliamentary law that shows that "the opposition expresses and the majority decides"<sup>19</sup>. "To deny the right of the opposition to speak is synonymous with the denial of political pluralism which, according to Article 1, paragraph (3) of the Constitution is a supreme value and is guaranteed ... the principle the 'majority decides, opposition expresses "implying that in the entire organization and functioning of the Parliament's Chambers to ensure, on one hand that the majority is not obstructed, especially in the conduct of the parliamentary procedure and, on the other hand the majority to decide only after the opposition has voiced"<sup>20</sup>. The censorship of the Constitutional Court has not proved to be sufficient and effective to determine the Government to respect these values of the lawful state.

In the context of these arguments we support the proposal to revise these constitutional provisions that limit the right of the Government to use its liability for a single bill in a parliamentary session. However, in our opinion there is no justification to exclude from the limitation of Government's liability, situations aiming the government draft law on state budget and state social insurances.

2. All post-December governments have massively used the practice of Emergency ordinances, fact widely criticized in the literature.

The conditions and prohibitions established by revising law in 2003 on the constitutional regime of

<sup>17</sup> Gheorghe Iancu, *Drept constituțional și instituții publice* (Bucharest: All Beck, 2010), 482.

<sup>18</sup> Decision nr. 1557 on 18<sup>th</sup> of November 2009, published in the Official Gazette. Nr. 40 on 19.01.2010.

<sup>19</sup> Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 55-69.

<sup>20</sup> Ioan Muraru, Mihai Constantinescu, quoted works, 56.

emergency ordinances, in practice proved to be insufficient to limit this practice of the Executive and the control of the Constitutional Court also proved insufficient and even ineffective. The consequence of such a practice is the violation of the Parliament's role as "the sole legislative authority of the country" (art. 61 of the Constitution) and creating of an imbalance between the executive and legislature by emphasizing the discretionary power of the Government, which most often turned into the abuse of power.

We propose in the perspective of a new revision of the Basic Law, that art. 115 par. 6 of the Constitution be amended so as to prohibit the adopting of emergency ordinances in the field of organic laws. In this way is protected an important area of social relationships as the constitutional legislature considers essential for the social and state system, the excess power of the executive through the practice of issuing emergency ordinance.

3. In our opinion is necessary that the Constitutional Court's role as guarantor of the Basic Law to be amplified by new responsibilities in order to limit the excess of power by the state's authorities. We disagree with the assertions in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional court<sup>21</sup>. It is true the Constitutional Court ruled some questionable decisions regarding their compliance with the limits of exercising their duties according to Constitution, by assuming the role of a positive legislator<sup>22</sup>. Reducing the powers of the constitutional court for this reason is not a solution as a legal basis. Of course reducing the powers of the state authority has the consequence of eliminating the risk of improper exercise of those powers. This is not a way of doing things in a lawful state, but it should be done by seeking legal solutions to achieve better conditions of the tasks which prove to be necessary to the state and social system.

To the powers of the Constitutional Court may be included the one to rule on the constitutionality of administrative acts, exempted from the review of legality by the administrative courts. This category of administrative acts, to which refers Article 126 paragraph 6 of the Constitution and the provisions of Law no. 544/2004 of administrative litigation, are particularly important for the whole social system and state. Therefore it is necessary a constitutional scrutiny because in its absence, the discretionary power of the issuing authority is unlimited with the consequent possibility of restricting the excessive

exercise of fundamental freedoms and rights or of breaching the important constitutional values.

For the same reasons our constitutional court should be able to control in terms of constitutionality also the Presidential decrees establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in an appeal on points of law that are binding on the courts. In the absence of any control of legality or constitutionality, the practice has shown that in many cases the Supreme Court has exceeded its power to interpret the law, and such decisions amended or completed acts behaving as a genuine legislature thus violating the principle of separation of powers in the state<sup>23</sup>.

In these circumstances, in order to avoid the excessive power of the Supreme Court, we consider it necessary to assign the Constitutional Court the power to decide on the constitutionality of the decisions of High Court of Cassation and Justice adopted in the procedure of appeal on points of law.

### III Conclusions

Proportionality is a fundamental principle of law consecrated explicitly to the constitutional, legislation and international legal instruments regulations. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or appropriate relation between actions, situations, events, being a criterion for limiting the measures ordered by the authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess of power by the state's authorities. Proportionality is a fundamental principle of EU law being expressly consecrated by article 5 of the Treaty on European Union<sup>24</sup>.

We consider that this principle's express regulation in the content of the provisions of Article 53 of the Constitution, with application in the restriction of certain rights, is not enough to highlight the full significance and importance of the principle of the lawful state.

It is useful that to article 1 of the Constitution to add a new paragraph stating that "*The exercising of state power must be proportionate and non-discriminatory*". This new constitutional regulation would be a veritable constitutional obligation for all state authorities to conduct their duties in a way that the measures adopted to enroll within the discretionary power recognized by law. At the same

<sup>21</sup> Genoveva Vrabie, "Natura juridică a curților constituționale și locul lor în sistemul autorităților publice", *Revista de Drept Public* 1 (2010): 33.

<sup>22</sup> We refer with the title for example to the Decision No.356/2007, published in the Official Gazette.no.322on 14<sup>th</sup> of May 2007 and to the Decision no..98/2008 published in the official gazette no. 140 on 22<sup>nd</sup> of February 2008.

<sup>23</sup> For developments see Marius Andreescu, "Constituționalitatea recursului în interesul legii și ale deciziilor pronunțate", *Curierul Judiciar* 1(2011): 32-36.

<sup>24</sup> For developments see Marius Andreescu, "Proportionalitatea, principiu al dreptului Uniunii Europene", *Curierul Judiciar* 10(2010): 593-598.



time it creates the possibility for the Constitutional Court to sanction by means of the constitutional reviewing control of the laws and ordinances, the excess of power in the work of Parliament and Government, using as criteria the principle of proportionality.

Of course, the existence of an institutional state viable, efficient qualitatively, well structured and harmonized, including under the aspect of moral and professional quality of the civil servants and magistrates dignitaries is obviously an ontological factor to eliminate or at least diminish the excess of power of state's authorities in all its forms,

especially we would emphasize on the situation in which the measures decided by the political and legal manifestations will take the *form of legality* but are in obvious contradiction with the requirements of *the principle of legitimacy*.

Strengthening the judiciary power, the control of the courts and control of constitutionality, particularly, mainly in situations where being questioned the violation of human rights or of the principles of lawful state, particularly the separation and balance of powers, can be a viable solution to ensure not only the legality of the measures taken by the state authorities, but also of their legitimacy.

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