THE RIGHT TO GOOD GOVERNANCE. ASPECTS OF CONSTITUTIONAL DOCTRINE AND JURISPRUDENCE

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Abstract

The obligation of the authorities, namely the parliament and the executive, to have a loyal constitutional behavior was stipulated for the first time in the jurisprudence of the French Constitutional Council, which is the constitutional court of France. This obligation is found in the powers that the state authorities have to interpret and apply constitutional norms. It is not reduced only to the simple requirement of legality of the acts and provisions of the rulers, that is, to the formal observance of the law. It is a requirement of good governance.

In our opinion, the concern of the political class and the state authorities in the current period, in relation to the current content of the Fundamental Law, should also be oriented towards its correct interpretation and application and the respect for the democratic purpose of constitutional institutions.

In order to consolidate the rule of law in Romania, even in the current normative form of the Constitution, it is necessary that political formations, especially those that hold power, all state authorities act or exercise their powers within the limits of a loyal constitutional behavior that implies respect for the meaning and democratic significance of the Constitution, the traditions and Christian Orthodox values of the Romanian people, the rights and dignity of the person.

A new concept has been introduced in public administration – good governance. The term good governance is difficult to define. Good governance is considered today as a paradigm of public administration, since its role is to regulate the exercise of state power in general and the exercise of executive power in particular, to support governance oriented towards ensuring the general well-being of citizens and less so of representatives of political parties. The term has broader implications and includes both the activities of the government and other organizations, public or private.

In this study, we analyze from a constitutional, doctrinal and jurisprudential perspective, the principle of good governance and the fundamental right to good governance, especially through its composition, which we consider essential, the constitutionally loyal behavior of state authorities. In this sense, we also make proposals de lege ferenda.

Keywords: *Principle of good governance, right to good governance, excess of power, constitutionally loyal behavior.*

1. Introduction

At the end of the 20th century, the idea of good governance was imported by political scientists from Great Britain, on the occasion of the development, through government support, of a program to improve the activity of local administration. Currently, in the specialized literature there is no single definition of the concept of „good governance". This term is used with great flexibility. However, there is a consensus, according to which by „good governance" we understand a „process by which public institutions carry out public activities, manage public resources and guarantee respect for human rights in a manner free from any abuse and corruption, paying particular attention to respect for the principle of the rule of law."[1]

Good governance is considered today as a paradigm of public administration, because it is committed to regulating the executive power, the proper functioning of public services, to supporting governance oriented

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[1] See Good governance in the understanding of project beneficiaries, *https://www.dezvolt.md/beneficiarii-desprebuna-guvernare*, last consulted on 26.03.2024; C. Budurina-Goreacii, S. Cebotari, *Buna guvernare Definiții, Principii, Caracteristici și Limite în societățile Democratice*, *https://ibn.idsi.md/sites/default/files/imag_file/21-28_11.pdf*, last consulted on 26.03.2024.

towards ensuring the general well-being of citizens. The term governance has two meanings: one is narrow and the other is broad. The first means the exercise of executive power, the administration or management of the state in accordance with the Constitution and the laws in force. But in the current era, governance is used in a broader sense. Government institutions and in general public administration must engage in the development of a nation, in accordance with the requirements of the rule of law to enshrine and guarantee human rights. The purpose of administration will always be to achieve the development of man and society, and good governance does not only mean legality in the exercise of the powers of government authorities but also legitimacy, that is, a correct adequacy of political and normative governmental and administrative decisions to the intended purpose and the factual situation in mind.

2. Content

An essential aspect of good governance consists in exercising the powers of the executive branch within the limits of the margin of legality and legitimacy conferred by constitutional and legal requirements, with the consequence of avoiding excess power with all its consequences, political conflicts but also legal ones of a constitutional nature.[2]

In this context, we emphasize that governance is a comprehensive term that includes both general administration and general progress of the political body. In other words, we can say that good governance encompasses both good administration and, along with it, progress. But the meaning of the term is not limited to the aforementioned notions. It embraces many other things, such as vigilance, activities and constructive thinking for the people, that is, the development of society. Good governance also includes the participation of citizens in both the developmental and administrative functions of society.

Good governance also means the realization of the ideals of democracy, the requirements of the rule of law and the participation of citizens in administration through public-private partnership. Participatory administration finds its fullest realization in a society that is properly governed. It is also expected that there is a good and effective relationship between governmental and international institutions.

In essence, good governance can be characterized by:

- It is based on compliance with laws and the application of regulations;
- It assumes full responsibility towards the members of society;
- It allows the equitable participation of all stakeholders in the development and formulation of policies and political decisions;
- It allows citizens to participate in the proper functioning of public institutions;
- It is transparent;
- It ensures the integrity of public administration representatives;
- It delivers public services efficiently.

Good governance ensures the minimization of corruption, the consideration of minority opinions. Good governance is responsive to the current and future needs of society. Good governance is the process by which public institutions carry out public activities, manage public resources and guarantee respect for human rights in a manner free from any abuse and corruption, paying particular attention to the principle of the rule of law.[3]

The concept of good governance is also enshrined in EU law, but it has more of an ethical significance and refers to the work of the European Union institutions. It is enshrined in the Treaty on European Union, art. 21 para. 2 letter H: „…promoting an international system based on stronger multilateral cooperation and good global governance."[4]

The concept of good governance formulated at European level and presented in the „White Paper on European Governance" implies compliance with five basic principles – openness, participation, accountability, efficiency and coherence, each of which is fundamental for establishing democratic governance and a consolidated democracy, applied at all levels – global, European, national, regional and local.[5]

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[2] See M Andreescu, *Delimitarea puterii discreționare de excesul de putere în activitatea instituțiilor statului*, in Fiat Iustitia no. 1/2014.

[3] T. Şaptefraţi, *Buna guvernare: caracteristici, dimensiuni şi metode de evaluare*, *https://ibn.idsi.md/sites/default/files/imag_file/Buna%20guvernare%20caracteristici%2C%20dimensiuni%20si%20metode%20de%20evaluare.pdf*, last consulted on 20.03.2025.

[4] Consolidated version of the Treaty on European Union, OJ C 83/13/30.03.2010, p. 29.

[5] Commission of the European Communities, European Union – a White Paper, COM (2001) 428 final, Brussels, 25.07.2001, p. 10.

Good governance is also considered a fundamental right of European Union citizens and enshrined in art. 41 of the Charter of Fundamental Rights of the European Union. Right to good administration:

- Everyone has the right to be treated impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union in matters concerning them.
- This right includes in particular:
  - The right of every person to be heard before any individual measure which could affect him is taken;
  - The right of any person to access his own file, with due regard for legitimate interests related to confidentiality and professional and commercial secrecy;
  - The obligation of the administration to justify its decisions.
- (3) Any person has the right to reparation by the Union of the damages caused by its institutions or agents in the exercise of their functions, in accordance with the general principles common to the legislation of the member states.
- (4) Any person may write to the institutions of the Union in one of the languages of the Treaties and shall have an answer in the same language.[6]

As regards European ethics and integrity in relation to good administration of the Union's entities, it respects the case-law of the Court of Justice and the decisions adopted by the Court of First Instance, based on the principle of legality, and also representing realities of the European construction. For example, the right to good administration, art. 41 of the Charter of Fundamental Rights of the European Union, is applied to all citizens and recognized to „any person" who comes into contact with the EU institutions and bodies, being specific to the European administrative area.

Good administration requires impartial and fair behavior on the part of European institutions, respecting citizens' rights and responding to their requests within a reasonable time.

The concept of constitutional supremacy cannot, however, be reduced to a formal and material meaning[7]. Professor Ioan Muraru stated that: „The supremacy of the constitution is a complex notion whose content includes political and legal features and elements (values), which express the superordinate position of the constitution not only in the legal system, but in the entire socio-political system of a country."[8]

So, the supremacy of the constitution represents a quality or a feature that places the fundamental law at the top of the political-legal institutions in a state-organized society and expresses its superordinate position, both in the legal system and in the entire social-political system.

The legal basis of the supremacy of the Constitution is represented by the provisions of art. 1 para. 5 of the Fundamental Law: „In Romania, compliance with the Constitution, its supremacy and the laws are mandatory". The supremacy of the Constitution does not have a purely theoretical dimension, in the sense that it could be considered only a political, legal or, possibly, moral concept. Due to its express enshrinement in the fundamental law, this principle has normative value, being formally a constitutional norm. The normative dimension of the supremacy of the constitution implies important legal obligations, the non-compliance of which may attract legal sanctions. In other words, as a constitutional principle, normatively enshrined, the supremacy of the Fundamental Law is also a constitutional obligation with multiple legal, political, but also value-based meanings, for all components of the social and state system. In this sense, Cristian Ionescu emphasized: „Strictly formally, the obligation (to respect the supremacy of the fundamental law, *s.n.*) is addressed to Romanian citizens. In reality, respecting the Constitution, including its supremacy, as well as the laws, was a completely and completely general obligation, the recipients of which were all subjects of law – natural and legal persons (national and international) in legal relations, including diplomatic ones, with the Romanian state."[9]

The general meaning of this constitutional obligation refers to the conformity of the entire law with the norms of the constitution. By „law" we understand not only the component of the normative system, but also the complex, institutional activity of interpreting and applying legal norms, starting with those of the fundamental law. „It was the intention of the derived Constituent Parliament, from 2003, to mark the decisive importance of the principle of the supremacy of the Constitution over any other normative act. A signal was

[6] Charter of Fundamental Rights of the European Union of 12 December 2007, OJ C 303/1/14.12.2007.

[7] In the same sense, see R. Duminică, *Lege și legiferare în societatea românească actuală*, C.H. Beck Publishing House, Bucharest, 2024, pp. 215-221.

[8] I. Muraru, E.S. Tănăsescu, *Constituţia României - Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2009, p. 18.

[9] C. Ionescu, *Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii*, C.H. Beck Publishing House, Bucharest, 2015, p. 48.

given, in particular, to the public institution with a governing role to strictly respect the Constitution. Respect for the Constitution is included in the general concept of legality, and the term of respecting the supremacy of the Constitution imposes a pyramidal hierarchy of normative acts at the top of which is the Fundamental Law"[10].

Respecting this constitutional obligation and its implementation not only in the strict sphere of the normative system, but in the entire dialectic of the movement and evolution of the social and legal order, is the basis for what can be called the constitutionalization of law, but also of the entire state-organized social system. To support this statement, we take into account that, constantly, in specialized literature, the principle of the supremacy of the Constitution is not reduced only to its normative significance, and the Fundamental Law is also considered from a value perspective, with major implications for the entire social system. In this sense, the Constitution is defined in the doctrine as being „a fundamental political and social institution of the state and society"[11].

According to constitutional jurisprudence, legal conflict of a constitutional nature means:

Concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences; the attributions, powers and competences belong to other public authorities; omissions by some public authorities, consisting in the decline of competence or in the refusal to perform certain acts that fall within their obligations; by resolving conflicts between different public authorities, the aim is to remove possible institutional blockages; the conflict between a political party or a parliamentary group and a public authority does not fall within the category of conflicts whose resolution is within the competence of the Constitutional Court; the conflict concerns the content or scope of the attributions of the constitutional authorities.

The legal conflict of a constitutional nature as a conflict of competence is thus generated by the mode of action of public authorities and is capable of determining an imbalance in terms of the principle of separation of powers in the state, but also a violation of the principle of good governance.

The Constitution of Romania and Law no. 47/1992 on the organization and functioning of the Constitutional Court use the phrase „legal conflict of a constitutional nature" without specifying its content. Therefore, to establish the features of the content of the legal conflict of a constitutional nature, the main reference point is the jurisprudence of the Constitutional Court.

Thus, the legal conflict of a constitutional nature involves concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences which, according to the Constitution, belong to other public authorities or the omission of some public authorities, consisting in the decline of competence or in the refusal to carry out certain acts which fall within their obligations.[12]

The legal conflict of a constitutional nature exists between two or more authorities and may concern the content or scope of their powers, arising from the Constitution, which means that these are conflicts of competence, positive or negative, and which can create institutional blockages.[13]

According to art. 146 of the Constitution, the Court has the competence to resolve any conflict of a constitutional nature between public authorities, and not only conflicts of competence. The text of art. 146 letter e) of the Constitution „establishes the competence of the Court to resolve on the merits any legal conflict of a constitutional nature arising between public authorities, and not only conflicts of competence arising between them."[14]

The Constitutional Court has established that these conflicts are not limited to disputes that could create institutional blockages. A constitutional conflict refers to any conflicting legal situations that are directly generated by the text of the Constitution.[15]

The Constitutional Court has established that these conflicts are not limited only to disputes that could create institutional blockages. A constitutional conflict refers to any conflicting legal situations that are directly generated by the text of the Constitution. It was also noted that to the extent that there are mechanisms through which public authorities can self-regulate through their direct and immediate action, the role of the Constitutional Court becomes a subsidiary one. „In contrast, in the absence of these mechanisms, to the extent

[10] C. Ionescu, *op. cit.*, p. 48.

[11] For developments see I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii politice*, C.H. Beck Publishing House, Bucharest, 2013, pp. 85-88.

[12] See CCR dec. no. 53/28.01.2005, published in the Official Gazette of Romania no. 144/17.02.2005.

[13] See CCR dec. no. 97/07.02.2008, published in the Official Gazette of Romania no. 169/05.03.2008.

[14] CCR dec. no. 270/10.03.2008, published in the Official Gazette of Romania no. 290/15.04.2008.

[15] CCR dec. no. 685/07.11.2018, published in the Official Gazette of Romania no. 1021/29.11.2018, and CCR dec. no. 26/16.01.2019, published in the Official Gazette of Romania no. 193/12.03.2019.

that the mission of regulating the constitutional system falls exclusively on the responsibility of the litigant, who is thus put in the position of fighting to guarantee his rights or freedoms against an unconstitutional, but institutionalized, legal paradigm, the role of the Constitutional Court becomes a main and primary one for removing the constitutional blockage resulting from the limitation of the role of Parliament in the architecture of the Constitution"[16].

The Court cannot analyze hypothetical legal conflicts of a constitutional nature. Consequently, the existence of a litigious situation cannot be held since, by definition, it must concern concrete acts or facts committed by public authorities. Thus, in the absence of the act/fact generating an alleged conflict, the conclusion of the existence of a litigious situation that would concern the commission of the act or fact in question cannot be drawn.[17]

The legal conflict of a constitutional nature was also defined by dec. no. 26/2019 on the request for resolution of the legal conflict of a constitutional nature between the Public Ministry – Prosecutor's Office attached to the High Court of Cassation and Justice, the Parliament of Romania, the High Court of Cassation and Justice and the other courts.[18] Thus, by legal conflict of a constitutional nature we will understand „concrete acts or actions by which one or more authorities arrogate to themselves powers, attributions or competences, which, according to the Constitution, belong to other public authorities, or the omission of some public authorities, consisting in the decline of competence or in the refusal to perform certain acts that fall within their obligations."

As for the specific effects of the aforementioned decisions, they must be examined from the perspective of the role and reason for which this attribution of the Constitutional Court was established. In this regard, in dec. no. 85/2020[19], by which such a conflict was found, it was held that, by virtue of the provisions of art. 142 para. (1) of the Constitution, according to which the Constitutional Court „is the guarantor of the supremacy of the Constitution", it has the obligation to resolve the conflict, showing conduct in accordance with the constitutional provisions to which public authorities must comply.

In this regard, the Court took into account the provisions of art. 1 para. (3), (4) and (5) of the Constitution, according to which Romania is a state governed by the rule of law, organized according to the principle of separation and balance of powers - legislative, executive and judicial, a state in which compliance with the Constitution, its supremacy and the laws is mandatory, and the relations between the state authorities/institutions are based on the principle of loyal collaboration and mutual respect. One of the conditions for achieving the fundamental objectives of the Romanian state is the proper functioning of public authorities, respecting the principles of separation and balance of powers, without institutional blockages (dec. no. 460/13.11.2013, dec. no. 261/08.04.2015, para. 49, or dec. no. 68/27.02.2017, para. 123). Also, the text of art. 146 letter e) of the Constitution does not confer on the Constitutional Court the power to ascertain only the existence of legal conflicts of a constitutional nature, but also to resolve these conflicts.

Decision no. 85/2020 is also important because it expressly refers to the obligation of constitutional loyalty of public authorities in order to avoid legal conflicts of a constitutional nature.

The Constitutional Court emphasized that „respect for the supremacy of the Constitution, a corollary of the rule of law, is not reduced only to respecting its letter. If that were the case, a constitution would never be sufficient, because it could never explicitly regulate solutions for all situations that may arise in practice, including in relations between public authorities of constitutional rank." (para. 120).

The Court also held, as a matter of principle, that accepting a strictly literal and fragmented interpretation of the Constitution could lead to the conclusion that anything not expressly prohibited by the constitutional text is permitted by it, even if it would obviously contravene the logic and spirit of the Constitution, and such a conclusion is unacceptable, as it is incompatible with the principles of the rule of law (para. 121).

In this regard, the rulings of the Venice Commission were also invoked, which noted that „respect for the rule of law cannot be limited only to the implementation of the explicit and formal provisions of the law and the Constitution. It also implies constitutional behavior and practices, which facilitate compliance with formal rules by all constitutional bodies and mutual respect between them. "[20]

[16] CCR dec. no. 685/07.11.2018, cited above, and CCR dec. no. 26/16.01.2019, cited above.

[17] CCR dec. no. 26/2020, published in the Official Gazette of Romania no. 168/02.03.2020.

[18] Published in the Official Gazette of Romania no. 193/12.03.2019.

[19] CCR dec. no. 85/2020, published in the Official Gazette of Romania no. 195/11.03.2020.

[20] Opinion on the compatibility with constitutional principles and the rule of law of the actions of the Government and Parliament of Romania with regard to other state institutions and the GEO amending Law no. 47/1992 on the organisation and functioning of the

In the same Opinion, the Venice Commission also noted that „respect for the Constitution cannot be limited to the literal execution of its operational provisions. The Constitution by its very nature, in addition to guaranteeing human rights, provides a framework for the institutions of the State, establishes their powers and obligations. The purpose of these provisions is to allow the proper functioning of the institutions, based on loyal cooperation between them. The Head of State, Parliament, Government, the judiciary, all serve the common purpose of promoting the interests of the country as a whole, not the narrow interests of a single institution or of a political party that appointed the holder of the position. Even if an institution is in a position of power, when it is in a position to influence other institutions of the State, it must do so with due regard to the interest of the State as a whole (…).” (para. 87).

Referring to the same Opinion cited, in which the Venice Commission noted that „in Romania, political and constitutional cultures need to be developed. Dignitaries do not always pursue the interests of the state as a whole. First of all, there was a lack of respect for institutions. Institutions cannot be viewed separately from the people who lead them. (…) Such a lack of respect for institutions is closely linked to another problem in political and constitutional culture, namely the violation of the principle of loyal cooperation between institutions. (…) Only mutual respect can lead to the establishment of mutually accepted practices, which are in accordance with the European constitutional heritage and which allow a country to avoid and overcome crises with serenity.” (para. 73), the Constitutional Court recalled that it had noted, over time, behaviors contrary to the aforementioned principle, and ruled on the obligation of constitutional loyalty, of loyal constitutional behavior that governs the exercise of the duties incumbent on public authorities in a state governed by the rule of law.

Thus, the Court showed that the relations between the authorities „must function within the constitutional framework of loyalty and collaboration, in order to achieve the constitutional attributions distinctly regulated for each of the authorities; collaboration between the authorities is a necessary and essential condition for the proper functioning of the public authorities of the state.”[21] This is because „respect for the rule of law (..) implies, on the part of public authorities, constitutional behaviors and practices, which have their origin in the constitutional normative order, viewed as a set of principles that underpin the social, political, and legal relations of a society. In other words, this constitutional normative order has a broader significance than the positive norms enacted by the legislator, constituting the constitutional culture specific to a national community.

In our opinion, the concern of the political class and the state authorities in the current period, in relation to the current content of the Constitution, should be oriented towards its correct interpretation and application of the respect for the democratic finality of the constitutional institutions. In order to consolidate the rule of law in Romania, even in the current normative form of the Constitution, it is necessary that the political formations, especially those that hold power, all state authorities act or exercise their powers within the limits of a loyal constitutional behavior that implies respect for the meaning and democratic significance of the Constitution, the traditions and Christian Orthodox values of the Romanian people, the rights and dignity of the person. The obligation of the authorities, respectively the parliament and the executive to have a loyal constitutional behavior was stipulated for the first time in the jurisprudence of the French Constitutional Council, which is the constitutional court of France.

This obligation is found in the powers of the state authorities to interpret and apply constitutional norms. It is not limited to the simple requirement of legality of the acts and dispositions of the rulers, *i.e.*, to the formal observance of the law.

The normative activity of drafting the law must be continued with the activity of applying the norms. In order to apply, the first logical operation to be performed is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. What constitutes the object of interpretation are not the legal norms, but the text of the law or the Constitution. A legal text may include several legal norms. A constitutional norm can be deduced from a constitutional text by way of interpretation. The text of the Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. Through interpretation, the constitutional norms are identified and determined.

Constitutional Court and the GEO amending and supplementing Law no. 3/2000 on the organisation and conduct of the referendum in Romania, adopted by the Venice Commission at its 93rd plenary session, Venice, 14-15.12.2012, para. 72.

[21] See CCR dec. no. 356/05.04.2007, published in the Official Gazette of Romania no. 322/14.05.2007.

It should also be emphasized that a Constitution may include certain principles that are not clearly expressed *expressis verbis*, but they can be deduced through the systematic interpretation of other norms.

In the sense of what has been shown above, in the specialized literature it has been stated: „The degree of determination of constitutional norms by the text of the fundamental law may justify the need for interpretation. The norms of the Constitution lend themselves very well to an evolution of their course, because the text is by excellence imprecise, formulated in general terms. The formal superiority of the Constitution, its rigidity, prevents its revision at very short intervals and then interpretation remains the only way to adopt the normative content, usually older, to the social reality in constant change. The meaning of constitutional norms being by their very nature, that of maximum generality, its exact determination depends on the will of the interpreter"[22].

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained in both the Constitution and the laws, through institutions that mainly carry out the activity of interpreting the norms issued by the author. These institutions are primarily the courts and constitutional courts.

The verification of the conformity of a normative act with constitutional norms, an institution that represents the constitutionality control of laws, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures of interpreting both the law and the Constitution.

Therefore, the necessity of interpreting the Constitution is a condition for its application and for ensuring its supremacy. The constitutionality control of laws is essentially an activity of interpreting both the Constitution and the law.

Constitutional jurisprudence, through the work of interpreting and applying the norms of the Constitution, can contribute to revealing the meanings and significances of the content of the norms of the Constitution, some of which are explicitly included in the content of the interpreted norm and others only implicitly. We consider the contribution of constitutional jurisprudence to the construction of the content of the norms of the Fundamental Law to be a work of legal construction of the content of the interpreted norms consisting of the new revealed valences of the explicit and especially implicit form of the norms. Of course, the work of construction of the content of constitutional norms does not represent an addition to the legal norm of elements that exceed the intention of the constituent legislator or are contrary to his will. The Constitutional Court, given the characteristics of our legal system, cannot create legal norms, cannot substitute itself for the legislator. Our constitutional court is, as is constantly stated in the specialized literature, a „negative legislator" because it does not have the competence to create legal norms but only to ascertain the unconstitutionality of the analyzed legal norm. The Constitutional Court, like any other court, does not create the law but „says the law", expressing through the decisions it pronounces the explicit or implicit content of the interpreted and applied constitutional norm.

The Constitutional Court cannot be characterized only by the phrase „negative legislator" but has an important positive role through its jurisprudential work in the construction of the normative content of the Constitution and, in particular, the construction of the content of general principles of law formulated explicitly or implicitly by the norms of the Fundamental Law.

The relations between the state authorities have a complex character, but which must also ensure their proper functioning in compliance with the principle of legality and the supremacy of the Constitution. To achieve this goal, it is very important to maintain state balance in all its forms and variants, including as a social balance.

The separation and balance of powers no longer concerns only the classical powers (legislative, executive and judicial). To these powers are added others that give new dimensions to this classical principle. The relations between the participants in state and social life can also generate conflicts that must be resolved in order to maintain the balance of powers. Some constitutions refer to public law disputes (German Constitution – art. 93), to conflicts of competence between the state and the autonomous communities, or conflicts of attributions between the powers of the state, between the state and the regions and between the regions (Italian Constitution – art. 134). The Romanian Constitution speaks of legal conflicts of a constitutional nature between public authorities [art. 146 letter c)] and regulates the mediation function between the powers of the state, a function exercised by the President.

[22] I. Muraru, M. Constantinescu, E.S. Tănăsescu, M. Enache, G. Iancu, *Interpretarea Constituţiei. Doctrină şi practică*, Lumina Lex Publishing House, Bucharest, 2002, p. 67.

The Constitutional Court is an important guarantor of the separation and balance of state powers, because it resolves legal conflicts of a constitutional nature between public authorities and through its powers in the matter of the prior constitutional review of laws and the verification of the constitutionality of the regulations of the chambers, it intervenes in ensuring the balance between the parliamentary majority and minority, effectively ensuring the right of the opposition to express itself.

The Constitutional Court is a guarantor of respect for fundamental rights and freedoms. This fundamental role of the constitutional court in the rule of law is achieved through the jurisprudential interpretation of the Constitution and laws. In principle, there are three essential constitutional guarantees regarding the rights and freedoms of citizens established by the Constitution: a) the supremacy of the Constitution; b) the rigid character of the Constitution; c) citizens' access to the control of the constitutionality of the law and to the control of the legality of acts subordinate to the law.

In Romania, the procedure of exception of unconstitutionality ensures indirect access of citizens to constitutional justice.

The constitutional obligation that the rulers have, to have a constitutional behavior loyal to the normative content but also to the purpose of the Constitution, is also an expression of the requirement of legitimacy that the normative acts, as well as the adopted governmental measures and provisions, must fulfill. To be the expression of a loyal constitutional behavior, the legal and political acts of the Parliament and the executive must not only be legal, *i.e.*, formally correspond to the Constitution, but also legitimate. The legitimacy of a legal, individual or normative act reveals the requirement according to which, the act in question must correspond not only to the letter of the law (the Constitution), but also to its spirit.

The legality of legal acts of public authorities implies the following requirements: the legal act must be issued in compliance with the competence provided by law; the legal act must be issued in accordance with the procedure provided by law; the legal act must comply with the higher legal norms as legal force.

Legitimacy is a complex category with multiple meanings and which forms the object of research for the general theory of law, the philosophy of law, sociology and other disciplines. The meanings of this concept are multiple. Let us recall a few: the legitimacy of power; the legitimacy of the political regime; the legitimacy of a government; the legitimacy of the political system, etc.

The concept of legitimacy can also be applied to legal acts issued by public authorities, being linked to the „margin of appreciation" recognized to them in the exercise of their powers.

The application and observance of the principle of legality in the activity of state authorities is a complex issue, because the exercise of state functions also implies the discretionary power with which state bodies are invested, or in other words, the right of appreciation of the authorities regarding the moment of adoption and the content of the measures ordered. What is important to emphasize is the fact that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

Legality represents a particular aspect of the legitimacy of legal acts of public authorities. Thus, a legitimate legal act is a legal act issued according to law and within the scope of the margin of appreciation recognized to public authorities, which does not generate discrimination, privileges or unjustified restrictions of subjective rights and is appropriate to the factual situation that determines it and the purpose of the law. Legitimacy distinguishes between the discretionary power recognized to state authorities, and on the other hand, excess of power.

Not all legal acts that meet the conditions of legality are legitimate. A legal act that respects the formal conditions of legality, but which generates discrimination or privileges or unjustifiably restricts the exercise of subjective rights or is not appropriate to the factual situation or the purpose pursued by the law, is an illegitimate legal act. Legitimacy, as a feature of legal acts of public administration authorities, must be understood and applied in relation to the principle of supremacy of the Constitution.

In the current state of the Romanian legal system, the requirement of legitimacy of laws cannot be verified through the constitutionality control exercised by the Constitutional Court. It is sad to note that currently, in the exercise of the powers of government, the state power is often concerned not so much with the requirements of legality, the formal correspondence of an adopted legal act with the constitutional norms, and very little or not at all with the fulfillment of the requirement of legitimacy. The consequence of such behavior in the exercise of the powers of government, which violates the obligation of loyalty to the Constitution, but first of all to the Romanian people, is the excess and abuse of power with serious consequences on the respect, defense and

promotion of the traditions and values of Orthodox faith of the Romanian people, the affirmation of the public interest and not personal, on the exercise of important fundamental rights and freedoms.

Exceeding the limits of discretionary power means violating the principle of legality and legitimacy of the requirements of good governance, or what in legislation, doctrine and jurisprudence is called „excess of power".

Excess of power in the activity of state bodies is equivalent to abuse of law, because it means exercising a legal competence without a reasonable motivation or without an adequate relationship between the measure ordered, the factual situation and the legitimate aim pursued. Exceptional situations represent a particular case in which state authorities, and especially administrative ones, can exercise their discretionary power, there being an obvious danger of excess of power.

Issuing simple or emergency ordinances by the Government in violation of the constitutional norms in the matter is an example of disloyal constitutional behavior and failure to comply with the principle of good governance.[23]

The institution of legislative delegation is defined by legal doctrine as a „transfer of legislative powers to the authorities of the executive branch through an act of will of Parliament or constitutionally, in extraordinary situations". Such a transfer of powers is not contrary to the principle „*delegata potestas non delegatur*", since it is carried out based on the will of the constituent power, a power that has expressly delegated some legislative powers to the executive through the very constitutional text of art. 115 para. 4. Therefore, it is noted that powers in the field of legislation are delegated, and not the legislative power/function itself.

By dec. no. 15/25.01.2000[24] the Court ruled that „the possibility of the Government, in exceptional cases, to adopt emergency ordinances, in a limited manner, even in the field reserved to the organic law, cannot be equated with a discretionary right of the Government and, even more so, this constitutional empowerment cannot justify the abuse in issuing emergency ordinances. The possibility of the executive to govern through emergency ordinances must, in each case, be justified by the existence of exceptional situations, which require the adoption of urgent regulations."

The Constitutional Court interpreted and ruled on the meaning and significance of the conditions provided for in art. 115 of the Constitution regarding the issuance of emergency ordinances by the Government. Thus, by dec. no. 484/2023, the Court established that extraordinary situations express a high degree of deviation from the usual or common, an aspect reinforced by the addition of the phrase „whose regulation cannot be postponed". The Court also showed, by dec. no. 1008/07.07.2009[25], that in order to meet the requirements provided for in art. 115 para. 4 of the Constitution, the existence of an objective, quantifiable state of affairs, independent of the will of the Government, which endangers a public interest is necessary. As for the condition of emergency, provided for in art. 115 para. 4 of the Constitution, by dec. no. 421/09.05.2007[26], the Court ruled that the urgency of the regulation does not equate to the existence of an extraordinary situation, the operative regulation being able to be achieved through the ordinary legislative procedure.

By dec. no. 152/2020[27] the Constitutional Court, among other things, admitted the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of GEO no. 1/1999 on the state of siege and state of emergency regime are unconstitutional. It also found that GEO no. 34/2020 amending and supplementing GEO no. 1/1999 on the state of siege and state of emergency regime is unconstitutional, in its entirety.

In order to pronounce this decision, the Court held that the constitutional prohibitions provided for in art. 115 para. (6), not to adopt emergency ordinances that may affect the regime of the fundamental institutions of the state, the rights, freedoms and duties provided for by the Constitution, and electoral rights, were intended to restrict the Government's competence to legislate in these essential areas instead of the Parliament.

The Court notes that, de plano, the normative act with such a regulatory object affects both fundamental rights and freedoms of citizens and fundamental institutions of the state, falling within the scope of the prohibition provided for in art.115 para. (6) of the Constitution. Thus, the Court finds that the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can only be regulated by

[23] For developments see R. Duminică, *Criza legii contemporane*, C.H. Beck Publishing House, Bucharest, 2014, pp. 74-85.
[24] Published in the Official Gazette of Romania no. 267/14.06.2000.
[25] Published in the Official Gazette of Romania no. 507/23.07.2009.
[26] Published in the Official Gazette of Romania no. 367/30.05.2007.
[27] Published in the Official Gazette of Romania no. 387/13.05.2020.

a law, as a formal act of Parliament, adopted in compliance with the provisions of art. 73 para. (3) letter g) of the Constitution, in the regime of organic law.

The Constitutional Court's arguments are important in several respects. The notion of „law" by which the legal regime of states of emergency can be established is interpreted in a narrow sense, namely as a normative act of Parliament, excluding the normative acts of the Government, with express reference to the executive ordinances. At the same time, a necessary interpretation is given to the prohibition provided for in art. 115 para. (6) of the Constitution in the sense that through emergency ordinances, including those issued in exceptional situations, the Government cannot establish primary regulations regarding the restriction of the exercise of certain rights. Such measures can be established primarily only by law, as a legal act of Parliament.

Romanian Administrative Litigation Law[28] uses the concept of „excess of power of administrative authorities", which it defines as: „the exercise of the right of appreciation belonging to public administration authorities, by violating the fundamental rights and freedoms of citizens provided for by the Constitution or by law" [art. 2 para. (1) letter m)]. For the first time, the Romanian legislator uses and defines the concept of excess of power and at the same time recognizes the competence of administrative courts to sanction the exceeding of the limits of discretionary power through administrative acts. Of course, excess of power is not a phenomenon that manifests itself only in the practice of executive bodies, but can also be encountered in the activity of parliament or courts.

We consider that the discretionary power recognized to the state authorities is exceeded, and the measures ordered represent excess of power, whenever the following situations are found to exist:

- The measures ordered do not pursue a legitimate aim;
- The decisions of the public authorities are not appropriate to the factual situation or the legitimate aim pursued, in the sense that they go beyond what is necessary to achieve this aim;
- There is no rational justification for the measures ordered, including in situations in which a different legal treatment is established for identical situations, or an identical legal treatment for different situations;
- Through the measures ordered, the state authorities limit the exercise of fundamental rights and freedoms, without there being a rational justification that represents, in particular, the existence of an adequate relationship between these measures, the factual situation and the legitimate aim pursued.

In all these situations there is a constitutionally unfair behavior of the public authorities, even if formally the activity of these authorities corresponds to the requirements of legality, but not of legitimacy in relation to the principle of supremacy of the Constitution.

The essential problem remains to identify criteria by which to establish the limits of the discretionary power of state authorities and to differentiate it from the excess of power, which must be sanctioned. Of course, there is also the problem of using these criteria in the practice of courts or constitutional litigation.

In relation to these aspects, the opinion was expressed in the specialized literature according to which, „the purpose of the law will therefore be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom outside the law, but one permitted by law".[29] Of course, the „purpose of the law" represents a condition of legality or, as the case may be, constitutionality of legal acts of state bodies and therefore can be considered a criterion to delimit discretionary power from excess of power. As results from the jurisprudence of some international and domestic courts, in relation to our research topic, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, a term used by the ECtHR), because a legal act of the state can represent excess of power not only in the situation where the measures adopted do not pursue a legitimate aim, but also in the hypothesis in which the measures ordered are not appropriate to the purpose of the law and are not necessary in relation to the factual situation and the legitimate aim pursued.

The adequacy of the measures ordered by the state authorities to the legitimate aims pursued represents a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan, who considers that the limits of discretionary power are established by: „written positive rules, written general principles of law, the principle of equality, the principle of non-retroactivity of administrative acts, the right to defense and the principle of adversarial proceedings, the principle of proportionality" (*s.n.*).

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[28] Law no. 554/2004, published in the Official Gazette of Romania no. 1154/2004.

[29] R.A. Lazăr, *Legalitatea actului administrativ. Drept românesc şi drept comparat*, C.H. Beck Publishing House, Bucharest, 2004, p. 165.

Therefore, the principle of proportionality is an essential criterion that allows the delimitation of discretionary power from excess power in the activity of state authorities.

This principle is explicitly or implicitly enshrined in international legal instruments[30] or by most constitutions of democratic countries[31]. The Romanian Constitution expressly regulates this principle in art. 53, but there are also other constitutional provisions that imply it.

The obligation to correctly interpret and apply the Constitution and the law also falls to the rulers, namely the President, Parliament and Government, in relation to the attributions they have. The activity of interpreting and applying constitutional norms and generally legal norms carried out by the rulers must correspond to some minimal formal imperatives that constitute the content of good governance:

- The obligation to respect the supremacy of the Constitution;
- The obligation to respect in the activity of governance the principle of stability and security of legal relations;
- The clarity and predictability of the adopted normative acts;
- The limitation of the practice of legislative delegation in the activity of governance, especially in the form of emergency ordinances;
- The obligation to guarantee human dignity, fundamental rights and freedoms;
- The restriction of the exercise of certain rights and freedoms must be of an exceptional nature, without affecting the substance of the law and with strict observance of the principle of proportionality;
- The prohibition not to add by interpretation to the interpreted normative text;
- The obligation to respect the meaning and purpose of the constitutional norm;
- The obligation to give efficiency to the interpreted legal norm;
- The obligation to strictly respect the constitutional competence and procedures and those established by law in the exercise of powers and to avoid excess of power;
- Avoiding, as far as possible, conflicts of a constitutional and political nature between state authorities.

Regarding the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values.[32]

Human dignity, along with the freedoms and rights of citizens, the free development of the human personality, justice and political pluralism, represent supreme values of the rule of law [art. 1 para. (3)] „As part of the constitutional system of values, freedom of religious conscience is attributed the imperative of tolerance, especially with human dignity, guaranteed by art. 1 para. (3) of the Fundamental Law, which dominates the entire system of values as the supreme value".[33]

It is also interesting to emphasize that our constitutional court considers human dignity to be the supreme value of the entire system of constitutionally consecrated values, the value that is found in the content of all fundamental human rights and freedoms. At the same time, it is an important aspect that requires the state authorities to primarily consider respect for human dignity in all their activities. It is worth noting that in its jurisprudence, the Constitutional Court also identifies the content components of human dignity, as a moral, but at the same time constitutional value, specific to the rule of law: „Human dignity, from a constitutional perspective, involves two inherent dimensions, namely the relationships between people, which concerns the right and obligation of people to be respected and, correlatively, to respect the fundamental rights and freedoms of their fellow men, as well as the relationship of man with the environment, including the animal world"[34].

Therefore, respecting human dignity, but also guaranteeing constitutional freedoms and rights are requirements of the obligation of constitutional loyalty and at the same time of good governance.

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[30] We recall, in this regard, art. 29 para. 2 and 3 of the Universal Declaration of Human Rights, art. 4 and 5 of the International Covenant on Economic, Social and Cultural Rights; art. 5 para. 1, art. 12 para. 3, art. 18, art. 19 para. 3 and art. 12 para. 2 of the International Covenant on Civil and Political Rights; art. 4 of the Framework Convention for the Protection of National Minorities; art. G Part V of the revised European Social Charter; art. 8, 9, 10, 11 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[31] For example, art. 20 point 4; art. 31 and art. 55 of the Spanish Constitution; art. 11, 13, 14, 18, 19 and 20 of the German Constitution or the provisions of art. 13, 14, 15, 44 and 53 of the Italian Constitution.

[32] CCR dec. no. 1330/04.12.2008, published in the Official Gazette of Romania no. 873/23.12.2008.

[33] CCR dec. no. 669/12.11.2014, published in the Official Gazette of Romania no. 59/23.01.2015.

[34] CCR dec. no. 1/11.01.2012, published in the Official Gazette of Romania no. 53/23.01.2012. See also CCR dec. no. 80/16.02.2014, published in the Official Gazette of Romania no. 246/07.02.2014.

3. Conclusions

In international legal instruments, but also in doctrine, the principle of good governance, as well as the right to good governance, have more of an ethical content and do not generate legal obligations and liability for those in power. In our opinion, as we have briefly analyzed in this study, good governance has a complex legal content and is an important component of the rule of law.

The Romanian Constitution does not explicitly mention the principle and obligation of good governance, nor the right of citizens to good governance, nor the obligation of loyal constitutional behavior of state authorities.

However, the principle and requirements shown above can be found implicitly through the doctrinal and jurisprudential interpretation of some constitutional texts and subsequent legislation.

In relation to excessive politicking and acts that represent a clear excess of power of the executive contrary to the spirit and even the letter of the Constitution, with the consequence of the violation of fundamental rights and freedoms, manifested during the last three decades of democracy originating in Romania, we believe that the scientific approach, and not only in the matter of revising the Fundamental Law, must be oriented towards finding solutions to guarantee the values of the rule of law, to limit the violation of constitutional provisions, essentially to guarantee the loyal constitutional behavior of state authorities.

De lege ferenda, we propose that in a future procedure for revising the Constitution, the principle of good governance and the fundamental right to good governance should be clearly mentioned.

However, the procedure for revising the Constitution is difficult and unlikely to be achieved in the near future. That is why we propose that the principle and the right to good governance be included in the future Administrative Procedure Code of Romania.

In this way, there would be an efficient legal framework generating obligations and legal liability for the rulers, implicitly the possibility for our constitutional court or the administrative courts to censure the legal acts of the rulers that would violate the constitutional principle of good governance or the right to good governance.

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