THE RULE OF LAW-CONSTITUTIONAL AND CONTEMPORARY JURISPRUDENTIAL SIGNIFICANCE

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Abstract

The doctrine of the rule of law originates from German theory and jurisprudence, but is now a requirement and a reality of constitutional democracy in contemporary society. At present, the rule of law is no longer a simple doctrine but a fundamental principle of democracy consecrated by the Constitution and international political and legal documents. In essence, the concept of the rule of law is based on the supremacy of the law in general and of the Constitution in general. Essential for the contemporary realities of the rule of law are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, the guarantee and the observance of the constitutional rights of man especially by the state power and, last but not least, the independence and impartiality of justice.

In this study we analyse the most important elements and features of the rule of law with reference to the contemporary realities in Romania. An important aspect of the analysis refers to the separation, balance and cooperation of the state powers, in relation to the constitutional provisions. The most significant aspects of the jurisprudence of the Constitutional Court on the rule of law are being analysed.

Keywords: *Conditions of the rule of law / powers separation and balance / law supremacy / guarantee of fundamental rights / contemporary realities and aspects of constitutional jurisprudence*.

1. Introduction

The notion of state attributes means its defining dimensions as they result from constitutional provisions, as an expression of the political will and determined by the political regime and at the same time values of principle of constitutional order.

The rule of law, pluralism, democracy, civil society are unquestionable universal values of contemporary political thinking and practice and are found to be expressed in the Constitution of Romania as well as in international documents. The state attributes configure its quality as constitutional law subject and define the power, but also the complex reports between the state and citizens and the other constitutional law subjects. The attributes of the Romanian state regulated by the provisions of art. 1 paragraph (3) of the Romanian Constitution: 1. rule of law; 2. social state; 3. pluralist state; 4. democratic state.

The rule of law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from the state law to the rule of law. In the literature, contradictory opinions were sometimes affirmed, according to which the rule of law corresponds to an anthropological necessity or is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense.

The concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of society and in the application of the principle of legality to the entire state activity, but also in the behaviour of each member of society.

The rule of law has formed and spread over three major models:

1. The *English model of* "Rule of Law" is characterized by the limitation of the monarch's power and, on the other hand, by preserving the power of the parliament, which in terms of constitutional law means:a) the restriction of the powers of the monarch and their recognition of a power constituted by the norms of positive law, b) the necessity to found acts of the executive directly or indirectly on the authority of the Parliament, c) the obligation of all subjects of law to submit to the law of jurisdiction. **2.** The *German concept* emphasizes the need to ensure the legality of the administration and its judicial control; 3. The French conception regards the rule of law as a legal state, proclaiming and maintaining the principle of legality. **3.** The *French concept* considers the rule of law as a legal state, that proclaims and defends the principle of legality.

In the expression rule of law there are two aspects of the legal, seemingly contradictory but still complementary: normativism and ideology. In the normative plane, the rule of law appears as a structural principle of the Constitution along with other essential attributes of the state, materializing the fundamental values on which the existence of society and state are based.

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2. Content

From the normative point of view, the requirements of the rule of law are manifested in a double sense: a) the formal meaning expresses the requirement that the state and its organs observe the laws, strictly subordinate to the juridical rules regarding the composition of the state bodies, their attributions and their functions. and b) the material meaning - the requirement that the state bodies, exercising their functions, comply with the legal guarantees concerning the exercise of citizens' fundamental rights and freedoms.

In the field of ideology, the rule of law confers a logical system of ideas by which people represent their society, the state, in all its manifestations, and which confer the legitimacy of the state.

The term "rule of law" is not a simple logical concept but it expresses a fundamental constitutional necessity according to which: a) the state is indispensable for the law in order to create for it its norms and to ensure the finality and effectiveness of the legal norms; b) the law is indispensable for the state to express power by establishing a general and binding behaviour.

In essence, the rule of law expresses a condition of power, a movement to rationalize it, but also a new conception of law, its role and functions. Professor Tudor Draganu, in his paper "*Introducere în teoria şi practica statului de drept*" (Introduction to the Law and Practice of the Rule of Law), proposes an interesting and comprehensive definition of this concept of constitutional law: "The rule of law is considered to be that state which was organized on the basis of the principle of separation of powers of the state, the application of which justice acquires real independence and pursues through its legislation the promotion of the rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs in all their activity. "

The definition defines the main elements of the rule of law - the separation of powers as a reality of the state activity, in the application of which justice acquires real independence and pursues through its legislation the promotion of rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs, in their entire activity".

This definition renders the basic features of the rule of law – separation of powers, as reality of the state activity, the application of the principle of legality in the activity of all the state bodies, the observance and the guarantee of fundamental human rights. Also, from the same definition result the basic features of the rule of law, respectively: *a)* the freedoms of the human being require guarantees of security and justice through the primacy of law and in particular the Constitution; *b)* the moderation of the execution of the power requires the organization and adaptation of the functions of the erratic organisms and a hierarchical normative system.

In the final document of the Copenhagen Summit in 1990 was stated that *the rule of law* does not simply mean a formal legality, and in the Charter of Paris from 1990 *the rule of law* is prefigured not only in terms of human rights but also of democracy, as the only governing system.

From the corroboration of the principles written in international documents, as well as in relation to the constitutional law doctrine, we consider as conditions or characters of the rule of law the following: 1. the accreditation of a new concept concerning the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the civil society, the responsibility of the state and the authorities that make it, and the moderation of constraint as a means of intervention of the state in society by appropriate and reasonable forms; 2. capitalization of the rations and mechanisms of the principle of separation of powers in the state; 3. the establishment and deepening of an authentic and real democracy; 4. Institutionalization and guaranteeing of the rights and freedoms of man and citizen; 5. the establishment of a coherent and hierarchical legal order and of an area of law.

The systematic functionality and consistency of the rule of law must be ensured by a number of regulatory systems, namely: *a)* political control by Parliament as one of its essential functions through various institutional means *b)* administrative control that is carried out in the system public authorities, either on their own initiative or at the initiative of citizens; *c)* judicial review of the legality of administrative acts entrusted to either the courts of common law or the specialized courts; *d)* control of the constitutionality of laws; *e)* control of the observance of fundamental rights and freedoms through the bodies of the authority and the judiciary; *f)* the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate; g) free access to justice and organizing the court activity in several degrees of jurisdiction.

The consecration of the rule of law in the Constitution of Romania is achieved not only by art. 1 paragraph 3 of the 1st thesis, but also by many other constitutional provisions expressing the content of this principle of organization and exercise of power in a democratic society. In this respect we reiterate the provisions of art. 16 paragraph (2), which provide that no one is above the law and those of art. 15 paragraph (2) proclaiming the principle of the unretroactivity of the law, principles essential to the entire construction of the rule of law. The content of the rule of law is expressed in particular in the constitutional provisions regarding the separation and balance of state powers as well as those regarding the organization, functioning and attributions of the state institutions. The provisions refer to the fundamental rights, freedoms and duties of the citizens, to the mechanism of the separations of powers, pluralism, free access to justice, independence of courts, and the organization and functioning of

parliamentary, administrative and judicial control. They can be considered as a constitutional normative expression of the content and requirements of the rule of law

The rule of law is not a state whose essence is exhausted by constitutional regulations and other normative acts at a given moment. The rule of law is not exclusively an institution of constitutional law but must become a reality found at the level of the conduct of each subject of law, whether it is a state organ or a simple citizen. This means and implies a complex evolutionary process in which all the structures of society participate, and at the same time a process of perfection on the ideological and moral level in order to improve the activity of the organs of state and to effectively establish the principle of legality, to form a civic behaviour in the spirit of observance the law and the fundamental values of democratism.

The Constitution of Romania establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, that is, the establishment in the Constitution of the fundamental principles of organization and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;
b) the direct or indirect popular legitimacy of state and public authorities;
c) ensuring the supremacy of the Constitution through political or judicial control, as well as ensuring the rule of law, over other normative acts;
d) he exercise of fundamental rights and freedoms may be restricted only temporarily, only in cases expressly determined in proportion to the circumstance justifying the restriction and without suppressing the very right or fundamental freedom;
e) independence and impartiality of justice.

Therefore, art. 21 paragraph (2) of the Constitution of Romania stipulates that no law may impede the free access of a person to justice for the protection of legitimate rights, freedoms and interests.[1]

From the complexity of the issue of the rule of law, we further on refer to the implicit application of the principle of proportionality in the constitutional provisions on the state organization of power.

This principle is explicitly expressed in the Constitution of Romania only in the provisions of art. 53, but it is implicitly found in other constitutional regulations as it has been emphasized in the specialized literature. The constitutional principle of proportionality is a synthesis of other principles of law and expresses the ideas of fairness, and the correctness of the state's dispositions to the intended purpose. We consider it a criterion in relation to which the powers of the state are organized in a state of law because by its application a dynamic and functional balance is realized in the institutional diversity of the state system. We also underline the fact that this principle confers legitimacy and not only the legality of state decisions and is a criterion already used in jurisprudence which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other hand the excess of power in the activity of the organs of the state in situations where state decisions have the appearance of legality but are also not legitimate because they are not appropriate to the intended purpose defined by constitutional or secondary legislation We believe that the constitutional principle of proportionality can be considered a requirement of the rule of law.

Further on, briefly analyze the application of the principle of proportionality to the state organization of power in our country, as it results explicitly or implicitly from the constitutional provisions applicable.

The principle of the separation of powers in the state, considered to be a foundation of democracy, is at the same time a reflection on the moderation and rationalization of state power. “Balancing these powers by judiciously distributing the powers and equipping each of them with effective means of control over the others, thus defeating the inherent tendency of the human power to grasp the whole power and to abuse it is the condition of social harmony and the guarantee of human freedom”. In its classical form, as it is known by the decisive contribution of Montesquieu, the principle of separation of powers in the state affirms that in any society there are three distinct powers: legislative, executive and judicial power. These three powers must be exercised by separate organisms independent of each other. The purpose of this division is that power should not focus on a single state organ, which would naturally tend to abuse the prerogatives entrusted to it. “In order that power not be abused, it is necessary that by the arrangement of things power stop power” -says Montesquieu. At the same time, the division of state power is necessary to respect individual rights and freedoms, so that one power opposes the other and creates itself instead of a single force, a balance of force.

In order to achieve these goals, the organs of the state must be independent of one another in the sense that no one can exercise the function entrusted to the other. Consequently, it is not possible for an organ of the state to be subordinated to another, if it exercises a separate power.

The doctrine states that: “The theory of separation of powers is in fact an ideological justification of a very concrete political purpose: weakening the power of the governors as a whole, limiting one another. It is considered that the separation of powers has two well-defined aspects: a) separation of parliament from the government; b) separation of jurisdictions against the governors, which allows them to be controlled by

[1] To develop, see: Marius Andreescu, Andra Puran, *Drept constituțional. Teoria generală a statului*, 3rd edition, (Bucharest: C.H. Beck, 2018) , 65-75.

independent judges[2]. The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote Carré de Malberg, "is certainly to have thought it possible to regulate the game of the public powers by their mechanical separation and, in a certain way, mathematical, as if the problems of the state organization were susceptible to be solved by procedures of such rigor and precision"[3]

In the doctrine, other inaccuracies and limitations were noted as well, among which we recall: from the terminology used, it is not clear whether a "state body" or a "function" is to be understood by power; power is unique and indivisible and belongs to a single titular - the people. That is why we cannot speak of the division of powers, but, possibly, the distribution of the functions involved in the exercise of power; the separation of powers, conceived in the form of opposition between them, is likely to block the functioning of state authorities. It is not possible for the sovereign exercise of the completeness of each of the static functions to be assigned to a separate authority or group of authorities. None of the state organs perform a function in integrity, and consequently the steady organs cannot be rigidly and functionally separated; in most constitutional systems, as a result of the existence of political parties, the real problem is not the separation of powers, but the relationship between the majority and the minority or, in other words, between the governors and the opposition. There is no antagonistic relationship between parliament and government. A government that has a parliamentary majority will work in close association with the parliament, which is considered a modern state of their efficiency; the legislative function is not equal to the executive function. Execution of the law is by definition subject to legalization. If the two functions are in hierarchical relations, then the organs that perform those functions are in the same ratios.

It should also be underlined that, in doctrine, there is more and more talk of a decline of legislative power in favour of the executive; the separation of powers does not solve the issue of guaranteeing fundamental human rights. Constitutional justice is the main guarantor of respect for fundamental rights, but it does not find its place in the classic scheme of separation of powers in the state[4].

In the case of the theory of separation of powers in the state it was said that "the myth" far exceeds the reality. In fact, it is the dogmatic confidence to impose on a concrete reality a pre-established theoretical and abstract framework[5]. The criticisms formulated and the modernization tendencies cannot result in the abandonment of this principle. "The great force of the theory of separation of powers in the state - said Professor Ioan Muraru - lies in its fantastic social, political and moral resonance[6]. It should not be forgotten that the principle is enshrined, explicitly or implicitly, in the constitutions of the democratic states. From the perspective of our research theme, it is important to consider the autonomy of the state authorities and the relations between them in order to prevent separatism and rigidity.

The myth of absolute separation of powers is in fact, Carré de Malberg says, irreconcilable, "with the principle of unity of the state and its powers"[7]. The will of the state, he continues, being necessarily a single one, must be maintained between the authorities that held a certain cohesion, without which the state would risk being harassed, divided and destroyed by the opposite pressures to which it would be subjected. It is thus impossible to conceive that the powers in the state are equal. "That is why, in any state, even in those whose Constitution is said to be based on Montesquieu's theory and pursues a certain equalization of powers, invariably will find a supreme organ that will dominate all the others and thus achieve the unity of the state".[8] As the author states, it is not so much about separation, but rather about the "gradation of powers". There would then be a single power that would first manifest through acts of initial will - the legislative power - and would be exercised at a lower level through law enforcement acts - the executive power.

It follows that the powers of the state are unequal, but this cannot have the significance of subordination, nor can allow for excess power. "State means also force, hence the risk of escaping from the control of the holder, of considering himself being the owner of the power"[9]. At the same time, a coherent functioning of the organs of the state is not possible, nor can it be conceived, unless there are some relations between them.

It was said that, given the existence of political parties and their access to power, "the real problem is not that of the relations between the institutionalized powers but of the relations between the majority and the minority, between the government and the opposition, especially when the government comes from a parliamentary majority, comfortable and homogeneous and leaning on it".[10]

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[2] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Vol. II, (Bucharest: All Beck, 2003), 121.

[3] Carré de Malberg, *Contribution á la théorie géneral de l'Etat*, vol. II, (Paris: Tenin, 1922), 35.

[4] See also: Charles Eisenmann, „L'espirit des lois et la separation des pouvoirs", in *Cahiers de philosophie politique* no. 2-3 (1984): 198; Dominique Rousseau, *Droit du contentiux constitutionnel*, (Paris, 1990), 365, 256-265; Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. II, 9-11.

[5] See: Olivier Duhamel, Yves Meny, *Dictionnaire constitutionnel*, (Paris: PUF, 1992), 972-975.

[6] Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. II, 11.

[7] Carré de Malberg, *op. cit*., vol. II, 23.

[8] Carré de Malberg, *op. cit*., vol. II, 52.

[9] Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. I, 19.

[10] Ion Deleanu, *Drept constituţional şi instituţii politice*, vol. I (Bucharest: Europa Nova, 1996), 95.

In a wider sense, it must be stressed that democracy generates a majority that leads, imposing its will and values to minorities, but they also have the opportunity to express themselves and their rights have to be respected. Achieving the democratic and functional balance between the majority and the minorities is the solution to avoid what the doctrine is called the "tyranny of the majority". Undivided power - says Giovani Sartori - is always an excessive and dangerous power. Thus, the tyranny of the majority, relevant from a constitutional point of view, is defined according to the rights of the minority, especially if the right to opposition is complied with or not[11]. The main problem in this context is that the minority or the minorities have the right to oppose, have the right to opposition.

The relationship between the majority and the minority involves the analysis of the very complex interaction between those that govern and the ones that are governed. Interaction consists of a multilevel process in which majorities and minorities are materialized in different ways and at different levels. The rule that allows the functioning of such a complex system of democracy is the application of the principle of majority in decision-making. However, Hamilton observed very well: "Give all the power to many, and they will oppress the few. Give all the power of the few, and they will oppress the many".[12] Therefore, the problem is to avoid giving all or most of the power to all, by distributing it, alternately and/or at the same time to the majority and minority.

Therefore, in order to avoid dogmatism, in order to respond to these problems of social, political and state realities, it is necessary to reconsider the theory of the separation of powers in the state from the point of view of the principle of proportionality. The fundamental idea has already been stated: the moderation of power and the balance in the exercise of power that actually reflects, to a certain extent, the balance of social forces[13]. When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers[14]. Balancing the powers in the state by judiciously distributing the powers and equipping each with effective means of control over the others, thus stabilizing the tendency to capture the whole power and to abuse it, is essentially the application of the principle of proportionality to the organization of state power. This is the condition of social harmony and the guarantee of human freedom [even though, until now, an explicit reference to the principle of proportionality has not been made in the specialized literature, it results from the context of supporting some authors: "So, weight and counterweights in the power tiles so that none of them dominates the others. It would not be so much a separation of powers, but especially about their relative autonomy and their mutual dependence: the balance of powers ".[15]

Rethinking the separation of powers in terms of the constitutional principle of proportionality can be answered, in our opinion, to all the problems listed above.

The principle of the separation of powers in the state was not explicitly enshrined in the Constitution of Romania before its revision in 2003, but from the analysis of the constitutional texts, the doctrine ascertained that the balance of state powers as a principle was found in the content of the norms of the Constitution Through the Review Law, the Romanian derived constituent expressly enshrined this principle, referring not only to the separation of powers but also to the balance between them: "The State is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy"[Art. 1 paragraph (4)].

The necessary balance between state authorities is the expression of the principle of proportionality applied in the matter of organizing the institutional system of power in Romania. State authorities are neither equal nor independent in the absolute sense. The balance that a proportionality relationship implies is based on differences but also on interrelations that allow the functioning of the institutional system so as to avoid excessive concentration of power or exercise of the same, as well as the excess of power, especially by violating human rights and fundamental freedoms. The finality of the proportionality ratio between public authorities is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms"[16]. We will refer to some of the constitutional regulations concerning the Romanian state institutional system, which reflects the principle of proportionality:

A. Elements of *difference* between state authorities, meaning the autonomy of each category of organs and their position within the system: public authorities are governed distinctly by the rules contained in Title III of the Constitution. These are the "three classic powers" in the traditional order: legislative, executive and judicial power.

The Constitution confers a certain degree of prerogative to Parliament in relation to the other state authorities: "Parliament is the supreme representative body of the Romanian people and the sole legislator authority of the country" (art. 61 paragraph (1).

Besides the classic scheme of the separation of powers in the state, the Constitutional Court achieved constitutional power (art. 142 and subsequent of the

[11] Giovani Sartori, *Teoria democraţiei reinterpretată*, (Bucharest: Polirom, 1999), 137.
[12] Jonathan Elliot, *Debates on the Adoption of the Federal Constitution*, (Philadelphia: Lippincott, 1941), 203.
[13] Constance Grewe, Helene Ruiz Fabri, *Droit constitutionnels europeans*, (Paris: PUF, 1995), 361 and next.
[14] Ion Deleanu, *op. cit*., vol. I, 80.
[15] Ion Deleanu, *op. cit*., vol. I, 80.
[16] Ioan Muraru, Mihai Constantinescu, „Rolul Curţii Constituţionale în asigurarea echilibrului puterilor în stat", in *Dreptul* no. 9 (1996).

Fundamental Law), which is the guarantor of the supremacy of the Constitution, the only constitutional jurisdictional authority of Romania, independent of the any other public authority [art. 1 paragraph (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished]. The People's Advocate is also independent of any other public authority. He is appointed by the Parliament in the joint session of the Chambers [art. 65 paragraph (2) letter i)]. Ex officio or at the request of persons injured in their rights or freedoms, the People's Advocate may refer the matter to the public authorities in order to take measures to eliminate acts or facts that affect subjective rights or legitimate protected legal interests (article 58 and subsequent). It has the power to notify the Constitutional Court, in the situations provided by art. 146 letters a) and d);

The bicameral structure of Parliament is an expression of the balance involved in the principle of proportionality. Thus, Chambers are equal but are functionally differentiated in the exercise of their legislative powers. The distinction between the Chamber referred first (of reflection) and the Decision Chamber, made by article 75, expresses the "quasi-perfect" bicameralism, which is a proportionality ratio. We agree with the opinion expressed in the literature, according to which "the system of parliamentary bicameralism in Romania must be preserved, but it must be transformed into a differentiated bicameralism. Thus, to the law of democratization and efficiency can be ensured, and to the legislative organ a representativeness and responsibility increment."[17]

The difference between the length of the term of office of some state authorities contributes to a proportionate ratio between the powers of the state, is the expression of the balance and not of the formal equality, in order to ensure the good functioning of the Romanian institutional system. Thus, the duration of Parliament's mandate is 4 years (Article 63), of the President of Romania is 5 years (Article 83), of the members of the Superior Council of Magistracy is 6 years (Article 133), the mandate of the judges at the Constitutional Court is 9 years, and the president of this institution is elected for a period of 3 years (Article 142), the judges of the courts appointed by the President of Romania have practically an indefinite mandate in time because they are irremovable under the law (art. 125). The People's Advocate mandate is 5 years (Article 58).

B. The specialty literature highlighted the particularities of the relations between the state authorities, which in our opinion materialize the principle of proportionality, because the relational balance also implies the difference. In this respect, it was stated that: "The election of the President of Romania by the people, an essential feature of the presidential republics, combines in our country with the pre-eminence of the Parliament, as a result, mainly, of the parliamentary origin of the government, thus defining a semi-presidential political regime" [18].

The set of interrelations between the different categories of organs of the state is the form of achieving the balance and mutual control of the powers. These relations, which form the "identity card of the state power system"[19], presuppose the autonomy of the state authorities and the differences between them. The complex structure of the state power system is a concretisation of the principle of proportionality, in other words, it strikes a balance between the powers of the state, which are based on autonomy, differentiation and interrelations. The more the constitutional regulations in the field manage to materialize the requirements of the principle of proportionality, the more exists the guarantee of avoiding some forms of concentration of the state powers, the tyranny of the majority or minorities and obviously the excess of power.

The concern of the Romanian constituent legislator to achieve a functional balance between the powers of the state, between these and society, is obvious, if we refer to the provisions of art. 80, according to which: "The President exercises the function of mediation between the powers of the state as well as between state and society", but also to the provisions of art. 146 letter e) according to which our constitutional court has the competence to resolve constitutional legal conflicts between public authorities. We also need to remember the role of mediator and balance factor for the powers of the state, but also for the society that justice has. In this respect, the provisions of art. 124 of the Constitution consecrate the general "uniqueness, impartiality and equality" of justice, which represents important guarantees for the achievement of the functions of the judicial power in society.

Of course, the system of state power is an open, dynamic one, implying not only the multiplication of its constituent elements or their reorganization, but also of the functions that correspond them and of the interrelationships between the elements of the system. Within the internal system, the social-political system, and externally the system of the international community of states represent the "environment" with which the state authorities interact. Therefore, the balance, as a particular aspect of the principle of proportionality, between the powers of the state must be understood in its dynamics, including in the continuous process of interpreting and applying the constitutional provisions in the matter.

Proportionality, as a principle of constitutional law, has a concrete dimension. The existence of a proportionate, balanced relationship between the state authorities, between them and society, is verified in practice through the functioning of the political and

[17] Ioan Muraru, Andrei Muraru, ,,Scurtă pledoarie pentru un bicameralism parlamentar diferențiat", in *Revista de drept public* no. 1 (2005):.8
[18] Mihai Constantinescu, "Echilibrul puterilor în regimul constituțional din România", in Dreptul no. 3 (1993): 3.
[19] Ion Deleanu, *op. cit.*, Vol. II, 201.

social system, the avoidance of crises, or, when they occur, through the capacity of the state authorities to manage these, complying in any situation with the principles of the rule of law. Essential for the fulfilment of the requirements of separation and balance between the powers of the state, but also for stability, in its social and political system dynamics, from the perspective of pluralism in society, there is the existence of a proportionate balance between the majority and the minorities between the government and the opposition, "especially when the government comes from a comfortable and homogeneous parliamentary majority and relies on it".[20]

At the end of this analysis we shall refer to some decisions of the Constitutional Court which we consider relevant to the rule of law.

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to observe the law. See to that effect[21].

At the same time, it has been stated in the jurisprudence of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also realizes "the correlation of all laws and all normative acts with it"[22] .

The requirements of the rule of law concern the major purposes of state activity, namely the supremacy of law, which implies the subordination of the state to the law. In this respect, the law provides the means by which the political options or decisions can be censored and performs the abolition of any abusive and discretionary tendencies of the state structures. Further on, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of the public powers and establishes guarantees, including of a judicial nature, that ensure the observance of citizens' rights and freedoms, primarily by limiting the state authority, which represent the framing of the public authorities' activities within the limits of the law.

The jurisprudence of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by jurisprudence is achieved a very eloquent synthesis of the doctrine on the notion and features of the rule of law. It is significant in this respect the Decision no. 17 of January 21st 2015[23], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 paragraph (3) thesis I of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, prefigured in what is commonly called the reign of law, a phrase involving the subordination of the state to the law, the guarantee of the means to allow the law to censor political choices and, in this context, to weigh the potential abusive, discretionary tendencies of the static structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of the public powers that must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of safeguards, including jurisdictional, to ensure that citizens' rights and freedoms are complied with by the state's self-restraint, namely the involvement of public authorities in the coordinates of law".[24]

The principle of stability and security of legal relations is not explicitly enshrined in the Constitution of Romania, but, like other constitutional principles, it is involved in the constitutional normative provisions, respectively art. 1 paragraph (3), which enshrines the rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of the principles of law implied by the express rules of the fundamental Law. In this respect, by means of the Decision no. 404 of April 10th 2008[25], the Constitutional Court stated that: "The principle of stability and security of legal relations, although not explicitly enshrined in the Romanian Constitution, is deduced both from the provisions of art. 1 paragraph (3), according to which Romania is a state of law, democratic and social, and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence". See also Decision no. 685 of November 25th 2014[26]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[27]

Constitutional Court decides constantly for clarity and predictability of law, which are requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the principle of security of legal relations, due to the lack of clarity and predictability of the norm, principles which constitute a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 paragraph (3) of the fundamental Law[28].

[20] Ion Deleanu, *op. cit*., vol. I, 95.

[21] Decision no. 232 of July 5th 2001, published in the Official Gazette no. 727 of November 15th 2001, and Decision no. 53 of January 25th 2011, published in in the Official Gazette no. 90 of February 3rd 2011.

[22] Decision no. 22 of January 27th 2004, published in the Official Gazette no. 233 of March 17th 2004.

[23] Published in the Official Gazette no. 79 of January 30th 2015.

[24] See also Decision no. 70 of April 18th 2000, published in the Official Gazette no. 334 of July 19th 2000.

[25] Published in the Official Gazette no. 347 of May 6th 2008.

[26] Published in the Official Gazette no. 68 of January 27th 2015.

[27] See Decision mo. 570 of May 29th 2012, published in the Official Gazette, no. 404 of June 18th 2012, Decision no. 615 of June 12th 2012, published in the Official Gazette no. 454 of July 6th 2012.

[28] Decision no. 26 of January 18th 2012, published in the Official Gazette no. 116 of February 15th 2012).

Concerning the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, exercise, under the law, specific powers regarding the defense of public order and tranquillity, of citizens' fundamental rights and freedoms, of public and private property, of prevention and detection of crimes, and other violations of applicable laws, and the protection of state institutions and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of militarized authorities to find contraventions committed by civilians, art. 1 paragraph (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[29]

Human dignity, together with the freedoms and rights of citizens, the free development of human personality, justice and political pluralism, are supreme values of the rule of law (art. 1 paragraph (3)). In the light of these constitutional regulations, it has been stated in the Constitutional Court's jurisprudence that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful of religious or philosophical beliefs of parents, which is why organizing school activity must achieve a fair balance between the process of education and teaching religion, and on the other hand with respect for the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviours specific to a certain attitude of belief or philosophical, religious or non-religious beliefs must not be subject to sanctions that the state requires for such behaviour, regardless of the person's motivation for faith. "As part of the constitutional system of values, freedom of religious conscience is attributed to the imperative of tolerance, especially to human dignity, guaranteed by art. 1 paragraph (3) of the fundamental Law, which dominates the entire value system as a supreme value"[30]

It is also interesting to note that our constitutional court considers human dignity as the supreme value of the entire system of values constitutionally consecrated, value that is found in the content of all human rights and fundamental freedoms. At the same time, it is an important aspect that requires the state authorities in their entire activity to first consider respecting the human dignity.

It should be noted that in its jurisprudence the Constitutional Court also identifies the content components of human dignity, as a moral value but at the same time constitutional, specific to the rule of law: "Human dignity, in constitutional terms, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their peers, as well as the relation of man to the environment, including the animal world".[31]

3. Conclusions

Antonie Iorgovan said that an essential problem of the rule of law is to answer the question: "where discretionary power ends and where the abuse of law begins, where the legal behaviour of the administration ends, materialized in its right of appreciation and where the violation of a subjective right or legitimate interest of the citizen begins?" Therefore, 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 presupposes the discretionary power with which the organs of the state are invested, or in other words the authorities' "right of appreciation" regarding the moment of adoption and the content of the measures imposed. What is important to emphasize is that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

The excess of power can be manifested in these circumstances by at least three aspects: a) the appraisal of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent authorities of the State, by virtue of discretion, to go beyond what is necessary to protect the publicly threatened public interest; c) if these measures unduly and unjustifiably restrict the exercise of fundamental rights and freedoms constitutionally recognized.

The key issue for the practitioner and the theorist is to identify criteria by which to establish the limits of the discretionary power of the state authorities and to differentiate it from the excess of power that must be sanctioned. Of course, there is also the question of using these criteria in court practice or constitutional litigation.

Concerning these aspects, the opinion of the specialized literature was that "the purpose of the law will be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom beyond the law, but one permitted by law. Of course, "the purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of the organs of the state, and can therefore be considered a criterion for delimiting discretionary power from excess of power.

As can be seen from the case law of some international and domestic courts in relation to our research theme, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, term

[29] Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.
[30] Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.
[31] Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012. See also Decision no 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

used by the ECHR) of the State may be an excess of power not only in the case where the measures adopted do not pursue a legitimate aim but also in the case that 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 is 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 set by: "positive written rules, general principles of law, principle of equality, principle of nonretroactivity of administrative acts, right to defense and principle of contradictory, principle of proportionality Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess of power in the work of state authorities. And by this is an essential principle of the rule of law.

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