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Rule of Law and Exceptional Situations

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Abstract

The doctrine of the lawful state comes from the German theory and jurisprudence, but is now a requirement and a reality of the constitutional democracy in contemporary society. Presently, the lawful state is no longer merely a doctrine but a fundamental principle of democracy consecrated in the Constitution and international political and legal documents. In essence, the concept of the lawful state is based on the supremacy of law in general and of Constitution in particular. Essential for the contemporary realities of the lawful state are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, guaranteeing and observance of the constitutional rights of man especially by the state powers and, last but not least, the independence and impartiality of justice. In this study we analyze the most important elements and features of the lawful state with reference to the contemporary realities in Romania in the context of the requirements expressed in the political and legal instruments of European Union. An important aspect of the analysis is the separation, balance and cooperation of the state powers, in relation to the constitutional provisions. The excess of power of the public authorities, the excessive politicking and failure to respect the independence of justice are aspects of contemporary social and state reality that contravene to the requirements of the lawful state. Are analyzed the most significant aspects of the Constitutional Court jurisprudence and the jurisprudence of administrative courts in regard to the guaranteeing of the lawful state attribute in Romania, as well as, regarding the power excess. In exceptional situations, such as the state of emergency or the state of alert established for a long time on the Romanian territory, the rulers have restricted the exercise of some essential fundamental rights, restrictions that seriously affect the private and social life of the people.

Keywords: Conditions of the lawful state; Separation and balance of the powers; The supremacy of law; Guaranteeing of the fundamental rights; Exceptional situations, restriction on the exercise of certain rights and freedoms.

Brief considerations on the notion of the rule of law

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

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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 para. 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, which 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. 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 [1], 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.

Conditions of the rule of law

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

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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 para. 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 para. 2, which provide that no one is above the law and those of art. 15 para. 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) the 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 para. 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 [2].

Application of the principle of proportionality in terms of state organization of power

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 case-law which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other

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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 stops 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 independent judges [3]. The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote [4], "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" [5].

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, as [6, 7, 3] develop in their papers. In the case of the theory of separation of powers in 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 [8]. 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 [3]. 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" [5]. 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

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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" [5]. 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" [3]. 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" [9].

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 [10]- 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. 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" [11].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 [12]. When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers [9]. 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"[9].

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 para. 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

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is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms" [13].

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 para. 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 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 para. (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 para. (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 (art. 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 art. 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" [14].

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 (art. 63), of the President of Romania is 5 years (art. 83), of the members of the Superior Council of Magistracy is 6 years (art. 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 (art. 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 (art. 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" [15].

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" [9], 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.

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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 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.

Aspects of the constitutional court case-law on garanteeing and complying with the requirements of the rule of law

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[1].

At the same time, it has been stated in the case-law 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"[2].

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 case-law of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by case-law 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[3], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 para. (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"[4].

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 para. (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[5], 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 para. (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

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

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

[3] Decision no. 17 of January 21st 2015, published in the Official Gazette no. 79 of January 30th 2015.

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

[5] Decision no. 404 of April 10th 2008, published in the Official Gazette no. 347 of May 6th 2008.

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interpreted by the European Court of Human Rights in its case-law[1]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[2]

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 para. (3) of the fundamental Law[3]

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 para. (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[4]

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 para. (3)). In the light of these constitutional regulations, it has been stated in the Constitutional Court's case-law 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 para. (3) of the fundamental Law, which dominates the entire value system as a supreme value"[5]

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 case-law 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"[6].

The unconstitutionality of restricting the exercise of certain rights during the existence of a state of emergency and a state of alert. The excess of power.

Exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess of power.

In doctrine there is no unanimous opinion on the legal signification of exceptional situations. Thus, in the older French doctrine, the discretionary power is considered to be the freedom of decision of the administration within the framework allowed by law, and the opportunity evokes a de facto action of the public administration, in exceptional situations, necessary action (therefore opportune) but against the law. Jean Rivero considers that exceptional situations refers to certain factual circumstances which have a double effect: the suspension of the application of the ordinary legal regime and initiation of the application of a particular legislation to which the judge defines the requirements. Another author identifies three features for exceptional situations: 1. The

[6] Decision no. 685 of November 25th 2014, published in the Official Gazette no. 68 of January 27th 2015.

[7] Decision no. 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.

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

[9]Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.

[10]Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.

[11]Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012; Decision no. 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

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existence of abnormal and exorbitant situations or serious and unforeseen events; 2. The impossibility or difficulty to act in accordance with the natural regulations; 3. The necessity of a quick intervention for the protection of a considerable interest, under serious threat.

Excess of power can be manifested in these circumstances by at least three aspects: a) the appreciation 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 state authorities, by virtue of their discretion, to go beyond what is necessary for the protection of the seriously threatened public interest; c) if these measures unduly, unjustifiably limit the exercise of the constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations – economic, social, political or constitutional – does not justify the excess of power. In this sense, Prof Tudor Drăganu stated: "the idea of the rule of law requires that they (exceptional situations n.n.) find appropriate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to determine only the areas of social relations, in which the transfer of power from Parliament to Government can take place, to emphasize its temporary nature, by setting deadlines for applicability and to specify the purposes for which it is performed".

Of course, the excess of power is not a phenomenon manifested only in the practice of executive authorities, being met also in the activity of the Parliament or of the courts.

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

The principles of the supremacy of the Constitution and of the law, of the rule of law and of the separation of state powers are not respected.

The ordered measures do not aim a legitimate purpose.

The decisions of public authorities are not appropriate with the factual situation or with the aimed legitimate purpose, in the meaning that they exceed what is necessary for the achievement of this purpose.

There is no rational justification for the measures ordered, including in situations where a different legal treatment is established for identical situations, or an identical legal treatment for different situations.

By the measures ordered, the state authorities restrict the exercise of fundamental rights and freedoms, without there being a rational justification representing, in particular, the existence of an adequate relationship between these measures, the factual situation and the legitimate aim pursued.

The exceptional state, respectively the state of emergency and subsequently the state of alert established by the rulers on the Romanian territory, similar to the existing situation in other countries of the world, in order to limit the spread of the pandemic created by the Covid-19 virus, generated the adoption of numerous normative acts by which a significant number of fundamental rights and freedoms are restricted and correlatively a significant constitutional jurisprudence on the constitutionality of these measures.

In the following, we briefly analyze this jurisprudence but also the legislation in force in order to highlight aspects of the excess of power of state authorities.

The Constitutional Court by two decisions, Decision no. 152/2020 and Decision no. 157/13 May 2020 found the unconstitutionality of some provisions of GEO no. 1/1999 and GEO no. 21/2004 on the National Emergency Management System, regarding the actions and measures ordered during the state of emergency regarding the restriction of the exercise of certain rights.

By Decision no. 152/2020[1], the Constitutional Court, among others, 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 the state of emergency are unconstitutional. Also, it ascertained that the GEO no. 34/2020 on the modification and amendment of the GEO no. 1/1999 on the state of siege and the state of emergency is unconstitutional, in its ensemble.

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

Legislating on the legal regime of the state of siege and the state of emergency, GEO no. 1/1999 is the primary regulatory act which restricts the exercise of fundamental rights and freedoms, an act based on which public authorities with competences in crisis management (President of Romania, Parliament of Romania, Ministry of Internal Affairs of Romania, military authorities and public authorities, provided for in the decree establishing the state of siege or emergency) issue normative administrative acts (President's decree establishing the state of siege or state of emergency, military ordinances and orders of other public authorities) implementing the primary rule, identifying, depending on the particularities of the crisis situation, the rights and fundamental freedoms whose exercise is to be restricted.

"However, taking into account all these arguments, the

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Court notes that, incidentally, the normative act with such an object of regulation affects both rights and fundamental freedoms of citizens and fundamental state institutions, falling within the scope of the prohibition provided by 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 be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 para. 3 lit. g) of the Constitution, in the regime of organic law".

Regarding the GEO no. 34/2020 for the modification and amendment of the GEO no. 1/1999, the Court has ascertained that it has been adopted with the violation of art. 115 para. 6 of the Constitution.

The normative act modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in GEO no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of goods intended, used or resulting from the contravention and the temporary suspension of the activity.

The Court recalls that the main sanctions and the complementary sanctions are sanctions specific to the contravention law, applicable to the subject of law who violates the legal norm of contravention law by conduct contrary to it. They have a preventive-educational role and represent a form of legal constraint, targeting, in particular, the patrimony of the perpetrator. Therefore, considering the legal nature of the contravention sanctions, their effect on the patrimony of the perpetrator, as well as the jurisprudence of the Court, results that the statement of certain norms in this area implicitly affects the right to property, stated by art. 44 of the Constitution, as well as the economic freedom, provided by art. 45 of the Constitution restricting the exercise of these rights which violates the prohibition established by art. 115 para. 6 of the Constitution.

At the same time, the normative provision of the inapplicability of the legal norms regarding decisional transparency and social dialogue, in fact their suspension during the state of emergency or siege, affects the fundamental rights in consideration of which these laws were adopted, as well as the regime of a fundamental state institution, so that the emergency ordinance by which such a suspension is operated contravenes the interdiction provided by art. 115 para. (6) of the Constitution.

Given all these arguments, the Court has ascertained that the GEO No. 34/2020 for the modification and amendment of the GEO No. 1/1999 is unconstitutional, in its ensemble, because it has been adopted with the violation of the constitutional statements of art. 115 para. 6 limiting such competences.

The notion of "law" by which the legal regime of exceptional states can be established is interpreted in a narrow sense, respectively as a normative act of the Parliament, excluding the normative acts of the Government with express reference to the executive ordinances. At the same time, a necessary interpretation of the interdiction provided by art. 115 para. 6 of the Constitution in the sense that by emergency ordinances, including those issued in exceptional situations, the Government may not establish primary regulations regarding the restriction of the exercise of certain rights. Such measures may be instituted primarily by law only, as a legal act of Parliament.

It is obvious that the normatively materialized intention of the Government to restrict the exercise of certain rights and fundamental freedoms with the violation of its legislative competence in this area and the non-compliance with the constitutional interdictions, represent an excess of power which the Constitutional Court has ascertained and removed.

By the same decision, the Court found that the provisions of art. 28 para. 1 corroborated with art. 9 para. 1 of GEO no. 1/1999 does not indicate clearly and unequivocally, within the legal norm, the acts, facts or omissions that constitute contraventions nor do they allow their identification easily, by referring to the normative acts with which the incriminating text is in connection.

We reproduce an excerpt from the motivation of our constitutional court: "The provisions of art. 28 of GEO no. 1/1999 not only does not concretely foresee the facts that attract the contravention liability, but establishes indiscriminately for all these deeds, regardless of their nature or gravity, the same main contravention sanction. As regards the complementary sanctions, although the law provides that they are applied according to the nature and gravity of the offence, as long as the offence is not circumscribed, it is obvious that neither its nature nor its gravity can be determined to establish the complementary applicable sanction.

In conclusion, the Court finds that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for minor offenses, they violate the principles of legality and proportionality governing the contravention law.

Thus, the Court finds that the provisions of art. 28 of GEO no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and are thus incompatible with the fundamental principle of respect for the Constitution, its supremacy and the laws, provided by art. 1 para. 5 of the Constitution, as well as with the principle of proportional restriction of rights and fundamental freedoms, provided by art. 53 para.

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2 of the Constitution. For the same arguments, the Court states that the imprecision of the legal text subjected to constitutionality control also affects the constitutional guarantees characterizing the right to a fair trial, stated by art. 21 para. 3 of the Constitution, including its component on the right to defense, fundamental right stated by art. 24 of the Constitution.

By Decision No 157/2020[1], the Constitutional Court, among others, has accepted the exception for unconstitutionality stated by the People's Advocate and ascertained that art. 4 of the GEO no. 21/2004 on the National Emergency Management System is constitutional to the extent to which the actions and measures ordered during the state of alert does not aim the restriction of the exercise of certain rights and fundamental freedoms.

The Court ascertained that the actions and measures ordered during the state of alert, based on the GEO no. 21/2004 cannot aim rights and fundamental freedoms. The Court also notes that the delegated legislator cannot in turn delegate to an administrative authority/entity what he himself does not have in jurisdiction. "As the Court has constantly stated, from the corroboration of the constitutional norms stated by art. 53 para. 1 and art. 115 para. 6 it follows that the impairment/restriction of rights or fundamental freedoms can only be achieved by law, as a formal act of Parliament".

The arguments of the Constitutional Court, as well as the solutions given to these constitutional disputes are important guarantees for respecting the rights and freedoms of citizens especially in exceptional situations when increases the danger that the executive will take discretionary measures that are in fact excess of power.

Our Constitutional Court noted that "It is indisputable that the legislation providing for the legal regime of crisis situations requiring exceptional measures presupposes a greater degree of generality than the legislation applicable during the normal period, precisely because the peculiarities of the crisis situation are the deviation from normal (exceptionality) and the unpredictability of the serious danger affecting both society as a whole and each individual. However, the generality of the primary norm cannot be attenuated by infralegal acts that complement the existing normative framework. Therefore, the measures that organize the execution of legal provisions and customize and adapt those provisions to the existing factual situation, to the areas of activity essential for managing the situation that generated the establishment of the state of alert cannot deviate (by amendments or completions) from the framework circumscribed by the norms with the force of law, so they cannot target rights and fundamental freedoms".

By Decision no. 457/2020[2], the Constitutional Court admitted the exception of unconstitutionality raised by the People's Advocate and found that the provisions of art. 4 para. 3 and 4, as well as of art. 65 lit. s) and ș), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ș) and t) and of art. 67 para. 2 lit. b) regarding the references to art. 65 lit. s), ș) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic are unconstitutional.

The Court notes that the Parliament's approval of the measures adopted by the Government's decision to establish the state of alert creates a confusing legal regime for the Government's decisions.

The Court notes that the criticisms formulated by the People's Advocate are grounded, with the consequence of the unconstitutionality of art. 4 para. 3 and 4 of Law no. 55/2020, since, through these texts of law, the Parliament cumulates the legislative and executive functions, a situation incompatible with the principle of separation and balance of powers in the state, enshrined in art. 1 para. 4 of the Constitution; the legal regime of Government decisions is distorted, as acts of law enforcement, enshrined in art. 108 of the Constitution; a confusing legal regime of Government decisions is created, such as to raise the issue of their exemption from judicial control under the conditions of art. 126 para. 6 of the Constitution, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution, which enshrines free access to justice and the right of the injured person by a public authority.

In relation to art. 65 lit. s)-ș), art. 66 lit. a), b) and c) and art. 67 para. 2 lit. b) of Law no. 55/2020, criticized for unconstitutionality, the Constitutional Court has noted that the compliance of the law is mandatory, but it cannot pretend to a subject of law to comply with a law that is unclear, imprecise and unpredictable, because he cannot adjust his behavior depending on the normative hypothesis of the law". This is why the legislator must show special attention when adopting a normative act (Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania, Part I, no. 123 of February 19, 2014). A legal provision must be precise, unequivocal, to establish clear, predictable and accessible norms whose application does not allow arbitrariness or abuse (Decision no. 637 of October 13, 2015, published in the Official Gazette of Romania, Part I, no. 906 of December 8, 2015).

Legislative acts with the force of law and administrative acts of a normative nature by which contraventions are established and sanctioned must meet all the quality conditions of the norm: accessibility, clarity, precision and predictability. The determination of the facts whose commission constitutes

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contraventions must be made in compliance with these requirements, and not left, arbitrarily, at the discretion of the ascertaining agent, without the legislator having established the necessary criteria and conditions, the operations of ascertaining and sanctioning contraventions. Also, in the absence of a clear representation of the elements constituting the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, when solving the complaint on the record of finding and sanctioning the contravention. Based on these considerations, our constitutional court found the unconstitutionality of these texts of law. In Romania, derogations specific to the state of emergency are regulated at the constitutional level, including in terms of increased powers offered to the executive, i.e. the President of Romania, and not the Government. To "build" by law a new institution – the "state of alert", with an obvious regime less restrictive than the state of emergency regulated by the constituent legislator – but allowing the circumvention of the constitutional framework governing legality, separation of powers in the state, conditions of restriction the exercise of certain rights and freedoms, contradicts the general requirements of the rule of law, as enshrined in the Romanian Constitution.

The aspects that formed the object of the constitutionality control of the Constitutional Court with reference to the exceptional state established on the Romanian territory are not the only abusive and unconstitutional measures of the state authorities ordered and applied during this period.

In our opinion, human dignity and fundamental rights have been seriously violated, such as: the right to life, the right to family and private life, the right to health care, access to culture, the right to education, the right to a decent standard of living and especially the freedom of conscience, the autonomy of religious cults, their freedom and especially of the Orthodox cult and the autonomy of the Orthodox Church, majoritarian in Romania.

The space does not allow us to develop these aspects, but we emphasize that the restrictive measures imposed by law and applied by excess of power by state authorities, do not respect the principles of supremacy of the Constitution and the law and the requirements of art. 53 of the Constitution and especially the principle of proportionality, because they are not suitable for different specific situations, (for example the religious communion of Orthodox believers participating in a service in the Church cannot be considered a simple civil meeting) and far exceed what is necessary respectively combating and preventing the spread of the pandemic.

Respect for the supremacy of the Constitution and the law, guaranteeing the rights and fundamental freedoms of citizens, elimination of manifestations of excess of power by the rulers during the existence of exceptional situations are clearly expressed by the Constitutional Court in the following considerations of Decision no. 457/2020: The Venice Commission recalled that "the concept of a state of emergency" is based on the assumption that in certain political, military and economic emergencies, the system of limitations imposed by the constitutional order must yield in in the face of the increased power of the executive.

However, even in a state of public emergency, the fundamental principle of the rule of law must prevail. The rule of law consists of several issues that are all of paramount importance and must be fully maintained. These elements are the principle of legality, separation of powers, division of powers, human rights, state monopoly on force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation of citizens and supervision by these of the decision-making process, decision-making, transparency of government, freedom of expression, association and assembly, the rights of minorities, as well as the rule of the majority in political decision-making. The rule of law means that government agencies must operate within the law and their actions must be subject to control by independent courts. The legal security of persons must be guaranteed".

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

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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 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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