

Petroleum-Gas University of Ploiesti

The Centre for Studies and Legal and Socio-Administrative Research

JOURNAL OF LAW AND ADMINISTRATIVE SCIENCES

Issue 6/2016

ISSN 2392-8298

ISSN-L 2392-8298

The Journal is indexed in the international data bases

Petroleum and Gas University Publishing House of Ploiești

EDITORIAL BOARD

Director: Lazăr Cornel, PhD

Chief Editor: Mihai Cristian Apostolache, PhD

Executive Editors: Emilian Ciongaru, PhD; Mihaela Adina Apostolache, PhD; Eufemia Vieriu, PhD; Andrei Jean Vasile, PhD; Adrian Stancu, PhD; Vasile Muscalu, PhD; Elena Lazăr, PhD c; Alexandru Voicu.

SCIENTIFIC BOARD

Atanas Semov, PhD, University of Sofia, Bulgaria;

Alexander B. Djuric, PhD, University of Niš, Faculty of Law, Serbia;

Zoran Jerotijevic, PhD, Faculty of Business and Industrial Management Belgrade Union University Belgrade, Serbia;

Maria Orlov, PhD, Institute of Administrative Sciences of the Republic Moldova, Moldova;

Verginia Vedinaș, PhD, University of Bucharest, Romania;

Augustin Fuerea, PhD, University of Bucharest, Romania;

Daniel Mihail Șandru, PhD, Romanian Academy, Romania;

Constanța Călinoiu, PhD, “Dimitrie Cantemir” University Bucharest, Romania;

Nicoleta Diaconu, PhD, “Spiru Haret” University Bucharest, Romania;

Gheorghe Calcan, PhD, “Petroleum-Gas” University of Ploiești, Romania;

Lazăr Cornel, PhD, “Petroleum-Gas” University of Ploiești, Romania;

Gabriela Vasilescu, PhD, “Petroleum-Gas” University of Ploiești, Romania;

Daniela Ciochină, PhD, Member of the Superior Council of Magistracy “Dimitrie Cantemir” Christian University Bucharest, Romania;

Ioan Laurențiu Vedinaș, PhD c., “Alexandru Ioan Cuza” Police Academy;

Cristina Pigui, PhD, Judge Court of Appeal Ploiești, Romania.

Lucian Pitaru Lawyer

CONTENTS

Verginia VEDINAS - THE SIGNIFICANCE OF THE ADOPTION OF THE CURRENT ROMANIAN CONSTITUTION ON 8 DECEMBER 1991.....	4
Mihaela Adina APOSTOLACHE - THE NATIONAL INTEREST AND THE COOPERATION BETWEEN THE ROMANIAN PRESIDENT, THE PARLIAMENT AND THE GOVERNMENT IN THE FIELD OF EUROPEAN AFFAIRS.....	9
MIRCEA TUTUNARU - SOME CONSIDERATIONS ON NATIONAL AND INTERNATIONAL LEGAL GUARANTEES OF THE INVOLABILITY OF DOMICILE.....	21
Mădălina - Elena MIHAILESCU - ABOUT PUBLIC POLICY AND DECISION MAKING IN THE LIGHT OF THE CONSTITUTIONAL TEXT AND CURRENT LEGISLATION.....	32
Mihai Cristian APOSTOLACHE - THE PRIME MINISTER AND THE SUPREME COUNCIL OF NATIONAL DEFENCE.....	45
Marius ANDREESCU, Andra PURAN - CONSTITUTION AND THE CONTEMPORARY CONSTITUTIONALISM.....	58
ELISE VÂLCU - PROCEDURAL RIGHTS OF THE SUSPECTS AND OF THE ACCUSED DURING THE CRIMINAL PROCEDURES ACCORDING TO THE NEW COMMUNITARIAN REGULATIONS.....	77
Petre LAZAROIU, Ionița COCHINTU - SOCIAL POLICY INFLUENCES IN THE FIELD OF TAX POLICY.....	94
Mihail NIEMESCH - THE CONSTITUTIONAL NATURE OF THE PRINCIPLES OF THE U.N.O. CHARTER.....	105
DUMITRU VIERIU - CONSIDERATIONS REGARDING THE CONTROL OF THE CONSTITUTIONALITY OF LAWS.....	112
Mihaela Cristina PAUL - THE RELATION BETWEEN MAN AND ENVIRONMENT. CONCEPT AND SIGNIFICANCE.....	126
Eufemia VIERIU - REFLECTIONS ON THE SEPARATION OF THE STATE POWERS IN THE ROMANIAN CONSTITUTION.....	132
Ingrid Ileana NICOLAU - ASPECTS CONCERNING THE NECESSITY AND THE OPPORTUNITY OF THE CONSTITUTIONAL ENVIRONMENTAL RIGHTS.....	148
Valentin- Stelian BADESCU - ROMANIAN CONSTITUTIONAL LAW AT A CROSSROADS - BETWEEN THE IMPERATIVES OF THE FUTURE AND NOSTALGIA OF THE PAST.....	158
Gheorghe CALCAN - DIACHRONIC SURVEY ON THE CONSTITUTIONAL RIGHT OF OWNERSHIP IN ROMANIA.....	179

THE SIGNIFICANCE OF THE ADOPTION OF THE CURRENT ROMANIAN CONSTITUTION ON 8 DECEMBER 1991

Professor Virginia VEDINAS, PhD.

Faculty of Law, University of Bucharest (Department of Public Law)
Counselor of accounts at the Romanian Court of Accounts, President of the
Institute of Administrative Sciences “Paul Negulescu”
verginia.vedinas@rcc.ro

Abstract

This article aims to analyze the significance of the moment December 8th 1991, when the Constitution of Romania entered into force, in its initial form. It presents a brief history of the adoption of the 1991 Constitution, which laid the foundations for a real transition from a totalitarian regime to a democratic regime in Romania.

This has also led to the proclamation of December 8 as “Constitution Day” and the annual celebration of this day, through festivities which seek to highlight the value of our fundamental law and the role it has played in creating and strengthening the democratic rule of law, as it is declared by the first text of the fundamental law.

Key words: *Constitution, rule of law, democracy, role, political regime, Constitutional Court.*

I. A short history

After over four decades of totalitarian political regime, Romania gained, at the cost of impressive human sacrifices, the right turn into a democratic rule of law, and this required the development of new fundamental laws, which after almost two years of legal endeavor, became the first Constitution of Romania. The Primary Constituent Assembly that was invested with the development of theses, and subsequently the draft Constitution, was led by the great late Professor Antonie Iorgovan, and it also included other valuable names from the legal world in our country[1].

The Constitution was adopted by national referendum and entered into force on 8 December 1991, a date that has become, over time, Constitution Day, being celebrated every year through events organized by the guarantor of the supremacy of the Constitution, which is the Constitutional Court. It is important to mention that such events are not merely festive; they involve not only the

imminent celebration, but also the presentation of communications which list interesting information, by renowned experts, some of them former members of the Commission drafting the 1991 Constitution or Law no. 429/2003 [2] for its revision. It is appropriate to point out that the interpretation of the constitutional norms by those who have underlain their adoption is undoubtedly advantaged, given that they know the history of each text, the debates taken place, the amendments formulated, and the variations of each constitutional norm until reaching the current form in the text of the fundamental law.

What is significant is that the history of the Constitution represented the topic of specialty papers [3], and we refer here mostly to monographic works, one of them, of reference, having as author the chairman of the Drafting Commission, and which under a provocative metaphor in the title, reveals “the odyssey” of the development of the first democratic Constitution of Romania, adopted after the abolition of the totalitarian regime.

The Constitution of Romania has been the subject of papers commenting on its provisions, developed by narrower [4] or wider [5] collectives of authors, where there are discerned the meanings of the constitutional texts, and there are revealed solutions from the jurisprudence of the Constitutional Court, the aim being to facilitate the interpretation and application of the Constitution in its wording and spirit.

The revision from 2007 of our fundamental law enriched its provisions that had not been included in the original form of the Constitution, and which were imposed by the European destiny that our country assumed, having triggered the procedure of integration in the Euro-Atlantic structures[6].

Currently, Romania has a constitutional edifice suitable to facilitate the path to democracy, to sit among the states of Europe and the world.

II. Democratic valences of the Constitution: a brief presentation

We present below several ideas on what, in our opinion, represent the “*strengths*” of our fundamental law, also indicating, where appropriate, some of

its “*weaknesses*”, which impose, in a timely and developed perspective, the rethinking of certain solutions, the introduction of others, in order to harmonize its norms with the needs of the historical time we are living.

1. The first aspect that we try to reveal is the modernity of our fundamental law, which combines with “the perfume” of some classical theses on the institutions enshrined therein.

We bring forth in support of this claim, the way in which it regulates the principle of the separation of powers in the state, the original and derivative constituent legislator “giving a hand” in the sense of consecrating it in such an implicit manner, by Title III, where we find the authorities performing the prerogatives of the three classical powers of state, and also in an express manner, by its proclamation in paragraph (4) of the first article. Equally, it can be added the constitutional regulation of property, by articles 4 and 136, which *evenly ensure and protect private property and guarantee the right to property and claims against the state, and ensure and protect public property*. This would require, in our view, a future obligation, by *Constitution*, of the *institution* of public domain as a notion of synthesis regarding the idea of the public interest in a legal regime, and the destination of a good, that allows as some other private goods, not only public property ones, to be subject to rules of safety and security, to be set apart and transmitted to future generations.

But the modernity of the Romanian Constitution does not limit only to those norms. It is supported, in our view, by other rules, among which we mention:

a) the constitutional regulation of the fundamental rights and freedoms, both in terms of the principles that govern them, of the rights sphere, which reflects their full spectrum, and their proper content. Remarkable are, in this respect, the constitutional provisions enshrining the emption of international treaties on human rights over the internal ones, except when the latter are more favorable [7] or the consecration of new rights, such as “*access to culture*” [8] or “*the right to a healthy environment*” [9].

b) “the proclamation of Romania” as the rule of law and the consecration of the fundamental institutions that allow its edification and consolidation and we consider:

- the administrative court, which is qualified in the traditional doctrine as a tool to protect the citizen against the abuse of public authorities;

- the constitutional court, guaranteeing the supremacy of the Constitution by the Constitutional Court;

- the existence of independent authorities with a decisive role in defending the fundamental rights and freedoms and respect for the law, and we invoke here the Ombudsman, the Court of Accounts, the Council of Magistrates, which is the guarantor of judicial independence;

c) the declaration, by Constitution of the Parliament, as the supreme representative body and the sole legislative authority of the country, considering that we must signal the need to rethink, in the future, the institutions that affect the legislative role of the Parliament, and we have the *legislative delegation* or *the liability of the Government*;

It has been found, and the doctrine [10] and jurisprudence of the Constitutional Court [11] have criticized and, where appropriate, sanctioned some abusive applications of the two constitutional procedures, with the consequent serious damage, we might say, to the role of the Parliament as sole legislative body.

III. Conclusions

There is no doubt that we could add more to these arguments in support of the thesis that we wanted to convey in this study, with the value of a message, namely that the current Constitution through its content, its democratic valences, sets Romania among the states whose fundamental laws represent an engine in their evolution. Through its essential content, through the clarity and concision of its norms, our current Constitution meets the requirements of the famous axiom that “*a Constitution is not a Constitution unless it fits in a pocket*”.

But the Constitution is itself a law, and a law is eminently perfectible. Therefore, we support, in theory, need to achieve in the future a revision of its contents. It is important to understand that this must be done with a serious and responsible approach, from where there are removed opportunistic political interests, and which should have the contribution of powerful specialists in the field of law, as found in 1991 and 2003. We are not allowed to “make experiments” with the destiny of our country. We use the term “destiny” because it is beyond doubt that, through its contents, a Constitution settles the fate of a country. It is far from our intention to use empty words. We only want to join those consciences responsible for drawing attention to the need to assume the drafting of a bill of revision to correct the insufficiencies expressed in the 25 years since the Constitution is in effect and create the necessary framework for the evolution of Romania as a Member State of the European and international structures of the world.

References:

- [1] From these, we mention professors Ioan Moraru, Florin Vasilescu, Marian Enache, the late professors Ioan Deleanu or Mihai Constatinescu
- [2] Published in the Official Gazette of Romania, Part I issue 758 of 29 October 2003.
- [3] Example Geneza Constituției, RA “Official Gazette of Romania”, Bucharest.
- [4] Example Victor Duculescu, Constanța Călinoiu, Georgeta Duculescu – *Constituția României comentată și adnotată*, Lumina Lex, Bucharest, 1997.
- [5] Ioan Muraru, Elena Simina Tănăsescu (coord.) – *Constituția României, Comentariu pe articole*, C.H.Beck, Bucharest, 2008.
- [6] Considering Title VI of the Constitution newly introduced, for the “*Euro-Atlantic integration*”.
- [7] Norm comprised in art. 20 of the Constitution.
- [8] Article 33 of the Constitution.
- [9] By art. 35 of the Constitution.
- [10] See Dana Apostol Tofan – *Drept administrativ*, 3rd ed., Vol. I, C.H.Beck, Bucharest, 2014, pp 243 – 253, 263 – 272.
- [11] Decision of the Constitutional Court no. 738/2012, published in the Official Gazette of Romania, Part I issue 690 of 8 October 2012.

THE NATIONAL INTEREST AND THE COOPERATION BETWEEN THE ROMANIAN PRESIDENT, THE PARLIAMENT AND THE GOVERNMENT IN THE FIELD OF EUROPEAN AFFAIRS

Associate Professor Mihaela Adina APOSTOLACHE, PhD.

Petroleum-Gas University of Ploiesti

mihapostolache@yahoo.com

Abstract:

The paper deals with the issue of national interest, analyzed from an internal perspective, with implications on the manifestation of the state at European level. Internally, at the level of the state, the most common phrase is “national interest”, but at regional level, the term “general interests” is employed. In practice, national interest may vary from one state to another, being influenced by the changes occurring on the international scene. Relevant for the support, promotion and defense of the national interest is the cooperation between the President, the Government and the Parliament in the field of European affairs. The paper also tackles the parliamentary control over Romania’s representation at the European Council meetings, as a way of supporting and defending the national interest.

Keywords: *national interest, European affairs, national security, monitoring, information.*

1. Introduction

The concept of *national interest* has a wide scope of coverage; however it can be restricted to two components, with a certain interdependence: one which contains the priorities of the internal policies of any state, and one that brings together certain imperatives of its foreign policy.

Although it is established that the national interest is what determines the actions of the states on the international scene, and that the primary interest of every state is to survive and ensure national security, we must bear in mind that the national interest does not have a unique content, as it varies from state to state, according to the power that they hold, and also in time, often influenced by the changes occurring in the international environment [1].

The broader perspective of the phrase “national interest” includes its internal dimension, not only the internationally valid one, concerning the place of the

state analyzed globally, among other international actors. It can be established that the security and defense strategies developed by most countries refer to their national interests, but, in addition, there are other national interests, which are secondarily treated by the documents addressing the topic of security.

Usually, we talk about “national interest” only in the singular. In the Romanian Constitution, the concept of “national interest” is mentioned four times: in paragraph 1 of Article 87 (the participation of the President at Government meetings), in Article 90 (referendum called by the President) in Article 135 paragraph 2 letter d) (Economy) and in Article 136, paragraph 3 (Property), and Article 135 paragraph 2 letter b) (Economy) we find the phrase “national interests”.

In the present context, since the idea of “national interest” is used increasingly more often in the political, administrative and academic environment, this requires a conceptual distinction between the terms “*national interest*” and “*public interest*”. [2] For example, it can define “the preferences of the decision-makers at central level”, “goals that need to refer to the overall aims of the society, which are perennial and of cardinal importance, which justify their classification as national interests” [3]. In this view, national interests may include the satisfaction of the psychological need of knowing a welfare growth, weakening the opponents, acquiring territories or law enforcement.

When analyzing the national interest of a state authority, we must take into account the following *factors* [4]:

- the general characteristics of the international security environment;
- the power level of the state concerned (the sources of power that can be identified for the respective state);
- the position of the state on the geopolitical map of the world;
- the instruments of power that the state benefits from to promote its interests at international level.

2. The national interest – a selection criterion in the procedure for monitoring the activities and documents submitted by the European institutions

Following the major axes of the national interest and of the European Union interests, it can be seen that, in many respects, they coincide, such as, for example, “the economic and social progress of the European peoples” – an objective of the Union interest and “harnessing the economic and human potential of the country in order to guarantee a decent life for all Romanians” – an objective of the national interest [5]. That is why, in drafting the European legislation, both national and European institutions are obliged to harmonize these interests.

Romania’s active participation in developing European policies and the influence of our country in the Union depends mainly on the institutional system of coordinating the process of decision-making and adoption of its positions in the field of European affairs. Starting from the fact that the target of this system is the preparation of the national position for the meetings that occur in the European institutions, it is necessary to bring into the discussion several terms from this domain. Thus, according to Article 2 letter e) of Law no. 373/2013 [6], *the mandate* represents Romania’s negotiating position for the themes on the agenda of the Council, including the draft legislative acts at EU level. The *general mandate* is defined at letter f) as the negotiation position of Romania, elaborated by the Government, for the Council agenda, including for the draft legislation from the European Union, where the economic, social or environmental implications of the draft legislative acts from the European Union are of major importance or concern several sectoral areas.

The Parliamentary Review System (Scrutiny) [7] includes the mechanisms or procedures established by national parliaments in order to influence, to control and hold governments accountable for their activities in the EU Council, the European Council and in the European Commission committees or subcommittees. Addressing the complex issue of national interest within the

scrutiny system brings up two aspects. The European stake of this type of control of national parliaments on European affairs considers *legitimizing the common European interest* - member legitimacy, namely the democratic control of the European Union Council, since any European institution is responsible before the citizens through its representatives. The national stake aims *to promote the national interest, legitimizing the government activity in European affairs* – the parliamentary control over the government, as the parliament is the direct representative of the citizens.

As a general rule, national parliaments or parliamentary chambers monitor all types of activities and documents transmitted by the European institutions. One of the selection criteria in prioritizing various activities or documents is, above all, *the national interest*, and then the relevance of the problems, the concerns of regional entities represented in parliaments or only in certain chambers thereof.

In practice, the competence of monitoring the European affairs by national parliaments from the EU member states has been delegated to the Committee on European Affairs (CEA), conceived as a structure with expertise and which must issue an opinion to inform the plenum of the Parliament, in the event of a common CEA, or just a Chamber of it, if there is one CEA for each chamber of the legislature. “The final product” of the parliamentary control system is an opinion or a parliamentary mandate, and not a law. The parliamentary opinion/mandate represents the option for a European policy communicated to the government.

The current trend is to delegate almost complete competences to the Committees on European Affairs, an aspect that leads to the existence of stronger monitoring systems and a more active involvement of the national parliament. It should be taken into account the fact that the system of parliamentary control in the field of European affairs must be rapid, simple, and distinct from the other activities of the parliament and have a high capacity for fast access to information and credible expertise. It does not exclude the

participation of the other sectoral committees and other parliamentary members to the consultations on European affairs, but this should be done under the supervision of CEA.

The examination of the European acts and the decision on the opinion/mandate is usually centralized, based on a relatively simple procedure, different from the classic legislative one. The Committee on European Affairs is a standing committee, which helps to reinforce the position of national legitimacy against a European act, and also strengthen the political influence of the national parliament.

3. Cooperation within the triad President - Government - Parliament in the field of European affairs

The issue of national interest must prevail even *over the cooperation between the Romanian President, the Parliament and the Government in the field of European affairs*. Romania's position as a member state of the European Union has represented for the Romanian Parliament both a challenge and an opportunity: the challenge of remaining sufficiently influential, and the opportunity to be, by exercising new powers, a relevant component in the European policy-making act, something which is closely linked to the position taken by Romania in the field of European affairs.

If a European act disadvantaged certain national interests of Romania, the solution could only be that of carrying out certain diplomatic measures likely to allow the synchronization of the harmed national interest with European interests. Community practice has shown, moreover, that there is enough flexibility in such situations to give satisfaction to specific points of view of interest to some countries [8].

In Romania, Law no. 373/2013 regulates the cooperation between the Romanian Parliament, or one of its Chambers, and the Romanian Government concerning the country's participation in the decision-making process within the

European Union, as well as monitoring the harmonization of national legislation with the European legislation.

The normative act includes provisions that permit, first, to fully inform the Parliament about the developments registered in the EU decision-making process. Under these provisions, the Romanian Parliament may request extensive information on the draft legislative acts under negotiation in the European institutions.

The normative framework was also developed as a result of institutional practice. The debates on the draft of this normative act lasted for more than six years. There was initially a legislative proposal [9] drafted by counselors and experts in the Committees on European Affairs of the Romanian Parliament, initially debated only by the Senate, and then returned for amendments. Subsequently, a series of informal discussions were held with the representatives of the Ministry of European Affairs and certain adjustments were made.

Basically, the adoption and promulgation of this normative act was a major step, offering a legal basis for what had been achieved as a “common practice” that allowed the monitoring system in European affairs to fit in the scrutiny typologies from the other member states of the European Union. Law no. 373/2013 was an *absolutely necessary tool that introduced a mechanism meant to ensure an extensive involvement on behalf the Parliament in the process of formulating and supporting the positions and interests of Romania in the European Union*, an aspect also supported in the doctrine [10]. Thus, it regulates the procedure of consultation between the Parliament and the Government regarding their activity, considering that the negotiations at European level have direct implications on Romania’s internal policies and, consequently, on the national interest.

The information of the Parliament by the Executive involves the transmission, immediately after delivery, of all draft European Union legislative acts to be entered on the Council agenda, as well as the accompanying documents. In addition, based on Article 5, paragraph 2, at the request of one of

the two Chambers, the Government transmits the draft legislative and non-legislative acts of the European Union, and the accompanying documents which have not been already submitted by the European Commission, as obliged under Protocol no. 1 on the role of national parliaments in the European Union, annexed to the Treaty of Lisbon.

Periodically, according to Article 8, the Government should make available for the parliamentary Chambers reports on the results of participation in the European Council, periodical reports on the activity and results of Romania's participation in the decision-making process at the European Union, in the Council, and quarterly reports on the fulfillment of the transposition obligations of the EU law into national legislation.

In terms of representation and support of Romania's interests at the European Council meetings, this was brought before the Constitutional Court, with objections of unconstitutionality made by the Romanian President, under Article 146 letter a) first sentence of the Constitution, Article 11 paragraph (1) letter a) and Article 15 of Law no. 47/1992 on the organization and functioning of the Constitutional Court. In motivating the objection of unconstitutionality it is alleged that Law no. 373/2013 does not stipulate the role the President of Romania in the process of drafting and adopting the mandate at the European Council. Further, it is appreciated: "Given that Romania's representation is an originary right of the Romanian President, the latter may delegate, by an act of express will, the attribution to attend the meetings of the European Council, when necessary, developing and approving the mandate. Therefore, it is considered that the mandate proposed by the Government and its amendment by the Parliament are unconstitutional, contrary to the Constitution and to the jurisprudence of the Constitutional Court".

Article 18 paragraphs 1-3 of Law no. 373/2013 refer to the case in which the duty of the Romanian President to participate in meetings of the European Council is delegated to the Prime Minister, then the parliamentary control shall be exercised only on the content of its mandate, while Article 18 paragraph (4) of the

Law refers to the possibility of the Romanian President to inform the Parliament about the content of the mandate he himself prepared, if he decided not to delegate the task of participating in European Council meetings. These are two distinct situations: 1) when the President of Romania has decided to participate himself in the meetings of the European Council, having the opportunity to present his mandate to the Parliament, with a content established exclusively by the President; 2) when he delegates the task of participating in the meetings of the European Council, the Romanian President can not formulate or determine the content of the mandate, and the prime minister is obliged to address before the Parliament a “project or mandate draft” to be approved by the latter.

According to Article 10 paragraph (2) the second sentence of the Treaty on the European Union [11], “The Member States are represented in the European Council by their Heads of State or Government, and in the Council by their governments, which are themselves democratically accountable either before the national parliaments, or before their citizens”. This principle text stipulates the responsibility of the Member States representatives in the European Council either to their national parliaments, or to their citizens, without specifying aspects of the order and constitutional traditions of the states. It can be thus concluded that the member states are obliged to establish, on the basis of the national constitutional texts, their national representative at the European Council (the President or Prime Minister) and to determine a national legal framework regarding the relations between national authorities in order to ensure a democratic representation.

Since 2012, by Decision no. 683 [12], the Constitutional Court has established that “in the exercise of constitutional attributions, the President of Romania participates in the meetings of the European Council as head of state. This duty may be delegated by the President, specifically, to the Prime Minister”. The political decision to delegate the participation in the meetings of the European Council should consider a consensus between the public authorities involved: the President of Romania, respectively the Prime Minister, the decision

must be based on the constitutional principle of loyal cooperation, and both have to be subsumed to the national interest.

Thus, the parliamentary control over Romania's representation at the European Council meetings occurs in the first case, under the form of information, and, in the second, the Parliament acquires a decision-making power in determining the content of the mandate due to specific relations with the Government (Article 111 of the Constitution).

As a conclusion, the parliamentary control over Romania's representation at the European Council meetings manifests as a *debate, information and collaboration between the Government, the Parliament and the President*. Moreover, the existence of a parliamentary control, in whatever form, on determining the content of the mandate of the head of delegation at European Council meetings is already an aspect established in all member states of the European Union. The absence of any information of the Parliament by the President would lead to the case where Romania would become the only European state in which the mandate of representation at the European Council would be developed by a single institution, an aspect also developed by the Constitutional Court in its jurisprudence.

In support of these claims, we can bring forth the examples mentioned in a study [13] prepared by the European Commission, which notes that 17 Member States have formal rules explicitly stipulating the European Council, either in the constitutional text, or in the regulations of the Parliaments (Belgium, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Spain and Sweden). These rules relate to the information of the Parliament about the decisions and procedures on the European Council and outline the obligation of the Government to provide different written documents regarding the European Council meetings (agenda, strategy documents, the Government's position, report on results), or to explain them orally. In Estonia, Latvia, Lithuania, Slovenia, Slovakia and Sweden there are procedural rules regarding the control over the work of the European Council,

which provide the option or even the need for the Government to consult the Parliament and to seek its opinion (in Lithuania it is mandatory) .

The general trend mentioned in the study and identified in the member states is, on the one hand, to directly involve the Prime Minister in the parliamentary procedure (where the representation attribute belongs to the Prime Minister) and, on the other hand, to concentrate the parliamentary control on the activity of the member state representatives in the European Council before the start of its sessions, as an ex ante control (France, the Netherlands, Ireland or Portugal).

Consequently, the Constitutional Court found, as was natural, by Decision no. 449 of 6 November 2013 [14] that the Romanian semi-presidential system can not rule out the parliamentary control over Romania's representation at European Council meetings, which manifests in the form of information in the first case, while in the second the Parliament acquires a decision-making power in determining the content of the mandate due to specific relations with the Government, based on Article 111 of the Constitution. As such, the Court rejected as unfounded the objection of unconstitutionality raised by the Romanian President, noting that the provisions of Articles 2, 3 and 18 of the Law on the cooperation between the Parliament and the Government in the field of European affairs are constitutional.

4. Conclusions

Currently, in practice, there is a tendency to find a dynamic balance between the promotion and the defense of the national interest of each state and the achievement of general interests by all the actors actively involved in international relations. There is also a desire to alleviate any tensions arising from the integration in terms of competition and cooperation, between competition and partnership, between individual competences of the state and the Union's exclusive ones, the fight against inequalities, between short-term and long term goals, in order to meet the national interest without prejudicing the

interests of the Union. More specifically, there is an aim to highlight the thesis with the value of principle at European level “unity in diversity”.

As stated, the term “national interest” has several meanings. The first one refers to the general theoretical level of the implications of this concept, the national interest following the need for survival of the state and national security. Although, in this view, the national interest is invariable in time and space, its content and the way it is expressed varies depending on the evolution of the international security environment, according to the power resources of that state etc. In other words, survival and national security may require different things over time and from state to state. Therefore, the cooperation between institutional actors becomes vital in order to promote and defend the national interest, both internally and externally. It thus becomes relevant the manner of achieving the parliamentary control over Romania’s representation at European Council meetings under the form of *debate, information and collaboration between the Government, the Parliament and the President*.

In other words, the President is, under the Fundamental Law, the holder of the right of representation of the Romanian state in international relations. By virtue of this law, the President determines the content and scope of the mandate that he plans to present at the European Council meetings, when deciding not to delegate the task of participation to the European Council, but with the possibility provided by Article 18 paragraph (4) of Law no. 373/2013 to inform the Parliament about the content of the mandate which he himself prepared. The second situation referred to in Article 18 paragraphs 1 to 3 concerns the task of representation, which may be delegated by the President, specifically, to the Prime Minister, the laws establishing the obligation of the Government to draft the mandate and submit it for approval before the Parliament, which thus acquires a decisional power in determining the content of the mandate. All these aspects highlight once again the essential role of the principle of separation and balance of powers in a state of law, closely linked to the principle of loyal

cooperation of state authorities in the promotion, representation and full satisfaction of the national interest.

References:

- [1] Petre Duțu, Cristina Bogzeanu, *Interesele naționale și folosirea instrumentelor de putere națională pentru promovarea și apărarea acestora. Cazul României*, "Carol I" National Defense University P.H., Bucharest, 2010, p.12.
- [2] Mihai Cristian Apostolache, *Despre stat, administrație locală, Constituție și realitatea europeană*, Universitara Publishing House, Bucharest, 2015, pp. 38-39.
- [3] Stephen D. Krasner, *Defending the National Interest. Raw material investments and U.S. Foreign Policy*, Princeton University Press, Princeton, New Jersey, USA, 1978, p. 13.
- [4] Petre Duțu, Cristina Bogzeanu, *quoted opera*, p.11.
- [5] See also Mihaela Adina Apostolache, *Rolul parlamentelor naționale în elaborarea și aplicarea dreptului european*, Universul Juridic Publishing House, Bucharest, 2013, p. 246.
- [6] Law no. 373 of 18 December 2013 on the cooperation between the Parliament and the Government in the field of European affairs, published in the Official Gazette, Part I, issue 820 of 21 December 2013.
- [7] Klara Szalay, *Scrutiny of EU Affairs in the National Parliaments of the new Member States – Comparative Analysis*, Hungarian National Assembly, Budapest, 2005, p. 7.
- [8] Victor Duculescu, "Rolul Parlamentului European și al parlamentelor naționale în procesul integrării europene", *Studii de Drept Romanesc*, no.3-4/2004, p.279.
- [9] See PL- x/01.02.2012, The Draft Law of cooperation between the Parliament and the Government in the field of European affairs, available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=12520, adopted by the Chamber of Deputies on 11 June 2013 and filed to the Senate, which, in this case, is the decisional chamber.
- [10] Costantin Mihai Banu, 2016, *Ghid pentru controlul parlamentar al respectării principiilor subsidiarității și proporționalității*, Direction for the European Union, Chamber of Deputies, Parliament of Romania, April 2011, updated in January 2016.
- [11] The Treaty on the European Union published in the Official Journal of the European Union series C issue 326 of 26 October 2012.
- [12] The Decision of the Constitutional Court of Romania no. 683 of 27 June 2012 on the legal conflict of constitutional between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other, published in Official Gazette issue 479 of 12 July 2012.
- [13] Wolfgang Wessels, Olivier Rozenberg, Mirte Van Den Berge, Claudia Heffler, Valentin Kreiling – Study, European Commission, the Directorate-General Internal Policies of the European Union and the Directorate for Citizens' Rights and Constitutional Affairs, 15 January 2013, available at: <http://www.europarl.europa.eu/committees/ro/supporting-analyses-search.html?action=6&organs=AFCO>, accessed on 26 October 2016.
- [14] The Decision of the Constitutional Court of Romania no.449 of 6 November, 2013 regarding the unconstitutionality of the provisions of Articles 2, 3 and 18 of the Law on the cooperation between the Parliament and the Government in the field of European affairs, published in Official Gazette issue 784 of 14 December 2013.

SOME CONSIDERATIONS ON NATIONAL AND INTERNATIONAL LEGAL GUARANTEES OF THE INVIOABILITY OF DOMICILE

Associate Professor Mircea TUTUNARU, PhD.

Titu Maiorescu University, Faculty of Law Tg-Jiu, (ROMANIA)

mircea_tutunaru@yahoo.com

Abstract

This article makes a comparative analysis of the concepts of domicile and residence as well as guarantees in accordance with the constitutional rules of law, civil law, criminal law and international documents. Legal term of "domicile" and the "residence" used in art. 27 para. (1) of the Constitution have other meanings than those known and commonly used, these terms are used with different meanings in civil law to criminal law and to constitutional law. The right to housing and the right to inviolability of private life are related to a person, it is guaranteed by domestic legal norms and rules of European and international legal.

Keywords: *domicile, residence, inviolability, domicile searches*

1. The legal concept of "domicile" and "residence"

Residence, as shown in the general theory of civil law, is an attribute identifying the person and aims its location in space. [1]

Legal term of *domicile* and the *residence*, used as art. 27 para. (1) of the Constitution, have other meanings than those known and commonly used. Terms of *domicile* and the *residence* are used with different meanings in civil law to criminal law and constitutional law. [2]

Domicile in the sense of dwelling is presented as a natural human right to have a shelter in which to carry out their work safely and private life without being disturbed by other people. [3]

As stated prof. Cristian Ionescu, the right to housing does not have its source in a legal reasoning complicated, is not the result of theories subtle but a necessity elementary society in a spirit of solidarity, should ensure any person who, for lack of financial resources or materials can not meet. [4]

As results from the analysis made in the literature and the Romanian Constitution, the right to housing and the right to inviolability are guaranteed and protected by the state, being related to private life. In this regard, the Civil Code stipulates in art. 87 that: "The domicile of individual, to exercise his rights and freedoms civilian, is where it says it has its main dwelling." Also in the Civil Code covered four types of home: common law domicile, legal domicile, business domicile and chosen domicile.

Common law domicile is that it voluntarily declare an individual. Any individual can choose or change their residence whenever desired, or to establish a main residence anywhere in the country, respecting the laws in force. Since domicile, as main residence, by its nature, is a home steadfast, he is unique. Considering the provisions of art. 90 para. (2) of the Civil Code, we note that it establishes a presumption home: "In the absence of residence, the individual is deemed to reside at the place last home, and if it does not recognize the place where that person is."

Legal domicile is established by law for certain categories of individuals and it signifies a measure of protection.

Business domicile refers usually to the person who has a business, and the economic obligations that are running there. It is usually set in the place where the enterprise is located.

Chosen domicile It is governed by the provisions of art. 97 of the Civil Code provides that "Parties to a legal act may give an chosen domicile in order to exercise or enforcement of obligations arising from that act." Being an imperative requirement of the legislature, the chosen of domicile must be in writing.

As results from the analysis of the legal issues concerning civil law domicile, it has as distinct features the *obligativity*, *uniqueness* and *stability*. [5]

The concept of residence is governed by the provisions of art. 89 of the Civil Code. As apparent from the provisions of this article, " residence of the individual is the place where is the secondary house." Unlike domicile, which is required, as stated in the literature, the residence is an optional attribute of

personal identification, meaning that any person may have a residence but it is not required to have. [6]

The concept of domicile in the provisions of the Criminal Code has a lato sensu regulation. Penal Code criminalizes and punishes the offense of trespassing in art. 224, which states that: "The penetration without, in any way, in a house, room, outbuilding or place fenced taking them without the consent of the person using them, or refusing them leave to request punishable by imprisonment from 3 months to 2 years or a fine." In para. (2) of same article the legislator provided an aggravating offense of trespassing in the sense that: "If the offense is committed by a gunman at night or by using false impersonations, the penalty is imprisonment 6 months to 3 years or a fine. "

Also, the Code of Criminal Procedure and the conditions under which it may be ordered house searches and procedures carried out.

Regarding the concept of domicile in terms of criminal law, the legislature took into account a broader sense than in civil law, namely: housing, room, outbuildings or place enclosed which is integral with main house, as provided in article 224 of the Penal Code in force. [7]

According to art. 157 par. (2) of the Criminal Procedure Code, domicile is the housing or any delimited space, in any way, belonging to or used by a person or entity. [8]

Given the fact that the legislator stated the concept of domicile in relation to the procedure to order a house searches by the judge gives us the guarantee to protect the right to inviolability of the domicile against abuses or acts of arbitrary search. It is important to remember that no matter the place or body building where is the house or outbuilding about who is speaking in art. 22 Criminal Code. To be invoked art. 224 of the Criminal Code, the role dwelling home must have actually inhabited by the person who has the right to inviolability of domicile or residence.

The Constitution uses the notion of domicile but, in reality, the guarantee of inviolability extends to all necessary places for domestic use, as set out in the Criminal Code. [9]

The offense of trespassing is a criminal offense in the Criminal Code with other criminal offenses affecting the private life of citizens. Penalizing those facts, the legislator guarantees and protects the freedom and privacy of individuals, as these social values are based on a democratic society and the rule of law protects these values through both social and constitutional rule through criminal law. [10]

The doctrine shows that the law protects the person who actually owns the dwelling, no matter how precarious is his title against illegal closure of any acts taken by another person. [11]

Under art. 224 of the Criminal Code state that both come domicile spaces role and the role of residence.

By constitutional provision was regulated inviolability of domicile and residence, as an important aspect of protecting freedom and privacy of the person. [12]The concepts of domicile and residence are not situational separately understood by them, in accordance with art. 27, in a general formula, the space in which a person actually resides, either permanently constant or occasional. Everyone has the discretion to opt for a main residence and steadfast that uses the destination home or have their residence. From the constitutional point of view it is important that no one may restrict a person's right to freely use their domicile or residence.

The right to a home is a manifestation of freedom of the individual and his private life. In this sense, constitutional law (art. 27 of the Constitution), as well as criminal law, protect the social relations that consider the defense of personal freedom in terms of freedom of domestic life and the right to inviolability of the home. [13]We note that the constitutional text does not distinguish between right holders on established between natural and legal persons, but on legal persons, we mention the broad interpretation of the concept of domicile formulated by the

European Court of Human Rights. Therefore, entitled to respect for the home include, according to that Court, the right to the respect of the registered office of his business premises or agents. [14]

In the Romanian constitutional system is already a tradition normative regarding constitutionalising inviolability of the home (art. 15 of the Constitution of 1866, 1923, 1938, and art. 29 of the Constitution of 1952, art. 32 of the Constitution of 1965). Please note also that the current constitution legislator has not protected residence as a good heritage but as a right for every citizen to have as a condition of freedom and his private life, a place which one to use freely others or the public authorities. [15]

It is a full agreement between the European conceptions regarding inviolability of the home as part of the freedom of the individual and Romanian constitutional theory. Even if the legal norm some public authorities would be entitled to enter the domicile or residence of a person, intrusion into private life should be conducted in compliance with legal requirements. Violation of the inviolability of the dwelling must be legitimate, that is necessary and without abuse of power. [16]

2. Protection and inviolability of domicile and residence in the international documents

Since value is a social-human inviolability of the home is enshrined in international documents on the matter of human rights and fundamental freedoms. Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, provides in art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home [...]".

Art. 17 paragraph 1 of the International Covenant on Civil and Political Rights, adopted in 1966 at the UN, resume content of Article 12 of the Universal Declaration of Human Rights, and states that "No one shall be subjected to any arbitrary interference or unlawful privacy, family, home or correspondence [...]"

Also art. 8 par. 1 of the European Convention on Human Rights states that "Everyone has the right to respect for his private and family life, his home and his correspondence."

Analyzing these international documents containing explicit reference to inviolability of the home seen as an essential component of individual freedom, and the European Convention on Human Rights, we note that there is no distinction on the content, the role and features of the inviolability of the dwelling to a person used it a domicile or residence. It is essential to mention that protect those documents but not domiciled or resident person's private life in the complexity and diversity of its components. [17]

Article 8 requires states two types of obligation: negative and positive. The ratio of negative obligations, states must refrain from committing acts likely to hinder the exercise of rights holders which they are recognized, except when such acts are legitimate in relation to the provisions of paragraph 2. The rights guaranteed by art. 8 are not absolute rights, so any intervention by the State in the exercise of these rights constitutes a violation of art. 8, but only those that do not comply with the three cumulative conditions imposed by paragraph 2 of art. 8. The State interference is given a legitimate if it is prescribed by law and pursued a legitimate aim and is necessary to achieve this goal. [18]

By virtue of its positive obligations under article 8 states should legislate private relations and family to ensure compliance and to intervene by the means available to ensure the legislation, including sanctioning touches unjustified interference with the private life and family relationships between private individuals. [19]

State liability is a good solution for providing legal force of regulations of the European Union, especially the directives not or wrong transposed into national law. [20]We note that, compared with the system of human rights protection that exists in the UN, the European mechanism, the European Convention for the Protection of Human Rights offers us the image of a system more integrated with broader opportunities to repair human rights violations, it

comprising three main bodies: the European Commission of Human Rights, European Court of Human Rights and the Committee of Ministers of the Council of Europe. [21]

Democracy does not admit intrusions illegitimate constitutional state and any person in private individuals. Respecting privacy of individual privacy is the rule and the legal and legitimate state intrusion is the exception. Always legitimate interference of state authorities in the privacy of a person must be motivated by public interest on its expansion due to impairment of certain fundamental values protected by the state and individuals who owe respect. [22]

Both Article 8 of the European Convention on Human Rights and the constitutional and legal provisions that protect domestic inviolability of the home and residence are binding both states and individuals. [23]

In the system of the European Convention on Human Rights, as in national legislation, inviolability of the home, being by nature an individual freedom, the holder can not give it up. Nobody has the right to disregard or violate privacy of domicile or residence of a person only as provided by law in accordance with national constitutional provisions. [24]

Examination art. 27 of the Constitution is clear on two distinct situations intrusion into private homes. The first situation is when it enters the home with the consent of that person. The second situation is where the derogation can enter the house of a person without consent, but only in cases expressly provided for by art. 27 of the Constitution. [25]

We find a similar formulation in art. 8 of the European Convention on Human Rights but in literature and the jurisprudence of the ECHR noted that the interests protected by the provisions of art. 8 are a free person and, consequently, it may validly waive, in the exercise of rights that the holder of rights available. In jurisprudence, the European Court of Human Rights considers that the concept of domicile must include a broad interpretation, which could also include the trailer used as a home, holiday home or other dwelling spaces as

secondary. European Court extends inviolability of the home at the business premises of a legal person (eg a person's Law Office). [26]

Also we mention that there is a rich jurisprudence of the European Court of Human Rights in infringement person to inviolability of their homes with home destination (for example cause of Varga against Romania).

3. The conditions in which constitutional guarantee of inviolability of domicile or residence does not operate

The owner of the inviolability of domicile and residence is any individual citizen of Romanian or foreign holding, compliance with legal requirements, a home or a residence. In accordance with art. 27 para. (2) of the Constitution, the inviolability of domicile and residence can not be invoked in several cases expressly and exhaustively set out in the constitutional norm. The constitutional text is, therefore, consider the following:

- The execution of an arrest warrant or a court order;
- Removing a risk to life, physical integrity or assets of a person;
- Defending national security or public order;
- Preventing the spread of an epidemic.

Logical interpretations of these provisions should be stated that the derogation from para. (1) art. 27 of the Constitution is just a possibility that recourse. Therefore, the public authority or any other person who enters the domicile or residence of a person under the conditions set by par. (2) art. 27 of the Constitution would do so only if necessary if necessary and if entering into such housing does not affect the principles of constitutional democracy.

In our opinion, the constitutional provision that applies violation of the inviolability of domicile or residence must be proportionate to the situation that caused it.

We also specify that the search be ordered only by the judge [art. 27 para. (3) of the Constitution] and carried out under conditions and forms provided by law. House searches being a form of limiting the inviolability of the home is ready when the person was asked to teach an object or document that may constitute

evidence, denies the existence or ownership of, or when there are serious indications that performing a search is necessary discovery and gathering of evidence. [27]

This is done in the terms and forms stipulated by law; is prohibited during the night, except for crimes in flagrante delicto. Code of Criminal Procedure provides that "house searches times of goods in home may be ordered if there is reasonable suspicion of committing a crime by a person or in possession of items or documents that relate to an offense allegedly search may lead to the discovery and gathering evidence regarding this crime to preserving the traces of the offense or catching the suspect or defendant "[art. 157 par. (1) Code of Criminal Procedure]

4. Conclusion

Respect human personality involves to respect his home and his residence, and that involve two common aspects, namely the inviolability of the home, freedom of choice, change or use of residence. To avoid any speculative interpretation of its provisions, the Constitution uses the notion of residence.

Constitutional law, as well as the theory and practice of criminal law guarantees the inviolability of the dwelling that uses constantly or occasionally, anyone legally resident on Romanian territory. Violation of inviolability of domicile or residence is an exception and must be proportional to the situation that caused it. Derogation from the regime inviolability of the home and residence is exclusively a public authority which has independence from other state bodies, thus being excluded arbitrary action of an organ of state power. Social relations, as relations state - citizen, suppose drawing lines of demarcation between the public interests of society and the private interests of individuals, whatever their status.

International documents and European Convention on Human Rights contain explicit reference on the guarantees inviolability of the home as a natural component of the individual. Although the Romanian state has an adequate legal

framework guaranteeing individual rights to a healthy environment to enjoy your own home, though Romania has been condemned by the Court in Strasbourg for violation of this right due to failure of a series of positive obligations. We note also that the Romanian state authorities within fail to ensure effectiveness of implementing rules which ensure the inviolability of the domicile and residence.

References:

- [1] Constantin Stătescu. *Civil law. Individual. The legal entity. Real rights*. Bucharest: Didactic and Pedagogical Publishing House, 1970, p. 146
- [2] Cristian Ionescu. *About constitutionalising right to inviolability of the home*. In: *Dreptul* magazine no 8/2016, pp. 75-76
- [3] F. Sudre ș.a. *The great decisions of the European Court of Human Rights*. Bucharest: International Rosetti, 2011, p. 395; J.F. Renucci. *Treaty of European human rights law*. Bucharest: Hamangiu, 2009, p. 282
- [4] C. Ionescu, op.cit., p. 76
- [5] Ernest Lupan, S. Sztranyczki, *Individuals in the new Civil Code*. Bucharest: C.H. Beck, 2012, p. 138
- [6] Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *The new Civil Code, comment on articles*. Bucharest: C.H. Beck, 2012, p. 97
- [7] Nadia Elena Dodescu, *Romanian criminal law*, vol. I, Craiova: Arves, 2015, pp. 118-119
- [8] Voinea, Nadia Elena Dodescu, *Criminal Procedural Law. The special part*. Craiova: Arves, 2011, p. 18
- [9] V. Dobrinoiu, N. Neagu, *Criminal law. The special part*. Bucharest: Universul juridic, 2014, p. 183; Nadia Elena Dodescu, Pantelimon Boștină, *Romanian criminal law. The special part*. Craiova: Arves, 2013, p. 113
- [10] George Antoniu, Tudorel Toader (coord.), *Explanations of the new criminal code*. Bucharest: Universul juridic, 2015, p. 245
- [11] Idem, p. 184
- [12] Cristian Ionescu, op.cit., p. 79
- [13] A. Ionaș, A.F. Măgureanu, C. Dinu, *Criminal law. The special part, under the new criminal code*. Bucharest: Universul juridic, 2015, p. 173
- [14] Corneliu Bîrsan, *The European Convention on human rights. Comment on articles*, vol. 1, Bucharest: AllBeck, 2005, p. 662
- [15] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions*, 13th edition, vol. 1, Bucharest: C.H. Beck, 2008, p. 170
- [16] Cristian Ionescu, op.cit., p. 80
- [17] Corneliu Bîrsan, op.cit., p. 657
- [18] Radu Chiriță, *The European Convention on human rights. Comments and explanations. 2nd edition*, Bucharest: C.H. Beck, 2008, p. 416
- [19] Idem, p. 474
- [20] Ana Daniela Bobaru, *The Court of Justice of the European Union - the guarantor of uniform application of European Union law*, Bucharest: University Publishing House, 2014, p. 173
- [21] Victor Duculescu, *Legal protection of human rights*, Bucharest: Lumina Lex, 1998, p. 107
- [22] Tudor Drăganu, *Constitutional law and political institutions. Elementary Treaty*. vol. I, Bucharest: Lumina Lex, 2000, p. 161
- [23] Marin Voicu, *European protection of human rights. Theory and jurisprudence*. Bucharest: Lumina Lex, 2001, p. 162
- [24] Ioan Muraru, *Constitutional law and political institutions*, Bucharest: Actami, 1997, pp. 220-221

[25] Idem, p. 221

[26] Fr. Sudre ș.a., *op.cit.*, p. 45 și urm.

[27] Marieta Safta, *Constitutional law and political institutions. Vol.1. General theory of constitutional law. Rights and freedoms*. Bucharest: Hamangiu, 2014, p. 200

Bibliography:

- A. Antoniu George, Toader Tudorel (coord.). *Explanations of the new criminal code*. Bucharest: Universul juridic, 2015
- B. Baias F.-A., Chelaru E., Constantinovici R., Macovei I. *The new Civil Code, comment on articles*. Bucharest: C.H. Beck, 2012
- C. Bîrsan Corneliu. *The European Convention on human rights. Comment on articles*. Vol. 1, Bucharest: AllBeck, 2005
- D. Bobaru Ana Daniela. *The Court of Justice of the European Union - the guarantor of uniform application of European Union law*, Bucharest: University Publishing House, 2014
- E. Chiriță Radu. *The European Convention on human rights. Comments and explanations. 2nd edition*, Bucharest: C.H. Beck, 2008
- F. Dobrinioiu Vasile, Neagu Norel. *Criminal law. The special part*. Bucharest: Universul juridic, 2014
- G. Dodescu Nadia-Elena, Boștină Pantelimon. *Romanian criminal law. The special part*. Craiova: Arves, 2013
- H. Dodescu Nadia-Elena. *Romanian criminal law, vol. I*, Craiova: Arves, 2015
- I. Drăganu Tudor. *Constitutional law and political institutions. Elementary Treaty*. Vol. I, Bucharest: Lumina Lex, 2000
- J. Duculescu Victor. *Legal protection of human rights*, Bucharest: Lumina Lex, 1998
- K. Ionaș A., Măgureanu A.F., Dinu C. *Criminal law. The special part, under the new criminal code*. Bucharest: Universul juridic, 2015
- L. Ionescu Cristian. *About constitutionalising right to inviolability of the home*. In: *Dreptul* magazine no 8/2016
- M. Lupan Ernest, Sztranyiczki Szilárd. *Individuals in the new Civil Code*. Bucharest: C.H. Beck, 2012
- N. Muraru Ioan, Tănăsescu Elena Simina. *Constitutional law and political institutions*, 13th edition, vol. 1, Bucharest: C.H. Beck, 2008
- O. Muraru Ioan. *Constitutional law and political institutions*, Bucharest: Actami, 1997
- P. Renucci Jean-Francois. *Treaty of European human rights law*. Bucharest: Hamangiu, 2009
- Q. Safta Marieta. *Constitutional law and political institutions. Vol.1. General theory of constitutional law. Rights and freedoms*. Bucharest: Hamangiu, 2014
- R. Stătescu Constantin. *Civil law. Individual. The legal entity. Real rights*. Bucharest: Didactic and Pedagogical Publishing House, 1970
- S. Sudre Frederic ș.a. *The great decisions of the European Court of Human Rights*. Bucharest: International Rosetti, 2011
- T. Voicu Marin. *European protection of human rights. Theory and jurisprudence*. Bucharest: Lumina Lex, 2001
- U. Voinea Dan, Dodescu Nadia-Elena. *Criminal Procedural Law. The special part*. Craiova: Arves, 2011

ABOUT PUBLIC POLICY AND DECISION MAKING IN THE LIGHT OF THE CONSTITUTIONAL TEXT AND CURRENT LEGISLATION

Lecturer Mădălina - Elena MIHAILESCU, PhD.

Faculty of Legal, Social and Political Sciences
"Dunărea de Jos" University of Galați,
Administrative, Legal, Social and Political Research Center
madalina.mihailescu@ugal.ro

Abstract

The process of decision making is extremely complex and difficult, involving many political, social, economic and administrative factors, but unfortunately neglecting a factor that is, in itself, fundamental in all this mechanism – the human factor, the ordinary citizen.

Our study aims to demonstrate the influence of decision makers on the smooth functioning of society in general and government in particular, both at a European and national level.

Describing a number of current issues at the level of the local decision makers, the study was meant to focus on current, practical issues, specific to the Romanian administration authorities and to the territorial administrative unit of Galați County, analyzing many of the factors that negatively influence decision making and also those national and local legislative issues in support of the authorities and the citizens for better cooperation between them and to respect a transparent decision-making.

Key words - Citizen, decision, authority, transparent decision making, factor.

Section 1. Introduction

In the course of their daily lives, people are affected, directly and indirectly, obviously and subtly, by an array of public policies. [1].

Policy making is political. It involves politics. That is, its features include conflict, negotiation, the exercise of power, bargaining, and compromise and sometimes, such nefarious practices as deception and bribery. The policy process (sometimes called the policy cycle) approach to policy study has several advantages. First, and most important, the policy process approach centers attention on the officials and institutions who make policy decisions and the

factors that influence and condition their action. Consequently, the policy process approach not only helps us learn about policy making and policy it also causes us to take a more holistic view of how government works. [2].

Politicians have also voiced disquiet about the policy making process. Perhaps, unsurprisingly, their criticism often focuses on the advice provided to ministers. Kenneth Clarke¹, for example, argued in 2008 that *The civil service lost its policy role*and that is why, maybe, those who observe and analyze policy making are often even more critical. [3].

The decision making process is the mechanism by which individuals, public actors or not, institutionalized or not, make decisions that are found later in behavior, individual or group action, in the institutional plan at all its levels. Decision is the driving force of the action and the action means dynamics, evolution, transformation, no matter which field these concepts are applied to. [4].

Decision and the decision-making process in terms of public policy means the more or less exploited success of these public policies in the community, at an institutional or state level, in relation to what we call as the general welfare identified or identifiable in the public space. [5].

In Romania, the provisions of Law no. 52/2003 on transparency of decisions are designed to establish minimum procedural requirements applicable to ensure decisional transparency in central and local public administration authorities, elected or appointed, as well as other public institutions that use public financial resources, in the relationships established between them, with citizens and their legally constituted associations.

¹ Kenneth Clarke evidence to the Public Administration Select Committee in 2008, available at <http://www.publications.parliament.uk/pa/cm.200708/cmselect/cmpubadm/c983-iii-c98302.htm>., apud. Michael Hallsworth, Simon Parker, Jill Rutter, Institute for Government, *Policy making in the real world, Evidence and Analysis*, 2011, pag 16. Details at www.instituteforgovernment.org.uk/policy.

According disp. art. 2 para. 2 letters b and c of this law, the principles underlying decisional transparency in Romania are those of consulting citizens and the legally established associations, on the initiative of public authorities, in the process of drafting legislation and active participation of citizens in administrative decision-making and in the process of drafting legislation. According to art. 3 paragraphs. (1) b of Law No. 52/2003 on decisional transparency in public administration, political administrative decisions are obviously made after a deliberative process conducted by deliberative central and local authorities.

On the one hand, the specificity of political-administrative decisions derives from the fact that they are adopted by state or local administration authorities and reflect the political will of the parties that hold the majority in those public authorities. Such decisions have a profound democratic character just because they are the result of the confrontation of ideas between individuals, groups, parties, all participating in the decision-making phenomenon, which is the case of local or county councils where decisions are taken by majority vote. [6].

On the other hand, purely administrative decisions are developed by managers of authorities, public institutions or services, elected or appointed, and usually have an organizing character of the execution and/or concrete enforcement of laws.[7] .

The present study aims to highlight the fact that, regardless of the nature of the decisions taken, the procedure of making them, filtering them and, especially, their implementation is not a simple process, it requires management skills, administrative and life experience, patience, understanding of the social political environment and the ability to adapt the decision to the environment which applies and observes it, engaging more specific aspects of government policy making activity, both at European and Romanian level.

Section 2. Adopting and implementing decisions at European level. General context.

Development of the decision within the European Union is a process involving several institutions and bodies of the Union, the legislative procedure being based on the principle of institutional balance so that all institutions are participating in the legislative process. European Union institutions that interact in decision-making are: the European Council, the European Parliament, the Council, the European Commission or other bodies with an advisory role, the Economic and Social Committee and Committee of the Regions.[8], [9]. Decisions are taken as openly as possible within the European Union, according to the second subparagraph of Article 1 of the Treaty on the European Union. This principle is reflected in Article 15 of the Treaty on the Functioning of the European Union ("TFEU"), which requires the Union's institutions to conduct their work as openly as possible.

The ability of the institutions to make acts which they adopt public is therefore the rule. EU law may provide for exceptions to this rule and prevent the disclosure of such acts or certain information contained therein [10].

The Council of the European Union is the EU's main decision-making body. It represents the Member States, and therefore, is composed of one representative of each EU national government. Each Minister is empowered to commit their Government during meetings and is politically accountable to their own national Parliament and to the citizens that Parliament represents. The acts of the Council can take the form of regulations, directives, decision, common actions or common positions, recommendations, conclusions or opinions. When acting as a legislator, it is in principle the European Commission that makes proposals that are examined by the Council, which can modify them before adopting. Council meetings are limited to specific subject areas, like health and attended by the relevant Ministers from each Member State. [11].

The Council is an *essential EU decision-maker*. It negotiates and adopts new EU legislation, adapts it when necessary, and coordinates policies. In most cases, the Council decides together with the European Parliament through the ordinary legislative procedure, also known as 'codecision'. Codecision is used for policy areas where the EU has exclusive or shared competence with the member states. In these cases, the Council legislates on the basis of proposals submitted by the European Commission. In a number of very specific areas, the Council takes decisions using special legislative procedures - the consent procedure and the consultation procedure - where the role of the Parliament is limited [12].

The EU's standard decision-making procedure is known as 'Ordinary Legislative Procedure' (ex "codecision"). This means that the directly elected European Parliament has to approve EU legislation together with the Council (the governments of the 28 EU countries).

The ordinary legislative procedure gives the same weight to the European Parliament and the Council of the European Union on a wide range of areas (for example, economic governance, immigration, energy, transport, the environment and consumer protection). The vast majority of European laws are adopted jointly by the European Parliament and the Council [13]. The codecision procedure was introduced by the Maastricht Treaty on the European Union (1992), extended and made more effective by the Amsterdam Treaty (1999). With the Lisbon Treaty that took effect on 1 December 2009, the renamed ordinary legislative procedure became the main legislative procedure of the EU's decision-making system. [14].

According to the 288th article of TFEU to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the

choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

The Treaty of Maastricht (the Treaty on European Union-TEU) has introduced co-decision procedure by which the European Parliament is associated with the Council, being given effective legislative competence. The Treaty of Amsterdam has simplified the co-decision procedure and reinforced the role in appointing the Commission. The Treaty of Nice extended the co-decision application in almost all areas where the Council decides by qualified majority. [15].

This form of decision-making about governance is reflective of a more generalised pattern of regulation which has been spreading across Europe, regulation which is directed not at member states or specific sectors or businesses, but at public organisations and public servants (high-level appointees, legislators and civil servants). This pattern of regulation is now also visible in the EU institutions, and has recently begun to be structured inter-institutionally. This idea of regulating the governance of the EU institutions collectively, but outside of any intergovernmental agreement, seems to point to a new trend in inter-institutional relations. [16].

Section 3. About public policy and decision making in Romania, in general and in Galați county, in particular. Approach in the light of the constitutional text and current legislation.

If we look back on the Romanian path for developing policy capacity, several reforms focused on that direction can be found. For example, after its accession to the European Union, Romania developed an institutional structure to ensure the coordination of public policies, a mechanism for inter-institutional consultation, and a normative framework to carry out the public policy documents. [17], [18].

The Lisbon Strategy, adopted in March 2000 at the high-level summit of the European Union, proposed the objective according to which Europe should

become the most competitive and dynamic economy in the world in the next decade. To achieve this goal, the states must be able to use budget planning and public policy in the medium and long term, including initiatives such as better regulation, impact analysis of public policies and improving consultation and participation of civil society structures in developing public policies. [19].

These development directions are followed by new approaches to Government action and its institutions, to make the transition from technical understanding of the legislative process to a thorough analysis of the pre-legislative phase – called public policy analysis - and developing a development system of public policy as the main tool for improving, establishing and promoting quality in the decision making process in the complex socio-economic environment of modern society. [20].

According to the principles described in this Annexe non-governmental organizations, the private sector, local authorities and international institutions contribute to the public policy planning and the institution involved in formulating public policies must prove its readiness for cooperation with other public institutions, as with other civil society organizations interested or affected by a particular public policy initiative, thereby ensuring a coherent conception of the objectives to be fulfilled and the measures to be taken. [21].

In Romania the Constitution is the fundamental document that mentions the right of citizens to engage in social and political decision making that will affect them. Thus, art. 9 -called "*Trade unions, employers and professional associations*" states their right to defend the rights of citizens who are members through actions which protect their rights and interests with respect to the executive representatives or other factors - namely that they contribute to defending their rights and promoting professional, economic and social needs of their members.

According to Article 21 para. 4 special administrative jurisdictions are optional and free, and in accordance with paragraph. (1) of the same text, any

citizen can remove the unfair decisions of an authority or person, being able to go to court to protect the rights, freedoms and legitimate interests.

The right to information is guaranteed by disp. art. 31 - which, in para. (2) states that public authorities, according to their competence, are obliged to provide correct information to citizens in public affairs and matters of personal interest, the mass media being obliged to provide correct information to the public, who, in this way will have a chance to counter the inappropriate actions of policymaking forums or to contest them, including the use of the lever provided by administrative litigation in art. 52 of the Constitution.

The right to petition, the state's obligation to respond to the damage caused, *the right to propose laws* are just a few examples proving the possibility for a citizen of Romania to be part of the decision making process and to engage effectively in most steps leading to the implementation of public policies .

Returning to the executive in Romania, in accordance with Annexe 1 of Government Decision no. 909/2014 approving the 2014-2020 Strategy to strengthen public administration and the establishment of the National Committee to coordinate the implementation of the 2014-2020 Strategy to strengthen public administration, from 10.15.2014 (published in the Official Gazette, Part I no. 834bis of 17 November 2014) in the design and provision of services as in and in making other kinds of decisions, public administration wants to rely on citizen participation, the involvement of experts and key actors in society, through stable mechanisms for consultation, so as public authorities and institutions respond to societal needs, directly supporting its initiatives.

Focus on the citizen is a requirement for any institution that aims to satisfy the needs of citizens. For example, in Romania, Law no. 52/2003 on decisional transparency in public administration, lists the objective of increasing the accountability of the public administration to the citizen, as a beneficiary of the administrative decision and fostering active participation of citizens in the administrative decision making and in the process of drafting normative acts (art. 2 letter a and b). [22], [23].

The 2014-2020 Strategy to strengthen public administration is aimed at the predictability and lawfulness of the decision-making process (article III, Annexe 1 of Government Decision no. 909/2014), so that, by using systematic dialogue, genuine dialogue about the options available, the public administration develop and maintain a culture of anticipatory knowledge, constantly using new information technologies (art. II, art. III, Annexe 1 of Government Decision no. 909/2014, 2014-2020 Strategy to strengthen public administration).

In defining strategic objectives for 2014-2020, the institutions involved have proposed to outline a coherent approach whose application to generate a substantial improvement in business administration activity, which entails the establishment of a mechanism of cooperation and consultation with civil society and also its accountability in order to support implementation, monitoring and evaluation of these reform initiatives, namely establishing a mechanism for coordination of implementing reform measures supported at the highest level, managed by the Prime Minister and the Ministry of Regional Development and Public Administration, which should be accompanied by transparent monitoring and evaluation and which allows the involvement of representatives across the political spectrum, academia and civil society. [24].

To create a context for the involvement of citizens in decision-making, and to prove the compliance with the principles of decision making transparency within the county of Galați, the County Council made an annual transparency report for 2015 at the level of Galați County Council at the end of 2015, according to Law no. 521/2003 , which emphasized the following:

1. Transparency towards the citizens in the decision making process;
2. Cases in which the authority was sanctioned in court for failure of transparency in decision making;
3. The actual number of people who attended public meetings;
4. The number of public meetings that were announced through media, display at its headquarters or on its website;

5. The number of projects submitted to business associations and other legally constituted associations that have submitted a request to receive information on the draft laws in their field of activity [25].

The conclusion, we believe, was a positive one, to the extent that:

- The number of draft laws adopted in 2015 was 10, while the number of draft laws that were publicly announced was also 10;

- The number of projects submitted by business associations and other legally constituted associations that have made a request to receive information on the draft laws in their field of activity was a small one -10 - but it shows their interest in making decisions, that is, the open approach of the authorities to other structures in order to take appropriate measures to the local social and economic environment;

- There were 2 persons appointed to facilitate the relationship with civil society;

- The total number of persons who were present at public meetings of the County Council was 520, which shows some increase of the ordinary citizen's interest, non- politically involved, in the phenomenon of making decisions important for the community which they belong to. [26].

All these demonstrate that the local government authority respects the principles governing decision transparency, under article. 2 of Law no. 52/2003, respectively informing the people in advance, ex officio, on matters of public interest which will be discussed by central and local public administration authorities, and on draft legislation; consulting citizens and legally established associations on the initiative of public authorities, in the process of drafting legislation and the elaboration of a realistic program to improve communication with citizens, a component that must become essential in the phenomenon of law enforcement.

However, as regards the perception of ordinary citizens across Galați² county, when questioned about the factors that may influence the public decision in the territorial administrative unit which they belong to, they had varied answers, like:

- Public decision is affected by the indifference of public officials or the different types of public relations between decision-makers;
- Public decision is deeply affected by European policies and the vision of the Council of Europe on the course of political affairs in the E. U. Member States;
- Public decision is affected by the prevailing interests of the majority groups;
- Public decision is influenced by citizen feedback, the experience of the decision makers or the media;
- Public decision is influenced by economic factors (the budget of the administrative unit and its management).

Section 4 . Conclusions

The public decision making process is a complex phenomenon that involves both legal knowledge and a realistic involvement of the decision maker in the political, social and administrative context.

Most times there is an estrangement of those who are meant to take decisions from those on which decisions are to produce effect, which indicates an insufficient experience of the administration, superficiality in the approach to the needs of the citizen who feels like an insignificant element in a process that, even if it must include and consult them, it constantly neglects them.

² The questionnaire was applied to a group of approximately 25 young people, aged between 18 and 22, secondary education graduates or university graduates, in Galați county.

We note, however, as evidence of the Romanian administration authorities' desire to adopt European modernization techniques, that there has been a phenomenon of improving the way the administration highlights the social and human capital at the level of local groups, of assuming an open communication with those who bear the tough impact of decisions, which is an advantage for society and a step forward in the process of modernization and reform of the Romanian administration.

The questionnaire applied to citizens belonging to Galați county shows, in a limited but realistic way, the current impression of the ordinary citizen on the relationship between the administration and the citizen, between the decision-maker and those who must accept and bear the effects of decisions which are sometimes perceived as having an emphasized political background to the detriment of the public interest or the proper functioning of the administration.

The future of the administration and the quality of the decisions depend, to a large extent, on the real closeness of the national authorities to the citizen and the actual involvement of the latter in all its administrative processes that concern the local community and the social, cultural, economic, local priorities.

References /Bibliography:

- [1]James E Anderson, (2015), Public policymaking. The eighth edition, Texas A and M University, pp. 1.
- [2]Ibidem, pp. 5;
- [3]Michael Hallsworth, Simon Parker, Jill Rutter, (2011), Institute for Government, Policy making in the real world, Evidence and Analysis, pag. 16;
- [4]Dorina Țicu, (2014), Politicile publice, Raționalitate și decizie în spațiul administrativ, Ed. Adenium, pp.. 2;
- [5]Ibidem, pp. 2;
- [6]Anton P. Parlăgi, (2013), Tehnici și metode ale adoptării deciziei publice, Suport de curs, Edit Pro Universitară, București, pp 15;
- [7] Idem;
- [8]Dan Vătăman, (2010), Institutional law of the European Union, Bucharest, Universul Juridic Publishing House, pp. 179;
- [9].Dan Vătăman, (2016), Decision making process in the european union after entry into force of the treaty of Lisbon in Law Review, no 1/2016, pp. 2;
- [10].See Judgment of the General Court of 28 January 2015, Akzo Nobel NV and Eka v Commission, T-345/12, ECLI:EU:T:2015:50, paragraph 60, Judgment of the General Court of 28 January 2015, Evonik Degussa v Commission, T-341/12, ECLI:EU:T:2015:51, paragraph 89 and Judgment of the Court of First Instance of 30 May 2006, Bank Austria Creditanstalt v

Commission, T-198/03, ECLI:EU:T:2006:136, paragraph 69, in Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003; at http://ec.europa.eu/competition/antitrust/guidance_on_preparation_of_public_versions_antitrust_04062015.pdf);

[11]. http://www.eurocare.org/resources/policy_issues/eu_health_strategy/the_eu_institutions_and_the_decision_making_process;

[12]. <http://www.consilium.europa.eu/en/council-eu/decision-making/>;

[13]. <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers.>;

[14]. <http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00004/Legislative-powers>);

[15]. Dan Vătăman, (2016), Decision making process in the european union after entry into force of the treaty of Lisbon in Law Review, no 1/2016, pp. 2;

[16]. Michelle Cini, The Limits of Inter-Institutional Co-operation: Defining (Common) Rules of Conduct for EU Officials, Office-holders and Legislators, in Decision-Making in the European Union Before and After Lisbon, 3-4th of November 2011, Leiden University, Sholary Workshop, at http://ces.ufl.edu/files/Cini_DEUBAL_110311.pdf);

[17]. Ani, Matei,, Tatiana-Camelia, Dogaru., (2013). Coordination of Public Policies in Romania. An Empirical Analysis, Procedia - Social and Behavioral Sciences 81, pp. 65 -71;

[18]. Tatiana - Camelia Dogaru, (2014), The national policy-making process in the context of the international economic and financial movements, in Procedia Social and Behavioral Sciences, 143/2014, pp. 965;

[19]. Annex 1 of Government Decision no. 870 of 28 June 2006 approving the Strategy for improving the development, coordination and planning of public policies at central government level, Official Gazette no. 637/24. 07. 2006;

[20]. Annex 1 of Government Decision no. 870 of 28 June 2006 approving the Strategy for improving the development, coordination and planning of public policies at central government level, Official Gazette no. 637/24. 07. 2006;

[21]. Annex 1 of Government Decision no. 870 of 28 June 2006 approving the Strategy for improving the development, coordination and planning of public policies at central government level, Official Gazette no. 637/24. 07. 2006;

[22]. Dan Șandor, (2006), Romania's Digital Divide and the Failures of E-Government", Transylvanian Review of Administrative Sciences, vol. 16E, pp. 154;

[23]. Raluca Andrada Baltaru, (2012), Reforma în administrația publică. studiu privind e-guvernarea la nivelul uniunii europene, Revista Transilvană de Științe Administrative 1(30)/2012, pp. 23;

[24]. Also see the suggestions of this strategy in the National Gazette no. 834/17.11.2014, http://www.mdrap.ro/userfiles/strategie_adm_publica.pdf);

[25]. <http://www.cjgalati.ro/images/stories/Comunicate11/raport-transparenta-2015.pdf>;

[26]. <http://www.cjgalati.ro/images/stories/Comunicate11/raport-transparenta-2015.pdf>.

THE PRIME MINISTER AND THE SUPREME COUNCIL OF NATIONAL DEFENCE

Associate professor Mihai Cristian APOSTOLACHE, PhD.

Petroleum-Gas University of Ploiesti
mihaiapostolache5@yahoo.com

Abstract

The Prime Minister is the fourth most important position in the state, after the President of Romania, the Chairman of the Senate and the Chairman of the Chamber of Deputies. According to the constitutional and legal provisions, the Prime Minister has the role of leading the Government and coordinating the work of the Government members, and they can not be revoked by the President of Romania. But the Prime Minister is also the vice president of the Supreme Council of National Defence. This article aims to analyze this quality of the Prime Minister conferred by the legislation in force and the constitutional and legal status of the Supreme Council of National Defence.

Key words: *the Supreme Council of National Defence (CSAT), Prime Minister, law, Constitution, Government.*

General aspects

According to Article 102 paragraph 3 of the Constitution of Romania, the Government consists of the Prime Minister, Ministers and other members established by the organic law. The organic law by which the Romanian Government is organized and operates is Law no. 90/2001, as amended and supplemented. Article 107 of the revised Constitution enshrines the constitutional status of the Prime Minister, giving him the power to lead the Government and

coordinate the activity of its members. The function of coordinating the activity of the government team stems from the role that the Prime Minister has in the formation of the Government. Regarding the prerogative of leading the Government, as highlighted in the doctrine[1], the Romanian constituent opted for a solution compatible with solutions from other European constitutions. Thus, it can be seen that despite its special legal position[2], so established by the constitutional provisions, as well as those of Law no. 90/2001, the Prime Minister leads the Government and coordinates the activity of its members, respecting the attributions of each function, without the power of injunction[3]. In the Romanian constitutional system, the Prime Minister holds similar position and responsibilities to that of a premier from other democratic countries with parliamentary systems of government[4].

The Prime Minister of Romania is also the vice president of the Supreme Council of National Defence, the president of that body being the Romanian president. The Supreme Council of National Defence is a fundamental institution of the Romanian state, a status conferred by Article 119 of the Romanian Constitution. The nature of the Supreme Council of National Defence as a fundamental state institution is emphasized both by its constitutional status, and by the fact that its organization and functioning, i.e. its legal regime, are regulated, under Article 73 paragraph (3) letter e) of the Constitution, by organic law.

An institution of tradition[5] in the Romanian constitutional system, the Supreme Council of National Defence has its origins in the interwar period, ranging in the Romanian Constitution of 1923, in Article 122, its legal regime being outlined by the Law of 14 March 1924.

The constitutional status of the Supreme Council of National Defence

Re-established by Law no. 39/1990[6], the Supreme Council of National Defence found, in 1991, the constitutional consecration, despite criticism from certain politicians and media[7], the material being initially comprised in Article

118, and after revising the Constitution of Romania in 2003, in Article 119. To understand both the legal nature of this body, and its role and place in the Romanian constitutional system, Article 119 should be read in conjunction with Article 65 paragraph 2 letters f) and g), Article 73 paragraph 3, letter e), Article 92 paragraph 1, Article 116 paragraph 2, Article 117 paragraph 3, a requirement that needs to be respected for the unrevised constitutional text as well[8]. We must not lose sight of the fact that Article 118 of the revised Constitution refers to the armed forces and, taking into account the mission of CSAT (the Supreme Council of National Defence) stated in Article 119, it is natural that this last article be examined in connection with Article 118. According to Article 119 of the revised Constitution of Romania, the role of the Supreme Council of National Defence is to unitarily organize and coordinate activities concerning national defense and security, to participate in maintaining international security and the collective defense in military alliance systems, as well as actions to maintain or restore peace. As outlined in the literature[9], if in its original form the Romanian Constitution only referred to the duties of the domestic nature of CSAT, following the revision of 2003 extended its attributions, including in its scope and tasks of external nature. Empowering the Supreme Council of National Defence is a consequence of our country acquiring the status of NATO member. In this new context, the functions of the armed forces have undergone significant changes to their internal defense function, adding also the collective defense in military alliance systems and participation in actions to maintain and restore peace. The latter function is exercised both in terms of the law, and the international treaties to which Romania is a party[10].

Placing the Supreme Council of National Defence in Title III, Chapter V - Public Administration Section 1 - The specialized central public administration confers this collegial body the legal status of central public administration authority of autonomous specialization. The corroboration of Article 119 with the other articles mentioned leads to the conclusion, also highlighted in the doctrine[11], that we are in the presence of a specialized central public

administration authority of autonomous character, established by organic law, chaired by the president and subject to parliamentary scrutiny. This status is also emphasized by the Romanian Constitutional Court, which, in Decision No. 1008/2009 notes that CSAT “is an authority of central public administration with autonomous character, which, according to Article 65 paragraph (2) letter g) and Article 111 paragraph (1) of the Constitution, is under direct parliamentary control”.

Comparative law

Such a collegial body is found covered in the constitutions of other countries within the European Union. Moreover, *“the collegial formula as a way of organizing autonomous administrative authorities represents the most widely adopted solution, the number of the members of the college varying from one authority to another”* [12]. The Constitution of the Italian Republic, in Article 87, states that the “President of the Republic is the president of the Supreme Defence Council established under the law”. The Constitution of the Republic of Bulgaria, in Article 100, paragraph 3, refers to the Advisory Council for National Security, adding that this body is chaired by the President of the Republic and its status is established by law. The Estonian Constitution, in Article 127 paragraph 2, provides that “the President of the Republic is assisted by a National Defense Council” defined as an advisory body whose structure and responsibilities are stipulated by law. The French Constitution does not expressly regulate such a body, but states in Article 15 the fact that the president is the Supreme Commander of the Armed Forces, and in this capacity, he chairs the higher councils and committees of national defense. The State Defence Council is covered in the Constitution of Lithuania in Article 140. According to this article, “the main issues in national defense matters are discussed and coordinated by the State Defense Council”, a body chaired by the President of the Republic and where the President of the Republic enters, the Prime Minister, the Chairman of the Parliament, the Minister of National Defence and the Commander of the

Armed Forces. The method of forming this body, together with its activities and competencies, are established by law, according to Thesis 2 of the Article 140. The Polish Constitution, in Article 135, regulates the National Security Council, an advisory body for the President of the Republic in the field of internal and external security. According to Article 144 paragraph 3 of the Constitution of Poland, the President of the Republic is empowered to appoint and dismiss members of the National Security Council. In Portugal, the Constitution regulates, in Article 274, the Supreme Council of National Defense. This body is chaired by the President of the Republic, aspect emphasized both by Article 274 paragraph 1 of the Constitution of Portugal, and by Article 133 letter o). The competence to appoint members of the Supreme Council of National Defence belongs to the Assembly of the Republic, and as a legal status, it takes the form of an advisory body specific for issues related to national defense and the organization, functioning and discipline of the armed forces, exercising administrative powers conferred by law. In the Hungarian Constitution, in Article 45, there is mentioned the National Defense Council, whose structure and competence are regulated in Article 49.

From the above information, it can be seen that bodies similar to the Supreme Council of National Defence of Romania are regulated in the constitutions of other European countries, having taken into account the constitutional tradition of the respective states and the particularities of the constitutional systems of those states. Not a new institution in the Romanian constitutional landscape, or in the European constitutional one, this public authority with a constitutional rank^[13] is organized and operates under its organic law, Law no. 415/2002. This legislation is complemented by the provisions of Law no. 51/1991 on the national security of Romania.

The legal status of the Supreme Council of National Defence

The normative act that develops the constitutional norms regarding the CSAT is Law no. 415/2002^[14] on the organization and functioning of the

Supreme Council of National Defence, which repealed the pre-constitutional Law no. 39/1990.

Unfortunately, this normative act has not been linked with the constitutional provisions resulting from the revision of the Constitution, the first article of the law being different both in terms of content regulation, and the terminology of the constitutional text contained in Article 119 of the Romanian Constitution, fact which prompted the doctrine[15] to appreciate that it is necessary to amend this law so that the legal role of CSAT be made consistent with that established by the constitutional text, and terminology used in the Constitution be taken in the law so as to eliminate any terminological differences. Based on its constitutional and legal status, CSAT is not subordinated to the Government or any other public institutions, its autonomy excluding any form of subordination[16]. However, this independent entity, like all autonomous administrative authorities, can not act in contradiction with the government decisions or ordinances [17].

The autonomous central authorities doctrine are qualified by the doctrine[18] as field bodies with a special status and are classified according to their purpose and object of activity in bodies of synthesis, coordination and control. The Supreme Council of National Defence falls in the category of bodies of coordination. The emergence of these authorities in the institutional system is the result of the democratic practice[19].

Law no. 415/2002 develops the constitutional norms and broadly regulates the duties of CSAT. According to Article 4 of law, the competence of the Supreme Council of National Defence includes the following:

a) analyzes and/or proposes, according to the law, to promote the strategy of National Security of Romania and the national strategy for national defense, the military strategy of Romania and the strategies of public order and national security of Romania, in relation to the responsibilities of authorized institutions; data, information and assessments provided by intelligence services and other structures with responsibilities in national security;

b) if requested by the President of Romania, analyzes and proposes measures for the establishment of the state of siege or state of emergency throughout the country or in some localities; declares partial or general mobilization of the armed forces; rejects armed aggression against the country; declares a state of war and its cease; initiates, suspends or terminates military actions;

c) proposes for approval the implementation of the mobilization plan of national economy and state budget execution, for the first year of war; the measures necessary to defend and restore the constitutional order;

d) approves the draft normative acts initiated or issued by the Government on national security; generally organizes the armed forces and other institutions with responsibilities in national security; organizes and operates the Supreme Council of National Defence; trains the population, economy and territory for defense; budget proposals of institutions with responsibilities in national security; budget allocations for ministries and services with attributions in the field of defense, public order and national security; conditions of entry, passing or stationary on the Romanian territory of foreign troops; appointments stipulated in the organizational states with the rank of Lieutenant General, Vice Admiral, similar and superior to these;

e) submits for approval to the commander of the armed forces the plans for use of forces in peacetime, in crisis and in war;

f) approves: basic orientations in international relations on national security; draft international treaties and agreements on national security or with incidence in this field; establishes relations with similar bodies abroad, with the institutions and structures with responsibilities in national security; the completion of military structures, according to the states of organization in peacetime; the execution of battle alarm to bring military structures in the state that allows them the passage, on order, to fulfill combat missions; the action plans to declare mobilization and to declare a state of war; the action plans when declaring the state of siege and state of emergency; the project for the mobilization of national economy and the draft state budget for the first year of war; the verification plan for the population

preparation stage for defense through mobilization drills and exercises; the distribution of the number of recruits set in the institutions involved in national security; the objectives of territory preparation to ensure the operational needs of the national defense forces; the nomenclature and levels of reserve mobilization; the multi-annual programs on equipping the national defense forces; the militarization, under the law, of economic operators whose business is directly related to providing the resources necessary for defense; the joint plan of intervention units of the Ministry of Defense and Ministry of Internal Affairs to limit and eliminate the effects of disasters on the national territory; the regime of special telecommunications networks and equipments and the criteria for allocating the subscriber stations for the users of such networks; the organizational structure and powers of the General Staff; setting the position of military commander subordinated to the General Staff and its responsibilities for providing unitary leadership in wartime; the people and objectives that benefit from protection and guarding of the Protection and Guard Service and the rules concerning antiterrorist protection of Romanian and foreign dignitaries as well as other officials; the reports and information submitted by the heads of government bodies, relating to national security; general plans to search for information submitted by the institutions and organizations with responsibilities in national security; the main directions of activity and general measures necessary to remove the threat to national security; the organizational structure, personnel and operating regulations of the Romanian Intelligence Service, Foreign Intelligence Service, the Special Telecommunications Service and Guard and Protection Service; the expenses destined to achieve national security; the norms regarding planning, registry, use, justification and control of operational costs for achieving national security for institutions with responsibilities in this area; the annual accounts of budgetary execution of operational expenditure for achieving national security, of the institutions responsible for national security, after the approval of the reports on the work performed by them; setting up, closing, deployment and redeployment, in peacetime, on the national territory of large military units, from

the brigade rank upwards; proposals to grant the rank of marshal, general, admiral and similar ones;

g) coordinates the integration into European and Euro-Atlantic security structures, monitors the adaptation of the armed forces to NATO requirements and formulates recommendations in accordance with the standards of the Alliance;

h) appoints and revokes to/from office, in the cases and under the conditions established by law;

i) exercises any other attributions provided by law in the field of state defense and national security.

The Prime Minister as vice president of the Supreme Council of National Defence

Law no. 90/2001 on the organization and functioning of the Government establishes in Article 14 that the Prime Minister is the Vice president of the Supreme Council of National Defence, exercising all powers derived from this quality. Such a regulation is to be found also in Law no. 415/2002 on the organization and functioning of the Supreme Council of National Defence, in Article 5 paragraph 2. The President of the Supreme Council of National Defence is the President of Romania. If for the president, the quality of president of the Supreme Council of National Defence is established by the Constitution, for the Prime Minister, the quality of CSAT vice president is the result of the will of the organic legislature.

CSAT operates in secret working sessions which are convened by the President or by at least one third of CSAT, quarterly or whenever necessary. At the end of each session, a protocol is drawn up, signed by the president, the secretary and the members present at the session, a document that contains the findings and decisions adopted in the respective CSAT meeting.

Besides the president and vice president, the Supreme Council of National Defence comprises the following members: the Minister of National Defence, the

Minister of Administration and Interior, the Minister of Foreign Affairs, the Minister of Justice, the Minister of Industry and Resources, the Minister of Public Finances, the Director of the Romanian Intelligence, the Director of the Foreign Intelligence service, the chief of General Staff, the presidential counselor on national security. The people who make up the Supreme Council of National Defence are aided in their work by a secretariat operating within the Presidential Administration and which is coordinated by the Secretary of the Supreme Council of National Defence.

In 2008, by Government Emergency Ordinance no. 224/2008[20] for the amendment of Article 5 paragraph 2 of Law no. 415/2002, there was introduced a second position of vice-president of CSAT, which was to be held by the Senate chairman. Practically, this legislative change allowed that in the structure of CSAT enter both representatives of the executive power, and also of the legislative power, which led to the violation of the principle of separation and balance of powers[21], governed by Article 1 paragraph 4 of the Constitution of Romania. This was also underlined by the Constitutional Court [22], declaring the unconstitutionality of the law approving the ordinance, and implicitly the normative act approved by the law. With the declaration of unconstitutionality of the ordinance, there was a return to the initial composition of the CSAT, the only vice president of this structure being the Prime Minister. The Supreme Council of National Defence operates under Article 10 of Law no. 415/2002, under the rules of procedure. The current rules of procedure of the CSAT were approved by Resolution no. 3 in the meeting on 10 February 2003.

The Supreme Council of National Defence adopts, by consensus, decisions which are signed by the president and are mandatory for the public authorities and public institutions referred to, CSAT gaining, under Article 3 of its law of organization and functioning, a regulatory power[23]. Being an authority under parliamentary control, CSAT must report annually to the Parliament, at the request of specialized standing committees of the Parliament or whenever necessary.

The Prime Minister, in his capacity as vice president of the Supreme Council of National Defence, leads the CSAT sessions in case the President is absent. Also, the prime minister is consulted by the president when the agenda is drawn up for the CSAT meeting. Last but not least, the prime minister approves the proposals of the ministries that are to be included on the agenda of the CSAT meeting. Therefore, *the prime minister, as vice president of CSAT, is the rightful replacement of the president, when absent from meetings of the Council*, is consulted when drawing up the agenda for the CSAT meeting and has the endorsement right for the initiatives coming from ministries.

Conclusions

Our analysis attempted to highlight the importance of the Supreme Council of National Defence within the state institutional mechanism, and especially the role of the Prime Minister in his capacity as vice president of this body. Usually, when discussing the position of head of government, the approach aims at the responsibilities of leadership and coordination of the government team, rather than the role of the Prime Minister within the entity vested by the Constitution with the prerogative of unitary organization and coordination of the activities relating to country defense and national security, participation in maintaining international security and collective defense in military alliance systems, as well as actions of maintaining or restoring peace. Starting from the constitutional role of the CSAT and its legal responsibilities, there results, unquestionably, that this quality of the Prime Minister as the Vice President of the Supreme Council of National Defence is highly important, especially when it becomes the replacement of the President of Romania in the CSAT.

We could see from the analysis of the legal provisions for the organization and functioning of the Government and the organization and functioning of the Supreme Council of National Defence, that the Vice president of CSAT leads the session of this forum when the president is absent, is consulted by the president about preparing the agenda of the CSAT meeting and is the one who endorses

the proposals of the ministries that are to enter the agenda of the Council meeting. These powers require competence, experience in the conduct of public affairs, determination and spirit of sacrifice, and the lack of any vulnerabilities. These are qualities that need to be taken into account when designating the person who will exercise the function of prime minister because, beyond the eminently political character of the Government, the person in the forefront takes part in crucial decisions for the nation, or even imprints, through the CSAT meeting management, the meaning of those decisions. We are in a historical phase characterized by uncertainty and phenomena which are difficult to anticipate and counteract, some of which may affect national security, thus forcing us to ponder and to have professionals and spotless policy makers. As Mircea Djuvara appreciated, “each public service should be managed by a person to make a profession of it, and not to deal with it only by chance and sporadically, because otherwise we can not reach a good administration”[24].

References:

- [1] Antonie Iorgovan in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tanasescu, *Constitutia Romaniei revizuita, comentarii si explicatii*, All Beck Publishing House, Bucharest, 2004, p. 180
- [2] Valentin Prisecaru, *Tratat de drept administrativ roman. Partea generala*, 3rd. ed., Lumina Lex Publishing House, Bucharest, 2002, p.133
- [3] Antonie Iorgovan in Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tanasescu, *Constitutia Romaniei revizuita, comentarii si explicatii*, All Beck Publishing House, Bucharest, 2004, pp. 180-181.
- [4] Bogdan Dima, *Conflictul dintre palate*, Hamangiu Publishing House, Bucharest, 2014, p. 47.
- [5] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C. H. Beck Publishing House, Bucharest, 2008, p. 1140
- [6] Published in the Official Gazette of Romania, issue 142 of 13 December 1990.
- [7] Victor Duculescu, Constanta Calinoiu, Georgeta Duculescu, *Constitutia Romaniei comentata si adnotata*, Lumina Lex Publishing House, Bucharest, 1997, p. 361.
- [8] Antonie Iorgovan in Mihai Constantinescu, Ion Deleanu et al., *Constitutia Romaniei comentata si adnotata*, Regia Autonoma “Monitorul Oficial”, Bucharest, 1992, p. 268.
- [9] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck, Bucharest, 2008, p. 1141
- [10] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck, Bucharest, 2008, p. 1134
- [11] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck, Bucharest, 2008, p. 1142
- [12] George Girsteanu, *Autoritati administrative autonome*, Universul Juridic Publishing House, Bucharest, 2011, p. 42.

- [13] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck, Bucharest, 2008, p. 1142.
- [14] Published in the Official Gazette of Romania, Part I, issue 494/10.07.2002
- [15] Verginia Vedinas in Ioan Muraru, Elena Simina Tanasescu et al., *Constitutia Romaniei. Comentariu pe articole*, C.H.Beck, Bucharest, 2008, pp.1145-1146.
- [16] Verginia Vedinas, *Drept administrativ*, 9th ed., revised and updated, Universul Juridic, Bucharest, 2015, p. 419
- [17] Emil Balan, *Institutiile administrative*, C.H.Beck, Bucharest, 2008, p. 92.
- [18] Antonie Iorgovan, *Tratat de drept administrative*, vol.1, 3rd ed., All Beck, Bucharest, 2005, p. 447; Verginia Vedinas, *Drept administrativ*, 9th ed., revised and updated, Universul Juridic, Bucharest, 2015, p. 419
- [19] Emil Balan, *Institutiile administrative*, C.H.Beck, Bucharest, 2008, p.91
- [20] Published in the Official Gazette of Romania, Part I, issue 899 of 31 December 2008.
- [21] Mihaela Adina Apostolache, *Rolul parlamentelor nationale in elaborarea si aplicarea dreptului european*, Universul Juridic, Bucharest, 2013, p. 17.
- [22] Decision of the Constitutional Court of Romania no. 1008 of 7 July 2009, published in the Official Gazette of Romania, Part I, no. 507 of 23 July 2009.
- [23] George Girlesteanu, *Autoritati administrative autonome*, Universul Juridic, Bucharest, 2011, p. 95.
- [24] Mircea Djuvara, *Teoria generala a dreptului*, All Beck, Bucharest, 1999, p. 100.

CONSTITUTION AND THE CONTEMPORARY CONSTITUTIONALISM

Marius ANDREESCU, PhD.

Faculty of Economic Sciences and Law, University of Pitesti (ROMANIA)
andreescumarius@yahoo.com

Andra PURAN, PhD.

Faculty of Economic Sciences and Law, University of Pitesti (ROMANIA)
andradascalu@yahoo.com

Abstract

In a democratic society, the judicial legitimacy of the state and its power, of its institutions, but also the social and political grounds are generated and determined by the Constitution, defined as expressively as possible as being: "The fundamental political and judicial settlement of a people" (I. Deleanu)

The supremacy of the Constitution has as main effect the conformity of the entire system of law with the constitutional norms. Guaranteeing the compliance with this principle, essential for the state of law, is first of all an attribution of the Constitutional Court, but also an obligation of the legislative power to receive, through the adopted normative acts, in content and in form, the constitutional norms.

Altering the fundamental law of a state represents a political and judicial act extremely complex with major meanings and implications for the socio-political and national systems, but also for each individual. This is why such measure should be very well justified, to answer certain socio-political and legal needs well shaped and mainly to match the principles and rules specific to a democratic constitutional and state system, by insuring its stability and functionality.

These are a few aspects of the Romanian contemporary constitutionalism that this study shall critically analyse in order to differentiate between the constitutional ideal and reality.

Keywords: *Constitution, constitutional supremacy, constitutional ideal and reality, fundamental rights, discretionary power of the state, constitutional reform.*

1. Political and judicial meanings of the Constitution

For any people, for any form of modern social state organization, the Constitution was and is an ideal given by the meanings and role of the fundamental law especially for each one's social existence.

In modern history, starting with the 18th century, the *constitution* has been imposed along with other major institutions created with the purpose of expressing the political, economic or legal structural transformations as the

fundamental law of a state. Towards the importance and meanings of the Constitution, of the practices in this area, it is considered as the fundamental political and judicial settlement of a state. This is why the Constitution was and is created in a broader vision, exceeding the politics, not only as a fundamental law, but also as a political and state reality identifiable with the society it creates or shapes and for whom its adoption has the meaning of a true revolution.

The constitution states the fundamental principles of the economic, political, social and legal life, in accordance with the fundamental values promoted and protected by the state. The people, according to Hegel, must have, for his constitution, the feeling of his law and state of fact, thus it may exist, in an exterior form, but without meaning and value. How current are the words of the great philosopher saying that “The constitution of any given nation depends in general on the character and development of its self-consciousness”.

The value, content and meanings of the constitution as an ideal of a democratic society were clearly stated by the constitutional acts and constitutions opening the way for the constitutional process. Thus, the French Declaration of the Rights of Man and of the Citizen of 1789 stated that “Any society, in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution”. The United States Constitution, the first written constitution in the world, in 1787, stated in its preamble that “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America”. As stated by the American legalists the spirit of constitutionalism has found its climax in the American Constitution. Therefore, right from its apparition, the constitution has been considered and analysed in opposition to absolutism, as a limitation in the arbitrary performance of power. Once this purpose has been fulfilled, the constitutionalism continued to play an important and, most of all, progressive role

in history, aiming the efficient guarantee of the fundamental rights and freedoms for citizen.

The ideal of constitutionalism is best expressed by the notion of the *state of law*. Moving from the state's law to the state of law was and still remains a long and difficult process enlisted between the poles of contradictory values. Conceptually, on the foundation of the construction of the state of law is the idea of rationalizing the system of law and of emphasizing its efficacy. The essential requirement of the constitutional ideal of the state of law is represented by the subordination of the state towards the law and the limitation of the state's power using the law. The supremacy of the law and, implicitly, of the constitution, forces the state authorities to comply with the fundamental rights and freedoms of the citizens, to withheld from any arbitrary interference in their performance, moreover to adopt politically and legally appropriate and necessary means for the preservation and affirmation of the fundamental rights.

Indeed, the constitutions, in a state of law which assumes the compliance of legality and the rule of law, the protection of the individual and of the citizen in his relations with the power, the performance of the entire state activity based on and within the strict limits of the law, are or might be an obstacle in the way of the arbitrary, if they express the general will and their respect becomes a "religion" for the governors.

The ideal of the constitution, as well as of the constitutionalism, is also expressed by the concept of the supremacy of the constitution. We may say that the supremacy of the constitution is one of its qualities placing it on top of the politico-legal institutions of a state and makes the constitution the source of all regulations in the political, economic, social and legal areas. The most important consequences of the supremacy of the constitution are the conformity of the entire legal system with the constitutional norms and the fundamental obligation of the state authorities to perform their attributions within the limit and in the spirit of the constitution.

Of course, the constitution's supremacy would represent only an ideal if there were not any specific guarantees which mainly allow the control of power and the avoidance of its evolution towards the arbitrary. Among these guarantees, only two of them are more important: the control of the constitutionality of the laws which represent an important counterweight to the parliamentary and governmental powers, while the second one refers to the establishment of the principle to free access to justice. In a constitutional system based on the constitution's supremacy, the control performed by the courts represent an important guarantee of the compliance with the citizens' rights and freedoms, especially in their relations with the executive authorities.

The essence and finality of the constitution, as well as of the constitutionalism as a historic process consists in the achievement of a balance between different realities and forces, but which must coexist and harmonize to insure the social stability, the individual freedom, but also the legitimacy and functionality of the state's authorities. In other words, the purpose of a democratic constitution consists in the achievement of a fair and rational balance between different realities, between individual and public interest. In the meaning of the above mentioned, Prof Ioan Muraru stated that "In socio-legal and contemporary state realities, the constitutionalism must be seen as a complex politico-legal status, expressing at least two aspects: a) on the one hand, the constitution must reflect the demands of the movement of ideas (originating in its evolution) on the state of law and the democracy, public freedoms, organization, functioning and balance of powers; b) on the other hand, the large reflection of the subjects of law regarding the constitutional provisions. This mutual reflection is the only one able to insure the efficiency and viability of the constitution; it may insure the concordance between the constitutional rules and the political practice".

We have discussed about what could be considered as the ideal of the constitution and the constitutionalism. The reality of a constitution mainly represents the interpretation and application of the fundamental law, but especially the compliance with its provisions by the public authorities. There

cannot be an ideal, perfect and immutable constitution. The constitution, as fundamental law, in order to be efficient, must be adjusted to the social, economic and political realities of the state. The dynamic of these factors shall eventually determine alterations of the constitutional norms. The achievement of an adequate relation between the constitution and the political, ideological, economic and state's realities is a complex matter, which must not be formally understood. We emphasize the fact that strictly juridical, the constitution may define both a liberal regime, as well as dictatorial one. If in any type of state, either democratic, or totalitarian there is a constitution, one cannot state that there is a real constitutional regime everywhere. The features of the constitutional regime existing at some point in history in a state, but also the way in which is perceived and complied with, the constitution determines the reality of the fundamental law and of the constitutionalism.

The differences which may arise between the constitutional ideal above expressed, and on the other hand, the reality of the constitutionalism existing in every state is justified by objective and subjective factors. Among the objectives factors, we identify:

a) the dynamic of the social life in relation to the stability of the constitution. The inevitable transformations in the social, economic, political or legal life of a state led to a distance between these realities and the viability and efficiency of the constitutional norms. This situation is one of the factors determining the revision of the fundamental law;

b) the constitution has all the features of a normative act, therefore the application of the fundamental law requires an interpretation of the public authorities, which may imply a different reception of the constitution;

c) there may be cases in which the constitutional regulations, though democratic in their essence are in contrast with the socio-economic realities of the moment, inferior towards the democratic constitutional principles. Such situation inevitably leads to a reduced reception of the constitutional norms among the population and to its inefficiency. The history of the Romanian

constitutionalism offers a conclusive example in this meaning, if we consider the period between 1866-1938, in which the reality of the Romanian constitutionalism was inferior to the values and principles stated by the Constitutions of 1866 and 1923.

There are also subjective factors we might determine a difference between the constitutional values, and on the other hand the way in which are respected and applied. The tendency of the central authorities to abuse the power, attempting to authoritatively exercise powers, sometimes in disregard with the constitutional norms, represents an important subjective factor denaturing the norms and spirit of the constitution, with the consequence of building a political, economic and social reality obviously contrasting with the fundamental law.

We shall exemplify the above mentioned with brief mentions to the Romanian Constitutions of 1866, 1923 and 1991.

The Constitution of 1866 was mainly a liberal constitution which stated in the area of the legal and political practice the Romanian liberalism, emphasizing the “historical role and purpose” of the Romanian bourgeoisie in the creation of a form of government and of democratic institutions based on the creative valorisation of our traditions in this area. The functionality of the Constitution raised a controverted issue regarding the incapacity of the monarchy and of the central authorities of that time to adjust to the social realities of the country. From a socio-economic perspective, the Romanian society was polarized, the middle class being extremely thin as average (formed only by clerks and liberal professionals). In exchange, the majority of the peasantry recently released from servitude, mostly analphabetic, was in contrast with the reduced average of large landowners, many of them having received a good education in western schools. Under these conditions, the Romanian monarchy system and the Romanian state system were compelled to adjust the political parliamentary regime to the existent social and political structure, and from here on sprang most of the limits of the Romanian constitutionalism, because the general interests of society interfered and were contradictory with the interests of the landowners, amid a

weak economic power of the bourgeoisie crumbled into several factions and political groups. To all these, were added the personal ambitions of the politicians who, often, have seriously complicated the nature of the political area, hardening the acceleration of reforms and the amplitude of the modernization.

Analysed from a historical-political perspective, the Constitution of 1923, as an expression of the real balance of forces during 1919-1923 has represented the main legal settlement on whose base functioned the fundamental institutions of the united Romania, offering the Romanian state the monarchism, but based on the democratic parliamentary regime. The Constitution of 1923 maintains most of the structure of the Constitution of 1866, taking and deepening a series of principles offering the feature of modernity, as well as the real possibility for democratizing the interwar Romanian state and society. In this meaning, under the empire of this Constitution, the principles of representativeness, the separation of powers, the principle of legality and legitimacy of the laws, of the control of constitutionality, as well as the principles regarding the elective system and of the regime of property were much stronger than the one mentioned by the settlement in 1866. So, the Constitution of 1923 has represented a progress in the democratization of the Romanian society.

The application of the Constitution of 1923 has beard the mark of two trends: on the one hand, a series of subsequent legislations have tried to develop the democratic content of some provisions, and on the other hand, certain laws have narrowed the rights and fundamental freedoms. The position of the monarchy in the political practice has led to the reality that the appointment of the Government by the king, followed by the dissolution of the legislative bodies and the organization of new elections was, first of all, the expression of certain deals between the monarch and the representatives of the main parties, consultations which in most cases were the result of subjectivism and personal ambitions represented by the governmental changes. During the interwar period, 11 legislative bodies succeeded, representing their development within half the legal time stated by the Constitution.

Undoubtedly, the Romanian Constitution in force, adopted on 1991 has represented the rebirth of the Romanian constitutional life. The fundamental law of the state represents the fundamental legislative framework for the organization and functioning of the Romanian state and society on democratic bases. Nevertheless, the reality of the contemporary Romanian constitutionalism proves, in most cases, an abandonment of the values and spirit of the Constitution from certain central authorities, through their obvious intent to evolve towards the discretionary performance of the attributions given to them by the law and the biased interpretation of certain constitutional norms. We shall present two examples:

- The right to a decent living is stated by Art 47 of the Romanian Constitution, which states that: “The State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens”. It is a fundamental human right based in the feature as “social state” of the Romanian state, mentioned by Art 1 Para 3 of the Constitution which entails constitutional obligations for the state, namely to adopt political and legislative decisions in the political, economic and social areas, whose finality to be represented not only by the guaranteeing, but also the achievement of this fundamental right. This obligation is more of a constitutional and political ideal, than a legal obligation, because there are no normative criteria based on which it could be evaluated by the constitutional court, if the legislative measures adopted by the state have as result the material, effective, and not theoretical, abstract insurance of decent living for all citizens. The only sanctions if the state does not comply with these positive obligations have a preponderant political nature, and indirectly a constitutional one, such as the adoption of a motion of no confidence for the Parliament.

- According to Art 80 of the Romanian Constitution, the President has the obligation to guard the observance of the Constitution and the proper functioning of the public authorities. In this purpose, the president is the mediator between the state’s powers, but also between state and society. It is a constitutional

provision which may remain in the area of the constitutional ideal, or a political principle, because it is not concretized under the aspect of the means and procedures for achievement, nor is accompanied by specific constitutional sanctions. The Romanian political practice of the last decade proved that there is the possibility of a discretionary manifestation of power from the Chief of state based on this constitutional text.

Obviously, the examples could continue. We aim to emphasize that the constitutional norm, even if in most cases it has the value of a principles, it imposes in its logic the compliance with the syllogism hypothesis – disposition – sanction, to not only stay within the area of the constitutional ideal.

The modification of the Constitution could be necessary if the social and political realities impose it. We consider that the state authorities should be more concerned by the appropriate application of the fundamental law and only in subsidiary by its possible modification. Further, we shall analyse certain legal aspects and aspects of other nature entailed by the initiatives to revise the Romanian Constitution.

2. Constitutional stability and reform

The decision to initiate the revision of the Constitution of a state is, without any doubt, a political one, but in the same time it must have legal basis and to correspond to a historical need of the social system organized as a state from the perspective of its subsequent evolution. Therefore, the revision of the constitution must not be subordinated to political interests at that time, no matter how beautiful they are wrapped, but to the social general interest, well-shaped and possible to be legally expressed.

The late Prof Antonie Iorgovan rightfully stated that “In terms of the revision of the Constitution, we dare to say that where there is a political normal life, one shall express cautious restraints, the imperfections of the texts in their confrontation with life, with subsequent realities are corrected by the interpretations of the Constitutional Courts, namely by the parliamentary customs

or traditions, reason for which the western literature does not longer talks about the Constitution, but about the constitutional block” [1].

The revision of the Constitution cannot have as result the satisfaction of the political interests of the temporary holders of power. In the direction of strengthening the discretionary power of the state, with the inadmissible consequence of damaging certain democratic values and principles, unlike the political and institutional pluralism, the principle of the separation of powers or the principle of the legislative supremacy of the Parliament. Also, the limitations of the Romanian constitutional revision are stated by Art 152 of the Constitution, though the political interpretation of these constitutional provisions may denaturise their meaning and finality.

The two and a half decades of democratic constitutional life in Romania proved that the political power, by its decisions, numerous times it has denaturalised the constitutional principles and rules using interpretations contrary to the democratic spirit of the fundamental law, for political purposes and the support of conjectural interests. The consequences were and still are obvious: the limitation or violation of certain rights and fundamental freedoms, the generation of social tensions, non-compliance with the constitutional role of the state's institutions, in other words political actions, some dressed with a legal aspect, contrary to the constitutionalism which must characterize the Romanian state of law.

Under these conditions, a possible step in revising the fundamental law should be focused on the need to strengthen and enhancement of the constitutional guarantees for complying with the requirements and values of the state of law, to avoid excessive power specific to the politics exclusively subordinated to group interests, mostly conjectural and contrary to the Romanian people's interests, which according to Art 2 Para 1 of the Constitution has the national sovereignty.

In our view, the concern among politicians and state authorities in the current period compared to the current content of the fundamental law should be

guided not so much towards the change of the Constitution, but especially towards the correct interpretation and application of it and respect of the democratic purpose of the constitutional institutions. To strengthen the rule of law in Romania, it is necessary that political parties, especially those in power, all state authorities to act or perform their duties within a *loyal constitutional behaviour* involving respect for the democratic meanings and significance of the Constitution.

Some proposals to revise the Romania fundamental law aim to modification of the constitutional system of bicameralism to unicameralism and strengthen the executive power, especially the presidential institution.

We consider that the Romanian bicameralism is appropriate for the state and social system of this historic moment, better reflecting the need to achieve not only the efficiency of the legislative parliamentary procedures, but especially “norming” and the quality of the legislation. Bicameralism is a necessity for Romania, for the Parliament to represent a viable counterweight to the executive, in the context of the exigencies and balance of the powers in a democratic state. Rightfully, late Prof Antonoe Iorgovan pointed out: “It should represent a high political risk, in that post-revolutionary tension, that in Romania be projected a unicameral Parliament, such risk still being present at this hour, under the conditions in which we can no longer talk about a political life established on the normal aisles of the democratic doctrines accepted by the West (social-democratic doctrine, Christian-democratic doctrine, liberal doctrines and ecologist doctrines) [2].

Unicameralism in a semi-presidential constitutional system, such as the Romanian one, in which the powers of the head of state and generally of the executive are significant, also considering the current excessive politicking, would have as consequence the serious deterioration of the institutional balance between the legislative and executive, resulting in the increase of the discretionary power of the executive and the minimization of the Parliament’s role as a supreme representative organ and of the Romanian people, as single

legislative authority of the state, as stated by Art 61 Para 1 of the Constitution. The evolution to a unicameral Parliament must not be considered as a simple act as unfortunately it results from the project law on the revision of the Constitution drafted by the Government, but it requires a general modification of the Romanian constitutional system, a reconfiguration of the role and attributions of the state authorities, in order to preserve the balance between legislative and executive and to not create the possibility of an evolution towards an overrated preponderance of the institution of the head of state in relation to the Parliament. We emphasize the fact that all European states with a unitary structure which have a unicameral Parliament also have a constitutional parliamentary system in which the head of state has limited attributions regarding the governing.

We do not aim to perform a thorough analysis of this issue, underlining only the conclusion that the Romanian unicameralism could be justified both politically and constitutionally, and appropriate to the democratic values in a state of law only if the legitimacy and role of the Romanian Presidency, as constitutional institution, is fundamentally altered. The election of the President should be performed by the Parliament. Also, in the case of a unicameral parliamentary structure, it is necessary to significantly reduce the attributions of the President in relation to the executive. Such reconfiguration of the state institutions should increase the role and attributions of the Constitutional Court and of the justice, representing guarantees of the supremacy of the law and of the Constitution also avoiding the abuse of power of the other state institutions. In Romania, the unicameralism could only be associated with the existence of a constitutional system. The unicameralism has the nature to generate a disproportion between the Parliament and the executive, by that that a single chamber of the Parliament, in Romania, does not represent a satisfactory guarantee to represent an efficient counterweight for the executive, especially that the constitutional attributions of the President as participant in the governing are obviously significant. The dispute between bicameralism and unicameralism with application to the case of Romania is very well presented by the late Prof

Antonie Iorgovan: "...any bicameral or unicameral parliamentary system could generate serious dysfunctions, as expressed by Prof Tudor Drăganu, no matter how good the constitutional solution might be, if the parliamentary practice shows politicking, demagoguery and irresponsibility" [3].

Does the current Romanian parliamentary system correspond to the exigencies of the democratic requirements of bicameralism and is it fit for the performance of the role and functions of the Parliament? The late Prof Tudor Drăganu, in a large study of flawless argumentative logic answered this question: "The revised Constitution establishes a system claiming to be bicameral, but currently functioning as a unicameral one, convicted to break, by some of its aspects, certain elementary principles of the parliamentary regime and which embraces the danger of future serious dysfunctions in the performance of the legislative activity" [4]. The illustrious professor considered that the law amending the Constitution contains no explicit reference to the number of deputies and senators; it questions the substantial legitimacy of the two chambers because their members are appointed by the same body and by the same type of electoral system and electoral scrutiny; the chambers' legislative powers are not sufficiently differentiated; exercising the right for a legislative initiative by senators and deputies, as it is stated, generates constitutional contradictions.

We support that the prospect of a constitutional revision to regulate the differentiation between the two chambers using particular types of representation. The comparative law provides sufficient examples of this kind (Spain, Italy and France) and even the Romanian electoral Law of 27 March 1926 provides a benchmark in this regard. The Senate may represent the interests of the local communities. Thus, Senators could be elected by an electoral college consisting of the elected members of local councils. Interesting to note is that in the draft of the Constitution in 1991, the Senate was designed as a representative of the local communities, grouped in counties and in Bucharest.

The criticism of Prof. Tudor Drăganu is fair, according to which the current constitutional regulation does not provide a functional difference between the two chambers. This aspect was also noticed by the Constitutional Court, which referring to the parliamentary legislative procedure inserted by the project for revising the Constitution underlined that: “The cascade examination of the draft laws, in a chamber of first lecture, and in the one the second lecture, transforms the bicameral Parliament into an unicameral one” [5]. Therefore a new initiative for the modification of the fundamental law should also consider this aspect and to perform a real and functional differentiation between the two Chambers.

The final part of this study shall refer to certain aspects that we consider necessary to be stated by a future procedure for revising the Constitution.

As above mentioned, unlike the excessive politicking and discretionary use of power from the executive contrary to the spirit and letter of the Constitution, with the consequence of violating certain rights and fundamental freedoms, manifested during the past two decades of democracy in Romania, we consider that the scientific approach and not only in the area of the revision of the fundamental law should be oriented towards solutions guaranteeing the values of the state of law, limiting the violations of the constitutional provisions for the purpose of particular interests and to avoid the excessive power of the state authorities.

1. Art 114 Para 1 of the current regulation states that: “The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint sitting, upon a programme, a general policy statement, or a bill”.

The responsibility of the Government has a political feature and is a procedural means by which it is avoided the phenomenon of the “*dissociation of majorities*” [6] for the case in which the in Parliament the majority necessary for the adoption of a measure proposed by the Government was not gathered. In order to determine the legislative forum to adopt its measure, the Government, using the procedure of assuming the responsibility conditions the performance of its activity by requesting a vote of trust. This constitutional procedure guarantees

that the majority required for the dissolution of the Government, in the case of a censure motion to coincide with that for rejecting the law, the programme or the political statement to which the Government connects its existence.

Adjusting the laws as effect of invoking the political responsibility of the Government has as important consequence the absence of any parliamentary debates or deliberations on the draft law. If the Government is supported by a comfortable majority of the Parliament, this procedure could result in the adoption of the laws by “bypassing the Parliament”, which could have negative consequences on the compliance with the principle of the separation of powers, but also regarding the role of the Parliament, as it is defined by Art 61 of the Constitution. As consequence, using such constitutional procedure by the Government for the adoption of a law must have an exceptional feature, justified by a political situation and a social imperative very well shaped.

This aspect of extreme importance for the compliance with the democratic principles of the state of law by the Government was well emphasized by the Romanian Constitutional Court: “This simplified means of legislation must be used *in extremis*, when the adoption of the draft law using the common or the emergency procedure is no longer available or when the political structure of the Parliament does not allow the adoption of the draft law using one of the above mentioned procedures” [7]. The political practice of the Government for the past years has been contrary to these rules and principles. The Executive frequently assumed its responsibility not only for a single law, but also for packages of laws, without any justification in the meanings stated by the Constitutional Court.

The Government’s politicking clearly expressed by the frequency of using this constitutional procedure seriously harms the principle of the political plurality, which is an important value of the system of law stated by Art 1 Para 3 of the Constitution, but also of the principle of the parliamentary right stating that “the opposition shall express and the majority shall decide” [8]. “Denying the right of the opposition to express itself is synonym with denying the political plurality, which according to Art 1 Para 3 of the Constitution represents a supreme and

guaranteed value". The principle "the majority shall decide, the opposition shall express itself" refers to that throughout the organization and functioning of the parliamentary Chambers be assured that the majority is not obstructed especially in the performance of the parliamentary procedure, and on the other hand that the majority rule only after the opposition has spoken" [8]. The censorship of the Constitutional Court proved to be insufficient and inefficient in order to determine the Government to comply with these values of the state of law.

3. Conclusions

In the context of these arguments, we propose that in the perspective of a constitutional revision to limit the right of the Government to entail its responsibility for a single draft law in a parliamentary session.

1. All post-December Governments have massively used the practice of the emergency ordinances, practice blamed by the literature.

The conditions and interdictions stated by the Law No 429/2003 for the revision of the Constitution of Romania regarding the constitutional regime of the emergency ordinances, proved to be insufficient in order to limit this practice of the Executive, also the control of the Constitutional Court proved insufficient and even inefficient. The consequence of such practice is the violation of the role of the Parliament as single "legislative authority of the state" (Art 61 of the Constitution) and the creation of an imbalance between executive and legislative by accentuating the discretionary power of the Government, which in most cases turned into excessive power.

We propose that in the perspective of a future revision of the fundamental law, Art 115 Para 6 be modified in the meaning of prohibiting the adoption of emergency ordinances in the area of the organic laws. In this meaning it is protected an important area of social relations considered by the constitutional legislator as essential for the social and state system, from the excess of power of the executive by issuing emergency ordinances.

2. In the current conditions characterized by the executive's trend to profit from the obvious politicking and to unduly and dangerously force the limits of the

Constitution and of the democratic constitutionalism it is necessary to create mechanisms for the control of the executive's activity in order to really guarantee the supremacy of the Constitution and the principles of the state of law.

According to our opinion, it is necessary that the role of the Constitutional Court as guarantor of the fundamental law be amplified by new attributions with the purpose of limiting the excess of power of the state's authorities. We do not agree with the statements made by the literature that a possible amelioration of the constitutional justice could be achieved by reducing the attributions of the court of administrative contentious [9]. It is true that the Constitutional Court has ruled certain questionable decisions under the aspect of compliance with the limitations of its attributions according to the Constitution, by assuming the role as positive legislator [10]. The reduction of the attributions of the constitutional court for this reason is not a legally fundamental decision. Of course, the reduction of the attributions of a state authority has as consequence the elimination of the risk for deficient performance. This is not the way to achieve the perfection of the activity of a state authority in a state of law, but by the continuous search for legal solutions for better conditions for the performance of such attributions, which proved to be necessary for the state and social system.

The attributions of the Constitutional Court might as well include the one about ruling upon the constitutionality of the administrative acts exempted from the control for legality of the courts of administrative contentious. This category of administrative acts, to which Art 126 Para 6 of the Constitution and the Law No 544/2004 on the administrative contentious refer to, are extremely important for the entire social and state system. Therefore, it is necessary a control for constitutionality, because in its absence the discretionary power of the issuant administrative authority is unlimited with the consequence of a possible excessive limitation of the rights and fundamental freedoms or of the violation of certain important constitutional values. For the same arguments, our Constitutional Court should be able to control under the aspect of constitutionality the presidential decrees establishing the referendum.

The High Court of Cassation and Justice has the competence to adopt decisions using the procedure of the appeal in the interests of the law, which are mandatory for the courts. In the absence of any form of control for legality or constitutionality, the practice proved in numerous situations that the Supreme Court overcame its attribution to interpret the law, and by such decisions it modified or completed normative acts, acting as a real legislator, thus violating the principle of the separation of powers [11]. With the purpose of avoiding the excessive power of the Constitutional Court, we consider necessary the establishment for the Constitutional Court of the competence to rule upon the constitutionality of the decisions of the High Court of Cassation and Justice, adopted using the procedure of the appeal in the interests of the law.

3. The proportionality is a fundamental principle of the law expressly stated by constitutional and legislative regulations and international legal instruments. It is based on the values of the rational law of justice and equity and expresses the existence of a balanced or appropriate relation between actions, phenomena or situations, also being a criterion for limiting the measures ordered by the state authorities to what is necessary for the achievement of a legitimate purpose, thus guaranteeing the fundamental rights and avoiding the excessive powers of the state authorities. The proportionality is a basic principle of the European Union, being expressly stated by Art 5 of the Treaty on the European Union [12].

We consider that the express statement of this principle only by Art 53 of the Constitution, with application in the area of limiting the exercise of certain rights is insufficient for the valorisation of the entire meaning and importance of the principle for the rule of law.

It is useful the addition to Art 1 of the Constitution of a new paragraph stating that "*The performance of the state power must be proportionate and indiscriminate*". This new constitutional statement could represent a true constitutional obligation for all state authorities to perform their attributions so that the measures adopted to be within the limits of the discretionary power recognized by the law. Also, it is created the possibility for the Constitutional

Court to sanction using the control for constitutionality of the laws and ordinances the excess of power in the Parliament's and Government's activities, using as criterion the principle of proportionality.

References:

- [1]Iorgovan, A. (2001). Revizuirea Constituției și bicameralismul. Revista de drept public (1), p. 23
- [2]Iorgovan, A. (2001). Revizuirea Constituției și bicameralismul. Revista de drept public (1), pp. 18-19
- [3]Iorgovan, A. (2001). Revizuirea Constituției și bicameralismul. Revista de drept public (1), p. 16
- [4]Drăganu, T. (2003). Câteva considerații critice asupra sistemului bicameral instituit de legea de revizuire a Constituției adoptată de camera Deputaților și în Senat. Revista de drept public (4), p. 55-66
- [5]Decision No 148 of 16 April 2003, published in the Official Gazette No 317/12 May 2003
- [6]Iancu, Gh. (2010). Drept constituțional și instituții publice. Bucharest: All Beck, p.482
- [7]Decision No 1557 of 18 November 2009, published in the Official Gazette No 40/19 January 2010
- [8]Muraru I., Constantinescu M. (2005). Drept parlamentar românesc. Bucharest: All Beck, pp.55-69
- [9]Vrabie, G. (2010). Natura juridică a curților constituționale și locul lor în sistemul autorităților publice. Revista de Drept Public (1), p. 33
- [10]Decision No 356/2007, published in the Official Gazette No 322/14 May 2007; Decision No 98/2008, published in the Official Gazette No 140/22 February 2008
- [11]Andreescu, M. (2011). Constituționalitatea recursului în interesul legii și ale deciziilor pronunțate. Curierul Judiciar (1), pp. 32-36
- [12]Andreescu, M. (2010). Proportionalitatea, principiu al dreptului Uniunii Europene. Curierul Judiciar (10), pp. 593-598; Andreescu, M., Puran, A. (2016) Drept constituțional. Teoria generală și instituții constituționale. Bucharest: Ch. Beck, pp. 123-130

PROCEDURAL RIGHTS OF THE SUSPECTS AND OF THE ACCUSED DURING THE CRIMINAL PROCEDURES ACCORDING TO THE NEW COMMUNITARIAN REGULATIONS

Associate professor Elise VÂLCU, PhD.
University of Pitesti (ROMANIA)
elisevalcu@yahoo.com

Abstract

The communitarian legislator is concerned about the creation of minimal norms with the purpose of removing the obstacles standing in the way of the free movement of citizens within the territory of the Member States. The consolidation of the procedural safeguards recognized for the suspects, accused and wanted persons represents an element of analysis in this regard.

According to the Treaty on the functioning of the European Union (TFEU), the judicial cooperation in criminal matters within the European Union shall be based on the principle of mutual recognition of judgments and judicial decisions.

The transfer into practice of this principle is based on the premise that each Member State trusts the criminal justice systems of the other states. The extension of the principle of the mutual recognition depends on a series of parameters, which include protection mechanisms for the rights of the persons suspected and accused and common minimal standards, necessary for the smooth application of this principle

Keywords: *suspect, accused, wanted person, criminal procedures, procedural safeguards, fair trial.*

1 Introduction

Regarding the judicial cooperation in criminal matters, the communitarian legislator is preoccupied with the creation of certain communitarian judicial instruments having as area of application the consolidation of the procedural rights of the person suspected or accused during the criminal proceedings.

Until the present there has been adopted a number of measures regarding the procedural guarantees during the criminal procedures, among which we must mention the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and

the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. To these are added the Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, namely the Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

2 The consolidation of the right to a fair trial during the criminal proceedings by recognizing the procedural safeguards for the suspects, accused or wanted persons

The purpose of the Directive 2016/343/EU is to establish a set of minimal norms common for the recipient Member States on certain aspects of the presumption of innocence, of the right to remain silent, of the right to not incriminate oneself, namely to be present at his own trial during the criminal proceedings.

The communitarian directive does not have for the moment a norm for transposing it in our national legislative system (Romania having the obligation to transpose the present directive until April 2018) reason for which we are trying to identify in this meaning the provisions inserted in the current Code of Criminal Procedure. [1]

Specifically, the current directive is applicable for natural persons in all the phases of the criminal proceedings, starting with the moment in which is first suspected or accused for the commission of an offence or of a presumed offence until a definitive decision establishing that the person is guilty of the offence is rendered.

2.1. The presumption of innocence

The presumption of innocence represents a fundamental human right, but also a basic rule in the modern criminal trial [2].

In the European Union the presumption of innocence is expressly stated by Art 48 of the European Union Charter of Fundamental Rights, which states that: "Everyone who has been charged shall be presumed innocent until proved guilty according to law".

Internationally, the presumption of innocence is stated by Art 66 of the Statute of the International Criminal Court in Rome, according to which "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law".

Regarding the internal regulation, Art 4 Para 1 of the Code of Criminal Procedure, referring to the presumption of innocence, in the meaning that "Any person shall be considered innocent until a definitive criminal decision is being rendered" shall be completed with Art 99 Para 2 stating that the "The suspect or defendant beneficiaries of the presumption of innocence, not being compelled to prove his innocence and has the right to not contribute to his own accusation".

The public implications of the presumption of innocence consists in the fact that for as long as the guilt of a suspected or accused person has not been proven according to the law, the declarations made by the public authorities, other than the one referring to guilt, must not refer to that person as being guilty [3].

Regarding the treatment applied to these persons in front of the judicial organs, the directive compels the Member States that through the transposition norms to guarantee the fact that the suspected and accused persons are not presented as guilty in public or in front of the court, by using certain means of physical constraint [4].

Regarding the burden of the evidence in establishing the guilt of the suspected or accused persons, this shall be the responsibility of the criminal investigation authorities, within the limits currently stated by the legislations of the

Member States, thus not disturbing any of the prosecutor's obligations or the obligations of the court competent to search for incriminatory or exculpatory evidences, neither the right of the defence to present evidences in accordance with the internal law applicable. Moreover, Art 6 Para 2 states that "any doubt regarding the guilt shall be in favour for the suspected or accused person, including when the court assess the possibility of acquitting that person". The existent internal legislation at this moment states in accordance with the directive, thus Art 4 Para 2 of the Code of Criminal Procedure states that "after the administration of all the evidences, any doubt in the belief of the judicial organs shall be interpreted in the favour of the suspect or defendant".

Thus, we ascertain that the texts inserted in the actual Code of Criminal Procedure are in agreement with the communitarian recommendations, although in these circumstances we are wondering if, in the absence of an express regulation the presumption of innocence shall operate during the criminal procedures performed in front of the judicial organs in the situation of the procedure for the agreement to recognize the guilt, in the meaning that also for this situation the defendant is presumed innocent until the rendering of a definitive decision to validate the agreement? In other words, we consider that it is necessary a reconfirmation of the guarantee of this procedural right during the same special procedure. It is thus a matter of reflection which, from our perspective, needs to be clarified with the implementation of this directive.

2.2. The right to remain silent

The right to remain silent represents another procedural right recognized and guaranteed by the communitarian norm for the suspect or defendant. Specifically, the communitarian legislator requested the Member States that through their transposition norms to guarantee for the suspected or accused persons the right to remain silent and to not self-incriminate regarding the offence for which are suspected or accused of [5].

Which is the correct interpretation for this regulation? By the fact that using these rights by the suspect or defendant must not be considered by the judicial organs as a proof of the recognition of the offence by the aimed person.

In the present, the current Code of Criminal Procedure [6] welcomes the communitarian exigencies in this area, thus in Art 10 Para 4 of the category "General Principles" is found the obligation of the judicial organs to present to the suspect or defendant the procedural safeguards he is entitled to, "Before being heard, the suspect or defendant must be aware of the right to make no statement". We must note that because the legislator makes no reference regarding the phase of the criminal procedure in which the person shall be notified about this right in the virtue of Art 10 Para 4, we consider that it was taken into consideration the functioning of this procedural safeguard regarding each hearing of the suspect or defendant, in all procedural phases.

For the amendment of the above mentioned, the legislator emphasizes the benefits of this guarantee in Art 83 Let a) which states in the category of the procedural rights of the suspect or defendant that "During the criminal trial, the defendant has the following rights: a) the right to make no statement during the criminal trial, being aware of the fact that if he refuses to make statements he shall not suffer from an unfavorable consequence...".

Regarding the preventive measure of imprisonment, Art 209 Para 6 state that "Before the hearing, the criminal investigation organ or the prosecutor is forced to bring to the attention of the suspect or defendant the fact that he has the right to be assisted by an attorney of his choice or appointed ex officio and has the right to make no statement, except the information about his identity, being aware of the fact that anything he says may be used against him in the court".

Regarding the adoption of the preventive measure of the arrest of the defendant by the judge of rights and freedom, or by the judge in the preliminary chamber, Art 255 Para 8 states that "Before hearing the defendant, the judge for rights and freedoms shall bring to his attention the offence for which he is

accused of and the right to make no statement, mentioning also that anything he says may be used against him in court”.

Not least, Art 374 Para 2 of the Code, regarding the procedural phase of the preliminary explanations for the defendant, states that “The president explains to the defendant the charges against him, notifies him regarding the right to remain silent...”

The right to silence of the suspect or defendant refers also to the right to not contribute in the self-incrimination. Thus, this final guarantee may be analyzed as involving the right to make no statement regarding the charges he faces, in other words, he has the freedom to not answer all questions or to certain of them.

2.3. The right to be present in your own trial

The Member States recipients of the current communitarian norm are also compelled to insure that through the implementation norm the persons suspected and accused have the right to be present in their own trial, on the contrary being recognized the right to a new trial or another means of appeal, which would allow the reexamination of the case file, including the analysis of new evidences, which could lead to the annulment of the initial decision [7].

Nevertheless, Art 8 Para 2 states an exception, in the meaning that a trial which could lead to a decision regarding the guilt or innocence of the person suspected or accused may occur in the absence of the concerned person, with the condition that:

The person suspected or accused should have been informed in due time regarding the trial and the consequences of his absence;

The person suspected or accused who has been informed regarding the trial be represented by an attorney, who has been appointed either by the suspected or accused person or ex officio, by the state;

The text thus drafted in the communitarian norm raises the question if the right to be present in his own trial is analysed simply in relation to a trial with multiple hearings or it is also applicable for simplified procedures after an

exclusively or partially written procedure or of a procedure without any hearings. We consider that complying with the interpretation offered by the CJEU, the right to a fair trial aims all the procedural forms above mentioned.

Also, the communitarian legislator requires from the Member States to insure for the suspected or accused persons the right to access an efficient means of attack in case their rights stated by the current directive are violated.

What does it mean “an efficient means of attack?” We consider that it refers to a means of attack stated by the legislative system of each Member State recipient of the implementation, which has as effect the placement of the suspected or accused persons in their initial situation, prior to the occurrence of the violation.

3 Procedural safeguards recognized for children who are suspects or accused persons in criminal proceedings [8]

The Directive 2016/800/EU represents another communitarian legal instrument which completes the communitarian norm above mentioned, stating a series of procedural safeguards applicable: a) for children who are suspects or accused persons in criminal proceedings; b) for children who are the subject of the procedures regarding the European arrest warrant based on the Framework Decision 2002/584/JHA (wanted persons); c) for children who initially were not suspects or accused, but who become suspects or accused persons during the interrogations conducted by the police or another enforcement authority; d) for the persons who were under the age of 18, at the moment in which they began to be the subject of the procedures, but who subsequently turned the age of 18 and the application of the current directive or of certain provisions is appropriate, considering all the circumstances of the case, including the degree of maturity and vulnerability of the aimed person [9]; e) for children who are deprived of their freedom, regardless of the phase of the criminal procedures.

Member States have the obligation that through their norms of implementation be sure that, for the following situations, the following safeguards

are complied with and applied by the competent authorities, for the minor suspects, defendants or wanted:

a. When the children are informed regarding the fact that they are suspects or accused persons in criminal procedures, they shall be promptly informed regarding the fact that are the beneficiaries of the following rights:

- The right that the holder of the parental responsibility be informed, including the right of the minor to be accompanied by the holder of the parental responsibility during different phases of the procedure, other than the hearings;

- The right to legal assistance; children who are suspects or accused during certain criminal procedures have the right to an attorney in accordance with the Directive 2013/48/EU [10];

- The right to the confidentiality of communication with the attorney. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law;

- The right to the protection of their private life¹¹;

- The right to legal assistance [12].

b. During the criminal procedure, they shall be informed about the fact that they have the following rights:

- The right to an individual assessment [13];

- The right to a medical examination [14];

- The right to the limitation of the deprivation of freedom and the use of alternative measures, including the right to the periodical re-examination of the detention;

- The right to be accompanied by the holder of the parental responsibility throughout the hearings;

- The right to be physically present during the hearings [15];

- The right to use effective means of attack;

c. Are entitled to a specific treatment during their deprivation of freedom.

These procedural safeguards shall be applied where appropriate:

i) For the suspects or accused minors until the definitive establishment of the fact that the suspected or accused person has committed an offence including, where applicable, until the moment of the issuance of a definitive decision for conviction and the solution of any means of attack;

ii) For the minors who are wanted persons, from the moment of their arrest within the Member State of execution.

3.1. The right for the holder of the parental responsibility to be informed, including the right of the minor to be accompanied by the holder of the parental responsibility during different phases of the criminal procedure

Regarding the national regulation of these procedural rights, it is necessary to state that the current Code of Criminal Procedure dedicates for the special category of minors a special procedure in Title VII, the chapter titled “The procedure in cases referring to juvenile offenders”. Specifically, the legislator has identified for minors, during the two procedural phases, the criminal investigation, namely the trial, the procedural rights to which they are entitled to. Thus, regarding the criminal investigation, Art 505 Para 1 states that when “the suspect or defendant is a minor under the age of 16, at any hearing or confrontation of the minor, the criminal investigation authority shall summon his parents or, where appropriate, his guardian, curator or the person in whose care or under whose supervision the minor has temporarily been placed.

3.2. The right to legal assistance from a lawyer

Which is the moment from which the children may benefit from the assistance of an attorney? By anticipating the answer to this question, the directive states that “children shall be assisted by a lawyer from whichever of the following points in time is the earliest:

a) Before they are questioned by the police or by another law enforcement or judicial authority. At this phase, the assistance refers to the right to have private meetings and to communicate with the lawyer;

b) Upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act. Children shall be assisted by a

lawyer at least during the following procedural actions: group recognitions, confrontations, reconstructions;

c) Where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court;

d) When they have been presented to a judge or to a court competent to rule upon detention in whichever phase of the procedures;

e) During detention.

Therefore, we understand the importance of the lawyer's presence throughout the criminal procedures thus, in case no lawyer is present, the competent authorities shall postpone the interrogation of the child or the performance of other investigations or evidence-gathering acts for a reasonable time, allowing the arrival of the lawyer, or the appointment of one, if the child has not appointed a lawyer himself. For instance, the decision to conduct an interrogation in the absence of the lawyer could be the object of a jurisdictional control.

In our national system we identify provisions regarding the judicial assistance of minors aged between 14 and 18. Specifically, Art 90 Para 2 Let a) of the actual Code of Criminal Procedure states that "For the juvenile suspect or defendant, the judicial assistance shall be mandatory".

3.3. The right to an individual evaluation

Regarding the application of this measure it is necessary to clarify certain aspects. These shall be performed by specialized personnel aiming, as it is possible, a multidisciplinary approach and, where is necessary, with the involvement of the holder of the parental responsibility or of another professionally specialized adult. When an individual evaluation is performed, shall be taken into consideration a series of indicators such as the personality and degree of maturity of the child, the economic, social and family environment from which he originates, as well as any other vulnerability of the child.

The extent of the detailed individual evaluation may vary depending on the circumstances of the case, of the e measures possible to be adopted if the child

is found guilty of that offence and, not least, it is taken into consideration if recently the child was subjected to another individual evaluation.

The purpose of the individual evaluation is to establish the individual features of the child, which could be used by the competent authorities:

- In order to establish if a specific measure to be adopted is for the best advantage of the child;
- In order to establish the opportunity of adopting a preventive measure regarding the child;
- In order to establish the opportunity of adopting a decision or measure during the criminal procedures, including in the case of ruling a decision for conviction.

3.4. The right to audio-video recording of the interrogation

The interrogation of children by the police or by another law enforcement or judicial authority during the criminal procedures shall be recorded, when this is possible, considering, among other of the presence of the lawyer and if the child is deprived of freedom or not, with the condition that the superior interest of the child be always considered as primordial. Nevertheless, questions may be addressed without any recording, only for the establishment of the child's identity. If the interrogation is recorded, this shall be mentioned in a written and verified minutes.

3.5. The right to a protected private life

Children's private life during the criminal procedures must be protected. For this purpose, the recordings and writings must be confidential, and the hearings in which children are involved must be held without the public. The national legislation is in consensus with the current directive. Thus, concerning the trial, Art 509 Para 1 of the new Code of Criminal Procedure states that "the hearing shall not be public", while Art 3 states that "when the defendant is a minor aged under 16, the court, if it considers that the administration of certain evidence shall have a negative influence on the child, may order his removal

from the hearing. Under the same conditions, may be temporarily removed from the court also the parents or the representatives”.

3.6. *The limitation of the deprivation of freedom*

The measure of the deprivation of freedom shall be ordered for a child in any phase of the criminal proceedings, but it shall be limited to the shortest appropriate period considering the age and individual situation of the child, as well as the circumstances specific to the case. Thus, the detention shall be ordered for children only as the final solution. The objectivity of the application of this measure is guaranteed by the fact that:

- Any detention shall be based on a motivated decision, which represents the object of a jurisdictional control of a court;
- Such decision is, also, subjected to a periodical re-examination, at reasonable periods of time, by a court, ex officio or at the request of the child, of the child’s lawyer or of a judicial authority, other than a court;
- Every time it is possible, the competent authorities shall use alternative measures in exchange for the detention.

Using the modification of the Code of Criminal Procedure, the Romanian legislator has chosen to completely waive the punishments applicable for minors who are criminally liable and to apply only educative measures, privative of freedom or not, in the hope of having satisfactory results in the educational activity and for the social reintegration of the minors. Thus, regarding the minors, the application of the educative measures non-privative of freedom represents the rule, while the exception is represented by the measures depriving of freedom [16].

3.7. *The right to a medical examination*

This right is available for the minors deprived of freedom. Specifically, they are entitled to a medical examination, every time it is necessary, with the purpose of evaluating their physical and psychical general condition.

Who has the right to ask for a medical examination? The medical examination shall be performed either at the initiative of the competent authority, if there are clues motivating such measure, or at the request of the child, of the holder of the parental responsibility or the child's lawyer. This must be as non-invasive as possible and be performed by a doctor or other medical professional.

What is the benefit of this right? The answer is given by the communitarian norm which states that the results of the medical examination shall be taken into consideration in the determination of the child's capacity to be subjected to an interrogation, to other acts of investigations or evidence-gathering actions or to any other measures taken or foreseen to be taken against the minor.

3.8. Specific treatment for the privation of freedom

Member States have the obligation to state in their norms of transposition measures guaranteeing that:

- Minors deprived of freedom are kept separate from adults, including the minors found in police custody, being insured their physical and mental development, the right to education and training, including for children with physical, sensorial or educational handicaps, the access to programs encouraging their development and social reintegration. Art 264 of the Law No 254/2013 [17], with subsequent modifications, also states that the "accommodation of minor persons detained or placed into custody shall be made separate of adult persons, with the compliance of the principle of separation based on sex;

- For exceptional circumstances, when practically it is not possible, the children may be kept together with the adults, but in an appropriate manner compatible with the superior of the child;

- When a child deprived of freedom ages 18, he shall be presented with the possibility of continuing to stay separated by the rest of the detained adults, when it is justified and when this measure is compatible with the superior interest of the child who is detained together with the adult.

Given the lines established by the current directive, we consider that all minors deprived of freedom, accused or convicted for a criminal offence, shall be incarcerated in detention centres specially designed for persons of the same age, offering detention regimes adjusted to their needs and having a personnel trained for working with youth. Also, we agree with the recommendations of the directive in the meaning that taking into custody minor inmates requires special efforts in reducing the risks for long term social maladjustment. This means a multidisciplinary approach, calling upon the competences of a wide range of professionals (especially teachers, instructors and psychologists), to answer the individual needs of the minors, also considering the necessity of the cumulative performance of the following objective requirements:

a) *Material conditions of the detention [18];*

b) *Programs of physical activities and for the intellectual stimulation and programs referring to generalized stimulation systems, allowing the minors to benefit from supplementary privileges in exchange of a good behaviour [19];*

Concretely, the national Framework-Law No 254/2013, in its version modified in 2016, refers in Art 295 to the “Educational project for the educational centre” as representing “the general framework for projecting and implementing the standardized offer of the educational activities, of psychological and social assistance, established based on the personal needs of the inmates, in order to ease their social reintegration. The educational project of the centre identifies the areas of intervention, allowing the emotional, cognitive and skills development of the inmates, so that throughout the period of their detention to be created conditions for the improvement of their educational, psychological and social status. Also, the minors according to Art 313 have the right to education and the obligation to frequent the classes of the mandatory general education. The right to education includes all the activities of learning performed by each inmate, for the purpose of achieving knowledge, skills and abilities significant from a personal, civic, social and occupational perspective.

c) *Appointment of trained personnel* – Art 294 Para 2 of the Law No 254/2013 (modified in 2016) states that “the didactic personnel necessary for the functioning of schools within the centres is insured by the county board of education, according to the law...”

d) *Promoting contacts with the outside world* – any restriction for these contacts must be exclusively based on serious imperatives of security or circumstances related with the available resources.

3.9. The regulation of certain means of complaint, both inside and outside of the administrative system of the institutions, representing fundamental guarantees against bad treatments applied in the institutions for minors
[20]

4. CONCLUSIONS

We consider that the current Code of Criminal Procedure, though it refers to a series of regulations within the limits established by the communitarian policy in this area, though it is necessary a clarification of the reasons for the recognition of these fundamental safeguards.

The Romanian courts consider that the current code completely insures the compliance of the communitarian legislative requirements, also considering the fact that this normative document is consensual with the ECHR recommendations on the guaranteeing of the rights for the suspect or defendant, the limits of the coercive state powers, the insurance of evidence systems allowing the avoidance of judicial errors and the guarantee of human dignity.

On the other hand, regarding the minors, they must enjoy a special attention throughout the procedure for their potential of development and social reintegration is maintained. Thus, the authorities must insure that the minors are capable of understanding and follow these procedures and to use their right to a fair trial, thus preventing the relapse.

References:

[1] The current Code of Criminal Procedure, published in the Official Gazette No 486/15 July 2010, has entered into force starting with 1 February 2013 and has been modified and amended

until nowadays by: Law No 63/2012 on the modification and amendment of the Romanian Criminal Code and of the Law No 286/2009 on the Criminal Code, published in the Official Gazette No 258/19 April 2012; Law No 255/2013 for the application of the Law No 135/2010 on the Code of Criminal Procedure and for the modification and amendment of certain normative acts including criminal procedural provisions, published in the Official Gazette No 515/14 August 2013; G.E.O No 3/2014 for the adoption of certain measures for implementation necessary for the application of the Law No 135/2010 on the Code of Criminal Procedure and other normative documents; G.E.O No 82/2014 for the modification and amendment of the Law No for the modification and amendment of the Law No 135/2010 on the Code of Criminal Procedure, G.E.O No 82/2014.

[2] S.G. Barbu, *Dimensiune constituțională a libertății individuale*, Hamangiu Publ.-house, Bucharest, 2011, p. 359

[3] Nevertheless, it is not forbidden for the public authorities to share public information regarding the criminal procedures when this is absolutely necessary for reasons related to the criminal investigation or to the public interest. See in this regard, Art 4 Para 3 of the Directive 2016/343/EU.

[4] As an exception, the Member States shall apply the measures of physical constraint generated by the circumstances specific to the cause, related to the security or designed to prohibit the suspected or accused persons to come into contact with third party persons.

[5] Art 7 Para 5 of the Directive 2016/343/EU

[6] In the former Code of Criminal Procedure, the provisions aiming the right to remain silent did not had a unitary statement, thus they were inserted separately being mentioned in totally different institutions namely in the area of the evidences, in the area of the prevention measures, as well as in the mentions regarding the trial. This true fundamental guarantee was inserted in different times in the former Code of Criminal Procedure by the Law No 281/2003, namely by the Law No 356/2006. Concretely, we mention Art 70 Para 2 of the former Code of Criminal Procedure which aimed the procedure of hearing the defendant and which stated that "It shall be brought to the attention of the defendant...the right to make no statement, also by presenting him with the fact that anything he says may be used against him in a court of law". Art 143 Para 3 of the former Code of Criminal Procedure is also relevant for our debate, according to which "The prosecutor or the criminal investigation authority shall bring to the attention of the defendant that...he has the right to make no statement, also by presenting him with the fact that anything he says may be used against him in a court of law". A final essential modification supporting the guarantee of the right to silence has been brought to Art 322 on the judicial investigation, of the former Code of Criminal Procedure by the Law No 356/2006, thus "The president...shall explain for the defendant what is the guilt he is being accused of. Also, he shall notify the defendant regarding the right to make no statement, mentioning that anything he says may be used against him in court".

[7] Art 9 of the Directive 2016/343/EU; it is recommended that through the norms for implementation be offered a special attention for the persons suspected or accused considered as vulnerable. See in this regard the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings; in the meaning of the current directive are considered as vulnerable persons suspected or accused the persons who are not capable of understanding or effectively participate in the criminal trial because of their age, mental or physical condition or any other disabilities.

[8] Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

[9] The Member States may decide to stop applying the current directive when the person of interest has turned the age of 21

[10] Art 16 Para 1 of the Directive 2016/800/EU

[11] Art 14 of the Directive 2016/800/EU

[12] Art 18 of the Directive 2016/800/EU

[13] Art 7 of the Directive 2016/800/EU

[14] Art 8 of the Directive 2016/800/EU

[15] Art 16 of the Directive 2016/800/EU

[16] For serious offences for which the legislator has stated the imprisonment for 7 years or more or life imprisonment; or for minors who have committed multiple offences.

[17] Regulation of 10 April 2016 for the application of the Law No 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings

[18] See in this regard Art 135 of the Regulation of 10 April 2016 for the application of the Law No 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings

[19] See in this regard Art 188-196 of the Regulation of 10 April 2016 for the application of the Law No 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings

[20] See in this regard Art 129 of the Regulation of 10 April 2016 for the application of the Law No 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings

Bibliography:

Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2013 on the right to interpretation and translation in criminal proceedings

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings

Code of Criminal Procedure, published in the Official Gazette No 486/15 July 2010, entered into force starting with 1 February 2013 and modified and amended until the present by: Law No 63/2012 for the modification and amendment of the Romanian Code of Criminal Procedure and of the Law No 286/2009 on the Criminal Code, published in the Official Gazette No 258/19 April 2012; Law No 255/2013 for the application of the Law No 135/2010 on the Code of Criminal Procedure and for the modification and amendment of certain normative acts stating in the area of the criminal procedures, published in the Official Gazette No 515/14 August 2013; G.E.O No 3/2014 for the adoption of measures for the implementation of the Law No 135/2010 on the Code of Criminal Procedure and for the implementation of other legislative documents; G.E.O No 82/2014 for the modification and amendment of the Law No 135/2010 on the Code of Criminal Procedure

Regulation of 10 April 2016 for the application of the Law No 254/2013 on the enforcement of sentences and of measures involving deprivation of liberty ordered by the judicial bodies during criminal proceedings

SOCIAL POLICY INFLUENCES IN THE FIELD OF TAX POLICY

Petre LAZAROIU, PhD.

Judge of the Constitutional Court of Romania

Ionița COCHINTU, PhD.

Assistant-Magistrate of the Constitutional Court of Romania

ionitacochintu@yahoo.com

Abstract:

Having regard to the constitutional provisions concerning the national public budget, which establish, as a matter of principle, that the national public budget comprises the State budget, the State social security budget, and the local budgets of parishes, towns, and counties [1], made up mostly from fees, as well as from other revenues, in this paper, I intend to examine to what extent the separate imposition of non-harmonised direct taxes is compatible with the constitutional provisions on the fair distribution of the tax burden. [2]

In this context, I note that the constitutional legislature itself [3] has foreseen the possibility of setting up funds, available to entities, but provided that the amounts representing contributions to such funds be used exclusively for their intended purpose. Such contributions complement the budgetary resources and the imposition thereof can be achieved through infraconstitutional rules. One example is Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health. [4]

Keywords: *parafiscal charges, clawback tax, contributions, general public interest, "tax on tax", budget, protection of health.*

I. Ensuring the right to protection of health

The right to protection of health is guaranteed, whereas the State is required to take the necessary measures to ensure hygiene and public health, reason why the organisation of healthcare and social security system for sickness, accident, maternity and recovery, the control on the exercise of medical and paramedical professional activities and other measures to protect the physical and mental health of the person are established by law. [5]

In terms of measures implementing the constitutional provisions, one of the legislative acts with a major impact on the health system is Law no. 95/2006 on healthcare reform [6], which implements the fundamental principles and rules under Community law. Thus, the ordinary legislature sought to achieve a

healthcare system economically efficient, addressing major areas of healthcare, such as the public health, national programmes in the field of healthcare, social healthcare insurance, the European health insurance card and the national health insurance card, the optional health insurance, the financing of some health-related or medicine-related expenditure.

Law no. 95/2006 governs the sources of funding for public healthcare expenditure, whereas health funds are allocated for medicines with and without a personal contribution. However, such funds proved to be insufficient given the steady growth in the number of patients benefiting from the services provided by the public healthcare system that led to significant increase of expenditure incurred from public sources, and the supplementation of the sources of financing of the public health system was necessary.

In this context, as well as in the context of the global economic crisis, the State had to implement the measures needed to supplement the sources of financing of the public health system, to ensure a continuous access of the population to medicines with or without personal contribution granted in outpatient system, under the national healthcare programmes, as well as to healthcare units with beds. However, given the high consumption of medicines exceeding the allocated threshold [7], it was required also intervention by way of legislative delegation, i.e. the Government adopted a number of successive legislative acts.

Concerning the need to keep public budgets under control, it is acknowledged that public budgets, including those dedicated to cover healthcare expenditure, are under significant constraints, an issue which was also revealed in the Summary of the Pharmaceutical Sector Inquiry Report. [8]

II. The establishment of the clawback tax in Romania

Following the example of other European countries [9], Romania has implemented the clawback contribution system by means of Government Emergency Ordinance no. 104/2009 amending and supplementing Law no.

95/2006 on healthcare reform. That legislative act has established the payment of a quarterly contribution due for revenues obtained by drug manufacturers, according to a progressive scale varying between 5 % and 11 % of these revenues.

Then, the Government enacted Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health, with effect from 1 October 2011, which represents the legal framework also today, but with the corresponding amendments and supplementations, and which has repeatedly constituted the subject-matter of the review of unconstitutionality.

This contribution is assimilated to a tax liability [10], and it is therefore managed by the National Agency for Fiscal Administration in accordance with Government Ordinance no. 92/2003 on the Code of Fiscal Procedure. [11]

The amounts collected from the contribution provided for by this emergency ordinance [12] constitute revenue to the budget of the Sole National Fund of Social Healthcare Insurance and are used for medicines included in the national health programmes, for medicines released with or without personal contribution and for medical services.

According to Government Emergency Ordinance no. 77/2011, the subjects covered by its provisions are the holders of authorisations for placing medicinal products on the market, or their legal representatives, who are required to pay a quarterly contribution for medicines included in the national health programmes, and for medicines released with or without personal contribution for outpatient treatment, based on prescription, through open pharmacies, and for hospital treatment, as well as for medicines used for the medical services supplied by dialysis centres, covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. The quarterly contribution is calculated according to the formula of calculation laid down by this emergency ordinance.

These provisions do not *explicitly* define the concept of *holders of marketing authorisations of medicinal products*, so that such authorisations are

available to all legal persons involved in the marketing of medicinal products, whilst drug manufacturers are also included into this category, and the scope of these subjects is not limited to Romanian legal persons. According to Article 4 (1) of Government Emergency Ordinance no. 77/2011 “*within 30 days of the date of entry into force of the provisions of this emergency ordinance, holders of authorisations for placing medicinal products on the market [13], who are not Romanian legal persons, shall be obliged to submit to the National Health Insurance Fund the identification data of their legal representatives who will carry out the legal obligations laid down by this Emergency Ordinance, as well as the list of products subject to mandatory quarterly contribution.*”

From the analysis of the legal provisions, it results that the scope of products subject to mandatory quarterly payment is wide, comprising: a) medicines included in the national health programmes; b) medicines released with or without personal contribution, used for outpatient treatment, on prescription, through open pharmacies, and for hospital treatment; c) medicines used for the medical services supplied by dialysis centres.

The compulsory nature of the quarterly contribution is due to the fact that, as is apparent from the Government Emergency Ordinance no. 77/2011, these products are covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. Therefore, only those operators who place on the market the medicinal products whose consideration is ensured from the source indicated above are liable to pay that contribution, with the obligation [14] to submit to the National Health Insurance Fund the list of medicines for which they owe the contribution.

Indeed, not all drug manufacturers are included in the national health programmes, but from an analysis of all the provisions of Government Emergency Ordinance no. 77/2011, it results that not the capacity of drug manufacturer entail payment of tax, but the capacity of holder of marketing authorisation of medicines, and not only for medicines included in the national health programmes, but for all medicines that are covered from *the Sole National*

Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. [15]

The obligation of the subjects mentioned above, namely payment of the contribution owed by them, is established on quarterly basis (quarterly contribution) and is calculated by applying a percentage “p” to the “consumption of medicines” covered from *the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health*, consumption relating to the sales of each payer/holder of marketing authorisation for medicinal products. [16]

III. The case-law of the Constitutional Court regarding the clawback contribution

The imposition of any duties and charges implicitly leads to the dissatisfaction of those who are bound to pay them, so that the clawback tax has had its share of criticism, in that the payers of this contribution have bought a number of legal proceedings seeking annulment of the notices for the amounts due on that basis. While such cases were pending before courts, exceptions of unconstitutionality were raised both on specific issues concerning certain texts of the emergency ordinance, and the ordinance in its entirety.

These provisions have been criticised both extrinsically, namely in relation to the constitutional provisions of Article 115 (4) and (6) on emergency ordinances and intrinsically, primarily in terms of infringement of equality, right to protection of health, protection and guarantee of the right to property, fair distribution of the tax burden. [17]

Upon exercising the constitutional review, the Constitutional Court took into consideration, firstly, the legislative dynamics with regard to this matter. Thus, the provisions of Government Emergency Ordinance no. 77/2011, and in particular those relating to the calculation of the contribution, were amended and supplemented as follows:

- by Government Emergency Ordinance no. 110/2011 amending and supplementing certain legislative acts in the areas of healthcare and social

welfare was introduced Article 3¹, which at paragraph (5) provides, inter alia, that “sales value (...) means the value of medicines, in accordance with the law, covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health, which also includes value added tax”; [18]

- by Government Ordinance no. 17/2012 on regulating certain fiscal measures [19], which, in Article 7 - Section 2 — *Regulations on quarterly contribution provided for by Law no. 95/2006 on healthcare reform, as subsequently amended and supplemented, and Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health*, explicitly provides that the calculation formula does not include value added tax, returning to the legal solution in force before amendment by Government Emergency Ordinance no. 110/2011.

- as regards the distribution of reimbursed medicines, according to Government Emergency Ordinance nr.2/2014, “*in the case of medicines reimbursed within the national health insurance system, the holder of the marketing authorisation or its representative in Romania shall take all necessary steps to ensure that the wholesale distribution of such medicines is achieved by 3 or more authorised wholesalers, except for medicines supplied under the conditions of Article 699.*”

Therefore, when ruling on the first case referred to it, given that the claims of unconstitutionality related only to Government Emergency Ordinance no. 77/2011 and in particular to Article 1 and Article 3, in the initial wording thereof, which did not expressly state that the calculation formula shall also include the value added tax, the Constitutional Court found that the court called upon to hear applications for annulment of notices communicated under Government Emergency Ordinance no. 77/2011 must see to the correct implementation of Article 3 thereof. [20] Upon settling the first exception of unconstitutionality, the Court found that the authors thereof showed no interest in challenging the provisions of Article 3¹ of Government Emergency Ordinance no. 77/2011 [21], whereas those were not applicable in that case. In view of the

above, the Court found that the exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 77/2011, and in particular Article 1 and Article 3 criticised in that case, deals with issues relating to the interpretation and application of the law in cases pending before courts, and such falls outside the jurisdiction of the Constitutional Court, reason why the exception of unconstitutionality was dismissed as inadmissible.

In that context, the Court held that, where new notices, based on the provisions of Government Emergency Ordinance no. 77/2011, as supplemented by Emergency Government Ordinance no. 110/2011, will be referred to courts for resolution, the Constitutional Court will rule on the new provisions upon referral. [22]

Subsequently, the constitutional review was exercised also with regard to the legal provisions modifying the calculation formula that also included the value added tax.

IV. The unconstitutionality of a “*tax on tax*” duty.

Article 31 (5) of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011, with special reference to the phrase “*including also VAT*”, was subjected to constitutional review as well. [23]

In the respective case, in addition to the arguments put forward by the author of the exception of unconstitutionality and mentioned in Decision no. 1007 of 27 November 2012, applicable also to the case in question, the criticism were directed, on the one hand, at Article 3¹ (5) of Government Emergency Ordinance no. 77/2011, as introduced by Government Emergency Ordinance no. 110/2011, and, on the other hand, at the notices having as legal basis the provisions of Article 3¹ of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011.

During the review of constitutionality, the Court observed that Article 3¹ (5) specifically states that sales value, as governed by Government Emergency

Ordinance no. 77/2011, means the value of medicines covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health, which also includes the value added tax.

According to the legislature, the quarterly contribution represents a percentage applied in itself not only to the price of medicines, but also to the value added tax applied to the price of medicinal products, which, in the Court's view, is tantamount to a *tax on tax*.

By virtue of the general principle applicable in tax matters, taxes and charges apply only to taxable matters — revenues or property, and not to other taxes. However, the fact that the clawback tax is levied on another tax comes against the constitutional provisions on the fair distribution of the tax burden, which is why the inclusion of the value added tax in the total value of sales in relation to which the clawback tax is calculated appears as unconstitutional. [24]

In this context, the Court has upheld the exception of unconstitutionality and found that the phrase “***including also VAT***” in Article 3¹ (5) of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011, is unconstitutional, whereas the Constitutional Court's approach is rather strict in applying the provisions on fair distribution of the tax burden. [25]

Moreover, immediately after the amendment of Government Emergency Ordinance no. 77/2011 through **Government Emergency Ordinance no. 110/2011**, a question has been referred to the European Commission in relation to the “VAT taxation”, i.e. the clawback mechanism with regard to the value added tax in Romania and its compliance with Community law. [26] In its reply to that question dated 15 February 2012 [27], it was pointed out that according to a preliminary assessment of this issue by the Commission, the clawback tax is considered a direct tax, non-harmonised at EU level, to be paid by companies, not being passed to the final consumer through mechanisms similar to those in place for VAT/excise duties. It is therefore necessary to examine whether there is any breach of EU law in the area of direct taxation. However, from the point of

view of direct taxation, there does not appear to be a breach of EU law, for the following two reasons: the clawback tax applies equally to resident and non-resident drug manufacturers present on the Romanian market; there does not appear to be any difference regarding the calculation of the tax to be paid by the Romanian or by the foreign holders of authorisations to release medical products on the Romanian market, which makes the tax to appear as non-discriminatory.

In this context, it was revealed that this is a non-harmonised tax, and that Romania is free to establish how such is to be applied, as well as to include the value-added tax in the tax base. However, Directive 2006/112/EC does not become thus applicable to that tax. It was therefore considered that Directive 2006/112/EC does not appear to preclude such an approach. Furthermore, the clawback tax version taken into account in the discussions between the Commission, the International Monetary Fund and the Romanian authorities is based on the design of clawback systems in other Member States. The control of pharmaceutical expenditure is vitally important for the financial assistance from the EU and the International Monetary Fund as it has direct and significant effects on the sustainability of public finances and therefore on the future macroeconomic stability of the country, since these costs are the principal cause of the build-up of arrears and the existence of unregistered bills in the general budget of Romania. [28]

V. Conclusions

According to the Constitutional Court, the clawback contribution is a parafiscal levy, imposed in accordance with Article 139 of the Constitution, under which “taxes, duties, or any other revenue of the State budget and the State social security budget shall only be imposed under the law”. [29]The parafiscal levies therefore represent a distinct and special category of revenues, lawfully directed to institutions and/or bodies which, according to the State, require such additional revenues. [30] When carrying out the constitutional review, the Court has stated that it is the exclusive right of the legislature to impose parafiscal charges on taxpayers, *in casu* the clawback tax incumbent on economic

operators which are specifically covered by Government Emergency Ordinance no. 77/2011.

Moreover, according to the case-law of the European Court of Human Rights, a Contracting State, in particular when defining and implementing a policy on tax matters, enjoys a wide discretion, subject to a 'fair balance' between the demands of the public interest and the defence of fundamental human rights. [31] The legislature must enjoy, when implementing its policies, especially the economic and social policies, a margin of discretion to determine whether there is a public interest requiring regulation, as well as the implementing provisions, allowing it "*to maintain a balance between the interests at stake*". [32] However, the right to protection of health is one of the fundamental rights under the Constitution of Romania and the State is obliged to see that it is respected.

Therefore, the imposition of contributions such as the clawback tax, which shall become revenue for the budget of the Sole National Fund of Social Healthcare Insurance and shall be used exclusively for medicines included in the national health programmes, for medicines released with or without personal contribution and for medical services, is in line with the constitutional provisions of Article 139, provided that the other provisions of the Basic Law are complied with.

References:

[1] As provided for in Article 138 (1) of the Constitution of Romania.

[2] The fair distribution of the tax burden is set forth under the provisions of Article 56 (2) of the Basic Law.

[3] To that effect, see Article 139 (3) of the Constitution of Romania.

[4] Published in Official Gazette of Romania, Part I, no. 680 of 26 September 2011.

[5] According to the provisions of Article 34 of the Constitution of Romania.

[6] Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.

[7] Issues raised in the preamble of Government Emergency Ordinance no. 77/2011.

[8] In January 2008, the European Commission launched an inquiry into the pharmaceutical sector to investigate possible anti-competitive conditions. http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_ro.pdf.

[9] According to the pharmaceutical sector inquiry report, the clawback tax was in place at the date of the report, in countries such as Austria, Belgium, Italy, the Netherlands, Poland, United Kingdom. http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_ro.pdf.

[10] According to Article 5 (1) and (2) of Emergency Government Ordinance no. 77/2011.

[11] Republished in Official Gazette of Romania, Part I, no. 513 of 31 July 2007, as subsequently amended and supplemented.

[12] The contribution is provided for in Article 3 of Government Emergency Ordinance no. 77/2011.

[13] On the coverage of the medicinal products for which payment is due on a quarterly basis, all holders of authorisations for placing medicinal products on the market, whether they are Romanian legal persons or representatives of foreign legal entities, are required to submit to the National Health Insurance Fund within 30 days 'the list of medicines subject to quarterly contribution', as stated also by the Court in Decision no. 1007 of 27 November 2012, published in Official Gazette of Romania, Part I, no. 878 of 21 December 2012.

[14] As stated in Article 4 (2) of Government Emergency Ordinance no. 77/2011.

[15] In this respect, see Decision no. 1007 of 27 November 2012, published in Official Gazette of Romania, Part I, no. 878 of 21 December 2012, Decision no. 39 of 5 February 2013, published in Official Gazette of Romania, Part I, no. 100 of 20 February 2013, Decision no. 52 of 12 February 2013, published in Official Gazette of Romania, Part I, no. 167 of 28 March 2013, Decision no. 263 of 21 May 2013, published in Official Gazette of Romania, Part I, no. 418 of 10 July 2013, and Decision no. 344 of 24 September 2013, published in Official Gazette of Romania, Part I, no. 678 of 5 November 2013.

[16] Pursuant to Article 3 of Government Emergency Ordinance no. 77/2011.

[17] As grounds for the unconstitutionality of the provisions of Government Emergency Ordinance no. 77/2011, the authors relied on Articles 16 (1) stating that "citizens are equal before the law and public authorities, without any privilege or discrimination", Article 34 on the right to protection of health, Article 44 (1) and (2) relating to protection and guarantee of the right to property, Article 56 (2) stating that "the legal system of taxes must ensure a fair distribution of the tax burden" and Article 115 (4) and (6) on emergency ordinances. It also cites the provisions of section 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, prohibiting discrimination, as well as of Art. 1 paragraph 2 of the Additional Protocol No 1 to the Convention, on the protection of property.

[18] Published in the Official Gazette of Romania, Part I, no. 860 of 7 December 2011.

[19] Published in the Official Gazette of Romania, Part I, no. 611 of 24 August 2012.

[20] The reasoning part of Decision no. 1007 of 27 November 2012.

[21] Article 31 was introduced by Government Emergency Ordinance no. 110/2011. It comprises the phrase "*including also VAT*"

[22] *Idem*.

[23] See, to that effect, Decision no. 39 of 5 February 2013, published in Official Gazette of Romania, Part I, no. 100 of 20 February 2013.

[24] *Idem*.

[25] As stated in the operative part of Decision no. 39 of 5 February 2013.

[26] <http://www.europarl.europa.eu/plenary/ro/parliamentary-questions.html#sidesForm>

[27] <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-012188&language=RO>

[28] The answer to this question is published in the OJ C 285 E of 21 September 2012.

[29] For other papers, see Mircea Ștefan Minea „*About the constitutionality of the parafiscal charges imposed in Romania*”, in the Constitutional Court Bulletin no. 1/2011, <http://193.226.121.81/publications/buletin/12/minea.pdf>

[30] For example, Decision of 21 May 2013, published in the Official Gazette of Romania, Part I, no. 430 of 15 July 2013.

[31] See judgment of 23 February 2006 in *Case Stere and Others v. Romania*, paragraph 50; see also *Case Gasus Dosier*, subparagraph 60, and *Case Building Societies*, paragraph 80.

[32] Judgment of 4 September 2012 in *Case Dumitru Daniel Dumitru and Others v. Romania*, paragraphs 41 and 49.

THE CONSTITUTIONAL NATURE OF THE PRINCIPLES OF THE U.N.O. CHARTER³

Lecturer Mihail NIEMESCH, PhD.

“Titu Maiorescu” University, Faculty of Law (ROMANIA)
avocatniemesch@yahoo.com

Abstract

Certainly the principles of law are in relationship with human nature and they reflect the ideal of justice of the communities of people according to the social values that burden each and every society individually, and the thinkers of Ancient Greece thought it appropriate that law and implicitly, the general principles of law, existed since before the state did, being valued above it. The principles expressed by the UNO Charter, have a jus cogens character, meaning man cannot depart from them due to the fact that their juridical value is imperative. The UNO Charter also defends and promotes the rule of law, a fundamental cornerstone of democracy.

Keywords: *principles, the separation of state powers, human rights.*

The general principles of law are true legal postulates which contain the guidelines that must be found in any legal norm, which burden and condition the legal phenomenon in its entirety, in all aspects.

In the specialized literature it is mentioned that the origin of the principles can be found in ideas which developed along a long period of time, ideas which have become widespread, they have a strong effect on the consciousness of the people from a certain area or a certain historical period. Sometimes, the power of dispersion of an idea is so strong that it goes past the boundaries of the area in which it first crystallized, sometimes even garnering an international influence not only in the historical period that generated them, but also throughout centuries.[1]

This paper is written during the sustainability stage of the project entitled **“Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research”**, contract number POSDRU/159/1.5/S/140106. This project is co-financed by European Social Fund through Sectoral Operational Programme for Human Resources Development 2007-2013. **Investing in people!**

Certainly the principles of law are in relationship with human nature and they reflect the ideal of justice of the communities of people according to the social values that burden each and every society individually, and the thinkers of Ancient Greece thought it appropriate that law and implicitly, the general principles of law, existed since before the state did, being valued above it.

The author M.L. Hrestic shows that what explains the formation, functioning and reason of law are the general principles of law.[2]

Trying to emphasize the importance of the principles of law, John Locke asserted that the respect for them "is so great and their authority so sovereign that only the testimony of other people, but even the evidence of our own senses is oftentimes rejected if it brings forth a testimony contrary to these established rules".[3]

Regarding the relationship between the principles of international law, but especially those expressed in the UNO Charter, and the Romanian Constitution, the bond of the type "whole to part" is emphasized and the supremacy of international above internal law.

Romania officially expressed the wish to be a part of the UNO already from 1946, but our country was barred from joining until 1955. On **the 14th of December 1955**, the General Assembly decided, through motion no. 995(X), to welcome Romania in the UNO, along with other 15 states.[4]

In a reference paper of Romanian specialized literature, specifying that: "The United Nations Charter expresses, through its principles and goals, the aspiration to lift the relation between states on the level of rationality requested by safeguarding the most important of values of the human civilization, in order to shield it from the dangers of a conflagration, that would call into question the future of mankind itself. At its core the Charter incorporated the effort of human reason to forge a model that would take the relations between states out from under the sign of force and arbitration, to base them on postulates of law and moral, of respect for existence, equality and the freedom of each nation."[5]

Thus comes into being the idea that **the principles expressed by the UNO Charter are of a universal nature**, since they formed, are developing and are being applied through respecting the agreement of the signatories of the treaty of a global nature. The principles expressed by the UNO Charter, have a *jus cogens* character, meaning man cannot depart from them due to the fact that their juridical value is imperative. The UNO Charter also defends and promotes the rule of law, a fundamental cornerstone of democracy.

State law represents a great victory in the evolution of humankind because it eliminates the oppression and the arbitrariness of public power. The main purpose represents transforming the state into an instrument in the service of people, under the rule of law. The entire outlook of the state law was and remains centered on the individual. From the very beginning it meant that law ceased to be a simple element of legitimizing power, and it became an authority which power had to obey.[6]

As it is known the state of law promotes autonomy of law and the separation of state powers.

In the doctrine it is mentioned that the separation of power guarantees a constitutional democratic regime and the defending of the human rights, the constitutional regime consists of an array of constitutional stratagems, representing measures of precaution destined to complicate the governing process, so that it would not be possible for a single person at a single party to take over the entire power mechanism and use it for private objectives.[7]

And as far as promoting human rights is concerned[8], we notice that in the present respecting them represents a basic requirement of the state of law. The Universal Declaration of Human Rights, the European Convention of Human Rights must be a part of the positive law of any state of law.

Returning to the subject, it is appropriate to mention that, analyzing the UNO Charter it can be noticed that this global treaty represents the first international document that consecrates and codifies the fundamental principles of international law. I mentioned that since 1955 Romania has been a member of

the UNO and in conclusion, the provisions of the UNO Charter have been appropriated as internal law, a positive law, and we can consider that the principles this pact expresses are closely related to promoting and protecting human rights. For instance the principles of universal respect of human rights, of territorial integrity and of the inviolability of frontiers, the principle of not intervening in the internal problems of other states etc., express the profound penchant for promoting the fundamental human rights and liberties.

Prof. Raluca Miga-Beșteliu underlines the fact that in the preface of the UNO Charter, the people express their decision of "reaffirming the faith in the fundamental human rights, in the dignity and value of the human person, of equal rights between men and women and between small and big nations". The formulation "promoting and encouraging respect for human rights and fundamental freedoms" or "supporting the realization of human rights and fundamental liberties" show up with certain variations, in art.1 of the Charter regarding the goals of the United Nations, in art.13 regarding functions and strengths of the General Assembly, and in art.62 regarding the functions and strengths of Economic and Social Council.[9]

The Romanian Constitution[10] regulates the rapport between internal and international law. In the matter of human rights, our fundamental law provides in art. 20 "(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to".

In conclusion, even in the constitutional provisions which provide numerous human rights and liberties, will be interpreted and applied with respect to the international legislation in the respective domain.

Art. 20 par.(2) of the Romanian Constitution also stated that "Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions."

From the content of the aforementioned texts we must keep in mind that the fundamental law of Romania consecrates the primacy of the international legal regulations of which Romania is a part of and which refer to fundamental human rights and liberties, over internal legislation.

When it comes to applying the law in time, what will be taken into account – in accordance to the Universal Declaration of Human Rights – are only the laws adopted following the coming into force of the Romanian Constitution in 1991.

From a practical point of view, this means that, any Romanian citizen can base their claims and justify their rights, on the basis of international treaties that regulate the human rights and to which Romania is part of. For instance, Romanian courts presently decide, on the basis of the European Convention of Human Rights. As an example, we can show that on the basis of art. 6 regarding the right to a fair trial, the litigant upon request can receive a trial date in order to prepare their defense or hire a lawyer.

In the opinion of author Dumitra Popescu[11], normally, from the moment the state becomes part of a treaty regarding the fundamental rights and liberties, respectively the European Convention or the one regarding the status of refugees and others of the same kind, they become part of the internal law; through the law of ratification, it can be considered that the Parliament exercises at least in the special domain and that of human rights, in fact, the function of lawmaking, of complementary nature, of the existing gaps in the internal law, in the domain.

As such, having the consent of the legislative body, the provisions of a treaty, in special cases, can constitute alongside the internal law and in coordination with and complementary to it, exactly that law in the name of which justice can be applied, and judges being independent and obeying only the law, implicitly, it means that they also obey the provisions of the treaty become internal law.

The bond between international law and internal law is regulated by art. 11 of the Constitution which provides that “(1) The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law. (3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.”

International treaties become part of internal law through their ratification by the Parliament, which, as a legislative body, adopts the law of ratification (of accession), as an ordinary law.

However, the procedure of ratification, including the law of ratification, represents the continuation, on an internal level, of a process much more complex and drawn out, consisting of anterior stages which took place on an international level and led to the constitution, adoption, authentication and signing of the treaty by the authorized representative of the state.[12]

According to the opinion of author Dumitra Popescu[13], in the ratification stage, the lawmaking authority can have very limited powers, in the sense that if the treaty permits – reserves, and/or interpretative declarations, which however have a very limited object and produce effects only in relation to the states which accepted them. The fact that the Parliament has no other alternative is still emphasized, other than to agree with the treaty and adopt the ratification law or refuse the ratification and then, the state does not become part of the respective treaty.

As professor Ion M. Anghel shows, “we can appreciate that the our system of law is built upon the idea that the undertaken commitments, in the shape of regulations, through international treaties are not simply reflected and transposed into the national legislation, but they actually constitute part of it, there being utter compliance between international treaty and national.”[14]

Conclusions

The principles of the UNO Charter have a universal and profoundly democratic nature. This is why these “givens of humanity” must prevail in interstate relations so that through them the progress of civilization is ensured. The principles of the UNO Charter are dynamic and impose upon international accords consecrated by treaties or joint declarations. The Principles of the UNO Charter represent a unified whole and promote sovereign equality of the states.

References:

- [1]Măgureanu, A.F. (2011). *Principiile generale ale dreptului*, Ed. Universul Juridic, Bucharest, pp.85-86
- [2]Hrestic, M.L. (2016). In the collective course, *Teoria Generală a dreptului*, Ed. Prouniversitaria, Bucharest, pp.159
- [3]Locke, J. (2013). *Eseu asupra intelectului omenesc*, II, Ed. Științifică, București, 191, p.332, citat de M.Bădescu în *Teoria Generală a dreptului*, Ed. Sitech, Craiova, pp.92
- [4]<https://www.mae.ro>
- [5]Bolintineanu, A., M.Malița, *Carta O.N.U. Document al erei noastre*, Politică Publishing House, Bucharest, 1970, pp.5
- [6]POPESCU, S. (2000). *Teoria generală a dreptului*, Lumina Lex Publishing House, Bucharest, pp. 345.
- [7]POPESCU, S., *op. cit.*, pp. 349.
- [8]CIONGARU, E., *Human rights and multiculturalism*, in *Volume of International Conference BIBLIO 2012*, Transilvania University Publishing House, Brașov, pp. 191-192.
- [9]Beșteliu, R.M. (1997), *Drept Internațional Public*, Ed. All Educational, București, pp.172
- [10]For more information regarding the subject please read: Niemesch, M.(2010), *Izvoarele dreptului Internațional și ale dreptului Uniunii Europene*, Hamangiu Publishing House, Bucharest, pp.204-210
- [11]Popescu D. (2000). *Sistemul de drept român privind raportul dintre tratate și dreptul intern*, in *Studii de drept românesc*, an 12(45), nr. 1-2 (ianuarie-iunie)/ Academia Române Press, Bucharest, pp.126. In a footnote of the author's it is shown that after the treaty becomes internal law, it is no longer possible – without irredeemable mistakes sometimes – to consider that the provisions are in contradiction with the principle of the supremacy of the Constitution, which has the competence of being the legislative body of Romania, while the treaty represents not only an internal law, but also an international legal order which cannot, under any circumstances, be unilaterally modified.
- [12]Popescu, D., (1997). Năstase A., *Drept internațional public*, Șansa Publishing House and Press SRL, Bucharest, pp. 223-234
- [13]Popescu, D., *op.cit.*, pp. 112-113
- [14]Anghel, I.M., (1993). *Dreptul tratatelor*, Lumina Lex Publishing House, Bucharest, pp. 823

CONSIDERATIONS REGARDING THE CONTROL OF THE CONSTITUTIONALITY OF LAWS

Dumitru VIERIU, PhD.

Bucharest Bar, Str. Dr. Râureanu No. 3, Bucharest, Romania
eufemia_vieriu@yahoo.com

Abstract:

This paper illustrates the theoretical aspects regarding the notion of control of the constitutionality of laws as well as the need for exercising this type of control in a state of law. Likewise, there will be emphasized some forms of constitutionality control that exist in different historical or contemporary judicial systems.

The second part of this article treats the singularity of the control of the constitutionality of laws in Romania, presenting the attributions of the Constitutional Court the control procedure, the documents issued by the institution authorized to control as well as the judicial effects of these documents.

Keywords: *The control of the constitutionality of laws, preliminary control, the exception of unconstitutionality, judicial effects of the control of the constitutionality of laws.*

General Considerations

The control of the constitutionality of laws, theorized by Kelsen (1918) is organized in two main systems: control through a jurisdictional organ, also named the American system and control through a single special and specialized organ or the European system. [1]

The constitutional justice has progressively conquered a central position within the system of liberal institutions; by guaranteeing constitutional balance and by protecting the rights and liberties it has a major influence on the entire political system. taking into consideration that the „governing of the judges” is fairly agitated, often the latent conflict of legitimacy that opposes it to the political power constrains the constitutional justice to a certain cautiousness, expressed through a political jurisprudence that oscillates between activism and reserve, according to the political context.

The constitution is the fundamental law that has supremacy in relation to all other sources of law. Stating the supremacy of the constitution implies the

existence of certain control mechanisms of the accordance with the laws of the constitution. It is, therefore, necessary to ensure control of the constitutionality of laws, of the subordinate judicial rules. Without the existence of a penalty for the violation of constitutional rules by one of the constituted powers, the difference of principle between the constitution and ordinary laws gives way to a factual confusion. Therefore, there must be established a form of control to lead to the annulment of the unconstitutional judicial laws.

Summarizing, it can be stated that the need to exercise constitutionality control is due to the existence of the principle of the separation of state powers, on one side, and, on the other side, the constitutionality control is founded on the principle of the supremacy of the Constitution. [2]

Motivating the need for the existence of control of the constitutionality of laws to ensure the guarantees system necessary to the manifestation of the constitution as a normative act with supreme judicial power, in the speciality literature the control of the constitutionality of laws is defined as being: "the organized activity of verifying the compliance of the law with the constitution and, as an institution of constitutional law, contains rules regarding the authorities that are authorized to make this verification, the followed procedure and the measures that can be taken after following the procedure". [3]

The control of the constitutionality of law solely regards the law as a judicial act of the parliament as well as normative acts with judicial power equal to the power of the law (named law-decrees, decrees with the power of a law or ordinances), due to the fact that the other normative acts issued by the executive organs answer the request of legality (are in compliance with laws) and the control of their legality is made through usual means including through administrative jurisdiction.

By control of the constitutionality of laws, it is understood the ensemble of the normative dispositions that regulate the verification activity of the compliance of laws and other normative acts with the dispositions of the Fundamental Law. [4] The premises of these judicial norms can naturally be found in the

constitution. To them, there are added the norms within the special normative act which regulate the organization and functioning of the institution invested with prerogatives of constitutional jurisdiction. [5]

1 The Forms of The Control of The Constitutionality of Laws

1.1 Control through public opinion

It is the elementary control that contains the reaction of the public opinion when a constitutional provision is violated. This form of control has its ideological foundation in the theory of resisting oppression and its judicial foundation in the constitutions that have established the right to insurrection. This form of control is considered primitive because it implies violence.

1.2 Political control

Is the control exercised by the legislative organs and by state organs that are different from the legislative ones.

For some authors, the control exercised by the parliament is an authentic one and, at the same time, a form of self-control because the parliament is the one who votes the constitution and, therefore, is the most qualified to appreciate the compliance between the law and the constitution that it has adopted.

As a contrary opinion, it is said that this constitutionality control must be made by another organ than the one that makes the law due to the fact that this control means that the parliament is its own judge, a concept that contradicts the idea of constitutional justice. [6]

1.3 The jurisdictional control

It is exercised either by the judicial organs or by other organs that use a similar procedure to the judicial one.

The jurisdictional control can be made, as appropriate, either as an exception or as an action meaning that the law will be examined in a trial when one of the parts lifts the exception of unconstitutionality (for example USA) or that the control will have as object a law that is considered unconstitutional (for example Germany, Italy). The effects of this type of control can be either erga

omnes (like in the USA) or only between the litigator parts (in Romania, according to the 1923 Constitution).

1.4 Other forms of control

1.4.1 The implicit and explicit control

We find ourselves in the presence of the explicit control when the fundamental law (the constitution) expressly provides it and thusly consecrates the obligation of this constitutionality control and, eventually, the authorized organ and the followed procedure (for example in France, Switzerland, Austria, Romania).

There is an implicit control if the constitution does not expressly consecrate it but it is exercised as a consequence of the existence of the legality principle. [7]

1.4.2 The previous and subsequent control of the adoption of laws

The previous control of the adoption of laws (also named preventive control) is exercised in the bill stage of the law.

The subsequent control of the adoption of laws is exercised on the already adopted laws or on the normative acts with a judicial power equal to the law. This is a genuine control that is usually provided within the explicit control, the authorized organ and the followed procedure.

1.4.3 The abstract and concrete control

The abstract control regards the verification of the constitutionality of a law outside any litigation in the face of the court of law, in other words, the issue of the compliance of the law with the constitution is not seen as a „prejudicial matter“. [8] It is an action control and can be exercised either a posteriori when it is made on a norm that has already come into force or a priori when it regards a norm that has not yet come into force.

The concrete control evokes the idea that the unconstitutionality exception has been brought to attention within a trial when the judge would apply the litigious law. In other words, the constitutional justice is called to solve the „prejudicial matter“ of the unconstitutionality exception. The unconstitutionality

exception can be brought to attention either by one of the parts or ex Official by the court. This control is an a posteriori one, therefore, it is exercised on a norm that has been adopted and that has come into force. [9]

2 The Control of The Constitutionality of Laws in Romania

The control of the constitutionality of laws is regulated by the Constitution of Romania as well as by the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court (with the changes brought by Law no. 138/1997) republished. In the development of the constitutional and legal dispositions, the Constitutional Court has adopted the Regulation for organization and functioning.

2.1 *Attributions of the Constitutional Court regarding the control of the constitutionality of laws*

- a) Exercises a control of the constitutionality of law that is previous to their enactment, after being notified by the President of Romania, by one of the presidents of the two Rooms, by the Government, by the Hight Court of Cassation and Justice, by the ombudsman or by a number of at least 50 deputies or at least 25 senators.
- b) Pronounces on the constitutionality of the revision initiatives of the Constitution; in the exercise of this attribution, the Constitutional Court is notified ex officio and has the task to pronounce on whether the revision of the Constitution is to be made in accordance with art. 150 (the revision initiative) and art. 152 (regarding the limits of the revision) of the Constitution.
- c) Pronounces on the constitutionality of treaties or other international agreements at the notice of one of the presidents of the two rooms, of a number of at least 50 deputies or at least 25 senators.
- d) Pronounces on the constitutionality of the Parliament's regulations at the notice of one of the presidents of the two chambers, of a group of parliamentarians or a number of at least 50 deputies or at least 25 senators.

- e) Decides the unconstitutionality exceptions regarding the laws and ordinances brought to attention before the courts of law or by commercial arbitration, the unconstitutionality exception can also be brought into attention by the ombudsman.

2.2 The procedure of the Control of the Constitutionality of laws

2.2.1 The procedure in case of the constitutionality control of laws before promulgation (preliminary constitutionality control)

In this case, the Constitutional Court can act only if notified. It cannot notice itself *ex officio*. In what concerns the law subjects that can notice the Constitutional Court, they are the President of Romania, the presidents of the two Chambers of the Parliament, the Government, the Supreme Court of Justice, a number of at least 50 deputies or at least 25 senators. No other notice on behalf of any other law subjects can be taken into account. [10] The notice addressed to the Constitutional Court must be written and motivated.

Within the law regarding the organization and functioning of the Constitutional Court, procedural details are provided so that the ones entitled to notice to acknowledge the content of the law. Thus, 5 days before the law is promulgated, the law is communicated to the Government and the Supreme Court of Justice and it is filed by the general secretaries of the two Chambers. For adopted laws, an emergency procedure, the term is only 2 days. The operation of filing the law to the general secretaries is brought to attention in the plenary of every Chamber within 24 hours from its filing. The law firmly provides that the filling and communication is only made on days when the Chambers of Parliament work in plenary.

In what concerns the notice made by the parliamentarians, it is sent to the Court on the day the general secretary of the certain Chamber receives it. [11]

The Constitutional Court, in order to solve the issue, has the obligation to communicate the received notice, as appropriate, to the President of Romania, on the day of filing, if the notice comes from the President of Romania, the parliamentarians or from the Supreme Court of Justice, also stating the date of

the debates. Until the date of the debates and in the sight of them the presidents of the two Chambers and the Government may express their point of view in writing. As such, according to law, these authorities are not compelled to express their point of view, the judgment of the notice being able to unfold without them. [12]

Solving the notice is made by debate or in the plenary of the Constitutional Court. According to law, the debate is carried through both over the provisions mentioned in the notice and the ones that, necessary and obviously, cannot be dissociated.

As such, the judges debate and decide over the provisions mentioned in the notice or the ones that, necessary and obviously, cannot be dissociated. It would be possible that the provisions from the second category to include the whole content of the law (thus being made a thorough control of the law) but in this certain situation this control is motivated by law.

The issue is extremely interesting from a judicial point of view and the solutions will come out of the context of the issue. It is however without a doubt that the extension of the control of provisions that are not necessarily and obviously associated with the notified ones has not been the intention of the legislator. Another interpretation would limit, even bother, the control on means of the unconstitutionality exception. [13]

After deliberating, the Constitutional Court decides with the vote of the majority of the judges and the decision is communicated to the President of Romania in order for the procedure of law development to be complete.

If the unconstitutionality of the legal provisions has been decided, the decision is also communicated to the presidents of the Chambers of Parliament in order to commence the procedure provided by art. 147 (1) of the Constitution. The decisions of the Constitutional Court are published in the Official Monitor of Romania and are compulsory and only have power for the future.

The singularity of the preventive control is that it interferes with the legislative process. [14]

Uniting the previous abstract control with the subsequent one would try to ensure plentitude to the vocation and obligation of the Constitutional Court to guarantee the supremacy of the Constitution as one of the sine qua non conditions of the state of law and of constitutional democracy.

Exercising a subsequent control, by the unconstitutionality exception, cannot replace the absence of an a posteriori abstract control due to the fact that the exception unavoidably implies the existence of a trial.

Both the abstract and the apriori control are in essence optional by conditioning its exercise with the existence of a notice but it is compulsory after the notice of the Constitutional Court. Therefore, in a first stage, the vocation of the Constitutional Court is aleatory and then, in a second stage, the constitutionality control is compulsory, the Court not being able to refuse the fulfillment of an attribution that is part of its constitutional competence. [15]

The control made according to art. 146 paragraph (1) letter a) of the Constitution targets the laws only before their promulgation, resulting in that:

- they can make the object of this control the laws adopted in the Chambers of Parliament
- through laws as an object of the control of constitutionality there are understood both the organic and the ordinary laws.

Although in the generic term of „law” there are surely also included the laws of revising the Constitution, these have a special judicial regime, the control over the initiatives of revising the constitution being exercised ex officio, taking into account that the constitutionality control targets the law, all laws are susceptible to control. According to the disposition of the legal provisions the laws adopted by referendum cannot be the object of the constitutionality control due to the fact that the direct exercise of the national sovereignty by a people through referendum is by definition uncontrollable and to the fact that a referendum is not subjected to promulgation and the constitutionality control is exercised before promulgation.

The constitutionality control is control of the compliance with the law with the Constitution, not an opportunity one. The constitutionality principle is a judicial process implying, among others, hierarchical ordering of the judicial norms, including the ones with law character. The principle of opportunity is essentially political and it imposes a time and manner option within concrete circumstances and based on the hierarchy of certain values or strange, an option that has been objectified by a supreme political authority – the judicial authority. The decisions of the Constitutional Court are pronounced in the name of the law, a fact that excludes ab initio the statement of such acts in the name of opportunity.

Through its decision, the Court does not repeal the law or the disposition of a law that is incriminated under unconstitutionality reason, it only observes the unconstitutionality. The Court does not have the power to repeal the law.

2.2.2 The procedure in case of solving the unconstitutionality exception (the subsequent control)

The unconstitutionality exception is an efficient method of defending the public rights and liberties, it is a defensive procedure that implies waiting for the law to apply to you in order to attack it. [16] It regards an issue found in the role of a certain court of law procedure that implies that the interested person can attack the law based on which the court has made its decision, believing the law to be unconstitutional.

Through itself, the unconstitutionality exception regards a triggered judicial trial in which, by attacking the action of concretely applying the law, the interested one demands the ascertainment that the legal disposition based on which the unconstitutional appliance is based and as such must be removed. Naturally, the procedure of invoking and solving the unconstitutionality exception is regulated in detail by law, it being at the disposition of the legislators.

This method of control has a significant seniority, the courts being the first organs that faced, in judicial practice, with the unconstitutionality of a law. The

exercise of this control by the courts of law is an expression of the application of the principle of the separation of the powers.

The theoretical base of the control of the constitutionality of laws according to the principle of the separation of powers is unanimously accepted in the constitutional doctrine. Some authors have even emphasized that giving this type of control to the courts is a logical consequence of the separation of powers and therefore it should no longer be expressly provided. [17]

The unconstitutionality exception can only be brought to the attention of the courts of law by one of the parts or by the ex officio court. The unconstitutionality of a legal provision can only be summoned if the judging of a case depends on it, therefore, only if it is directly related to the certain case.

Only in these situations, the Constitutional Court can be notified and only by the court that has been brought to the attention the unconstitutionality exception. The court will decide this through a conclusion that will include the points of view of the parts that support or oppose the exception and the court's opinion on the exception. The conclusion will be accompanied by the proof of the parts. If the exception has been brought to attention ex officio by the court of law the conclusion must be justified, also including the statements of the parts as well as the necessary proof. Triggering the procedure of the unconstitutionality exception can determine the suspension of the trial but this is the decision of the court and is made by a justified conclusion.

An appeal can be made against the suspension conclusion within 5 days from the decision.

Receiving the notice, the president of the Constitutional Court designates the panel of judges, made of 3 judges, one of whom is designated by the president. The president of the panel of judges designates one of the judges to be the speaker. If the judge designated as speaker thinks that the exception is obviously ungrounded or violates the legal provisions regarding the notification of the Court he will notify the president in order to summon the panel of judges that can decide, with the unanimity of votes, to reject the exception without citing the

parts. In the other cases, the speaker judge is bound to communicate the conclusion through which the Constitutional Court has been notified to each Chamber of Parliament and to the Government, indicating the date until when they can file their point of view. The speaker judge will also take the necessary measures to manage the proof from the date of judgment.

The panel of judges will base its judgment on the report presented by the speaker judge, the conclusion for notifying the Constitutional Court, the presented points of view, the managed proof, the support of the parts, with their citation and the citation of the Public Ministry. The parts can be assisted by lawyers with the right to plead to the Supreme Court of Justice.

An appeal can be made against the decision within 10 days from its communication. The appeal is judged by a panel of 5 judges, one of whom is the president of the Constitutional Court or his substitution who will preside over it. If the appeal is approved, the appeal court also decides, through the same decision, on the unconstitutionality exception.

The panels of judges decide by the majority of votes. The final decisions that observe the unconstitutionality of certain legal provisions are communicated to the two Chambers of Parliament and to the Government. All final decisions are published in the Official Monitor of Romania.

2.3 The Actions of the Constitutional Court Regarding the Control of the Constitutionality of Laws and Their Judicial Consequences

The Constitutional Court, according to the law regarding its organization and functioning, in the control of the constitutionality of laws files can make decisions in the following cases:

- decides the constitutionality of laws before they are promulgated;
- decides the constitutionality of the Parliament's regulations;
- decides the exceptions brought to the attention of the courts of justice regarding the unconstitutionality of laws and ordinances.

2.3.1 *Judicial consequences of the actions of the Constitutional Court*

They have consequences directly related to the attribution exercise by the court. Thusly:

- The dispositions from the laws and ordinances in force, as well as other regulations, found to be unconstitutional, terminate their judicial consequences within 45 days from publishing the decision of the Constitutional Court. During this term the dispositions found to be unconstitutional are suspended by law;
- in cases of unconstitutionality that regard laws before their promulgation, the Parliament is bound to reexamine the certain dispositions in order to change them according to the decision of the Constitutional Court;
- in the case of revising the Constitution, the decision of the Court has the judicial power of a notice in the revision issue;
- in regards to the unconstitutionality exception, the decision of the Constitutional Court has judicial consequences on it, meaning it cannot be applied (the decision of the Court does not take the legal provision out of the legislation, it remains in force although it will no longer be applied in the future). It is the same in the case of the Court's decision regarding the unconstitutionality of the Government's ordinances.

Coming back to the decisions of the Constitutional Court, these have compulsory character. Some of them are final, others can be appealed. The final decisions are adopted by the Court in what concerns the initiatives of revising the Constitution, solving the unconstitutionality exceptions brought to the attention of the courts of law, respecting the procedure of electing the President of Romania, referendum, litigations that have as object the constitutionality of a political party and the public legislative initiative.

In what concerns the decisions expressed in virtue of the preliminary constitutionality control, if they refer to the unconstitutionality of law, the unconstitutionality objection of the Cort can be removed if the two Chambers adopt the Law again with a majority of at least two-thirds of the number of its members.

In the case of deciding over the constitutionality of the Parliament's regulations, if the final decision of the Court establishes the unconstitutionality of the legal provisions it no longer applies in the certain case. In other words, the decision of the Constitutional Court paralyzes the judicial effects of the contested judicial norm in the trial that summoned the unconstitutionality exception. [18]

The object of the unconstitutionality exception cannot be made by the legal provisions whose constitutionality has been established by the Court through preliminary control.

The final decision that states the unconstitutionality of a law or of an ordinance or of a disposition from a law or ordinance in force is final and compulsory.

The decision that states the unconstitutionality of a law or of an ordinance is a legal base for retrial, at the request of the part that invoked the unconstitutionality exception in a civil trial.

In criminal trials, the decision of unconstitutionality is a legal base for the retrial of the cases when the conviction was based on the legal provisions declared to be unconstitutional. [19]

BIBLIOGRAPHY:

BĂDESCU Mihai, *Constitutional law and political institutions*, vol.I, Universul Juridic Publisher, București, 2005

DELEANU Ion, *Constitutional law and political institutions Treaty*, vol.I, Europa Nova Publisher, București, 1996

IONESCU Cristian, *Constitutional law and political institutions*, vol.I, Lumina Lex Publisher, București

LEPĂDĂTESCU Mircea, *The general theory of the control of the constitutionality of laws*, Didactică și Pedagogică București Publisher, 1974

MURARU Ioan, CONSTANTINESCU Mihai, *The Constitutional Court of Romania*, Albatros Publisher, București, 1997

MURARU Ioan, *Constitutional law and political institutions*, Actami Publisher, București, 1997

- MURARU Ioan, *Constitutional law and political institutions*, vol I, Actami Publisher, București, 1995
- MURARU Ioan, TĂNĂȘESCU Simina Elena, *Constitutional law and political institutions*, vol.I, All Beck Publisher, 2003
- TĂNĂȘESCU Simina Elena, *Constitutional law and political institutions*, vol.I, All Beck Publisher, 2003
- VIERIU Eufemia, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016
- VIERIU Eufemia, VIERIU Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010
- VIERIU Eufemia, VIERIU Dumitru, *Constitutional law and political institutions*, Economic Publisher, București, 2005

References:

- [1] Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010, p.525
- [2] Mihai Bădescu, *Constitutional law and political institutions*, vol.I, Universul Juridic Publisher, București, 2005, p. 63
- [3] Ioan Muraru, Simina Elena Tănăsescu, *Constitutional law and political institutions*, vol.I, All Beck Publisher, 2003, p. 68
- [4] Mircea Lepădătescu, *The general theory of the control of the constitutionality of laws*, Didactic and Pedagogic Publisher, București, 1974, p. 9
- [5] Eufemia Vieriu, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.375
- [6] Simina Elena Tănăsescu, *Constitutional law and political institutions*, vol.I, All Beck Publisher, 2003, p.77
- [7] Ioan Muraru, *Constitutional law and political institutions*, Actami Publisher, București, 1997, p. 79
- [8] Ion Deleanu, *Constitutional law and political institutions. Treaty*, vol.I, Europa Nova Publisher, București, 1996, p. 307 și urm.
- [9] Mihai Bădescu, *Constitutional law and political institutions*, vol.I, Universul Juridic Publisher, București, 2005, p. 67
- [10] Ioan Muraru, *Constitutional law and political institutions*, Publisher Actami, București, 1997, p. 89
- [11] Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Economic Publisher, București, 2005, p.143
- [12] Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010, p.513
- [13] Eufemia Vieriu, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.364
- [14] Ioan Muraru, Mihai Constantinescu, *The Constitutional Court of Romania*, Albatros Publisher, București, 1997, p.119.
- [15] Eufemia Vieriu, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.364
- [16] Cristian Ionescu, *Constitutional law and political institutions*, vol.I, Lumina Lex Publisher, București, p.227
- [17] Ioan Muraru, *Constitutional law and political institutions*, Actami Publisher, București, 1997, p. 91
- [18] Ioan Muraru, *Constitutional law and political institutions*, vol I, Actami Publisher, București, 1995, p. 101
- [19] Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Economic Publisher, București, 2005, p.143

THE RELATION BETWEEN MAN AND ENVIRONMENT. CONCEPT AND SIGNIFICANCE

Lecturer Mihaela Cristina PAUL, PhD.
„Titu Maiorescu” University of Bucharest, ROMANIA
av.mihaelapaul@yahoo.com

Abstract:

In the last years, scientists have done in-depth studies of the extent of environmental degradation. The conclusion they reached was that the degradation stems from the relationship society has with the surrounding nature, but it is also due to economic institutions.

Human consciousness has evolved towards the future, encapsulating in its personal sphere of values ever-larger circles of elements.

The surrounding environment is the binding element between economic growth and ensuring the quality of life. Man and environment are in a relation of interconnectedness from which affecting the environment and the living conditions emerge.

Keywords: *natural environment, environmental law, sustainable development.*

The relationship between people and the environment in the general sense has been tackled especially in philosophy, political theory, sociology, but not so much in law.

In law, this human-environment relationship cannot be analyzed as nothing but a sociohuman relationship, that through regulation generates juridical rapports regarding the surrounding environment and its protection.

This relationship between man and the environment began in ancient times, when people wished and tried to transform nature after their needs.

The people-nature relationship started from a symbiotic stage and alongside the evolution of people their ever-greater desires for development have degenerated into a conflicting relationship. The evolution of the relationship is

configured under the shape of three stages: a symbiotic relationship, a neutral relationship, a conflicting relationship. [1]

Juridic rapports about the environment surrounding us contain rights and obligations, examined by different branches of law.

The socioeconomic development required the construction of models of perception and interpretation of the environment, of the relationship between man and environment.

Concerns regarding the *natural environment* have led to the apparition of certain legal norms such as the environment Law – Law no. 265 from the 29th of June 2006 for approving the G.E.O. 195/2005 regarding the protection of the environment.

Modern civilization led to major changes in what concerns the environment. Through economic development, the environment became more and more polluted, leading even to the certain species of plants and animals going extinct, and also led to the apparition of certain grave diseases for humankind.

At a national, but also at a European and international level, a way to make the protection of the environment more efficient is desired. For a more efficient protection of the environment first of all the balance in juridic rapports between people in what concerns the environment must be respected, and secondly the rights of the participants to the juridic environmental rapports must be respected, by other participants of this juridic rapports. [2]

When we say natural environment [3]., we mean demographics, fauna, flora, geographical environment etc. All these factors configure and influence all the components of law.

People never wondered about their future, since along time many damages have been done to the natural environment. Thus, there were (and still are) many residues dumped into the drinkable water courses, this leading to affecting the surrounding environment over time.

It was just a few years ago that people have begun to realize the danger that threatens the planet in what concerns the natural environment.

Life and the health of man depend on the entire atmosphere, hydrosphere, lithosphere and biosphere, as well as on the actions of the society, which encompasses the technical, economical, cultural, and artistic civilization, and so on.

In order to maintain the balance between man and environment there is a need for will[4], both individual and collective.

We can say that the subjective law is a certain kind of will power, a sovereignty of will [5]. Starting from the premise that human will can create subjective laws, the autonomy of violence pleads for individual liberty, unrestrained but through the request to respect good manners and public peace.[6]

Ecological balance can be affected through producing certain losses of human life, which forces us to ask the following question: what will happen to the future of humanity?

The world became aware of the phenomenon of pollution only halfway through the 20th century, when the consequences began to crop up more and more alarmingly: the urban smog, the acid rains, the exacerbated greenhouse effect, the thinning of the ozone layer, the grave deterioration of the quality of waters and soils, all of them dramatically affecting life. People have become the victims of their own actions, and have begun to take responsibility for the environment they live in [7].

In the Brudtland Report there was given a definition for sustainable development in the sense of conciliation of the economic and the surrounding environment through a new way of development: *Sustainable development represents that method of development that has as a goal to satisfy the needs of the current generations, without compromising the possibility of the future generations satisfying their own needs.*

Simion Mehedinti in his course of Anthropogeography (1909) underlined the fact that man can be considered: *like one of the most active agents in modifying the rapport of the areas and thus one of the major geographic factors.*

In a word, it can be said that the relationship man has with the surrounding environment relies only on *respect.*

Along time, man evolved constantly together with other species of plants and animals, so that man is subservient to the laws on nature.

The issues of the environment are present beyond any boundary. The ideological, cultural, and political, the academic disciplines and religious belief boundaries are exceeded.

These environmental issues affect both prosperous and poor countries, both developed and developing countries, natural entities and entire societies[8].

Regarding the human – nature relationship, four concepts were analyzed: *The ecocentric notion, the biocentric notion, the anthropocentric notion, and the notion of sustainable development.*

The ecocentric notion states that the protection of the factors of the environment represents a purpose in itself, and that Terra must be protected, by promoting a spirit of conservation[9].

This notion can also be named “Conserving without asking”[10].

The biocentric notion can be characterized through the phrase “Correcting the model”.[10]. In the framework of this notion there is a connection made between the economic crisis, the environment, and the socioeconomic model of development, but neither is the model is not put in question, nor are the causes that led to the present situation analyzed.

The anthropocentric notion places man in the centre of nature.

The notion of sustainable development. The academician N.N. Constantinescu said about this notion: “If the first three notions are each unilateral, the most encompassing is that of the reconciliation of humans with nature and with themselves. Without omitting the multiple needs of man, but affirming its essential role in respecting nature, this concept means respect for

life in general and for its development, respect for the ecological balance, for the health of Terra and its areas, as well as respect for the progress of human society".[11]

The inconsistency between the internal limits (human) and the surrounding environment have constituted the cause of the present ecological situation.

Based on these internal limits following certain fundamental rights (the right to life, health, freedom of movement) as well as the human liberties to do anything in the environment in which they live, man has created technologies, anthropic substances, the effect of which couldn't be reabsorbed by nature.

Nature's capacity to regenerate has been overtaken, from this point on beginning its degradation, the apparition of ecological damages, some of which irreversible [12].

Nature is immense, man is unique, the quality and level of the human life have always depended on the human-nature relationship, on the measure with which man could understand nature and use its strengths for their own good...[13].

The environment is our home, which is why it is us who need to take care of where exactly we obtain the necessary resources for sustainable growth and development. We all need to get involved in actions of protecting the environment and try to eliminate as much as possible the damaging actions done to the environment.

Conclusions

Each generation lives with the hope of having better living conditions from a material point of view, and with the belief that they are part of a system that is morally superior to that of their antecedents. Man is capable of learning. We have not yet reached the point of knowing everything, we can still learn from the rest of the living inhabitants of this world. In a world in which nature is affected, and we need responsible people, with a high level of culture, to involve themselves in a rational and sustainable use of resources.

People cannot give up on their own needs, leaving the planet for the future as it is today, because they wouldn't be able to continue living. For these reasons, people must and need to organize their life in harmony with nature, being capable of finding existence solutions for everything that is now on Earth.

References:

- [1]. Rojanschi V., Bran F., *Economie si protectia mediului*, Tribuna Economică Publishing House, Bucharest, 1987, pp. 61-68.
- [2]. Ghe Iancu, *Drepturile fundamentale si protectia mediului*, Regia Autonomă Monitorul Oficial [the Official Gazette of Romania], Bucharest, 1998, pp. 61.
- [3]. M.Niemesch, *Teoria generală a dreptului*, Hamangiu Publishing House, Bucharest, 2014, pp. 29
- [4]. M.C.Paul, *Rolul si formarea vointei juridice*, University Publishing House, Bucharest, 2014, pp. 18.
- [5]. R.Tudor Popescu, *Drept*, Didactic and Pedagogical Publishing House, Bucharest, 1970, p. 53.
- [6]. I. Deleanu, *Dreptul subiectiv si abuzul de drept*, Dacia Publishing House, Cluj, 1988, pp. 86.
- [7]. G.Bălan, *Dezvoltarea durabilă. Concept. Evolutie*, Burg Publishing House of the Romanian-German University of Sibiu, Sibiu, 2011, pp. 9-10.
- [8]. www.dezvoltarium.ro/detalii-articl/relație_cu_mediul_inconjurător
- [9]. I. Dăduianu Vasilescu, *Mediul si economia*, Didactic and Pedagogical Publishing House, R.A., Bucharest, 1997, pp. 8.
- [10]. M. Dutu, *Între a fi si a avea*, Economic Publishing House, Bucharest, 1998, pp. 68.
- [11]. N.N.Constantinescu, *Invațăminte ale tranziției economice în România*, Editura Economică Publishing House, Bucharest, 1997, pp. 191.
- [12]. Jean Dorst, *Înainte ca natura să moară*, Editura Politică Publishing House, Bucharest, 1971.
- [13]. A. Szent-Gyorgyi, *Pledoarie pentru viață*, The Idei Contemporane Collection, Editura Politică Publishing House, Bucharest, 1981, pp. 152-159

REFLECTIONS ON THE SEPARATION OF THE STATE POWERS IN THE ROMANIAN CONSTITUTION

Lecturer Eufemia VIERIU, PhD.

Petroleum – Gas University, Ploiești, Romania

eufemia_vieriu@yahoo.com

Abstract:

The complexity and dynamics of the political life determines evolution and reconsideration regarding the classic theories of the constitutional law. This kind of process is found in the case of the separation of the state powers as well. Numerous factors affect the way in which this theory is currently put into practice, according to the current political reality.

This article aims to examine the principle of separation, balance and collaboration of the state powers both from an historic point of view and from the point of view of the current constitutional regulations.

The final part of this material will briefly present the constitutional relations among the public power authorities.

Keywords: *the separation of the state powers, public authorities, the principle of constitutional loyalty.*

The State Power – Introductory Notions

Power, along with nation and territory, is the third constitutive element of the state. The category that is most commonly encountered in the theory and practice of the constitutional systems is the institutionalized power category.

This is tied to a „collective acknowledgment” which makes the group be recognized by all its members as a separate and superior entity. This power implies the creation of norms, social rules that are independent from every member of the group, implies social organization under these norms. The collective acknowledgment makes possible the occurrence of an „objective right” which makes possible the elaboration of the positive right that explains it and through which the norms and rules of social interaction that support that social structure are established. The state power can be included in this category as well. [1]

Regardless of the variety of its forms, the state power has certain common traits, which will be emphasized next:

- The state power is sovereign, designating the state power to rule, restrict, command.
- The state power is an institutionalized power, with an organized character, meaning that it is independent from the person that exercises it;
- The state power is a political power that determines the leadership of the society in the direction expected by the political forces that are in government, that have power.
- The state power is a command power, it commands to the entire nation and establishes compulsory norms, dispositions, either as general norms or as concrete dispositions;
- The state power owns the monopoly of restraint. It is a material power that is superior to any other power that exists on a determined territory. Restraint appears necessary for the protection of the values of the entire society, of the life, health, freedom or wealth of the people.

Being an official power, the state power is not founded on entreaties but on the “imperium” history, on the restraint power, including physical repression of the state towards the opposition of certain law subjects.

The Separation, Balance and Collaboration of The State Powers

The theory of the separation of state powers is a famous one, thoroughly advertised and frequently invoked. Under the name of theory of the separation of state powers there are, in fact, several theories referring to the state power, which analyses certain methods of exercising it.

The theory of the separation of state powers had a major, if not decisive, role in promoting the representative system, namely in the democratic capitalization of the relations between the sovereign owner of the power (the people, the nation) and the state organization of political power, in searching,

among the state organization and the functioning of power, of the guarantees of the exercise of the human and citizen rights. It is a theory that the elaboration of constitutions was based on, the statements of the Declaration of human and citizen rights (France, 1789) bringing proof in this regard. Thus, according to the declaration mentioned, a society in which the guarantee of rights is not ensured and there is no separation of the state powers determined does not have a constitution. [2]

Enunciated by John Locke the theory of the separation of state powers is final and broadly explained by Montesquieu in the famous paper „About the spirit of laws” (1748). Montesquieu made an efficient instrument for the safety of the citizens out of the separation of the powers.

In its essence, the process of ruling the state must be unitary, a reflection of the unitary character of the political power. In any state form, the political power must have a unitary character, meaning that it is owned either by an individual or by a very small group (in archaic states), either by a large political body (in modern states). [3]

From this perspective, it is said that only a single power can exist in a state, towards which other powers of the same nature do not oppose. In virtue of the public power, the state is entitled to not recognize on its territory another power that has come from the outside. [4]

During the two centuries of its practice, the theory of the separation of the three state powers has taken different forms in every political regime. Practically, there are no two states in which the actual methods of separation or distribution of the legislative, executive and judicial functions (powers) are identical.

Even within the same state, during a longer or shorter historical evolution, there have been observed changes of the relations among powers for the benefit of one of them, although the constitutional provisions which regulated the distribution of the power attributes have remained unchanged. For example, in the constitutional practice of the United States of America, the relations among

powers, especially between the executive and legislative ones, have a different evolution in every legislature, in every presidential term.

Both the legislative and the executive powers exercise the so-called listed powers (the powers expressly stated in the Constitution) and implicit powers (prerogatives that are either of legislative or executive nature).

In what concerns the implicit powers, the Congress or the President exercise different „powers”, at the limit of their competences established by the Constitution, with the help of which they can influence other sectors.

The source of the implicit powers is the interpretation of different texts of the Constitution. Thus, by an extensive interpretation of certain constitutional texts, the USA president becomes „more powerful” than the Congress without the constitutional balance among powers to be severely damaged. Theoretically, the Congress also benefits from the same latitude which, for example, has the right to draw all the laws that will be considered necessary and appropriate for applying the legislative powers that have been offered to it through the Constitution. Due to the fact that the Constitution does not specify which laws they can apply, the Congress is free to estimate in this regard. However, practically, the President has mostly given substance to the implicit powers.

Although the „competition” in terms of constitutional prerogatives takes place between the executive and legislative, the judicial power is not excluded. After all, it can be rightfully said that, in an extensive interpretation of the constitutional texts, the president of the Supreme Court of Justice of the United States, John Marshall, has „created” in 1803 the principle of judicial control of the constitutionality of laws. [5]

Summarizing the classic theory of the separation of state powers it can be remembered that in any society that is organized as a state there are three functions:

- of issuing judicial laws or legislative function;
- of exercising these laws or executive function;
- of judging the litigation or judicial function.

Each function belongs to a different organ:

- the legislative power – to the representative assembly;
- the executive power – to the head of state, possibly to the head of government and the ministers;
- the judicial power – to the judicial organs.

The theory of the separation of state powers is actually an ideological justification of a very clear political purpose: the overall weakening of the governor's power, restricting the ones through the others. It is considered that the separation of powers has two well defined aspects:

- separating the Parliament from the Government;
- separation the jurisdiction in relation to governors which allows control over them through independent judges.

The evolution of the separation of state powers, as a constitutional theory and reality, has three main aspects:

- defining the content and meaning of the theory;
- the critique of the classic theory;
- the continuity of its political and social importance and resonance.

In what concerns the content and meanings of the separation of the state powers it has often been stated that it is more about separation than about the balance among powers. The independence of the state authority is important for the state organization which cannot be total but must be very broad. The state organs must depend on one another only as much as it is necessary for their formation and designation and possibly for the exercise of some attributions. Then it is considered that, in fact, there are only two powers, namely the legislative and the executive ones.

The critique of the classic theory of the separation of state powers is included in the context of its evolution. It has gone as far as stating that the classic theory no longer expresses the political reality because it was removed by the totalitarian regime and is surpassed and outdated in the pluralist regime.

The aging of the theory of the separation of state powers is justified by the fact that it was elaborated in a time when political parties were not yet founded and when the main issues of power were of institutional nature. The occurrence of political parties, their important role in the configuration of judicial and political institutions, causes the fact that the nowadays separation is no longer made between Parliament and Government but between the majority, composed of the elected party or parties that have at the same time both the Parliament and the Government and the opposition that waits for the following election in order to „revenge”. A certain scheme is, in principle, applicable anywhere and, of course, more evidently in two-party constitutional systems.

The Consecration of The Separation of State Power in The Romanian Constitution

The principle of the separation of state powers was illustrated in the Romanian constitutional text even before its revision during the year 2003. Thus, the doctrine pertinently shows that, by examining the dispositions of the Romanian Constitution from its version adopted on December the 8th 1991, it can be seen that the balance among state powers was found in its modern content and meaning, in this regard more pertinent arguments were invoked:

The three classic „powers” were expressed in the Constitution:

- the legislative within the norms regarding the Parliament; [6]
- the executive within the norms regarding the President of Romania and the Government[7];
- the justice within the norms regarding the judicial authority. [8]

The order of the regulation of powers within the Constitution was the classic, natural order, namely the legislative power, then the executive power and, lastly, the judicial power. [9]

Taking into consideration the legitimacy of Parliament’s empowerments, its numerous and broadly representative composition, the Constitution ensures a certain preeminence to it in relation with the other state authorities. The Parliament was declared as the only legislative authority of the country, charged

with functions of training, electing, appointing, vesting of other state authorities and with control functions. Certainly, to this there could also be added the characterization given by art. 58 according to which the Parliament was the supreme representative organ of the Romanian people, although the use of the term „supreme” could have been regarded with many scientific limitations in the context of the theory of the separation/balance of the state powers. Furthermore, even the bicameral structure of the Parliament could have been considered an expression of balance in the exercise of legislative power. Besides, this even was the single solid argument of the quasi-perfect bicameralism that existed then towards the fact that Romania is a unitary state. [10]

During the revision of the Constitution arranged during the year 2003 there was the need of explicitly proclaiming the principle so that article 1 was completed by two new paragraphs, one of which is exclusively dedicated to the consecration of the principle of the separation of state powers and constitutional democracy as fundamental political coordinates for the entire organization and activity of the romanian state. The derived Romanian constituent could not however disregard more than two centuries of doctrinal evolution in this matter and not only referred to the separation of powers but also to the necessary balance that must be established among them within their natural functioning. Paragraph (4) of article 1 of the revized Romanian Constitution states that:

„The state is organized according to the principle of the separation and balance of the powers – legislative, executive and judicial – within the constitutional democracy.”

The Relations Between Public Authorities

The constitutional relations between public authorities are characterized by mutual implications of some in the other’s field of activity, implications that signify balance through collaboration and control. [11]

2.4 The Relations Between The Parliament and The Government

The mutual balance and control between the Executive and Legislative is ensured both the means of action and control of the Legislative over the

Executive and through the means of action and control of the Executive over the Legislative.

In the Romanian constitutional system, the main means of action and control of the Executive over the Legislative are the following:

- Legislative delegation. It is an exceptional substitution procedure of the Government in the legislative prerogatives of the Parliament so as through order the Government can primary regulate, modify or repeal the current regulation.
- Dissolution of Parliament. It is that constitutional mean provided to the head of state through which he can end a legislature, before its term, triggering a new election for appointing the representatives.
- Legislative initiative. This can objectify both in the constitutional laws' domain (revision of the Constitution) and in the organic and ordinary laws' domain. In the case of constitutional laws, the legislative initiative implies the explicit agreement between the President and the Government. Regarding the organic and ordinary laws, the Government is the main subject of the legislative initiative. Under terminological report, the legislative initiatives of the Government are called "bills" and the legislative initiatives of the citizens and parliamentarians are called "legislative proposals".
- Promulgation of law. It is a stage of the legislative procedure; the President does not perform an act of "legislative will" but only observes the regularity of adopting the law.
- The request of the President of Romania to reexamine the law. The President of Romania can temporarily postpone the coming into force of a law by sending it to be reexamined (by the Parliament) or by verifying its constitutionality (by the Constitutional Court) but he cannot prevent sine die its coming into force. Thus, the promulgation of the law is made in maximum 10 days since receiving the adopted

law after reexamination or since receiving the decision of the Constitutional Court that confirms the law's constitutionality.

- Engaging the responsibility of the Government regarding a bill, program or declaration of general politics. This takes place in the common meeting of the two Chambers of Parliament. If within three days from presenting one of the documents stated above a censorship motion is brought and voted, the Government is dismissed. Per a contrario, if the motion is not brought or if it is brought but not adopted the Government succeeds to enforce its proposed program, declaration or bill, modified or completed, as appropriate, with the amendments proposed by Parliament and accepted by the Government, thus avoiding the usual legislative procedure.
- Summoning the Parliament to an extraordinary session. The Chamber of Deputies and Senate meet in an extraordinary session, at the request of the President of Romania, and the object and duration of the session must be expressly stated on the summoning request. The summoning to an extraordinary session can regard both Chambers or only one of them.
- The ability of the President of Romania to send messages to Parliament. The message is the President's method of communication with the Parliament in what concerns the main political issues of the nation, as mediator between the state powers. The Constitutional Court has stated that "the message is a unilateral and exclusive political act of the President of Romania which the Chambers, met in a common meeting (...) only have the obligation to receive"; [12] the need to debate the message is left to the appreciation of both Chambers which will debate it if they will consider that expressing the Parliament's position and taking certain measures are necessary practices.

The Parliament-Executive relations, within constitutional regulation, can be examined by the interference of the legislative in the activity of the head of state and of the Government. Thus, the Parliament:

- receives the oath of the President;
- can prolong his term in case of war or calamity;
- can decide the indictment of the head of state for high treason;
- listens to the messages of the head of state;
- approves the international treaties according to art. 91 of the Constitution;
- approves the declaration of the head of state regarding the partial or general mobilization of armed forces;
- approves the institution of the state of emergency or state of siege;
- can suspend the President of Romania from office if serious deeds that violate the provisions of the Constitution are committed by him;
- establishes the indemnity and other rights of the President of Romania.

In what concerns the relations with the Government, it will be especially mentioned that the Parliament:

- grant the confidence vote to the Government's program and entire list;
- withdraw the granted trust;
- can require information and documents;
- through deputies and senators there can be asked questions and addressed interpellations;
- estimates the political responsibility of the Government;
- can request the prosecution of the members of Government for acts performed during the exercise of their function;
- establishes by law the responsibility cases and the sanctions applicable to the members of Government;
- enables the Government to issue ordinances in fields that are not the object of organic laws.

2.4.1 The Principle of Constitutional Loyalty in The Relations Between Parliament and Government

The principle of constitutional loyalty referring to the relations between Parliament and Government has been summoned in cases that have regarded the adoption of regulation and the enactment ability of the two political authorities. The same principle has been summoned by the Constitutional Court and regarding the way in which the institutions in question are organized and function to fulfill their constitutional abilities. [13]

The institution of governmental responsibility regarding a bill that the Romanian Constitution provides is an indirect political mean of adopting a law, not by debating it during the normal legislative procedure but by debating a problem that is political by excellence regarding the Government dismissal or stay.

The Romanian Constitution does not establish any conditions regarding the nature of the bill, its structure, the number of the bills that the Government can be responsible for in the same day or in another given period of time or regarding the moment when the Government decides to take responsibility.

It is a case when, apparently, the principle of the separation of state powers seems fully respected by taking responsibility of some bills by the Government, regardless when, how many times and regarding which regulations it engages responsibility. However, as it has been proven in practice, this type of interpretation voids the content of the constitutional principle of the separation of state powers. Thus, prevailing itself from the general character of constitutional norms which do not establish rules in the meaning shown above, the Government has often took to this enactment practice in place of the law making authority having consequences that are hard to anticipate by the Romanian legislative system. [14]

Noticed about the unconstitutionality of some of the thus adopted laws, the Constitutional Court of Romania has deducted some rules referring to the procedure of taking responsibility for a bill.

Thus, the Constitutional Court of Romania has stated that, to be in accordance with art. 114 of the Constitution, the Government's taking of responsibility must fulfill a series of criteria, namely:

- the existence of an emergency regarding the adoption of the measures of the law for which the Government has taken responsibility;
- the need for the regulations in case to be adopted with maximum celerity;
- the importance of the regulated field;
- the immediate application of the law in question. [15]

Even after establishing some criteria the institution of the Government's taking of responsibility has been excessively used, beyond the spirit of the Constitution, which led to ultimately summoning the obligation of constitutional loyalty of the Government by the Constitutional Court of Romania.

The constitutional loyalty must also be part of the way in which the will and activity of the Parliament is perceived and interpreted, as it is reflected in its decisions. It is about respect and god – will towards the institutions.

2.5 The Relations of The President of Romania With The Government

- Designates a prime minister. The exercise of this Presidential attribution takes place within the mediation function exercised by the President of Romania and implies organizing political consultations within the political formation that owns the majority in Parliament or, in lack of a majority, consulting all the political parties represented in the Parliament.
- Can revoke ministers from the prime minister proposal. In the case of revoking ministers, article 85, paragraph (2) is applied which provides that the existence of the governmental shuffle state or the state of vacancy of the post. The President can only deny a single time, with relevant reason, recalling a minister.
- Can take part, in certain situations, in the Government sessions;

- Represents Romania on an external plan. This sphere of attributions in the extreme political domain refers to:
 - a. The closing, in the name of Romania, of international treaties (under the reserve of their negotiation by the Government and ratification by the Parliament). In the specialty literature there is stated that engaging the Government in this process has the role to prevent the closing of some secret treaties, but it does not mean that the President has a passive role, he has to have a permanent connection to the state of negotiations but he cannot take part directly in the negotiations. [16]
 - b. The accreditation and recall of the diplomatic representatives of Romania and the approval of the foundation, dissolution or change of the rank of diplomatic missions is made at the Government's proposal in virtue of the President's quality as representative of the state.
 - c. For the accreditation of the diplomatic representatives of other states, according to diplomatic custom, the certain person is received by the head of state in order to present the letter of accreditation.

2.5.1 The Principle of Constitutional Loyalty in The Relations of The President of Romania with The Prime Minister

The constitutional relations between the two representatives of the executive have been examined by the Constitutional Court in order to solve certain judicial conflicts of constitutional nature that especially regarded the procedure of appointing ministers and the representations of Romania at the level of the Institutions of the European Union. It was decided that "In exercising the constitutional attributions the President of Romania takes part in the meetings of the European Council as head of state." This attribution can be expressly delegated by the President of Romania to his prime minister. [17]

The Constitutional Court has stated that the institutional relations between

the prime minister and the Government, on one side, and the President of Romania, on the other side, must function within the constitutional loyalty and collaboration environment, in order to fulfill the constitutional attribution distinctly regulated for each of the authorities, the collaboration among them being a necessary and essential condition for the good functioning of the public authorities of the state.

Thus, it has been established that the President of Romania, not having the right to veto, can ask the prime minister only once and with good reason to make a new proposal of appointing another person as minister. Likewise, the reasons of the Presidential request cannot be censored by the prime minister and he has the obligation to propose another person for the minister function. [18]

2.6 *The Relations of The Parliament with The Courts of Law*

It must be mentioned that the organization and functioning of the courts of law are made, according to law, accordingly. The Parliament establishes by law the competences and procedures for the courts of law. In this regard, it can be said that we find ourselves in the presence of a collaboration between the state structures to fulfill the will of the people. This collaboration implies:

- competences that are clearly delimited by the Constitution;
- organizational and functional autonomy;
- mutual control without interference;
- constitutional guarantees of the fulfillment of the term and of respecting the rights of the citizens.

2.6.1 *The Principle of Constitutional Loyalty in The Relations Between The Parliament and The Courts of Law*

The summoning of the constitutional loyalty has been made in order to solve a judicial conflict of constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on one side, and the legislative authority, represented by the Romanian Senate, on the other side. [19]

On this occasion, the Constitutional Court of Romania has remembered

that by putting into the discussion of the Senate's plenary of a final and irrevocable court order, decision that stated the incompatibility of a senator, followed by the negative vote regarding its execution, the Senate has acted as a hierarchically superior institution, which affects the fundamental principle of the state law, namely the principle of the separation and balance of the legislative, executive and judicial powers within the constitutional democracy.

Thus, the censoring under any aspect of a final and irrevocable court order which has acquired authority of judged fact is equal to transforming this authority in judicial power that competes with the courts of law in what regards the making of justice.

Therefore, the interference of other powers in the sphere of justice is contrary to the constitutional principle. This does not exclude however certain constitutional relations naturally resulting from the state organization of power.

In conclusion, it can be stated that the principle of the separation of state powers is broadly known as being specific to the democratic political regime, regardless of their parliamentary and Presidential nature or various combinations of the two. Its evolution throughout time, in doctrine and practice, has materialized in the occurrence of some new elements that put into an equation, if not new, then a relevant one the classic theory enunciated by Montesquieu.

Thus, the constant difficulties encountered in the functioning of a pure model of the rigid separation of powers have turned the attention and have moved the center of gravity of the classic theory to the idea of balance and collaboration among the state powers, collaboration that must be governed by mutual respect and constitutional loyalty. Besides, this is one of the meanings of interpretations which the Constitutional Court of Romania has given, in its jurisprudence, the principle of the separation of state powers, especially after the year 2003 when the Constitution has been revised, with the consequence of consecrating a new attribution to the Constitutional Court of solving judicial conflicts of constitutional nature between the public authorities.

Bibliography:

The Romanian Constitution

Decisions of the Constitutional Court of Romania

BĂDESCU Mihai, *Constitutional law and political institutions*, Judicial Universe Publisher, București, 2005

IONESCU Cristian, *Constitutional law and political institutions*, Juridic Publisher, București, 2004

MURARU Ion, TĂNĂSESCU Elena Simina, *The Constitution of Romania – commentary of the parties*, CH Beck Publisher, București, 2008

TEODORESCU Anibal, *Treaty of administrative law*, Volume I, Institution of graphical arts Eminescu” SA, București, 1929

SAFTA Marieta, *The separation of the state powers and the constitutional loyalty*, *The Judicial Tribune*, Vol. 3, Iunie 2013

VIDA Ioan, VIDA Ioana Cristina *The executive power and public administration*, ed. a II-a, Cordial Lex Publisher, Cluj-Napoca, 2012

VIERIU Eufemia, VIERIU Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010

VIERIU Eufemia, VIERIU Dumitru, *Treaty of constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016

References:

[1]Mihai Bădescu, *Constitutional law and political institutions*, The Judicial Universe Publisher, București, 2005, p.222

[2]Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010, p.43

[3]Cristian Ionescu, *Constitutional law and political institutions*, Juridic Publisher, București, 2004, p.58

[4]Anibal Teodorescu, *Treaty of administrative law*, Volume I, Institution of graphical arts Eminescu” SA, București, 1929, p.113

[5]Eufemia Vieriu, *Treaty of constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.42

[6]The Constitution of Romania art. 61 and the following

[7]The Constitution of Romania art. 80 and the following

[8]The Constitution of Romania art. 124 and the following

[9]Eufemia Vieriu, *Treaty of constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.43

[10]Eufemia Vieriu, Vieriu Dumitru, *Constitutional law and political institutions*, Pro Universitaria Publisher, București, 2010, p.46

[11]Eufemia Vieriu, *Treaty of constitutional law and political institutions*, Pro Universitaria Publisher, București, 2016, p.43

[12]The Decision of the Constitutional Court of Romania no. 87/1994

[13]Marieta Safta, *The separation of the state powers and the constitutional loyalty*, *The Judicial Tribune* Vol. 3, Iunie 2013

[14]Ion Muraru, Elena Simina Tănăsescu (coord.), *The Romanian Constitution – commentary of the chapters*, CH Beck Publisher, București, 2008, p.1080

[15]The Decision of the Constitutional Court of Romania no. 1655/201

[16]Ioan Vida, Ioana Cristina.Vida, *The executive power and public administration*, IInd edition,, Cordial Lex Publisher, Cluj-Napoca, 2012, p. 122

[17]The Decision of the Constitutional Court of Romania no. 683/2012

[18]The Decision of the Constitutional Court of Romania no. 98/2010

[19]The Decision of the Constitutional Court of Romania no. 972/2012

ASPECTS CONCERNING THE NECESSITY AND THE OPPORTUNITY OF THE CONSTITUTIONAL ENVIRONMENTAL RIGHTS

Lecturer Ingrid Ileana NICOLAU, PHD.

Faculty of Judicial and Economical Sciences, „Spiru Haret” University, Constanta
(Romania)
ingridnicolau@yahoo.com

Abstract:

The nature of environmental rights requires an international effort aimed at their keeping and protecting. This is due to the interdependency amongst environmental sectors, cross-border effects of destroying the environment and the complex and overwhelming phenomenon such as destroying the ozone layer and global warming. It is very important to understand that the constitutional environmental rights are not a solution for all environmental problems. They must be regarded as a way of approaching environmental problems, by strengthening the existing regulations, by encouraging the drawing up of new regulations.

Key words: *environment, environmental constitutional law, imposing, confirming, pollution*

Nature and definition of environmental rights

The constitutional environmental rights are very important in the process of eliminating the environmental injustice and the fear of the future generations regarding injustice. Given the legal definitions of “health” and “wealth”, other problems connected to the environment could be protected by this right.

Such problems, liberally defined, might include aspects related to the quality of life, esthetics, culture, spirituality. Nevertheless, an environmental constitutional right is not a solution to all environmental problems [1].

The nature of the environmental rights requires an international effort to keep and protect. This is due to the interdependency amongst environmental sectors, cross-border effects of destroying the environment and the complex and overwhelming phenomenon such as destroying the ozone layer and global

warming. These factors illustrate the way regional protection of the environment is beneficial, but they do not provide a solution for the global destruction [2]. Many sectors of the economy have a negative impact on the environment. Processing feedstock, using fuel, mining, deforestation, transportation and distribution methods, industrial processes, users' consuming patterns, products life cycle and many other common practices of the modern world work together to affect many other regions [3]. That way, the environmental protection measures in the USA ensures that the pollution in other countries will not affect the American population or soil. The ozone layer destruction and the global warming have a real and significant impact on the whole humankind. These problems won't be solved unless all actors work together to make the necessary changes. With these three factors in mind, a person can understand that the problems related to environment degradation won't be truly fixed until an international cohesive effort is made. Happily, a big part of the world has already started to get involved.

It is important to understand that the constitutional environmental rights are not a solution for all the environmental problems. They must be regarded as a way of approaching the environmental issues, through strengthening the existing regulations or encouraging the creation of new ones.

What should environmental rights guarantee?

It is logical that the environmental rights should mandate certain obligations and guarantees to the people protected. A right of an efficient environment must include procedural and substantive obligations and rights. Moreover, an environmental right should offer mechanisms of collecting the prejudices from the guilty parties. In order to avoid inherent difficulties in enforcing environmental rights, the definition, the purpose and the guarantees of the right should be very clearly voiced. The more precisely a right is being formulated, the less ambiguous the result would be, followed by a correct legal interpretation [4].

The procedural rights dictate how governments or local entities should operate. These rights ensure the correct and consistent enforcement of the processes and justice in all cases that come before a court. These rights will help the correct illustration of the enforcement procedures of the environmental rights. The proper procedure is very important. An incorrect procedure may violate the person's right to intimacy, free speech, or other basic human rights. The inadequate procedures might also force the court to exclude proofs, to renounce a case, or to sentence against a legitimate case. Dinah Sheldon believes that the procedural rights of an efficient environmental right should require the political participation, informed and acquiescent of the ones affected by the environmental decision. Shelton underlines three procedural rights that an environmental law should guarantee: the right to prior knowledge of such an action, the right to be a part of decision making, the right to appeal to the competent administrative and judicial courts.

Dispositions must be given to activate a mechanism of immediate procedures that guarantees against environmental degrading. Shelton states that, even in the above mentioned procedures, two questions have no answer: 1. How do the rights to information and participation apply to the people from the area neighboring the one directly affected and 2. Who makes the final decision on the projects affecting the environment and what are the limits of the decisive factors? [5] The first question tackles the topic of cross border degradation of the environment. Environment destruction and pollution may originate in one area, but affect many more areas. If foreign countries are affected, information, participation and redress must be provided accordingly. Therefore Shelton's first question tackles the subject of the non-citizens rights. The second question envisions an international scenario. From this perspective, international treaties establishing norms and standards will limit the decision-making factors. The last decision on the environmental problems will belong to the ones in the state of jurisdiction. Nevertheless, the state will be restricted by the limits imposed by the international treaties. In the absence of the norms and the standards imposed by

the international treaties, the second question asked by Shelton remains unanswered in case of a domestic scenario.

What are the difficulties with environmental rights?

There are different difficulties affecting the adoption of environmental rights. Enforcement, the different economic interests, determining the “right” levels of pollution, interaction with the existing legislation and the flexibility problems are only a few of the problems associated with the constitutional implementation of the environmental rights.

According to Betsy Apple [6], an integral component to assuring the enforcement of any right is that it should be “voiced clearly enough to allow a personalized remedy”. She points out that the lack of clarity in context, in the definition of the environmental rights can lead to enforcement difficulties. One single definition of the environmental rights may be interpreted in many ways, leading to more theories regarding responsibilities and results. Apple quotes how legal confusion, economic pressure and the lack of international treaties with a consensus on the issue, contributed to the problems of enforcing the existing environmental rights. Following the logical line of thinking, she states that the environmental rights would be easier accepted and enforced if there were international treaties to guarantee them as human rights. While some international treaties define, acknowledge and try to impose environmental rights as human rights, Apple considers that they are not enough. This is due to the fact that existing international legislation lacks fixed parameters and a written code. Apple claims that because of this ambiguity, the courts consider it risky to refer to this treaties, unless they are enforcing the most known violations of human rights (such as the right not to be tortured). It is also noteworthy that numerous international documents stating that the environmental rights are human rights are not ratified or endorsed by USA. Apple concludes that international treaties specific enough, universal and compulsory accompanied by the majority recognition of the environmental rights would help USA courts to enforce successfully environmental rights.

Sevine Ercmann summarizes the outcomes of three international meetings regarding the enforcement of the environmental legislation [7]. Imposing the environmental legislation is imperative to assure the enforcement of the constitutional environmental rights. The international meetings that Ercmann refers to were sponsored by the U.S. EPA, other US relevant authorities, The Ministries of the Environment of the host countries and the Dutch Ministry for Housing, Physical Planning and Environment. These conferences took place in Utecht, Holland in 1990, Budapest, Hungary in 1992 and Oaxaca, Mexic in 1994. Ercmann underlines the generalities, the necessary imposing measures, the powers to be given to the authorities, the role of public awareness, the role of NGO's and other special interest groups. Ercmann's data is often quoted because they represent an international effort to solve a very specific problem.

Ercmann points out the general methods to guarantee the correct interpretation and enforcement of the environmental legislation. He starts by stating that the requirements of the national and international legislation concerning the administrative, civil, criminal stipulations must be adopted. These legal requirements should begin with confirming measures and a raised administrative control. Ercmann believes that these measures will finally allow a better participation, information and judicial control measures, which will optimize the enforcement. Before all these to be accomplished, terms as "imposing" and "conformation" must be defined [8].

"Enforcing" is a set of actions that government or others execute to confirm to a regulation of the community and to correct or stop situations that imperil environment or public health.

Traditional methods of enforcing include monitoring, inspection, reporting, gathering proofs to locate violations, negotiating with individuals or industrial entities regarding their ways of conforming. The last step to enforce conformity is the ability of enforcing agencies to pursue legal measures and/or to settle agreements. Ercmann underlines that the success of an enforcing program depends on how the states exercise their rights when prioritizing the

environmental needs and the objectives and how they choose the mechanism of enforcement to reach its objectives. Ercmann notes that effective enforcement may require reorganizing of the administrative structures, implementing environmental legislation, using innovative administrative instruments, drafting precise, new laws, renouncing the short-term economic benefits and implementing new long-term imposing instrument, all have associated costs. Cheap and ineffective solutions may lead to larger environmental issues in the future, which will be more difficult and more expensive to deal with.

Public awareness through community motivation, education and incentives helped increasing the efforts even when implementation was hindered by adverse economic impact. NGOs and citizens have also played a very important part in detecting violations and notifying authorities, applying public pressure and helping to enforce the law.

Requiring companies to keep environmental managers also enhances enforcing efforts. These managers must be very well trained and their part is to advise the companies concerning environmental performance. Ercmann identifies the obligations of an environmental manager as [9]: 1) implementing legislation in force; 2) implementing environmental measures and conditions to protect economic use of the involved medium; 3) to keep information about environmental auditing and inspections; 4) to inform the public about the obstacles and to suggest remediation management strategies; 5) to propose the use of proper technologies; 6) to develop and implement measures to restrict, prevent, or diminish waste production; 7) to teach the staff about the environmental measures to be observed. Special consideration should be extended to prevent discrimination against environmental managers. Since their measures may affect company's profit, they can be bound to pressures, job insecurity and poor treatment only because they fulfill their duties. If job's security and fair treatment are not insured, these managers may compromise their activity to keep their employment status. Perhaps, environmental managers, should be appointed by non-governmental agencies and companies should pay their

salaries using guaranteed accounts. This way, security of the job and environmental standards would be high and discrimination would be discouraged.

Different problems of environmental rights enforcement pose particular difficulties. However, John Kinkaid underlines that: “even if such rights may be enforced or not, they serve a symbolic purpose within society and they may be guiding lines for policymakers” [10].

There are many problems regarding environmental issues information. Some natural systems are imperfectly or incompletely understood by science, such as global warming. Some pollution sources are hard to identify, mainly when several sources emit legally accepted pollution levels. Moreover, the causes of some environmental issues are difficult or impossible to identify with a certain necessary accuracy to pursue legal action. Facing these uncertainties, environmental law still needs courts’ protection when the quality of the environment dropped below the minimum guaranteed level.

Another fear of the industry is to invest in new technologies to protect the environment before they are established. Investing in technologies such as reducing emissions are bought and the costs are amortized during equipment lifetime. This allows the initial cost to be spread over time, thus reducing the quarterly and yearly impact of the profit. However, if a technology is bought and has a twenty year life, only to be replaced after ten years with superior technology, government mandated, the company will face significant loss. This is a real problem, often faced. The reality of this problem must not prevent companies from finding ecological solutions. The government may take steps to encourage acquisition of new technologies and to insure the investments made in good faith to protect the environment will not be penalized in future regulations. Thus, if a company makes a safe investment in a technology mandated by the government, should have the right to use this technology. If the new governmental regulations impose more strict technologies (the best available technology), the company should be forced to acquire it only at the end of the 20

year period. Credits could also be offered by the government to acquire ecological technologies. This would make investments in environmental protection technologies more attractive and would set off short-term costs.

Developing environmental rights require revising the old pollution standards and setting new ones. An environmental right should guarantee that pollution standards will be set using the precautionary principle.

Acceptable pollution levels are extremely difficult to determine because people have different sensitivity levels to pollution. Children and the elderly are more sensitive to pollution than adults. Moreover, people with respiratory difficulties, health or cardiac issues are more susceptible to pollution related diseases. Pollution standards should use the health risks for a child as a guide level. Additionally, composed effects of multiple sources emitting acceptable pollution levels should be considered. So that while a source may emit the minimum of pollutants considered as acceptable risk to a child's health, policy makers should also consider the effects of more sources in that area.

Following Rio de Janeiro conference, United Nations Organization preoccupied by human rights issue, continued to analyze the connection between the environment and human rights; in 1994, the special report of the subcommittee fighting against discriminatory practices analyzed not only this connection but also the right to a healthy environment as well as the effects of the environment on exercising other fundamental rights, such as: the right to life, the right to health, the right to food. But the full acknowledgement and guarantee of this right hasn't been reached yet.

In turn, Johannesburg Declaration on Sustainable Development (2002) [11] talks about "people representatives" commitment to build "a global balanced and careful society, aware of the necessities to insure every person's dignity" and expresses the hope that future generations will inherit a world free of the indecency caused by poverty, environmental degrading and unsustainable development models.

Other international documents, such as World Charter of Nature (1982), may be brought up in order to crystalize the defining significations of this fundamental human right.

In the same category of documents, but with a heightened inciting role, is the Recommendation 1614, June 27th 2003, of the Parliament Assembly of the Council of Europe regarding the environment and human rights, which, amongst others, recommends the member states “to acknowledge the human right to a healthy, viable and dignified environment, obliging the state to legally protect the environment, preferably within the constitution; to guarantee the procedural rights acknowledged by the Aarhus Convention, the right to the environment information, to public participation to the decisional process and access to specialized courts [art. 9(III)]” [12].

Slowly, some documents have found specific regulations; thus, the European Charter of the Water Resources (adopted by the Committee of the Ministries of the European Council on October 17th 2001) stipulates that any person has the right to sufficient water quantity to satisfy essential needs and World Water Organizations, UNO actions and the plan to implement the outcomes of the Johannesburg summit (2002) have given special attention to water management and each individual access to drinking water [13].

In terms of content, international documents enounce the notion of an individual right to a certain environment quality. Some documents dedicate another “minimalist” concept that regards the environmental right as violated only when the right to life itself is directly threatened given that the major degrading of the environment quality may endanger the vital biological surviving needs of the humankind.

However, in spite of their deficiencies, international regulations opened the perspective of “constitutionalizing” the right to a healthy and ecological balanced environment, set up procedural guarantees adopted by states in their national legislation and figured mechanisms of insuring its exercise on international cooperation level.

Finally, International Court of Justice signed a broader vision on the environment, pointing out in its 1996 advisory opinion on nuclear weapons license, that environment “is not an abstract concept, but a space where human beings live and responsible for the quality of their life and health, including next generations”.

References:

- [1] World Commission on Environment and Development, *Our Common Future (1987)*, Oxford University Press, p.348;
- [2] Hayward Tim, *Constitutional Environmental Rights: A case for Political Analysis*, Political Studies, 2000, Vol.48, p.559;
- [3] Shelton Dinah, *Human Rights, Environmental Rights, and the Right to Environment*, Stanford Journal of International Law, 1991-1992, vol.28, p.107;
- [4] Simeone Christina, *The Necessity and Possibilities of Constitutional Environmental Rights*, University of Pennsylvania, Scholarly Commons,2006, p.24;
- [5] Ibidem Shelton Dinah, p.117;
- [6] Carnegie Council Website- Apple B., Commentary on *the enforceability of environmental rights, 2006*;
- [7] Ercmann Servine, *Enforcement of Environmental Law in US and European Law: Realities and Expectations*, Environmental Law, Vol.26, p.1213-1236;
- ^[8] Ibidem, p.1215-1216;
- [9] Ibidem, Ercmann, p.1232;
- [10] Kincaid John, *State Constitutions in the Federal System*, Annals of the American Academy of Political and Social Science, vol.496, March 1988, p.18;
- [11] World Summit on Sustainable Development at Johannesburg, August 26th – September 6th 2002 summoned together 104 world state leaders and its main accomplishments were: Johannesburg Declaration on Sustainable Development and The Plan of Implementation of the World Summit on Sustainable Development.
- [12] Duțu M., *Tratat de dreptul mediului*, Third Edition, C.H. Beck Publishing House, Bucharest, 2007, p.316;
- [13] Ibidem, p.317.

ROMANIAN CONSTITUTIONAL LAW AT A CROSSROADS - BETWEEN THE IMPERATIVES OF THE FUTURE AND NOSTALGIA OF THE PAST

Valentin- Stelian BADESCU, PhD.

Associate researcher of the Institute of Legal Research of the Romanian Academy.
valentinbadescu@yahoo.com

Abstract

Issues listed on the title of the work announced in occasion give me some reflections on this issue even more as the title of the material, Romanian constitutional right is at a crossroads - between the imperatives of the future and nostalgia of the past. Very true statement. As one who had some concerns in this regard and tried by some papers to have my say on how it is done in concrete constitutional democracy and how it works practically rule of law in our country we have found it necessary to draw up several opinions . In principle I agree that there have been great efforts to reform the Romanian constitutional reality recognized part of Euro-Atlantic bodies of which Romania is part, however, are overshadowed or even challenged by various analyzes that highlight the existence of failures or serious shortcomings in our constitutionalism which, unfortunately, not much can be fully challenged, they are visible and perceived as such even in the reality of the constitutional system. This article attempts to cap the contemporary law issues analyzed multidisciplinary author previous other materials through innovative approaches, the proposed solutions, the originality of the research scientific, regarded even by right relationships with the principle of proportionality and the specifics of their interaction.
Keyword: constitution, constitutional law, constitutional system, tradition, originality, proportionality

1.Argumentum

This article appeared under the auspices of the journal "Journal of Law and Administrative Sciences", in Romania presents some considerations about the existential crisis of the current Romanian constitutional right under EU law hammer and anvil Romania's constitutional tradition. This is why the historical investigation of any state constitutional development must dovetail with the legal research and analysis of policy documents and generally historical sources. All the documents submitted is designed as an appeal to the political history of the Romanian state, which is beyond the value of historiography, a treasure of the

current generations of politicians can extract the essence of Romanian political thought traditional to revive the values of parliamentarianism, boldness and generations of revolutionary sacrifice and unflagging effort to remove and overcome obstacles to modern development of the country ".

According to Wikipedia, the free encyclopedia, constitutional law establishes the fundamental principles of the structure of social-economic and the organization of state power, governing relations between different parts of the state and between the state and citizens relationships embodied in the fundamental rights and duties thereof. Constitutional law regulating social relations fundamental to the process of introducing, maintaining and exercising power, is the main branch in the legal system. This requires that all other legal rules of other branches of law to conform to constitutional provisions that objective is achieved basically by controlling the constitutionality of laws, which in Romania is ensured by the Constitutional Court. On the work of the Constitutional Court and its role in the formulas will return conclusive.

Constitutional law is the branch of law which is made up of legal rules governing fundamental social relations that occur in the establishment, maintenance and exercise of state power. The notion of constitutional law should not be confused with that constitution. This is the most important component of constitutional law, but not the whole; more in some States constitutional law even where there is no constitution. In our country we have the Constitution, the 1991 Constitution as amended and supplemented by the Law amending the Constitution of Romania no.429/2003.

2. Romanian Constitutional law and advance the transition between the joys of science

Issues listed on the title of the work announced in occasion give me some reflections on this issue even more as the title of the material, Romanian constitutional right is at a crossroads - between the imperatives of the future and nostalgia of the past. Very true statement. As one who had some concerns in this regard and tried by some papers to have my say on how it is done in concrete

constitutional democracy and how it works practically rule of law in our country we have found it necessary to draw up several opinions . In principle I agree that there have been great efforts to reform the Romanian constitutional reality recognized part of bodies Euro Atlantic of which Romania is part, however, are overshadowed or even challenged by various analyzes that highlight the existence of failures or serious shortcomings in our constitutionalism which, unfortunately, not much can be fully challenged, they are visible and perceived as such even in the reality of the constitutional system. The constitutional system in our country has been the subject of extensive analysis and sometimes competent, both in academic courses or monographs, as well as various reports presented at national and international debates or European or international bodies.

The general impression is that, at least in terms of constitutional law, reform and modernization cause some reduction of the role played by public law in general and especially of the constitutional understood as an entity of common law in the whole of mechanisms regulating legal social change. At the same time, nobody can deny that the areas from which the public right to withdraw, does not cease to bear the stamp of legal element, the law in general. In fact, they are not abandoned by public law than to return to private law, which assumes the role of common law. It is also understandable that the state and its administration can not dispense resource legal with all the protest legitimate against formalism abusive and counterproductive certain rules and techniques (exempli gratia, the rules of the restitution or education or health). Advantage regulation rigorous functioning of social relations that arise in carrying state is unquestionable because, whether the regulation of relations within the administration or those arising in relations with the environment, law offers a wide range of possibilities solving. That is why we consider that the constitutional reform would have to propose, in our opinion, strengthening the rule should be devised a new policy regarding the role and functions of law. This can be done, not as a program designed and served up, but as an empirical building, designed by reality and

issues of state life. Moreover, it appears that businesses and, in part, and the administrative, which is involved in the reform have become very sensitive to drafting the legal text. This, because the upgrading involves creating a legal environment relatively constant, it is guaranteed certainty of legally (see aspiration of managers to an improved business environment and constant) and where you defend against legal practices, resulting from fluctuating and unpredictable behavior, such as those of an auditing body that reveals surprising qualities and applicability of outdated rules, appreciated, usually as obsolete or unusable in a different context than the one who gave birth. Rediscovering such rules have the effect of material paralyzing a service can not only increase the feeling of legal uncertainty, especially if, until now, the same provisions that have become contentious, had been considered and the users and the service providers, as obsolete and practically unusable outgoing therefore obsolete.

3. About the need to revise the current Constitution of Romania

Today, according to the intentions of policymakers makers, we are again in the same situation which requires this need. Before referring to the present situation, it is necessary to emphasize that the 2003 revision was a more controversial note, as regards both the organization and conduct of the referendum and the opportunity. For these reasons, many critics were attached to some changes that have been made by Law Review. It seems to me that when reviewing the 2003 - in terms of timeliness was not well chosen for the following reasons:

- At the time prefigured under the Treaty establishing a Constitution for Europe "appearance of so-called" European Constitution ". This indirect advertising and corrections subsequent national constitutional texts of member countries. Therefore, the revision was precipitated. At that time justified a greater concern and interest in the regulations that foreshadowed the European level in order to advance the best interests of Romania. In fact, that time was surpassed by invoking the "necessity" and "urgency" review.

- In fact, the 2003 revision was mostly resulted in only specific modifications imposed by political decision-makers at that time and according to the interest

they had had. There were no proper impact studies and not targeted as a major objective to improve constitutional provisions. In this regard, we can say that many of the new regulations that were adopted by Law Review, were limited to changes extrajudicial - dictated by political interests, some of which have generated controversy, others are considered to be even more poor made only original text tenure as president, his inability to dismiss from office the prime minister, extending the powers of the Constitutional Court, the property, soil and subsoil riches etc. Regarding the current revision of the Constitution that are expected, unlike the previous one, we consider that this time is appropriate, given the occurrence of unforeseen circumstances in relations between the powers. But we express great reservations about the real expression of interest to improve current regulations or achieving goals is required. From the statements and intentions expressed by policymakers, not emerged so far than the same concerns in amending the provisions punctual (more or less justified) and not the desire to improve the substance of all regulations (either through additions, alterations needed or of eliminating any possibility that lead to arbitrary interpretation).

Also in terms of timeliness - to which we have already expressed the view in that it is justified, while stressing the need that in some cases it is necessary to "fix" some texts that have been modified with the first review. Unquestionably no original text, as it was thought at the time, before being revised - it could not foresee or anticipate situations that arose subsequently, but many regulations that were adopted at the first review had generated many controversies justified and highlighted the recent realities.

By the arguments presented above, in agreement with other authors dare to formulate some observations and proposals to revise the current Constitution. So we appreciate that clarification is needed on the form of government, the structure of Parliament - which involves consulting the population, which has not been done so far. In our case we opt for a parliamentary republic, motivated by the fact that the possibility of preventing the concentration of power in the hands

of a single owner, which is a guarantee to prevent slip to a dictatorial regime. For this reason we consider that the restriction and expansion of presidential prerogatives conferred on the judiciary. As regards the judiciary and I add also that accountability is justified by pulling it to the magistrate responsible for judicial errors. Both required defense magistrate - by requiring professional insurance and continuation of the project "JURINDEX" - which, although originally sprang a welcome from within the judiciary was supported by CSM subsequently, however, it was diverted from its goals and objectives. Also to prevent the concentration of power in the hands of a single owner, justified a bicameral parliament and not unicameral, thus ensuring a control function more effectively in the legislature. In the number of MPs indisputable that today is excessive and that a reduction is justified according to population. We also believe that effective parliamentary work, is in strict accordance with the "quality" of each senator or deputy. Therefore it considers it necessary existence of necessary filters and selection criteria more stringent to prevent reaching the Parliament of individuals with training, level of training, education and morale.

Another critical issue is the one concerning the regulation of separation, independence and balance of powers, inter-relationship with other institutions, other factors of power, to prevent any slippage or dictatorial tendencies, in order to provide a guarantee and a normal functionality of powers, independence own effective mutual control and real separation of judicial functions that they have. Not least - determination and delimitation of competences and powers, removing any doubt, including in terms of terminology. To see how well regulated relations between these powers, we start with the following example, in Article 1 (4), entitled Romanian State, there are three powers (legislative, executive and judicial) - and that the State shall be held the principle of separation and balance - in the framework of constitutional democracy. In subsequent provisions - specifically Chapter VI, but we find that one of the powers (the judiciary), becomes "authority". Before any assessment of compliance / non-compliance with this principle of separation and balance of powers, mentioned in Article 1, to

see first - the extent to which these constitutional provisions are consistent with each other. Specifically, we refer to the provisions of paragraph 132 (1) of the Constitution - headed 'The prosecutors ', stating inter alia that their work is carried out" under the authority of the Minister of Justice "and under, the" hierarchical control ".

A few observations on this text can be made, due to the fact that, as we all know, almost all members of the government headed by Prime Minister, were and are political enlisted. Therefore, justice minister in the executive actually becomes a means regardless of party affiliation or recognition to "declare" it as "independent". Another remark: the text of this article speaks only of legality, impartiality and hierarchical control, authority of the minister of justice, the principle of "independence", accidentally or not - absent. We ask: if this principle would be found alongside the other principles mentioned would have been inconsistent terminology with "hierarchical control" or the latter no longer justify their existence? We think so. Talking about independence to be "hierarchical control" is a matter antagonistic at least illogical. Could this be the explanation "omitted" to mention in the text the principle of independence, or was thought to be understood?! We have reservations in this regard and we consider that in reality, political decision-makers did not want independence of this institution, for the simple fact that the DPP remains a lever of power important that political forces have not been missing until the present. This is why the position of Public Prosecutions in the judiciary was and is still a controversial issue / unresolved. The wording "under the authority of the Minister of Justice" - believe, that this is not in fact only a "sweetener" and masking apparent by substitution / avoidance of the term "subordination". It seems to me also that any provision prosecutors once by a state official among other powers, in total contradiction with the principle of "impartiality" and represents a serious threat to democracy. Not infrequently, for the "impartiality" of a prosecutor, was asked: "How can it be impartial, given that it must not only obey the law but also the mandatory provisions given by the Minister of Justice?" No less controversial is the status of

"judge" gave the prosecutor, on the other hand, the position and role of the Public Ministry in the judiciary. Referring to the institution find that, in agreement with title wearer ("Prosecutor's office ..."), it continues to be "attached" all courts at all levels - factually, in the judiciary, taking place -and work according to the same principle: that of "hierarchical control". Relevant is that still conferred powers identical to those of the judiciary, instead of this institution to be in an equal footing with the defense. We have in mind regarding this "inequality" not only status, duties and powers conferred to him the prosecutor, but including its physical position in the court proceedings. In a plastic expression, it stood at a "altitude difference" in relation to defense.

Another example, in Article 142 paragraph (2) and (3) regulating the "structure" of the Constitutional Court states that of the 9 judges making up, three are appointed by the Chamber of Deputies, three by the Senate and three by the President Romania. What conclusion can we come off the contents of this text? Firstly that the prerogative of appointing judges to the Constitutional Court equally does not return all the powers listed in Article 1 of the Constitution. The only power of the three, being only the legislature (the two chambers of Parliament). Then the executive and judiciary were "less equal" in relation to the legislature. Finally, that instead of the other two powers "omitted" appeared "other power" - the President conferred the detriment of the executive and judiciary, which have been substituted. Equally true is the fact that increasingly more executive power - by the multitude of ordinances and legislative packages (more or less assumed), came to substitute its turn Legislature, which he turned into her "court of review". Undoubtedly this situation is actually existing political will and thinking the adoption of the 1991 Constitution, including the time of the review. In the spirit of the principles of separation, equality and balance between powers (established constitutional), one wonders however whether, in line with these principles - would have been more fair that the legislature (both houses) to only 3 proposals and not 6 executive in its turn to make three proposals - and instead of the president, the judiciary to make three?

Before any changes or reformulations, it also requires a thorough and careful check of the consistency of the constitutional text with the Treaties and pacts which Romania has signed and it is a party. On the other hand, consider need to be regulated as accurately (in principle, purpose and objectives) some provisions that cannot be distorted by arbitrary interpretations or by references to special regulations, other law enforcement. Both practice and doctrine have shown consistently that the constitutional provisions cannot and should not be the be all encompassing, but sending proceeds to "other laws, orders, regulations and application instructions" - which are then modified ordinance in any way they can not alter or contravene the constitutional text, can not be hijacked meaning and purpose of these provisions. Also, we consider that, of utmost importance are the laws of organization and functioning of institutions, powers and duties conferred on them - which is why, in this direction are necessary clarification at the constitutional level. We refer to a number of institutions such as the Constitutional Court, the Superior Council of Magistracy, the National Anticorruption Directorate, and the National Agency for Integrity, the Ombudsman, the Legislative Council, etc. In agreement with the author cited above, we consider that should the last two exemplified - Legislative Council, which should have extensive powers in terms of legislative technique, systematization and not purely advisory and Ombudsman which turned into a mouthpiece which "intermediates" link citizens with governments to expand their skills, because in fact they no longer have a role "more decorative. Regarding the Constitutional Court, outside the examples stated above, I add that what powers conferred under the review of 2003 are far too extensive. We believe that they should be confined to those related only resolve exceptions of unconstitutionality of laws. Moreover, these skills in the interwar period were undertaken by the High Court of Cassation, who opts for. In case there is the same formula, except change the law on organization and functioning of the Constitutional Court, the manner of appointment of the 9 judges - imposed their other selection criteria and the exclusion of any political algorithm. This is required to be removed from

many other institutions such as the Supreme Council of Magistracy, the intelligence services, the National Integrity Agency, the National Council for Study of the Securities Archives, the National Audiovisual Council, Ministry of Defense, Ministry of Interior, Justice, Parquet and many other institutions - on which are becoming more interference from political factor, thus emphasizing a tendency to manipulate the law and independence impairment. More specifically, these reasons and others expressed by the author of these lines in other works on other occasions, that reasons for authors analyze the material they present Constitution of Romania in the future Constitutional Court should simply abolished!

Also highlight other examples where we believe changes are necessary. Thus, another regulation that we deem beneficial to retrieve the new text: the obligation of all officials and those assimilated to conduct regular medical control on tenure, including before the takeover. We refer to the need to examine and neuropsychological evaluations. Regarding Article 75 on "Notification of the Chambers" we consider totally unacceptable provisions of paragraph (2) which considers that the draft laws or legislative proposals were adopted for exceeding limits of 45 and 60 days. We consider absolutely necessary to change the text. The same is true of the emergency ordinances, against which imposes a restriction, including cases of excessive accountability through the promotion of "legislative package". Can such situations be avoided some of the effects caused by them. We refer to cases where the law is not adopted or situations when ordinances are being circumvented provisions of the organic law, or which are contrary to constitutional principles. Lastly, we emphasize the need for impact studies compulsory for all organic laws and parliamentary debates. They are absolutely necessary and the provisions establishing the limits and conditions review. In conclusion, no real separation of powers and independence, the relations between them cannot speak of the existence of a rule of law or democracy.

These issues and many others that reputed specialists in the field have emphasized the material much more extensive and well documented, including comparative law, can only be remedied by a new constitution; it cannot offer Romania the future. We have another constitution! A Constitution for Romania and Romanian. The current Constitution has turned Romania into a colony transnational financial oligarchy.

4. Constitution for Romania

Why we need a new constitution? The Constitution is the fundamental law of every people. Constitution underpins the entire legal system, the entire set of laws, rules governing relations between members of a people. The Constitution is the one that decides whether people live in freedom or in slavery in welfare and dignity, or the poverty and humility.

You can not just law if the Basic Law is crooked. You can not eradicate corruption if the Basic Law allows the adoption of laws that defends thieves and states that can not be confiscated possessions whose origin can not be justified. You can not be a free sovereign nation and as long as the Basic Law entitles "representatives" traitors to conclude treaties which deprives people of sovereignty, which allows foreigners to buy land capital and the country and the people to be consulted.

Romanian Constitution adopted in December 1991 and revised in October 2003, the Romanian people deprived of sovereignty and national wealth has brought Romania's colony in the state of transnational financial oligarchy and the Romanian people in slavery. The Romanian people needs a new constitution that would restore sovereignty, to restore property rights to his country, capital and national territory, to release the occupation financial oligarchy transnational him out of state from slavery to regain a sovereign and prosperous nation.

The current Constitution of Romania proved wholly inadequate for the aspirations and the aspirations of the Romanian people, trying hard over the last 70 years of its history, starting with the implementation of the Molotov-Ribbentrop Pact, continuing with the coup of 23 August 1944, by which communist regime

was installed in Romania, with the coup of 22 December 1989, under which the current oligarchic regime was installed, with 26 years of destruction and pillage of productive wealth accumulated over centuries Romanian.

Released from the communist regime through the supreme sacrifice of the more than 1,000 young Romanian killed in the bloody days of December 1989, the Romanian people, with the capital accumulated in his work during the communist regime, have the ability and was entitled to build a economics democratic and efficient, to assure freedom, welfare and happiness, and the opportunity to build a truly democratic state, a state's, the people who serve him, to defend the rights and freedoms. With the accumulated capital and labor, highly qualified, he had in 1990, the Romanian people had today, pensions and salaries, as budget revenues, four times higher than it has, the his life would have been among the highest in Europe and the world. Unfortunately, the authors of the coup in December 1989 captured the Romanian state, which they turned into instruments of plunder of people and their enrichment. With the help of the Constitution, the laws adopted on its basis, the government robbed and were enriched. Destroyed, demolished thousands of plants and factories built by Romanian, which sold them as scrap metal and other materials, with the collected money and bought luxury consumer goods - villas, SUVs, yachts etc. Most of the national capital was passed into foreign ownership, the so-called privatization by selling at ridiculous prices of thousands of enterprises, factories, factories, commercial premises and offices, banks, etc., built with the sweat and more privations by Romanian citizens. So a new constitution and a new constitutional right to serve the interests of Romanians

5. About the new constitutional Romanian

5.1. Preliminary issues

Given that laws were passed thousands and thousands of ordinances and given that dozens of acts suffered very many changes, it seems that the reform and modernization of the state should put more emphasis on coding. Beginning done in this direction is very useful, although opinions are divided, even if a fierce

critic of the current massive codification of Romanian law - enacting new legislative codes (civil - 01.10.2011, civil procedure - 02/15/2013 penal and criminal procedure - 1/29/2014), brought a number of changes in Romanian legal environment - an advocate unconditional codification. We consider that the adoption of a new constitution, we can talk about promoting in Parliament an Administrative Procedure Code and Administrative Code to promote and unleashing administrative law, along with the Constitution.

5.2. About a new Romanian administrative law

Both theorists and practitioners of public administration agree coding, hoping for a reclamation laws in various fields and obtaining hygiene Legal, generating then a reduction in field interpretations and thus of properties abusive certain legal rules. In this way would restore the regulatory function of law, including in relations between authorities and administrative services. Specific conditions of our country in an effort to assimilate the *acquis communautaire*, and modernizing administration reform have generated a decrease in the volume of legislation but rather an increase in the density of legal administrative system. In these circumstances, the logic of managerial had to live with the facts, myths and attitudes characteristic of our world legal regulations. Incidentally, here as in other countries, it may signal a real paradox of reform and modernization of public administration. Policy reform and modernization of the administration, the whole "revolution efficiency" derives its obviously, the resources of liberal ideas that extol market, following the promotion of so-called culture of enterprise, but to be functional, you have to resort to the law, is part of administrative law rules and principles which gave them a kind of mythical status. As one can easily find the values that builds on reform and modernization of the administration are not recognized until recently and which were made permanent, especially administrative law. In administrative law generally the right of the public service in particular, it prescribes and makes operating policy of modernization through reform, we will not only discover rules that constitute restrictions or benefits, but a

whole organized grouping of faith collective it is constituted as a foundation of a kind of imaginary constructions of the next administration.

Developing managerial practices typical market economy, could or ought to significantly reduce the structured through as a public service administration in general, but with all the changes expected and some even made, they continue to draw legitimacy the law and still relies on rules and behavior is not very favorable or promoted by public management.

The question often is whether profitable public service is a process that goes beyond public law as keep followers up-minimal state or contractualist, thereby question the utility of public law. The answer involves a broader review. One of the biggest paradigm of our legal system heavily influenced by French political and legal culture, is this division: public law and private law. No matter what shape policies Administration Reform encounter this binomial, invoking the most often a gap between the two sections of our legal system. Actors concrete reforms efficiently use this bipolarity of legal, especially since the rules of the game in the process of modernization and reform are still unclear, if not absent, they changed-sometimes the whim of subjects-their using it and by perceptions on the right that they have and where it is mixed with some legal database of empirically verifiable assumptions and beliefs ideological belonging area.

The question is that of whether, or how far, public management can be designed within a framework provided by public law, while the real actors of the reform texting, more or less direct, which public law considers as the most rigid legal framework composed of obsolete legal norms, prohibiting any type of modern leadership, managerial. So it is criticized, not right in general, but public law and, in particular, administrative law. Also retaining critical opinions should not disqualify a priori plan and public law. Such views have emerged by chance, but because of bureaucratic behavior, manifested in some sectors of the public administration reform allergic to, as it is conceived by a formal literature political, legal or infra-legal. Otherwise, find a support such behavior in public law in that, to some extent, he favors making permanent economic privileges which some

fear they could lose. However, we must not be fooled by this speech, clearly ideological, which blames the public right of all evils in society and government reform must be based on law, not to criticize, provided to establish the exact extent and not needlessly exacerbated the judicial function within the public administration authorities and services. We know that attention to a greater efficiency of the public service provides public communities of all categories, the temptation exceeds public law field. This trend seems to be necessary and natural to that reproaches and criticism made by managers on the organization and functioning of state institutions and enterprises rely on private right qualities. Today, perhaps more than in the past, we wonder if the legal protection of the two areas, public and private, has the same role he had always and if this bipolarity of legal need or may be given, provided that full legal area is undergoing restructuring and of the liberal capitalism more strongly proclaims personal interest at the expense of the general. To give more and then we get!

5.3. The general interest in contemporary law

With the introduction of the concepts of general interest, public order and public power state not only has some concepts, but also the necessary levers to regulate constitutionally ra-social ports. Between this kind of leverage and the European Union law can barely be making a joint without any tension. The legal concept EU gives less importance to the public and tends to impose measures such as those designed to limit the area which traditionally is in the public administration or measures consist in capturing certain operating rules, specific public services and the public sector in general. In this way, it can produce in a certain way, a legal assimilation between public and private, which gradually are subject to the same rules and regulations. To correlate the internal standard with the spirit and rules of the European Union was necessary to amend the legal provision within the meaning of the principles of subsidiarity and proportionality. On the role of the principles of law and constitutional right below.

6. The role of proportionality in contemporary constitutional law

Proportionality is a modern synthesis of classical principles of law. This principle is at home right outside and imposed the state and legal system rather late. Law principle of proportionality implies that ideas of reasonableness, fairness, tolerance, and adequacy measures necessary to state the facts and the legitimate aim pursued. It appears that the principle enshrined in legal instruments of European Union law in the constitutions of states, but the National Constitution explains, research increasingly common concerns and especially the identification of its size. Proportionality is not only a principle of rational law, but at the same time, it is a principle of positive law, a principle normative value. Thus, proportionality is a legal test that focused on the legitimacy of state power interference in the exercise of fundamental rights and freedoms.

This principle is explicitly or implicitly enshrined in international legal instruments or constitutions of most democratic countries. Constitution expressly states that principle in art. 53, but there are other constitutional provisions that it involves. In constitutional law, the proportionality principle also applies especially in the protection of human rights and fundamental freedoms. It is considered as an effective criterion to judge the legitimacy of the intervention of state authorities to limit certain rights situation. The principle of proportionality is present in the public law of most European Union countries. However, some distinctions must be made: a) establish the principle that countries have made explicit in the constitution and legislation (Portugal, Switzerland etc.), and b) countries where it is not expressly mentioned in legislation or case law. The latter can include: Greece, Belgium, Luxembourg etc.; c) countries where this principle applies to public law.

Understanding the difficulties legal principle of proportionality, since its content depends on a certain philosophical view about justice. Legal doctrine, from antiquity to the present, evokes proportionality to mean the idea of order, balance, compared rational measure of the fair. Proportionality is not only a principle of rational law, but at the same time, it is a principle of positive law, a principle normative value. Thus, proportionality is a legal test that focused on the

legitimacy of state power interference in the exercise of fundamental rights and fundamental freedoms.

This principle is explicitly or implicitly enshrined in international legal instruments or constitutions of most democratic countries. Constitution expressly states that principle in art. 53, but there are other constitutional provisions that it involves. The literature states that the principle of proportionality is present in most countries the civil rights of the Community. However, some distinctions must be made:

1. Establish the principle that countries have made explicit in the constitution and legislation (Portugal, Switzerland etc.), and on the other hand, countries where it is not expressly mentioned in legislation or case law. The latter can include: Greece, Belgium, Luxembourg etc.;

2. Countries where this principle applies to public law as a whole (ex. France and Switzerland), and on the other countries in which its use is limited to the scope of EU law.

In constitutional law, the proportionality principle also applies especially in the protection of human rights and fundamental freedoms. It is considered as an effective criterion to judge the legitimacy of state intervention in the situation authorities limit certain rights and legal understanding of the principle of proportionality in constitutional law presents difficulties, as its contents depends on a certain philosophical view about justice. Legal doctrine, from antiquity to the present, indication proportionality evokes the idea of order, balance, and compared rational measure of the fair. Proportionality is not only a principle of rational law, but at the same time, it is a principle of positive law, a principle normative value. Thus, proportionality is a legal test that focused on the state power legitimacy interference in the exercise of fundamental rights and freedoms. Moreover, even if the principle of proportionality is not expressly upheld the constitution of a state doctrine and jurisprudence considers as part of the concept of rule of law, a phrase which implies addition adage Legal known

news doctrine of specialty, but also transparency, consistency and consensus, especially when it is a New Constitution.

7. Instead of conclusions. Transparency, coherence and consensus - the three pillars of the New Constitution foundation for Romania's future

We need constitutional right? For us Romanians there, especially Caragiale, he created software that works by Romanian people. All descend from one character Caragiale that want it or not. Like I said, if you meet any Romanian or a Romanian situation and it seems that you cannot deduct from any typology Caragiale means that you read carefully the author. I would like to say a few words about the greatest satisfaction that a researcher can have a lawyer. For someone who cannot live without reading without writing for someone who makes the question and inquisitiveness meaning of his life, for someone who comes to appreciate the ideas above all and people only to the extent that embodies an idea, ie a researcher, there is one great happiness: discovering the correspondences between the law and the world. Satisfaction immense that researchers' lawyer discovers that nothing that happens is not really new, that all man's problems today, absolutely all, without rest, are found in Shakespeare or Caragiale or further, the ancient is not necessarily auspicious. This satisfaction is not necessarily being enriched. I think that the discovery of equivalence between what is written in books and what we live should, rather, to depress. Me, for instance, it was depressed discovery that politicians behave with people today in Romania, following the writings of Aristophanes perfect. Even the Romanian people today are the same as in his writings of the Athenian people 2500 years ago! And politicians are the same and situations are largely the same, and their outcome is unchanged. How could I not grasp depression? How not to become misanthropic clear when you see how boring is limited and redundant human being? How not to become pessimistic? But no. The researcher has acquired not know where the ability to move beyond such states. Le lives and exceeds them. Instead it sad discovery that nothing is new under the sun enjoying it. Satisfaction

identifying as refined typologies which then recognizes in previous lectures is often sparkling, and his vanity are only flares.

And finally, the apex of sophistication is to find that even the discovery that there is nothing truly new under the sun is not new! Already, the joy of finding that your own discovery is not new and, moreover, that even this conclusion, the impossibility of existence of a new really is not yours, but it was the beginning of the world said, is emotion Alexandrian specific researcher. How can anyone live like hamsters enjoy noting that running on their wheel, the small cage? Not more than those who do not realize this? Not more than those who imagine that the world is always new, because every day brings something different than the other, that people are infinitely diverse, that the world is constantly changing, that we live in an endless kaleidoscope of news? Sure. Undoubtedly. But those who enjoy the illusion unrepeatable are not researchers. For their happiness it is precisely to find the opposite that the world revolves around him after the three pillars of the New Constitution - transparency, coherence and consensus foundation for Romania's future.

Transparency can be achieved only by "architect" legislative building, both personally and especially professional quality I believe that this involves great responsibility! It is a great responsibility to carry out this endeavor so important for Romanian society. One of the few qualities of architect (using the singular and not plural because when you go out as need something call a committee) is the professional law and this quality, the maker to draft revision of the Constitution perceive as a culmination of a long professional careers exceptional. It is a great honor for a man to take part in this delicate process and with a great legal, political and social. Now we Iorgovan's Constitution, as amended! The new Constitution of who will be? There is a kind of satisfaction most important professional like any other, that of work well done, but also contentment translated into effective involvement in the development and modernization of Romania.

We know also that the revision of a constitution is a delicate exercise in democracy and political negotiation, an expression of "understanding" reached after laborious negotiations, the political forces of the country. Architect's role constitutionally is to listen to all sides to reconcile all opinions actors involved, to overcome the constitutional review and to ensure the fulfillment of the ultimate goal of it, to modernize the constitutional regulations in relation to reality Romanian society. The proposal for the training and consulting a Scientific Council, which includes the best specialists in constitutional law in the country, is based on the belief that She is the undeniable experience in the construction of the new Constitution. It is not only a practical necessity, but an intrinsic need to appeal to those who are best placed to make a valuable contribution to what is meant to be a modern constitution and adapt to social, economic and political Romania.

Considering the importance of this process, it requires "open doors", both those directly interested or willing to submit amendments, and the media to ensure that much needed transparency. It's about institutional transparency as it is a legal text that concerns us all and it is natural that all those interested to take part in the design process of the new Constitution text. Regarding the Venice Commission, the final text of the proposal for revision must be sent to the Commission for an advisory opinion since the new Constitution is the fundamental law, the Romanian modern state, unitary, European, reflecting the will of the people and translates into solidarity between citizens of this nation, who have a common goal of modernizing the rule of law. From here we can analyze the function of integrating the Constitution, especially considering the effects it will produce both the citizen and for state institutions: the new rules, standards of conduct, visions democratic, a new set of values and principles, all corresponding requirements and contemporary Romanian society needs. Externally, the revision of the fundamental law of the state has been and is an approach long debated and appreciated, the European Union considering both

the constructive approach of Romania, consistency, presenting an overview of the institutional structures of Romania, the rights and obligations of citizens.

Bibliography

1. Ioan Alexandru, *Există o criză a dreptului public?* în revista *Academica* nr. 11/12/2014, pp. 81-89;
2. Ioan Alexandru, *Administrația publică – Teorii, realități, perspective*, Editura Lumina-Lex, București, 2003.
3. Andrei Constantin, *Propuneri privind revizuirea Constituției actuale a României*, Comunicare prezentată la Sesiunea științifică, *Știință și codificare în România* a Institutului de Cercetări Juridice, București, 2012, pp. 650-657.
4. J. Caillosse, J. Hardy, *Droit et modernisation administrative*. La Documentation française, Paris, 2000;
5. J. Hardy, *Le service public en question, Politiques et management public*, vol. 14, no. 3, septembrie 1996, pp. 45–66;
6. Marius Andreescu, *Proportionalitatea, ca principiu constituțional*, material preluat de pe site-ul: <http://www.universuljuridic.ro/proportionalitatea-ca-principiu-constitucional/>
7. Valentin – Stelian Bădescu, *QUO VADIS CURTEA CONSTITUTIONALĂ A ROMÂNIEI?* *Revue Européenne du droit social*, Supplement, year 2015, pp. 8-18.
8. Cristian Ionescu, *Dezvoltarea constituțională a României*, Editura C.H. Beck, Bucuresti, 2016;
9. Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, Editura C.H. Beck, București, 2016;
10. Marieta Safta, *Drept constituțional și instituții politice*, Editura Hamangiu, București, 2016.

DIACHRONIC SURVEY ON THE CONSTITUTIONAL RIGHT OF OWNERSHIP IN ROMANIA

Professor Gheorghe CALCAN, PhD.

Petroleum-Gas University of Ploiesti

calcangheorghe@yahoo.com

Abstract:

This paper aims to provide a synthetic and diachronic presentation of the constitutional right of ownership in Romania. The Constitution of 1991, in effect, amended in 2003, divided property into public and private property. The right of private ownership has gradually limited its sphere over time. In the past, it included one's right of ownership on the natural resources of the soil and subsoil. The Constitution of 1866 did not specify anything about the exclusive right of the state on mineral resources. Carp Law from 1895 introduced underground metalliferous resources in the property of the state. The Constitution of 1923 extended the state's right over almost all mineral resources, including oil. The introduction of this principle triggered strong debate at the time.

Keywords: *Constitution of Romania, the right of ownership on underground resources*

1. Introduction

Since ancient times ownership has represented a right of an individual, of a family and of a community. Over time and in parallel with the organization of the society, it was regulated through customs and, later on, by written constitutions. In the modern age, the regulation of ownership has generated

various debates and brought several changes imposed by the evolution of the society itself.

In our analysis we highlight the evolution of the constitutional concept of ownership. Starting from the stipulations of the Constitution consecrated in 1991, amended in 2003, in force at the moment in Romania, we outline how this concept has evolved from the first Constitution of Romania, the one from 1866, and later on due to the major changes introduced by the Constitution 1923.

2. The right of ownership in the Constitution of 1991, amended in 2003

The Romanian Constitution in force since 1991, amended in 2003, “in the context of the increased process of democratization and orientation of the Romanian society towards Euro-Atlantic structures” [1], regulates the right of ownership in Article 44 and Article 136. Art. 44 stipulates in paragraph 2 that: “Private property is guaranteed and protected equally by the law [...]”. In Par. 3 it is specified that “No one may be expropriated except in the public interest, determined by the law, against just compensation paid in advance”. Par. 5 of the same article adds that “for works of general interest, public authority may use the underground part of any real estate with the obligation to indemnify the owner for any possible damage to soil, plantations or buildings, as well as for other kind of damage imputable to authorities”.

Article 136, paragraph 3, reiterates the fact that “underground resources of public interest [...], shall be exclusively in public property”. Par. 1 of the same article states that “Property may be public or private” [2].

To conclude, the Romanian Constitution in force clearly stipulates that the property of the Romanian state is divided into public and private property. Private property is guaranteed and protected by the law. Expropriation is allowed only for reasons of public utility, with a just and prior compensation. Underground

resources are public property and may be exploited on condition that compensations are paid.

3. The right of ownership in the Constitution of 1866

The first Constitution of the modern Romania, namely that consecrated in 1866, reglemented the right of ownership in two articles. Art. 19 provided that “property of any kind, as well as all claims against the state, are sacred and inviolable. No one can be expropriated except for the public interest that is legally noticed, and only after just and prior compensation. As public interest, one is to understand public communication and sanitation, as well as works that are vital for the defence of the country. The existing laws on the alignment and widening of roads, as well as on the banks of the rivers crossing or flowing by them remain in force. Special laws shall regulate the procedure of expropriation. Free and unimpeded use of navigable and floatable rivers, of roads and other means of transportation is in the public domain”. Article 17 of the same law specified that “No law may establish the penalty of confiscating one’s wealth” [3].

A first remark to be made is that property was considered sacred and inviolable and could not be confiscated. Secondly, we note that the first Constitution of Romania introduced the principle of expropriation, but only in case of public interest. The sphere of public utility, however, was restricted to public transport and sanitation, and to the defense of the country.

Economic interests of the Romanian society were totally excluded in the vision of this first legislative document. One possible explanation of this vision can consist in the early stage of the economic development of modern Romania, as well as in the conservative, traditionalist perspective on private property that existed in the Romanian society at the time, and not only.

4. The right of ownership in the Constitution of 1923

The Constitution of 1923 was the one to broaden the sphere of public property and to change the balance of the traditional equilibrium by extending the

issue of public utility to economic interests. The historical context in which this Constitution was adopted was completely different from that of 1866. Meanwhile, Romania had won its political independence, in 1877, Dobrogea had been integrated in the Romanian state, and, in 1918, Bessarabia, Bukovina and Transylvania had united with Romania. From an economic perspective, the Romanian state presented at the time a quite diverse and dynamic picture, in which the industrial aspects could not be neglected any more. Oil industry, for example, had become of European and even global importance. The introduction of universal suffrage and the political life after the Great Union from 1918, as a whole, indicated a stage of maturity for the democracy of the Romanian society.

The Constitution of 1923 regulated the issue of property in four articles, i.e. Art. 15, Art. 17, Art. 19 and Art. 20. Article 17 stipulated that “property of any kind, as well as the claims against the state, are guaranteed. Based on law, public authority has the right to use, for the purpose of public works, the basement of any real estate, with the obligation to pay for any damage produced to the terrain, the existing buildings and works. In case of disagreement, the compensation shall be established by the court. No one may be expropriated except in the public interest, and only after fair and prior compensation set by the court” [4].

In comparison with the provisions of the Constitution from 1866, the sphere of public utility was generously extended, thus coming to include interests of cultural nature and others, vaguely and expansively defined as: “general and direct interests of the state and of the government” (Art. 17). The same article suggested the possibility of extending this sphere to “other cases of public interest”, which “will be determined by laws voted by a majority of two thirds”. The statement that “a special law will determine the cases of public interest, the procedure and manner of expropriation” (Art. 17) conferred parliamentary control over the issue of the property that could be integrated into the sphere of public utility. The same article was the first to include the underground part of any building in the sphere of public interest property.

Article 19 of the Constitution consecrated in 1923 stipulated that “mine ores and underground resources of any kind are in the property of the state”. There were exempted “masses of common rocks, construction materials quarries and peat deposits”. The article also stated that “a special law on mines would determine the rules and conditions for the exploitation of these natural resources”. It also stated that one’s earned rights “would be taken into account” (Art. 19).

Article 20 stipulated that all “ways of navigation, air space, as well as navigable and floatable waters” were considered public property. Article 15 maintained the formulation and the provision of the Constitution from 1866 related to private property, when stipulating that “No law may establish the penalty of confiscating one’s wealth”.

Considering all these, one may notice that the Constitution of 1923 regulated the issue of property by a number of notable articles. The document granted adequate space to this aspect, due to the novelty and importance of the introduced principles. The extension and a clearer embodiment of the concept of “public utility”, the right of the state to exploit the underground part of any real estate and the exclusive right of the state over mineral resources were elements that revolutionized the existing concept and legislation.

The introduction of these provisions was neither easy nor rapid. The principle of the state’s right of ownership over mineral resources was partially introduced by a special law, i.e. the Mining Act of 1895, known as the Carp Law, after the name of its originator. According to this law, underground metal resources (excepting those from Dobrogea) came into the property of the state. Oil deposits still remained in the property of the landowners. The reason for issuing this law was mainly economic, as it aimed to create the conditions for the development of the industrial sector, by providing necessary resources. The law was, undoubtedly, a compromise between the traditionalist ideas on property, as sacred and immutable, and the evolution of the modern society [5].

The development of the oil industry in the early 20th century, as a dynamic element of the national economy and budget, determined the preparation of the final “assault”, namely that of placing almost all mineral resources, including oil, into state property. The promoters and supporters of this principle were the representatives of the Romanian liberalism. They had to face extremely fierce opposition both from the local landowners and from the representatives of major international oil trusts, existing at that time on the Romanian market.

The efforts to implement this principle started after the First World War, with the legislative work of drafting the new Constitution of 1923. Once the Liberals had won the elections from March 1922, they formed a parliamentary committee with the aim of carrying out the preliminary draft of the Mining Law. Its president was M. Pherekyde and the rapporteur was C.D. Dissescu. During the debates there were outlined two different attitudes. The former was supported by V. Brătianu, M. Constantinescu and D. Ioanițescu, who wanted the nationalization of all mineral resources, while the latter, represented by M. Pherekyde and Istrate Micescu, opposed this principle. Ludovic Mrazek was invited to express his opinion as a specialist and he “provided a splendid argument in favour of nationalizing the subsoil” [5].

In the autumn of the same year, the conceptual design was completed and accepted by the parliamentary committee. The principle and the issue of nationalizing all mineral resources were included in Article 19. In early 1923, the text agreed by the committee became the draft of the new Constitution. Last changes were made to the text during the parliamentary debates from February – March.

In his explanatory memorandum, C. Dissescu insisted that, in the modern era, property ceases to be one's abusive right and should be regarded as a social function, which can be expropriated for the public interest, obviously with related damages. As a subsoil natural resource, oil should therefore become the property of the state, representing a genuine attribute of its economic political and

military independence. The principle of mineral resources nationalization was agreed at that time by the legislation of other states [5].

The intention to nationalize subsoil resources triggered a series of reactions in the Romanian society. *Moniteur du Pétrole Roumain* promoted certain interests and therefore strongly opposed the principle. In a series of public lectures, doctor engineer Vasile Iscu combated this intention. In February 1923, owners of oilfields from Prahova, Dâmbovița and Buzău counties met in Ploiești where they appreciated the idea of nationalization as being, essentially, a communist theory. Deputy Istrate Micesu even read passages from the Soviet Constitution, whereas Petre Stoicescu, landowner, stated that: “on a parchment from my box in Scorțeni village, I have written the right of ownership over the subsoil that I possess”, as it was inherited from his great-grandparents, and deputy Constantinescu Borden asked for the support of his liberal colleagues from oil counties to vote against this principle [5].

The liberal leader I. G. Duca publicly stated within a conference that the concept of ownership should be reconsidered in a modern and flexible manner and that there should be made a clear distinction between the land and the subsoil of a property. Ion I. C. Brătianu, head of the Liberal Party, did not publicly pronounce in the matter, reserving the right to act decisively by the mediation of the parliament [5].

In the Romanian Parliament, Istrate Micescu refuted the principle of nationalization. In the debates within the Chamber of Deputies, on March 24, 1923, V. P. Sassu, Minister of Industry and Commerce, rejected the liberal ideas of his colleague Istrate Micesu. He also noted that Nicolae Iorga had associated with the opponents of nationalization out of emotional reasons and not out of substance considerations, namely because of his personal ties with Prahova county and his affection towards peasantry. Minister Sassu assured Iorga, that once the nationalization of mineral resources and the special law of mines have come into force, “life conditions of that peasant population, whom he cares so devoutly, will be much improved and their future more secured, when compared

with the kind of life and security that oil companies provide today, as they primarily follow their personal interests and only in the end they have time to think about the Romanian population” [6].

I. V. Sassu considered that the most important article of the future constitution was Art. 19, because “it gave to the new state, founded on the old borders of ancient Dacia”, its “core dowry” that may allow it to exist independently from an economic and political point of view.

The speaker did not neglect the fact that the opponents of subsoil nationalization were the same that had opposed the allotment of peasants, based on the land reform of 1921, and therefore, they were obviously against progress of any kind. He argued that both a modern vision and major interests of the state imposed the transfer of underground resources, including oil and gas, into state property. Given that Romania had become the fourth oil producer in the world, he also remembered what Lord Curzon had stated, namely that “the victory of the Allies came on waves of oil”. On these grounds, V. Sassu ended his speech by asserting that “it is in the interest of the state and of our nation, to have these resources in their patrimony, as they do not belong to any owner, but to the Romanian nation as a whole, and that present generation is due to use them cautiously so that generations to come may use them in the best interests of the state”[6].

The attitude of Istrate Micesu against the expansion of state ownership over underground resources was also combated from the parliamentary tribune by MP Constantin Georgescu. After pointing out that oil reserves were those that “ensure the supremacy of a people not only on land but also in air and water” and urging his fellow lawmakers to observe and follow the policy of the United States of America in the oil matter, he declared that he had voted in favour of the nationalization principle “wholeheartedly and fully aware of a duty fulfilled [...] as a patriotic deed of overwhelming significance” [7].

Having been passed by both Houses of Parliament, on 26 and 27 March and on 29 March 1923 respectively, the new Constitution of Romania was

promulgated and published in *Monitorul Oficial*. King Ferdinand appreciated that, by voting for the new fundamental law of the country, members of the parliament had proved their patriotism, as the Constitution “would be the foundation of the future development of the unified Romania” [8]. As the state had become the owner of almost all mineral resources [9], a new and important step in regulating and visioning the concept of property was made. The debates generated by this constitutional article revealed the difficulties caused by the changes in the legal regime of the property.

Eversince that moment, the regime of state’s ownership over underground resources has remained immovable and the Constitution of 1991, as well as its amendments from 2003, are no exception.

5. Conclusions

Our survey highlighted the most important stages in the evolution of the constitutional right of ownership in Romania. Within 150 years of constitutional history, it has been very clearly asserted what is to fall in the property of the state and what cannot represent private property. As a result, the right of ownership of an individual was restricted solely to land and surface resources, while underground resources fell exclusively in the property of the state.

This major change occurred as a result of the Constitution consecrated in 1923, a fundamental law that became possible in the context of the dramatic democratic changes after the First World War. The Constitution of 1923 introduced the principle of “the social function of property”, bringing further clarifications to the concept of “public utility” and that of “expropriation in the public interest”.

The introduction of the principle according to which underground resources represent the property of the state constituted a genuine constitutional revolution and it was accepted with great difficulty because of the strong opposition of oilfields owners. This decision was part of the natural evolution and

modernization of the society, Romania aligning to other states that promoted both superior public interests and the principles of modern legislation.

References

- [1] Calcan, Gheorghe, *Constitutia României din anul 2003* in "Petroleum-Gas University of Ploiesti Bulletin", vol. LVII, Humanities, Social and Legal Sciences Series, no. 2/2005, p. 229.
- [2] *Constitutia României 2003*, Tempus Dacoromania Comterra Publishing House, pp. 12, 39.
- [3] *Constitutia României din anul 1866*, http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?id=37755, accessed on 21st October 2016.
- [4] *Noua Constituție votată de Adunarea Națională Constituantă în ședințele de la 26 și 27 martie 1923*, Librăria Nouă Publishing House, București, pp. 6-7.
- [5] Calcan, Gheorghe, *Industria petrolieră din România în perioada interbelică. Confruntări și opțiuni în cercurile de specialiști*, Tehnică Publishing House, Bucharest, 1997, pp. 11 - 21.
- [6] „Monitorul Oficial”, The Debates of the National Constituent Assembly of Deputies, 16th November 1923, *Supplement* (to be further discussed within the debates of the National Constituent Assembly of Deputies, Ordinary Session (prolonged) 1922-1923, p. 1576, coloana II), Saturday, 24th March 1923 (no. 55), pp. 1-3.
- [7] „Monitorul Oficial”, The Debates of the National Constituent Assembly of Deputies, 10th May 1923, No. 56, *The Assembly of Deputies*, Ordinary Session (prolonged) 1922-1923, Monday, 26th March 1923, p. 1577.
- [8] „Monitorul Oficial”, The Debates of the National Constituent Assembly of Deputies, 20th May 1923, No. 64, *The Assembly of Deputies*, Ordinary Session (prolonged) 1922-1923, Thursday, 29th March 1923, p. 1769.
- [9] Calcan, Gheorghe, *Istoria Românilor*, Petroleum-Gas University of Ploiești Press, 2005, pp. 180-182.