

## CONSTITUTION AND THE CONTEMPORARY CONSTITUTIONALISM

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### **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 18<sup>th</sup> 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 denaturising 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 dysfunctionalities, 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 corresponds to the exigencies of the democratic requirements of the 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 dysfunctionalities 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.

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