Separation and balance of power and discretionary power in public administration

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Abstract

Separation and balance of powers is one of the fundamental principles which is a fundamental element of the rule of law in any contemporary. The recognition of this principle does not imply that even public administration authorities must have a rigid behaviour, and that they are not allowed to have and exercise a discretionary power, a right of appreciation. However, the exercise of such power or right must be within the limits of that principle and, implicitly, of the principle of legality. Nowdays, we can observe that any public authority, as well as those in the sphere of public administration, tries to force the limits of its discretionary power, or such a behaviour could affect the correct and constitutional functioning of the rule of law. This article is intended to be only an initial approach to identifying the constitutional aspects relevant to the proposed theme by using methods such as comparative or systemic method. Thus, we want to identify those constitutional mechanisms that constitutional legislators have established to prevent overcoming the limits of this discretionary power. Later, through other articles, we will have the opportunity to identify the risk factors that arise in such situations, as well as possible solutions to reduce or even eliminate these factors.

Keywords: *separation and balance of powers, discretionary power, public administration, excess of power.*

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1. Introduction

Although explicitly enshrined in constitutional provisions, as it is, for example, in the case of Romania[2], or in Portugal[3], or in South Africa[4] or Estonia[5],

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[2] According to art. 1 par. (4) of the Constitution of Romania, republished, "the state is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy". The Romanian Constitution, republished, is available online at: http://www.cdep.ro/pls/dic/site.page?id=339, last visited: 20.04.2018.

[3] The Portuguese constitutional provisions of Art. 2 corroborated with those of art. 111 state that the state is based on the separation and interdependence of powers in order to achieve an economic, social and cultural democracy and to strengthen participatory democracy, no organ capable of exercising sovereign power, and no body exercising regional autonomy or local authority can not delegate their powers to other organs, except in the circumstances and under the conditions expressly provided by the Constitution or by laws. The Portuguese Constitution is available online at: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, last visited: 20.04.2018.

[4] According to art. 40 par. (1) and (2) of the Constitution of South Africa, in this republic, the authorities exercising sovereign power will be distinct and interdependent, the governance being

or possible to be interpreted from constitutional provisions, as in the case of Slovenia[6], or of South Korea[7] or of Argentina[8], the separation and balance of powers in the state, the fundamental principle underlying the organization and functioning of any democratic state, any state of law at present, is at the same time and paradoxically challenged[9] or even denied[10] at times.

Over time, the doctrine has reevaluated this principle and found that several elements, which appeared after its construction in its modern version by Montesquieu[11], "which created the normative theory as it is known today"[12], influenced its content.

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organized at national, regional and local level, and also distinct, interdependent and based on mutual relationship. This constitution is available online at: https://www.constituteproject.org/ constitution/South_Africa_2012?lang=en, last visited: 20.04.2018.

[5] According to art. 4 of the Constitution of Estonia, "the activities of the Parliament, the President, the Government of the Republic and the courts are organized in accordance with the principle of separation of powers and the balance of powers". This constitution is available online at: https://www.constituteproject.org/constitution/Estonia_2015?lang=en, last visited date: 20.04.2018.

[6] This Constitution, by art. 116 and the following, enshrines an entire chapter of the organization of the state, and it is obvious that the basis of this organization is the principle of separation and balance of power in the state, considering that the constitutional identification and construction of the three legislative, executive and judicial - as we have recalled before, as well as the relations established between them, as well as the reciprocal control arrangements held by each of them. The Constitution of Slovenia is available online at: https://www.constituteproject.org/constitution/Slovenia_2013?lang=en, last visited: 20.04.2018.

[7] Neither this Constitution expressly provides for the principle of the separation and balance of powers in the state, but starting with art. 40 regulates the authorities exercising these powers, starting with the legislative power, exercised by the National Assembly, continuing with the executive, exercised by the President of the Republic together with the Prime Minister and the members of the State Council, mainly, and ending with the judicial power exercised by the courts thus respecting the classical order of these powers, and regulating the mechanisms and constitutional levers by which they mutually limit each other, collaborating and control each other. The Constitution of South Korea (Republic of Korea) is available online at: https://www.constituteproject.org/constitution/ Republic_of_Korea_1987?lang=en, last visited: 20.04.2018.

[8] In Part II of the Constitution of Argentina, the "National Authorities" are regulated, and the first Title is devoted to the "Federal Government", namely the legislative power, the executive power, the judiciary, a distinct chapter being for the Public Ministry. This constitution is available online at: https://www.constituteproject.org/constitution/Argentina_1994?lang=en, last visited: 20.04.2018.

[9] For more on this, see, for example: Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Lumina Lex, Bucharest, 2001, p. 271-275, or Ion Deleanu, *Instituţii şi proceduri constituţionale în dreptul comparat şi în dreptul român*, C. H. Beck, Bucharest, 2006, p. 45-57.

[10] See in this regard, for example, Louis Fisher, *Constitutional conflicts between Congress and the President*, Princeton University Press, 1985, p.10 and following.

[11] Through his work, *De l'esprit des lois*, Montesquieu not only identified the three branches of government, such as we know them today - the legislature, the executive (also called executive power regarding issues related to the law of nations, but sour even it called the executive power) and the judiciary (also called the executive power regarding civil law matters, which it also identifies as the judicial power itself), but mentioned the need for a system by which these powers to control each other so that none of them will capture or dominate the other two, identifying mechanisms and means of mutual control in this respect. See Montesquieu (Charles-Louis de Secondat, baron de La Brède et de Montesquieu), *Despre spiritul legilor*, vol. I, Scientific Publishing House, Bucharest, 1964, p. 195 and following.

Indeed, at the time of the modern foundation of this theory, it was impossible to speak of political parties and their role in the expression by the citizens of political choices and, implicitly, of some of the public authorities, such as the parliament, the head of state, the government, either directly or indirectly. Consequently, we could not even speak of a parliamentary majority and opposition, among which political struggle is currently taking place and which influence the constitution of the state authorities, including the formation of the local public administration authorities, such as keeping them in power and finalizing the mandate for which they were elected or formed, as the case may be, or its termination before the deadline. Certainly, the center of gravity in this political struggle was transferred to this area, but in no way, in our opinion, it could and should not affect the existence of the three constitutional powers in the state, the relations between them so to weaken their independence as well as the balance between them.

On the other hand, it is true that this theory was at least ignored, but not even denied, in those states that have known or known totalitarian political regimes when talking about the uniqueness of power or the confusion of powers or about both. But we can see that, over time, as has happened in our case, such regimes have been removed, a democratic regime being restored, the former failing to act efficiently, limiting or even canceling virtually any power of the people, the rights and the fundamental freedoms of citizens, to limit ourselves to just a few of the negative effects of such undemocratic regimes. Consequently, even though in such regimes one might speak of an inadequacy of the principle of separation and balance of power in the state, which, in our view, is also natural because, in essence, among others, this is one of the such regimes, however far, on the contrary, it could not be an argument in abandoning this principle, on the contrary in a counter-argument.

We ask, however, that if any attempt to remove the principle of separation and balance of powers in the state and its replacement with principles or rules at the limit of democracy, the rule of law or even denial of it is not, among other things, an attempt to encourage the existence of a discretionary power where the emphasis is placed on discretion by one of these powers, usually the executive one? The removal of this organization from exercising the power of the people through the assignment of separate authorities separated from one another by the fulfillment of the three functions - legislative, executive and judicial, as well as any mechanism by which they can control each other in the exercise of their own attributions, would not encourage in fact exercising discretionary powers of these powers either by authorities constituted according to the rules or by authorities constituted by random rules and circumventing a democratic system?

Here are some questions that we will try to answer during this work, focusing on the relationship between this fundamental constitutional principle and

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[12] Charles Manga Fombad, *The Separation of Powers and Constitutionalism in Africa: The Case of Botswana*, 25 "B.C. Third World L.J." 301 (2005), p. 304, article available online at http://lawdigitalcommons.bc.edu/twlj/vol25/iss2/2/, last visited: 20.04.2018.

the public administration. In this situation, we consider it necessary to point out the relationship between the executive and the public administration in the Romanian constitutional context, as well as to identify the public administration from an organic point of view. The views expressed by the Romanian constitutional[13] and administrative law doctrine are not unitary as regards the consideration of the public administration as a component of the executive[14] or the appreciation of the existence of an identity between the two[15]. How, unlike other constitutions[16], our

[13] The doctrine and the practice of constitutional law have highlighted that the executive function has become much wider, and it is necessary to even nuance it, considering that although "the executive (or governmental) function consists in securing or organizing laws and also in adopting the necessary acts central and local government and administration, "however" most administrative activities also have a political character or impact". See in this respect Cristian Ionescu, *Tratat de drept constituţional contemporan*, All Beck, Bucharest, 2003, p. 123-124. Contrary to this view, in another opinion it was argued that there is an identity between the executive authorities and the administrative authorities, their activity consisting in the organization of the execution and the concrete execution of the laws, as well as in the management of the national policy, the terminology used, this, "expressing the same content, namely the executive", the administrative apparatus being necessary for the executive and not to be seen outside the executive power. See in this respect Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Lumina Lex, Bucharest, 2001, p. 535, respectively p. 536.

[14] For example, an author has found that "administration is an executive, commanded or delegated task, and when this activity achieves its objectives by public power, by way of derogation from the rules of common law, it acquires the attributes of public administration", the author pointing out that, however, the public administration is more restricted than that of the executive, but it is also a component of it. Ion Vida, *Puterea executivă şi administraţia publică*, Autonomous Publishing House "Monitorul Oficial", Bucharest, 1994, p. 11-12.

[15] Thus, in an opinion, starting from the variant chosen by the Romanian legislator to regulate the system of public authorities constitutionally through the 1991 Constitution, an option maintained after the 2003 revision, which also avoided the use of the notions of legislative power, power executive and judicial power, it was emphasized that it is necessary to distinguish between what is meant by the executive activity, namely the administrative activity. It has been appreciated that the ways in which the executive function is to be distinguished, namely between governance and administration. In essence, it was appreciated that if the first of these activities only depend on the power of the state, they can be found in the sphere of any state power, having also a pronounced political character, and being carried out by the organizational structures of the state as a result of empowerments received from the state, powers which are obligations and not faculties for them, as opposed to the administrative ones: they are not necessarily related to the political power of the state; are carried out by any of the powers of the state; consist, as a rule, in acts of administration and material facts, legal acts having, in particular, an individual character; both state bodies and non-state organizational structures, local public administration authorities, autonomous administrations, public institutions, commercial societies, associations and foundations or private services, but of public interest, such as notaries or lawyers. See to that effect Mircea Preda, *Autorităţile administraţiei publice. Sistemul constituţional român*, Lumina Lex, Bucharest, 1999, p. 30-35. Another author, in the same sense, appreciates that "executive power or the executive perform administrative functions, without thereby confusing or limiting its administration", Ioan Alexandru, *Administraţia publică. Teorii, realităţi, perspective*, Lumina Lex, Bucharest, 1999, p. 56.

[16] For example, in the Constitution of Poland, by art. 10 par. (2), expressis verbis, which are the authorities exercising the three powers in the state, is provided, thus "the Diet (Sejm) and the Senate exercise the legislative power. The President of the Republic of Poland and the Council of Ministers exercise the executive power. Courts and tribunals exercise judicial power." This

Constitution does not identify the authorities exercising the three powers by expressly specifying the three powers as well as those exercising them, the constituent legislator preferring, through Title III, to identify in the classical order established the theory of separation and balance of powers in the state, the public authorities, as well as the functions and attributions through which they exercise these powers, in doctrine the discussions regarding the ratio between the executive and the public administration were consistent, the views expressed being often contradictory[17]. From a point of view expressed in doctrine, it was appreciated that "Within the rule of law the administrative organization of which is carried out also taking into account the principle of decentralization, it must be emphasized that although the public administration is involved at all levels in the execution of the executive function of the state, we find in the executive power only the state public administration authorities, excluding the local public administration authorities, organized as a result of the recognition of the right of local authorities to set up their own administrative authorities in the constitutional framework to solve an important part of public affairs of local interest. By way of exception, the local public administration authorities give their approval to the executive function of the state when, under explicit provisions of the law, they act as representatives of the state in the administrative-territorial unit in which they were elected"[18]. Against this opinion, we express our reservations. In this respect, we can not fail to notice that, according to the provisions of Chapter I of this title, provisions dedicated to the sole legislative authority of the country, the Parliament of Romania, and to Chapter VI of the same title, regarding the judicial authority, the other chapters contain regulations regarding the President of Romania, the Government, the relations between the latter and the Parliament, as well as the Public Administration, within which the latter regulates distinct central public administration and the local public administration. However, we could not appreciate only from these constitutional regulations that the local public administration authorities would not be part of the executive power and that, through their specific role and attributions, they are just giving their assurance to the executive. In a logical and systematic interpretation of the aforementioned constitutional provisions, we will appreciate that the executive power is exercised by the President of Romania, the Government, the specialized central administration and the local public administration, through the distinct identification of the two levels of public administration, the constitutional legislator desiring, in our opinion, to emphasize the administrative dimension of its role, to the detriment of the political one whose consistent burden we find expressed through the role and attributions of the President of Romania and the Government. On the other hand, by art. 102 par. (1) of the Constitution, it is stipulated that the

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constitution is available online at: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, last visited: 20.04.2018.

[17] See, to that effect, supra, footnotes 14, 15 and 16.

[18] Corina Dumitru Munteanu, *Administrația ca putere publică*, articol publicat în „Transylvanian Review of Administrative Sciences”, no. 20/2007, p. 88.

administrative aspect of the two-dimensional role of our Government presupposes the "exercise of the general management of the public administration", the constitutional legislator not between the central public administration and the local public administration, targeting both. In the same sense are, in our opinion, the provisions of art. 126 par. (6) of the Constitution of Romania, republished, according to which the judicial control, through the administrative litigation, concerns the administrative acts of the public administration. Corroborating these provisions, we appreciate that, from the perspective of constitutional norms, there is an identity between our executive and the public administration, in this case the President of Romania, the Government, the central specialized administration and the local public administration.

On the other hand, we consider that not only those authorities, organs, public institutions that are subordinated to the Government are part of the public administration, in terms of their organic size, because according to the constitutional provisions, within the central specialized public administration, of the public administration are autonomous autonomous authorities, which consist in the fact that "they are not subordinated to the Government and have no other overarching administrative authority"[19].

We also appreciate that the public administration also includes those bodies, institutions, national companies, commercial companies set up at central or local level under the control or control of the public administration authorities for the provision of public services.

So, in my opinion, the public administration is a component of the executive, having a broader sphere, strictly limited to strictly constitutional, to the authorities, institutions and bodies specified by the constitutional norms, including the autonomous administrative authorities, mentioned authorities of the Constitution, but also those bodies, institutions, national companies, trading companies established at central or local level, subordinated or controlled by the public administration authorities for the provision of public services.

2. Separation and balance of powers

In essence, the principle of separation and balance of power in the state provides the state with the optimal framework in which it fulfills its three fundamental functions, as identified by those who have laid the foundations of this principle[20], as well as those who founded the principle[21], in its classic version[22],

[19] Emöd Veress, *Considerații generale privind autoritățile administrative autonome*, p. 8, article available online at: http://jog. sapientia.ro/ data/tudomanyos/Periodikak/scientia-iuris/2011-2/8-veress.pdf, last seen on: 20.04.2018.

[20] Aristotle appreciated that the act underlying the organization of States is the Constitution which "must determine the systematic organization of all the powers of a state but, above all, of the sovereign, because any state considers itself well organized if it is organized in three parts: the general assembly - the current legislature - who deliberates on the public affairs, the body of magistrates - the current executive - to whom the nature, the attributions and the appointment, and the judiciary body must be decided". Aristotel, *Politica*, Antet, Oradea, 2004, p. 204.

namely the legislative function, consisting in the adoption of laws containing general rules; the executive function, which consists in the organization of the execution, the execution in concrete, the application of these general provisions; the judicial function, which consists in settling the disputes that arise in the process of organizing the execution, the concrete execution, the application of these general provisions [23]. The exercise of each function corresponds to a "power": the legislative power, the executive power, the judiciary, each of which is given to the exercise of distinct and independent authorities with respect to each other[24].

Current doctrine appreciated that the development of this theory, valued meanwhile fundamental principle of constitutional been scored, express or implied, in any modern constitution of a democratic state of law, generated apart of other principles, such as formal distinction between the three branches of government: legislative, executive and judiciary; the separation of their functions entitles each of these branches of government to exercise their functions and duties distinctly; the same separation requires each of the three branches to have their own staff, generically speaking, who performs their duties; the separation of powers presupposes their control and balance, by virtue of which each branch of government has entrusted special powers through which it controls the exercise of specific functions and attributions by the other branches[25].

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[21] Montesquieu said that the legislative power must represent the general will of the state because "by virtue of it the prince or authority makes laws, directs them and abolishes them", the executive power must carry out the fulfillment of this general will because, by virtue of it "the prince or authority declares war or peace, sends or receives messages, takes security measures, prevents invasions, "and the judicial power is" the prince or authority punishing the offenses and judging the litigation between the individuals." See to that effect Montesquieu, *op. cit*., vol. I, Book XI, Chapter VI, p.195, 197, 200.

[22] About discussions about the paternity of this principle, see also Charles Manga Fombad, *The Separation of Powers and Constitutionalism in Africa: The Case of Botswana*, „Boston College Thrd World Law Jounal", vol. 25, Issue 2, 2005, available online at: B. C. Third World L. J. 301 (2005), p. 303-309, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1097 &context=twlj, date of last visit: 20.04.2018.

[23] See in this regard, for example, Ion Deleanu, *Instituţii şi proceduri constituţionale în dreptul comparat şi în dreptul român*, op. cit., p.45-46, but also the following, Tudor Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, vol. I, Lumina Lex, Bucharest, 1998, p. 253-265; Paul Negulescu, *Curs de drept constituţional român*, edited by Alex. Th. Doicescu, Bucharest, 1928, p. 297-327; Antonie Iorgovan, *Drept constituţional şi instituţii politice – Teoria generală*, „Galeriile J.L. Calderon", Bucharest, 1994, p.150-158; Ioan Muraru, Simina Elena Tănăsescu, *Drept constituţional şi instituţii politice*, All Beck, vol.II, Bucharest, 2009, p. 6-20; Joseph Barthélemy, Paul Duez, *Précis élémentaire de droit constitutionnel*, Paris, 1926, p. 152 et seq.; Georges Burdeau, Francis Hamon, Michel Troper, *Droit constitutionnel*, L.G.D.J., Paris, 1995, p. 107-132; Pierre Pactet, *Institutions politiques. Droit constitutionnel*, Masson, Paris, 1993, p. 112-115; Jean Paul Jacqué, Droit *constitutionnel et institutions politiques*, Dalloz, Paris, 2003, p. 35-36; André Hauriou, *Droit constitutionnel et institutions politiques*, Montchrestien, Paris, 1967, p. 141, 203 et seq.

[24] See in this regard Charles Manga Fombad, *op. cit,* p. 306.

[25] See in this respect Oscar Sang, *The separation of powers and new judicial power: how the south african constitutional court plotted its course*, „Elsa Malta Law Review", edition III, 2013, p. 98, http://www.elsa.org.mt/wp-content/uploads/2015/02/8.-Article-Oscar-Sang.pdf, date of last visit:

He stressed also in terms of the American system that the framers of the Constitution (by reference to the United States Constitution) believed that freedom could be secured in an appropriate, realistic, against any negative trends of the federal government only structuring powers enjoyed by government and by modeling the ways in which they could exercise sense that demarcated the three branches of it - legislative, executive and judiciary, but were made to and work which brought the the emergence of separation and balance of powers where each branch of government constrains and is constrained by others[26].

From the above mentioned, we can see that, in essence, anyone who has written about the separation and balance of power has underlined the necessity of their separation so as not to get in the situation that only one can hold and exercise, in a discretionary manner, specific to the others, as well as one of them to grasp, also in a discretionary manner, and to exercise as such specific attributions. In fact, even Aristotle has identified such levers and mechanisms by which "power is not power." Thus, if we only refer to the executive power - the "corpus of magistrates", as it is called, given the title of this paper, we will notice that in Chapter XII of Book VI (or IV in the ordinary editions) it deals with issues such as the term of office of the executive, the possibility of having more mandates, the designation of magistrates, the number of magistrates. In this respect, for example, it mentions that the number of magistrates must differ according to the size of the states, it being obvious that in large states the number of magistrates is large, and in the small ones is accepted, from "lack of personnel", the possibility of a magistrate accumulates more functions, provided that first the number of indispensable functions in the state and those that are not so absolutely necessary are still to be determined[27]. It also estimates that, on average, the mandate of such a magistracy is 6 months - one year or a little longer, but anyway in the big states the chances of a citizen to hold more than one mandate are much lower than those of one from a small state where, for the same reason - "lack of staff" - this possibility should be accepted. Of all the arrangements for organizing the appointment of magistrates, Aristotle particularly appreciated only two, namely eligibility by lot, and eligibility by choice, either choosing one of these methods or combining them[28].

Also Montesquieu has identified mechanisms to temper each other's three powers, especially the legislative and executive powers, and considers that the executive must have the possibility to oppose the legislative initiatives, allowing it to participate in the legislative activity itself the exercise of a right of veto in order not to be deprived of its own prerogatives. Also, if the right of legislative initiative belonging to the executive does not have to be an absolute right of it because it

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20.04.2018, and Pieter Labuschagne, *The Doctrine of Separation of Powers and Its Application in South Africa*, „Politeia", vol. 23, Issue 3, 2004, p. 87, quoted by O. Sang, *op. cit.*, p. 98.

[26] See in this respect Stephen Ellmann, *The Separation of Powers in a Post-Apartheid South Africa*, „American University International Law Review", vol. 8, Issue 2/3, 1993, p. 456. This article is available online at: http://digitalcommons.wcl.american. edu/cgi/viewcontent.cgi?article =1862&context=auilr, last seen on: 20.04.2018.

[27] Aristotel, *Politica*, Antet, Oradea, 2004, p. 209.

[28] *Idem*, p. 211-212.

would reject any legislative proposal with which it disagrees, the application of the laws should be an exclusive task of the executive because it it acts only by taking prompt action. This does not mean that the legislator should not be recognized "the right to have the power to examine how the laws it has been enforced" [29], thereby controlling the work of the executive. As a result of this control, the legislature has no right to judge the person who was wrong, and this must be inviolable, "but as the one invested with the executive power can not harm any law without having counselors turned to evil who hate laws like ministers, although they regard them as people, they can be investigated and punished"[30], but only by the judiciary.

A constitution of any modern state is an "orderly distribution of power"[31] in which, if the legislative power is the heart of the state, the executive power is the brain that puts all parties in motion[32], which means that these two powers in particular can not not relate each other nor can one belong to one and the same person, and none of them can react arbitrarily, discretionally, to the detriment of the other.

It would be exaggerated, in our opinion, to argue that this is a perfect principle, nor is it important to establish a perfect government, but a functional one, which is why we agree with the support that by the separation and balance of powers in the state it has been attempted to create the best means to establish a moderate government[33] - which is to the liking of the citizens as well as that of the governors. Therefore, we agree with the appreciation that this principle is one that no longer corresponds to the current social-political realities, being aged, which is why it must be eliminated, even more with other viable solutions for the organization and functioning of powers were not identified. Certainly, in order to meet the new requirements, it must and should constantly be connected to social-political realities as they develop. Looking at the European Union, for example, we will notice that we are talking about the principle of institutional equilibrium, but in the context in which the European Union is not a state, not even a state federation, but a special form of organization, a supranational structure become members have understood to cede from their attributes of sovereignty to this union. So even if we can not understand by this principle all the aspects that we have in mind when we talk about the principle of separation and balance of power in a state[34], we will notice that the regulations of the treaties[35] of the European institutions are

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[29] Montesquieu, *op. cit.*, vol. I, Book XI, Chapter VI, p. 202.

[30] *Ibidem*

[31] Aristotel, *op.cit.*, p. 180.

[32] Jean Jacques Rousseau, *Contractul social*, Antet XX Press, Filipesti de Târg, translation of H. J. Stahl, p .82.

[33] Marcel Morabito, Daniel Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, Monchrestien, Paris, 1996, p.19 et seq.

[34] See in this regard, for example, Gigi Garziano, *Intitutional balance in E.U. The Prodi Administration as a reforming Commission*, Institut Universitari d'Estudis Europeus, Universitat Autònoma de Barcelona, Spain, 2007. This document is available online at: https://ddd.uab.cat/pub/estudis/2008/hdl_2072_169868/49.pdf, last seen on: 20.04.2018.

[35] See, for example, the provisions of the Treaty on European Union on the Institutions of the European Union and their attributions, art. 13 and following. This document is available online at:

recognized by their own prerogatives, and if it carries out joint tasks, such as the co-legislator, in the ordinary legislative procedure, the Council and the Parliament, the outline of its own tasks is clearly achieved[36], with the implicitly created mechanisms and the mechanisms of mutual control.

Today the principle of separation and balance of powers in the state interferes with other principles coached by international, European or constitutional regulations at national level.

One of these principles is that of proportionality which is "a fundamental principle of the law explicitly enshrined or deduced from constitutional, legislative, and international legal instruments, based on the values of rational law, justice and equity and expressing the existence of a balanced or adequate relationship, between actions, situations, phenomena as well as the limitation of the measures ordered by the state authorities to what is necessary to achieve a legitimate goal, thus guaranteeing fundamental rights and freedoms, and avoiding abuse of rights" [37]. This principle, recalled only by our Constitution at art. 53 which enshrines the exceptionality of the restriction of the exercise of certain rights or freedoms, but expressly provided by art. 5 par. (4) of the Treaty on European Union and the Protocol (No 2) on the principle of subsidiarity and proportionality[38] "presupposes a fair relationship between the legal measure adopted, the social reality and the legitimate aim pursued, proportionality can be analyzed as the result of the combination of three elements: the decision taken, its purpose and the factual situation to which it applies" [39]. From the above we can see that there is a correlation between proportionality and other legal concepts of legality, opportunity, but also discretionary power, and any violation of the principle of proportionality implies at the same time overcoming the freedom of action left to the authorities and ultimately court, is an excess of power[40]. Moreover, in its jurisprudence, the Constitutional Court of Romania sanctioned the violation of this principle, stressing that "the measure of restriction may only be ordered if it is necessary in a democratic society, it must be proportionate to the situation which

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http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF, date of visit: 20.04. 2018.

[36] See in this respect the provisions of art. 293 to 299 of the Treaty on the Functioning of the European Union, as well as the provisions of the Rules of Procedure of the European Parliament, valid for the 2014-2019 legislature, with the latest amendments of September 2015, 38 and following. These documents are available online at: http://eur-lex.europa.eu/resource.html?uri=cellar:2bf14 0bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF, respectively http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF, last seen on: 20.04.2018.

[37] Marius Andreescu, *Proporționalitatea, ca principiu de drep constituțional*, article available online at https://dreptmd.wordpress. com/2016/04/09/proportionalitatea-ca-principiu-constitutional/, last visited: 20.04.2018.

[38] This document is available online at: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=uriserv: OJ.C_.2010.083.01.0001.01. RON#d1e186-201-1, last seen on: 20.04.2018.

[39] Marius Andreescu, *op. cit.*

[40] See in this respect Marius Andreescu, *op. cit*.

has caused it, to be applied in a non-discriminatory way and without prejudice to the existence of the right or freedom"[41], as well as pointed out that "according to the principle of proportionality, any measure taken must be adequate - objectively capable of achieving the goal; necessary - indispensable to the fulfillment of the purpose and proportionate - the just balance between the competing interests to be consistent with the aim pursued"[42].

In the context of the discussion of the principle of separation and balance of power in the state, we consider that it is necessary to make a correlation of this and with another principle, used by the Constitutional Court of Romania, constantly and insistently, more recently, namely that of constitutional loyalty. In our opinion, any constitutional authority, and not only, must act within the limits set by the legislator, as any attempt to overcome these limits and, implicitly, unfair behavior must be sanctioned. In support of the aforementioned we mention that in the doctrine it was stressed that "constitutional loyalty represents the attachment to the constitutional values, the observance of the Constitution in the letter and its spirit, the faithful fulfillment of the obligations and the observance of the rights stipulated by the Constitution, the compliance with the limits of competence established by constitutional texts and compliance with the regulatory competence for all public authorities, cooperation, collaboration, consultation in the performance of competing competencies"[43].

3. The discretionary power

It would be ideal that the public authorities, including those of the public administration, should constantly and always observe their own competences, as they are regulated by the fundamental law and by laws and other normative acts. But practically there will always be such authorities who will want to achieve the competence of another authority and sometimes even the legislative framework encourages them.

At present, it is already evident that the executive through its authorities, bodies, institutions, and thus implicitly the public administration, has an increased role to the detriment of the legislature in particular. Indeed, the pace of today's economic, social and political life often requires that urgent and swift decisions be made urgently and imperatively. Taking such decisions requires an easier, faster deployment by either a one-person executive body, such as, for example, the head

[41] Decision no. 461/2014 on the objection of unconstitutionality of the provisions of the Law amending and supplementing the Government Emergency Ordinance no.111/2011 on electronic communications, paragraph 43, published in the Official Gazette of Romania no.775 of 24.10.2014.

[42] Decision no. 662/2014 regarding the exception of the unconstitutionality of the provisions of art. 77^1 paragraph (6) the final sentence of Law no. 571/2003 regarding the Fiscal Code, point 28, published in the Official Gazette of Romania no. 47 of 20.01.2015.

[43] Tudorel Toader, Marieta Safta, *Principiul loialităţii în jurisprudenţa Curţii Constituţionale a României*, p. 1. This article is available online at: http://www.constcourt.md/public/files/file/conferinta_20ani/conference_programme/Tudorel_Toader.pdf, last visited: 20.04.2018.

of state in a state that establishes a presidential regime, sometimes even in semi-presidential regimes, or even by a collegial body, in states that establish parliamentary or semi-presidential regimes, but which are far less numerous than the legislative assemblies, and operate after simpler, faster struggles. It is not by accident the institution of legislative delegation originally created so that in exceptional circumstances, such as a war, this duty can be exercised if not by the legislative authority, exceptionally and temporarily, by the executive authorities, as a rule, government, was so appreciated by the latter, that it now enshrines most of the constitutions[44], and governments even try to fully assume the legislative function by transferring it from the parliament.

In the doctrine[45], it is appreciated that "by the rule of law we must understand a state which, in its relations with its subjects and for the guarantee of its individual status, itself obeys a rule of law, and that through all that he acts upon them and by rules, some of which lay down the rights reserved to citizens, others fix the ways and means that can be used to achieve state interests: two kinds of rules that have the common effect of limiting the power of the state to subordinate to the public order they are consecrated", the public administration is always subject to the law in this context.

Legality is, moreover, one of the fundamental principles according to which the public administration authorities carry out their activity, by observing the Constitution, the laws and other normative acts according to the hierarchy of normative acts, taking into account the position of the authority, the institution of public administration within it, but also with respect to their competence, as well as the specific procedure provided by the normative acts, aiming at the organization of the execution and the concrete execution of the law.

When the text of a normative act is clear and precise, the public administration authority that must organize its execution or even enforce it will only have to implement it, leaving no room for discretion. There are, however, situations in which, whether willing or not, the public administration acquires such freedom and when it will certainly have to respect any minimal aspect of legality, but will have the possibility that among the possible and legal solutions it has when executing or organizing the execution of the law, two or more, to choose, on the basis of criteria, in the vast majority characterized by subjectivism, the one that is considered the most opportune, the best. Thus, the public authority [including the public administration, our underlining] will be able to appreciate the time and the

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[44] See, for example, the Constitution of Croatia (Article 88), the Constitution of Greece (Article 44 paragraph 1), the Constitution of Estonia (Article 109), the Constitution of Finland (Article 80), the Constitution of Romania (art. 108 and 115). The Croatian Constitution is available online at: https://www.constituteproject.org/constitution/Croatia_2013?lang=en, date of last visit: 20.04.2018, the Greek Constitution is available online at: https://www.constituteproject. org / constitution / Greece_2008? lang = en, date of last visit: 20.04.2018, Estonian Constitution is available online at: https://www.constituteproject.org/constitution/Estonia _2015?lang=en, date of last visit: 20.05 = 4.2018, the Constitution of Finland is available online at: https://www.constituteproject. org/constitution/Finland_2011?lang=en, last visited: 20.04.2018.

[45] Carre de Marlberg, *Contribuţie la teoria generală a statului*, vol. I, Sirey, Paris, 1920, p. 448-489.

concrete conditions for the issuing of the administrative act, ensuring the adaptation of the legal norms to the constantly changing needs of the society[46].

The content of this discretionary power of this right of judgment varies according to the limits of the law in the broad sense of the term, and in which the authority of the public administration can move, the authority being able to appreciate the sense of taking a measure adopting an administrative act or not, or can only appreciate when it adopts this act, for example.

Exercising such a discretionary power can not in any way imply violation of the authority's own competences, nor can it suppose that the authority performs its duties as it pleases, because it has the possibility, within the limits of law, to appreciate a conduct does not mean you have recognized the power to act arbitrarily[47]. Also once it is acted by virtue of these discretionary powers, the public administration authority will take action within the legal limits, respecting the compliance with higher normative acts as a legal force to the one in which the law is actually organized or the organization of its execution, the prescribed procedures, the form necessary for adoption act.

In the foregoing, we have recalled that proportionality is correlated with both legality and opportunity. However, as stated in the doctrine, "administrative action must proceed in proportion to the objective pursued and the completion by legal means, not bringing the citizens [but we add to us, nor to any other authorities] of any aspect that would facilitate the attainment"[48]. It is also stated that proportionality is closely related to the reasonable one, and it is not lawful to apply the law only when it has an advantage unintentionally omitted by law, the last case in which there may be an abuse of administrative power[49].

While there is such a risk that, by exercising this discretionary power, a public administration authority may even act excessively, that is to say by exercising its discretion by violating the limits of jurisdiction provided for by law or by infringing the rights and freedoms of citizens[50]; to be in passivity, although such an action would not have been desirable, by acting to prevent the occurrence of negative consequences, however, it is appreciated, in doctrine, that the present requirements that modern states have to face are achievable rather by the execution

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[46] Rodica Narcisa Petrescu, *Drept administrativ*, Accent, Cluj Napoca, 2004, p. 317.

[47] Regarding the competence and the discretionary power of the public administration see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 82-85.

[48] Iulian Nedelcu, Alina Nicu, *Legalitate și putere în administrațiile publice europene*, „Revista de Științe Juridice" no. 3-4, section Public Law, 2005, p. 136, available online at http://drept.ucv.ro/RSJ/images/articole/2005/RSJ34/0201Nedelcui.pdf, last visited: 20.04.2018.

[49] See in this regard, Iulian Nedelcu, Alina Nicu, *op. cit*, p. 136. On the application of the principle of proportionality in European Administrative Law, see Cătălin-Silviu Săraru, *op. cit. (Drept administrativ...)*, 2016, p. 813-817; Cătălin-Silviu Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 116-120.

[50] This is the definition given to excess power by Law no. 554/2004 of the administrative contentious, with the subsequent modifications and completions, by art. 2 par. (1) lit. n).

of such a discretionary power, rather than by creating rules of law, discretionary power being a better mechanism for the exercise of power[51].

On the other hand, today's modern state does not have the possibility, through the legislative authority, to enact all the specifications of the conditions in the law. with regard to the methods and mechanisms that the law enforcement or law enforcement authority takes into account when performing its lawful duties[52]. Moreover, it would be impossible for any legislator to provide for all these mechanisms and procedures, given the complexity of the administration's specific problems, the rapidity with which such new problems are raised by the public administration to answer them[53].

4. Conclusions

Certainly, the separation and balance of powers in the state must remain a fundamental principle recognized either expressly or indirectly by the constitutional norms of any modern state which declares itself to be a democratic and lawful state and, having regard to this principle, can be constructed, developed other principles specific to public administration. Discretionary power recognized within reasonable limits, including public administration, should be within the limits of this principle.

Although it would be ideal, as in the case of discretionary power, to be able to identify exclusively objective criteria that can be appreciated when its limits have been exceeded, subjectivism in their appreciation can not be eliminated. Thus, in general, in its doctrine, the more controllable the forms of control of the exercise of public power exercise, the more the risk that the administration will act with excess power becomes lower[54], and the first role in identifying and the regulation of such forms of control lies with the legislature. By means of regulated and clearly regulated control mechanisms, it will be possible to prevent and, where appropriate, identify and eliminate those situations when, under the umbrella of discretionary power, public administration acts arbitrarily. Whenever any situation of exercise of competences is identified by unlimited discretion, the regulations providing for the above control mechanisms must also be identified and applied with appropriate sanctions.

The permanent realization of specialized studies, multidisciplinary studies, could particularly highlight those risk factors of any nature that determine a public administration authority to exercise its duties in a discretionary but negative way,

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[51] Kwadwo B. Mensah, *Legal control of discretionary powers in Ghana: lessons from English administrative law theory*, „Afrika Focus”, vol. 14, no. 2, 1998, p. 123.

[52] See in this regard Fritz Morstein Marx, *Comparative administrative law: a note on review of discretion*, „University of Pennsylvania Law Review”, 1939, p. 973, article available online at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer= https://www.google.co.kr/&httpsredir=1&article=9051&context=penn_law_review, date of last visit: 20.04 .2018.

[53] *Ibidem*

[54] Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, All Beck, Bucharest, 1999, p. 18.

reaching it was even at an excess of power. Later, the development of good practice guides could guide the public administration to act within reasonable limits by virtue of its discretionary power.

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