



## The State of Law – between Ambition and Reality

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**Abstract: Objectives:** This article proposes to analyze if the statements regarding the unconsciousness of the law state in Romania, as a reason for not being included in the Schengen Area, are susceptible when the evolution of the relations between Romania and the European International Structures have confirmed the beginning of the rule of law in our country. **Prior work:** The special literature doesn't offer many documentaries regarding this subject because the statements that doubt the real existence of the law state in Romania are recent. Even so, the previous analyses show the rule of law in Romania only regarding the justice, without saying anything about the efficiency of these rules. **Approach:** We analyzed the way that the elements of the law state, as they have been identified in the international documents, are mentioned in the constitutional law in our country. Based on these documents, we analyzed if some risky elements towards the law state confirm or not the previous statements. **Implications:** The study is useful to highlight the institutional declines and also to offer arguments in order to join the Schengen area. **Value:** The study wants to offer arguments in order to confirm or to infirm the statements that doubt the existence of the law state.

**Keywords:** the rule of law; the independence of justice; the principle of separation of powers

### 1. The Notion and the Features of the Rule of Law

“The rule of law” is a concept invoked more often in recent decades, both internationally and nationally. International rule of law is a criterion which states are allowed to access the democratic circuit values, and national level is a guarantee of respect for democratic principles and fundamental human rights.

The notion of “rule of law” has received multiple attempts to define, most definitions of this concept being given by analyzing specific features.

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Etymologically speaking the term "rule of law" brings together two distinct terms defined in legal doctrine that is "state" and "right". "State" is the community of people, usually belonging to a nation, organized a series of political and builds its own institutions, whose function is ensured by complying with the rules of law (Calinoiu & Duculescu, 2010, p.41). The specialized state doctrine is analyzed according to a set of legal basis, political and socio-economic (Alexandru, 2008, p. 44).

"Right" was defined as all legal norms existing in society, indispensable organizing the social life (Calinoiu & Duculescu, 2010, p. 25). State law requires bringing together the two terms and is "the type of political regime in which state power is framed and limited by rules of law" (Chevalier, 2004, p. 23). Viewed from this perspective, the rule of law requires harmonizing, balancing the relationship between "state as representative of power" and "right" within the meaning of the rule of law, that its supremacy in order to preserve individual rights and freedoms. In principle, the rule of law means the law foundation of political power.

Rule of law prevails in history when society considered that public authorities must comply with legal rules (Muraru & Tanasescu, 2008, p. 7). Rule of law is a new model for the design of the report and relations between institutions, between them and the citizen, between civil society and politics. The rule of law constitutes an additional guarantee for the affirmation and the rights and liberties. Also, the rule of law, as an essential element of political power, is a basic factor of general progress.

Rule of law has a complex content and is characterized by a number of characteristic features such as:

1. *The existence of an adequate legal framework, ensuring supremacy of the Constitution* and to regulate social relations between members of society as a whole, regardless of their social or political position, which establishes the equality of all before the law;
2. *Election of state authorities, central and local suffraget and secret ballot*, based on political pluralism expressed in the options;
3. *Separation of powers*: Parliament is the legislative, the government is the executive and the judiciary ensures the compliance with laws and sanctions violations. According to this principle, state power should be divided into different sections with separate and independent powers. Traditionally, separation of powers relating to the powers legislative, judicial and executive. This principle was enunciated by John Locke (Two treaties on government) and later initially developed by Montesquieu (De l'esprit des lois) in the struggle against the absolutist state, the principle became the basis for modern constitutional state. The principle of separation of powers between the state powers means that there must

be balance, cooperation and mutual control. In a state of law no one of the 3 powers can be above the 2 others.

4. *Respect for human rights in accordance with international standards.*

5. *Free access to justice.*

As the rule of law has gained ground perfecting legislation, institutions and procedures began to emerge and its limits (Alexandru, 2008, p. 713). On this issue have been expressed views that there were some structural and procedural changes that generated the rule of law crisis (Chevalier, 2004, p. 143).

## **2. Specific Features of the Rule of Law in Romania**

### **2.1. Characteristics of the Rule of Law in Accordance with Constitutional Rules**

After 1989, the main goal of political power in Romania was the establishment of rule of law. In this sense, took place a comprehensive process of democratization, based on the supremacy of the Constitution and the supreme values which guarantee the rule of law in Romania.

According to. art. 1 paragraph 3 of the Constitution, "*Romania is a state of law, democratic and social, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and ideals of the Revolution of 1989, and are guaranteed*".

Looking at this text, we find the following:

- The first part of the text presents the characteristics of the state, which is the rule of law, democratic and social;
- Part two of the classic text on which the supreme values of the state, they are: human dignity, rights and freedoms, development of human personality, justice and political pluralism.
- The final part of the text argue the merits of supreme values, which are necessary in the democratic traditions of the Romanian people and ideals of the Revolution of 1989 and ensuring compliance with the supreme light.

Rule of law remains a simple theory if not consisting of a security system, including courts, to ensure real public authorities coordinates employment law (Muraru & Tanasescu, 2008, p. 9).

Concerns establishing the rule of law in Romania result from the fact that the characteristics of the rule of law have received regulatory *expressis verbis*, by provisions of the Constitution, following the revision of 2003, as follows:

### *1. Creating a legal framework based on the supremacy of the Constitution*

In terms of legal supremacy of the Constitution is enshrined in the provisions of Article 1 paragraph 5, according to which, in Romania, the observance of the Constitution, its supremacy and the laws is binding.

In terms of institutional, constitutional supremacy is ensured by the Constitutional Court. The constitutional revision of 2003 were added the provisions of paragraph 1 of Article 142, under which the Constitutional Court is the guarantor for the supremacy of the Constitution.

### *2. Election of state authorities, central and local suffrage and secret*

The choice of central and local organs of state power through universal suffrage and secret direct result of the following constitutional provisions:

- Art. 2, paragraph 1, according to which, national sovereignty belongs to the Romanian people and is exercised by its representative bodies, resulting from free, periodical and fair elections and a referendum.
- Article 62, paragraph 2, under which the Chamber of Deputies and the Senate are elected by universal, equal, direct, secret and freely expressed, according to electoral law.
- Art.81 paragraph 1, according to which Romanian President is elected by universal, equal, direct, secret and freely expressed suffrage.
- Article 121 paragraph 1, according to which, public authorities, which local autonomy in communes and towns, local councils and Mayors are elected according to law.

### *3. Separation of powers*

By revising the 2003 Constitution were introduced provisions in Article 1 paragraph 4, under which the State is organized on the principle of separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy.

### *4. Respect for human rights in accordance with international regulations*

Article 20 of the Constitution, entitled "International treaties on human rights" governs the relationship between national law and international human rights law. According to these regulations, constitutional provisions on the rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties Romania is part. If there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is party and national laws, international regulations have priority, unless the Constitution or national laws comprise more favorable provisions.

### 5. Access to justice

Free access to justice forms the content of Article 21 of the Constitution, under which any person can go to court to protect the rights, freedoms and legitimate interests. No law may restrict this right. Parties are entitled to a fair trial and to resolve cases within a reasonable time. Administrative special jurisdiction is voluntary and free.

## 2.2. Challenging Aspects of International Rule of Law in Romania

Relations between Romania and European international structures confirmed the rule of law in Romania. Thus, the rule of law in Romania was a criterion for evaluation, the focus of European bodies, a precondition for joining the Council of Europe and European Union.

However, further development of relations between Romania and the European structures and current political reality established national question the reality of rule of law in Romania. Thus:

- *International Challenge "rule of law"* in Romania occurred on May 30, 2011 in Brussels at a meeting of EU ambassadors (COREPER). At this meeting was considered the position of the Member States of Romania and Bulgaria's accession to the Schengen Area, Netherlands representative expressing the idea that Romania is not a "rule of law"<sup>1</sup>. Considering these aspects, European interior ministers decided to postpone talks in September on Romania and Bulgaria to the Schengen Area.

We appreciate that the position expressed by the representative of the Netherlands is contrary to the position expressed by the state official on the occasion of Romania's EU accession. Netherlands, as the other Member States ratified the treaty of accession to the European Union, recognizing implicitly that the conditions of accession and the rule of law itself. This was a precondition for EU accession is one of the Copenhagen criteria<sup>2</sup>.

A first assessment of the fulfillment of this requirement by Romania since 1997 held by "*Opinion on Romania's application for accession to the European Union*".

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<sup>1</sup> On this occasion, the Dutch representative said that there are still problems in justice reform in Romania and, therefore, the Netherlands does not believe that Romania is a "rule of law". Romanian representatives rejected as unfounded the allegations saying that there is a clear confusion between the rule of law and justice reform, which are different issues.

<sup>2</sup> Copenhagen criteria, established by the European Council in 1993, requires the candidate to the existence of stable institutions that guarantee democracy, rule of law, human rights, respect and protection of minorities, a functioning market economy and the ability to make with competitive pressure and market forces within the Union the capacity to assume the obligations of membership and, in particular, adherence to the aims of political, economic and monetary union.

Subsequently the European Commission's annual reports have consistently held that Romania continues to fulfill the political criteria.

*- The real reasons for postponement of Romania's accession to the Schengen Area*

The provisions of the Schengen acquis, while binding for Romania after accession, applies only in our country under a decision taken by the Council, after verification, in accordance with the applicable Schengen evaluation procedures in the field, to meet the territory of that state conditions of all parts of the acquis concerned. Council adopted its decision, after consulting the European Parliament, acting unanimously<sup>1</sup>.

Council members voting representatives of member governments are on the provisions of the Schengen acquis have been already implemented and the government representative on the Member States<sup>2</sup> that these provisions should be implemented.

The reasons for the decision on the application of the Schengen acquis in Romania is postponed just need unanimity voting which currently can not be obtained because of reservations expressed by some members. Although Romania has met all technical criteria set by the Schengen procedures, formulating a European Parliament overwhelmingly positive opinion, the final vote belongs to the Council, which is by its essence, a political vote.

Reservations expressed by some members of the Council on collateral issues of justice and home affairs and unfulfilled commitments by Romania, but were not part of the Schengen acquis on which Romania has not been evaluated by the Council. There was a separate and different monitoring of the European Commission on Cooperation and Verification Mechanism (CVM), but it was never formally linked to Schengen.

Given the political nature of the vote, the Romanian authorities should take into account these reservations, even if not related to formal prerequisites for joining the Schengen Area. Questions referred to MCV relates to the operation of justice, combat corruption and other issues involving the functionality even the rule of law in Romania.

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<sup>1</sup> See art. 4 of the Act of Accession, which is part of the Accession Treaty of Romania and Bulgaria to the European Union.

<sup>2</sup> Council representing the Governments of Ireland and the United Kingdom of Great Britain and Northern Ireland participate in this decision as far as it relates to the provisions of the Schengen acquis and the acts building upon it or otherwise related to it in these Member States participate.

## 2.3. Elements of Risk Analysis to the Rule of Law in Romania

### 2.3.1. Relationship Parliament - Government

Respect for the principle of separation of powers and its reflection in the rules governing relations between the legislative and executive power are defining for building the rule of law. In our constitutional system, which reflects a moderate political regime, separation of powers should not be a rigid, but must also provide balance functioning executive, legislative and judicial<sup>1</sup>.

One of the current problems in the relationship between legislative and executive power is increased executive involvement in legislative activity and extent of this involvement could be interpreted as an infringement of the provisions of Article 61 of the Constitution which provide that Parliament is "the sole legislative authority the country. "Disproportionate number of emergency ordinances issued by the Government in the last term has been criticized even by the Ombudsman which stated that "constitutional rules were diverted to legislate in the sense that the executive rather than legislative enact<sup>2</sup>."

Legislative delegation regulated by the Constitution is an expression of collaboration between government and parliament, but the frequency of recourse to this means calling into question compliance with the constitutional requirement (115) to issue emergency orders "only in exceptional cases, the regulation of which can not be postponed, the obligation to state reasons for urgency in their contents."

In this respect, the Constitutional Court found that emergency ordinances regulating the way is a "task performed by the Government under the legislative delegation and the delegation exceeding limits set by the very text of the Constitution, is inadmissible interference in the legislative competence of Parliament, otherwise said, a violation of the principle of separation of powers<sup>3</sup>". The Court also held that invocation of an item does not meet the requirements of art opportunity. 115 par. (4) of the Constitution, as it is by definition subjective, and not necessarily and unequivocal, objective data, but can give expression and subjective factors, the opportunity. According to the Court, the urgency, there is a subsequent extraordinary circumstances, can not be accredited or motivated by utility regulation<sup>4</sup>.

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<sup>1</sup> According to constitutional regulations contained in Article 1, paragraph 4.

<sup>2</sup> NewsIn.ro - I. Muraru statement the Ombudsman on 31 March 2010 in the press conference where he presented the 2009 balance sheet of the institution.

<sup>3</sup> Decisions. 842 of June 2, 2009 published in the Official Gazette, Part I, no. 464 of July 6, 2009 and Decision no. 989 of June 30, 2009 published in the Official Gazette, Part I, no. 531 of July 31, 2009.

<sup>4</sup> Decision 255 of May 11, 2005 published in the Official Gazette, Part I, no. 511 of June 16, 2005.

Court has determined that "emergency regulation is not equivalent to the existence of extraordinary situation, operational regulation can be achieved and the way ordinary lawmaking process<sup>1</sup>."

The government has indicated its intention to legislate not only improper attempt to replace the Parliament, but even in that ordinance developed in order to thwart a law passed by Parliament, the Court declared unconstitutional aspect. If the government finds it has no financial or other resources to implement a law passed by Parliament, is at the disposal of liability under art. 114 of the Constitution or will be submitted for adoption to the Parliament a draft law in an emergency procedure. In this regard, the Court held that the Government can not alter or thwart the expressed will of Parliament and the principle of separation of powers requires balance and cooperation between them and not hopelessly antagonistic positions and to configure it however such a crisis, each power can use the letter and spirit of the Constitution instruments provided by it.

Even if ordinances are subject to later approval by Parliament, creating the opportunity to correct any potential drawbacks to the manifestations of misuse of Government, Parliament does not make the desired efficiency so that "in our government legislates more practical than Parliament<sup>2</sup>."

From another point of view, the legislative authority of Parliament to restore problem is highlighted by the Presidential Commission report analysis of political and constitutional regime in Romania. In the Romanian political system has created a vicious circle: due to the large number of draft laws initiated by the Government which are sent to parliament's legislative proposals are rejected because deputies and senators of their similarity to these projects, and because these deputies and subsequent rejection Senators make increasingly fewer such proposals. The result of this situation was actually reducing the role of sole legislative authority of Parliament, constitutionally guaranteed principle of art. 61.

Another issue that concerns undermine the role of Parliament is the sole legislative authority to use more frequent in the last term of the government accountability procedure. In conditions in which not provided any temporal or material condition of this procedure, it creates the possibility of ignoring the constitutional legitimacy of the government by invoking the opposition majority in Parliament.

There were also cases where, even if the Government had only liability on a bill, that project was actually a package of regulatory laws whose object was extremely

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<sup>1</sup> Decision 421 of May 9,2007 published in Official Gazette of Romania, Part I, no.367 of May 30, 2007.

<sup>2</sup> See declaration Ombudsman, John Muraru 31 March 2010 at a press conference where he presented the 2009 balance sheet of the institution - [www.newsIn.ro](http://www.newsIn.ro).



diverse<sup>1</sup>. In this way, the Government violated the legislative role of Parliament, required to pass bills that, if it followed the usual procedure, was amended in Parliament or even rejected.

### *2.3.2. Designation and independence of judges of the Constitutional Court*

Another problem affecting the functionality of the rule of law is the constitutional justice, namely the independence of judges of the Constitutional Court.

Constitution and laws of organization and functioning of the Court are based on the principles and guarantees of independence and neutrality of judges of the Constitutional Court. Judge stated that independence derives from the inherent quality of constitutional justice - that is subject only to the Constitution and its organic law. Any form of dependence on any public authority or normative act issued by it, other than the Basic Law, not only would be incompatible with the purpose of the Constitutional Court - ensuring supremacy of the Constitution - but would simply impossible to judge the performance of constitutional (Toader & Puscas, 2011, pp. 4-5).

Yet, with all the guarantees offered by the Constitution, are critical to ensuring the independence of the judge pointing out that appointing judge's discretion as to the excellence of political bodies, their work is carried out into politics, there is a danger of subordination to foreign influences Court order (Draganu, 2010, p.1389).

We can see that the Constitutional Court judge is a magistrate within the meaning assigned to this Constitution and the Law on Judicial Organization, although it is known that judges and prosecutors are the ones who form the judiciary.

Constitutional Court judges are judges who have come to exercise that function in a competition, through the training in the National Institute of Magistracy, which is then appointed by the President of Romania. Unlike the magistrates, judges of the Constitutional Court are appointed politically, the only conditions imposed by the constitution for their appointment as superior legal training, (ie a degree in law), legal work experience of 18 years (being sufficient and the quality of lawyer ) and high professional competence (the latter being more difficult to quantify). A brief analysis of the current judges of the Constitutional Court activity reveals that they have previously occupied positions of lawyers, lawyers or professors, plus usually a large parliamentary political activity as during the previous appointment as constitutional judges. Therefore, are obvious question marks over the independence, gained by simply political appointment to the Constitutional Court without any other selection criteria.

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<sup>1</sup> For example, assuming responsibility by the Government on the legislative package on justice and property, in 2005, taking responsibility for reducing the package of budget revenues and the recalculation of pensions in 2010.

Doubts about the independence of members of the Constitutional Court questioning the principle of supremacy of the Constitution, rule of law affecting functionality in Romania.

### *2.3.3. Relationship President - Government*

Last legislatures have shown some problems with executive functioning dual model, with a president directly elected by the nation and a Chief of Staff validated by parliamentary vote.

Against the background of different and sometimes erroneous interpretation of constitutional norms, we find situations where it exceeded the constitutional law on the exercise of presidential elections, which affects the functionality of the rule of law.

These situations are different, the violation of the Constitution on its own initiative consisting of the President's participation at a meeting of government (taking into account article 87) until the announcement of a possible reshuffle or initiate legislation<sup>1</sup>. When referring to the first situation, we can see that there is a serious violation of the Constitution as defining the concept of the Constitutional Court<sup>2</sup> but in the latter case, we find that they violated the duties of Prime Minister or the Government, knowing that the President has right of legislative initiative and the reshuffle of ministers is only the proposal of the Prime Minister.

Even if the facts out of the constitutional President does not result in serious damage to represent the grounds for suspension, number and frequency of these facts clearly cause difficulties in the rule of law under the Constitution.

### *2.3.4. Relationship Government - judiciary*

The existence of an independent judiciary and functioning of any democratic state is desire. At national level we find instances of violation of principles of judicial independence and separation of powers, consisting of non-compliance and failure judgments for various reasons<sup>3</sup>.

State institutions are obliged to respect and enforce judgments, as a manifestation of the principle of separation of powers, something which involves a state of normalcy in a state of law.

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<sup>1</sup> See President's announcement of a new law or new law liability magistrates health in June 2011.

<sup>2</sup> See the Constitutional Court No. 1 of 5 April 2007 on the proposal of suspension from office of Romanian President Traian Basescu - Official Gazette No.258 of 18.04.2007.

<sup>3</sup> As such, the absence of a national legal framework, or insufficient financial resources necessary for this purpose.

A negative example of dysfunctional relationship between the executive and the judiciary is trying to delay by the Government on the implementation of court<sup>1</sup> or by issuing bills which are void judgments which is obviously a violation of the principle independence of the judiciary<sup>2</sup>.

### **3. Conclusion**

Following this analysis, it would require to answer the question whether Romania or not the rule of law. Analyzing legislation and regulations note that the main principles that define the essence of the rule of law are found in it. From this point of view we have even a confirmation of the rule of law in Romania in the European bodies, this actually represents a criterion for evaluation and even a precondition for joining the Council of Europe and later the European Union.

However the issues highlighted in the second part of our work, executive-legislative relations, political character of the Constitutional Court, constitutional conduct of the President of Romania, the relationship between judicial and executive raises the soundness of the rule of law, which entitles us to say that are problems regarding the functionality of the rule of law in Romania.

We believe that strengthening the rule of law must be supported and any malfunction of one of the state powers should be limited and controlled to goal implementation rule of law in reality.

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<sup>1</sup> For example, delaying enforcement of judgments on the rights of public sector wages staff. According to the European Court of Human Rights, the adoption of successive acts which granted deferred payment of the personnel budget system by which judgments are enforceable, constitutes a violation of right of access to justice for the holders of such securities enforcement. Also, authorities can not invoke lack of funds or other resources to justify the failure of a court decision (ECHR Case "vs. Burdov. Russia", decided on 15 January 2009). Another case that attracted the attention of European institutions is the National Communications Regulatory Authority. Within three years, the government passed three laws that changed the structure of this institution to bypass the Court of Appeal decisions, namely the High Court of Cassation and Justice, ordering reinstatement according to the presidents of this authority.

<sup>2</sup> A court order may be canceled only by judicial process as provided by law, violation of the constitutional government by adopting ordinances to reschedule the staff salary budget (statement by the Ombudsman, I. Muraru 31 March 2010 at a press conference in who presented the 2009 balance sheet of the institution - [www.newsIn.ro](http://www.newsIn.ro)).

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