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THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION

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Abstract

The scientists in the field of Constitutional Law, Theory of Law and Political Sciences approach to the legitimacy of authority in the quality of value judgment or feature of state authority. But the national practice, including the international one invokes an „evolution" of this concept, which we have formulated as a principle quality of the consolidation of the state of law and democracy.

In the present article, we examine the origins of the concept of legitimacy of the government, the subsequent doctrinary and contemporary approaches of the legitimacy of the state authority finalizing with the formulation of new principles of the political liberal and democratic – the principle of the legitimacy of the state authority, as well as the praxeological perspective of this principle.

Annotation. If the state authority as an indispensable element of the state in the contemporary acceptance is treated by the constitutional doctrinaires, theorists and political theorists unanimously, then the legitimacy of the authority is approached only partially and from different points of view. Thus, the constitutionalist T. Draganu expresses his opinion in this context from the point of view of value judgment of the legitimacy of the government, as well as of the Constitution. Then, the constitutionalist I. Guceac, through the prism of the analysis of various schools of legitimacy of the state authority, gives his own definition of the category of legitimacy of the state authority. While the theorist I. Jecev considers that the legitimacy is a characteristic feature of the state authority, a concept which we do not share, because in these circumstances the rebel regimes should be recognized as legitimate. And, at last, but not the least, the specialists in political sciences, in their turn, define the legitimacy of the state authority under the aspect of political sciences.

Thus, the problem of legitimacy of the state authority necessitates a scientific approach in the framework of the science of the law as a fundamental branch of the branches of juridical sciences.

As a starting point servicing and analysis serve the research results of the constitutionalists T. Draganu, I. Guceac, P. Pactet, L. Vlasceanu, S. Tamas, etc.

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ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

Keywords:
authority, legitimacy, principle, function, praxeology.

In the vision of the constitutionalist T. Draganu, the legitimacy problem occurs with occasion of adoption of the Constitutions, especially of those written, and was linked to a historical moment in which the "idea" of monarchical legitimacy still persists, although it lost more ground in favour of "democratic legitimacy" [6, p.77].

It is true that both France and UK have developed as states in the framework of the monarchical form of government, which "as it was considered - at a time when the religious beliefs had a predominantly social role - of divine origin, was accepted as natural and necessary popular mentality. That is why, in France, the first constitutions have been either pacts made between the monarch and the representative body or the book lay the monarch" [6, p.77].

The North American revolution and ouster of the monarchy in France in the late eighteenth century led eventually up to the consecration of the bankruptcy of this idea and its replace with the principle of the sovereignty of the people. The triumph of this principle has led to the appearance of the so-called constitution-conventions [6, p.77].

This overturn was not accepted in France by the followers of the old monarchic regime, which declared it illegitimate, since it was regarded as coming into contradiction with their religious beliefs and conceptions and their economic and political interests. For them, "The Republican Government imposed by force by the revolted crowds, may have a legal basis in the new republican constitutions, but he was not legitimate, because it was contrary to the secular traditions of the country and religious convictions, to which a part of the population was still attached to them" [6, p.77].

Thus was born in the political language the opposition between the legality and the legitimacy. This opposition is confined essentially to the fact that "legality is a principle that is based on the idea that legal rules in force must be strictly observed, while the legitimacy implies a value judgment on a particular system of government" [ibidem]. It is said good or bad depending on political beliefs, ideals and aspirations rooted at a given historical moment in the mentality of the community or a part of it. "Thus, the legality expresses an objective situation, a reality existing in a

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

certain period of development of a country, while the legitimacy is a given subjective, dependent on the evolution of concepts and feelings dominant in a human community.

Moreover, what is legitimate for a part of the society may be illegitimate to another" [10, p.678-682; 19, p.71-72; 21, p.194-197].

Gradually, over a historical process that led to a real turning point, the idea of divine right monarchic legitimacy has disappeared to make place for the idea of the democratic legitimacy. "Under the last concept, a constitution, in order to impose general respect must be freely accepted expression of the will of the people. Thus, in this view, the government is not legitimate unless and to the extent it is the will emanation of the electorate" [6, p.78].

Moreover, with the accession of the biggest part of the world countries to the two human rights covenants of 1966, it can be said that the principle of democratic legitimacy, according to which - as required by Article 1 of the above-mentioned covenants - people have the right to freely determine their political status, has become an integral part of the contemporary international law.

Once published, the problem of the legality and legitimacy of the different political regimes arises today, due to the fact that not infrequently the constitutional order in force in some states is overthrown by the violent actions, such as revolutions, riots, coups, foreign military interventions, guerrilla wars etc. At the way of these violent actions, at the leadership of the state are actually installed the governments that do not recognize anymore the previous constitutional order and replace it with new political structures, whose observance is ensured by the coercive force of the state.

Since the constitutional order introduced by the governments in fact after the collapse of a government defeat in war, or after the triumph of a popular revolution or after the success of a coup, is not established by the authority in force, it will be natural that the new regime which reached the power to seek to create a legal basis.

"If the government really is the emanation of a powerful popular movement, its legalization can be done easily. It will be sufficient to be convened the electorate to freely choose a constituent assembly and the constitution adopted by this assembly to be possibly subject to a referendum, because the government actually to be transformed, based on

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

the principle of the sovereignty of people, into a legal government" [6, p.79].

This was done in France after the Second World War, when, according to the constitutional law of November 2, 1945, it was elected a Constituent Assembly, which adopted a new draft of the constitution (on 29 November 1946). Subsequently subjected to popular vote, this draft of the constitution was adopted by a majority of the electorate.

A similar procedure was followed in Romania after the revolution of 16 to 22 December 1989. According to Decree-Law no. 92/1990, was elected a constituent assembly. It adopted on 21 November 1991 a new constitution, which was approved then on 8 December 1991 by referendum.

The problem arises, opines T. Draganu, "in different terms when a coup, triggered top-down and lacking a real basis of mass, reverses the old constitutional order by force and sets up new political structures, in order to subsequently submit the new constitution to a sham plebiscite (the case of the Constitution of 1938 decreed by Carol II)" [6, p.79].

It is clear that the implementation in these circumstances of a new political order does not appear consistent with the democratic principle of establishing the constitutions and therefore cannot be considered legitimate in optics of the modern conceptions. "Not being the result of consultation of the freely expressed popular will, it will be imposed by coercion and may be possibly maintained due to passivity of a good part of the social community. In this case, the new constitutional order is not an extension of the old legal order, but will be generated by its collapse" [6, p.79].

The new constitutional law does not appear within and in accordance with legal regulations in force at the time of its creation, but is the fruit of force, under which it will be respected more or less long term. The primacy of law is replaced by the primacy of the brutal fact. Born "*against the law*, the new right will apply, however, as a law as long as the state coercion force shall be in its service and the right in the service of law."

But if today the legitimacy of some rules arising in a constitutional vacuum can not be assessed, due to developments in human mentality universally, but in light of the democratic principle enshrined by the covenants in human rights of 1966, however the problem remains open "to know what procedural forms shall be guaranteed to comply with the

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

free expression of the popular will, the only one able to legitimize a the transformation of a government of fact in actually one of law" [6, p.79].

As the previously mentioned international rights covenants do not contain any statement in this regard, the problem will not receive a response only in the light of the principles and practices generally accepted in democratic regimes.

Based on these principles, it will be naturally, mentions T. Draganu, "to believe that the new constitutional order will have to be the work of a constituent assembly. The submission of the constitution adopted in this kind to a referendum vote, although it not strictly necessary appears to give expression to the will of the electorate, will be an additional measure required to emphasize the democratic nature of the procedure followed" [6, p.79].

It is obvious that in the circumstances in which occur the elections of the Constituent Assembly and the referendum, they will be organized by the government in fact. If in the decree convening the electorate for the election of a constituent assembly will be provided the rules according to which it will carry out the work, the procedure thus determined shall be binding on it, because it is an integrant part of the mandate given by voters to the elected in order to adopt a new constitution. Therefore, for example, if in the act of convening the electorate for the election of the Constituent Assembly is not established the procedure, according to which it will deliberate, it will be free to establish by itself.

The way the modern doctrine of the constitutional law establishes the problem of the establishment of the constitutions in case of a constitutional vacuum is likely to raise a number of questions. In his view T. Draganu, "indeed, there seems to be a common view that when such a vacuum is produced either by violent or nonviolent means (e.g., a new state arises in a peaceful manner following the emancipation of former colonies), the people are free to establish their own constitution. If, for this aim, the people will choose the Constituent Assembly, it will be able to adopt the text of the new constitution without being obliged to proceed by way of a qualified majority or other special procedures, of course provided that the act of convening the meeting not to be provided otherwise. In this situation, a natural question arises: the application of such a simplified procedure is possible only if a constitutional vacuum or whenever it is adopted a totally new constitution, followed the special regulations regarding the conditions for the exercise of the legislative

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

initiative, of the conduct of the debates, of voting (e.g., the obligation to obtain a qualified majority) to operate only in cases of proper constitutional revisions, i.e. when are targeted only one or more articles of the constitution in force? Such a question gives rise to, but, naturally, another question: if it is accepted that a constituent assembly by simple majority may adopt a new constitution, the provisions of the constitution that establish a procedure more complicated and more difficult of its review could not be circumvented under the pretext that they are adopted in its whole a new constitution? It shall be not concluded that a constituent assembly, since it is freely chosen, is empowered both to adopt a new constitution and to review the existing one, without the need for this purpose of a qualified majority or the carrying out a special procedure of the initiative, of debate, etc.?" [6, p.80].

Thus, the concept of legitimacy has gradually expanded its coverage sphere, culminating with the legitimacy of state power. Moreover, the issue of legitimacy becomes an object of research both in legal doctrine and in sociology, as well as in the political science, this topic being examined in terms of legal, sociological and political science. From the legal point of view. So, for example, Ion Guceac considers the legitimacy of state power as "a power characteristic specific to the state of law, where the rules of behavior are not only imposed, but also accepted, as a rule, by those whom they are intended, and are not based on absolutism, force, as in the police state" [9, p.72].

Analyzing the legitimacy of state power, the researcher I. Jecev emphasizes that "the state power in a democratic state cannot be maintained only to the extent when the power structures are legitimate, and the political decisions, including, first of all the laws, express the general will and are not used against a part of the population. And the legitimacy of the state power can be viewed from two perspectives: as an act of appointment of power structures (the conquest or the act of founding the power); the correlation between the content of the political decisions and expectations of those governing. The legitimacy in the state of law requires a bilateral relationship between the governors and the governed: to perception by the governed of the efficiency of the power and understanding by the governors of their power as one conditioned by the confidence of the governed and the limits of the power established by the regulatory requirements" [16, p.16].

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

In his turn, Cristian Ionescu considers that "the legitimacy is a fundamental element of political power, on which depends its authority, its capacity of dedication or defence, of adaptability at new confrontations of the political life, civil society" [9, p70- 73; 15, p.86].

From the sociological point of view. In the view of the sociologists C. Zamfir and L. Vlasceanu, the legitimacy is "the power characteristic (of the source, its nature and organization) to be consistent with what people see properly preferable or corresponding according to some legal, moral rules or religious traditions" [25, p.329-330].

From the politological point of view. According to the researcher S. Tamas, the legitimacy "is considered a founding principle and justification of a system of government that requires some recognition by the governed of the right to lead carried out by those who govern" [23, p.149].

In another opinion from the political science, through the legitimacy is understood, essentially, "the quality of being justified or accepted willingly by the subordinates, which converts the exercise of the political power in a right authority." In another opinion, the legitimacy reflects a foundational consensus that allows management and behaviour with authority and which provides acceptance and for the individual leaders, institutions, as well as the norms of behaviour [24, p.89].

But there is still a conception of legitimacy of power - the so-called "elitist legitimacy". The "modern" elitist theories are focused on elites, participating at the "modernization of the process in developing countries and on the various elites who operate in a democratic, pluralistic society, at the local, state and national level" [20, p.165].

We consider that in this case, rather it is about the quality of the political class and it is not about the legitimacy of the state power.

Meanwhile, the scientific doctrines brought several concepts, including:

Contractualist theory [2, p.232] - according to it, the power was created by a pact of allegiance by which subjects promise to listen and the monarchs promise a minimum package of rights and freedoms.

The theory of divine right - the sovereign has the right to command his subjects out of divine desire to exist some order, but also because the fact that the divine will designates a certain ruler (sovereign).

The Marxist theory - the power is the result and the form of expression the irreducibility of class contradictions.

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

Charismatic Legitimacy [9, p.77] - is based on the strong peculiarities of the leader who becomes a historical person in the full sense of the word, the people being devoted blindly.

The democratic theories - according to them, the political power is legitimate only to the extent that they have as the foundation the will of the human community that stay at the basis of power. This general will of the nation is the owner of the right of sovereignty, namely of the state power control.

The elitist legitimacy - a set of visions that aim to explain the nature and role of social groups and communities, in whose possession was the power.

The elitism theorists claim that every form of human coexistence there is a well-ordered power system, where a group exercises, directly or indirectly, the most part of the power [9, p.79].

As for us, in summary, we consider that the legitimacy is a trait, quality of political and state power, a principle of establishing and justifying the entities authorities corresponding to some legal and moral rules and the recognition by the government to be led by those who govern. And the legitimacy of power is a feature of state power that resides in the national sovereignty, specific to the state of law and democratic state, where the Constitution and the authorities of the state entities and acts issued by them are consistent with the general will and are accepted as such by the entire human society organized in the respective State.

Political system - environment of the state power

Theoretical concepts concerning the definition of a "political system"

The middle of the twentieth century is characterized by performing scientific and technical revolution, the revolution that covered virtually all spheres of social and economic life, all branches of science, including cybernetics. Among other novation, cybernetics gave birth also to the "general theory of systems" which, in its turn, gradually overwhelmed a whole range of sciences, including political science, and a little later the constitutional right as a fundamental legal science.

The concept of political system arises in the second half of the twentieth century "under the influence of the general systems theory,

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

reflecting the concern for the integrative approach of the policy area" [18, p.71].

It is under the influence of general systems theory the American political scientist David Easton uses for the first time, the concept of "political system" in his work The Political System written in 1953. Starting from the concept of "ensuring the intrinsic unity necessary for political science," the political scientist proposed as a modality of the concept of "the political system" [8, p.83].

This concept was developed, as the domestic political scientists mentioned [17, p.77], to avoid which gives the ambiguity to the concept of state [7].

The contemporary scientific doctrines present a wide range of definitions of the concept of political system, some of them only using the phrase without interpreting it [26, p.77-79].

The liberal and democratic political regime is based on a number of principles among which:

a) national sovereignty; b) separation of powers in state; c) multi-party system and political pluralism; d) the constitutionality and legality; e) equity and justice; f) the state of law.

Also in the contemporary conditions was imposed and is imposed a new enlightening principle, namely the principle of legitimacy of the state power.

Praxiological perspective of the principle of legitimacy of state power in order to strengthen state of law

The principle of legitimacy of the state power requires a new function that constitutionally refers to the Constitutional Court.

The Constitutional Court function to ensure the legitimacy of the state power in its complexity derives from Article 7 of the Constitution – "Constitution as the Supreme Law" and, logically, from the provisions of Article 135 "Attributions", among which "d) confirms the results of the republican referenda; e) confirms the results of the elections of the Parliament and the President of the Republic of Moldova; f) ascertains the circumstances justifying the dissolution of Parliament; the suspension from the position of the President of the Republic of Moldova or the interim position as a President of the Republic of Moldova, and the inability of the President of the Republic of Moldova to exercise powers for more than 60 days; h) decides on matters dealing with the

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

constitutionality of one party". At the same time, according to Article 62 of the Constitution, the "Constitutional Court, at the proposal of the Central Election Commission, decides on the validation of the mandate of deputy or its invalidation in case of breach of electoral law. This article, in conjunction with the confirmation of the election of the Parliament put the Constitutional Court at the guard of the national sovereignty - the source of legitimacy of the state power".

These conclusions are confirmed by the jurisprudence of the Constitutional Court. So, according to the Decision of the Constitutional Court on the confirmation of the republican consultative referendum results of 23 May, 1999, Article 37 of 15 June examining thoroughly the report of the Central Election Commission of 15 June of the same year, the protocol and the attached materials, the Constitutional Court did not ascertain any cases of the serious violations during voting or vote counting, as well as the process of totalization of the results of the republican referendum, of the provisions of the Electoral Code, which could influence the results of the referendum. Under the provisions of Article 140 of the Constitution, Article 26 of the Law on the Constitutional Court, Article 62 and 68 of the Code of Constitutional Jurisdiction, the Constitutional Court ruled: "1. Confirms the results of the republican consultative referendum of May 23, 1999" [14].

This decision is to justify the power of the referendum as a form of direct exercise of the national sovereignty.

Thus, in accordance with Article 75 paragraph (2) of the Constitution of the Republic of Moldova, "the decisions adopted by the results of the republican referendum have the supreme legal power [4] which they acquire, but "after their confirmation by the Constitutional Court and are enforceable throughout the Republic of Moldova (Article 142 paragraph (3) of the Electoral Code)" [3].

The Constitutional Court confirmed the legitimacy of the election of Deputes of Parliament by the Decision on the validation of mandates of the Republic of Moldova by the XVIII legislature, No. 14 of 19.08.2009. Examining the materials relating to the parliamentary elections of July 29, 2009, presented by the Central Election Commission under the provisions of Article 62, Article 69 paragraph (1) and Article 140 paragraph (1) of the Constitution of the Republic of Moldova, Article 26 of the Law on the Constitutional Court, Article 61 paragraph (1) and 62, letter d) of the Code of Constitutional Jurisdiction, Article 89 paragraph

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

(2) of the Election Code, the Constitutional Court ruled: "There are validated the mandates of the deputes elected in the Parliament of the Republic of Moldova by the XVIII legislature" [11].

After the parliamentary elections of July 29, 2009 and the legal meeting of 28 August, 2009 the newly elected Parliament, a group of deputes have asked the Constitutional Court having as object the Decision of the Parliament No. 2-XVIII regarding the approval the protocol No.1 of the meeting of the Commission to carry out the election by secret voting of the Parliament President and the Decision No. 3- XVIII for the election of the Parliament President. In a word, there was questioned the legitimacy of the election of the Parliament President. Examining in the plenary session the complaint, the Constitutional Court decided to stop the process for the control of the constitutionality of the Parliament decisions No.1-XVIII , No.2 and No.3 XVIII and No. 3 -XVIII of 28 August, 2009 "... being presumed constitutional" [5].

The principle of legitimacy of the state power

The state power being an element of the objective law, there appears the issue of its legitimacy. That is, the state power as a complex phenomenon and indispensable to the contemporary human society needs legitimacy. The principle of the legitimacy of the state power is applied to: the Constitution - as a legal and political act of the people constituted in that state. That is, after all, the last word in the adoption of the Constitution belongs to the people - the will expressed by a constitutional referendum. Respectively, and the further modifications or amendments to the Constitution may be legitimate only after their approval by the referendum.

The legitimacy of the state power emanates in the national sovereignty established in Article 2 of the Constitution. And the basis of the state power, in conformity with the Article 38 of the Constitution, lies in the will of the people expressed through free elections, which take place periodically through universal, equal, direct, secret and freely expressed vote.

Also the Article 2 (1) of the Constitution provides that the national sovereignty is exercised: directly by the people - elections, referendum and its representative bodies. The Constitution of the Republic of Moldova establishes only one supreme representative body of the people - Parliament (Article 60 paragraph (1)).

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

So the legitimacy of the Parliament, as a representative authority and sole legislative authority, resides in people's will expressed by the electorate. It shall be noted that only the Parliament receives the legitimacy directly from the people, while the other two branches of the state power receive the legitimacy in case of the Government - from the Parliament. The government legitimacy emanates under art.98 par. (3), from the granting of trust with the majority vote of the deputies elected.

The Government, as a central structure among the executive authorities, is the work of the Parliament, its existence is based on three essential components: the government program, the procedure for investing and confidence given by the Parliament. If case of lack of one of these components **the legitimacy** and the share of the government structure becomes uncertain [22].

The list of the Government members voted in Parliament includes: the Prime Minister; the Deputy Prime Minister; deputy prime ministers and ministers. There appears the problem of the legitimacy of other "members established by organic law". Following the logic of the principle of the legitimacy of the state power cannot be the members of the Government than those voted by the Parliament. And in case of the judiciary authorities - from the auto-administration authority itself - the Superior Council of the Magistracy.

A special status, have the magistrates of the Constitutional Court, whose legitimacy emanates equally from the Parliament, Government and the Superior Council of the Magistracy.

Obviously, the legitimacy of some state entities organs of senior rank: Prosecutor's office; Court of Auditors etc., emanates in the majority of cases in the Parliament's vote. Returning to the executive power, we shall clarify that the legitimacy of the Head of the state emanates from the vote of the deputies in the Parliament expressed in secret manner.

Another example of the principle of ensuring the legitimacy of the state power serves the Notification of the Constitutional Court regarding the finding of the circumstances justifying the deputizing of the position of the President of the Republic of Moldova, No. 4 of 17.09.2009. As a basis for examining the file served the referral of the Parliament of the Republic of Moldova, presented on September 14, 2009.

Examining the notification, the transcript of the Parliament hearing of September 11, 2009 where it was decided that the deputizing of the position of the President of the Republic of Moldova is ensured by

ARSENI, A. (2014). THE LEGALITY OF THE STATE AUTHORITY FROM THE VALUE JUDGEMENT TO THE CONSTITUTIONAL JUDGEMENT: SCIENTIFIC ARGUMENTATION. Jurnalul de Studii Juridice, Year IX, No. 1-2, June 2014, pp. 115-129.

the Parliament President [1], as well as by the other materials attached to the file, the Constitutional Court has adopted this notification, by which "it is ascertained that the circumstances justifying the deputizing the position of the President of the Republic of Moldova the vacancy of the position following the resignation of the head of state" [13].

It was disputed the mandate of the Presidential of the Republic of Moldova, elected by the Parliament on March 16, 2012. Thus, a group of deputies draw the attention of the Constitutional Court to control the constitutionality of the decisions of the Parliament: No 38 of 7 March 2012 on setting the date for the election of the President of the Republic of Moldova, No. 39 of March 7, 2012 on special commission to conduct the elections for the position of the President of the Republic of Moldova, No. 46 of March 16, 2012 on the confirmation of the election of the President of the Republic of Moldova.

Analyzing the documents mentioned in terms of legal provisions, the Constitutional Court declared them constitutional and confirmed "the constitutionality of the election for the position of the President of the Republic of Moldova from March 16, 2012" [12].

All these acts confirm with certainty the function of the Constitutional Court to ensure the legitimacy of the state power in all its aspects of manifestations.

Summing the matter we consider necessary to regulate the constitutional principle of the legitimacy of the state power to consolidate the state of law and the democratic state. To this end we propose the following amendments in the Constitution of the Republic of Moldova: 1) To amend the Article, paragraph (2) by the phrase "The legitimacy of the state power emanates from the national sovereignty" and further following the text; 2) To amend the Article 134 paragraph (3) with the words "... the supremacy of the Constitution", with the phrase "and ensuring the application of the principle of the legitimacy of the state power", following further the text; 3) To amend the Article 135 paragraph (1) with sub- point "i" with the following contents "shall have the matter and decide on the conflict of the parliamentary immunity."

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