CONSTITUTIONAL IMBALANCES IN THE ROMANIAN CONSTITUTIONAL SYSTEM. THE CONSTITUTIONAL COURT'S ROLE IN ENSURING THE STATE BALANCE

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Abstract: *The settlement of Romania's Constitution was based on the principle of the separation and balance of the state powers. Over the past 30 years of democracy, the balance of powers has been distorted many times. The executive's desire to dominate the legislature, the open differences in opinion within the executive, namely between the two actors - the President and the Prime Minister-have created the premises for constitutional blockages in the act of governing. To establish the balance and to respect the values of the rule of law, the intervention of the Constitutional Court was needed. In this study we are making an analysis of the jurisprudence of the Constitutional Court on how the powers are required to cooperate for the proper functioning of the state.*

Keywords: *separation of powers, Constitutional Court, rule of law, the loyal collaboration, constitutional blockages*

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Motto:

'Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers (...). But if the legislative power in a free state has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed'. (Montesquieu, 'The Spirit of Laws', Book XI, Chapter VI)

1. Separation of powers. General considerations

Any state aiming at being democratic by law must be based on the separation of powers. In the states' constitutional practice, over time, this famous theory has undergone various transformations. Originally emerged as a reaction against the government's abuses, the concept of the separation of powers played a special role, perhaps even a decisive one, in promoting the representative system, in the democratic capitalization of the relationship between the sovereign holder of the power (the people) and the state political power¹.

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¹ Gilia C., *Drept constituțional și instituții politice. Vol. I Teoria generală a dreptului constituțional*, Universul Juridic Publishing House, Bucharest, 2022, pp. 141-142.

After the events in 1989, there were lively debates in the Constituent Assembly regarding the enshrinement of this fundamental principle in the constitutional norm. There were divergent opinions on this issue: '(...) we are talking of a principle that needs to be enshrined in paragraph (4) of article 1, as follows: All the powers of the state, namely the legislature, the executive, and the judiciary, emanate from the Romanian people, who exercise them separately, according to the present Constitution'. 'The reason to which I'm limiting myself is that the principle of the separation of powers - even if, in the way the Constitution is conceived, there can be admitted the commission's grounds stating that this principle is outdated, however in terms of its acknowledgement, this principle should be recognized by our Constitution—as we are after 45 years of dictatorship now and, at the same time, we must keep in mind that this principle is recognized by one of the first laws that were adopted after the Revolution'. (Petre Ninosu, National Salvation Front deputy²).

'(...) I would like to make it clear, from the very beginning, that we, members of the commission, do not reject *de plano* the capitalization of the aims and reasons of the principle of power separation'. This is also the reason why the setting up of these powers, of the authorities, and of the relations among them, as you can easily see, was done starting with the assimilation of the values of 'the separation of powers' principle. But we did not intend to consecrate *expressis verbis* the constitutional principle of 'the separation of powers' in Chapter VII. The theory of the separation of powers', because it has proved to be simply a scientific error. Firstly, the power is only one, therefore it is not divisible. Secondly, the power holder is only one - namely, the people - who passes around the exclusive rights deriving from this power to the various public authorities. Thirdly, sovereignty is also indivisible, and sovereignty is an immanent feature of power. Fourthly, it is wrong to conceive of a rigid separation of these powers, because, in fact, (...) there is an interconditioning, an intercorrelation between these powers' (Professor Ion Deleanu, PhD, member of the Commission for the Romanian Constitution³). "(...) from technical and legal point of view, we cannot allow the inclusion in the Constitution, under these circumstances, of the principle of 'the separation of powers in the state', as this would essentially be a teaching excess, which is below the dignity and the style of drafting a Constitution; and, finally, we consider this principle, in terms of its nature, namely to defeat the natural tendency of any power branch to set out the relationship between the three powers — the executive, the judiciary, and the legislature.

We can notice that there is a balance, a cooperation and a separation between them that could defeat any possible abuse by any of the powers, that could defeat the likely fantasies of any of the powers, and that could defeat the absolutism of any of them'. (Professor Marian Enache, PhD, member of the Commission for the Romanian Constitution⁴)

The 1991 Constitution therefore did not specifically make provisions for the concept of the separation of powers. The law revising the Romanian Constitution of 18 December 2003 removed the critical comments on the Constitution of 1991, namely the lack of provisions to enshrine the principle of the separation of the three powers - the legislative, executive and judicial powers. Thus, paragraph 4 of article 1 of the revised Constitution provides *expressis*

² *Geneza Constituției României 1991, Lucrările Adunării Constituante*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1998, p. 141.

³ *Geneza Constituției României 1991, Lucrările Adunării Constituante*, Regia Autonomă "Monitorul Oficial" Publishing House, Bucharest, 1998, pp. 141-142.

⁴ *Idem*, pp. 142-143.

verbis that: *'The state is established according to the principle of the separation and balance of powers - legislative, executive, judicial - within the constitutional democracy'*.

Over the centuries, the concept of the separation of powers had various forms under each administration. At present, this principle is seen as a rule of 'political art', of 'opportunity', or of 'good organization of powers'. The 'future' of this principle is debated: some voices are demanding to remove it as being 'outdated'; others are pleading only for 'making it adequate' or 'modernize it' in favor of a 'strong power', usually of the Executive.

2. From separation of powers to loyal collaboration

Could we imagine a state structure in the 21st century without regulations about the principle of the separation of powers? We believe the answer is no. We cannot speak today of this principle in the way it was conceived by Locke or Montesquieu. In the contemporary societies, it is difficult to imagine a rigid separation of powers. The constitutional practice shows that an absolute separation of powers would correspond to a constitutional deadlock. In order not to block the constitutional mechanism, the Constituent Assembly established instruments of cooperation and control between the state powers, meant to ensure a harmonious social leadership and to prevent one power's abuse over another power. The reason for the social balance is to prevent both the hegemony of one constitutional power to the detriment of the others, and to avoid violating the constitutional order, set out by the Nation's will.

The constitutional imbalances among various public authorities in Romania affected the constitutional principle of the separation and balance of powers. Thus another state authority was needed to produce equilibrium. Consequently, the Constitutional Court, through its jurisprudence, set out that the principle of constitutional loyalty is indispensable in a state governed by the rule of law. *As it was notified to resolve some legal conflicts of constitutional nature, caused by such blockages, the Romanian Constitutional Court issued a proper interpretation of the constitutional texts, established the conduct for the public authorities in conflict, and stressed, when appropriate, their obligation to observe the constitutional loyalty*⁵.

Following the revision of the Constitution in 2003, the public authorities that make the object of article 146 letter e) in the Constitution began to exercise in concrete terms the right to formulate requests for the settlement of the legal disputes of a constitutional nature involving public authorities. From 2005 (when the first notification was registered) until the end of 2021, all the sea mounted 55 requests, which equals an average of about 3 requests a year. The record in this matter was reached in 2019, when 8 requests were submitted⁶.

In its jurisprudence, the Court stated that one of the conditions for achieving the fundamental goals of the Romanian state is 'the proper functioning of the public authorities, by respecting the principles of the separation and balance of the powers, without institutional blockages'. Also, the text of article 146 letter e) of the Constitution does not give the Constitutional Court only the assignment of ascertaining the legal disputes of a constitutional nature, but also the assignment of resolving these disputes. Therefore, in the exercise of its

⁵ Safta M., *Separarea puterilor în stat și loialitatea constituțională*, <http://www.tribunajuridica.eu/arhiva/An3v1/art8.pdf>

⁶For more details: https://www.ccr.ro/wp-content/uploads/2022/01/ActivitateRo_dec.pdf,

powers, the Court applies a two-step procedure, namely it examines the existence of a legal dispute of a constitutional nature and, if the answer is yes, it indicates the procedures to be followed by the public authorities that have a dispute.

Once a legal dispute of a constitutional nature is found, the Constitutional Court -- by virtue of the provisions of article 142 paragraph (1) of the Constitution, according to which 'it is the guarantor of the supremacy of the Constitution' -- has the obligation to resolve the dispute, in accordance with the constitutional provisions which the public authorities must comply with. In this regard, the Court follows the provisions of article 1 paragraphs (3), (4), and (5) of the Constitution, according to which Romania is a rule of law, established according to the principle of the separation and balance of the powers, namely the legislative, executive, and judicial powers, a state in which observing the Constitution, its supremacy, and its laws is mandatory, and the cooperation between the state authorities or institutions is based on the principle of loyal cooperation and mutual respect.⁷

Year	The President of Romania	President of the Chamber of Deputies	Prime Minister	President of the Superior Council of Magistracy	Number of cases
2005	-	2	-	-	2
2006	-	-	-	1	1
2007	-	1	1	-	2
2008	2	2	2	1	7
2009	1	2		1	4
2010	-	1	1	-	2
2012	2	-	-	1	3
2013	-	-	-	2	2
2014	1	-	3	1	5
2015	1	-	-	1	2
2017	1	4	-	1	6
2018	1	1	3	-	5
2019	-	6	1	1	8
2020	-	3	1	-	4
2021	-	1	1	-	2
TOTAL (2005-2021)					55

⁷ For more details: Decision by the Constitutional Court of Romania no.460/13.11.2013, Official Gazette of Romania, Part I , no. 762/ 09.12.2013, Decision by the Constitutional Court of Romania no.261/08.04.2015, Official Gazette of Romania, Part I, no. 260/17.04.2015, Decision by the Constitutional Court of Romania no.68/27.02.2017, Official Gazette of Romania, Part I, no. 181 din 14.03.2017, Decision by the Constitutional Court of Romania no. 611 din 3.10.2017, Official Gazette of Romania, Part I, no. 877/07.11.2017, Decision by the Constitutional Court of Romania no.358/30.05.2018, Official Gazette of Romania, Part I, no. 473/7.06.2018, Decision by the Constitutional Court of Romania no.589/28.09.2021, Official Gazette of Romania, Part I, no. 986/15.10.2021.

Decision by the Constitutional Court of Romania no. 611 of 3 October 2017, Official Gazette of Romania, Part I, no. 877 of 7 November 2017 provides: "105. Thus, in paragraphs 72 & 73 of the Decision, the Venice Commission states that paragraph 72 «Respect for the rule of law' cannot be limited to the implementation of the explicit and formal provisions of the law and the Constitution. It also involves a constitutional behaviour and practices that can facilitate the compliance with the rules of all the constitutional bodies and the mutual respect among them».

73. In Romania, the political and constitutional culture must be developed. The dignitaries do not always pursue the interests of the state as a whole. First of all, there was a lack of respect to the institutions. The institutions are not taken into consideration separately by those who run them. This is reflected in the way dignitaries were treated, as representatives of the political forces which appointed them or voted for them to occupy certain positions. It is expected that the dignitaries will favour the positions of the political parties that voted for them, as well as that the new majority in the parliament may consider that the dismissal of the dignitaries appointed by the former majority is justified. Such a lack of respect for the institutions is closely linked to another issue in the political and constitutional culture, namely the violation of the principle of loyal cooperation between institutions. This principle is of particular importance in cases where positions such as President and Prime Minister are held by people with different political beliefs. Only mutual respect can lead to the establishment of mutually accepted practices, which are in line with the European constitutional heritage and which allow a country to avoid and overcome crises with serenity.

106. The Constitutional Court therefore finds that a first component of the rule of law is the implementation of the explicit and formal provisions of the law and the Constitution. In other words, in terms of the of loyal collaboration between the state institutions / authorities, a first significance of this concept is the observance of the positive law norms, in force in a certain period, which expressly or implicitly make provisions for the competences, prerogatives, attributions and duties of the state institutions and the state authorities.

107. Furthermore, the Court finds that the observance of the rule of law is not limited to this component, but involves, in relations to the public authorities, constitutional behaviour and practices, which originated in the constitutional normative order, that is seen as a set of principles which substantiate the social, political, and legal relations of a society. In other words, the constitutional order has a broader meaning than the positive norms set out by the legislator, and represents the specific constitutional culture of a national community. Therefore, *the loyal collaboration involves, not only the respect for the law, but also the mutual respect of the state authorities / institutions, as the expression of some assimilated, assumed and promoted constitutional values, in order to ensure a balance between the state powers*. The constitutional loyalty can therefore be seen as a value -a constitutional principle, while the loyal collaboration among the state authorities / institutions has a defining role in the implementation of the Constitution.

108. The respect for the Constitution cannot be limited to the literal implementation of its operational provisions. The Constitution, by its very nature, in addition to guaranteeing the human rights, provides a framework for state institutions, and sets out their attributions and duties. The purpose of these provisions is to enable the institutions to work properly, on the basis of fair cooperation among them. The head of state, the parliament, the government, the judiciary -all serve the common purpose of promoting the interests of the country as a whole, though not the narrow interests of a single institution or of a particular political party, which appointed the holder of a certain position. Even if an institution is in a position of

power, when it is able to influence other institutions of the state, it must do so in the interests of the state as a whole, including, as a consequence, its own interests as well.

109. The institutional conduct, which is limited to a loyal collaboration, has therefore an extra legem component, based on the constitutional practices, whose primary purpose is the proper functioning of state authorities, the good administration of public interests, and the respect for the fundamental rights and freedoms of the citizens. The secondary purpose is to avoid the inter-institutional conflicts and to remove any blockages in the exercise of their legal prerogatives. The tools which help achieve these goals and which show a loyal behaviour towards the constitutional values are the institutional dialogue and the setting out of mutually accepted practices. These instruments must be the basis for resolving 'together', 'by agreement of the parties' and not 'against', 'to the detriment' of one or the other one, any disputes arising from relations among the authorities, caused by confusing, equivocal facts or legal situations. By virtue of the principle of loyal cooperation among the authorities, it is therefore necessary that each of them make rational and increased diligences, within the legal institutional dialogue, in order to avoid, as far as possible, the occurrence of legal conflicts of a constitutional nature".

Also, Decision by the Constitutional Court of Romania no. 85 of 24 February, Official Gazette of Romania, Part I, no. 195 of 11 March 2020 provides: "123. As it found, over time, behaviours opposed to the mentioned principle, the Constitutional Court ruled on the *obligation of constitutional loyalty, of loyal constitutional behaviour that rules the carrying out of the attributions of the public authorities in a state governed by the rule of law.*

Thus, the Court decided that the relations between authorities *«must serve within the constitutional framework of loyalty and cooperation, in order to achieve the constitutional duties, which are clearly provided for every authorities; the collaboration between the authorities is a necessary and essential condition for the proper functioning of the public authorities of the state».*

126. (...) The Constitutional Court, by virtue of the provisions of article 142 paragraph (1) of the Constitution, according to which 'it is the guarantor of the supremacy of the Constitution', has the obligation to resolve the conflict, showing a conduct in accordance with the constitutional provisions which the public authorities must comply with. In this regard, the Court had and takes into account the provisions of article 1 paragraphs (3), (4), and (5) of the Constitution, according to which Romania is a rule of law, established according to the principle of the separation and balance of powers - legislative, executive and judicial, a state in which *the respect for the Constitution, its supremacy and the laws is mandatory, and the relations between the state authorities or institutions are based on the principle of loyal collaboration and mutual respect.* One of the conditions for achieving the fundamental goals of the Romanian state is the good functioning of the public authorities, and the respect for the principles of the separation and balance of powers, without any institutional blockages".

3. Conclusions

The political instability in Romania has led, in the past years, to many constitutional conflicts between the state powers, especially between the Executive and the Legislature. The Executive's growing tendency of being 'the main actor' of the political life has done nothing but reduce substantially the role of the legislature, particularly in terms of its legislative

function. Following a governance by emergency ordinances and an increasing involvement of the President of the Republic in the public life have changed the way in which the 1991 Constituent Assembly drafted the principle on the separation of the powers.

In order not to block the governing, the repeated intervention of the Constitutional Court was required. Through its rich case law, the Court has become a balance wheel among the state powers. Unfortunately, the rulers, who were led by political passions, forgot to respect the sphere of competence they were assigned with by the Basic Law or violated it with full knowledge and deliberation. The Constitutional Court has become 'the firefighter in charge' for constitutional tensions and disputes. Through its jurisprudence, the Constitutional Court established the principle of loyal cooperation between the powers, in order to restore the constitutional balance.

When a future revision of the Constitution is made, it will be necessary to transfer the provisions of the decisions by the Constitutional Court – through which certain constitutional disputes have been settled between the legislature and the executive – into constitutional texts. On the other hand, we cannot turn the Constitutional Court into a positive legislator only because the rulers do not have the capacity to observe the Constitution in the letter and spirit, and do not have the ability to coexist.

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