REFLECTIONS ON THE SEPARATION OF THE STATE POWERS IN THE ROMANIAN CONSTITUTION

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Abstract:
The complexity and dynamics of the political life determines evolution and reconsideration regarding the classic theories of the constitutional law. This kind of process is found in the case of the separation of the state powers as well. Numerous factors affect the way in which this theory is currently put into practice, according to the current political reality.
This article aims to examine the principle of separation, balance and collaboration of the state powers both from an historic point of view and from the point of view of the current constitutional regulations.
The final part of this material will briefly present the constitutional relations among the public power authorities.
Keywords: *the separation of the state powers, public authorities, the principle of constitutional loyalty.*

The State Power – Introductive Notions

Power, along with nation and territory, is the third constitutive element of the state. The category that is most commonly encountered in the theory and practice of the constitutional systems is the institutionalized power category.

This is tied to a „collective aknowledgment" which makes the group be recognized by all its members as a separate and superior entity. This power implies the creation of norms, social rules that are independent from every member of the group, implies social organization under these norms. The collective acknowledgment makes possible the occurrence of an „objective right" which makes possible the elaboration of the positive right that explains it and through which the norms and rules of social interaction that support that social structure are established. The state power can be included in this category as well. [1]

Regardless of the variety of its forms, the state power has certain common traits, which will be emphasized next:

- The state power is sovereign, designating the state power to rule, restrict, command.
- The state power is an institutionalized power, with an organized character, meaning that it is independent from the person that exercises it;
- The state power is a political power that determines the leadership of the society in the direction expected by the political forces that are in government, that have power.
- The state power is a command power, it commands to the entire nation and establishes compulsory norms, dispositions, either as general norms or as concrete dispositions;
- The state power owns the monopoly of restraint. It is a material power that is superior to any other power that exists on a determined territory. Restraint appears necessary for the protection of the values of the entire society, of the life, health, freedom or wealth of the people.

Being an official power, the state power is not founded on entreaties but on the “imperium” history, on the restraint power, including physical repression of the state towards the opposition of certain law subjects.

The Separation, Balance and Collaboration of The State Powers

The theory of the separation of state powers is a famous one, thoroughly advertised and frequently invoked. Under the name of theory of the separation of state powers there are, in fact, several theories referring to the state power, which analyses certain methods of exercising it.

The theory of the separation of state powers had a major, if not decisive, role in promoting the representative system, namely in the democratic capitalization of the relations between the sovereign owner of the power (the people, the nation) and the state organization of political power, in searching,

among the state organization and the functioning of power, of the guarantees of the exercise of the human and citizen rights. It is a theory that the elaboration of constitutions was based on, the statements of the Declaration of human and citizen rights (France, 1789) bringing proof in this regard. Thus, according to the declaration mentioned, a society in which the guarantee of rights is not ensured and there is no separation of the state powers determined does not have a constitution. [2]

Enunciated by John Locke the theory of the separation of state powers is final and broadly explained by Montesquieu in the famous paper „About the spirit of laws" (1748). Montesquieu made an efficient instrument for the safety of the citizens out of the separation of the powers.

In its essence, the process of ruling the state must be unitary, a reflection of the unitary character of the political power. In any state form, the political power must have a unitary character, meaning that it is owned either by an individual or by a very small group (in archaic states), either by a large political body (in modern states). [3]

From this perspective, it is said that only a single power can exist in a state, towards which other powers of the same nature do not oppose. In virtue of the public power, the state is entitled to not recognize on its territory another power that has come from the outside. [4]

During the two centuries of its practice, the theory of the separation of the three state powers has taken different forms in every political regime. Practically, there are no two states in which the actual methods of separation or distribution of the legislative, executive and judicial functions (powers) are identical.

Even within the same state, during a longer or shorter historical evolution, there have been observed changes of the relations among powers for the benefit of one of them, although the constitutional provisions which regulated the distribution of the power attributes have remained unchanged. For example, in the constitutional practice of the United States of America, the relations among

powers, especially between the executive and legislative ones, have a different evolution in every legislature, in every presidential term.

Both the legislative and the executive powers exercise the so-called listed powers (the powers expressly stated in the Constitution) and implicit powers (prerogatives that are either of legislative or executive nature).

In what concerns the implicit powers, the Congress or the President exercise different „powers", at the limit of their competences established by the Constitution, with the help of which they can influence other sectors.

The source of the implicit powers is the interpretation of different texts of the Constitution. Thus, by an extensive interpretation of certain constitutional texts, the USA president becomes „more powerful" than the Congress without the constitutional balance among powers to be severely damaged. Theoretically, the Congress also benefits from the same latitude which, for example, has the right to draw all the laws that will be considered necessary and appropriate for applying the legislative powers that have been offered to it through the Constitution. Due to the fact that the Constitution does not specify which laws they can apply, the Congress is free to estimate in this regard. However, practically, the President has mostly given substance to the implicit powers.

Although the „competition" in terms of constitutional prerogatives takes place between the executive and legislative, the judicial power is not excluded. After all, it can be rightfully said that, in an extensive interpretation of the constitutional texts, the president of the Supreme Court of Justice of the United States, John Marshall, has „created" in 1803 the principle of judicial control of the constitutionality of laws. [5]

Summarizing the classic theory of the separation of state powers it can be remembered that in any society that is organized as a state there are three functions:

- of issuing judicial laws or legislative function;
- of exercising these laws or executive function;
- of judging the litigation or judicial function.

Each function belongs to a different organ:

- the legislative power – to the representative assembly;
- the executive power – to the head of state, possibly to the head of government and the ministers;
- the judicial power – to the judicial organs.

The theory of the separation of state powers is actually an ideological justification of a very clear political purpose: the overall weakening of the governor's power, restricting the ones through the others. It is considered that the separation of powers has two well defined aspects:

- separating the Parliament from the Government;
- separation the jurisdiction in relation to governors which allows control over them through independent judges.

The evolution of the separation of state powers, as a constitutional theory and reality, has three main aspects:

- defining the content and meaning of the theory;
- the critique of the classic theory;
- the continuity of its political and social importance and resonance.

In what concerns the content and meanings of the separation of the state powers it has often been stated that it is more about separation than about the balance among powers. The independence of the state authority is important for the state organization which cannot be total but must be very broad. The state organs must depend on one another only as much as it is necessary for their formation and designation and possibly for the exercise of some attributions. Then it is considered that, in fact, there are only two powers, namely the legislative and the executive ones.

The critique of the classic theory of the separation of state powers is included in the context of its evolution. It has gon as far as stating that the classic theory no longer expresses the political reality because it was removed by the totalitarian regime and is surpassed and outdated in the pluralist regime.

The aging of the theory of the separation of state powers is justified by the fact that it was elaborated in a time when political parties were not yet founded and when the main issues of power were of institutional nature. The occurrence of political parties, their important role in the configuration of judicial and politic institutions, causes the fact that the nowadays separation is no longer made between Parliament and Government but between the majority, composed of the elected party or parties that have at the same time both the Parliament and the Government and the opposition that waits for the following election in order to „revenge". A certain scheme is, in principle, applicable anywhere and, of course, more evidently in two-party constitutional systems.

The Consecration of The Separation of State Power in The Romanian Constitution

The principle of the separation of state powers was illustrated in the Romanian constitutional text even before its revision during the year 2003. Thus, the doctrine pertinently shows that, by examining the dispositions of the Romanian Constitution from its version adopted on December the 8th 1991, it can be seen that the balance among state powers was found in its modern content and meaning, in this regard more pertinent arguments were invoked:

The three classic „powers" were expressed in the Constitution:

- the legislative within the norms regarding the Parliament; [6]
- the executive within the norms regarding the President of Romania and the Governement[7];
- the justice within the norms regarding the judicial authority. [8]

The order of the regulation of powers within the Constitution was the classic, natural order, namely the legislative power, then the executive power and,lastly, the judicial power. [9]

Taking into consideration the legitimacy of Parliament's empowerments, its numerous and broadly representative composition, the Constitution ensures a certain preeminence to it in relation with the other state authorities. The Parliament was declared as the only legislative authority of the country, charged

with functions of training, electing, appointing, vesting of other state authorities and with control functions. Certainly, to this there could also be added the characterization given by art. 58 according to which the Parliament was the supreme representative organ of the Romanian people, although the use of the term „supreme" could have been regarded with many scientifical limitations in the context of the theory of the separation/balance of the state powers. Furthermore, even the bicameral structure of the Parliament could have been considered an expression of balance in the exercise of legislative power. Besides, this even was the single solid argument of the quasi-perfect bicameralism that existed then towards the fact that Romania is a unitary state. [10]

During the revision of the Constitution arranged during the year 2003 there was the need of explicitly proclaiming the principle so that article 1 was completed by two new paragraphs, one of which is exclusively dedicated to the consecration of the principle of the separation of state powers and constitutional democracy as fundamental political coordinates for the entire organization and activity of the romanian state. The derived Romanian constituent could not however disregard more than two centuries of doctrinal evolution in this matter and not only referred to the separation of powers but also to the necessary balance that must be established among them within their natural functioning. Paragraph (4) of article 1 of the revized Romanian Constitution states that:

„*The state is organized according to the principle of the separation and balance of the powers – legislative, executive and judicial – within the constitutional democracy*."

The Relations Between Public Authorities

The constitutional relations between public authorities are characterized by mutual implications of some in the other's field of activity, implications that signify balance through collaboration and control. [11]

2.4 The Relations Between The Parliament and The Government

The mutual balance and control between the Executive and Legislative is ensured both the means of action and control of the Legislative over the

Executive and through the means of action and control of the Executive over the Legislative.

In the Romanian constitutional system, the main means of action and control of the Executive over the Legislative are the following:

- Legislative delegation. It is an exceptional substitution procedure of the Government in the legislative prerogatives of the Parliament so as through order the Government can primary regulate, modify or repeal the current regulation.
- Dissolution of Parliament. It is that constitutional mean provided to the head of state through which he can end a legislature, before its term, triggering a new election for appointing the representatives.
- Legislative initiative. This can objectify both in the constitutional laws' domain (revision of the Constitution) and in the organic and ordinary laws' domain. In the case of constitutional laws, the legislative initiative implies the explicit agreement between the President and the Government. Regarding the organic and ordinary laws, the Government is the main subject of the legislative initiative. Under terminological report, the legislative initiatives of the Government are called “bills” and the legislative initiatives of the citizens and parliamentarians are called “legislative proposals”.
- Promulgation of law. It is a stage of the legislative procedure; the President does not perform an act of “legislative will” but only observes the regularity of adopting the law.
- The request of the President of Romania to reexamine the law. The President of Romania can temporarily postpone the coming into force of a law by sending it to be reexamined (by the Parliament) or by verifying its constitutionality (by the Constitutional Court) but he cannot prevent sine die its coming into force. Thus, the promulgation of the law is made in maximum 10 days since receiving the adopted

law after reexamination or since receiving the decision of the Constitutional Court that confirms the law's constitutionality.

— Engaging the responsibility of the Government regarding a bill, program or declaration of general politics. This takes place in the common meeting of the two Chambers of Parliament. If within three days from presenting one of the documents stated above a censorship motion is brought and voted, the Government is dismissed. Per a contrario , if the motion is not brought or if it is brought but not adopted the Government succeeds to enforce its proposed program, declaration or bill, modified or completed, as appropriate, with the amendments proposed by Parliament and accepted by the Government, thus avoiding the usual legislative procedure.

— Summoning the Parliament to an extraordinary session. The Chamber of Deputies and Senate meet in an extraordinary session, at the request of the President of Romania, and the object and duration of the session must be expressly stated on the summoning request. The summoning to an extraordinary session can regard both Chambers or only one of them.

— The ability of the President of Romania to send messages to Parliament. The message is the President's method of communication with the Parliament in what concerns the main political issues of the nation, as mediator between the state powers. The Constitutional Court has stated that "the message is a unilateral and exclusive political act of the President of Romania which the Chambers, met in a common meeting (...) only have the obligation to receive"; [12] the need to debate the message is left to the appreciation of both Chambers which will debate it if they will consider that expressing the Parliament's position and taking certain measures are necessary practices.

The Parliament-Executive relations, within constitutional regulation, can be examined by the interference of the legislative in the activity of the head of state and of the Government. Thus, the Parliament:

- receives the oath of the President;
- can prolong his term in case of war or calamity;
- can decide the indictment of the head of state for high treason;
- listens to the messages of the head of state;
- approves the international treaties according to art. 91 of the Constitution;
- approves the declaration of the head of state regarding the partial or general mobilization of armed forces;
- approves the institution of the state of emergency or state of siege;
- can suspend the President of Romania from office if serious deeds that violate the provisions of the Constitution are committed by him;
- establishes the indemnity and other rights of the President of Romania.

In what concerns the relations with the Government, it will be especially mentioned that the Parliament:

- grant the confidence vote to the Government's program and entire list;
- withdraw the granted trust;
- can require information and documents;
- through deputies and senators there can be asked questions and addressed interpellations;
- estimates the political responsibility of the Government;
- can request the prosecution of the members of Government for acts performed during the exercise of their function;
- establishes by law the responsibility cases and the sanctions applicable to the members of Government;
- enables the Government to issue ordinances in fields that are not the object of organic laws.

2.4.1 The Principle of Constitutional Loyalty in The Relations Between Parliament and Government

The principle of constitutional loyalty referring to the relations between Parliament and Government has been summoned in cases that have regarded the adoption of regulation and the enactment ability of the two political authorities. The same principle has been summoned by the Constitutional Court and regarding the way in which the institutions in question are organized and function to fulfill their constitutional abilities. [13]

The institution of governmental responsibility regarding a bill that the Romanian Constitution provides is an indirect political mean of adopting a law, not by debating it during the normal legislative procedure but by debating a problem that is political by excellence regarding the Government dismissal or stay.

The Romanian Constitution does not establish any conditions regarding the nature of the bill, its structure, the number of the bills that the Government can be responsible for in the same day or in another given period of time or regarding the moment when the Government decides to take responsibility.

It is a case when, apparently, the principle of the separation of state powers seems fully respected by taking responsibility of some bills by the Government, regardless when, how many times and regarding which regulations it engages responsibility. However, as it has been proven in practice, this type of interpretation voids the content of the constitutional principle of the separation of state powers. Thus, prevailing itself from the general character of constitutional norms which do not establish rules in the meaning shown above, the Government has often took to this enactment practice in place of the law making authority having consequences that are hard to anticipate by the Romanian legislative system. [14]

Noticed about the unconstitutionality of some of the thus adopted laws, the Constitutional Court of Romania has deducted some rules referring to the procedure of taking responsibility for a bill.

Thus, the Constitutional Court of Romania has stated that, to be in accordance with art. 114 of the Constitution, the Government's taking of responsibility must fulfill a series of criteria, namely:

- the existence of an emergency regarding the adoption of the measures of the law for which the Government has taken responsibility;
- the need for the regulations in case to be adopted with maximum celerity;
- the importance of the regulated field;
- the immediate application of the law in question. [15]

Even after establishing some criteria the institution of the Government's taking of responsibility has been excessively used, beyond the spirit of the Constitution, which led to ultimately summoning the obligation of constitutional loyalty of the Government by the Constitutional Court of Romania.

The constitutional loyalty must also be part of the way in which the will and activity of the Parliament is perceived and interpreted, as it is reflected in its decisions. It is about respect and god – will towards the institutions.

2.5 The Relations of The President of Romania With The Government

- Designates a prime minister. The exercise of this Presidential attribution takes place within the mediation function exercised by the President of Romania and implies organizing political consultations within the political formation that owns the majority in Parliament or, in lack of a majority, consulting all the political parties represented in the Parliament.
- Can revoke ministers from the prime minister proposal. In the case of revoking ministers, article 85, paragraph (2) is applied which provides that the existence of the governmental shuffle state or the state of vacancy of the post. The President can only deny a single time, with relevant reason, recalling a minister.
- Can take part, in certain situations, in the Government sessions;

— Represents Romania on an external plan. This sphere of attributions in the extreme political domain refers to:

a. The closing, in the name of Romania, of international treaties (under the reserve of their negotiation by the Government and ratification by the Parliament). In the specialty literature there is stated that engaging the Government in this process has the role to prevent the closing of some secret treaties, but it does not mean that the President has a passive role, he has to have a permanent connection to the state of negotiations but he cannot take part directly in the negotiations. [16]

b. The accreditation and recall of the diplomatic representatives of Romania and the approval of the foundation, dissolution or change of the rank of diplomatic missions is made at the Government's proposal in virtue of the President's quality as representative of the state.

c. For the accreditation of the diplomatic representatives of other states, according to diplomatic custom, the certain person is received by the head of state in order to present the letter of accreditation.

2.5.1 The Principle of Constitutional Loyalty in The Relations of The President of Romania with The Prime Minister

The constitutional relations between the two representatives of the executive have been examined by the Constitutional Court in order to solve certain judicial conflicts of constitutional nature that especially regarded the procedure of appointing ministers and the representations of Romania at the level of the Institutions of the European Union. It was decided that "In exercising the constitutional attributions the President of Romania takes part in the meetings of the European Council as head of state." This attribution can be expressly delegated by the President of Romania to his prime minister. [17]

The Constitutional Court has stated that the institutional relations between

the prime minister and the Government, on one side, and the President of Romania, on the other side, must function within the constitutional loyalty and collaboration environment, in order to fulfill the constitutional attribution distinctly regulated for each of the authorities, the collaboration among them being a necessary and essential condition for the good functioning of the public authorities of the state.

Thus, it has been established that the President of Romania, not having the right to veto, can ask the prime minister only once and with good reason to make a new proposal of appointing another person as minister. Likewise, the reasons of the Presidential request cannot be censored buy the prime minister and he has the obligation to propose another person for the minister function. [18]

2.6 The Relations of The Parliament with The Courts of Law

It must be mentioned that the organization and functioning of the courts of law are made, according to law, accordingly. The Parliament establishes by law the competences and procedures for the courts of law. In this regard, it can be said that we find ourselves in the presence of a collaboration between the state structures to fulfill the will of the people. This collaboration implies:

- competences that are clearly delimited by the Constitution;
- organizational and functional autonomy;
- mutual control without interference;
- constitutional guarantees of the fulfillment of the term and of respecting the rights of the citizens.

2.6.1 The Principle of Constitutional Loyalty in The Relations Between The Parliament and The Courts of Law

The summoning of the constitutional loyalty has been made in order to solve a judicial conflict of constitutional nature between the judicial authority, represented by the High Court of Cessation and Justice, on one side, and the legislative authority, represented by the Romanian Senate, on the other side. [19]

On this occasion, the Constitutional Court of Romania has remembered

that by putting into the discussion of the Senate's plenary of a final and irrevocable court order, decision that stated the incompatibility of a senator, followed by the negative vote regarding its execution, the Senate has acted as a hierarchically superior institution, which affects the fundamental principle of the state law, namely the principle of the separation and balance of the legislative, executive and judicial powers within the constitutional democracy.

Thus, the censoring under any aspect of a final and irrevocable court order which has acquired authority of judged fact is equal to transforming this authority in judicial power that competes with the courts of law in what regards the making of justice.

Therefore, the interference of other powers in the sphere of justice is contrary to the constitutional principle. This does not exclude however certain constitutional relations naturally resulting from the state organization of power.

In conclusion, it can be stated that the principle of the separation of state powers is broadly known as being specific to the democratic political regime, regardless of their parliamentary and Presidential nature or various combinations of the two. Its evolution throughout time, in doctrine and practice, has materialized in the occurrence of some new elements that put into an equation,if not new, then a relevant one the classic theory enunciated by Montesquieu.

Thus, the constant difficulties encountered in the functioning of a pure model of the rigid separation of powers have turned the attention and have moved the center of gravity of the classic theory to the idea of balance and collaboration among the state powers, collaboration that must be governed by mutual respect and constitutional loyalty. Besides, this is on of the meanings of interpretations which the Constitutional Court of Romania has given, in its jurisprudence, the principle of the separation of state powers, especially after the year 2003 when the Constitution has been revised, with the consequence of consecrating a new attribution to the Constitutional Court of solving judicial conflicts of constitutional nature between the public authorities.

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