THE PRINCIPLE OF SEPARATION OF POWERS - CONSTITUTIONAL GUARANTEE

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Abstract

The principle of ensuring the legal bases of the State functioning is the fundamental principle of law which actually settles down the principle of separation of powers: legislative, executive and judicial power. Over the time, the principle of separation of powers, although in practice its enforcement experienced more than two centuries, it hasn't expressed itself in a pure form, not even in the most advanced democracies. Whether it is approached the thesis of a more flexible or more rigid separation of powers or the thesis on certain exceptions to those two situations specific to certain political regimes, the principle of separation of powers is the fundamental mechanism in ensuring a balance of powers and preventing the establishment of a dictatorial or authoritarian regime. The complex content of the rule of law consists of: the rule of law regency; the capitalization on the actual size of the fundamental rights and freedoms; the achievement of the balance/mutual cooperation of public authorities and the performance of free access to justice. If the form of State organization of the political power of the people is done by several groups or categories of State bodies with functions and features clearly defined and characterized by organizational and functional autonomy, as well as mutual balance and collaboration, it is emerging the principle of separation of the State powers balance.

Keywords: *fundamental principle; principle of ensuring legal bases; principle of separation of powers; balance of powers.*

1. Introductory elements regarding the concept of rule of law*

In current democracies, the rule of law became the foundation of society. In a brief definition which contains the idea one must start from, the rule of law means subordination of the State to the rule of law. Likewise, Léon Duguit shows that *the State, by making the law, is obliged to observe it as long as it exists. The State may amend or repeal it, but as long as it exists, it can not do an act contrary, an administrative or jurisdictional act only within the limits set by this law and so the State is a rule of law. The State, under the same idea, is the litigant of its own courts. It may be a party to a suit; it can be convicted by its own judges and is kept as a simple individual to enforce the judgment given against it*[1].

The rule of law was the criterion for the classification of States in of law and despotic, in legislator State, administrator State or judge State. The rule of law must not be confused with the principle of legality, because it is more than that.

The complex content of the rule of law consists of: the rule of law regency; the capitalization on the actual size of the fundamental rights and freedoms; the achievement of the balance/mutual cooperation of public authorities and the performance of free access to justice.

The rule of law must be accompanied by a guarantee scheme, which has as final purpose the self-limitation of the State by the law. This guarantee scheme is based on the following main rules: the amendment of the Constitution to be carried out only by an expressly authorized assembly, elected on democratic bases and to carry out the review procedure; the review itself should not impact on the fundamental values of the constitutional democracy; the existence of a constitutional control; the confinement of the exercise of rights and fundamental freedoms by the law only if necessary, but in proportion to the situation that caused it, without prejudice to the right or freedom and for the grounds expressly provided in the Constitution and the non-limitation of the free access to justice.

2. General considerations regarding the historical evolution of the principle of separation of powers

If the form of State organization of the political power of the people is done by several groups or categories of State bodies with functions and features clearly defined and characterized by organizational and functional autonomy, as well as mutual balance and collaboration, it is emerging the principle of separation of the State powers balance, a state that is specific to the coherence of juridical systems[2] of the democratic system of government.

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[1] Léon Duguit, *Traité de droit constitutionnel*, (Tome II, Paris, 1923).

[2] Serban Alexandrina. *Law - as system*, (Hamangiu Publishing House. Bucharest. 2012), 51-54.

Over the time, the principle of separation of powers[3], although it experienced in its enforcement a practice of more than two centuries, it was not expressed in a pure form not event in the advanced democracies.

The principle of separation of powers was set for the first time by Aristotle in his work *Politics* and was later developed by the *school of natural law* - Grotius, Wolff, Puffendorf - and then by John Locke, but finding crowning in Montesquieu's work.

Aristotle in his work, *Politics, in Book IV*, speaks of segregation of powers in the State, asserting that: *In every State, there are three parties, which the legislature shall deal with if it's wise to appoint them as best as possible, given first any individual interests. These three parties once well organized, the whole State is necessarily well organized itself, and States can not effectively distinguish than by different organization of these three elements. The first of these parties is the general assembly that deliberates on political affairs, the second is the body of magistrates, which must decide the nature, the competences and the mode of appointment, the third is the body of judges*.[4] The general assembly was the deliberate body, that is, the real sovereign of power. The body of judges included officials and formed the executive power. As per the courts, Aristotle shows they are made up of judges, and these judges make up the body of judges - the judiciary power.

John Locke argued in his book *Essay on Civilian Government* the existence of three powers in the State, namely the legislative, the executive - which oversees law enforcement, the federative, which represents the State in external relations, prerogative which included powers that remain available to the executive. Arguing the idea of separation of powers, the English philosopher John Locke pointed out that *the temptation to seize power would be too high if the same persons who have the power to make laws would also have in their hands the power to enforce them, because they could exempt themselves to obey the laws which they make*[5].

Therefore, in his opinion, in a well-organized State, the power to make laws should be vested in an assembly specially convened for that purpose, but after the laws have been adopted, assemblies should separate and obey the laws they have adopted.

Taking up and developing the ideas of John Locke, the true theoretician of this theory, Baron Charles Montesquieu and then all the liberal State theorists *have seen the separation of powers the effective means to weaken the omnipotence of the State, spreading its prerogatives*[6].

Whether discussing of a flexible or rigid separation of powers, by certain exceptions in both cases (specific to a regime or other), the principle of separation of powers - is the main mechanism to ensure a balance and to prevent a dictatorial regime.

In terms of terminology, the doctrine attributed two meanings to *the separation of powers* theory[7]:

- In a first meaning, also called original meaning - being the non-despotic form of political organization, in which not all powers are assigned to the same person or authority.
- In a second meaning that is emphasized by the modern doctrine, reference is made to the need for separation and independence of powers, specialized authorities of the State, to ensure the balance between them, to prevent a despotic governing and thus to secure the individual rights and freedoms.

Montesquieu expressed particularly eloquent this need: Because there is no possibility of abusing power, power must be defeated by power. When in one hand there is joint legislative and executive power, there is no freedom"[8].

For these reasons, the separation of powers is intended to provide a guarantee in the normal functioning of the relationship and the balance between them, representing one of the fundamental principles of the rule of law and with the purpose to satisfy of the national interest[9].

Even though between the three powers - legislative, executive and judicial there is no full separation, they must work together in the words of the principle - they must concert.

What is essential in these *cooperation* relationships between powers is to keep their independence and the separation of their judicial functions, also motivated by the need to exercise a mutual control.

According to another author[10], the separation of functions between the legislative and the executive is the most critical because of the interference and the emergence between them of a *new trinity of mutual control and balance of powers: Parliament, Government and President*.

This point of view, of the author mentioned above, can be estimated to be entirely justified and we might add, in support, the fact that this *trinity*, of which he is speaking, really contains a *fragility* to ensuring the balance between powers.

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[3] Mircea Tutunaru, *Constitutional Law and political institutions*, ("Scrisul Romanesc" Publishing House, Bucharest, 2015), 253-255.
[4] Aristotel, *Politics*, Book IV, Chapter XI, (Bucharest, 1996).
[5] John Locke, *Two Treatises of Civil Government*, ("Antet" Publishing House. Edite by Peter Laslett. Bucharest, 2011), 123-124.
[6] Paul Negulescu, George Alexianu, *Public Law Treaty*, ("Casa Scoalelor Publishing House, Bucharest, 1942), 243.
[7] Sofia Popescu, *Rule of Law in Contemporary Debates*, (Romanian Academy Publishing House, Bucharest, 1998), 84-86.
[8] Charles Montesquieu, *Spirit of law*, vol.1, ("Stiintifica" Publishing House, Bucharest, 1964), 195-196.
[9] Mihaela Adina Apostolache, *The national interest and the cooperation, between the romanian president, the Parliament and the government in the field of european affairs*, (Journal of Law and Administrative Sciences Issue 6/2016, Petroleum and Gas University Publishing House of Ploiești), 9-11.
[10] Sofia Popescu, *work cited*, 85.

Although in this regard many examples of the lapse can be given, we can remind and submit to reflection only the present situation that characterizes the Romanian political life and the *original way* in which, quite often, these powers get to *work*...

Therefore, it is considered justified to emphasize that, regardless of the degree of flexibility of the cooperation relationships between powers for maintaining the separation and balance, it is necessary to drive a wedge primarily by any overlapping of functions conferred to every power, any substitution, and secondly - to distinguish between *cooperation*, *mediation* and *interference.*

3. Constitutional regulation of the principle of the separation and balance of powers

To be able to find a rationale for the title of this paper, we need to study the ways that can be used to argue whether, how much and how it is applied and observed the principle of separation and balance of powers. It would be appropriate if before any concrete examples of factual situations, we would first undertake an analysis in terms of the provisions governing this principle, starting with the Constitution provisions.

The Constitution, as any normative act, must keep up with social developments, adapt to the social, political, economic context and be able to respond to both internal and international trends[11].

Thus, in the Constitution, art. 1 para. (4) - entitled The Romanian State, there are mentioned three powers - legislative, executive and judicial - and that the State is organized on the principle of separation and balance - in the framework of the constitutional democracy.

In subsequent provisions - specifically Chapter VI, it can however be seen that one of the powers, namely the judicial power, becomes *authority*?

Before any opinion on the compliance or breaches of this principle of separation and balance of powers, mentioned in the Art. 1, to be first stated - to what extent these constitutional provisions are consistent with each other.

In particular, reference is made to the provisions of the Constitution[12] - headed *The Prosecutors' Status*, stating inter alia that their work is carried out *under the authority of the Minister of Justice* and under the *hierarchical control* principle.

So it would appear appropriate to make some observations on this text, motivated by the fact that, as it is well known, almost all members of the Government headed by Prime Minister were and are politically enlisted or politically controlled.

Consequently, the minister of justice, who should enjoy a maximum independence, in fact becomes an instrument of the executive, regardless of acknowledgement of party affiliation or *declaration* as *independent*.

Another remark: the text of this article speaks only of legality, impartiality and hierarchical control, the authority of the minister of justice, the principle of *independence*, accidentally or not - being absent.

Then the question is inherent: if this principle would have been found alongside the other principles previously mentioned, would have been inconsistent in terms of terminology with the *hierarchical control*, or the latter no longer justifies its existence?

It would seem so. To discuss about an independence to be *hierarchically controlled* is an antagonistic approach to the problem, or at least illogical.

Could this be the explanation for *the omission* to mention in the text of the principle of independence, or it was thought to be understood?!

Discretions can exist in this regard and one might conclude that in reality, the political decision-makers did not want the independence of this institution, for the simple fact that the Public Ministry is still an important leverage of power and the political forces could not do without so far.

This is why the Public Ministry's position within the judicial power was and still is a controversial and unresolved issue.

As per the wording *under the authority of the Minister of Justice* - it is hypothesized that this is not in fact than some apparent *sweetening* and a masking through substitution or avoidance of the term *subordination*.

The assumption can arise that any provision given to prosecutors by a State official, among other powers, is in total contradiction with the principle of *impartiality* and represents a serious threat to democracy.

Not infrequently, for the *impartiality* of a prosecutor, the question arose of how they can be impartial, given that not only they must obey the law, but also the mandatory provisions given by the Minister of Justice[13].

No less controversial is the status of *magistrate* given to the prosecutor, and on the other hand, the position and the role of the Public Ministry within the judicial power.

Referring to the institution it is clear that, in agreement with and with that title they bear - *Prosecutor's Office attached to...* - it continues to be *attached* to all courts at all levels - factually, within the

[11] Mihai Cristian Apostolache, The review of constitutional norms concerning local public administration in the view of the European Commission for Democracy through Law (Venice Commission), (Journal of Law and Administrative Sciences Issue 3/2015, Petroleum and Gas University Publishing House of Ploieşti), 105.

[12] In the Art. 132 para. (1) of the Constitution it is stated that: ″Prosecutors operate according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice″.

[13] Nicolae Cochinescu, Organization of the Judicial Power in Romania (Courts - Public Ministry - Special Jurisdictions), ("Lumina Lex" Publishing House, Bucharest, 1997), 406-431.

judicial power, operating according to the same principle: that of *hierarchical control*...

Also relevant is that they are still conferred identical powers to those of the judicial power, instead of this institution to be on an equal footing with the defence. It is envisaged regarding this *inequality* not only the status, duties and powers conferred to the prosecutor, but including their physical position in the court proceedings. In a plastic expression, the prosecutor stands at an *altitude difference* in relation to the defence.

A final example in finding the answer to the question:

In the Constitution[14] regulating the *Structure* of the Constitutional Court, it is stated that of the nine judges making it up, three are appointed by the Chamber of Deputies, three by the Senate and three by the President.

What conclusion could be drawn from the content of this text?

- In firstly that this prerogative of appointing judges to the Constitutional Court does not return equally to all the powers listed in Art. 1 of the Constitution.
- The only power of the three, being only the legislative power - which is represented by the two Chambers of Parliament.
- That the executive and judicial powers - were ″less equal″ in relation to the legislative power;
- That instead of the other two *omitted* powers, *another power* appeared - that conferred to the President to the detriment of the executive and judicial powers, which have been substituted.
- Equally true is the fact that increasingly more the executive power - by the multitude of ordinances and legislative packages - more or less assumed, came to substitute in turn the legislature, which it turned into a *body of review*. As it has been said in a more than elegant manner: *Given that on average, the Governments of Romania have adopted annually in the last decade about 2,000 emergency ordinances, it is understood that our State passed all this time by 2,000 extraordinary situations, in other word, almost every day*[15].

Undoubtedly this situation is actually the political will and thinking existing in the adoption of the Constitution 1991, including the time of the review.

In the spirit of separation, equality and balance between powers, an enshrined and thus constitutionally guaranteed principle, it can be asked whether still in line with these principles - wouldn't have been more equitable that the legislative power represented by the two chambers to submit only three proposals, not six, the executive in its turn to make three proposals - and instead of the president, the judicial power to make its three proposals...?! Of course, controversies existed, are and will still be, and the only regulatory document that might clarify, largely, or at least should begin to clarify these controversies would be the Constitution itself.

The Constitution is the supreme regulatory document that regulates the State organization and the exercise of national sovereignty and the holder of the sovereign power is the Romanian people and only the people exercises this power in two ways: through representative bodies and by referendum. Thus, these provisions confer a clear and limited mandate to the representative bodies that are entrusted with the exercise of power only, so certain powers and not the absolute power. It is not devolution of power but delegation of some power functions, and the only holder of power is and shall remain the Romanian people, resulting in significant legal consequences, including those relating to the responsibility of all public authorities before the people, responsibilities that can get clarified only under the legal provisions, specific to the rule of law.

4. Conclusions

In conclusion, as per the facts mentioned above, we may point out that the principle of separation and balance of powers in the State is the fundamental principle of the right guaranteed unequivocally by the Constitution as the supreme will of the people, as sovereignty specifically set by the people in and for the people's interest. To achieve this principle, a permanent and continuous cooperation of the State structures should exist in achieving the people's will, cooperation which entails clear delimitation of competences by Constitution, the existence of an organizational and functional autonomy, mutual control without the interference of a power in the duties and powers of the other, categorical constitutional guarantees of the commission fulfilment and the observance of the fundamental rights and freedoms of citizens, as supreme values of existence of any civilized society. The separation of powers does not mean their isolation because each branch of power participates in the functioning of the other through a system of mutual control and balancing. Thus, the separation between the legislative, the executive and judiciary powers aims to prevent the establishment of a dictatorial, tyrannical or totalitarian regime.

This paper is written during the susteinability stage of the project entitled "Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research", contract number POSDRU/159/1.5/S/140106. This project is co-

[14] Art. 142 para. (2) of the Constitution: ″The Constitutional Court consists of nine judges, appointed for a term of nine years, which can not be extended or renewed″.
Art. 142 para (3) of the Constitution: ″Three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President″.

[15] Gheorghe Mihai, Fundamentals of Law - Objective Law Theory Springs (volume III), ("All Beck" Publishing House, Bucharest, 2004), 169.

financed by European Social Fund through Sectoral Operational Programme for Human Resources Development 2007-2013. Investing in people!

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