

# Separation of powers and constitutional loyalty

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## **Abstract**

*The complexity and dynamics of political life leads to developments and reconsiderations in terms of classical theories of constitutional law. Such a process occurs also in the case of separation of powers. Many factors have a bearing on how this theory is currently translated into practice, which requires additional perspectives of analysis in order to develop improved models of cooperation and balance of powers, according to new political realities. This study aims at examining the principle of separation and balance of powers in terms of mutual respect and loyal cooperation between institutions, or, in a broader sense, of constitutional loyalty, an intrinsic value-principle of all constitutions, without which no fundamental law, no matter of how democratic it might be, could function properly<sup>2</sup>. Based on examination of concrete cases drawn from the case-law of the Constitutional Court of Romania, the study demonstrates that, in lack of constitutional loyalty, the objective pursued by enshrining the principle of separation of powers cannot be achieved effectively, i.e. compliance of public authorities and political actors with constitutional provisions is purely formal and the alleged collaboration between them is a "dialogue of the deaf" at the expense of democracy. The seriousness of the consequences of this type of behaviour requires identification of remedies. What are the limits and what solutions can be identified in this regard are questions that also we aim to answer.*

**Keywords:** loyal cooperation between institutions; separation of powers; unconstitutionality, the Constitutional Court.

**JEL Classification:** K10

## **Introduction**

The principle of separation of powers is widely recognized as immanent to democratic political regimes, whether parliamentary, presidential or various combinations thereof. The progress that it has made over time, in doctrine and practice, resulted in the emergence of new elements, which, as shown<sup>3</sup>, put in a different equation if not totally new, in any case reconsidered, the classical theory enunciated by Montesquieu.

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<sup>2</sup> Erhard Denninger, "Verfassungstreue und Schutz der Verfassung" (1979) 37 VVDStRL 7; Hans Hugo Klein, "Verfassungstreue und Schutz der Verfassung" (1979) 37 VVDStRL 53, Hartmut Bauer, *Die Bundestreue* (J.C.B. Mohr, Tubingen, 1992), cited in Anna Gamper, "On loyalty and the Federal Constitution", *ICJ - Journal*, vol. 4, 2/2010, pp. 157-170, [www.icl-journal.com](http://www.icl-journal.com).

<sup>3</sup> Ioan Muraru, Mihai Constantinescu, "The role of the Constitutional Court in ensuring the balance of powers", Romanian-French Constitutional Days, 4th edition, Bucharest, 28 May – 2 June 1996.

Thus, the difficulties found in the operation of a pure model, of the rigid separation of powers, have focused attention and have shifted the centre of gravity of the classical theory to the idea of balance and cooperation between the State powers, collaboration that must be governed by mutual respect and constitutional loyalty.

This is, moreover, one of the meanings of the interpretation given by the Constitutional Court of Romania, in its case-law, to the principle of separation of powers, especially after 2003, when the Constitution was revised, and a new power was entrusted to the Constitutional Court, i.e. to resolve legal disputes of a constitutional nature between public authorities. According to Article 146 e) of the Constitution of Romania, the Constitutional Court “*decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of Magistracy*”. Especially while settling such disputes, the Constitutional Court found a certain behaviour of representatives of the three powers which, although formally fitted the letter of the Constitution, was still likely to cause an imbalance in terms of separation of powers or to create institutional blockages, which required finding remedies.

In some cases, these blockages were determined by the absence of express constitutional provisions providing for the conduct to be followed in various situations encountered in practice. It is in fact obvious that no Constitution can envisage all these situations, “The Constitution inevitably uses some concepts or principles which, by their content, in reality, represent a true legislative delegation for the interpreter. There are concepts that allow expansion of constitutional provisions whose content, not defined by the constituent legislator, varies depending on the social developments”<sup>4</sup>. However, in such cases, interpretation of constitutional texts and identification of the procedure and of the conduct to be followed involves a certain attitude both toward the spirit of the Constitution and toward the concepts it establishes, an attitude which can be characterised in a broad sense, by the concept of constitutional loyalty. Upon referral for settlement of certain legal disputes of constitutional nature caused by such bottlenecks, the Constitutional Court of Romania gave an appropriate interpretation to the constitutional texts; it established the conduct to be followed by the public authorities in conflict, reminding them, when necessary, of their duty of constitutional loyalty.

In other cases, the general formulation of the constitutional provisions allowed the abuse of one power at the expense of another, a situation which would have been avoided by interpreting the Constitution in its spirit and according to the obligation of constitutional loyalty of public authorities.

But, it is worth mentioning that in Romania (as in most States); the duty of constitutional loyalty is not expressly enshrined in the Constitution. Given the cases it had to settle, the Constitutional Court of Romania established this duty by

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<sup>4</sup> Ioan Vida, “The binding nature of the decisions of the Constitutional Court for the courts – stability factor of the Constitution and of the judicial practice” in *Pandectele române* no. 3/2004, p. 202.

means of interpretation of the norms of the Basic Law. The case-law of the Court has evolved from a mere statement of the concepts of "loyalty" and "loyal behaviour" to circumscribing certain "rules of constitutional loyalty" arising from a principle expressly enshrined by the Constitution - the principle of separation and balance of powers. Also the Federal Constitutional Court of Germany enshrined in its case-law a similar principle. This principle<sup>5</sup> – of faithful co-operation between organs (*Organtreue*) – was first mentioned in a set of constitutional complaint proceedings in which the complainants referred as reasoning for the unconstitutionality of a statute about which they were complaining to the recognised constitutional principle of federal comity (*Bundestreue*) (also referred to as the principle of conduct which is well-disposed towards the Federation (*bundesfreundliches Verhalten*) which obliges the Federation and the Länder to give consideration to one another, and had claimed that, by analogy to this, the principle of faithful co-operation between organs applied in the relationship between the constitutional organs of the Federation. The Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, a complainant<sup>6</sup> in constitutional complaint proceedings can invoke it. The Court however explicitly recognised this principle in later rulings<sup>7</sup>. It was expressed the opinion<sup>8</sup> that this meaning of the principle of constitutional loyalty as rendered by the Federal Constitutional Court has become an "export model"<sup>9</sup> as it has been adopted also by other federal states<sup>10</sup>.

As we shall demonstrate in what follows by bringing forward cases in which the Constitutional Court of Romania examined the constitutional relations between public authorities, the express establishing of the duty of constitutional loyalty is a significant "enrichment" of the principle of separation of powers. This is all the more since "the respect for the rule of law cannot be limited to the implementation of explicit and formal provisions of the law and of the Constitution"<sup>11</sup>. The respect for the rule of law also involves a constitutional

<sup>5</sup> www.ccr.ro – extract of the *National Report for the XV<sup>th</sup> Congress of the Conference of European Constitutional Court, presented by the Federal Constitutional Court of Germany*, rapporteurs: Prof. Dr. Gertrude Lübke-Wolff, prof. dr. h.c. Rudolf Mellinghoff, prof. Dr. Reinhard Gaier, justices of the Federal Constitutional Court.

<sup>6</sup> Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 29, 221 <233>

<sup>7</sup> cf. BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>

<sup>8</sup> Anna Gamper, On loyalty and the Federal Constitution, *icj-journal*, vol. 4, 2/2010, pp. 157-170, www.icl-journal.com.

<sup>9</sup> Hans-Peter Schneider, 'Loyalty-Solidarity-Subsidiarity. Three Principles of a Judge Made Federalism in Germany' in idem/Jutta Kramer/Beniamino Caravita di Toritto (eds), *Judge made Federalism?* (Nomos, Baden-Baden 2009) 99, 101. Similar, Peter Häberle, *Europäische Verfassungslehre* (6th edn Nomos, Baden-Baden 2009) 4, cited in Ana Gamper, see above 2.

<sup>10</sup> Jens Woelk, 'Die Verpflichtung zu Treue bzw Loyalität als inhärentes Prinzip dezentralisierter Systeme?' (1997) 52 ZÖR 527, cited in Ana Gamper, see above 2.

<sup>11</sup> Opinion on the compatibility with constitutional and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government Emergency Ordinance on amendment to the Law no.47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government Emergency

behaviour and practices that facilitate compliance with formal rules by all constitutional bodies and mutual respect between them. In the absence of such behaviour, the principle of separation of powers would be deprived of content, meaning that under the protection of the letter of the Constitution, behaviour contrary to the idea of the rule of law would be permitted.

## **I. Public authorities and the relationship between them**

### ***1.1. Parliament's relationship to the Government***

#### *1.1.1 Government's assumption of responsibility on a bill*

The concept of Government's assumption of responsibility on a bill provided by the Constitution of Romania represents an indirect legislative method for adopting laws, i.e. not by debating the law in the ordinary legislative procedure, but by discussing a political issue par excellence, related to keeping or dismissing the Government<sup>12</sup>. The provisions of Article 114 of the Constitution, which govern this procedure, provide as follows: the Government may assume responsibility „before the Chamber of Deputies and the Senate, in a joint session”; the Government shall be dismissed if a motion of censure, tabled within three days after presentation of the bill, is passed in accordance with Article 113, i.e. by a majority vote of Deputies and Senators; unless the Government is dismissed, the bill presented, be it modified or supplemented with the amendments consented by the Government, is deemed to have been passed.

The Constitution does not set therefore in Article 114 any requirements on the nature of the bill, its structure, the number of bills on which the Government may assume responsibility in the same day or another period of time, or on when the Government decides to assume responsibility. It is a typical situation in which the principle of separation of powers seems fully respected by the acts of assumption of responsibility on certain bills by the Government, no matter when, how often and on what regulations it decides to assume responsibility. We believe, however, that such an interpretation deprives of content the constitutional principle of separation of powers, as proven in practice.

Thus, relying on the general nature of constitutional norms, which, in their text, do not establish rules for the purposes shown above, the Government have often resorted to the practice of law-making, as substitute for the legislative authority, with consequences difficult to predict for the Romanian legal system<sup>13</sup>.

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Ordinance on amending and completing the Law no.3/2000 regarding the organisation of a referendum of Romania, adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012) – available on the website of the Constitutional Court – www.ccr.ro.

<sup>12</sup> I. Muraru, E.S. Tănăsescu (coord.), „*Constitution of Romania – comments on articles*”, C.H. Beck Publishing House, Bucharest, 2008, p.1072

<sup>13</sup> I. Muraru, E.S. Tănăsescu (coord.), *cited work*, (2008), p. 1080

Upon referral on the unconstitutionality of some of the laws thus adopted, the Constitutional Court of Romania proceeded to the deduction, towards systematic and teleological interpretation of the Constitution, of the rules relating to the procedure of assumption of responsibility on a bill. Thus, for example, by Decision no.1655/2010<sup>14</sup>, the Court established that, in order to be conformant with Article 114 of the Constitution, assumption of responsibility by the Government must fulfil a series of criteria, namely: *"existence of an emergency in the adoption of measures contained in the law on which the Government assumed responsibility; the need for legislation in question to be adopted with utmost celerity; the importance of the area covered; - the immediate application of the relevant law"*. The Court explained<sup>15</sup> its approach to identifying these rules, holding that the *"legitimacy of such an act (A/N the Government's assumption of responsibility in breach of the mentioned requirements) with the argument that Article 114 of the Constitution makes no distinction on the Government's opportunity to assume responsibility, an argument based on the idea that everything not forbidden is allowed, could lead eventually to the creation of institutional stalemate, meaning that Parliament would be unable to legislate, i.e. to exercise its primary role, as sole legislative authority"*.

Even with the establishment of criteria for the purpose indicated, Government assumption of responsibility was used excessively, beyond the spirit of the Constitution, reason why the Constitutional Court of Romania, in the last resort, recalled the duty of constitutional loyalty of Government. Thus, in one of its decisions<sup>16</sup>, the Court added that beyond these formal criteria, in exercising the option for the procedure for adopting a bill, account must be given to the fact that some areas of regulation, by their specificity (e.g. elections), recommend that the respective regulations be debated in Parliament, *"and not adopted by means of proceedings with exceptional character, where the Parliament is avoided, but forced to a tacit vote on a normative content almost exclusively at the discretion of Government. The mechanism of motion of censure, governed by Article 114 of the Constitution, may be illusory when the Government has a safe majority in Parliament, and the adoption of a bill on which the Government assumes responsibility becomes, in these conditions, a pure formality"*.

Violation of the same principle, still in relation to the application of Article 114 of the Constitution, was established by the Constitutional Court when analysing the act of assumption of responsibility by the Government on the National Education Draft Law, upon settlement of the legal dispute of a constitutional nature initiated by stopping the legislative procedure in the Senate in terms of the National Education Draft Law and assumption of responsibility by the Government on this draft. So by Decision no.1431/2010<sup>17</sup>, the Court held that the assumption of responsibility by the Government on the National Education Draft

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<sup>14</sup> Official Gazette of Romania, Part I, no. 51 dated 20 January 2011

<sup>15</sup> Decision no. 1431/2010, Official Gazette of Romania, Part I, no.758 dated 12 November 2010

<sup>16</sup> Decision no. 51/2012, Official Gazette of Romania, Part I, no.90 dated 3 February 2012

<sup>17</sup> Published in the Official Gazette of Romania, Part I, no. 758 dated 12 November 2010

Law, while in parliamentary debate, respectively in the Senate, as decisional Chamber, was unconstitutional. In the reasoning part of its decision, the Court stressed "*the importance for proper functioning of the rule of law of the cooperation between State powers which should be manifested in the spirit of the rules of constitutional loyalty*", the observance of which would have prevented the Government from assuming responsibility on a bill that was under legislative procedure in Parliament. Again, this is a situation / behaviour that was not envisaged in the Constitution and, in any case, not forbidden therein, which creates an appearance of conformity with the principle of separation of powers.

### *1.1.2 Functioning of the Parliament and of the Government*

The principle of constitutional loyalty with respect to the relationship between Parliament and the Government was invoked, as shown above, in situations relating to the adoption of regulations and to the legislative powers of the two authorities. The same principle was invoked by the Constitutional Court also with respect to their organisation and functioning as to achieve their constitutional powers.

One example in this regard is the examination of the constitutionality of Parliament Resolution no. 1 of 9 February 2012 for granting the vote of confidence to the Government. As grounds for referral, it was alleged that the impugned resolution is flawed by unconstitutionality as a whole, because adoption was made in violation of constitutional rules relating to the procedure established for the investiture of the Government, namely disregard of the applicable rules in terms of setting up parliamentary committees and obtaining advisory opinion by the candidates for the posts of Minister (lack of quorum in committees).

Rejecting the referral of unconstitutionality, the Constitutional Court reiterated its case-law (Decision no. 65/1994<sup>18</sup>) in the meaning that "*it is beyond doubt that the constitutional norms establish a unitary system that allows achievement of the constitutional order. [...] The rules comprised in the regulations must procedurally ensure that Parliament may rule on matters that are required to complete a vote. At the same time, and this is a matter of rationalization and efficiency of parliamentary life, the rules comprised in the regulations should not permit a delay, a postponement sine die of the parliamentary resolution. The rules comprised in the regulations are constitutional if they ensure the normal, responsible and reasonable operation of parliamentary life*". Likewise, it specified that "*the right to postpone the vote is not limited and conditioned by a procedure or possibly by a time limit, its continuous exercise, in the same case, may eventually lead to the obsolescence of the issue that needs to be decided. It would thus be another situation where the duties of the Chamber could not be exercised due to a procedural abuse, which is contrary to the letter and spirit of the Constitution*". Consequently, "*the situation where a parliamentary committee, for various*

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<sup>18</sup> Published in the Official Gazette of Romania, Part I, no. 156 dated 22 June 1994

*reasons<sup>19</sup>, cannot carry out its activity, respectively preparation of a report or of an advisory opinion, is not likely to prevent the plenary of each Chamber to debate upon and decide directly on the issues that fall within the scope of its powers. Ultimately, the specific activity of a Chamber of Parliament is to adopt a collective decision taken by majority vote after a public debate. Any other conclusion would be tantamount to, on the one hand, an oversizing of the role of the working committees of Parliament, by assigning greater effects to the acts adopted by these working bodies, a circumstance exceeding the framework of the Constitution and the Regulations, in which they operate, and, on the other hand, an diversion of the role of Parliament, in its whole, as supreme representative body of the Romanian people, which enjoys an original legitimacy, being the exponent of the interests of the entire nation. However, these assumptions are totally unacceptable from the perspective of constitutional principles which the Court is called upon to ensure<sup>20</sup>.*

While stating the above, the Court also emphasized the fact that the interpretation and application of the norms establishing procedural rules must be at all times carried out in good faith, in the spirit of a **loyal behaviour** towards the Basic Law. *"In a contrary case, the result would be blocking the activity of the institution, in terms of fulfilling constitutional powers, with negative consequences for democratic structures on which the State is founded"*.

Constitutional loyalty should also exist in terms perception and interpretation of the will and work of Parliament, as reflected in the resolutions which it delivers. It's about respect for institutions and good-faith in relation to them. In this respect, examination of challenges of unconstitutionality was an attempt to practically prevent possible disregard by Parliament of a ruling of the Constitutional Court delivered while exercising its power under Article 146 i) of the Constitution (*"it sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns"*), the Court recalled that *"the Parliament resolution, like any legal document, must be interpreted and applied in good faith and in the spirit of loyalty to the Basic Law"*<sup>21</sup>.

<sup>19</sup> On the reasons for absence of MPs from the proceedings of the Chambers and of the Committees, we find interesting the differentiations emphasized in the case-law of other Constitutional Courts. Even if it exceeds the framework of the present study, we shall mention an example found in the case-law of the Constitutional Court of the Republic of Moldova - by Ruling no.8 dated 19 June 2012, this Court stated that *"61. [...] Unlike unjustified absences, parliamentary protest is, essentially, an absence politically motivated, as a method of political struggle, an action by a member or group of members, in response to a particular action of the majority, aimed to express, without violence, the opposition against acts or decisions that are considered illegal or contrary to the common interest, in order to obtain concessions"*; see <http://www.constcourt.md/Activitatea-jurisdictionala/Actele-Curtii-Constitutionale/Jurisdictia-Curtii-Constitutionale-in-anul-2012>

<sup>20</sup> Decision no. 209/ 2012 on the referral of unconstitutionality of Parliament Resolution no. 1 dated 9 February 2012 on granting the vote of confidence to the Government, published in the Official Gazette under no. 188 dated 22 March 2012

<sup>21</sup> Decision no.734/2012 on the referral of unconstitutionality of the provisions of Article 3 of Parliament Resolution no. 34 dated 6 July 2012 on setting the object and the date of the national referendum for dismissal of the President of Romania, published in the Official Gazette of Romania, Part I, no. 516 dated 25 July 2012.

Similarly, the Constitutional Court dismissed the referral concerning the Senate Resolution no. 38/2012 on establishing a Committee of Inquiry into abuses reported in the activities of public authorities and institutions in terms of the vote cast in the referendum dated 29 July 2012<sup>22</sup>, criticised in the prospect of a similar interpretation, envisioning a possible interference of Parliament in the activity of the Public Ministry. But to prevent any possible interpretation contrary to the spirit of the Constitution, the Court recalled, in the final part of its decision "*the importance of the general constitutional principle of loyal behaviour, principle that is derived from Article 1 (4) of the Constitution and that is guaranteed by paragraph 5 of the same constitutional article.*" Accordingly, the Court held that "*it is primarily incumbent on the public authorities to apply and to respect it in relation to the values and principles of the Constitution, as well as in relation to the principle enshrined in Article 147 (4) of the Constitution on the generally binding nature of the decisions of the constitutional court*".

### ***I.2. Parliament's relationship to the courts***

Constitutional loyalty was invoked also on the occasion of settlement of a legal dispute of constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the legislative authority, represented by the Senate of Romania, on the other hand<sup>23</sup>. On that occasion, the Court held that, by bringing into question a final and irrevocable judgement in the plenary of the Senate, a judgement that ascertained the state of incompatibility of a Senator, followed by the negative vote in terms of enforcement of the respective judgement, "*the Senate acted as a higher court, which affects the fundamental principle of the rule of law, namely the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy, enshrined in Article 1 (4) of the Basic Law*". The Court noted and held that "*the proposition that a Chamber of Parliament, by virtue of the provisions comprised in its regulations, may censor in any situation a final and binding judgment which has become res judicata, is equivalent to transforming this authority into a judicial power, concurrent with the courts regarding administration of justice. Legitimizing such an act would result in accepting the idea that in Romania there are individuals/institutions/authorities in whose respect the judgments of the courts specified in the Constitution and in the law are not binding upon, so they are above the law. However, such an interpretation of provisions on regulations autonomy is in obvious contradiction with the provisions of Article 1 (4), Article 16 (2), Article 61 (1), Article 124 and Article 126 (1) of the*

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<sup>22</sup> Published in the Official Gazette of Romania, Part I, no. 699 dated 11 October 2012

<sup>23</sup> Decision no. 972/2012 on the referral formulated by the president of the Superior Council of Magistracy on the existence of a legal dispute of constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the judicial authority, represented by the Senate of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no. 800 dated 28 November 2012

*Constitution*". Besides stating the reasons based on which the Court ascertained the existence of a legal dispute of constitutional nature, the Court also emphasized the importance for proper functioning of the rule of law, of cooperation between State powers, *"which should manifest in the spirit of the rules of constitutional loyalty, as loyal behaviour is a guarantee of the separation and balance of powers"*.

### ***I.3. President of Romania relationship to the Prime Minister***

The constitutional relations between the two representatives of the executive were subject to review by the Constitutional Court upon settlement of certain legal disputes of a constitutional nature, which concerned, in particular, the procedure of appointment of ministers and the representation of Romania at the level of the EU institutions.

Thus, for example, by Decision no.356/2007<sup>24</sup> on the request for settlement of the legal dispute of constitutional nature between the President of Romania and the Government of Romania, formulated by the Prime Minister, the Constitutional Court held that *"institutional relations between the Prime Minister and the Government, on the one hand, and President of Romania, on the other hand, must operate within the constitutional framework of loyalty and cooperation, for achievement of constitutional prerogatives regulated separately for each authority; cooperation between authorities is a necessary and essential prerequisite for the proper functioning of the public authorities of the State"*. The issue under discussion was the procedure of appointment of ministers, regulated by Article 85 of the Constitution, whose insufficient regulation was the source of a new dispute between the two authorities a year later. By Decision no.98/2008<sup>25</sup> for settlement of the legal dispute of a constitutional nature caused by the President's refusal to act on the proposal submitted by the Prime Minister on an appointment to the office of Minister of Justice, where the constitutional text of reference – Article 85 – does not provide the procedure to be followed in case of such a refusal, the Court searched the meaning of the norm in Article 85 (2) of the Constitution *"in the letter of this text, as well as in the basic principles and in the spirit of the Basic Law"*. Following this process of interpretation, it established the procedure to be followed: *"while applying Article 85 paragraph (2) of the Constitution, the President of Romania, not having right of veto, may ask the Prime Minister only once, upon statement of grounds, to nominate a different person for the office of minister"*. The Court also pointed out that *"the reasons for such request made by the President of Romania cannot be censored by the Prime Minister, [and] as concerns the Prime Minister's possibility to reiterate his first proposal, the Court finds that such possibility is excluded by fact that the President of Romania*

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<sup>24</sup> Published in the Official Gazette of Romania, Part I, no.322 dated 14 May 2007

<sup>25</sup> Published in the Official Gazette of Romania, Part I, no.140 dated 22 February 2008

*declined the proposal from the beginning. Therefore, the Prime Minister must nominate a different person for the office of minister*<sup>26</sup>.

This is again a particular situation not envisaged in the Constitution where both authorities with conjunct powers – the President and the Prime Minister can state that they comply with the principle of separation of powers by strictly exercising their powers - to propose and, respectively to accept / reject appointment of ministers. However, it is clear that the exercise of these powers, even if formally compliant with the Constitution, could lead to the perpetuation of institutional stalemate, as it happened in the case revealed.

Another legal dispute of constitutional nature between the two public authorities occurred in connection with the interpretation of constitutional provisions of Article 80 (1) - Role of the President and of Article 102 (1) - Role and structure (of the Government) of the Constitution, the factual situation consisting in the participation in the meetings of the European Council. Noting the existence of a legal dispute of constitutional nature between the Government, represented by Prime Minister, and the President of Romania, the Court held that<sup>27</sup> *"in exercising his constitutional powers, the President of Romania participates in the meetings of the European Council in his capacity as Head of State. This task may be delegated by the President of Romania, specifically, to the Prime Minister."* The Court also emphasized that *"in carrying out their powers, public authorities must be concerned with the proper functioning of the rule of law, thus having the duty to collaborate in the spirit of rules of constitutional loyalty"*<sup>28</sup>.

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<sup>26</sup> To come to this conclusion, the Court held that *"as concerns the number of cases in which the President of Romania may ask the Prime Minister to make a different nomination for the vacant office of minister, the Court finds that, in order to avoid the occurrence of an institutional blockage in the law-making process, the constituent legislator provided under Article 77 paragraph (2) of the Basic Law, the President's right to return a law to Parliament for reconsideration, only once. The Court finds that this solution acts as a constitutional principle in the settlement of legal disputes between two or several public authorities which have conjoint duties in the adoption of a measure provided by the Basic Law and that this principle can be generally applied in similar cases. Applied to the process of government reshuffle and appointment of some minister in case of vacancy of the offices, this solution could eliminate the blockage generated by the possible repeated refusal of the President to appoint a minister at the proposal of the Prime Minister"*.

<sup>27</sup> Decision no. 683/2012 on the legal dispute of constitutional nature between Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no. 479 dated 12 July 2012.

<sup>28</sup> In a similar situation of conflict between the two authorities, the Constitutional Tribunal of Poland made express reference to the President's and to the Prime Minister's obligation to work together in order to achieve their constitutional duty, stating that the participation of the President in a session of the European Council requires the co-operation of the President with the Prime Minister and the minister competent in this regard, according to the principles set out in Article 133.3 of the Constitution. The goal of the co-operation is to ensure uniformity of actions taken on behalf of the Republic of Poland and in relations with the European Union (Decision dated 20-05-2009, *Monitor Polski* (Official Gazette, 2009, no. 32).

#### *1.4. Constitutional loyalty and political statements*

As already mentioned, the Constitutional Court sometimes invoked in its decisions reasons that we would describe as "preventive" in the sense that they draw attention to the need to have a particular behaviour under the Constitution in given situations, and the consequences that might occur if this behaviour is not the one prescribed. This is another way in which the Constitutional Court of Romania has sought to fulfil its role as guarantor of the supremacy of the Constitution, and to transmit the values imposed by the Basic Law. In fact, some referrals concerning legal disputes of a constitutional nature between public authorities, even if the Court did not always ascertain the existence of such disputes, revealed disruptions in the relationship between State powers and their representative authorities, reason why the Court adopted such preventive provisions.

We recall in this regard the reasons held in Decision no. 53/2005<sup>29</sup> on the request for settlement of the legal dispute of a constitutional nature between the President and the Parliament of Romania, formulated by the president of the Chamber of Deputies and by the president of the Senate. Noting, in that context, that the statements of the President of Romania have the character of political opinions expressed on the grounds of Article 84 (2) in conjunction with Article 72 (1) of the Constitution, not give rise to a legal dispute of a constitutional nature between public authorities within the meaning of Article 146 e) of the Constitution, the Court however held that *"also public statements of representatives of various public authorities in relation to the context in which they are made and their concrete content, may create confusion, uncertainty or stress, which could then escalate in conflicts between public authorities, even of legal nature"*.

Similarly, by Decision no.435/2006<sup>30</sup> on the request formulated by the President of the Superior Council of Magistracy for settlement of the legal dispute of constitutional nature between the judicial authority, on the one hand, and the President of Romania and the Prime Minister, on the other hand, finding that the statements made by the President of Romania and by the Prime Minister, have not given rise to a legal dispute of a constitutional nature between public authorities - judicial authority, on the one hand, and the President of Romania and the Prime Minister, on the other hand - in the meaning of Article 146 e) of the Constitution, the Court held that: *"obviously, freedom of expression and criticism is essential in a constitutional democracy, but it must be respectful, even when expressing a highly critical attitude. Since judicial independence is guaranteed by the Constitution, the Court considers that magistrates must enjoy an effective protection, in the constitutional sense, against attacks and denigration of any kind, the more so as the magistrates, who are deprived of any right of reply in relation to their work of restoring legal order, should be able to count on support from other branches of government, i.e. the legislative and the executive branches"*.

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<sup>29</sup> Published in the Official Gazette of Romania, Part I, no. 144 dated 17 February 2005.

<sup>30</sup> Published in the Official Gazette of Romania, Part I, no.576 dated 4 July 2006

## II. Final remarks

The situations presented herein lead us to conclude that, in some cases, strict compliance with the principle of separation of powers does not lead to resolution of legal disputes of a constitutional nature or to identifying solutions that meet the requirements of the rule of law. As noted in the same opinion of the Venice Commission (point 74) not anything that can be done according to the letter of the Constitution is also admissible. This is why the principle of separation of powers must be reviewed and interpreted so as to cover the duty of constitutional loyalty, as set forth by the Constitutional Court of Romania.

Concerning this method to enshrine, by means of case-law, the duty of constitutional loyalty of public authorities, we should specify that, according to the interpretation of the Constitutional Court of Romania, compliance with the generally binding effect of its decisions does not only mean to efficiently enforce their operative part but also an equally, its reasoning part<sup>31</sup>, respectively the interpretation given by the Constitutional Court to the texts of the Constitution<sup>32</sup>.

Even though the generally binding effect of the decisions of the Constitutional Court, as a whole, is a guarantee for promotion of the duty of constitutional loyalty, we consider that in view of its role and in order to be perceived directly, constitutional loyalty should be regulated specifically in the Constitution, either as a general principle, included in Section I of the Constitution, or as a principle governing the work and the relationship between public authorities<sup>33</sup>.

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<sup>31</sup> The decision is a whole, a unit comprising both the reasoning part and the operative part, and that is why the Court will therefore present the operative part in light of the reasoning part; moreover, if there is a contradiction between the two components of the decision, it could become inapplicable, as the authority enforcing it should choose at its own discretion between the two elements of the decision, which is inadmissible; therefore a contradiction in the body of the decision would call into question even the *res judicata* thereof.

<sup>32</sup> See Marieta Safta, Benke Karoly, *Dreptul Magazine* no. 9/2010 „Compulsory character of the Constitutional Court opinions”.

<sup>33</sup> See examples presented in detail in Anna Gamper, *cited work*.