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REPORT

"The Balance of State Powers through the Constitutional Court"

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Whereas Romania's Basic Law adopted in 1991 did not proclaim the principle of separation of State powers, which had been looked upon as a superfluous decoration of the constitutional architecture, it remained for the Constitutional Court, soon after its creation, to acknowledge *"the separation of State powers, a principle that can be surmised – even though not explicitly declared – from the entirety of constitutional regulations and, in particular, from those defining the functions of public authorities and their respective relations"* (Decision No.6 of 11 November 1992*).* As was further held in that same decision, *"Parliament does not have the right to interfere with the process of carrying out justice. An interference of the legislative which might put the judicial authority at an impossibility of functioning (…) would result in breaking away the constitutional balance between these authorities".*

The Constitutional Court reaffirmed the principle more than once, which proves its commitment to be a factor of balance within the system of government and accounts for its contribution to the smooth functioning of public authorities.

The principle of separation and balance of State powers articulated through the Court's case-law was finally incorporated into the Constitution in 2003, when the Basic Law underwent an ample revision process. Now, its Article 1 para.(4) clearly stipulates: "*The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy".*

Among other major amendments, the constitutional revision has also empowered the Court "*to decide 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 [of Parliament], the Prime Minister, or the President of the Superior Council of Magistracy*".

The wording, rather equivocal, was deemed to have opened up the way for the Constitutional Court's implication into resolving not just legal conflicts. In that regard, when the Court reviewed the constitutionality of the legislative proposal for the revision of the Constitution of Romania, it noted in its Decision No.148 of 16 April 2003: "*the text… bestows on the Constitutional Court the power to resolve legal disputes of a constitutional nature between public authorities (…) Such powers are also to be found in constitutional regulations in other countries (for example, Article 189 in the Constitution of Poland or Article 160 in the Constitution of Slovenia). The matter concerns conflicts of authority (or organic litigations), cases in which the Constitutional Court will have to decide or settle constitutional disputes between the authorities. Such disputes may concern a conflict which exists between two or more constitutional authorities in connection with the content or limit of jurisdiction as is derived from the Constitution. It thus appears as a necessary measure whose aim is to eliminate institutional deadlock. However,* ***in order to avoid that the Court is implicated in resolving political conflicts, it is necessary to specify that such concerns only an institutional blocking, in respect of positive or negative conflicts of jurisdiction***."

In spite of the Court's observations, the derived constituent assembly chose to leave the text unaltered, so that now it categorizes as the Court's powers under Article 146 subpara.e) of the Basic Law. As shown in practice, the issues brought before the Court over the last three years to be resolved as "legal conflicts of a constitutional nature" between public authorities have sometimes involved a political component as well, but that has always remained outside the Court's scrutiny.

This paper has attempted to cover the case-law of the Constitutional Court of Romania in the adjudication of such requests.

1. The Court was first approached with an alleged conflict of a constitutional nature between the President of Romania and Parliament, based on an interview published in January 2005 in one of the largest central newspapers, when the President also touched upon certain aspects concerning the activity and functioning of Parliament, but also political parties. The applicants, the President of the Chamber of Deputies and the President of the Senate, complained that the President of Romania would have so overstepped constitutional attributes, his "conduct being contrary to the Constitution".

On that occasion, while scrutinizing into the concept of "legal conflict of a constitutional nature between public authorities", the Court extracted the following theses:

- the only parties susceptible to partake in such conflict are the **public authorities** provided under Title III of the Constitution, therefore it cannot engage other entities (e.g. political parties or parliamentary groups);

- such conflict must necessarily take some concrete action or decision whereby one or several authorities have arrogated powers or competencies which otherwise, subject to the Constitution, are entrusted to another public authority, or omissions on their behalf, consisting in declined competencies or refusal to perform certain action which falls under their obligations;

As to the facts impugned, and whether they did or did not produce any legal effects, the Court held that opinions, value-judgments or statements made by someone who holds a mandate of public dignity – such as the President of Romania – in regard of other public authorities could not *per se* engender a conflict between those public authorities, as long as such opinions or proposals about how a certain authority or its structures functions or should function, or even criticism thereof, have not created an institutional blocking, that is such have not been followed by action or omission on the part of the public authorities concerned, which may have hindered fulfillment of their constitutional powers. In essence, the Court reaffirmed its jurisprudence regarding freedom of expression of political opinions, which is only bound by the limitations specified in Article 30 para.(6) and (7) of the Constitution.

Thence the Court elaborated on the constitutional status of the President of Romania, and his functions, one of which, in accordance with Article 80 para.(2) second thesis of the Basic Law, is to act as a mediator between State powers as well as between the State and society, which requires impartiality on his behalf, still without precluding expression of opinions about best possible choices for resolving divergences. Where it comes to the expression of political opinions, such right is guaranteed under Article 84 para.(2), which confers to the President of Romania the same immunity as is enjoyed by Deputies and Senators according to Article 72 para.(1) of the Constitution.

Furthermore, the Court dwelt upon Article **Error! Hyperlink reference not valid.**1 para.(4) of the Constitution, according to which the organisation of public authorities within the organic structure of the Romanian State is accomplished pursuant to the *"principle of separation and balance of powers - legislative, executive and judicial",* in consideration of which the President of Romania has the right to criticize laws passed by Parliament and also to take action. In that regard, he is entitled to ask Parliament to re-consider legislation before its promulgation, but that only once, subject to Article 77 para.(2) of the Basic Law, while under Article 146 subpara.a) he is listed among the authorities and legal entities qualified to seize the Constitutional Court to carry out the preventive, *a priori* review of laws enacted by Parliament. These powers vested in the President of Romania, devised as a counterweight to the legislative power, are designed to ensure the balance of powers in a law-governed State. A similar significance was attached to the President's right to approach the Constitutional Court with a request for resolution of a legal conflict of a constitutional nature between public authorities, in conformity with Article 146 subpara.e), when he is also entitled

to a viewpoint on the ways and means to resolve such, which is his opinion about the attitude or position of the public authorities involved in the conflict.

Although the Court's conclusion was there had not been any legal conflict of a constitutional nature, it still pointed out that, under certain circumstances, political declarations from the representatives of public authorities are likely to create a state of confusion, uncertainty or tension, which ultimately could degenerate into a conflict between public authorities, manifested even under a legal form. (Decision No.53 of 28 January 2005).

2. The following request came from the President of the Superior Council of Magistracy, in connection with public criticism repeatedly voiced by the President of Romania and by the Prime-Minister against the judiciary, blamed *inter alia* for its "high level of corruption". It was claimed that such statements were susceptible to impair on the constitutional status of the judicial authority, in violation of Article 124 para.(3) of the Constitution concerning independence of judges.

In line with its previous decision and based on similar arguments, the Court held that criticism, albeit harsh-worded, was still acceptable, however it stressed once again that representatives of public authorities, while exercising their mandate, have an obligation to refrain themselves from creating conflicts between the State powers. Furthermore, given the constitutional status of the President of Romania and Prime Minister, and their role within the framework of constitutional democracy, they are bound to choose adequate forms when expressing criticism against other State powers in order to avoid the origination of legal conflicts of a **constitutional nature**.

In what concerns the appreciation of limitations on freedom of expression where such envisages the administration of justice, the Constitutional Court also referred to the case-law of the European Court of Human Rights, and quoted excerpts from judgment rendered in the case of *Prager and Oberschlick v. Austria*, 1995: "*The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them. Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State**, it must enjoy public confidence if it is to be successful in carrying out its duties**. It may therefore prove **necessary to protect such confidence against destructive attacks that are essentially unfounded**, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying*."

Finally, the Constitutional Court found that criticism had not been actually directed against the judicial authority as such, being only targeted at certain courts of law or certain judges, in their capacity of representatives of the judiciary; moreover, there was no concrete proof that the conflicting state of affairs between the President of Romania and the judicial authority had created any legal effects that might have led to institutional blocking or might have prevented any public authority from discharging their constitutional prerogatives. Nonetheless, the Court emphasized that the independence of the judicial authority, which is guaranteed by the Constitution, poses imperative requirements in what concerns effective protection, therefore magistrates should be able to rely on, and receive support from the other state authorities: the legislative and the executive (Decision No.435 of 26 May 2006).

3. In March 2007, the Prime Minister requested the Court to ascertain the existence of a legal conflict of a constitutional nature between the President, and the Government of Romania, in that the former had refused to formally release from office a member of the Government (the Foreign Affairs Minister) following his resignation, and to appoint a new minister, as was proposed by the Prime Minister.

In order to establish whether the matter at stake had created such conflict, the Court

took the view that resignation from a ministerial office is a unilateral action at the sole discretion of the office-holder, which requires no verification or approval whatsoever, an act of which the President of Romania, following the Prime Minister's proposal, must simply take note of, and declare vacancy of office in accordance with Article 106 of the Constitution and relevant texts of the Law No. 90/2001 on the organization and functioning of the Government of Romania. The Court also observed that neither constitutional nor legal provisions have prescribed any specific time-limit for the President to exercise his prerogative, and that such is not conditional on any external authority in connection with validity of resignation or its legal effects.

Consequently, the key-issue adjudicated in that case envisaged the President's powers in exercising his constitutional prerogative to appoint the members of the Government, and within that framework, whether his refusal to do so in order to replace a stepped-down Minister had engendered a legal conflict of a constitutional nature.

At that point, the Constitutional Court scrutinized into Article 85 para.(2) of the Constitution: "*In the event of government reshuffle or vacancy of office, the President dismisses and appoints, at the proposal of the Prime Minister, some Members of the Government*" to reach the conclusion that, insofar this one concerns a specific form of government reshuffle, it cannot depart from the basic concept and fundamentals embedded in all three paragraphs under Article 85, which establish the constitutional regime for any investiture of the Government, but also for later changes in its composition. Based on that assumption, the Court held that parliamentary procedures carried out before the standing committees in respect of the candidates proposed to fill the office of a Minister, prior to a vote of confidence in Parliament subject to paragraph (1) [for investiture] or prior to Parliament's approval subject to paragraph (3) [for changes in its political structure or composition] of said Article 85, proceedings which are meant to assess a candidate's basic qualification, expertise, experience and other capabilities in a specific area, untainted reputation, etc., all of which represent qualifying criteria, have a counterpart in the President's entitlement to verify whether the candidate proposed by the Prime Minister satisfies such conditions.

That, however, does not signify that the President of Romania is vested with veto rights against the candidate proposed by the Prime Minister: in the exercise of powers provided under Article 85 para.(2) of the Constitution, the President can ask the latter to relinquish said proposal, where the person concerned may have proved unsatisfactory in view of the legal requirements for that particular position. If that should be the case, the President's refusal must also state the reasons.

As a conclusion, the Constitutional Court found that the President's refusal to appoint a member of the Government upon proposal from the Prime Minister had engendered a legal conflict of a constitutional nature, nonetheless that such had ceased to exist by the day of the Court's adjudication of the case, given the three Decrees issued by the Head of State in the meanwhile and the appointment of the Minister whom he had initially rejected.

Apart from defining, in more exact terms, the institutional relations between the President of Romania, on the one hand, and the Prime Minister and Government, on the other hand, in what regards the appointment of ministers, the Court also insisted on the necessity that the relationship between these two authorities should unfold within a constitutional framework based on loyalty and cooperation so as to fulfil each of their respective constitutional powers, in view of the fact that cooperation is an essential pre-requisite for the smooth operation of all public authorities of the State (Decision No.356 of 5 April 2007).

4. However, the problem was to be raised once more in January 2008, when the Prime Minister approached the Constitutional Court, claiming that the President of Romania, who was still refusing to appoint the person proposed to step into the vacant office of Justice Minister,

despite the fact that the Prime Minister maintained said proposal, had created a legal conflict of a constitutional nature.

While recognizing its competency, the Court declared itself obligated to resolve the conflict while giving adequate interpretation for a number of relevant texts from the Basic Law. In doing so, it also construed provisions of Article 146 subpara.e), under which the Court is entrusted with powers to resolve legal conflicts of a constitutional nature between public authorities, and those of Article 142 para.(1), bestowing its role as "*the guarantor of the supremacy of the Constitution*". On that basis, not only that the Court viewed itself to be compelled by imperative norms of jurisdiction, it also held that eschewing such duty, on account that Article 85 para.(2) of the Constitution neither specifies **how many times** the President of Romania may ask the Prime Minister to come up with a different proposal, nor that the Prime Minister has an obligation to present **a different proposal**, other than the previous one, would amount to perpetuating the deadlock in governmental activity in the area of justice. That is why the Constitutional Court explicitly acknowledged its obligation to remove the institutional blocking, and also called upon one fundamental legal principle, a constant of the law to be found in Article 3 of the 1864 Romanian Civil Code and in other national legislation, subject to which no judge can refuse judgment of a case solely on the ground that there is no law prescribing a solution, or that the law is obscure.

In interpretation of the norm set forth under Article 85 para.(2), in its letter but also guided by the basic principles and spirit of the Constitution, the Court took regard of provisions of Article 1 para.(3), subject to which "*Romania is a democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed*", and observed that one essential pre-requisite for the realization of the Romanian State's fundamental objectives was the proper, **smooth functioning of public authorities**, while keeping with the principles of separation and balance of powers.

Under the circumstances, since disagreement between the President of Romania and the Prime Minister came down to irreconcilable terms, the institutional deadlock had obviously affected proper operation of the Government.

In the present case, the Court basically maintained its previous case-law concerning application of Article 85 para.(2) of the Constitution, stating that the President of Romania has a right to ask the Prime Minster to propose another candidate for a vacant Minister's office, still that he was not simply entitled to a veto. However, it also recognized that two open questions had been left due to the fact that the previous conflict ceased to exist before its adjudication.

To the first one, that is how many times the President of Romanian may ask the Prime Minister to put forward another nomination for the office which is vacant, the Court had to rely on the constitutional provisions of Article 77 para.(2), meant to prevent the occurrence of an institutional deadlock at the end of the law-making process. In that regard, it was noted that the President has a right to ask for re-consideration of a law before promulgation, but **only once**.

The solution was construed by the Court as one which enjoys the value of a constitutional principle when it comes to resolving any legal conflict between two or even more public authorities endowed with conjoint powers insofar it goes about their taking the steps and measures provided by the Basic Law, and that the principle has general applicability in similar cases.

As far as the process of government reshuffle and appointment to vacant posts is concerned, the solution adjudicated by the Court was meant to eliminate the impasse if the President had repeatedly refused to make the appointment proposed by the Prime Minister. On the other hand, since the relationship between the President of Romania and the Prime Minister cannot be reduced to a mere formality, the Court reaffirmed the Head of State's competency, in the cases provided under Article 85 para.(2) of the Constitution, to verify whether the candidate proposed by the Prime Minister has fulfilled the requirements. If the President's option is a limited one, for just once, account should be taken of the fact that the Prime Minister will bear exclusive responsibility for what second nomination he chooses to make at a later point.

Establishing that the President's refusal did not equal to a veto and so precluded arbitrariness and exercise of discretionary powers, insofar his request to be presented another nomination must come out as a reasoned decision, the Court also held that the Prime Minister was not entitled to check into or review in some other way the grounds, the rationale underlying the former one's decision. That because the President ultimately remains politically answerable before the voters for the way in which he has been discharging all of his constitutional powers, including his refusal to make proposed appointments, just like the Prime Minister and the Government will be held politically answerable before Parliament.

As to the second question, whether the Prime Minister should be allowed to reiterate his first proposal, the Court denied such possibility, and explicitly stated that he has an obligation to propose a different person for the vacant Minister's office (Decision No.98 of 7 February 2008).

5. In the adjudication of the most recent case brought forward, the Court confirmed its competence to resolve any kind of legal conflict of a constitutional nature which may have occurred between public authorities, not just their conflict of competencies.

The case concerned the conflict arising between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the two Parliament Houses, on the other hand, because of variance in their interpretation and application of provisions of Article 109 para.(2) first thesis of the Constitution, in connection with the competent authority to request initiation of prosecution proceedings against the incumbent or former Members of the Government who, at the point when such request was made, also held office as a Deputy or Senator.

Divergence was caused by refusal of the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, to pass on to Parliament Houses the documents which may have been relevant for the initiation of prosecution proceedings against certain incumbent or former Members of the Government, who also held MP offices.

The constitutional text in question reads that: "*Solely the Chamber of Deputies, the Senate, and the President of Romania shall have the right to demand criminal prosecution be taken against Members of the Government for acts committed in the exercise of their office*". As the Court has established, that must be taken as a **procedural norm** at the rank of a constitutional principle, which synthetically reflects the role played by each of the three public authorities within the constitutional mechanism for the formation of the Government, and also liability of Members of the Government. Since decisive for the Government's investiture is the vote of confidence given by Parliament, based on which the President of Romania appoints the Government in conformity with Article 85 para.(1) of the Basic Law, the strongpoint outlining the constitutional relationship between Government, Parliament, and President of Romania "essentially lies in the decision of Parliament, by whose will the Government shall be vested or dismissed".

That being so, each of the three authorities enumerated in the constitutional text has a competency of its own, with excludes either cumulative or alternative jurisdiction in making a decision whether to request the initiation of prosecution.

Whereas under Article 71 para.(2) of the Constitution, the capacity to sit as a Deputy or Senator is compatible with the exercise of the office of a Member of the Government, such dual capacity should naturally entail, pursuant to Article 109 para.(2) first thesis, the competence of the Chamber of Deputies or Senate, as the case may be, to solicit the initiation of prosecution proceedings where the person envisaged is also MP.

Accordingly, if the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice has to approach one of the three authorities: Chamber of Deputies, Senate, or President of Romania, in order to be given consent to initiate prosecution proceedings against a Member of the Government, the procedure is differentiated depending on whether this one also sits as a Deputy or a Senator.

The Court's interpretation of the constitutional text was meant to provide firm procedural guidelines for the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, where it assumes the initiative to seize, of the three public authorities, the one which is competent to formally request the prosecution of incumbent or former Members of the Government. Otherwise, it would mean that the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, while seeking which of the three authorities to approach with, would enjoy complete discretion, which implies arbitrariness and random choice.

In what concerns the entitlement of these three authorities to demand that prosecution proceedings be taken against present or former Members of Government for acts committed in the exercise of their office, the Court reaffirmed that each of them had an **absolute right**, which remains unconditional on decision made by another. (Decision No.270 of 10 March 2008).

In light of the complex issues adjudicated by the Constitutional Court, it must be unequivocally stated that the public authorities themselves have made a significant contribution to securing the balance of State powers, in that they have fully and promptly complied with all of the Court's decisions.