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Seminar

Confidence in the judiciary in the context of the judicialisation of public life

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A veritable *human rights culture* has grown up in contemporary democracies, and as a result much greater importance is now being attached to justice. This is the main thrust of a number of relevant ideas set out in the communication presented by Ms *Marta Cartabia*, the Vice-President of the Italian Constitutional Court at the seminar on “the authority of the judiciary” which was organised on the occasion of the opening of the 2018 judicial year at the headquarters of the European Court of Human Rights (ECHR) in Strasbourg: “most of the new issues facing society are framed in terms of individual rights: a number of new rights have stemmed from the right to private life, the right to self-determination, and the right to non-discrimination Whereas political bodies might be paralysed by division and a lack of consensus ... courts are bound to rule on even the most sensitive cases... These cases push the judiciary to the forefront of the public debate and keep it constantly under the spotlight”¹.

All this is happening at a time when the Strasbourg Court has been emphasising the separation of the powers and the independence of the judiciary. In fact, the ECHR has held that “the notion of separation of powers between the executive and the judiciary... has assumed growing importance in the case-law of the Court”².

In France, Henri Leclerc, the Honorary President of the Human Rights League, tells us that for over two centuries the judiciary has been endeavouring to find its rightful place in the balance of powers. Those in power generally show scant respect for the judiciary; they constantly point to the danger of creating a “Republic of Judges” replacing representative democracy³.

Here we might intercalate the views of the well-known political philosopher Pierre Manent, on the subject of the emancipation of rights: “rights are the attributes of every human being ... they are declared and guaranteed by judges who are, or who should be, increasingly independent from the political order”⁴.

In his latest work⁵, Pierre Rosanvallon, a Professor at the Collège de France, refers to a new aspect of our contemporary democracies, which has shifted the public debate into the criminal-law field: the *judicialisation of public life*⁶.

1. M. Cartabia, *Separarea puterilor și independența judecătorească: provocări actuale*, in *Pro Lege* n° 1/2018, p. 386.

2. *Stafford v. the United Kingdom*; Ov. Predescu, *Drepturile omului și ordinea mondială*, in *Dreptul* n° 8/2016.

3. H. Leclerc, *La justice et le pouvoir*, in “Le monde qui vient. Entre périls et promesses. 2000-2015: un État des droits”, edited and coordinated by G. Aschieri, J.-P. Dubois, E. Tartakowsky and P. Tartakowsky, *Ligue des Droits de L’Homme*, Ed. La Découverte, Paris, 2016, p. 115, 117- 119.

4. P. Manent, *Cours familier de philosophie politique*, Ed. Fayard, Paris, 2001.

In Romania, specialist research has shown us that the citizens have greater confidence in the judiciary than in the other powers. The perception is that there are no substantive public-policy projects, and that candidates for election are no longer nominated on the basis of their competence and integrity. All of this explains the ordinary citizen's wish to find out who is responsible (or who is criminally liable) for the lack of leadership in the proper management of public finances. For example, the National Anti-Corruption Department (DNA) has recently been investigating and prosecuting a large number of high-ranking public figures, finally convicting them of corruption offences. This has set off shock-waves affecting the balance among the three powers of State, with the judiciary now apparently setting the public agenda. The balance emerging from the constitutional relationships among the public powers stems from the "reciprocal involvement of one power in the area of jurisdiction of the other two, which leads to a balance based on cooperation and supervision"⁷. This phenomenon is focusing public attention on reinforcing the role of justice and the force of law in our young democracy.

In the analysis of the issue of reinforcing confidence in the Romanian judicial system as set out in various specialist studies⁸, it has been noted that, under the 2003 amendment to the Constitution, "the separation of powers was expressly incorporated into the text of Article 1 § 4: the separation and balance of powers are the fundamental principles of the organisation of the State 'within the framework of constitutional democracy'". The Constitutional Court (CCR)⁹ has been central to most of the progress made in the sphere of separation of powers. The CCR has pointed out "the importance, in the proper functioning of the law-governed State, of cooperation among the powers, which must be conducted in line with the spirit of constitutional fairness, because the latter guarantees the principle of the separation and balance of powers"¹⁰.

The 2004 judicial reform helped strengthen confidence in the institutions, because it was perceived as shielding the Higher Council of the Judiciary (CSM) from any political influence. In that regard, the ECHR has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice – a fundamental value in a law-governed State – must enjoy public confidence in order to discharge its duties successfully¹¹.

The setting up and reform of the CSM has influenced the values of judicial performance, that is to say effectiveness, access, efficiency, competence, fairness, etc. The National Institute of the Judiciary selects and trains young judges and prosecutors, provides high-quality teaching and ensures respect for the fundamental rights.

The DNA is considered as the main vehicle for rooting out corruption in society, particularly since the repeated manoeuvring by political leaders to amend legislation in order to scale down the anti-corruption policies¹².

Among the key factors influencing public confidence in the judicial system, we might mention the independence and impartiality of judges, the length of proceedings, the enforcement of judicial decisions¹³ and the political pressure exerted by the media. Thus, following a media campaign, a series of legislative measures were launched to distance the Romanian judicial system from the European model on the pretence that the

5. P. Rosanvallon, *Counter Democracy – Politics in an Age of Distrust*, Ed. Harvard University, 2008.

6. Ov. Predescu, *Montesquieu și penalizarea vieții publice*, in *Legal Point* n° 2/2016.

7. I. Muraru, E.S. Tănăsescu, op. cit., pp. 16-17.

8. Bianca Selejan-Guțan, *România: riscurile unui "model european perfect" al Consiliului Judiciar*, *German Law Journal* Vol. 19 No. 7 (2018), <https://www.germanlawjournal.com/> (the current issue is devoted to judicial self-governance).

9. CCR, Judgment no. 63/2017.

10. CCR, Judgment no. 972/2017.

11. ECHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016.

12. Bianca Selejan-Guțan, op. cit.

13. The ECHR has emphasised that deficiencies in the execution of judicial decisions can undermine judicial authority and consequently public confidence in the judicial system. For instance, in the case of *Broniowski v. Poland* [GC] (no. 31443/96, § 175, ECHR 2004-V), the Court found a violation of Article 1 of Protocol No. 1, stating that "such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention ..."

“absolute independence of the judiciary from the rest of the Romanian State architecture, including *vis-à-vis* its citizens – which it is called upon to serve – is raising serious issues and adding to the increasing fragmentation of Romanian society”¹⁴.

Despite the serious concerns voiced by the CSM, judicial associations and the European Commission, the laws enacted have retained the new provisions hardening the substantive liability of judges and prosecutors, setting up a special agency responsible for investigating wrongful actions by the judiciary, and altering the system for appointing senior magistrates, and so on – so many threats to judicial independence and effective action against corruption.

Specialist analyses have highlighted the risk of such threats transforming the Romanian judicial system in such a way that instead of a system modelled on European best practice, it might up as a failed European experiment, incapable of imposing the rule of law. On the other hand, if the system gains support and is able to resist, it will reinforce its position as a guardian of judicial independence, including in the fight against corruption¹⁵.

In its 13 November 2018 report on the Cooperation and Verification Mechanism (CVM), the European Commission (EC) recommended that Romania should, *inter alia*, immediately suspend the application of the laws on justice and their concomitant emergency orders. As the Constitutional Court has also stated, dialogue among the powers and the principle of fair cooperation probably together constitute the optimum solution for the harmonious application of the principle of the separation and balance of State powers¹⁶.

The judicialisation of public life should not be confined to “the mere issue of institutional ‘competition’ between the members of the judiciary and those responsible for exercising power”¹⁷. On the contrary, it should above all be analysed from the angle of the proper administration of justice, which is based on the independence and impartiality of judges and prosecutors¹⁸.

In Romania, under Law no. 303/2004 on the status of judges and prosecutors, judges are independent and subject only to the law, and they must be impartial. It is vital that their impartiality be absolute, because public confidence in and respect for the judicial system are what guarantees its effectiveness¹⁹.

It is incumbent upon the State, particularly the executive and the legislature, to adopt *optimum strategies to reinforce the confidence which they inspire and the responsibility which they display, with a view to consolidating and protecting the judiciary*. The ways and means of de-judicialising society include recourse to the methods of *Alternative Dispute Resolution (ADR)*.

As regards the legislature’s contribution to reinforcing the judiciary, it is interesting to note the internal structure of the *common law* system: the courts act as joint law-makers because their case-law is a formal source of law.

Moreover, the reverse effect is easy to discern. The “*stare decisis*” doctrine (or “*super stare decisis*” in its consolidated version)²⁰ prevents the legislature from issuing standard-setting decisions inconsistent with matters that have been settled under well-established (*longa, diuturna, inveterata*) case-law.

14. Bogdan Dima, Elena Simina Tănăsescu, *Reforma constituțională: analiză și proiecții* (2012), p. 142.

15. Bianca Selejan-Guțan, *op. cit.*

16. CCR, judgment no. 972/2012. For example, on 27 November 2017 the Romanian Constitutional Court organised a seminar on the theme of “Dialogue of Judges of the Constitutional Court”, an open debate geared to developing fair cooperation among the partner institutions and reinforcing the defence of the fundamental values of the law-governed State.

17. P. Rosanvallon, *op. cit.*

18. *Ibid.*

19. For further details on the independence and impartiality of judges, as well as references in the text to the ECHR’s doctrine and case-law on the subject, see M. Udriou and O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, Editura C.H. Beck, Bucharest, 2008, pp. 572-593.

20. William M. Landes and Richard A. Posner, *Private Alternatives to the Judicial Process*, *The Journal of Legal Studies* Vol. 8, No. 2, (March 1979), University of Chicago Press, pp. 235-284.

In conclusion, the strategy for reinforcing confidence can be built up by promoting and strengthening the “functional legitimacy” of the judiciary, which means ensuring high-quality judicial services. The criteria for assessing the achievement of this aim are training for judges and prosecutors, the existence of fair trials completed within reasonable timescales, the effective application of European law, the existence of judicial councils working for the community, the effective enforcement of high-quality judicial decisions, the use of information technology, specialisation and evaluation of judges, and proper cooperation with prosecutors and lawyers. If those criteria are met, the judiciary will retain its legitimacy in the eyes of the citizens and maintain their respect, thanks to the efficiency and quality of its work and its accountability for its choices *vis-à-vis* society and the other powers, withstanding all forms of pressure²¹. Regulating and implementing alternative dispute resolution methods provide the wherewithal for de-judicialising public life and relieving the courts of much of their workload in terms of cases.

I shall conclude with a reference to the appeal launched to the Romanians by Mr Antonio Tajani, the President of the European Parliament. During a recent visit to Bucharest, Mr Tajani, paraphrasing the great philosopher Emil Cioran, declared that “in a world undergoing exceptional change, we must not be afraid of the ‘enormity of the possible’”.

21. For further details see Opinion no. 18 (2015) of the Consultative Council of European Judges (CCJE) on the place of the judicial system and its relationship to the other State powers in a modern democracy.