

The Protection of the Separation and the Balance of Powers in the Jurisprudence of the Constitutional Court of the Republic of Bulgaria

Pavlina Panova

*President of the Constitutional Court
of the Republic of Bulgaria*

There are values and principles that stand at the heart of modern constitutionalism. The separation of powers is undoubtedly one of them. Limiting the possibility of state power being concentrated in the hands of a single body is both a prerequisite for the existence of constitutional justice and a principle to be preserved by constitutional courts. The principle of separation of powers is explicitly provided for in the 1991 Bulgarian Constitution. Building on a fundamentally different value base from the previous 1971 Constitution, which established the principle of unity of State power, a Fundamental Law meeting the standards of democratic and liberal constitutionalism was established in 1991.

The separation of the executive, legislative and judicial functions of the State between different organs is fundamental to the protection of the fundamental rights of citizens, for which the Constitutional Court is the guarantor.

The Constitutional Court of the Republic of Bulgaria has been consistent in its jurisprudence in its understanding that the principle of separation of powers is a principle guaranteeing balance between the different organs of the State, without allowing the possibility of establishing a hierarchy between them (1). A fundamental value of any modern democratic and liberal state, this principle that forms the core

of modern Bulgarian constitutionalism enjoys a particularly heightened constitutional stability, which the Constitutional Court carefully ensures (2).

1. Principle guaranteeing balance between State organs, without the possibility of hierarchy between them

The Constitutional Court in 2005 has stressed that “the principle of separation of powers in the Bulgarian Constitution does not create an insurmountable barrier between the constituted powers and should not be understood as an absolute separation of each of the three powers, the existence of each of them for itself and its isolation from the other two. On the contrary, it ensures both mutual control and a reasonable relationship between them, so that independence does not exclude control, deterrence and cooperation, and control and deterrence do not exclude either independence or interaction and influence”¹. The Court adheres to the understanding that “the separation of powers is a method for the optimal functioning of the supreme State power and a means of preventing possible arbitrariness on the part of the State authorities, which has repercussions on the rights of citizens”².

The three branches of government are on an equal footing before the norms of the Constitution and statutory laws. The scheme of the separation of powers is such that no primacy is given by means of law to any of the executive, legislative and judicial powers. The legal system does not confer preferential treatment on any power at the expense of another. The Constitution treats equally the executive,

¹ Decision No. 8 of 2005 in Constitutional Case No. 7/2005, Decision No. 8 of 2006 in Constitutional Case No. 7/2006, Decision No. 10 of 2021 in Constitutional Case No. 8/2021, Decision No. 15 of 2022 in Constitutional Case No. 10/2022

² Decision No. 6 of 1993 in Constitutional Case No. 4/1993, Judgment No. 10 of 2021 in Constitutional Case No. 8/2021

legislative and judicial powers, placing them in an equally binding subordinate position to its provisions. The three powers are equal in their duty to faithfully execute the Constitution and the statutory legislation and to promote the legally sound governmental organization of society. In this sense, none of them can have primacy and supremacy in constitutional terms³.

The Constitutional Court considers in two cases from 2020 and 2021 that it is constitutionally intolerable for any of the organs of the legislative, executive and judicial power to go beyond the constitutionally defined limits of competence, to refuse to exercise the powers conferred on it or to delegate its constitutional powers to another, as well as to take away constitutionally provided powers of the state bodies⁴. The Constitutional Court had the occasion to proclaim explicitly that it is constitutionally unacceptable to “alter the constitutionally established balance of powers by taking away powers that the Constitution has vested in the executive. This is in direct contradiction with the principle of the separation of powers (Article 8 of the Constitution), which is enshrined in the Basic Law. [...] The National Assembly's seizure of constitutional functions that belong to the Council of Ministers violates the principle of the separation of powers, the rule of law and the supremacy of the Constitution”⁵.

2. Separation of powers - a principle enjoying a high degree of constitutional protection

The Constitutional Court draws attention to the fact that the Constitution establishes a certain balance between the powers of the state bodies that are

³ Decision No. 10 of 2021 in Constitutional Case No. 8/2021

⁴ Decision No. 10 of 2021 in Constitutional Case No. 8/2021, Decision No. 6 of 2020 in Constitutional Case № 10/2019

⁵ Decision No. 4 of 2008 in Constitutional Case No. 4/2008

fundamental to the organization and exercise of public power, including the National Assembly, the Council of Ministers, the President of the Republic and the organs of the judiciary, in such a way that they balance and restrain each other in the exercise of state power. In Bulgaria, only a Grand National Assembly, specifically convened to amend the constitution and to adopt a new one, following an extremely complicated procedure, can change the balance of constituted powers, because it could change the form of government (Article 158 point 3 of the Constitution). Interpretative Decision No. 3/2003 in Case No. 22/2002 sets out the dimensions of the “form of government” that each National Assembly must apply as substantive criteria and limit to its own constitutional amendment competence when adopting constitutional changes. The Court states that only the Grand National Assembly is granted the competence to amend the fundamental principles, the main constitutional institutions, their place in the state hierarchy, the order of their constitution and their mandates, the activity specific to each of them, the powers assigned to them and the balance between them, and holds that “it is not permissible for an ordinary National Assembly to make a change in the organization, functions and status of the main constitutional organs that carry out state governance as defined by the Constitution.” The essential point in this case is that the “objects” referred to in the Basic Law that falls within the competence of the Grand national assembly are defined in the quoted decision as “that on which the State is built”, i.e. as the foundation of the State.

The basic organs of the State established by the Constitution, their place, formation and structure, as well as the basic powers conferred on them and the balance established between them, are within the scope of the essential content of the Constitution defining its identity, and it is not permissible to change them by a transitional parliamentary majority elected in the National assembly. They are substantive limitations established by the constitutional legislator on the constitutional changes to be made by the National Assembly, which it must follow.

The provision of Article 158 of the Constitution has this meaning and prescribes that a new Constitution and changes to the existing Basic Law relevant to the foundations of the constitutional order are matters which are within the competence of the Grand National Assembly.

The Constitutional Court, in a recent decision from this year - 2024, had occasion to rule on the constitutionality of the Constitutional Amendment Law, adopted in 2023 by the National Assembly⁶. In its decision, the Court reiterated that the founders of the Constitution distributed the State power among the principal constitutional organs in such a way that state power would be exercised in the most effective manner, defining their status together with the mechanisms of interaction and cooperation and mutual control and restraint in accordance with the nature of the task entrusted to them. The effective functioning of the different state organs would not be possible, however, if such restrictive means of exercising power were established that they were not given the necessary and sufficient discretion to do what was necessary for the well-being of society and the State as a whole. The introduction in the Constitution by constitutional amendments adopted by the National Assembly of limitations on the exercise of the powers of the different bodies, in violation of principles fundamental to the established constitutional order, such as popular sovereignty, separation of powers and the rule of law, affects the core values of the Constitution as a substantive limits on the inherently limited power of the National Assembly. In this context, the Constitutional Court declared unconstitutional part of the amendments, considering that they changed the established balance between the legislative, executive and judicial powers and thus violated the principle of separation of powers. For example, the Constitutional Court declared unconstitutional provisions that established that the primary task of the

⁶ Judgment No. 13/2024 in Case No. 1/2024.

caretaker government was to organize fair and free elections and that limitations on the caretaker government's powers could be provided for by a statutory law, as well as a provision that removed the power of the Prosecutor General to supervise the legality of the activities of all prosecutors. With regard to the amendment of the composition of the administrative body of the judiciary competent to appoint, promote, demote and dismiss prosecutors and investigators - the Supreme Prosecutorial Council, the Constitutional Court also considers that it affects the balance of powers. The Court held that the composition of the Supreme Prosecutorial Council provided for by the amendment, by upsetting the balance between the judiciary and the legislature, violated the principle of separation of powers. The declared unconstitutional amendment provided that the number of members of the Supreme Prosecutorial Council elected by the National Assembly (six out of the ten members of the body), taking into account the prohibition on including sitting prosecutors and investigators in its composition, has the effect of depriving prosecutors and investigators of the possibility of counteracting impermissible interference by the legislature in the formation of the body, which is also intended to be a guarantor of the functional independence of prosecutors and investigators. In this case, the Court considers that „the independence of the judiciary is not absolute, but that the overstepping of constitutionally permissible limits of influence by the legislature is in essence a violation of the principle of separation of powers.“

For a long time rejected from the values shaping constitutional law in Bulgaria, absent from positive constitutional law as well, the separation and balance of Executive, Legislative and Judicial Powers is an element of the value core of Bulgarian constitutionalism after 1991. One of its main guardians is also one of the bodies that cannot exist without separation of powers - the Constitutional Court. From the idea of the separation of the various functions of the State between different organs, the Court derives the necessity of a balance between the legislature, the

executive and the judiciary, which is an indispensable condition for safeguarding the rights and freedoms of every citizen that we have a duty to protect.