RULE OF LAW AND THE NEW REGULATIONS CONCERNING THE DISCIPLINARY LIABILITY OF THE MAGISTRATES

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Abstract

The paper address the functioning of the rule of law, starting from the separation of powers, but also it offers a brief perspective over several theories that were developed as this principle evolved from one period of time to another. Closely linked to the principle stating the rule of law there is another one, proclaiming the imperative of an independent judicial authority and which, in performing its duties according to the rules that govern a fair trial, contributes to the implementation of the separation of powers but also of the checks and balances system and loyal cooperation between these authorities. We also presented an anlysis of the new regulation regarding the disciplinary liability of the magistrates, following the legislative changes adopted at the end of last year, and their eventual impact on the principles mentioned above. The research methods used in order to achieve this aim are the comparative method, the analytic and historical methods.

Keywords: *rule of law, disciplinary liability, magistrates, judiciary.*

JEL Classification: K10, K23, K31

1. Separation of powers – characteristic of the democratic government

Starting from the ancient philosophy of the Greeks, that offers the first examples of distributing authority (either to one individual – the monarch, or to a small group – the artistocracy or even to the entire people – democracy), it has been stated that legitimate power is only one and can be exercised either by a person or by the people.

Although unique, political power has always been exercised through various categories of structures of power, each having specific leading prerogatives and specific functions[2].

The exercise of the unique power by distributing it among specialised instituions was a common practice in Greek cities but also in the times of the Roman Republic, these states being organized upon a model that had as a foundament the assembly of the people, various magistratures and also judiciary instituions.[3]

English philosopher John Locke first brought forward the idea of what nowadays is commonly referred to the theory of separation of powers; he distinguished between the legislative power, the executive and the confederative ones (the latter was attributed to each person that was not yet a member of the body of the society, before adhering to the social contract, and it was formed by the right to peace and to declare war, the right to negotiate and other similar ones). Although Locke did not clearly mention a judicial power, he used to represent the State as having four functions, thus including the judicial one[4].

European states, lead by various types of monarchic (and often absolute) governments did not get to know, in theory or in practice, the separation of powers, until the XVIII th century, when Montesquieu made public his work *The Spirit of the Laws*. Affirming the right of the people not to be governed in a despotic manner, he stated that political liberty exists only if power is not used in an abusive manner; but since experience taught us that the one who has power tends to increase it more and more, until meeting an element that stops this tendency, the Fench philosopher enounced what later would be known as the theory of separation of powers, because, in order fot the abuse to be prevented, power must be limited by power.[5]

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[2] C. Ionescu, *Tratat de drept constituțional contemporan*, 2nd ed., C. H. Beck Publishing House, Bucharest, 2008, p 262-263.

[3] G. Glotz, *Cetatea greacă*, Meridiane Publishing House, Bucharest, 1992, pp 280-317.

[4] D. C. Dănișor, *Drept constituțional și instituții politice, vol I, Teoria generală*, C. H. Beck Publishing House, Bucharest, 2007, p 390-391.

[5] Montesquieu, *Despre spiritul legilor*, vol I, Scientific Publishing House, Bucharest, 1964, p 193-194.

The principle of separation of powers, considered from a theoretic perspective, has its origins in the idea that sovereignity, thus power, belongs to people, but since it cannot exercise power directly, it will name representatives. And by naming various representatives, each exercising a certain function of this unique power, the abusive use of power unto citizens will be avoided.[6]

The French philosopher also theorized about the necessity that the three powers cooperate, althouth they are exercised by separate institutions, as each power should help the others realize their aim, the executive power also having the capacity to veto agains the intitiatives of the legislative power[7].

The cooperation between the representatives of the three powers has been seen as a necessity, in order to avoid an instituional gridlock.

In this context, several decisions of the Constitutional Court are to be mentioned, because they offered solution to constitutional judicial conflicts between institutions representing different powers of the state. Thus, in the Decision no 358 of May 30, 2018, published in the Official Journal no 473 of June 7, 2018[8], the Constituional Court stated, regarding the regulations of article 1 (3), (4), (5) of the Constituion, according to which „Romania is governed by the rule of law, organised by the principle of the separation and balance of powers - legislative, executive, judiciary -, the need to respect the supremacy of the Constituion and the laws being imperative in Romania, and the cooperation between the institutions and the authorities of the state being founded on the grounds of the mutual respect and collaboration (Decision no 460 of November 13, 2013, Decision no 261 of April 8, 2015, paragraph 49, Decision no 68 of February 27, 2017, paragraph 123 or Decision no 611 of October 3, 2017, paragraph 139)".

The system called checks-and-balances allows and at the same time requests that the three powers of the State function only according to the limits stated by the fundamental law, and any traspassing of these boundaries by any of the three powers (each having a special status) should be sanctioned by the other two. Of course that putting into practice of the principle of separation of powers made it necessary that a less inflexible interpretation was given, creating new rules, such as the loyal cooperation and collaboration between the instituions.[9]

The magistracy, as an authority that exercises the judicial function of the State, imposing the rule of law, appeared in the XVIII th century, in the times when the theory of separation of powers was stated, and it ousted the royal judiciary which, at its turn, had ousted the ecclesiastical and noblemen judiciary, from the Middle Age.

The importance of the principle of separation of powers, seen in correlation to the notion of fundamental law, appears explicitly from the content of article 16 of the Declaration of rights of Man and the Citizen from 1789[10]. By the means of mutual control the protection of the individual freedoms against the authority of the State is aimed, and also, by efficiently putting into practice of this principle, a state governed by the rule of law is created, in which the arbitrary is severely diminished.[11]

In nowadays Romania, although the Constitution does not mention explicitly the separation of powers, by the manner the prerogatives of the Legislative, the Executive and the Judicial Authority are regulated, and the principle of the independence of the judiciary (as the act of justice is conducted only in the name of the law), the way these authorities are set to cooperate one with the other, one can conclude that the intention of the fundamental law creators was that to effectively put into practice the principle of separation of powers, which is a foundation for any democratic government.

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[6] M. Criste, *Drept constituțional și instituții politice*, Mirton Publishing House, Timișoara, 2004, p 40-41.
[7] Montesquieu, *op cit,*, p 202-204.
[8] Available online at https://www.ccr.ro/files/products/Decizie_358_2018.pdf, accessed on April 22, 2019.
[9] C. Ionescu, *op. cit.*, p. 274-275.
[10] The text states that „*Any democratic society in which the seapration of powers is not clearl affirmed and the safeguard of the civil rights is not realised, has no place for a Constitution*".
[11] D. C. Dănișor, *op. cit.*, p 165.

2. The jurisdictional control as a mechanism of the rule of law

The fundamental law, in its article 1(3), defining Romania as governed by the rule of law, expressly mentions this principle, appeared as an imperative of protecting the human rights and freedoms, of preventing the arbitrary, and which, in essence, represents the necessity that every person, whether it is an individual or an institution, must respect the supreme authority of the law, the imperative of the judicial regulation (emanating from the representatives of the State) being directed even towards the State, through its representatives.

Three theories of the rule of law have taken shape: the formal theory that assumes the State acts by the means of the law, the functional theory, that regards the State as a subject of the rule of law, and the material theory, which defines the rule of law as having certain inherent characteristics.

The central element of the formal theory is that the administration is a subject of the law, and it cannot act outside the boundaries set by the law, and thus by the State itself. The state precedes the law, and the necessity for the State to be a subject of the regulations it emanates is voluntarily, accepting to limit its exercise of the power, and also setting the limits.

The functional theory regards the law as being above the State, limiting its power, on the executive, administrative field, but also on the legislative field, the law being seen as a guaranty of the human rights. A corollary of this vision is the supremacy of the fundamental law, above all the inferior regulations, stating that a constitutional control represents an imperative mechanism for a State governed by the rule of law.

The adepts of the material theory of the rule of law stress the importance of civil rights and freedoms, of the judicial security, that must be protected by the regulations set by the State. These regulations must be founded on the values that regard the human person (liberty, dignity), the democratic character of a liberal society (political pluralism, the respect of rights and freedoms).[12]

Accordingly to the evolution of the notion of democracy, the doctrine[13] elaborated four forms of a State based on the rule of law, and those are: the parliamentary State, the administrative State, the judicial one and the social State.

The parliamentary State represented the first phase of the democratic rule of law based State, trying to prevent the abusive exercise of the executive power, this being limited by legal regulations. The Parliament represented the supreme will of the people, the supreme authority of a State, and, as a constitutional control was lacking, the position of the legislative was superior to those of the other two powers.

The administrative state transfers the importance, from the Parliament to the executive power, this gaining prerogatives to set rules and carry laws, its acts being controlled through a specific judicial procedure, carried on in front of a special administrative instance, and a set of regulations (the administrative law) are created, the parties involved being not on equal positions during the procedures, as the administrative institutions are set higher.

The judicial State based on the rule of law functions around the idea that the fundamental rights are to be guaranteed by the control the judicial power realizes over the actions of the representatives of the other two powers (legislative and administrative). Together with the constitutional control of the laws, the administrative control realized by ordinary courts, the theory assumes an almost complete independence of the judge from the representatives of the legislative or executive powers, or even from the civil society. A key role is played by the control mechanism of respecting the hierarchy of the judicial regulations, of freedoms and rights.

The social state theory considers as of crucial importance the social role of the State, as a guarantor of the social justice, by rightfully distributing the social benefits among the citizens, in order that, among the idea of justice (which is typical for a rule of law State) the idea of social justice works as a supreme principle.

[12] D. C. Dănișor, *op. cit.*, pp 149-153.
[13] *Idem*, p. 154-157.

For the existence of a rule of law State, the elaboration of the laws must be made accordingly to the principles of non retroactivity, of clarity and predictability of the regulations and also to be founded on the values that are commonly admitted as inherent to the human being, as liberty, dignity, equality, but also fundamental values of democracy and economic liberalism.

Among the mechanisms stated in order to assure the respect of the rule of law we find the above mentioned principle of the separation of powers, the principle of a hierarchy of regulations, the vertical expression of power and the jurisdictional control of how human rights and freedoms are respected.

This last mechanism represents the most important step in the evolution of the society to the material rule of law State, in which the power and the way it is exercised are subject to the principle of guaranteeing individual liberty.

It has been said[14] that the protection of the fundamental rights of a person cannot be assumed by a single person, and it should be transferred to certain institutions, the courts of justice, in order to counteract the natural tendency of the individual to exercise power abusively. And thus, the judges, which are not considered superior to chiefs of State or of government, are entitled this mission, of protecting the fundamental rights, because of the way the judicial power is organized, not acting under the imperative to gain more power for itself. The judges are called to ensure the rule of law, to protect the rights and freedoms of the individuals, lacking the power to regulate laws, or the legislative initiative. And also, as long as the judicial courts cannot initiate proceedings on its own regarding a failure to comply with a regulation, this manner of exercising the jurisdictional control prevents an abuse of power, situation that is also completed by other mechanism and constitutional guarantees, such as the existence of a double degree of jurisdiction.

In a rule of law State based on the material theory, the central element is represented by the civil rights and freedoms, and the main procedure is the one of a fair trial. Nevertheless, the fact that the fundamental law mentions these rights and freedoms is aimed at protecting them even from the actions of the legislative power, and not only from the executive one. Also, following the regulation in the fundamental law of these rights, it appears as a necessity a form of constitutional dispute which should be accessible to individuals, a situation that is founded in the Romanian legislation[15].

3. The new regulations regarding the disciplinary liability of the magistrates

In their activity, judges are independent and are only complied by the law, and this principle, among the one of the separation of powers and the respect for the rule of law impose on the magistrates the necessity to respect a code of conduct and deontology which is meant to ensue the act of justice is completed on the highest standards of professionalism and in due respect for a fair trial. If judges fail to comply with these regulations, disciplinary procedures can be initiated against them, with the potential consequence of applying a sanction.

By adopting, at the end of 2018, the laws number 242 and 238, referring to the revision of the laws number 303 and 317 of 2004 regarding the statute of the magistrates and the judicial system, a major change regarding the disciplinary proceedings against the magistrates occurred[16].

Thus, the titular holders of the disciplinary action, who have the right to demand that a disciplinary procedure is initiated against a magistrate, are, for a magistrate judge: the Judicial Inspection, the president of the Supreme Court of Justice and regarding the magistrate prosecutor: the Judicial Inspection, the ministry of Justice, the General Attorney.

We can observe that the new regulation of article 44 of law 317 from 2004 eliminates among the holders of the disciplinary proceeding initiative regarding judges the ministry of justice,

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[14] T. Fleiner, *Quelques reflexions sur le discourse contemporain des droits de l'homme*, in *Les droits individuels et le juge en Europe. Melanges en l'honneur de Michel Fromont*, Presses Universitaires de Strasbourg, 2001, p 237-239.

[15] D. C. Dănișor, *op. cit.*, p 178-179.

[16] For further considerations on a disciplinary procedure, see: A. Hurbean, *Disciplinary action of the teaching and research staff in the academic field*, 2014, *Monduzzi editore*, ISBN 978-88-7587-694-4.

which is a step forward that can prevent the use of this power in order to exert pressure from a representative of the Executive on the judges.

The new regulations refer to the procedure of duty suspension of a magistrate (article 62-64 of law number 303 from 2004), the articles being modified and now stating that duty suspension operates if the magistrate is put on trial for commiting a crime, but only after the confirmation of this procedure by the preliminary room judge.

This measures represents a guarantee that the duty suspension shall not be disposed until a judge, which represents an independent tribunal as the article 6 of the ECHR requests, confirms the solution of the prosecutor to put the magistrate on trial.

Another new regulation states that the duty suspension can be disposed if the magistrate is placed under judicial supervision or under judicial supervision on bail, also having the right to exercise his function banned. This logical measure completes, on the level of disciplinary liability, the restrictive effects of the preventive measures taken during the criminal trial.

Article 62(1) has been modified in such a manner that against the magistrate can be taken the duty suspension measure if he or she has been put to trial for a crime that affects the prestige of justice. If those entitled decide otherwise, that the magistrate can continue to perform his duties, he or she can be forbidden from taking certain decisions until the trial is finished. Even if the regulation fails to stipulate clearly, we appreciate that, the same as in the case mentioned above, the duty suspension can be enacted only if the measure of putting the magistrate to trial has been confirmed by a judge in a criminal preliminary procedure.

Another case of duty suspension, which comes to fulfil a void of regulation, is referred to in article 62(1), the situation when the magistrate is suffering from a disease, other than a mental illness, and which renders him unable to perform his duties. The duty suspension may be decided either at the request of the magistrate or at the request of the leading council of the court and it should last until the recovery of the magistrate or, if the medical expertise concludes that the recovery is not possible anymore, until the retirment of the magistrate that would intervene following the conclusions of the experise.

If the necessity of such a procedure is undisputable, because of the need that the persons working in the judiciary system to be in a good mental and physical health, the new regulation could cause suspicions because of the right given to the court president or the head of the prosecutor office to initiate such proceedings. These would notice the corresponding section of the Superior Council of Magistracy, and this would decide sending the magistrate in front of a medical commission named by a common order of the justice and health ministries. The unjustified refuse of the magistrate to appear in front of this commission would enable the duty suspension for a period of one year. If the magistrate continues to refuse to appear in front of the commission for the examination, he or she would be relieved of his or her duties. We appreciate that by offering the president of the court the possibility (which is regulated as a right, not as an obligation) to notice the section of the Superior Council of Magistracy in order to send the magistrate in front of the medical examination commission, as long as the new regulation does not mention any criteria that are to be used by the president of the court when taking this decision (criteria that would be hard to establish as long as the president of the court does not have specialized medical knowledge) does not offer enough guarantees to protect the magistrates against an abusive use of this procedure. Further more, as long as judges and prosecutors are medically examined each year, and this examination is carried out by specialized personnel who has this type of medical knowledge in order to notice any possible health issue of the magistrate, the regulation mentioned above, giving the president of the court the right to initiate such a procedure, seems liable to be improved.

The amendments to the Law number 303 of 2004 eliminate the possibility to allow the magistrate to continue his duties if a waiver sentence was pronounced against him or a solution to end the criminal pursuit against the magistrate, and a new situation of relieving the magistrate from his duties has been regulated, when such types of solutions are pronounced in case of a crime that injures the prestige of justice.

We notice a hardening of the disciplinary liability of the magistrate, in this regard, as the Superior Council of Magistracy has no longer the possibility to appreciate if the magistrate should or should not continue his duties in such cases. The law now drastically punishes (with the most severe disciplinary measure) any criminal offence committed by the magistrate, if an acquittal solution was not pronounced in that case.

The law number 242 of 2018, in its statement of reasons, offers an explanation regarding the necessity to modify the regulations on the liability of the magistrates, as long as their independence imposes the exercise of duties with the respect to the fundamental rights, including the ones to a fair trial, which is also stated in article 4 of the respective law.

The statement[17] explains the changes by the evolution of the Romanian society in the decade since the law 303 of 2004 was adopted, and the necessity of implementing the Decisions of the Constitutional Court, together with the need to clarify the notions of gross neglijence and bad faith.

We remind that the letter ”o” of article 99 of the law 303 of 2004 now sanctions the disrespect of the rules regarding the random allocations of files that happenes in any situation and not solely if the deed was commited in a severe and repeated mannner, as the old regulations stated.

The new regulation of letter ”r” of the same article does not sanction anymore the total lack of the judgement reasoning (a situation that was very rarely found in practice) but now sanctions the situation when the judgement is not drafted in the period of time stipulated by the law. But the law states that the sanction is only applied if the delay is imputable to the magistrate, following a Decision of the Constitutional Court regarding this aspect (the Decision number 45 of 2018).[18]

We consider that, when appreciating the fault of the magistrate in respecting the period of time that the law settles for drafting the judgement, objective circumstances should be taken into consideration, if they are related to the conditions in which the magistrate is performing his duties (such as the number of files that are to be handled in a period of time, the possible temporary circumstances that could cause the delay, such as a sick leave) but also personal circumstances, such as the good faith of the magistrate, or the absence of it.

4. Conclusions

Nowadays democratic regimes, founded on the constitutional basis of the separation of powers, have as a central element the respect for the human rights and freedoms, and an independent judicial authority acts as a guardian of these rights, by respecting the rules of a fair trial.

For the existence of a rule of law State, the elaboration of the laws must be made accordingly to the principles of non retroactivity, of clarity and predictability of the regulations and also to be founded on the values that are commonly admitted as inherent to the human being, as liberty, dignity, equality, but also fundamental values of democracy and economic liberalism.

As a rule of law mechanism, the jurisdictional control of how human rights and freedoms represents the most important step in the evolution of the society to the material rule of law State, in which the power and the way it is exercised are subject to the principle of guaranteeing individual liberty.

The new regulations regarding the disciplinary liability of the magistrates, adopted in 2018, have been justified by the idea that their independence imposes the exercise of duties with the respect of the fundamental rights, including the one to a fair trial.

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