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THE CHECKS AND BALANCE OF THE STATE BRANCHES IN ROMANIA. AN ADMINISTRATIVE ASSESSMENT

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ABSTRACT

This paper talks about the extent of public administration in connection to the separation and equilibrium of state's power. This paper will try to address what the government of Romania has failed to address, which are the topics that must concentrate on enhancing its legal power as part of one state branch. This article focuses, also, on the links between the doctrine of the separation of powers and the concept of public administration in a cross-state branches perspective. Even if, the separations doctrine is at the root of the concept of public administration it remains unclear how administration relates to the other state powers. What is more, the doctrine proofs that public administration is an inner actor of the state's branches and it can unbalanced or balance them.

Keywords: *administrative law, constitutional gridlock, regulatory power, independent authorities.*

1. Introduction

The principle of separation of powers is composed of several elements: separation of functions (among rule making, rule execution and rule adjudication), separation of agencies (constitutional court enforcing the constitution, and legislature, executive and judiciary operating in the post-constitutional stage), separation of persons and, most importantly, the structure of relations between the powers (pure separation, checks and balances on the decision level as in most presidential systems—or on the personal level as in most parliamentary systems).[1]

James Madison theory is that, the Constitution has to grant each branch its power, which serves the highest interests of the people, otherwise the quest to maintain the separation it becomes endless. "The accumulation of all powers, legislative, executive and judicia[l] in the same hands, whether of one, a few, or many, and whether hereditary, self–appointed, or elective, may justly be pronounced the very definition of tyranny" (James Madison, Federalist No. 51, 1788). Also, Madison retorted that a "pure" separation of powers was neither what

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[1] Salzberg, E. and Voigt S., *Separation of Powers: new perspectives and Empirical findings – introduction.* Constitutional Political Economy, September 2009, 20:197–201, p. 198.

Montesquieu intended nor practical: "[Montesquieu] did not mean that these [branches] ought to have no partial agency in, or no control over, the acts of each other. … [T]here is not a single instance in which the several [branches] of power have been kept absolutely separate and distinct" (James Madison, Federalist No. 47, 1788).[2]

The separation of powers has a tremendous impact on state administration, divides authority over public agencies and administrators. Legislators and courts, as well as executives, are constitutionally mandated to play substantial roles in public administration and each one of them brings a different – value set.[3] Content complex the rule of law and the role of law within it includes the value dimension, the right being the product of social facts and the will of people, a material phenomenon, a set of moral and normative values, a series of acts of will and authority's acts, freedom and constraint.

Pluralist and liberal regimes promote democracy. From an institutional perspective, democracy brings into the foreground the principle of separation and balance of powers. The degree of separation and balance of powers is the one that distinguishes between: the rigid separation of powers, the flexible separation of powers, the semi-presidential or semi-parliamentary regime and the primo-ministerial one.[4]

2. The Separation of Powers: Past and Present

The concept of rule of law has its own universal dimension, being enshrined expressly in several international and European documents, the rule of law depends essentially on national realities, because they defines and keeps it as an overarching concept of the existence of the modern state.

The artisan of the theory of separation of powers, Montesquieu, conceived State only to the extent where it entrusts power to distinct organs: legislative, executive and judicial. It was Montesquieu's vision of a truly separated, tripartite system: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty… Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." (Baron de Montesquieu, Spirit of Laws, 1748).

Quickly, this theory became dogma as it entered in the national Constitutions' provisions, and especially in the Declaration of Human and Civic Rights of 1789,

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[2] Webpage on the Separation of Powers with Checks and Balances retrieved on https://www.docsoffreedom.org/readings/separation-of-powers-with-checks-and-balances.

[3] Rosenbloom, David H., *Administrative Law for Public Managers,* Westview Press, 2003, p. 19.

[4] Cărăuşan M.V., *The Executive Branch. The Chief of State – comparative study*, Acta Universitatis Danubius. Juridica, Vol. 5, No. 1/2015, pp. 66 and 67.

art. 16 "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution." Although powers are equal in authority within the state, Montesquieu established a 'hierarchy' of them. In this regard, the legislature is holding sovereign legitimacy directly from the people, and so is the first among the three, the executive power is nothing but a derived power, while judicial authority is 'neutral'.

Even if the vast majority of European states have enshrined this principle in their regulations, the quotidian get us now to a reversal of the "hierarchy" of Montesquieu. The executive power has become progressively the decision-making power in the detriment of the legislative and the judiciary mere an independent authority.

Montesquieu developed and exposed his theory of separation of powers in the paper Spirit of the Laws (1748), a research who had as pillars the study of the English Constitution and John Locke's paper (Essay on Civil Government - 1690). In his study he concentrated not only on the formulation of an abstract theory about how to avoid concentration of powers, but looked at powers and monitored how they work. At that time, Montesquieu not only created a counterweight to monarchical absolutism but also laid the foundations of modernity, the foundation of what would become the core existence principle of the modern state, the existence of the rule of law.

The three powers encountered in Montesquieu's theory have been and are still considered to be:

1. the legislative power or the power to make laws, to modify and to repeal;
2. the executive power or the power that applies laws, and it retains the public safety, the national defence and diplomacy;
3. the judiciary, namely judicial authority, tasked with prosecuting the crimes, the failure to comply with laws and the disputes between individuals, and nowadays the disputes between individuals and the administration.[5]

By applying a rigid separation of powers will minimize the principle of national sovereignty, because the power belongs to the nation and not to the public organs/authorities (legislative, executive and judicial) which only exerts on its behalf. A rigid separation of powers can cause a blockage, an institutional disrupt of the efficient functioning of powers.

Therefore, a state cannot function unless the law passed by the legislature is applied at the impulse of the executive and the judicial authority with the help of the executive power carries out its decisions. This cooperation should be accompanied by a control power against one to another. But for this to be feasible, it is necessary to provide them the legal and institutional instruments and mechanisms to counterbalance the others.

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[5] Cărăuşan, M.V., *Drept Administrativ* [Administrative Law], Vol. I, Economica Ed., Bucharest, 2012, p. 81.

Any Constitution is based on the sovereignty of the people and requires an approach to relations between the legislature, executive and judiciary. But for securing its superiority over other legal rules, the state constituted an independent authority which oversees compliance with constitutional norms. This authority, in the European state model, is the Court or the Constitutional Council which in the modern state became the guarantor of the rule of law, preserving the balance of powers.

The nation is entitled to participate in the exercise of political power by either its representatives or directly. Today, the issue of democracy – through the representatives, as well as the direct one – experience a great revival. No Constitution cannot ignore the assertion in one form or another of people's right to participate and exercise the sovereign power. The access to the democratic exercise in the contemporary era is through representation, but participation concept which gives masses the right to materially exercise the power brought foreword the concept of participative democracy. Sure, forms of participation vary from state to state, according to the political regime, the historical conditions and democratic traditions, the political culture, the citizens' interests and the political forces that share electorate's options.

The state's discretion, in the rule of law, is limited by the existence of higher legal rules whose respect is assured by the existence of an impartial judicial power. The judge is therefore the basis of achieving the rule of law. In this way, fundamental rights are not ensured unless justice protects them.

Therefore, if the liberal state insists on the representatives (the Parliament's members), the welfare state on the technocrats (the civil servants) as the sole possessors of expertise, the rule of law insists on the prevalence of judges as representatives of the normative order.

The rule of law involves a new vision of the state and democracy; therefore, the latter in contemporary societies is a form of citizen participation in decision making, as well as a form of guarantee rights and freedoms of citizens within the state. The rule of law is an essential element of democracy enlarged, which finds its foundation in society. The degree of democratization of society, economic crises, social or political collapse can influence the rule of law and through it public administration.[6]

3. Executive bodies which are involved in the checks and balance of the powers

Nowadays, the political power of the democratic state is limited for several reasons. First governments, as an expression of political power, are bound to respect and heed the bureaucracy of various authorities and also the judicial authority that knows better the government's files and has to conclude 'social pacts' with union leaders. Otherwise, both bureaucracy as well as justice can obstruct reforms on which unions do not agree (situations which it happens

[6] *Idem*, p. 93.

frequently in transition states like Romania). Moreover, in some cases they have to get along with elected officials ('local barons' whose role is sometimes like the old feudal) and with various and multiple pressure groups and finally with the opposition party(ies) which, depending on the position and weight in parliament, is(are) able to paralyze executive initiatives.

On the other hand, both within the country as well as in external relations, governments are bound to comply European rules (requirements and regulations of the European Union and of the Council of Europe) and the rules contained in treaties and conventions of international law (NATO's rules and others).

Finally, sometimes governments are confronted with the power of corruption that spread its network all over the world, featuring a huge financial capacity, obtain significant support and manage to exert an occult influence on political life, business, and the administration or justice.

All these causes reduce the capacity of governments and generates a state of their complacency and limit the measures, likely to be materialized in terms of pressures said so, finally, the time limit they have and under the spectre of losing a new mandate, very often abandoning the structural reforms that can be realized only in the long term and summarize current affairs management. This state of affairs has generated a false impression, namely that the state role in the world has decreased and that many of its functions have been alienated.[7]

Moreover, the executive becomes the main centre decision, thus achieving a transfer of jurisdiction in favour of the administration in a subtle way, which practically (in some cases) replaces the political power.

Furthermore, constitutional evolution demonstrates the abandonment of the legislature's monopole because it is too rigid and unworkable in practice. Executive receives regulatory power which grants him competence to take measures to enforce laws as acts that are *erga omnes* opposable. So, Parliaments delegation of powers granted to executive, it widens its power regulation. However, the primacy of the legislature remains recognized in law as long as the executive's ordinances enacted under legislative empowerment have to be approved by Parliament.

The spectacular reinforcement of the regulatory powers of the executive was produced in France by Constitution of 1958 (art. 38), which like in art. 115 of the Romanian Constitution (1991), expressly stipulates that the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally reserved to law (but not to the organic laws - art. 115 para. 1). However, in the administrative case law, especially the constitutional one, greatly limited impact of this innovation. It remains a fact, however, that executive power as regulators was strengthened.

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[7] Cărăuşan M.V., *Brief Apology to the National State in Europe,* Acta Universitatis Danubius. Juridica, Vol. 5, No. 1/2009.

Besides this, as it concerns the active roles played by the two entities of executive power on the political scene new mechanisms are discovered.

Historically, the legitimacy of administrative arrangements has been greatest when they were connected to the ideologies of dominant political coalitions and movements. In each case, the core principles of dominant and accepted administrative practice lost their legitimacy after the political groups supporting them fell from the power. In short, administrative expertise must be in the service of the nation's dominant political vision.[8] In our constitutional gridlock, Romanian administration is an arm of the nation's ruling civil servants elite (the technocrats) and is considered legitimate.

Additionally, even if, the Romanian Constitution provides the possibility of the President to attend the Government meetings and without influencing the rhythm of government, as it is in France (art. 9 of the French Constitution), or the separation and equilibrium of branches nowadays we experience different situations. By taking into account the new citizens' movements in Romania and the role of the President we can conclude that, even if the Constitution sees the President as a monitor of the state separation and equilibrium of branches, because is part of one branch and directly elected by the citizens, in crisis situations, cannot act freely and independent. A major political problem with governmental regulatory activities is that although they do tend to promote domestic tranquillity, they are also widely viewed as a breach of the government's commitment to secure the 'blessing of liberty'[9].

3.1. The Ministry of Justice

Public policy is established through administrative rulemaking. They determine much about the health care, the education system and the practices used in business, agriculture and other areas. The rules are prospective and can be of general or particular application. The executive branch through the Government, we could see in the above lines, is directly involved in the administrative rulemaking system.

Another aspect that confirms the tendency of the Government to apprehend the regulatory power is the major role of the Ministry of Justice in the legislative reform. Ministry of Justice as public administration authority is directly involved in achievement of the legislative process even its main role is to ensure fulfilment of justice, public order, and citizen safety. The simplification and consistency of the legal regulations, compatibility of national legislation with the obligations assumed by Romania, and the harmonization of national legislation to European and Euro-Atlantic one are roles assumed by the Ministry of Justice.

Among the authorities who have the right of legislative initiative according to the Constitution, a special role is given to the government. May develop draft

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[8] Rosenbloom David H., O'Leary Rosemary and Chanin Joshua, *Public Administration and Law,* 3rd ed., CRC Press, 2010, pp. 29-30.

[9] Rosenbloom David H. and Kravchuk Robert S., *Public Administration. Understanding Management, Politics, and Law in the Public Sector,* 6th ed., McGraw Hill, 2005, p. 49.

legislation in their field, ministries and other specialized central public administration and autonomous administrative authorities.

The mission of the Ministry of Justice does not end, however, with the draft legislation's submission of the Government to the Parliament, but continues in ensuring representation of the executive in specialized committees, and in the plenum of the Parliament's Chambers.

The Ministry of Justice has, besides the attribution of drafting normative acts for the justice system, also the endorsement, in terms of the legality, of projects designed by other ministries or by other central public administration authorities in the exercise of legislative initiative by the Government. Ministry of Justice provides a particularly important opinion in creating an effective legislative framework, stable and consistent.

3.2. The independent administrative authorities/ institutions

The rule enshrined in art. 117 para. 3 of the Constitution creates independent administrative authorities which are not under the subordination, authority or coordination of the Government, because they are virtually outside government administration.

It is noted that the only relationship between the Government and these autonomous authorities/ institutions is based on collaboration. In this respect, the Romanian Constitution, and a series of subsequent laws, establish and/or organize various autonomous administrative authorities/institutions that are independent from the Government and ministries, but not from the Parliament.

These autonomous administrative authorities / institutions exercise, just as other specialized bodies of the government, administration which falls into the category of executive bodies of state. They have to organize the execution and concretely enforcement of the laws and ensure the functioning of public services and, sometimes, the exercise of administrative-jurisdictional powers.

However, autonomous administrative authorities/institutions differ from ministries and other specialized bodies subordinated to the Government or ministries, through:

a) heads of ministries and other specialized bodies of the central government usually belong to the government and are appointed by the President on the vote of confidence of Parliament; independent authorities/institutions are led by people who are not part of government and are appointed by the President based on a vote of confidence given by the Parliament with two exceptions, the President of National Council for Solving Complaints in Public Procurement and the President of Superior Council of Magistracy;

b) ministries and other specialized central public administration operates in subordination, coordination or authority of the Government; the autonomous institutions/authorities exercises their duties under the control of the Chambers of Parliament or of some standing committees thereof, or outside a constitutional review explicitly regulated, such as the Superior Council of Magistracy.

c) administrative acts issued by ministers and other heads of specialized bodies belonging to government may be cancelled by the Government, but it has no power over the administrative provisions adopted or issued by the autonomous administrative institutions that, sometimes, are not controlled by any branch of the state.[10]

Figure 1.1. The state branches in Romania (author's representation)

[10] Cărăuşan M.V., *idem,* 2012, pp. 295 and 296.

We find, therefore, a new category of institutions that exceeds the powers conferred by the Constitutions to the three branches of state: legislative, executive and judicial. Therefore, taking into account both legal rules and doctrine they perform specific activities even if they are created and function as mechanisms of interference of state powers. Consequently, it cannot be said that the autonomous administrative authorities are subordinated to an organ or another, even their title bids us to place them under the government or judiciary.

At present, in Romania are set up and operate under the constitutional provisions the following authorities or independent administrative institutions: the Advocate of the People, the Legislative Council the Supreme Council of National Defence, the Superior Council of Magistracy, the Court of Audit, the Romanian Intelligence Service. All the others mentioned in the paper are set up and operate based on organic laws. According to the Constitution autonomous administrative authorities/institutions may be established by an organic law (art. 117, para. 3).

The actual names of these autonomous administrative authorities/institutions differ from one to another and in their title different terms are used, such as: Council, Commission, Court Service, Society etc. As a rule, their heads are president, with the exception of the Advocate of the People, and of the services, which have directors with ministerial rank. Regulations of these autonomous authorities/institutions are in principle decisions, orders and instructions, for those lead by one person, recommendations for the Advocate of the People, and also regulations, notices for the Competition Council or decisions for the Council for Study of Securitate Archives.

The courts are generally viewed as essential to subordinating administrative action to the rule of law. They provide a checks against abuse of administrative discretion and unconstitutional, illegal, irrational, or procedurally irregular decision making and enforcement.[11] Judicial review takes place within the state court system. These generally have a well-defined division of labour among first instance, tribunals ordinary and specialized, and courts of appeal. The High Court sits at the top of court system. Law is an important means of dealing with administrative discretion and constraining administrative actions but is not solely the purview of legislatures it is also made by the courts through interpretation (especially in the case of the constitutional court). The purpose of the judicial review of public administration acts is to ensure compliance with the law and at least minimum levels of rationality and fairness.

4. Instead of conclusion

The theory of separation and balance of powers has revolutionized political thinking and practice all around the world, from the late eighteenth century, and generated a process of constitutional replenishment both in Europe and in North

[11] Rosenbloom David H., *idem,* 2003, p. 141.

America. The success of the theory is due to the fact that it provides an alternative to absolutist government and a safeguard against the governors' tyranny.[12]

Parliament's effort to redefine its constitutional position vis-à-vis administration relied heavily on the idea that autonomous administrative authorities/institutions should operate and be treated as independent but they have to present their activity reports in front of the legislature. Autonomous administrative authorities/institutions had always been considered instruments for implementing legislation, and they always had some degree of discretion.

Public administration strongly subscribe to the principle of "unity of command" as a means of coordinating work. In Gulick[13] and Rosenbloom[14] public administrators ought to be subordinate to one branch of state, not three. Just because Parliament experiments with the autonomous authorities/institutions does not mean it is ready to turn the administration to the legislative branch. We do not have to forget that public administration in rule making, adjudication and policy implementation has two great advantages: it is flexible and able to rely on expert specialization in decision making.

[12] Cărăuşan M.V., *idem,* 2015, p. 67.

[13] Luther G. (1937). *Notes on the theory of organisation (reprinted in Classics of Public Administration,* 2nd ed. Shafritz, J. And Hyde, A., eds.), Dorsey Press, Chicago, 1987, pp. 79-89.

[14] Rosenbloom D.H. *et al., idem,* 2010, p. 13.