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Short Considerations on the Rule of Law and the Separation of Powers. The Conditions under Which the Two Principles Can Create Positive Outcomes in a Constitutional System

1. Introduction

The rule of law and the separation of powers are the most fundamental principles of a democratic state. However, as I will argue in this article, their theoretical existence in a constitutional framework does not amount to anything, if they are not properly understood and implemented by the constitutional actors.

Taking the aforementioned idea into consideration, I will first of all offer a personal perspective on the content of the two principles, followed by an analysis of the conditions under which the two principles can actually create positive outcomes in a constitutional system. Throughout this article, I will use examples from the Romanian constitutional system in order to substantiate my ideas.

2. The Rule of Law. Defining the Principle by Reference to Positive and Natural Law

Without delving into the long history of the rule of law principle, I can safely affirm that its importance grew considerably in the aftermath of the events of World War II, in light of the Holocaust and the communist

dictatorships that followed it. The historical context in question inevitably poses the following question: "What is the actual content and significance of the concept of *law* in the context of the rule of law principle?"

According to a simplistic, positivist definition of the principle in question, *a state governed by the rule of law is a state in which public institutions respect positive law in order to prevent the potential abuses to which they are prone in the context of exercising the public power delegated by citizens*. This preliminary definition of the rule of law emphasizes some of the fundamental characteristics of the principle in question. First of all, it underlines the purpose of the rule of law principle, which is to prevent potential abuses coming from the state. Secondly, the definition emphasizes that the potentiality of abuses stems from the fact that public institutions exercise public *power*, which by its very nature, has the ability to corrupt those who exercise it. Thirdly, the definition acknowledges that the rule of law only functions in democracies, where public power is delegated by the people through vote.

Before developing further the aforementioned definition, I believe it is also important to underline that the rule of law principle is a norm addressed first of all to the state and not to the citizens. A state governed by the rule of law is not a state in which citizens are extremely obedient (that is a totalitarian state), but is a state in which public institutions understand first of all the importance of respecting positive law. Yes, public order as a consequence of civil obedience is important in a state governed by the rule of law, but the central characteristic of such a state has to do with the state's attitude towards respecting the law.

I will further elaborate on the content of the aforementioned definition of the rule of law, expanding on the characteristics of the principle in question, while also highlighting the limits of the definition in capturing its essence. First of all, it is important to mention that in the context of respecting the rule of law, *public institutions must obey positive law, both in its letter and in its spirit*.

From this point of view, a violation of the rule of law principle by disrespecting positive law in its letter is easy to prove, which is why states usually avoid this type of violation. For example, Article 76 of the Constitution of Romania states that organic laws shall be adopted by the majority vote of the members of each Chamber, while ordinary laws shall be adopted by the majority vote of the members present in each Chamber. It is highly unlikely that the Chambers of Parliament would adopt an organic law by the majority vote of the members present in each Chamber instead of the majority vote of the members of each Chamber, as such a violation of the Constitution would be evident and the law could easily be declared unconstitutional by the Constitutional Court.

On the other hand, public institutions in Romania often resort to violating the spirit of positive law, as this type of violation is more difficult to ascertain and sanction. In this context, it is important to underline that by the spirit of positive law, I refer to the *ideal purpose* of the norm, as it can be derived from its text and context.[1] Whenever public institutions distort this ideal purpose by pursuing an illegitimate purpose in the confines of the legal text, the rule of law principle is violated in a perverse manner, as this type of violation is harder or, at times, impossible to prove directly.

In order to clarify this type of violation of the rule of law, I will use as an example the possibility of the Government to adopt emergency ordinances, in the conditions laid down in Article 115 of the Romanian Constitution. According to this article, the Government can only adopt emergency ordinances in extraordinary circumstances, the regulation of which cannot be postponed, and has the obligation to give reasons for the emergency within their content. *A bona fide* textual and contextual interpretation of this provision leads to the conclusion that the phrase "extraordinary circumstances" refers to extremely unusual events which create a pressing need for immediate legislation, a state of urgency which does not allow for ordinary legislative procedure.[2] A pandemic, a state of war or natural catastrophies could be considered "extraordinary circumstances" in the sense of Article 115. At the same time, the restrictive interpretation of this phrase is supported contextually by the separation of powers principle and by Article 61 paragraph (1) of the Constitution, which states that the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country. However, the day to day constitutional reality in Romania shows that the Government acts like a Parliament by adopting emergency ordinances every week. For example, in 2020[3] and 2021,[4] the Government adopted 198 emergency ordinances in total. When it comes to the obligation of giving reasons for the "extraordinary emergency" in the content of the ordinances, that is in their preamble, the Government resorts to alleging all kinds of "urgent situations", thus transforming the extraordinary emergency in an extremely ordinary one. For example, by the Emergency Ordinance no. 82/2021, the Government modified the Law of Citizenship by introducing the possibility of using

[1] A. Scalia, B.A. Garner, *Reading Law: The Interpretation of Legal Texts*, St. Paul, MN 2012, p. 33.

[2] I. Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, București 2006, p. 705.

[3] See ORDONANȚE DE URGENȚĂ emise în anul 2020 de catre Guvern (cdep.ro) (accessed: 20.12.2021).

[4] See ORDONANȚE DE URGENȚĂ emise în anul 2021 de catre Guvern (cdep.ro) (accessed: 20.12.2021).

electronic communication instead of postal communication in the process of solving citizenship requests, which is, of course, a good idea, but by no means can be integrated in the notion of "extraordinary circumstances". In the preamble of the ordinance, the Government referred to the practical difficulties in the communication between the state authorities and the persons requesting the Romanian citizenship, which represents a completely usual need for legislation to be met by the Parliament.

In this context, it is important to observe that by transforming the "extraordinary urgency" in a usual one, the Government distorts the ideal purpose of the constitutional provision. Even though art. 115 of the Constitution was created to offer the possibility of rapidly passing legislation in truly extraordinary situations, when there is no time for the common legislative procedure, it is used by the Government to transform itself into a Parliament and take over the legislative power. This abuse of the rule of law by distorting the ideal purpose of the norm is done by way of *interpretation*, in this case an interpretation realized in bad faith, by not taking into account the fair reading of the legal text in its context.[5]

In order to clarify the essence of the rule of law principle even more, I will further analyze in a concise manner the concept of "state" and the concept of "law" in the context of the principle in question. Regarding the first concept, I previously stated that the rule of law principle is first of all addressed to the state and not to the citizens. However, it is essential to clearly ascertain who the state really is in order to know who to hold accountable[6] for a violation of the rule of law. Being a legal fiction, the state is immaterial by its nature, which is why it is necessary to deconstruct it into more "real" elements. Otherwise, an artificial concept of the state will disguise all kinds of abuses, which cannot be attributed to anyone. In reality, the state is composed of public institutions, which are composed, in their turn, of *persons*. These persons possess an additional quality in comparison to simple citizens. They have public power or authority. Stripped to its essence, *the state is a form of power, immaterial in its nature*. In this context, it must be emphasized that any person that has power over another will be tempted to abuse it. That is basic human nature and the classic theorists of constitutionalism acknowledged this fact as fundamental in their writings. For example, in the Federalist Papers no. 51, James Madison expressed the following idea: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In fra-

[5] A. Scalia, B.A. Garner, *Reading Law…*, p. 428.

[6] At least on a moral level, if not legally.

ming a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself".[7] This is the crucial need of every political system, stemming from the imperfections of human nature: to control the abusive tendencies of men when in authority over others. At the same time, this is the context in which the need for the rule of law principle emerged. However, as I will further demonstrate, a principle, abstract and theoretical in its nature, cannot change the nature of men, unless they willingly acknowledge its necessity and implement it in their day to day lives. In relation to the abusive nature of men when placed in positions of authority, the rule of law principle should sound like this in their heads: "I am a human being. Therefore, I am vulnerable to power. If I have it, I will be tempted to abuse it. This is a fact that I must be aware of at all times in the exercise of my public function. Whenever I see in myself the selfish tendency of interpreting law in order to advance my personal interests, I will consciously abstain from it because I understand that such behavior endangers the democratic state".

Regarding the definition of the concept of "law" in the context of the rule of law principle, several observations are necessary. First of all, if a state governed by the rule of law is bound only to obey positive law, according to the definition presented at the beginning of this section, some peculiar consequences might ensue.[8] For example, if the Constitution of an imaginary state would provide that every two years, ten babies randomly picked must be killed for a national barbecue, that would be a state governed by the rule of law, if it would implement the provision in question. However, it is obvious that such an assertion cannot be accepted. This extreme example shows that it is not sufficient for a state to respect positive law in order to truly be a state governed by the rule of law. There has to be at least a partial conformity between positive law and natural law in order to maintain that a state is governed by the rule of law.[9] In this context, by using the concept of "natural law" I refer to the fundamental principles which govern democratic states, such as the principle of non-retroactivity, equality before the law, proportionality etc., as well as to those norms which protect natural rights. It is true that a perfect conformity between the two types of law cannot be attained as positive law is always perfectible, but in a state governed by the rule of law, natural law must be found

[7] The Federalist Papers no. 51, Federalist Papers No. 51 (1788) – Bill of Rights Institute (accessed: 27.12.2021).

[8] M. Balan, *Considerations on the Evolutions of the Theories of the Rechtsstaat*, Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, Stiinte Juridice, 2007, p. 39.

[9] B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, p. 96.

at least as a hard core of positive law. That is usually the case in democratic states, given the fact that all constitutions recognize and protect fundamental rights. It can even be said that in this age, constitutional provisions play the role of natural law in our legal systems.[10] As most of the constitutional provisions have a flexible nature, they can be invoked whenever a positive norm contravenes those fundamental principles which compose natural law. From this perspective, it can be said that constitutional courts play the part of "enforcers" of natural law by eliminating from positive law norms which are contrary to it.

Thus, in the context of the rule of law principle, law is not only the totality of norms adopted by the state (positive law), but comprises a sum of essential principles of fairness that are superior to the state and previously existed in the human consciousness (e.g., the prohibition of murder). Consequently, it cannot be maintained that a state in which there are laws manifestly contrary to natural law, which are respected and implemented as such, is a state governed by the rule of law (e.g., the Nazi state with its discriminatory laws against the Jews). Therefore, a state governed by the rule of law is a state in which there is at least a relative conformity between natural law and positive law, with mechanisms in place for the elimination of positive norms contrary to natural law (for example, by finding them unconstitutional).

3. The Separation of Powers. Defining the Principle

The separation of powers principle is complementary to the rule of law. Both principles were created as a response to the abusive nature of human beings when placed in positions of authority. While the rule of law is the more general principle, aiming at preventing all types of abuses, the separation of powers only prevents the accumulation of power in one hand or the specific abuse consisting in exceeding one's own competence in the context of exercising a public function. The separation of powers principle is based on the same assumption that power is a drug, which is why it must be reduced in its amount in order for the person representing the public authority not to become addicted.

At the same time, the separation of powers principle has an important role in organizing public power. Thus, it is distributed into three branches

[10] S. Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped*, Oxford 2021, p. 6.

according to the essential functions of the state: lawmaking, implementation/enforcement of the law and settlement of disputes. In this context, it must be mentioned that for the separation of powers to be effective, a formal separation is not sufficient. For example, in the former Romanian communist state, different bodies exercised the three functions of the state. However, they were all maneuvered by the same power of the communist party. Therefore, a state in which the separation of powers is indeed effective is a state in which every public body has the *real power* of making its own decisions within the limits of its competence.[11]

Furthermore, it must be noted that a strict separation of powers is impossible on a practical level. First of all, the public authorities which are not voted must be appointed by other public bodies, which excludes a complete separation of powers. In this context, is is important that the appointed authorities maintain their independence in making their decisions. If they let themselves be influenced by a desire to please the authorites that appointed them, the public interest will suffer and the principle of separation of powers will be violated. Second of all, the three branches of power and the public bodies that constitute them do collaborate and control each other in the context of different constitutional mechanisms, which gives rise to the "checks and balances" principle. Thus, the three branches are not absolutely separated and their separation mainly concerns their essential functions and not all of their duties.

Equally, it must be emphasized that modern states have surpassed the classical conception of the separation of powers through the multiplication of public institutions. For example, in Romania, there is a list of autonomous institutions, which cannot be integrated in the three branches of power. The most important one is, of course, the Constitutional Court.[12] This change led to a partial redefinition of the separation of powers principle by transforming it in a more general principle delineating the competences of all public institutions, whether they can be integrated in the three classical branches or not.

At the same time, the position of the judicial branch deserves special attention in the context of the separation of powers principle. Thus, it can be observed that the judicial branch is "more" separated than the other two branches. While there is ample collaboration and control between the two political branches, the judicial branch, which is apolitical, is radically secluded from them. For example, the Constitution of Romania provides

[11] Ch. Möllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford 2013, p. 44.

[12] M. Balan, *Reflections on the Principle of Separation of Powers*, Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, Stiinte Juridice, 2008, p. 17.

for severe sanctions which can be applied by the legislative branch to the executive one and vice versa. Thus, according to art. 89, the Parliament can be dissolved by the President in certain restrictive conditions. Also, according to art. 95, the President can be suspended from office by the Parliament in case of committing grave acts infringing upon constitutional provisions. At the same time, according to art. 113, the Government can be dismissed from office by the Parliament at any time, if the majority vote of the deputies and senators is achieved. However, not a single judge can be dismissed from office by any public body from the other two branches.[13] This is a consequence of the independence of the judiciary, which is in itself a fundamental principle of a democratic state.

Lastly, it is important to reiterate that the separation of powers is not an absolute principle. It can allow for various exceptions depending on the actual content of the constitutional or legal provisions of a state. For example, art. 126 paragraph (3) of the Romanian Constitution provides that the High Court of Cassation and Justice shall guarantee a unitary interpretation and implementation of the law by the other courts of law, according to its competence. A systematic reading of this provision along with other provisions from the civil and criminal procedure codes, which elaborate on this constitutional provision, shows that the supreme court has the competence of adopting judicial rulings resembling interpretive laws in certain cases. This is an exception to the separation of powers principle as only the Parliament should adopt interpretive laws in its legislator capacity. Another exception to the separation of powers principle in Romania was already presented above. The Government can adopt emergency ordinances in extraordinary situations, even though this is in itself a legislative action.

The relative character of the separation of powers principle must be taken into account whenever it is necessary to ascertain whether the principle in question was violated. In this context, it is first of all necessary to establish whether one of the branches intervened in the essential function of another branch. If such an intervention can be ascertained, it must be verified next if the intervention in question is permitted by the Constitution or by other laws. If it is not, a flagrant violation of the separation of powers principle has occurred. For example, if the President of Romania solved a case instead of a judge, that would be a blatant violation of the separation of powers as this situation is not regulated as an exception to the principle in question. On the other hand, if a certain situation is provided for as an exception to the principle, it must be verified whether the

[13] Judges can only be dismissed from office by the Superior Council of Magistracy – an independent body mostly composed of judges and prosecutors.

conditions of the exception were respected. If they were, the separation of powers would not be violated. If the conditions were not respected, the principle would be violated. Returning to the first example regarding the emergency ordinances, whenever the Government adopts one in a situation which is not extraordinarily urgent, the separation of powers principle is violated because the Government does not respect the conditions of the exception in which it can legislate instead of the Parliament.

4. The Conditions under Which the Two Principles Can Create Positive Outcomes in a Constitutional System

Both the rule of law and the separation of powers are expressly provided for in the Constitution of Romania. Art. 1 paragraph (3) emphatically states "Romania is […] governed by the rule of law", while art. 1 paragraph (4) states that "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".

It is first of all important to observe that the simple fact that the two principles are expressly mentioned in the Romanian Constitution does not mean that they are respected in practice at all times.[14] Throughout the short history of democratic Romania, the Constitutional Court has often found a violation of those principles.[15] The constitutional provisions presented above must be seen as simple desiderata of the constitutional legislator from 1991, whose implementation into practice depends on several factors.

Regarding the conditions under which the two principles can create positive outcomes in a constitutional system, it must be established first of all what are those positive outcomes. What do we really expect from the two principles?[16] I think that first and foremost we expect to avoid atrocious dictatorships, such as the fascist and communist ones. Second of all, we expect to avoid more common abuses of law, which negatively impact our daily lives (e.g., disproportionate restrictions of human rights) or destabilize the constitutional system (e.g., a takeover of the legislative power by the executive through excessive adoption of emergency ordinances).

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[14] *The Rule of Law in Comparative Perspective*, eds M. Sellers, T. Tomaszewski, Dordrecht–Heidelberg–London–New York 2010, p. 1.

[15] See, for example, Decisions no. 838/2009 and 972/2012 of the Romanian Constitutional Court.

[16] *Rethinking the Rule of Law After Communism*, eds A. Czarnota, M. Krygier, W. Sadurski, Budapest 2005, p. 272.

Returning to the conditions which have to be met in order for the two principles to create the outcomes mentioned above, I believe that they can be reduced to two main conditions, which do not pertain to a positivist approach to law, but reflect a certain mindset which the *persons* representing the state should have. The first condition consists in *a deep and personal understanding of the frailty of human nature when confronted with the possibility of handling power*. This understanding inspired the creation of the two principles and underlies them to this day. A superficial and purely intellectual understanding of the fact that power can lead to abuses is not sufficient. The persons representing public authorities must realize on a personal level that they themselves are in the danger of becoming dictators, to a lesser or greater extent, because of the absolute value of the truth that power has the ability to corrupt those who exercise it. This type of realization cannot be achieved by reading the Constitution. It is a matter of education, which is sadly missing especially in post-communist states, where constitutional actors have the tendency of obeying rules in a formalistic manner, without understanding their true purpose.

The second condition consists in a *constant self-analysis before making decisions in a public capacity, aiming at discerning whether the decision in question is motivated by selfishness or by a true desire to respect positive law, both in its letter and in its spirit, with the goal of advancing public interests*. This type of inner activity cannot be regulated by law in a direct manner. It can only be practiced if the person representing the public authority chooses to do so, on a moral level, because he/she acknowledges its necessity in order to contribute to the consolidation of a truly democratic state, governed by the rule of law and by the separation of powers.

5. Conclusion

Thus, it can be seen in light of the ideas presented above, that the practical destiny of the two principles, legal in their nature, depends on the inner mechanisms of the human being, which are not at all considered to be part of the legal universe, according to the prevailing positivist mindset. However, those mechanisms influence law much more than legal texts do.