BRIEF CONSIDERATIONS ON THE DISCIPLINARY LIABILITY OF THE MAGISTRATES

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Abstract

The recent amendments in the applicable law on the disciplinary liability of the magistrates have induced many debates regarding the increase of holders that own the right to initiate the disciplinary action against a magistrate and also regarding the area of disciplinary offenses. The conferring of the status of holder of the disciplinary action to the Minister of Justice, the President of the High Court of Cassation and Justice and to the General Attorney of the Prosecutor's Office of the High Court of Cassation and Justice, has conferred us the opportunity to present the impact of these legislative amendments on the legal environment.

Therefore, the theme proposed through this study will be done by presenting the relevant legislation and the relevant constitutional jurisprudence.

Keywords: *magistrate, disciplinary liability, Constitutional Court, Minister of Justice, Superior Council of Magistracy.*

Introduction

In several texts of the Constitution the notion of public office or service is introduced, and therefore the notion of officer[1]. The legal system of public office also includes its liability, whose purpose is the suppression of errors made by public officials, which represents only one of the liability purposes[2]. In this context of public servants, in the doctrine was stated that: "legal liability applies to the magistrates too, being obvious that, in a democratic society, the magistrate can not be under the protection of absolute immunity when he seriously breaks the obligations of impartiality and fairness"[3].

In the case of the magistrates, the multiplication of facts that may represent misconducts, made them furthermore face a situation that can no longer be ignored, namely, the magistrates, the judges, the public servants in general, may interfere at some point in time with a possible disciplinary action promoted against their activity. Therefore, here is the fact, at least theoretically but also practically, the disciplinary action against a magistrate is a predictable action within the context of the legislative amendments, but also undesirable in the activity of a magistrate.

1. The holders of the disciplinary action against a magistrate

In our opinion a controversial issue that will raise many problems in practice is related to the amendments to the legal system al the liability of the magistrates. Thus, the amendments to

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[1] Rodica Narcisa Petrescu, „*Drept administrativ" (Administrative Law),* Hamangiu Publishing House, Bucharest, 2009, p. 522.

[2] Dana Apostol Tofan, „Instituţii administrativ europene", (European Administrative Institutions), C. H. Beck Publishing House, Bucharest 2006, p. 184.

[3] I. Leş, „Organizarea sistemului judiciar românesc", (The Organization of the Romanian judiciary system), C. H. Beck Publishing House, Bucharest, 2004, p. 211.

Law no. 303/2004[4] on the status of the judges and prosecutors are on: the extending of the disciplinary offenses area; the increase of the holders of the disciplinary action; the amendment of legal provisions that regulate the disciplinary sanctions applicable to judges and prosecutors, including the introduction of disciplinary sanction of suspension from office for a period of up to 6 months, the definition of the exertion of the function with serious disregard or bad faith; the introduction of the condition of good repute as a requirement of access and office sustentation.

Concerning the exception of unconstitutionality on new amendments on the law regarding the status of the judges and prosecutors, the status of the magistrates and the law on the Superior Council of Magistracy,[5] Romanian Constitutional Court, through the decision no. 2/2012[6], was rendered a judgment on its constitutionality, as we would briefly present it, *a point of view that we disagree*. The criticism has been focused on several issues, but we will analyze only those concerning the conferment of the status of holder of disciplinary actions to the Minister of Justice, the President of the High Court of Cassation and Justice and the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Thus, the criticism refers to the conferment of the status of holder of disciplinary actions by including together with the Judicial Inspection represented by the judicial inspector, the Minister of Justice and the President of the High Court of Cassation and Justice in case of misconduct committed by judges, and the status of holder of disciplinary actions to the General Attorney of the Prosecutor's Office attached to the High Court of Cassation and Justice, for disciplinary violations committed by prosecutors. Essentially, the criticism of unconstitutionality in this respect points out that these amendments determine the decrease of the autonomy of the Judicial Inspection, it is violated the independence of law and of the principle of the separation of power owing to the fact that they allow the executive to have an influence on the triggering of the mechanism of the disciplinary liability of the magistrates and in this case we refer to the provisions of art. 44, paragraph 3-5 of Law no. 317/2004.

The Romanian Constitutional Court considers that the law is constitutional owing to the fact that, we must distinguish between the participants to the disciplinary procedure and the disciplinary research court, so in this case we refer to the Superior Council of Magistracy. In its jurisprudence[7], the Constitutional Court states that "a dimension of the Romanian state is represented by the constitutional law accomplished by the Romanian Constitutional Court (…), its role being to ensure the supremacy of the Constitution, as a fundamental law of the state of law. Thus, in accordance with art. 142 (1) of the Constitution, the Romanian Constitutional Court is the guarantor for the supremacy of the Constitution".

In order to support our arguments, contrary to the view of the Romanian Constitutional Court, we will present below the relevant legislative texts, both form the Romanian Constitution and from the two laws in question. According to art. 3 letter c) of Law no. 317/2004: "The President of the High Court of Cassation and Justice, representing the judiciary, the Minister of Justice and the General Attorney of the Prosecutor's Office attached to the High Court of

[4] Law no. 303/2004 on the status of the judges and prosecutors published in the Official Gazette no. 576/2004.

[5] Law no. 314/2004 on the Superior Council of Magistracy, published on the Official Gazette no. 599/2004.

[6] The Constitutional Court Decision no. 2/2012 on the objection of unconstitutionality of the provisions of Law for the amendment and supplementing of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 131/2012.

[7] The Decision of the Romanian Constitutional Court no. 727/ 2012, published in the Official Gazette no. 477/12.07.2012.

Cassation and Justice are members of the Superior Council of Magistracy" and according to art. 4 (1): "the Members of the Superior Council of Magistracy shall be elected among the judges and prosecutors appointed by the President of Romania".

As regards the Minister of Justice, the designation and appointment procedure is closely related to the executive. Thus, according to the provisions of the revised Constitution, the Minister of Justice may eventually hold the function of minister:

a) through the procedure of forming a new Government, as a member on the list of the members to be of the Government, proposed by the candidate for prime minister and voted by the Parliament, in block together with the rest of the proposed ministers, procedure called "the investiture of the Government".

b) or due to the vacant position by "Government reshuffle", when the Minister of Justice is proposes by the Prime Minister and appointed by decree of the President.

In connection with the Superior Council of Magistracy, as shown, the Minister of Justice is a member of the Superior Council of Magistracy. Basically, the method of appointment and his status as a member of the Superior Council of Magistracy, the law conferring the right to take disciplinary action against a magistrate is, in our opinion, an obvious breaking of the separation of powers by mixing the executive in the judiciary, affecting also the independence of law. We therefore agree with the criticism of unconstitutionality in what concerns the Minister of Justice, holder of the disciplinary action, being obviously, as stated previously, the political character of this institution.

As regards the President of the High Court of Cassation and Justice, although he is part of the judiciary, he is appointed by the President of Romania and member of the Superior Council of Magistracy. In our opinion, the President of the High Court of Cassation and Justice, when exerting the disciplinary action against a magistrate, he cannot be considered impartial if the judge is considered guilty in the disciplinary procedure, he will appeal the measure taken by the Superior Council of Magistracy, the appeal will be solved by the High Court of Cassation and Justice, the panel of 5 judges, it is said the same court that, indirectly through its president, has triggered the disciplinary action. Furthermore, as what concerns the Minister of Justice, we state that by this appointment is violated the principle of the independence of law, we argue that if the President of the High Court of Cassation and Justice, holder of the disciplinary action, this contradiction between his status and the legal attributions is very visible, leading to questioning his impartiality.

The third holder of a disciplinary action against a magistrate is the General Attorney of Romania. We state that the General Attorney of Romania (judiciary power), according to the Romanian Constitution, appointed by the President of Romania (executive power!!!) on the proposal of the Minister of Justice (executive power!!!), with the opinion of the Superior Council of Magistracy, depends on the executive power, politically influenced, so that when exerting the disciplinary action against a prosecutor, he determines the violation of the separation of powers and of the law state. Moreover, according to art. 132, paragraph 1 of the Constitution", prosecutors operate according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice". Can it be in this case about impartiality or independence since the status of the prosecutors provides the hierarchical control and their subordination to a member of the executive power, namely the Minister of Justice?

In our opinion, the holders of the disciplinary action, as presented above, once they have triggered the disciplinary action, we are no longer interested in the position of the Superior Council of Magistracy in those concrete cases, in this case disciplinary court, in the scope of solving the disciplinary action, owing to the fact that the prejudice has already been produced by promoting the action. These considerations above lead us to believe that the decision of the

Constitutional Court through which the amendment of the law system of the disciplinary liability of the magistrates was considered to be constitutional, is not inspired.

As shown in the Report[8] on the Superior Council of Magistracy activity in 2012, "although the legislative amendments occurred during 2012 concerning the holders of the disciplinary action have displeased the judiciary as a whole, is to be reported that, by the end of the year, the Minister of Justice has not used the legal privilege that has been conferred to him". The same report points out that, in disciplinary matter, the Department for judges in disciplinary matters delivered by the end of 2012 a total number of 16 decisions and the Department for prosecutors a total number of 9 decisions.

2. The extending of the disciplinary offenses area

The disciplinary liability of public servants is defined in art. 77^1 of the republished law no. 188/1999, according to which: "the guilty violation by the public servants of their public office duties and of the professional and civic conduct provided by the law, represents a disciplinary misconduct and results in their disciplinary liability"[9]. In the doctrine of the administrative law, the disciplinary offense represents the act committed with guilt by the public servant through which he violates the obligation arising from the report of public office or in connection to it and which affects his socio-professional and moral status[10]. Coming back to the magistrates, according to art. 99 of Law no. 303/2004, amended in 2012, a large number of actions are considered to be disciplinary offenses[11].

The new legislative amendments are focused, in case of the disciplinary offenses, on a number of actions related to the moral conduct of the person who acts as a magistrate, actions that may prejudice the prestige of law. For example, *in case of the magistrates, the disciplinary offenses* may be: the events affecting the honor and professional integrity or the reputation of law, committed when exerting or outside of the exerting of duties; the violation of the legal provisions on incompatibilities and prohibitions on judges and prosecutors; *undignified attitudes* while exerting their duties of service, *the unjustified refusal to perform a service duty;* the failure of the prosecutor to comply with the provisions of the superior prosecutor, given in writing and in accordance to the law*; the repeated failure* and for attributable reasons of the legal provisions regarding the solving without delay of all the mattes or the *repeated delay of works*, for attributable reasons; *the total lack of motivation* of the prosecutor's judicial judgments or actions; the use of *inappropriate expressions in the prosecutor's judicial judgments or actions* or the motivation which is manifestly contrary to the legal reasoning, likely to affect the prestige of law or the dignity of the magistrate office. Also, in the case of disciplinary offenses is situated *the failure of the Constitutional Court decisions, too or of the decisions of the High Court of Cassation and Justice* in the solving of appeals for the convenience of law; the exerting of office with *bad faith or serious inadvertence.* We can note that after a long time, there are defined in this area the notions of *bad faith or serious inadvertence.*

[8] The Report on the Superior Council of Magistracy activity in 2012, http://www.csm1909.ro/csm/index.php?cmd=24, accessed on February 16 th 2013.

[9] Rodica Narcisa Petrescu, *quoted work*, p. 562.

[10] Verginia Vedinaș,"*Drept administrativ*",*(Administrative Law),* Universul Juridic Publishing House, Bucharest, 2009, p. 487.

[11] Law no. 24/2012 for the amendment and the completion of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 51/2012.

In the recent jurisprudence of the Superior Council of Magistracy it has been noted that, "in order to find the serious inadvertence, it is necessary for the judge to show a conduct of violation of some basic professional duties, with serious consequences for the accomplishment of the act of law. The Department observes from the administrated probation in question that there are accomplished the conditions required by the law because the defendant judge has flagrantly violated the procedural rules, by not preparing the device of the judgment, in the cases in which he has disposed the termination of debates, being obvious to any judge that takes part in the solving of a case, the obligation of drawing the minute, as a result of the deliberation"[12]. In another disciplinary case, it is noted that "the guilt of the defendant prosecutor G. V. G. and takes the form of the bad faith and arises from the fact that he has unduly disposed the taking over of a criminal case from a Prosecutor's Office local drive, if the prosecutor of the case had concluded the criminal investigation and had started the drafting of the indictment."[13] "If there is charged the misapplication of the procedure rules as a result of their interpretation by a judge, he cannot be liable of disciplinary liability, as it is not a serious violation of the procedure rules"[14], it is noted in a case. "In order to be a prejudice, the violation has to be unquestionable and to be lacked of any justification, elements that have not been revealed in this case, yet. Thus, there is noted from the probation material in question that the legal requirements to attract disciplinary sanction are not accomplished owing to the fact that the judgment given by the defendant judge in the case is not the expression of the serious inadvertence in exerting the office, by disregarding the legal provisions on the notification of the court (…) but it reflects the interpretation of the defendant judges for the probation material in question"…

As shown in the Report of the Superior Council of Magistracy in 2012, "between 01.01.2012-25.05.2012 (until the abolition of the commissions for discipline), the *Commission for Discipline for judges* has ordered the disciplinary investigation in 19 cases and the Commission for Discipline for prosecutors has ordered the disciplinary investigation in 6 cases and after the abolition of the commissions for discipline, the disciplinary investigation has been ordered by the judicial inspectors in 4 files. As of 24.05.2012 the disciplinary investigation has been ordered by the *judicial inspectors.* Thus, the judicial inspectors have ordered the commencement of the disciplinary investigation in 16 cases.

At the same time, the Report of the Superior Council of Magistracy activity in 2012 has also revealed some abnormalities in the activity of the magistrates. For example, it is reminded the difficulty of complying with the deadlines of drawing the works, in the context of a large number of vacancies for inspector and staff, the finding of the fact that some legal provisions contained in Law no. 317/2004 on the Superior Council of Magistracy refer to concepts which are not sufficiently well defined. In this context, it was noted that "the notion of good reputation does not meet the requirements of foresee ability of the law, not being correlatively provided the desirable behavior of the magistrates in exerting their duties, thus they objectively do not know which parts need circumscribe their behavior in order to enjoy the good reputation".

Conclusions

As we have proposed, this study has brought into discussion a topical issue in terms of the disciplinary liability of the magistrates, namely legislative amendments on the extension of the

[12] Decision no. 10J/2012, The Department for judges – the disciplinary matter, http://www.csm1909.ro/csm/linkuri/03_09_2012__51190_ro.pdf, accessed on 16.02.2013.

[13] Decision no. 7P/2012, the Department for prosecutors – disciplinary matter, http://www.csm1909.ro/csm/index.php?cmd=0301&tc=s, accessed on 16.02.2013.

[14] Decision no. 9J/2012, the Department for judges – disciplinary matter, http://www.csm1909.ro/csm/linkuri/15_10_2012__52151_ro.PDF accessed on 16.02.2013.

holders of the disciplinary action. At the same time the study has conducted a brief presentation of the amendments on the disciplinary offenses, by presenting a selection of several cases solved by the Superior Council of Magistracy. In what concerns the holders of the disciplinary action, although the Constitutional Court has described as constitutional the law that has provided these amendments, in our opinion it has been created the legal frame for the violation of the constitutional principles that aim the independence of law and the separation of powers.

Furthermore, the widening of the disciplinary offenses area, by the presenting of the selected cases, has revealed some abnormalities of the Romanian judiciary concerning not only the actual activity of a magistrate but, in our opinion, related with the system. Thus, unless we note a real reform of the judiciary, we cannot have fewer cases of disciplinary liability of the magistrates.

References

- I. Leş, *„Organizarea sistemului judiciar românesc”*, (*The Organization of the Romanian judiciary system*) C. H. Beck Publishing House, Bucharest, 2004.
- Rodica Narcisa Petrescu, *„Drept administrativ”*, (*Administrative Law*), Hamangiu Publishing House, Bucharest, 2009.
- Dana Apostol Tofan, *„Instituţii administrativ europene”*, (*European Administrative Institutions*), C. H. Beck Publishing House, Bucharest 2006.
- Verginia Vedinaş, *“Drept administrativ”*(*Administrative Law*), Universul Juridic Publishing House, Bucharest, 2009.
- Romanian Constitution.
- Law no. 24/2012 for the amendment and the completion of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette no. 51/2012.
- Law no. 303/2004 on the status of the judges and prosecutors published in the Official Gazette no. 576/2004 through G.E.O. no. 81/2012, published in the Official Gazette no. 837/2012.
- Law no. 314/2004 on the Superior Council of Magistracy, published on the Gazette no. 599/2004 with the latest amendments through G.D.no. 824/2012, published in the Official Gazette no. 571/2012.
- Law no. 188/1999 on the Status of the public servants, published in the Official Gazette no. 600/1999, with the latest amendments through Law no. 187/2012 for the enforcement of Law 286/2009, published in the Official Gazette 757/2012.
- The Constitutional Court Decision no. 2/2012 on the objection of unconstitutionality of the provisions of Law for the amendment and supplementing of Law no. 303/2004 on the status of the judges and prosecutors and of Law no. 317/2004 on the Superior Council of Magistracy, published in the Offcial Gazette no. 131/2012.
- The Decision of the Romanian Constitutional Court no. 727/ 2012, published in the Official Gazette no. 477/12.07.2012.
- Decision no. 10J/2012, The Department for judges – the disciplinary matter,http://www.csm1909.ro/csm/linkuri/03_09_2012__51190_ro.pdf, accessed on 16.02.2013.
- Decision no. 7P/2012, the Department for prosecutors – disciplinary matter, http://www.csm1909.ro/csm/index.php?cmd=0301&tc=s, accessed on 16.02.2013.
- Decision no. 9J/2012, the Department for judges – disciplinary matter, http://www.csm1909.ro/csm/linkuri/15_10_2012__52151_ro.PDF accessed on 16.02.2013.