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The State Law and the Multi-Party System

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Abstract: Creation of the modern epoch, the state law is mainly governed by the supremacy of law, but of a fair law, equal for all citizens and exerting positive effects not only for the society as a whole but also for each individual in part. Subsequently, the constant application of this principle is possible only under the circumstances of a democratic organization and functioning of the social life, which ensure the observance of basic human rights and freedoms, while fundamental human values are being preserved and promoted. But even though democracy and state law are based on correlative principles, they also stand in a relative opposition: the sovereignty of law and the multiparty system, the stability of law and the succession to power of various political parties, the reflection of the general interest by the law and the legislation principle of the parliamentary majority. Therefore, eliminating dysfunctionalities generated by such a relative antagonism imposes a series of corrective measures not only regarding the way democracy is applied, but also regarding the organization and functioning of the state. This paper aims to analyze precisely these corrective measures, also emphasizing the dysfunctionalities that may appear if these measures are not taken into consideration properly.

Keywords: state law; multiparty system; democracy; supremacy of law

The concept of state law appeared with the theory of the power separation in the state, whose initiator was the English philosopher John Locke. Here for the first time one came across the idea that the Parliament, as representative of the people, needs to own great amount of power when compared to executive power, that adopting laws is the prerogative of the Parliamentary institution and that the monarch needs to obey the laws adopted by the Parliament. „In a state based on its own fundament and acting according to its own nature (i.e. to preserve the Community), there can only be *one single supreme power, that of the law*, to which all the other powers need to be subordinated" (Locke, 1999, p. 146). It is therefore the law that needs to be the basis of the entire activity of the state and not the various situational initiatives of the head of the state, which are most of the time marked by a high degree of subjectivity and negative influences from around.

Furthermore John Locke came up with an idea that was to become the doctrine of the state law, i.e. that all people must observe the law and that all people are equal in front of the law.

The requirement to make the law the basis of the whole activity of the state and of the relation between state and its citizens will gradually become the credo of the entire European movement of political emancipation and of creating a state acting for the citizens and not as their supreme master. According to Montesquieu for instance – who is otherwise regarded as a continuator of the spirit founded by J. Locke and the classical author of the principle of power separation – the essence of freedom is represented by the government of the law.

In time, as the theoretical principles of the main representatives of the European Enlightenment are applied in practice, it shall become obvious that neitherthe power separation, nor the triumph of democracy in political life is enough to protect citizens from abuses conducted by the state or to benefit from truly fair laws, applicable in the same way for all citizens. One noticed that under certain circumstances democracy may be just as tyrannical to some categories of citizens like despotic regimes, so that many of the laws emerging from a democratic regime may be equally unjust like those emerging from a totalitarian regime. Is there perhaps no perfect compatibility between democracy and the state law? Is not democracy that form of political organization, in which the ideal inspiring the fight for the state law is closest to being fulfilled?

Before trying to clarify all these issues, one should first remark that it is not the democracy itself or the authentic type of democracy that is responsible for some failures mentioned above. Secondly, one should also make clear that no type of political organization, democracy included, is perfect and that therefore imperfections and failures are always to be found.

History shows that in order for the human society to function at its best, in accordance with the legitimate goals of all social categories, the state law and democracy need to be constant realities, in permanent interaction and balance; this balance actually imposes a series of measures regarding not only the way democracy is being applied, but also the way the state law is organized. However, it is also history that shows that this goal is fully possible in the case of traditional democracies, whereas in more recent democratic regimes – such as those established two decades ago in those countries freed from the communist doctrine – things are not so easy, which is for instance perfectly illustrated by the evolution of the political situation in Romania.

The transition from the totalitarian state to the state law represents one of the major achievements of the Romanian society after 1989. As it has been already stated, what differentiates a state law from a totalitarian state is the fact that the supreme authority is represented by the state itself, and not by a certain political party, the

whole activity of the state being governed exclusively by the law. The power in the state law is obtained and exerted in a democratic way, the multiparty system playing a very important role in this case.

However the two principles that make up the basis of the proper organization and functioning of the state law – *supremacy of the law* and *multiparty system* – and that grant the state law an absolute superiority when compared to the totalitarian state, stand in a certain antagonic relation, which may generate serious dysfunctionalities unless a series of additional principles meant to transform this relation in a harmonious interaction is applied. Therefore, in order to represent the absolute authority in a democratic state, the law needs to be indeed *the expression of the general will* and *the embodiment of the major interests of the society*. At the same time, in such a state, the party that following free and democratic election obtains the parliamentary majority is the one forming the government and having legislative initiative, in that it passes through the Parliament all the laws considered necessary in order to promote the interests of the people it represents.

Precisely in this point resides the delicate issue of government, since state administration and the law may place themselves between boundaries of certain interests, which obviously contravenes the fundamental requirement that the law is the expression of the general interest. This requirement is eluded and ignored whenever the government party acts on behalf of one social group, even though this may be, at a certain moment, the social majority, yet it is most of the time only a relative majority.

In those states that have a long tradition, in democracy the political class is usually aware of the fact that the state should always be the representative of *the whole society*, even though the power is held successively, either by the big parties or by party coalitions. Under these circumstances each political party is bound to act so as to come up with and achieve certain governing programmes meant to harmoniously bind general interests and various specific group interests. In other words, these are programmes from which all social groups can benefit. From the election competition is thus a competition among the best and most attractive programmes posing interest to the entire society, even though in some cases the interests of certain social groups seem to be better represented. Whenever the governing party does no longer have in view the general interest and whenever the interests of those belonging to the groups represented by the parliamentary opposition are favoured, the civil society, mass media and opinion leaders are bound to interfere so as to re-establish the conditions of balance and social tranquility.

The whole situation is however different in former Communist countries, implicitly in Romania, where ideas and repercussions of the old ideology still linger in the awareness of the people and of politicians. According to these, the state is the

instrument of class domination and the law – the will of the dominating class having the power of law, that the minority should be *absolutely* submitted to the majority. As reality shows, in most of these countries, including Romania, despite the two decades that passed since the rule of totalitarianism, the optimal functioning of the state law is obstructed by the tendency of the political class to transform the state power in an instrument that serves their own interests. Therefore, in Romania, the state has become to a great extent a *state of clients*, in other words a state that tends to act for the interests of the political clients of the governing party, regardless its political orientation; these political clients include those that by various means helped the party gain victory during election, i.e. businessmen sponsoring the party during the election campaign, party militants in national and local centers, representatives of the civil society supporting that party, leaders of some pressure groups also supporting the party during the election campaign etc.

When a certain party comes to power, its first major concern is to reward its supporters using the institutions of the state, its budget and the legislative instruments for this purpose. Firstly all positions in state administrations are given to the representatives and supporters of the governing party, starting with leading positions and ending with executive ones. With every new government they appear not only new Cabinet Office members, which is, after all, normal, but also new so-called public servants and officials, whose role should be precisely that of ensuring the stability and continuity of the governing activity irrespective of the political party at power. One no longer takes into account considerations regarding the expertise, the professionalism, the training or the professional qualification when naming certain persons in such positions, since the only criterion that matters is the party membership and the support granted to the party in its way to power.

In Romania, as it is already known, there is a law of the public servant, drafted after the European model, but nonetheless eluded by various legislative tricks. For instance, in order to be able to replace the heads of specific regional directions, or the general directors and directors from ministries, whose status is that of public officials, with reliable persons of the party, the left-oriented PSD[1] government from the period 2001 – 2004 employed the following legislative trick: it changed, by law, the names of all directions and departments and due to the creation of new institutions it thus organized a public competition for the key positions within these institutions. It is no surprise that this competition was won by the persons supported by the governing party and that the old public officials lost their jobs. Even though at that time the parties in the Opposition rightfully criticized such a measure, considering it illegal, the same parties that are now in power have taken the same measures so as to promote their own persons in those positions.

[1] PSD = Social Democratic Party [*n.tr.*]

Another clear example regarding this client-based way of occupying these positions of public officials is the application of *The Law of the Prefect*[1], according to which the prefect and the sub-prefects are no longer governmental officials losing their positions when the government changes, but are quite on the contrary high public officials. The Opposition basically agreed to such a measure but when it came to power it changed this law in such a way that it allowed them to maintain in those positions the same persons named by the government of the D.A. Alliance[2], who also gained the status of tenured high officials. In order to create the impression of legitimacy one organized an exam, where all the old prefects and subprefects took part, so as to officially name them as high officials, but the possibility for other people to participate in this exam was excluded. Obviously it would have been normal to have a public competition organized for these positions, since these are high officials' positions for a permanent time. It would have been again normal to have a transparent and entirely objective competition, which would have favored criteria of professional qualifications and not support from the governing party. After the D.A. Alliance dissolved, the liberal government changed all the prefects originating from the newly formed P.D.L.[3], even though the Law of the Prefect was still valid. Things repeated almost in the same way once the PDL-PSD government was formed (the first government from the mandate 2009 – 2012), the positions of prefects and subprefects being shared between the two parties; after PSD came out of the government coalition, their prefects and subprefects were obviously replaced.

If the militants of the party are rewarded by leading functions and positions in all institutions of the state administration, the sponsors of the party usually benefit from another type of reward: recalculation or even erasing of debts to the state budget, granting subsidies, providing help so as to win important auctions and bids for the initiation of some economic projects that may provide important financial benefits. However, irrespective of the nature of the reward - administrative, political or financial - all these are granted by legal reglementations, so as to justify the legitimacy of the measures, in other words to allegedly observe the *legitimacy* principle. Nonetheless, in such a case *legitimacy* cannot be substituted for *justice*, since the law is no longer just and impartial.

Dura lex, sed lex is precisely the saying invoked for the observance of the law in a state law. What this saying implies is that even though it may be *tough* the law must be respected because it is *just and fair*. Therefore, this saying may be completed in the following way: *Dura lex, sed justa est*. However, in the case of

[1] Law no. 340/2004 regarding the institution of the Prefect published in the Official Monitor of Romania, no. 658 of 21st July 2004, article 13.
[2] D.A. Alliance (*Justice and Truth*) – a political alliance in Romania formed between the National Liberal Party (PNL) and the Democrat Party (PD) for the 2004 elections [*n.tr.*]
[3] PDL = Democrat Liberal Party [*n.tr.*]

the above mentioned situations the average citizen may come up with the equally justified saying *Lex est, sed mala est*, in other words when laws serve exclusive interests of clients, they no longer have that specific moral authority ensuring the people's consideration for the just law, since the supreme principle of justice is ignored and breached in the case of such laws.

Sometimes one initiates and adopts laws in favor of politicians, meant to bring about image advantages to the party initiating the law and to pose difficulties to the other parties. For instance, towards the end of the 2005-2008 government, at the initiative of the opposition, one adopted the law to increase the salaries of the teaching staff by 50%. This law was also approved by the governing party, so as not to lose important votes in the forthcoming election campaign. Afterwards, though, the still ruling government asked the approval of the Parliament to postpone the application of the law, because there were no funds for such a measure. The reaction of the parties making up the parliamentary majority, i.e. P.S.D and P.D.L., was obviously virulent, yet pure demagogy, since they asserted quite openly that there were funds and it was all a matter of bad faith on behalf of the government. The law to increase the salaries immediately was thus still valid. However after the election campaign was over and the two parties once supporting the law made up a new government, the law was no longer applied, the justification being the same lack of sufficient funds.

Similarly one may mention situations when certain normative acts were adopted so as to promote some interests, from which people supporting the power were to benefit. These laws were rapidly applied, because they were meant to serve the immediate interests of those persons.

Therefore one may notice that, if from a strictly formal point of view, the law and the legitimacy seem to be respected, from the point of view of the content, the state law and the justice are quite often in a difficult position, first of all because the law is not always the expression of the general interest and it does not always embody the spirit of justice.

A first consequence of transforming the law in an instrument serving certain interests or in a means of political fight is that of constant and disturbingly often changes in the legal area. Within the last 15 – 16 years one adopted tens of normative acts in the same field of activity, the newer act replacing the previous one or bringing sometimes absurd amendments to the old law, so that this is eventually radically transformed. In achieving this endless legislative *renewal* one often breaches the principle of hierarchy legislative norms, which means that an organic law superior to an ordinary law is amended and modified by ordinary laws or by mere government's decrees and sometimes even by orders of ministers. In this way one breaches a fundamental request of the state law, that regarding the certainty of laws. „*The certainty of law – as mentioned in a book on the state law*

and the human freedom – is of utmost importance for the efficient and fluent functioning of a free society. No other factor has contributed more to the prosperity of Western Europe than the relative certainty of the imposed law" (Hayek, 1998, p. 226).

This completely unjustified policy to change the law every year and sometimes even every month is one of the major factors in diminishing the authority of the law and the consideration for the law. Ignored first and foremost by those obliged to act in favor of the law and justice in all fields of the social life, in other words by those drafting and applying the laws, the law shall gradually lose its authority in the eyes of the citizens. In Romania people tend no longer to obey a certain law, since most definitely it is going to be changed.

Consequently a genuine legislative thicket emerges and even those that are well intended seem to get lost. Furthermore the legislative *coherence* is severely damaged, which is otherwise a *sine qua non* condition for the viability and optimal functioning of any legal system. The provisions of such legislative acts quite often contravene severely against fundamental or constitutional principles and implicitly against those values that provide authority and power to the law.

Therefore the justice in Romania is far from being a genuine justice, which affects to a great extent the optimal functioning of the state law. However the main fault in this case belongs not only to those applying the law, but most of all to those initiating and adopting the laws. The first step that needs to be taken in order to bring back things to normal would be a change in the way of thinking and acting of the entire political class. Such a change though does not occur automatically, but by the active and focused intervention of the civil society. The civil society however should also be educated in the spirit of the fundamental value of a state law: *a fair law respected by absolutely all people and by all the institutions of the state.*

Here as well one should perhaps appeal to the philosophy dating back from the period when the theoretical basis of the state law was established. Our civil society, which is the main factor blocking the authority and subjectivity of the state in the activity of the public officials, owes a great deal to a well-known modern philosopher – G. W. F. Hegel, one of the first and most important theoreticians of such a way of influencing the political life. He is mostly praised for having drawn the attention on the danger the state may represent for the freedom of the individual. Due to all its structures, the state may exert absolute control on the people. The unorganized population is an amorphous crowd unable to pose resistance if the state were to ignore the principles of moral and justice. Starting from here, he concludes that isolated individuals will be able to pose resistance against excessive etatism only if they use the sole way of counterbalancing the huge force of the state, i.e. their association in organizations able to promote and

support the legitimate goals and aspirations of the members (Hegel, 1996, p. 291). What Hegel stated regarding the role of the civil society turns out to very up-to-date in the Romanian society nowadays, since it still has a lot to do until it reaches the point of a genuine state law.

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