SUBSTANTIATING THE STATE OF LAW

Assist.prof. **Nicuşor Crăciun**
University „Transylvania" from Braşov

Abstract: *The present essay aims at offering a short survey upon the State of law and its historical and anthropological fundament. The State of law is a necessity in any democratic and constitutional political system, although this concept tends to fade away because of its controversy. Surely, there are opinions according to which the State of law is a juridical non-sense since there is no state where there is no law, but for those who experienced the totalitarianism and the dictatorship, this concept represents the fundament of the democracy. As a consequence, we submit a short perspective upon the importance of the State of law for humankind, and for all the democratic systems, from its origin till present.*

Key words: short survey, political system, State of law, totalitarianism and the dictatorship, democracy, humankind.

The passage from the „law of the State" to the „State of Law" has been and still is a long and toilsome process. The State of Law corroborates with an „anthropological necessity" [1], stands for a „myth"[2], for a veritable dogma [3], for a pleonasm and a juridical non-sense [4], for a futile concept, which „arbitrarily mutilates other two concepts"[5]. If Western democracies have been going through a de-consecrating process of the State of Law, the budding European democracies need the guaranties of the State of Law, which turn It into a necessary, into a useful, even indispensable element. Therefore, if as regards Western democracies with tradition, the „State of Law" is a mere pleonasm, or a juridical non-nonsense, for the budding democracies within Eastern Europe, after the fall of the Iron Curtain, this concept has turned into a necessary, useful and indispensable element in implementing and exerting democratic values. Presumably not by chance, the signing States of the European Convention of the Human Rights would rather have used the term „pre-eminence of law", in the detriment of the controversial phrase „State of Law"; however, for those acquainted with the horrible realities engendered by totalitarianism, and for those having experienced the „State with no law" (which means that in many cases we could not speak but of formal legality), this phrase is no longer a paradox.

The idea of the State of Law has appeared ever since Antiquity, when a series of philosophical schools, especially the Greek ones, of the Sophists, as well as the one of the Legitimists within Ancient China; but also a series of thinkers, such as Plato, Aristotle, formulated the idea of substantiating the State upon the law, upon human right. In its classical form, the State of Law has come into being once with modern society, with society settling on laic, rational principles, on rightful principles

At the same time, there appeared several theories upon the State of Law. The first such theories pertained to natural law. The name of State of Law was put into circulation by Montesquieu; nevertheless the concept was elaborated and substantiated by the German doctrine of the second half of the 19th century.

The concept of the State of Law was worked out within continental Europe around three models: the English model, the German model and the French model.

In English version, *rule of law* progressively implemented itself in the sovereign monarch's entourage – *de legibus absolutus* – likewise as an attempt at limitatating, and finally as an attempt at consecrating the Parliament's sovereignty. The results manifested in two directions: 1) restriction of the Monarch's prerogatives and their attribution to a „power constituted" through the imperative norms of the positive law; 2) necessity of basing the Executive's acts directly or indirectly, on the Parliament's authority. *Rule of law* rather implied the principle of equality than the principle of lawfulness, the obligation incumbent on everybody to equally abide by law and jurisdiction. In German version, the stress lies on the necessity of ensuring the lawfulness in administration and its jurisdictional control. The Republic of Weimar introduced this concept into the Constitution, turning this way into a „Constitutional State", although it remained in truth a „legal State", the Legislative placing itself beyond control.

In the French version, the State of Law was „a lawful State", cultivating the principle of legality.

In general terms, through the State of Law there is understood the State that is substantiated on law, exercises its prerogatives on the basis of the law. It resorts to the force of arguments and to the law as an argument. It may be differentiated by the other forms of State through the following features:

- it is based on - and functions in compliance with - the supreme law of the Constitution. The Constitution is the one that substantiates, legitimates, arguments, orients and rules the entire activity of the State, of its institutions;

- there is a wide system of citizens' basic rights and liberties based on the law, on the Constitution, which guarantees their existence and their practical application;

- there is practically applied and abided by the principle of the separation of powers within the State;

- the organs and institutions of the State, both central and local, are the outcome of the vote, of the options expressed by the citizens, by their majority;

- in the State of Law, there is a clear delimitation between the institutions, the prerogatives and the attributes pertaining to the State and the ones of the political parties.

Political parties, whatsoever their place and role within society, cannot be mistaken for the State or for the reduced State, identified with these ones.

The measures adopted and decisions made do not have to reflect the position of a certain party, they have to materialize a result of the will and interests of the population's greatest part.

Such States of Law function of our days within democratic countries throughout Western Europe, Japan, Canada, USA etc.

The State of Law stands for a new conception model as regards the relations and terms among the institutions, between these ones and the citizen, between civil society and politics. It constitutes a supplementary guarantee for the citizen's rights and liberties.

In Romania too, after 1989, we may appreciate there has been underway an accomplishment and achievement of a State of Law, substantiated on the supremacy of law, of the Constitution. The Constitution drawn up in 1991 is based on principles and values that guarantee the existence of the State of Law throughout Romania, whom it expressly mentions as a matter of fact.

The life within the State has been made possible through sacrificing every individual's boundless liberty, so that we might ensure thereby the exercise of these liberties inherent to life [6]. When there is about "many" and all, the power and liberty cannot be exercised and consequently be realized, unless self-bound. The fact of deciding upon many (all) is first of all the result of delegating by these ones a part of their liberty; me

and the others like me have freely decided that somebody else (the Power) should decide for us. But, if this is only a partial delegation of our liberty, towards power, then this one should exercise only within the limits of our liberty achievement and liberty. Trespassing these limits imposes resorting to the responsibility by the self-abiding power. Power regulates social relations, to the purpose of achieving the rights and liberties. [7]. This occurs depending on the interests that focused upon. Therefore, many a time, the individual, overwhelmed, for instance, with the multifarious immixtures and controls from power, is in full right to ask oneself whether the power has not somehow its own limits and responsibilities and if so, which might these ones be? Anything, any process, phenomenon, process, system, unleashed from control, destroys or self-destroys [8].

History has proved that unlimited power oversteps the use and benefit of its creators, and it may even act in their detriment and harm them. The mere limitation of power, without instituting and putting into practice responsibility for trespassing its limits is an utopia, and its administration turns against those which set it up.

Within antique conception, power was fundamentally totalitarian, under all its three forms: as function, as organ and as will. Tomism, distinguishing between "eternal law" and "human law" has the merit to allege a "pretext" so as to limit power, whatsoever the forms for its exercise. This way, Biblical formula "Give Caesar what belongs to Caesar, and God what belongs to God" lays the basis for the limitation of power and for the institution of responsibility for having trespassed these limits, ideas which first materialized in habits and afterwards in laws. If, beforehand, the sovereign might pass and void laws to his will, through having adopted the principle "princeps legibus tenetur", he was still under obligation to abide by law, even if at the beginning it was only by natural law and not by the law of the city, by the civil law.

The apparition of Constitution, as "fundamental Law of the State", consecrated for the first time the principle of self limitation of the State's power, stating that its power should only exercise within the limits provided by the Constitution, therefore without infringing its own laws, and their infringement should incur the judicial responsibility of public authority and its clerks. Furthermore, in France, the Constitution drawn up in 1789 introduced for the first time the possibility of control upon legislative power, by Courts of Justice; the activity of elaborating the law had to be always in accordance with the Constitution [9]. The control upon the constitutionality of the laws aims at impeding the legislator to pass laws at will, therefore limits the law enacting to constitutional principles. This way, we may place outside the Constitution, the tendencies of power arrogation, plastically expressed through L'État est moi."

In England, unlike France, the Parliament and the king could not create the right, they could only discover and express its rules. Common Law lay at the basis of the right and the Legislator could not act against its spirit. The Revolution of 1688 marked a triumph of the "Parliament's supremacy", excluding any judiciary control upon the validity of the laws [10].

Nevertheless, within English colonies, inclusively within Northern America, judges arrogated "a right of control" through ignoring local laws, when they did not comply with English law, a fact consecrated during the year 1803 in "the principle considered essential by all written constitutions, that a law incompatible with Constitution is void and that the Courts, as the other organs of power, must implement and enforce the effects of Constitution."

History has proved that the self-limitation of the State's powers, without instituting responsibility for trespassing these limits, is insufficient in ensuring the human rights and protecting them against the despotic tendencies or the abuses by authority, be it

even judiciary. A series of constitutions and international documents consecrated and guaranteed human rights as for ever sacred and no order imposed by tyranny or by an arbitrary power could have enough authority to cancel them [11]. Guaranteeing human rights is given by consecrating through law and by instituting the reign of law above any authority, a desideratum that cannot be achieved without responsibility, without public authority and its clerk.

Consequently, any judicial sentence or any act issued by a public authority, illegally infringing a person's rights must be cancelled, entailing the adequate judicial liabilities, evidently merely on the basis of a procedure stipulated by law. As, ***only governing though law is the essence of liberty***, Montesquieu puts forth.

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