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# Short Remarks on the Rule-of-law State Concept

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**Abstract:** State law has not always existed in its current form, state concept has evolved over time, in this aspect, various theories have developed doctrines which they founded and strengthened him as the most viable form of political organization of human society. By analysis of the doctrine it is necessary to define the state legally, politically and socio-economic. Legal concept explains many relationships and situations established between active subject and passive state, a subject of rights and obligations and other social groups. Moreover, we can say about the political concept, that it originates in the formulations of thinkers on the origin and formation of the State, its evolution and its current meaning, according to political realities, while the socio-economic terms is a system of subordination organization, aiming to achieve a balance between legitimate personal interests of individuals and those of the communities, but first of all the interests of the nation and then the assembled humanity. There is a diversity of views on the state, which addresses two trends - an abstract one and another realistic, so we can say that it defines a unit of institutions, a human community situated on a territory and subject to an authority.

**Keywords:** democracy; public authorities; public administration

## 1. Introduction

The first article, paragraph (3) of the Constitution of Romania provides that "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed".

The concept of rule-of-law state has been established and founded by the German doctrine in the second half of 11th century. The idea of rule-of-law state constituted, beginning with the 18th century, the model of fundamental guarantee for citizens' rights and freedoms. The philosophic and juridical doctrine about human natural and imprescriptible rights[2] (Universal Declaration of Human and Citizen Rights, 1789) represents the original source of the rule-of-law state principles.

## 2. The Rule of Law

The rule-of-law state means the subordination of state towards law, the approach of this notion being made from two standpoints:

- the power of state as constraint force;
- the relation between normality and power.

As for the power of state as constraint force, it is interesting the relation freedom - power.

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[2] *„The aim of every political association is the preservation of the natural rights, which rights must not be prevented. These rights are freedom, property, security and resistance to oppression.*"

The feeling of freedom was born at the same time with man. The freedom, for man, was and will remain as natural and legitimate as the existence itself. The relation between freedom and constraint must be rational. Freedom without authority alters (Locke, 1690, p. 53 and following) such as authority without freedom degenerates. The law models, by behaviour rules which express general will, human disposition, which is natural otherwise, towards absolute, unconditioned freedom. The law is also that one which institutes and legitimates constraint, by framing it in a system of means and procedures.

The power and normality are in a mutual relation of inter-conditioning, thus the power creates norms which limit the power.

The problem of defining the rule-of-law state or the legality state, at a first sight, seems simple. Most of the authors asserts that the rule-of-law state is characterized by the fact that materializes the rule of law in its entire activity whether through its relations with citizens, whether with different social organizations on its territory (See the Constitution of Germany, Spain and Romania). At a thorough analysis, the problem of rule-of-law state appears more complex, as the state, as institutionalized organization, endowed with sovereignty, never acts as such in its interior and external relations, but through different organizational structures inside it. This finding is valid both for direct democracies and for the representative ones.

Direct democracy – namely that one characterized as being a government system where the people exercises its public power by himself, without resorting to an individual or group of individuals (Parliament) – it is more like a theoretical concept as the legislative function is exercised, in reality, by a body which is not identical with the people, in its entirety, namely the People's Assembly. Direct democracy is more and more rarely met in compared law, as its functioning suppose to meet a bigger number of conditions which are difficult to be accomplished concomitantly.

The State organized within the parameters of representative democracy acts, as a rule, through three main categories of bodies: Parliament, executive bodies, judicial bodies. In order to be in the presence of a rule-of-law state, the legislative, executive and judicial powers must carry out activity in compliance with judicial norms, working together and controlling reciprocally.

The Parliament, the authority which has the mission to adopt and alter the norms which are at the bases of the State's functioning, must subject to Constitution, the supreme law of every State.

The other public authorities must subject both to Constitution and to other laws.

The rule-of-law state cannot exist as long as through the Constitution is established the absolutism of one of the powers existent in the state, because the rule-of-law state supposes the existence of a political disposal based on the separation of powers in the State.

The definition of the rule-of-law state cannot be complete if we would not add, besides the fact that is characterized as being a state where the law rules, also the specification that through its content this law must also comprise regulations based on the recognition and effective guarantee of fundamental human rights and freedoms, inherent to human nature.

In order for a rule-f-law state to exist, it is not enough to be instituted a judicial mechanism which guarantees the strict observance of laws, but it is necessary that this law be given a content inspired from the idea of promoting human rights and freedoms in the widest liberal spirit and democracy.

The rule-of-law state is a state organized based on the principle of separation of powers in the state, where for its application the justice acquires a real independence and through its legislation aims at promoting rights and freedoms inherent to human nature, ensuring the strict observance of its regulations by its entire body, in its entire activity.

An essential trait of the rule-of- law state is represented by its judicial personality. In the conception of majority, the state, which is the holder of the public power, has not only a public domain, but also a private one. The State has the same civil condition which an individual has. It has the capacity to be owner and has the capacity to exercise all civil and legal acts which arise from the attributes of the

right of property, acts which can do any capable person, in person or by representation, if is an unable person.

There has been stated the question if the State, holder of public power, is or not different from the State, holder of private rights.

The solution given here (Disescu, 1915, p. 22 and following) has been that there is no difference, this unity characterising the rule-of-law state, state which must be subject to its own laws, whose rights and powers are limited within the relations with the other private persons.

Consequently, the rule-of-law state presents the following particularities:

1. There is established a status of power through Constitution;
2. The power is organized and its prerogatives are fulfilled in compliance with the provisions stipulated in the Constitution;
3. There is instituted a system which sanctions the supremacy of Constitution;
4. Judicial norms are constituted in a ranked and staged unit;
5. Human fundamental rights and freedoms are guaranteed and established as effective means of protection of people in their relations with power.

In order to identify how Member State of the European Union can offer to their citizens an effective and efficient administration, The Swedish Agency for Public Management conducted a research, four years ago, regarding identification of the best good practices in the public administrations of the Member States of the European Union. The purpose of this research has been the identification of some essential principles to ensure a good administration. Following this research, there have been identified 12 principles widely spread within the Member States, and without them we cannot talk about a good administration. The principles emphasized in this research are also found within the public administration in our country, as follows:

- Principle of legality, non discrimination and proportionality
- Principle of impartiality and correctness
- Principle of promptitude
- The right to be listened to – Ordinance no.27/2001
- The right to have access to personal file
- Access to information of public interest – Law no.544/2001
- Obligation of the public institution to declare, in written form, the reasons which led to this decision
- Obligation of the public institution to notify all interested parties on making a decision
- Obligation to recommend possible solutions to the problems presented by citizens, identification of several solutions to solve some situations and their presentation to the interested person
- Obligations to draw up minutes after each meeting
- Obligation to keep registers
- Obligation of public officers to be entitled to improve the quality of services

## 3. The Principle of Legality

The principle of legality is the fundamental principle of organizing and functioning public administration, principle which is found in every rule-of-law state.

In the case of rule-of-law, democratic state, based on the separation and balance of powers in state and on the observance of citizens' fundamental rights and freedoms, the assurance of the supremacy of legality principle constitutes the centre of maximum interest of any modern society.

The establishment of this principle, as basic principle for the organization and functioning of state administration, has been accomplished quite tardily, at the end of the 18th century, alongside with the

profound transformations which took place in Europe. The French Revolution in 1789 and the adoption of the Declaration of Human and Citizen Rights marked the transition from a police state to a state based on rules of law. This meant that there has been carried out, for the first time, the basis necessary for the creation of a modern system of administrative law, namely public administration subject to the rule-of-law state (Alexandru, 2007, p. 38 and following).

Within the context of the rule-of-law state, "the State must be a state governed by law. The State must establish with precision the limits of its competences under the shape of law, as is doing with the citizens' freedoms; it must not act more than its legal competency."

The principle of administration legality is an essential pillar of the rule-of- law state (Jurgen, Schwarze, 1994, p.219 and following) which, alongside with the structural separation of the powers in the state, must guarantee citizens' fundamental rights and freedoms. The development of equality principles of all before law and those of legal safety, as well as the protection of individual rights by the independent Courts, played a major role in completion of the subjection of state to the sovereignty of law.

The same content of the principle, subjection of administration, law, means, in Jacques Ziller (Jacques, Ziller, 1993, p.291 and following) opinion, the fact that particular persons dispose of jurisdictional means of appeal to assert the principle of legality, inwardly being independent from the actual organization of the control of administration. From this perspective, the limitation, through the laws of Parliament, of the powers of the executive constituted the first step to an effective guarantee of citizens' freedoms.

The Constitution of Romania, reviewed in 2003, enounces in art.1, par. (3) that Romania is a rule-of-law state, opting for the collocation "rule-of-law state", literally translation of the word "Rechtsstaat" proposed by the German doctrine, and not for that of "legal state", preferred by the French doctrine, considering that the legal state is only one of the levels of the rule-of-law state, which does not offer enough guarantees towards the arbitrary nature, the legislative remaining uncontrollable (Ion, Deleanu, & M., Enache, 1993, p.14 and following).

Trying to define the rule-of-law state, we notice that there exist many definitions, due to the complexity of its significances and implications. In the doctrine is hold that the shortest definition and apparently the clearest one is the definition given by Rudolf Wassermann, according to which the rule-of-law state is the state whose activity is determined and limited by law.

In the specialty literature has been expressed the opinion that two elements are always present in defining the rule-of-law state, namely: the relation between state and law, as well as the subordination of state to law (Deleanu, 2003, p. 77 and following).

According to art.1, par. (5) "In Romania, the observance of the Constitution, its supremacy and the law shall be mandatory". This formulation may raise the question if the constituent considered two distinct principles, that of constitutionality and the legality or the principle of legality must be understood *lato sensu* as obligation to observe the pyramid of the legal system, in whose top is situated the Constitution.

Accordingly, the obligation of law, the principle of legality which ensure the rule-of-law order, is something else than the principle of supremacy of Constitution or legality, which constitute the essence of the rule-of-law state, meaning the pre-eminence of law in regulating the social relations in the sense of art.16, par.(2) of the Constitution (Rozalia-Ana & Lazăr, 2004, p. 44 and following).

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