AMBIGUITY OF THE COLLOCATION "STATE SUBJECT TO THE RULE OF LAW"

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Abstract

This work has as purpose the analysis of the notion of "State Subject to the Rule of Law", considered within the doctrine as being ambiguous due to the fact that there are several methods to understand the base of state being subject to the rule of law, on one hand and on the other hand because, similarly to the concept of democracy, the abusive use of the concept to describe political and legal regimes which are completely different from one another voids it of any meaning. The concept of state subject to the rule of law is a doctrinary creation. Although normativised by many current constitutions, its contents mostly remains uncertain, precisely due to its origin which makes it an incessant debate theme, a theme upon which a generalised agreement has not been possible up to presently.The analysis of this notion shall approach the visions upon the state subject to the rule of law expressed within the doctrine: formalist, functionalist and material which provide three different types of organisation of the state subject to the rule of law which are complementary instead, not antagonistic ones.

Keywords: *stat subject to the rule of law, constitutionality, formalist vision, functionalist vision, material vision.*

Introduction

The notion "*state subject to the rule of law*", within the doctrine, is appreciated to be ambiguous due to the fact that there are several ways of understanding the basis of subjecting the state to law, on one hand and on the other hand, because, as in the case of the concept of democracy, the abusive use of the concept to describe political and legal regimes which are radically different from one another, voids it of any meaning. Its symbolic charge renders its structure too fluid, and its contents too little determined. This is why we find it useful to very synthetically survey a few of the state subject to the rule of law theories, on this occasion shaping its features, so that subsequently we should see its functions.[1]

The state subject to the rule of law concept is a doctrinary creation. Although normativised by many current constitutions, its contents greatly stays uncertain, precisely due to its origin, which turns it into a continual them for debate, a theme upon which a generalised agreement has not rather been possible so far. Created in Germany, under the name of "rechtsstaat", the concept has been taken over by the French doctrine under a critical but also constructive form under the name of "l'etat de droit" and it has penetrated even in the specific legal Anglo–Saxon world, even if the concept of rule of law, greatly stays distinct. We actually have three concepts, which although they seem to express the same thing, they are distinct in many regards, being tributary to a certain particularity of the legal culture using them.

If the objective of all theories which are the basis of these concepts is to enframe and limit the power of the state through law (this being the basic feature that we can find in all the theories), the manner to attain this objective is different, the state subject to the rule of law being

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[1] Dan Claudiu Dănișor, *Constitutional Law and Political Institutions*, Volume I – General Theory (Craiova: Sitech Publishing House, 2006), 170.

for some people a state which acts through the law, that is under its legal form, for others a state which is subjected to law or, as a third category of doctrines considers, a state of which law shows certain inner traits. These three visions – formal, functional and material – provide three different methods of the state subject to the rule of law organisation, but which are complementary instead, not antagonistic. If for the formalist vision, the state subject to the rule of law is reduced to a hierarchisation of the legal order, which has as purpose to limit random due to the fact that the different state's bodies can act only based on a legal empowerment given by a higher legal standard in the normative hierarchy as compared to those that the respective body can adopt, if for the functionalist vision the state not only that it acts using the law but also, it is subjected to it, although the basis of this subjection of the state to a law which is superior to it, is conceived in very different manners, for the material vision upon the state subject to the rule of law the law contents becomes more important than the form of the controlled normative hierarchy, the idea on which this vision is focusing being the one of freedom, and not the one of authority asserting organisation.

1.The concept of state subject to the rule of law

The concept of state subject to the rule of law was elaborated and substantiated by the German doctrine from the second half of the XIth century. The idea of state subject to the rule of law represented, beginning with the VIIIth century, the pattern of fundamental guarantee for the citizens' rights and liberties. The philosophic and legal doctrine on the human natural and imprescriptible rights[2] represents the primordial source of the principles of the state subject to the rule of law.

The state subject to the rule of law means the subordination of the state to law, the approaching of this notion being made from two perspectives:

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

With regard to the state's power as coercive force, what it is interesting is the freedom-power relation.

The feeling of freedom appeared simultaneously with the human kind. For the human kind, freedom has been and will remain as natural and as legitimate as his very existence. Relation between freedom and coercion must be rational. Freedom without authority is altered[3] as authority without freedom is degenerated. Law models, through behavioural rules expressing the general will, human tendency, which is a natural one for that matter, to complete, unconditional freedom. It is still law that institutes and legitimates coercion, enframing it within a system of means and proceedings.

Power and normality are in a mutual interconditioning relation, thus power creates the standards which limit power. The problem of defining state subject to the rule of law or the legality state seems simple at a first view. Most of authors claim that the state subject to the rule of law is characterised through the fact that it accomplishes law reigning in its whole activity, either through relationships with the citizens, and either with the different social organisations on its territory[4].

[2] Universal Declaration of the Human and Citizen's Rights - 1789: "The purpose of any political partnership is to preserve human's natural and imprescriptible rights: freedom, proprietorship and resistance to oppression".
[3] John Locke, Essay on Civil government, Dalloz Publishing House, p.53.
[4] To see German Constitution, Spain Constitution, Romania's Constitution.

2. Formalist vision upon the state subject to the rule of law

Formalist vision upon the state subject to the rule of law was imposed in Germany in the XIXth century, even if initially it encountered a substantial vision due to a liberal perspective and was consolidated under the impulse of the Kelsenian Normativism. Thus, the state subject to the rule of law is opposed to the police state. "*The police state is that in which administrative authority can, in a discretionary way and with a freedom of decision making more or less complete, apply to citizens all the measures they consider useful on their own authority, to cope with circumstances and to attain each moment the purposes they propose*".[5] Unlike this type of state, the state subject to the rule of law is "*a state which, in its relations with its subjects and in order to guarantee their individual status, it is subjected itself to a law regime, because it enframes its action upon them through rules, some of them determining the rights reserved to citizens, some others establishing in advance the methods and means which can be used to achieve state purposes*".[6] **Which is in the centre of this theory of the state subject to the rule of law is administration being subjected to the laws**. The administration cannot act but ***secundum legem***, that is based on a legislative empowerment and, certainly, it cannot act ***contra legem***. **This fact entails on one hand that any administrative coercion should be accepted by citizens, for they participate in the laws creation through Parliament elections and, on the other hand, it should be predictable, non arbitrary, for laws are not only general, abstract and impersonal, but also presumed to be known by everyone.** This vision upon the legal enframing of the administrative action is doubled in Germany by a material understanding of the law, which requires to the constitution "*to ask for any « material law», - that is any prescription regarding a rule of law applicable to citizens* - a *«formal law», which excludes ordinances based only on the monarch's will or only on the administrative regulating power*"[7]. Therefore, contrary to the French vision, the administration actually misses its own regulating power. This is one of the reasons for which theory could not be fully accepted in the French legal environment which is generally attached to a formal vision of law and which reserves to the administration an own normative power. Therefore *"Rechtsstaat" means that administration not only that it cannot impose by its own force legal duties to its subjects, but also that it must be limited to making that application specific and individual of the legal rules, being limited to the law application: to create norms, would mean, indeed, intromission upon the legislative function; despite all this*, ***a contrario***, *administration has available a decision making and initial action power with regard to its own affairs, its internal organisation – field in which it can take the specific or general required measures, without being necessary to be based on a law text. Through this it is manifested the political force of the* Rechtsstaat *theory which at the same time represents a barrier in the way of random, requiring an intervention of* ***Landtag*** *for everything that cause prejudice to individual rights and keeps the Administration prerogatives, placing the state itself outside the law application*"[8].

This vision upon the state subject to the rule of law starts from a trust out of principle in laws and in representation which is not at all unanimously shared. On the contrary, for some people "*normativism does not produce, essentially, but one result: it carries at the legislative level the dynamism of adaptation of Law which otherwise would have made the state to act in*

[5] Rene Carré de Malberg, Contribution à la théorie générale de l'Etat, Tome II, Sirey, Paris, 1920-1922, p. 488.
Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.
[6] Idem.
[7] Jacky Hummel, Etat de droit, libéralisme et constitutionnalisme durant le Vormärz, in Figures de l'Etat de droit, p. 144.
[8] Jacques Chevallier, *L'Etat,* (Paris: Dalloz, 1999), 17-18.

the administrative field". Overall, there will not exist either more or less change, as we find ourselves within a state subject to the rule of law or within a «*random*» one; there is only one difference of state's bodies obliged to make the adjustment in the two cases. This is not the essence of the Rechtsstaat (the state subject to the rule of law) to guarantee the predictability through a normative immobilism. What a citizen grains before inosculated administration, he/she will lose because of a law maker which «*breaks out within the norms*».

This theory settles the relation *state – law*, which is addressed in terms of priority/primordiality, claiming that the *state precedes law*. Therefore there is no previous right which is also superior to the state. If the state is subjected to law, it will make it voluntarily. The theory is based on an overreaction of sovereignty doctrine. A sovereign state does not know other limits apart from those placed by itself. Only prescriptions punished or ordered by the state can have the status of legal norms. Precisely due to the fact that the state is the only holder of the coercion force, it is the ***«only source of law»***. The contents of the legal order, which is structured so as to be organised as a state subject to the rule of law, is determined by the state. This does not mean that the state's power does not have any limits, but that the state establishes itself limits within which its power is asserted through legal norms. It can amend these norms, but as long as they are in force, it is held to strictly comply with. And yet, law represents for the state a true coercion, even if not an external one.

A first coercion results from the fact that state cannot suppress the very legal order, that it is obliged to act based on a legal title. A second one results from the social pressure asserted on behalf of the idea of law which substantiates the feeling of affiliation to a state. These barriers that the self-limitation theory places in the way of the state's power are yet fragile. State creates a limit of its power assertion, creating a legal order which is structured, hierarchised, stable and coherent, but the contents of this order is indifferent, which makes that the state subject to the rule of law should remain a mere form, of which contents is too handiest for the ruling power.

3. Functionalist vision upon the state subject to the rule of law

In the functionalist vision upon the state subject to the rule of law, the state not only will act through law, but it is subjected to it. The nuance is very important, for law becomes not only a means of the state's action, but an outer limit of this action. From an instrument of power, law turns into a guarantee of freedom. Not only administration is limited by law, but the very law maker who finds his/her action enframed by the existence of a law which escapes to a certain extent to its direct and exclusive control. Therefore, this time it is about a limiting from outside of the state's power. The basis of this subordination of the state to law is instead conceived in different manners depending upon the basis found for this right which in order to limit the state, should be anterior and superior to the latter*: God, Nature, Reasoning, Society*. But regardless of the basis, the state is held to comply with this right, not based on its own will, but based on a will which is superior to it. Since the creating fact of this right is found outside the state, it cannot modify it. Essentially, it is the idea transposed into the constitutional revision procedures which implies the direct intervention of the people or into the procedure of control of the constitution revision projects constitutionality.

The state subject to the rule of law becomes more complex from the formal perspective. If formalist theories of German origin instituted only a law priority before the administration, instituting a legal state, the state subject to the rule of law institutes a priority of law before the state overall, not only before its bodies and it cannot be conceived without the Constitution's supremacy in relation with the laws. Thus, the constitutionality control becomes mandatory for the existence of the state subject to the rule of law. But the very Constitution does not have an indifferent contents, it is not a mere postulate as in the normativist theories, which requires from

law a certain contents. Thus, this vision tends to become material, but it remains inaccurate, for the contents of the natural law, of the objective law, of social consciousness is too vague, too difficult to be transpose in accurate legal terms.

4. Material vision upon the state subject to the rule of law

For the material vision upon the state subject to the rule of law, *"if the state subject to the rule of law would be only a technical device which made the laws be subjected to the Constitution and which manifested the triumph of the norms hierarchy, it would not have at all a different excellence but to provide the intellectual satisfaction of Hans Kelsen's disciples"*.[9] For this vision the notion upon which the state subject to the rule of law is focused is that of freedom, not the norm one. Fundamental rights are in the centre of this construction, which keeps the benefits of the normative hierarchy, of the jurisdictional control of its compliance with the latter, but it gives them a new purpose, requiring the laws of the state subject to the rule of law the qualities necessary to guarantee the individual freedom by providing the legal security of the law subjects.

Conclusions

In the context of the state subject to the rule of law, "the state must be a state governed by the law. The state must establish with accuracy the limits of its competences under the form of laws, as it does with regard to the citizens' liberties, it must not act more than its legal competence."[10]

Romania's Constitution revised in 2003, proclaims in art. 1 paragraph (3) that Romania is a state subject to the rule of law, opting for the collocation "state subject to the rule of law", the literal translation of the word "Rechstaat" proposed by the German doctrine, and not for that of "legal state", preferred by the French doctrine, being considered that the legal state is only one of the levels of the state subject to the rule of law, which does not provide enough guarantees as compared to the random, the law-marking remaining uncontrollable.[11]

The laws of the state subject to the rule of law must first of all not only be structured as an hierarchy, but it must be certain, which requires the public character of the legal norms, a certain clarity of prescriptions, their non-retroactivity and stability, that is the predictability of the amendments that might be operated, qualities which make law provide the legal security of the subjects and their legitimate trust in the continuity of the state's action. Subsequently, law must be based, so as to be in the presence of a state subject to the rule of law, on certain values inherent to the human person (dignity, freedom), inherent to the democratic society (participation, pluralism) and to the liberal society (justice, compliance with the individual's rights and liberties, the state's intervention subsidiary and proportional). This axiological law subordinates its state through contents, the formal means being subordinated to the achievement of the values founding the juridical order.

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[9] Dominique Colas, *L'Etat de droit*, (Paris: P.U.F., 1987), p. VIII.

[10] Ioan Alexandru, *Administrative Law in the European Union,* Lumina Lex Publishing House, Bucharest, 2007, p. 150.

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