

EU LAW

Brief considerations on the rule of law from the perspective of EU member states¹

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Abstract

The state is a reality, it is present in the daily life of all citizens and is framed in many areas of social activity. However, it is an abstract concept, it is a support of power and allows the distinction between rulers and ruled to be established.

Europe is in the midst of rebuilding. Here is a great hope, which will only come true if history is taken into account: a Europe without history would be orphaned and unhappy. Time flows forward, and today is derived from yesterday, and tomorrow is the fruit of the past. A past that should not paralyze the present, but help it be different. The functioning and nature of the state cannot be understood without prior research of its origin and historical formation.

A picture according to a nuanced historical-political analysis is often spectral, but the amplitude can change or extend, as for example during a revolution. The transformation of great cultures, centers and voids of power, of universal empires and religions, of slavery, apocalyptic thinking and the hilarious solution are found throughout the historical process as elements.

Keywords: *rule of law, rulers and governed, persistence and change, sovereign fiscal authority of a frequently interrupted continuity.*

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The state is a reality, it is present in the daily life of all citizens and is framed in many areas of social activity. However, it is an abstract concept, it is a support of power and allows the distinction between rulers and ruled to be established.

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Europe is in the midst of rebuilding. Here is a great hope, which will only come true if history is taken into account: a Europe without history would be orphaned and unhappy. Time flows forward, and today is derived from yesterday, and tomorrow is the fruit of the past. A past that should not paralyze the present, but help it be different. The functioning and nature of the state cannot be understood without prior research of its origin and historical formation.

A picture according to a nuanced historical-political analysis is often spectral, but the amplitude can change or extend, as for example during a revolution. The transformation of great cultures, centers and voids of power, of universal empires and religions, of slavery, thinking in apocalyptic categories and the hilarious solution are found throughout the historical process as elements of a frequently interrupted continuity.

What remains is the alternation between persistence and change, between broken connections and continuities in themselves, as an innovative continuation of an existence full of lessons, but also the tense relationship between change and force: all important changes in history have taken place so far. by the use of force or triggered the use of force after an internal gear (riots, revolutions), or external (wars) and most often after a more complex gear between internal and external. Thus, history does not simply allow itself to be forcibly introduced into a bed of Procust of the "primacy of foreign policy" or the "primacy of domestic politics": internal and external factors are constantly related to each other, often they cannot be separated in historical reality, because in many cases they are in turn composed of internal and external sub-factors.

We must emphasize in this sense the essential unity of the historical process in time and space, despite the overwhelming abundance and diversity of human activities and behaviors. Numerous historical mechanisms are in principle everywhere and always valid².

The state is an ancient human institution, dating back about ten thousand years, from the time of the first agricultural societies that emerged in Mesopotamia. In Europe, the modern state, with numerous armies, fiscal powers and a centralized bureaucracy, which could exercise sovereign fiscal authority over a large territory, is much more recent dating back about four to five hundred years, during the consolidation of French monarchie, Spanish and Swedish. The rise of these states, with their ability to guarantee order, security, law and property rights, was what made the emergence of the modern world possible.

The Roman state was formed around the middle of the sixth century BC. The periodization of the history of the Roman state was made according to the three forms it knew: royalty, republic and empire. Republican Rome was never a

² See more Imanuel Geiss, *History of the World from Prehistory to 2000*, All Educational Publishing House, 2002, p. 15 et seq.

democracy as Athens was, but remained constantly under the leadership of its nobility.

In the Europe of the Middle Ages it was not possible to speak of states in the current sense, that is, of political constructions that include all the individuals of an extended territory. We have only recently learned that states represent relatively recent appearances in European history. The image of the Middle Ages, as it emerged in the minds of educated Europeans in the nineteenth century, differed only insignificantly from the image of the state configuration on the eve of the French Revolution: it is assumed the existence of relatively stable feudal states, led by kings. -they exercised power over the people divided into states: at the top of the hierarchy was the aristocracy, followed by the bourgeoisie, and finally the peasants. States were perceived as a principle of immemorial, eternal-human organization, "original creations of the human spirit," as Leopold von Ranke called them, "we could say God's ideas"³.

The first long-established modern state in Europe was France. The domain of the crown belonging to the French sovereigns, located in the Ile de France, remained insignificant until the twelfth century compared to the great duchies of the world.

In France, the *curia regis*, the council of the royal crown, had changed its character since the twelfth century; the circle of large landowners who advised the king on important decisions had become a governing and judicial body, consisting of petty nobles, clergy, and bourgeois, all knowledgeable in Roman law, appointed and paid by the king.

At the beginning of the fourteenth century at the latest, the foundations of the modern centralized state had been laid in France, as it appears to us in an almost finite form in Louis XIV's France. The character of the laws whose conclusion formula had hitherto been changed accordingly: "in the presence and with the consent of the prelates and barons". At the beginning of the fourteenth century, in its place can be read: "The king ordered and established by deliberation of his council" that is, "the king commanded and ruled in the crown council".

Until the French Revolution, the monarchy would remain for the whole of Europe the standard of concentration of state power; however, it boils down to an intermediate power, often only indirect, whose task was primarily to mediate as arbitrator and judge between the largely autonomous regions of the country, between different social groups and the public good of the state, settling differences. The fact that the modern European state has not allowed the concentration of power in one hand from the very beginning has several causes.

³ Leopold von Ranke, *Das politische Gespräch*, in *Sämtliche Werke*, Leipzig, 1887, p. 329.

One of them is found in the separation between the Church and the state resulting from the dispute over the investiture.

The classic example of a balance of power between the crown and the states was England, but the dual authority had a different look in each country. In France, the crown also needed the consent of

the states when exceptional financial circumstances demanded additional income. But unlike England, French monarchs generally managed to avoid the convening of "general states," which meant a significant diminution of the sovereign's freedom of action.

The French Revolution would translate the concept of the absolutist state into reality, introducing the revolutionary unitary state through armed violence and mass terror. The French example exerted an overwhelming influence in seventeenth- and eighteenth-century Europe. During this period, almost all the states of the continent were transformed into absolutist regimes; however, external similarities, the general tendency towards staging theatrical in the court of princely power, the numerous imitations of the court at Versailles, the European hegemony of taste and the French language cannot hide the profound differences between European states despite the current of reference to the model of Louis XIV. Each country had formed its Constitution in the light of its own historical configurations, and the absolutist model was adapted to situations, in the highest degree, individual, outlined over the centuries. One can therefore speak of the state of absolutism itself only from a strictly theoretical point of view; In reality, there were as many approaches to the absolutist state model as there were states.

Broadly speaking, it can be said that from the feudal relations of the Middle Ages and the Renaissance in Europe, the essentially secular state crystallized, liberated from the tutelage of the Church and at the same time a sovereign authoritarian state. In the civil and religious wars of the sixteenth and seventeenth centuries, the question of state power and sovereignty was decided; the monarch and the state were confused, at least in theory; the sovereign now had the „monopoly of legitimate physical violence”⁴.

Only the state had the legitimacy to claim its own subjects to give their lives and kill in case of armed conflict or to execute individuals outside the state, with a correspondent in the license to decide in the form of a sentence on the life or death of the individual.

Bringing all the power of one nation together in one place in order to destroy another nation was an idea that had fled in a nationalist phase of the liberation wars of 1813, which was eventually rejected by the state leadership and the army in all countries. Europe. The reaction of the conservatives had meant not only a

⁴ **Max Weber**, *Etica protestantă și spiritul Capitalismului*, Editura Humanitas București, 1993, p. 21 și următoarele.

rejection of democracy, the republic and the liberal constitution, but also a return to the basic rationalist political principles of the absolutist era.

The old pre - war laissez - faire liberal state was now completely obsolete. In any case, there had been a formula close to it, since the end of the nineteenth century, almost all the states of Europe had already begun to dominate the economic and social spheres. In particular, the Prussian-German state had become a pioneer in this regard by regulating sickness insurance against accidents, setting protective duties for the local old age industry and trying to prevent the excessive proliferation of associations by controlling subsidies and cartel law, and even directly influence the market price of electricity production and fuel demand.

A great mistake, of course, was that the Liberals pointed to England as a model for a liberal state not socially and economically involved - England itself, the standard of liberalism, had to accept the reproach of the liberal newspaper *The Economist*, which claimed that the state took over time the role of universal intervener⁵, and in 1911 the socialist Sidney Webb was delighted to find that if the English state did not engage in "even all industrial activities," it would "register, inspect, and control" them".

The war had made this evolution irreversible towards a state that would intervene economically and socially. The expansion of the state's activity, its growing involvement in the economy and society was the answer to a problem faced by almost all European states after the First World War, given the growing lack of legitimacy of democracy, whose institutions failed to remove the dysfunctions. deep social problems that the war had created.

Most post-war democracies were caught in the grip of the extreme left and right, while social and economic problems worsened. Antagonisms between states have intensified, as have those within them - extremist, nationalist and communist parties have gained ground on a democratic middle ground and are now setting the tone in public debates, while the threat of internal peace in the new states formed by the Habsburg, Russian, and Turkish Empires, it grew stronger because of the national minorities in Eastern Europe, who also demanded the right that had been granted to other, luckier nations: to form nation-states. In a word, Europe is on the brink of war both between and within states.

The new beginning of 1945 brought to an end the older developments that emerged at the end of the First World War: the creation of sovereign nation-states.

The tension of continuity and discontinuity created after the Second World War is what gave rise to a new identity. The states that have restored their unity, have this time relegitimized themselves on the basis of the sovereignty of the whole people, have set new limits. Their intermediary was the right.

⁵ **Vasile Marin**, United Europe and the legacy of nations, in *Revista Geopolitica*, year III, no.13 (3/2005), Top Ford Publishing House, Bucharest, p. 15-40.

It can be stated with full certainty that in the twentieth century, politics was massively influenced by controversies over the appropriate size and power for states. The century began with a liberal world presided over by the world's leading liberal state, the Sea Kingdom. As the years passed, the century was subject to wars, revolutions, economic crises, that liberal order of the world disintegrated, and the minimalist liberal state was replaced in some parts of the globe by a much more centralized and active state, a state that he alone gives himself increased powers⁶.

Reducing the size of the state sector was the dominant theme of the turn of the century, when the collapse of the extreme form of statism, communism gave further impetus to the movement to reduce state proportions in non-communist countries, a situation predicted since 1956 by Hayek or, as Huntington says, the „third wave of democratization“ had begun.

From now on, the law had the task of regulating the new democratic relations, of becoming a barrier of arbitrariness. From now on, the rule of law is no longer just a necessity, but becomes an interference of society, a reality, a standard of the existence of the national state.

In the French system, at the top of the administrative pyramid stands, with the role of guarantor of the legality of the activity of public administration the Council of State (Conseil d'Etat) which, as specified in the doctrine⁷, plays a decisive role in limiting the powers of the executive, especially by using the procedural means of the appeal for excess of power⁸.

The analysis of the Romanian legal literature regarding the Council of State reveals a comparative and synthetic approach of this prestigious institution which, as it has been shown, assumes in its activity a double function: jurisdictional and consultative. The Council is the supreme administrative jurisdiction that annuls all acts of the administration issued in violation of the principle of legality and rules on its responsibility. The citizen is thus effectively protected against excesses of executive power. A judge of fast-track proceedings, in case of urgency, may order all measures necessary to defend a fundamental freedom to which a legal person would have infringed. Also, the Council of State can easily compete with the Constitutional Council in its own field. In essence, the administrative law, which is his work, served as a reference to the latter⁹.

⁶ Francis Fukuyama, *State Building - The World Order of the 21st Century*, Header Publishing House, 2004, p. 10 și urm.

⁷ J. Schwarze, *Droit administratif europeen*, Office des Publications officielles des communautes europeennes, Bruylant, 1994, p. 224-225.

⁸ A. R. Lazăr, *The legality of the administrative act*, *op. cit.*, p. 52.

⁹ I. Alexandru, C. Gilia, I. V. Ivanoff, *European Political and Administrative Systems*, Second Publishing House, revised and added, Hamangiu Publishing House, Bucharest, 2008, p. 261-262;

I. Alexandru, *Comparative Administrative Law*, Lumina Lex Publishing House, Second Publishing House revised and added, Bucharest, 2003, p. 284-292; I. Alexandru, *European Administrative Law*, Universul Juridic Publishing House, Bucharest, 2008, p. 145-147.

The French model penetrated other states, in the form of administrative courts separate from the common law courts, including Romania received it by its establishment by law of February 11, 1864, for a period of only 2 years¹⁰.

French doctrine makes differences in the identification and hierarchy of sources of legality between written rules that do not come from the administration (such as the Constitution, international conventions, legal acts of the European Union, laws), judicial practice and general principles of law, rules from the administration herself¹¹.

In Germany, as a federal state, the sources of legality are found in the Constitution and the norms valid at national level to which are added the rules of European law, international treaties, decisions of the Federal Constitutional Court, the principles of international law and the Constitutions and norms valid at the state level; rules of local authorities.

The discretion of the administration was analyzed in German doctrine with reference to the notion of opportunity. Professor Earnest Forsthoff shows¹² that discretion means the legal order created by the conformity with the law of everything that will be judged opportune by the administration. At the same time, he points out that in this approach the administration is given a certain freedom through which they can take the measures they consider appropriate to fulfill the tasks for which that power has been conferred on them. The same author defines the notion of "discretionary power" as the legal order created by complying with the law of everything that will be judged appropriate by the administration, which, in our opinion, gives legality the main role in the activity of German public administration, which "is obliged to act objectively and in compliance with the law "principle established by the Constitution (art. 20 paragraph 3) and the other laws (as acts issued by the Parliament).

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¹⁰ The Council of State in Romania was established as an advisory body to the Government, with tasks and an administrative tribunal and functioned for only 2 years, until the adoption of the Constitution of 1866.

¹¹ C. Debbasch, *Institutiones et droit administratifs*, 4e Editura, Presses Universitaires de France, 1998, p. 334-351; A. van Lang, G. Gondouin, V. Inseguet - Brisset, *Dictionary of Administrative Law*, op. cit., 1997, p. 173; J. Morand - Deviller, *Administrative Law Course*, 5th Editura, Montchrestien, E.J.A, 1997, p. 239.

¹² E. Forsthoff, *Treatise on German Administrative Law*, translated by A. Fromont, Etablissements Emilie Bruylant, Brussels, 1969, p. 156, footnote 191. See A. Iorgovan, *Treaty on Administrative Law*, op. cit., p. 93.

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