

The State and the separation of powers

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Abstract

The State is a complex concept that can be addressed from a legal, political, social and economic perspective. The paper explores the meanings of the concept of State, State elements and stresses that the State power is one and indivisible and it is exercised through three functions and not to separate powers, namely the legislative function, executive function and the judicial function. The State institutions through which the three functions are controlled each other and collaborate to achieve the needs of society, which is likely to prevent abuses against citizens.

Keywords: State, State power, public functions, separation of powers.

JEL Classification: K10, K33

1. Preliminary considerations. The concept of 'State'

The State is a complex concept that can be approached from a legal, political and socio-economic perspective².

From a legal perspective the State is a legal entity³ of public law with full legal capacity and its own patrimony following the needs of the society. The State thus appears as "a form of creation of law"⁴ or "legal personification of the nation"⁵.

The State and the law are closely linked. The State creates law and, paradoxically, delimits the right configuration and State actions. The State, through representative political bodies, draw up legal rules and it becomes the guarantor of their observance by applying of the coercion, if their non-application voluntarily. Thus, in the acceptance of Kelsen "the State whose essential elements are people,

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² See Ioan Alexandru, *Introducere în teoria administrației publice*, Sylvi, Bucharest, 1997, p. 21 et seq.

³ The need for legal personality of the State is explained eloquently in the interwar Romanian doctrine, by M. Văraru: "If the State does not have personality could not be held liable for the obligations taken under an international agreement. The State personality theory explains very well the continuity of the State. Any government debts, are binding on another government, because the government did not engage him down, but the State as a moral person", M. Văraru, *Tratat de drept administrativ român*, Socec & Co., Bucharest, 1928, p. 69.

⁴ F. C. von Savigny, *System des heutigen römischen Rechts*, Berlin, vol. VIII, 1849, p. 25.

⁵ Esmein, *Droit constitutionnel*, V^e edit., Recueil Sirey, Paris, 1906, p. 211.

territory and power, is defined as a legal order relatively centralized, limited in its scope of validity spatially and temporally, subject to direct international law and effective as a whole and in general"⁶.

From a **policy perspective** the State is organized and operates according to leaders about the common good vision imposed following the conquest of power by democratic means (elections free) or dictatorships (in totalitarian States). This State is a political tool through which, as Aristotle said, city leaders solve problems and find means to improve civic life of the community⁷. Politics is an art in Aristotle's vision which aims peace of the city⁸. Nowadays, the modern State, in the view of J. Dabin, they shall not interfere in the economy or culture, affairs of individuals or groups; but it will have an economic policy, a cultural policy, a policy of morality and health that involves both a diagnosis given by the exigencies of public good in different areas, a plan or program of its own realization⁹. The common good - says Nicolae Titulescu - shows that under the laws abstraction moves people, and sacrificing an excess of logic, is to say "the man is made for law and not law for the man" which is absurd¹⁰.

From **the socio-economic perspective** the State appears as a tool for achieving the balance between individual interests and the overall interests of society, aimed at reducing social disparities and increased satisfaction in public service.

In the early twentieth century, under the influence of industrialization, urbanization and the trade unions, the State's role will shift from the position authoritarian, repressive, at that social actor, as a service provider. In France appears *Ecole du service publique* (public service school) represented by Léon Duguit¹¹, Gaston Jéze¹², Roger Bonnard¹³, who conceived of the State as a whole public service. In Germany, Forsthoff speaks for the first time in 1938 by expanding the State's role from the original function at the sole authoritative public service provider that focuses on social responsibility of the State¹⁴. Thus, under the imperative "welfare clause", the administration will establish municipal public utilities, public transport corporations and provide social and cultural services.

Today the State has numerous socio-economic implications. Thus the State sets the regulatory framework for economic activity, organizing the financial

⁶ H. Kelsen, *Théorie pure du droit*, Bruylant, LGDJ, Paris, 1999, p. 285.

⁷ See Aristotel, *Politica*, Paideia, Bucharest, 2001, p. 213

⁸ *Ibidem*.

⁹ J. Dabin, *Théorie générale du droit*, Bruxelles, 1953, p. 165.

¹⁰ Nicolae Titulescu, *Observațiuni asupra reorganizării facultăților de drept*, 1904, p. 25-26.

¹¹ See Léon Duguit, *Traité de droit constitutionnel*, Paris, 3^e éd. 1927.

¹² See Gaston Jéze, *Les principes généraux du droit administratif* (3 volumes) : *La notion de service public* (vol. 2), Dalloz, Paris, 2004.

¹³ See Roger Bonnard, *Précis de droit administratif*, 4^e édition, Librairie générale de droit et de jurisprudence, Paris, 1943.

¹⁴ Ernst Forsthoff, *Die Verwaltung als Leistungsträger*, 1938, cited by Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München, 1971, p. 75.

market supervisory institutions, collaborating with operators in the provision of public services, acts as operator in companies¹⁵ etc.

The concept of State can be defined, depending on the context it is used in either a broad or in a narrow definition.

In a **broad sense** "State" means the political entity consisting of a territory bounded by borders, a population and an institutionalized power. In this sense "the State" is synonymous with "country", including civilization, resources, people, territory, borders, authorities etc. That understanding is reflected in formulations like "the world's States," "countries with different levels of development", as illustrated by art. 10 of the revised Constitution which provides that "Romania fosters and develops peaceful relations with all countries ...".

In this sense the State has the following elements¹⁶:

- **Personal element** - is the population nation. The nation is a social unit which is based on a series of natural connections: national consciousness and language as a psychological element as externalizing it. In a democratic State the power belongs to the people who exercise it through its representative bodies.
- **The territory** - is that portion of land and water, bounded by natural boundaries or conventional, permanently residing on a community and on which the State power is exercised. It is characterized by two elements:
 - a) independence, which ensures the sovereignty of the State power in relation to the population and other countries. The national territory is inalienable.
 - b) equality of the territory which ensures the application and enforcement throughout the national territory of the legal norms, rights and freedoms of citizens, without discrimination of order ethnic, religious, political, wealth etc.
- **Institutional formal element** - public institutions through which the public power is exercised (sovereignty). The exercise of sovereignty is in compliance with legal norms and international law (eg compliance with the UN Charter on Human Rights).

In **the narrow sense** "the State" means all public institutions that govern the society and make up the State apparatus mechanism (formal institutional element). In this sense the term is used in Article State. 47 para. (1) of the revised Constitution: "The State shall take measures of economic development and social protection, to provide the citizens a decent standard of living."

The State arose as a necessity in human community life. This is underlined by the **theory of natural State**, superbly rendered to us by Eminescu in his political writings.

¹⁵ See Jean-Philippe Colson, *Droit public économique*, 3^e édition, L.G.D.J., Paris, 2001 ; G. Vlachos, *Droit public économique français et européen*, 2^e édition, Dalloz, Paris, 2001.

¹⁶ See Ion Corbeanu, Maria Corbeanu, *Teoria generală a dreptului*, Lumina Lex, Bucharest, 2008, pp. 48-55.

Eminescu regards the State as its own personality that grows as a human body having a body and a soul. *The body is the State land; the soul is the people's consciousness of its organic State in the strict sense, abstracted from the country and nation - State as such*¹⁷.

In Eminescu's vision, the **natural State** has two important functions: 1. constantly moving in this society where there are really struggling for existence and supremacy between individuals, classes, parties (*bellum omnium contra omnes*), the State's role is to harmonize these interests, the State regulator of this struggle, the stabilizing; [...] *individual interests are harmonized. After this the State idea: the idea of the harmony of function*¹⁸ 2. moral fairness of the State, which is required to prevent unjust enrichment - *is why [the State] will be through a rough organization, against the tendency to selfish these classes earn more, work less, not to ask in whose expense they live*¹⁹. By promoting the natural State theory, Eminescu will continue harsh criticism of Titu Maiorescu begun to address forms without substance introduced into Romanian society. But Eminescu will use paradigm to another operating mode - the economic and administrative. He understands the evolution of a nation as the natural result of economic growth interior. Automatic adoption of modern Western institutions would have meant progress, but on the contrary, more a spiritual impoverishment of a nation constantly ignored by the government.

Eminescu considers the developing a historical process naturally in *any moment of growth is conservation of the won in the past and adds elements conquered again, so true progress can not operate but preserving the one part, adding on the other: a living connection between present and future, but not without a series of jumping ordinance*²⁰. In the conception of Eminescu need of the function (the fund) is what determines the establishment of the body (the form). In other words the free development of the people will impose self build those institutions for which he needs that time to progress. A distinct point of view expresses Lovinescu that will try to justify the *theory of of synchronism* that borrowing forms create the prerequisites for the fund consolidation, everything is seen in terms of Romanian fund adaptation to the pace of modern European culture, *the soul living in the same space*. Also Cioran, expressing regret that *the Romanian democracy has created a national consciousness even shows that our existence can not get a sense only from a jump, a jump from definitive and essential*²¹.

¹⁷ Mihai Eminescu, *Personalitatea statului și organismele sale*, manuscript, 2257104r-208r, Opere XV, Romanian Academy Publishing House, 1993 pp. 1151 -1159.

¹⁸ Mihai Eminescu, *Influența austriacă asupra românilor din Principate*, Opere XV, Romanian Academy Publishing House, 1993.

¹⁹ *Ibidem*.

²⁰ Mihai Eminescu, *Studii asupra situației*, published for the first time in „Timpul” of 17, 19, 21, 22, 24 February 1880; Opere XI. Publicistica, Romanian Academy Publishing House, 1984, pp. 17-30

²¹ See Emil Cioran, *Schimbarea la față a României*, Humanitas, Bucharest, 2006, p. 44 and 46.

The *form without substance theory* and the *theory of of synchronism* still give rise to lively debate on ways to modernize Romania in the context of new challenges for connection to the system of values of the European Union²².

2. The separation of powers in State

Over time the philosophers have formulated various theories about the organization of State power which corresponds to the optimal driving modes.

Thus in antiquity Aristotle stated in *Politics* that "the law must be preferred sovereignty, that of the citizens of only one and the same principle, if the power should be entrusted more of them should not be made only guardians and servants of the law"²³.

In modern times, the English philosopher John Locke grounded the incipient theory of the separation of powers in his book published in 1689 "*Essay on the Civil Government*" where he speaks about the power essentially judiciary available to civil status under a contract with society members. Based on this contract the society members are guaranteed natural rights and the civil State acquires judicial power to punish and justice. John Locke see this judicial power as divided in *legislative power*, which is to determine facts that violate the rules of social coexistence and proper penalties, the *executive power*, which is designed to execute specific laws issued by the legislature and the *Confederacy power* exercising power outside the State in relation to other States²⁴.

Montesquieu is the one who has formulated for the first time in 1748 in the book "*De l'esprit des lois*" the principle of separation of powers in the modern sense, talking about the three powers: legislative, executive and judicial power. In his conception "in every State there are three kinds of powers: legislative, executive power regarding issues relating to the law of nations and the executive relating to those pertaining to civil law. Under the first, the prince or the authority to make laws for some time or forever and moving or repeal existing ones. Under the second, the Prince declares war, concludes peace, sending or receiving messages, take security measures, prevents invasions. By virtue of the third, punishable offenses or judges disputes between individuals. On the latter we shall call judiciary power and the other simply the executive power of the State"²⁵.

This approach ensures separation of powers, according to Montesquieu, a moderate ruling aimed at fostering safety and every citizen can exercise their full liberties. "Everything would be lost - says Montesquieu - if the same man or the same body of leaders, whether of the nobles or of the people would exercise those

²² About Romanian legal culture and its connection to the values of the European Union see Manuel Guțan, *Forme pe un alt fond: transplantul juridic comunitar și cultura juridică românească*, „Pandectele Romane” no. 5/2008, pp. 17-39.

²³ Aristotel, *Politica*, Antet, Bucharest, 1996, p. 110

²⁴ A se vedea Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *Filosofia dreptului. Marile curente*, All Beck, Bucharesti, 2002, p. 167.

²⁵ Montesquieu, *Despre spiritul legilor*, Scientific Publishing House, Bucharest, 1964, p. 195.

three powers: that of making laws, that of bringing out the decisions of public and that the offenses or disputes between individuals"²⁶. Power, Lord Acton said, tends to corrupt, and absolute power corrupts absolutely²⁷.

The existence of the three powers that control each other and collaborate to achieve the needs of society is likely to prevent abuses against citizens. According to Montesquieu, "because there is no possibility of abusing power, be that through the established order of power is restrained power"²⁸.

The theory of separation of powers formulated by Montesquieu underlying the organization of democratic States today. This theory has not been free from criticism over the years. The most important criticism stems from the fact that the **State power is one and indivisible** and actually talk about the existence of functions of the State, not to separate powers, namely the **legislative function, executive function and the judicial function**²⁹. Corresponding to their powers established by law, the State bodies will be properly grouped of these functions in the legislative body, executive or judicial.

Maurice Hauriou is one that will define terms of power, function or organ in a manner that corresponds to the realities of today "there are three related concepts that should be distinguished with great care:

1. That the *functions* of the State, which is the administration of justice or the to legislate, or to govern or administer;
2. That the *bodies*, which are organizations of persons entrusted with the exercise of their functions
3. That the *public powers*, which are the expression of powers (competences) under which organs exercising their functions"³⁰.

3. Conclusions

Nowadays the stake is not so separation, as the balance of powers. The balance of powers should allow, from a legal point, the avoidance of overlapping of the exercise those three powers, that they might be unable to "assign" a sovereignty whose sole owner is the people, and from a politically point, preventing abuses that holder's unique powers may commit, abuses that would jeopardize the freedom of citizens³¹.

In Romania, according to art. 1 para. (4) of the revised Constitution, the State is organized on the principle of separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy.

²⁶ *Idem*, p. 196.

²⁷ Letter to Bishop Mandell Creighton, April 5, 1887 published in *Historical Essays and Studies*, edited by J. N. Figgis and R. V. Laurence, London: Macmillan, 1907

²⁸ Montesquieu, *op. cit.*, p. 194

²⁹ See G. Burdeau, *Traité de science politique*, LGDJ, 1966, p. 300

³⁰ Maurice Hauriou, *Précis de droit constitutionnel*, 2^{ème}, Ed. Sirey, Paris, 1929, p. 347.

³¹ Pierre Pactet, *Institutions politiques. Droit constitutionnel*, Editions Armand Colin, Paris, 2001, pp. 110-111

The concrete modalities of cooperation of the three powers and their integration in socio-political system of social organization are determined by the legal rules.

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