

## SOME ASPECTS OF A LEGAL STATE

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### (Abstract)

Nowadays defining the term of a democratic legal state is a very actual issue in the process of building and developing a civil and democratic society. Although there are still certain disagreements about this term concerning its comprehension, it is important to point out that a legal state is, in the first place, a philosophic- theoretical value and that it is its essential zone of existence. In fact, the term of a legal state in its possible modern theoretical meaning refers to a legal sociological category giving optimal frames for human freedoms, giving people the equal chances for success and particularly giving them the equal position in front of the state and laws. It also refers to some state limitations and depersonalization of people performing some state and other public functions in the society. In other words, a legal state is such a political organization in which any individual or a group do not rule, but there is only law which rules and everyone is obliged to obey this rule.

*Keywords: a legal state, justice, righteousness, ruling of law, a democratic legal system, power division.*

### Introductory remarks

Even nowadays, determining the term of a legal state does not lose its actuality in spite of the fact that a state as a politically organized and institutionally legal product has historically existed for many milleniums. For the last two decades this issue has particularly been important to the countries where there was a collapse of the concept of the real-socialism and socialistic self-management. After half a century one party social-political existence, the countries of the East and South-east Europe and the Balkans states, including the states of ex -Yugoslavia, are following the way of building the institutions of politically plural and democratic society as important presumptions of a legal state.

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Reality and contemporaneity of the topic became actual again for the international public through "the happening of people" and the so-called "African spring".<sup>1</sup>

The basic constituents of a general term of a state as a political association having an absolute authority on the exactly determined territory with the basic demographic corpus are generally accepted categories of the general-theoretical scientific way of thinking. And while a territory and existing population on it are, in a theoretical and practical sense, historical constants, the forms of organizing and the way of demonstrating mastery are absolutely social-historical changeable variables which determine a position of an individual in a state. Therefore, this piece of paper will basically concern the issues of government functioning as a basic element of a legal state.

At the very beginning there is imposed quite a logical question: what is a legal state, and what makes its sense and its basic essence? First of all, one should say that, because of a scientific disagreement and controversies concerning a generally accepted definition and opinion what a legal state is, one small book can at least be written - a chrestomathy of theoretical and operational definitions of a legal state. However, it is important to emphasize that a legal state is, first of all, **a philosophic-theoretical value** and that it is its essential zone of existence being said by many authors. Therefore, theoretically viewed, what a legal state could be?

### **A notional determination**

Attempting to give an answer to this question, first, we should say that, in an organized civilized society, the very nature and essence of a human existence are made of both personal and legal safety. A personal or individual safety, a social freedom and the inviolability of the private property are exposed through an equal treatment with other citizens in front of state and law regardless the personal and collective characteristics, through an institutional

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<sup>1</sup> Being unsatisfied with multi-decade autocratic ruling of their leaders, people of Tunisia, Egypt, Algeria, Libya and some other countries of the Arabic world started the wave of social riots, dethronement of the leaders and building a new democratic government in spring of 2011.

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protection from the state arbitrariness and through searching for a human's happiness, surely in a form every individual can imagine it. It is sure that it is hard to create and find an ideal type of society and state. Since the ancient times, Socrates and Hellenic philosophers Plato and Aristotle, anticipating such values has always been and stayed mainly a hard way through which scientists must pass, as well as the wishes of political visionaries, but also the wishes of common people, the dreamers.

Precisely, the term of a legal state in its possible modern theoretical meaning refers to a legal sociological category giving optimal frames for human freedoms, giving people the equal chances for success and particularly giving them the equal position in front of a state and law. It also refers to certain state limitations personalized by the former "Leviathan" and depersonalization of people performing some state and other public functions in the society. In other words, a legal state is the one in which **any individual or a group do not rule, but there is only law which rules and everyone is obliged to obey this rule**. This ruling of law must be based on meta-legal, better to be said generally accepted humanistic principles such as justice, righteousness, natural human rights, moral and democracy.

Coming to the ground of a social reality in which science and theory value their imaginative values and confirm their scientific validity, one can say that a legal state is, first of all, as a theoretical **concept and pattern for fulfilling optimal human justice in the society**, a synonym for one democratic state or a state as a desirable legal value. Such a state should enable **human's dignified upright walk**, and it means a materialization of human's essential natural rights and freedoms, as well as a limitation of arbitrariness of any government and its functioning within a democratic legal system. These human freedoms and rights refer to the rights and inviolability relating to the state government which can, in the case of its breaking the human rights unscrupulously, be responsible in front of an independent state court. If an individual feels harmed by the acts of government organs in realization of his inviolable rights and freedoms, he can, according to the law, ask for a protection in front of court as an independent state organ in the system of power division. So, a legal state is a state in which nobody is above the law, even a

legislator. According to Gustav Radbruch: "A state is obliged to bring laws only under a condition of considering itself being bound by these laws".<sup>2</sup> **Meaning and essence of one democratic legal state lie in its subordination to the given laws.**

A legal state conceived in this way is not a historical coincidence. For, as William Hazlitt would say, if a mankind had really wanted justice, it might have got it already.<sup>3</sup> Since, apparently, it was not the case, people, **most likely, created a legal state as a model through which they replaced justice as a value with a value of a legal state.** In this way, it was done little, for one universally human value was replaced with the other one, a purely legal value. However, in this way, when we are talking about human relationships, it was done much, for **one emancipating idea about general legal equality, safety and predictability** was introduced into those relationships. We can freely conclude that if, let us say, a mankind had not wanted an absolute justice, then it is sure that it had wanted a legal state as one of the proved forms of human justice. For, a legal state is based on the idea that legal rules, until the time they are worth, have the same bounding power for both the directors and those being directed. In this way, two important ideas are being joined into one whole: on one side, the idea about a general legal obligation including a legal obligation of a state sovereign, and, on the other side, the existence and guaranteeing of the civil and human rights and freedoms. In other words, **a legal state as a social product does not allow anyone to be out of or above a democratic legal system.** Exactly this is the biggest guarantee of human rights and freedoms and an obstacle for any usurpation of these rights. A legal limitation and excluding any subjectivity and arbitrariness of those who perform some state functions in their applying the law, make a corner stone of principles of a social justice.

On the basis of a historical experience, a legal state has, according to its relevant characteristics, become **an instrumental frame** for constituting the basic elements of a civil society. Chronologically, this frame is revealed, in the first place, through the abolition of class privileges, then through a

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2 Radbruch Gustav: *A Philosophy*, Belgrade, 1980, page 236.

3 Hazlitt William: *Of Persons One Would Wish to Have Seen*, (1826)

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limitation of a political power by using a law, through establishing an efficient democratic control and performing the state and other functions in public, through the division of power, binding the state by its own laws, an adequate (both material and legal-institutional) guarantee of basic human rights and freedoms, through an independent judicature, political pluralism and a free game of a quality competitiveness in both an economic and cultural fields.

It is logical to ask oneself what caused and determined the emergence of an idea, and then an institution of a legal state. It seems that our giving the answer to this question should start with the following.

### **A genesis of a statehood**

It is evident that **a dictatorship and totalitarianism prevailed in a longer period of a historical development**, whose basic characteristic was an unlimited power of a ruler as an individual or oligarchy groups, because they had absolute legislative, executive and judicial power. All power bearers were their subjects. During those periods existed neither guaranteed human rights and freedoms nor they were materialized, for there was neither any legal safety nor any serious legal limitation of absolute bearers having such a power. None could even speak about any political plural elements making a basis of forming a democratic authority. Such systems as a historical reality were the following: the ancient autarchy, a dictatorship in Rome, a despot monarchy in Byzantium and absolute monarchies during the period of feudalism. The main characteristic of previously mentioned totalitarian-dictatorial regimes is their long duration and more or less their stability and unchangeable way of ruling.

With the industrial revolution there came a period when certain ideas and pleading for **human rights and freedoms, a legal limitation of people occupying the highest positions in the functions of power, a power limitation through its division into legislative, executive and judicial power as well as through mutually limiting factors** got their importance and emerged to the first place. The socio-political life during this epoch was characterized by numerous political parties as an expression of forming a democratic authority, forming an authority through free elections and an equal treatment of

all citizens having the right to participate in elections for the highest organs. The following democratic systems enabled, as distinguished from totalitarian-dictatorial systems, materializing of human rights and freedoms, the development of science, modernizing producing techniques and technology, forming a free market as well as forming every citizen's creative and entrepreneurial skills depending on his qualities and wishes. All these made a social frame for one humane democratic civil society.

The best example that politically plural societies are economically more developed and socially more progressive than dictatorial one-party societies are the examples of countries such as the USA, the Great Britain, France, Germany, Canada etc. Precisely, a legal state, together with a democratic political system, is the best basis for realization of such social - state communities. The last two centuries, without doubt, proved this thesis.

### Basic legal acts

On this very spot it is important to point out that the beginning of the legal state theory was preceded by phases being marked by adopting certain **resolutions about human rights and freedoms**, democracy and limitations of, till then, almost limitless rights of a sovereign. Those declarations and documents were the legal acts containing the broadest social wishes in the process of forming democratic states and the platform for bringing the first constitutions. They contained the requests concerning individual rights as a predominance to the laws, but also some principles about the state organization as well as about the highest organs and their competences.

Talking about this topic, according to certain order, the first such declarations can be found in England and they date from the 13th and especially 17th centuries. The first such an act is **The Great Liberty Charter (Magna Carta Libertatum)** from 1215 containing, besides the rules referring to the feudal organization, some regulations ensuring the individual freedom and inaugurating the rules when one citizen can be accused and when he can be judged. This act also includes certain principles according to which a tax cannot be determined without a consent of people's representative too. After adopting

**The Great Charter** of the King John of England "The Magna Carta". Exactly the same goes to the limits of the English constitutionalism in the sense that the established legal system

The other declaration of the royal prerogative through the declaration of the royal speech in the Parliament of 1689. Many a civil rights. Many a the fight of the civil rights in European countries. England (1668-1689) Declaration of Rights "The Bill of Rights", the "Bill of Rights" also legally and politically thanks to proclamation

**Similar to this** the Declaration of Independence of the United States. The **Constitution of the United States** not contain the rules of the Congress suggested a constitution and they became the Bill of Rights and freedoms.

In France the first **human and citizens rights** it is well-known all over the world was brought The Declaration of the Rights of Man and of the Citizen. The established

4 Hobs Tomas, Russo JJ.

**The Great Charter** it was clear that law was not "the wish and authority of the Crown". Exactly this socio-legal axiom telling us that the power of the monarch goes to the limits determined by the law makes an ideological basis of the English constitutionalism and a future democratic comprehension of a legal state in the sense that the authority of a sovereign can go only among the frames of an established legal system and not out of or above this system.

The other declaration- **Bill of Rights** from 1688 contains limitations of the royal prerogatives and, along with this, it insures certain citizens rights. Through the declaration there are guaranteed the petition right, freedom of speech in the Parliament, more liberal relationship during elections and other civil rights. Many authors <sup>4</sup> think that a legal state is undoubtedly a result of the fight of the civil class for the political power whose beginning is, in the European countries, connected with the so-called "Glorious revolutions" in England (1668-1669) and goes to the 20th century. And, we can see that the Declaration of Rights (Bill of Rights) was brought in 1668. After that "Glorious revolution", the authority of the Crown was not only legally limited, but also legally and politically controlled by the independent Parliament, mostly thanks to proclamations of that Declaration.

**Similar to this in America**, on the 4th of July 1776 there was announced the Declaration of independency, and, after that, there came the bringing of **the Constitution of the USA (1787)**. However, since that Constitution did not contain the rules concerning individual human rights and freedoms, the Congress suggested adopting 10 amendments (1791) along with the Constitution and they became valid in all states members of the USA. These amendments contain the Bill of Rights and they guarantee individual human rights and freedoms.

In France the first such a declaration was a well-known **Declaration of human and citizens rights** from August 1789 constituting of 35 acts. Today, it is well-known all over the world. In 1793, along with that Declaration, there was brought The Declaration of human and citizens duties consisting of 9 acts. The established rules, being parts of these two declarations, were trans-

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<sup>4</sup> Hobs Tomas, Russo JJ., Lock John, Kant Immanuel, Radbruch Gustav ...

ferred to the Constitution of France in special sections referring to guarantees of citizens rights.

Precisely the historical and socio-political character of these declarations, **mostly becoming a part of contemporary constitutions** and basic laws of democratic states, points out the meta-legal establishment of law and regulations being made as an expression of advanced and civilized ideas of economic-technological and cultural development of the society from the 13th century till today, and in whose centre there have always been and stayed human rights and freedoms being liberated of all ties of the historical heritage.

If a **legal state** is analyzed from the political point of view, then it represents **an optimal materialization of human freedoms**, which is based on the power division and which is supported by the greatest part of population through the legitimacy principle. The high level of tolerance and consensus among people (the voters) giving the legitimacy to the legal state are the most important for the political comprehension of a legal state. Therefore, when we are talking about a legitimacy of any authority, it seems that it is always actual a legitimacy axiom being uttered by Russo: "the strongest man is not always strong enough to be a master unless he transforms his strength into law, and obedience into duty".<sup>5</sup> Obviously this formula of legitimacy, from the political point of view, puts its two characteristics in the first place and these are the ruling of law and not of force, and subordination of all, even a master to behave himself in accordance with the established law. The legitimacy principle imposes duties, which are, in fact, axioms of a legal state.

**The public opinion and freedom of getting informed** are important democratic and controlling mechanisms of the materialization of the legitimacy principle in a legal state.

This proves a fact that it is possible the legitimacy principle to be endangered even where there are no dictatorship and totalitarianism, for there appear certain aspirations of the administrative authority to be independent and free from legal control and to neglect the factor of the public opinion. It is usually done under the guise of "a full safety" and "unity".

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5 Russo J J, *The Social Contract*, Belgrade, 1949, page II

**The power division** is comprehensible and intuitive, obvious in the states whose political essence and the law is convincingly given by Montesquieu saying: "Everything works for the persons, either nobles or the authority, i.e. the authority of decisions and the authority for every man having power within the law limits. That is why in every organ has a full and complete authority to different

### **The influence on**

One should point out that **both an economic development** are talking about social and economic referring to the previous Smith: "The economic development of material and human resources on the macro-economic level, which do not count sufficiently, and which do not fit convenient global frames. The economic development legal frames, which, not only establishing of a status quo, but **only making the game more fair**. In this way, the role of the state is to establish "fair rules", whose benefits

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6 Montesquieu S., *About the Spirit of the Laws*

7 Smith Adam, *Researching into the Nature and Causes of the Wealth of Nations*



**The power division principle**, in the political sphere, depreciates the incomprehensible and intact sovereignty of any power bearer, which is especially obvious in the states where there is a tradition of legal constitutionalism. The political essence and the meaning of the power division principle were convincingly given by Montesquieu in his well-known book "About spirit of law" saying: "Everything would be lost if the same man or a board of distinguished persons, either noblemen or ordinary persons would do all three elements of authority, i.e. the authority of bringing laws, the authority of executing public decisions and the authority of judging for crimes and private persons conflicts, for every man having power is inclined to the misuse until he comes to the law limits. That is why it is necessary to limit the power of any organ, so none organ has a full and complete power, i.e. it is necessary to give each of three authorities to different organs, so one authority limits the other one".<sup>6</sup>

#### **The influence on the economy**

One should point out that **a legal state is an important condition for both an economic development** and a legal certainty and safety when we are talking about socio-economic relationships. A very illustrative example referring to the previously mentioned statement is something said by Adam Smith: "The economic development of one country does not only depend on material and human resources, financial stimuli and good decisions at the macro-economic level, but also on the resource which was not taken into account sufficiently, and which is now called a social capital consisting of convenient global frames. These frames can mostly be reduced on convenient legal frames, which, not any more, have as their primary characteristic the establishing of a status and the direct distribution and allocation of values, but only making the game rules for one, in any aspect, a society of free individuals. In this way, the role of the so-called distributed laws is reduced, and the role of "fair rules", whose benefits we do not know in advance, is extended."<sup>7</sup>

<sup>6</sup> Montesquieu S., „About spirit of law”, Belgrade, 1989, pages 175-176

<sup>7</sup> Smith Adam, *Researching of economy and cause*, Kultura, Belgrade, 1970, page 998

Therefore, if we carefully analyze what factors have, to certain number of countries, brought an economic rise and prosperity, besides the role of human and material resources as well as financial stimuli, the most important, but an insufficiently noticeable role refers to **a convenient, rational and stable global legal system**. It ensures certain game rules, certainty and relatively predictable safety and it gives only basic frames within which an economical social game can take place, and all socially accepted kinds of knowledge and skills can be practiced. Only these global systemic frames can be provided in the widest national and international proportions. Adam Smith saw the fruits of that work distribution as a basic source of productivity and creation of economic values and wealth of one industrial society.

In this piece of paper, which is segmented according to some relevant parts being important for observing the whole picture of a legal state, we would like to put an emphasis on the segment referring to the quality of law from the point of view of justice, righteousness and moral regulating the relationships in a legal state. Therefore, it is essential to mention the standpoint concerning a legal state according to which **law should be an intellect of a community established on justice, the natural law logic, righteousness, universal moral values and the principle of the social rationality**. This conception, first of all, obviously sees a law as a social ratio and not as a voluntas or force claimed by Kelzen or Marxists. In other words, a law is a spiritual product of one social community whose sense and essence are in accordance with the nature of things and whose content is objectively given regardless people's will and their subjective wishes.

A legal state as the broadest expression of this conception should provide, through its institutions and prescribed procedures, a legal limitation and legal control of the authority in accordance with law, and it should guarantee inviolability of basic rights and freedoms of its citizens in the sense of a syntagm that everything which is not forbidden by the constitution and law, it is considered to be allowed for an individual, and that everything which is not obligatory by the constitution and law, it is forbidden for the state and its organs.

## Final reflection

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### Final reflections

Although as a social-legal phenomenon a state has existed for several milleniums, the determination of the term of a legal state, being present in theory for the last two and a half centuries, is a very actual issue when we are talking about the end of the 20th, but also the beginning of the 21st century. Admittedly, geographical-biological elements of a statehood, the bounded territory and a demographic substratum on it are unchangeable constants of a state. The third element, an absolute power, has evaluated during the history starting with dictatorial-totalitarian regimes, through a legal limitation and depersonalization of the individuals performing the highest public functions and the division of power as an expression of a balance and mutual control in the realization of the constitutional functions of legislative, executive and judicial power. The organization and establishment of power, on the new democratic bases, is a presumption of materialization of personal rights and freedoms of a human and citizen, but also the whole social and economic development based on the principle of legitimacy too. A legal state has its formal-legal beginning and genesis in the English Great Chart of Liberty, the Declaration of rights, the Constitution of the USA, the French Declaration of human and citizens rights, and in all other national legal acts being brought under their influence.

Nowadays, effectiveness and efficiency of a democratic legal state is manifested through the efficiency of its institutions within prescribed procedures, but also through the control of authority organs according to law. Historical, but also some modern experiences tell us that a legal state should be studied analytically through its basic principles and postulates, and these are, first of all, human rights, the independent judicature and social and political pluralism in the conditions of democratic social relationships. For, there is no doubt, **a legal state has always been and stayed more an ideal, whose realization** we should long for gradually, than a tangible reality, more a theory than a praxis, and more an idea than an institution functioning efficiently.

## LITERATURE

1. Hazlitt William, *Of Persons One Would Wish to Have Seen*, 1826
2. Montesquieu S., *About the Spirit of Law*, Belgrade, 1989
3. Russo JJ., *The Social Contract*, Belgrade, 1949
4. Smith Adam, *Researching of economy and cause*, Kultura, Belgrade, 1970
5. Radbruch Gustav, *A Philosophy*, Belgrade, 1980

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