THE FUNDAMENTAL RIGHT TO INSURRECTION OF THE PEOPLE AND THE ROLE OF CIVIL SOCIETY IN THE CONTEXT OF ENSURING THE SUPREMACY OF THE CONSTITUTION

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Abstract

The people manifests its disapproval of a law it considers unconstitutional or of an executive act and even a judicial decision manifestly unfounded and illegal. This right has been enshrined in Article 35 of the 1793 French Declaration of the Rights of Man and Citizen, according to which "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties."

In the process of constituting new societies, based on values unanimously recognized at the international level, democratization constitutes the main pillar of reform in every aspect of life: political, cultural, economical and social. The alternative to a totalitarian regime is an open society, based on the rule of law, political pluralism and a market economy, citizen-oriented, in which the citizen is the subject not the object of the socio-political processes.

Civil society must rely on a model of active citizenship, where the individual is fully engaged economically, socially, culturally and politically. This is a global strategy of sustainable social development, aiming at widening of the range of options for the citizens, an increase of their involvement in all socio-economical, cultural and political activities.

Keywords: insurrection, control laws, civil society, the supremacy of the Constitution, is unconstitutional.

Keywords

French Declaration of the Rights of Man and Citizen, totalitarian regime, socio-political processes.

The idea of controlling the powers in state, of the different types of activities, the correlation of the relationship and balance between them has existed ever since antiquity. Thus, Han-Fei (deceased in 324 BC) stated: "to stay in power, the monarch has to accurately divide the tasks to his subordinates and to make sure that they control one another well." This line of thought was developed in the context of the fight of the middle class against the unlimited power of the monarch.

Montesquieu's doctrine on the separation of powers in state is important because of the power of control it grants to the different powers in state over one another. In his work, "On the spirit of laws," published in 1748, Montesquieu upheld the necessity of political organization based on the separation of powers in state, starting off from the necessity of protecting individual freedom. The same book shows that there is one nation in the world that has a Constitution whose aim is political freedom, perceived as a tranquillity of the

spirit originating from the opinion that everyone enjoys personal safety. In order to have that freedom, government must be organized so that one citizen will not fear another. According to Montesquieu, “political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.” This is the source of Montesquieu’s idea of opposing an equal power to the power abusing its competencies.

When motivating his opinion on the separation of powers, Montesquieu affirms: “There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.(...) To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.”

Thereafter, J.J. Rousseau reiterates this idea in “The Social Contract.” He states that, since the people are the holder of sovereignty, nothing can prevent them from establishing a new order, according to their own sovereign will. Rousseau’s social contract theory legitimizes the citizens’ right to remove from power those political leaders that infringe the “fundamental pact,” by abusing the prerogatives that the people have bestowed on them through the original pact that laid the foundations of the political institutions of the state.

The 1789 French Revolution is a clear example of this statement. While the monarch claimed that “The state, it’s me,” the revolutionaries replaced this phrase with “The state, it’s us.” The doctrine of the French Revolution argued that power should be vested not in the monarch, but in the citizens, as the rightful owners of the power in state.

In this context, the monarch and his ministers tended to become simple executioners of the politics desired by the chosen assemblies, representing the whole of the nation. This tendency is obvious, for example, in the 1971 French Constitution, according to which in France there is no authority superior to that of the law. Article 3, Chapter II, Section V of this document states: “There is no authority in France superior to that of the law; the King reigns only thereby, and only in the name of the law may he exact obedience.” Therefore, the review through public opinion was proclaimed by the 1791 French Constituent Assembly. At the time, this review was perceived, in the first place, as an expression of the right of the people to react to any governmental violation of rights and liberties. It was thus considered that, should such violations occur, the insurrection of the people is “the most sacred right and the most indispensable duty.” Therefore, individual and collective uprising sanctioned unconstitutionality.

A similar idea results from the Maryland Declaration of Rights of 1776, which states that “the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.” Although these ideas were considered to be of Cartesian origin, the recommended procedure for dealing with unconstitutionality was catalogued as primitive.

The 1776 Declaration of Independence of the USA states that all governments were created by the people in order to safeguard fundamental rights. According to this Declaration, “whenever any Form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government.” The same document argues that all men were created equal, and that they were endowed by their Creator with certain unalienable rights, and that among these are life, liberty and the pursuit of happiness.

In this context, French thinkers during the 1789 French Revolution stressed the law as a means of manifestation of the sovereign will of the people. The 1789 French Declaration of the Rights of Man and Citizen comprises a basic conception on the rule of law, the Constitution and the separation of powers in state. This was stated in Article 16: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." The first Article also shows that "[m]en are born and remain free and equal in rights. Social distinctions may be founded only upon the general good," establishing as aim of all political association the preservation of the natural and imprescriptible rights of man, namely the liberty, property, security, and resistance to oppression.

The French Declaration of the Rights of Man and Citizen contained a "social warranty," namely the possibility to rely on common action in order to safeguard individual rights and freedoms. The infringement of such rights leads to the fundamental change of top government structures through social explosions and revolutions, when the people refuse to live in poverty and deprived of fundamental rights, and the governors can no longer rule. In this case, the governing system is radically changed and a new political order is institutionalized, as it was done in Romania in December 1989.

The idea of social equity existed since antiquity and the middle ages. However, it was only during the middle class revolutions that the idea of human rights was affirmed in social practice. Philosophers were the first to proclaim human equality, by building on the principles of rationalist-humanist anthropology as a foundation for human rights. In turn, the French and American Revolutions enshrined for the first time in human history the principles of equality before the law, freedom of thought and human dignity.

A question arises on the justification of the right of citizens to exercise certain forms of direct review in relation to safeguarding the supremacy of the Constitution. The answer lies in the constitutional provisions stating that national sovereignty belongs to the people. Thus, a law passed by Parliament, the supreme representative body of the people, has to express the general will. Nevertheless, there is no guarantee that Parliament, a body composed of individuals, will act impartially. The activity of Parliament takes place with the observance of principles such as: the principle of political pluralism and the principle of the transparency of the activities. This is actually the source of the right of citizens to political opinions, including by means of referendum, opinions that are related to the method of government of the state in the interest of the people, and, secondly, of the right of the people to insurrection, as an objection to the infringements of the constitutional order by the public authorities.

Today, constitutional review, based on the people's right to insurrection, is efficient only in the case of totalitarian, tyrannical regimes, which sooner or later fall because the people can no longer tolerate them. In what concerns the constitutional review of legislation, it is not systematic and its efficiency varies from case to case. In relation to the socio-historical conditions nowadays – characterized by a great variety of psycho-social behaviour, by civic manifestations, by adverse political interests, by ideological disputes, etc. – constitutional review of legislation through public opinion lacks efficiency.

However, this does not prevent citizens, political parties, trade unions or social organizations to raise – through petitions, press articles or meetings – the issue of constitutional review of legislation. We must emphasize that such an action does not have legal effects in respect of the legal provision or contested piece of legislation, but it may constitute an alarm signal for the competent authorities, which are entitled to raise the unconstitutionality of the respective law. It is difficult to find grounds of accepting the idea

that the citizens or social organizations would be willing to take on the task of monitoring the observance of the Constitution and to submit to their personal review the legislation adopted by Parliament in order to determine whether it is compatible with the Constitution or not.

The people manifest their opposition to a law they consider unconstitutional, or to an act of the executive power and even a court decision which is manifestly ill-founded. This right was formally recognized by Article 35 of the Declaration of the Rights of Man and Citizen which was included in the Preamble of the 1793 French Constitution, according to which "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties." When analyzing the control and identification of laws that set up a tyrannical political regime, we realize that this is possible by means of popular uprising. However, this is an exceptional situation, which does not cover the permanent need of constitutional review of legislation.

The role of civil society in ensuring the supremacy of the Constitution

The transition period from a totalitarian to a democratic state governed by the rule of law is difficult because the changes that occur in the political system, in the social life and in the mentality of the citizens and governing authorities, influence considerably the process of human development. This influence is not always positive, and citizens don't always understand the social transformation processes that occur, given that Romania is experiencing an economical crisis and is fractioned by social tensions. For these reasons, the degree of involvement of the citizens in the various fields of social life is rather low.

In the process of building up new societies, based on values and traditions internationally recognized, democratization is the main pillar of reform in all areas of life: political, cultural, economical and social. The alternative to a totalitarian regime is an open society, democratic, based on the rule of law, political pluralism and a market economy, oriented towards the general good of the individual, in which the citizen must be a subject and not an object of the socio-political processes.

Civil society must be based on active citizenship, where the individual is fully engaged economically, socially, culturally and politically. This is a global strategy for sustainable social development, with a view to enlarging the choice options for the citizens, an increase of their involvement in all the socio-economical, cultural and political activities. Civil society involves a space in which people compete with each other in the race for accumulating values outside of the sphere of state influence.

There are various definitions for civil society and multiple interpretations that were given to it, along with several constituent elements. We note that civil society incorporates a multitude of associations and identities which we must look at outside or under the umbrella of the state. The concept of civil society defines the free association area and the set of relational freedoms for the promotion of the widest range of interests – from cultural, educational, informational, professional and economical to civic and political. Law no. 47/2006 defines civil society as being formed of people associated under different forms, on the basis of common interests, and who dedicate their free time, knowledge and experience to promote and protect their rights and interests. The main forms of associations are the associations and foundations, the trade unions and employer's associations, the cultural and religious organizations, as well as informational community groups.

After the 1989 Romanian Revolution, we witnessed a spectacular development of certain important institutions of civil society. The dynamics of this development were determined

by the need to replace the institutions of the old communist regime, founded on those values, which could constitute an alternative to the official state ideology, rejecting the dictatorship of this new institution, offered democracy as an alternative.
The freedom of association and assembly is enshrined by the Romanian Constitution in Article 39, which states that: "Public meetings, processions, demonstrations or any other assembly shall be free and may be organized and held only peacefully, without arms of any kind whatsoever." Further, Article 40 provides that: "(1) Citizens may freely associate into political parties, trade unions, employers' associations, and other forms of association." The political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania are unconstitutional. Judges of the Constitutional Court, the advocates of the people, magistrates, active members of the armed forces, policemen and other categories of civil servants, established by an organic law, may not join political parties. Moreover, secret associations are prohibited by law.
The role of political parties in safeguarding the supremacy of the Constitution arises from the functions that they perform:
- intermediary bodies between the people and the power;
- society leaders, by transforming their programs into governmental programs;
- agents of political information and education of the citizens.

In this context, an important role belongs to the parliamentary fractions that are entitled to exercise certain constitutional mechanisms, such as the right to file a petition before the Constitutional Court or to ask for the setting up of inquiry committees.
Natural and legal persons aiming to carry out public interest activities, or, as the case may be, activities related to their personal non-pecuniary interest, may form associations or foundations. These are private law non-profit legal persons and they lay the foundations for:
a) exercising the right to free association;
b) promoting civic values, democracy and the rule of law;
c) pursuing a general, local or group interest;
d) facilitating access to public and private resources for associations and foundations;
e) creating partnerships between public authorities and private law non-profit legal persons;
f) observing the public order.

An association is a subject of law constituted of three or more persons who, on the basis of an agreement, share, without being entitled to restitution, their material contribution, their knowledge and their lucrative activity, in order to accomplish activities of general interest, of community interest or, if such be the case, of their personal, non-patrimonial interest. A foundation is a subject of law created by one or more persons who, on the basis of an act of will *inter vivos* or *mortis causa*, establish a patrimony allocated permanently and irrevocably to achieving an objective of general interest or, if such be the case, of community interest. As we can see, the Constitution only mentions freedom of association in socio-political organizations and trade unions, leaving up to the governing authorities to establish the legal framework for non-profit public NGOs.
The issue of religious beliefs and their respective organizations is regulated by the Decree no. 177/1948. Within a democratic state, any citizen should have the same power of coercion in relation to the government, aiming at fulfilling the law in the strictest terms. The principle of legality has a fundamental role in a state governed by the rule of law. In fact, legality is a *sine qua non* condition in such a state. It articulates to the highest degree

the obedience of the state to its own laws, which express the common interests of the state, the society as a whole and its citizens. Moreover, legality allows for the organization, formation and development of the so-called “civil society,” which voices the interests of the citizens, by giving preference to the rights of the individual as opposed to those of the state.
Civil society is, in fact, a semantic equivalent of the political society. The personal mechanism of civil society reveals the existence of certain interdependence between civil society and political order, each of them maintaining their own specificities. In the context of legality and of the existence of a prosperous and vigorous civil society, the state is prevented from monopolizing the power, and has to share it with civil society represented by various political, cultural, economical etc. citizen associations.
Within civil society, the citizens engage in a “cobweb” of social relationships, by participating to the activities of a number of associations and organizations, with a view to promoting a variety of aims and interests. Civil society organizations are, in a way, autonomous in relation to the state, and they represent a multitude of power centres, a system of non-state powers. These forms of associations (independent from permanent associations created by law, such as villages or cities etc.), at local or national level, with political, professional, cultural, religious or moral aims, represent not only a background for the manifestation of individual rights, but also a counterweight to state power or to various combinations of interests of the official political institutions (political society). Because of its specificities, civil society reinforces the legitimacy of democracy, multiplies the means of expression of the various interests and reinforces the consciousness and the faith of citizens in their own power, for the formation and selection of new leaders.
A state governed by the rule of law protects the freedom of the civil society components – trade unions, various associations, etc. However, their freedom of association must be corroborated with interior discipline and the social and moral responsibility of civil society. Where there is freedom, there are also responsibilities; or, freedom is best expressed by observing the law. Civil society is possible only in those cases where relationships involving active manifestations of the individual creative capabilities are formed, where individual freedom becomes reality.
Although the right of access to information is a constitutional right that guarantees the right to information, for citizens and their organizations alike, it constitutes a difficult problem because the bureaucratic apparatus holds the monopoly over information, and it tends to hide the most necessary data, so long as the constitutional text states that the right to information must not endanger the citizen protection measures or national safety.
The various activities in the association sector are poorly reflected in the media. The population does not have a clear image of the possibilities of association in NGOs and of the activities that this sector conducts. As a result, the majority of the population does not perceive the necessity of its personal efforts as a contribution to ensuring the functioning of civil society.

Strategic targets of civil society

Institutionalized and non-institutionalized organizations have to be recognized as partners in implementing policies and strategies of sustainable development, in promoting legality in various fields as well as human rights and freedoms.
Public administration and civil society should not be in constant competition, but come up with solutions opening the door to meaningful cooperation. International experience has shown that governmental policies are more efficient and better implemented if civil society is involved both in the drafting and implementing and monitoring stages. Dialogue is

merely one example of cooperation between civil society and public administration; however, it should be complemented by various forms of partnership. In order to contribute to the development of the civil society sector, there are a number of necessary steps:

- Amending the legislation in the area, by making a strict delimitation among the various types of organizations (foundations, charities, non-profit organizations, etc.);
- Adopting elaborate and successful solutions in the non-governmental sector by the public authorities and governmental institutions;
- Organizing public awareness campaigns in relation to the rights that citizens have and which can be enforced with the help of the various NGOs;
- Enhancing NGO participation to discussions on official programs related to public necessities, enabling them to express their point of view as well as regional/local experiences;
- Giving a higher support to public administration and NGOs to elaborate a sustainable development strategy, boosting the development of the state institutions, professional development of the staff as well as enhancing managerial capabilities.

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