THE LEGITIMACY OF LAW IN DEMOCRATIC SOCIETIES

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Abstract

The legitimacy of the state power identifies an interactive relation of balance and cooperation between branches of power in the state, under the condition of a contemporary democratic political regime. The rule of law is based on the legitimacy of the Constitution itself and this quality preconditions can only be achieved by applying and respecting the principle of the legitimacy of state power and the ethical bodies directly involved in the complex process of establishing, mantaining and exercising state power.

Legitimacy is the form of thinking and managing society within a predominant political order, around which a social consensus is built through different processes and at different times.

In this paper we will try to produce an argument showing that the state has a legitimate authority and we need – as we can see – two aspects. On the one hand, the validity of the state's claim to have authority (to order, to issue laws etc.) and on the other hand, the correlated obligation to obey.

People are responsible for what they are doing. They are free to choose, to judge about the choices they are going to make, they take responsibility for their actions and their consequences. As philosopher I. Kant argued, the human person gives these moral norms to itself: to have personal autonomy means to obey the norms you give yourself. By definition, the idea of autonomy opposes the idea of obedience under the will of another. The person's autonomy is incompatible with accepting to act according to the will of another. Sure, the autonomy does not mean that the person always refuses to take into account other people.

Keywords: *legal order, civil society, moral principles, democracy*

1. Introduction

The central concept of politics, legitimacy, has a long intellectual history. Starting with ancient Greece, passing through the Roman Empire, the Middle Ages and modernity, legitimacy has been constantly disputed between the elites and society in order to identify the most appropriate form of government in a certain historical context.

"Legitimacy" is a complex category with multiple meanings and also the topic of research for the general theory of law, philosophy of law, sociology and other disciplines. There are multiple meanings of this concept. We mention a few: legitimacy of power; the legitimacy of the political regime; legitimacy of governance; the legitimacy of the political system, etc. The term "legitimacy" designates the feature which enables an entity to the power to order or prohibit something without resorting to physical violence or even successfully use coercion if necessary, in the last instance, an option recognized as normal. The concept of legitimacy can also be applied to legal acts issued by public authorities, linked to the margin of appreciation to which they are entitled in the exercise of their duties.

In *Economy and Society*, Max Weber defines the dominance as "the likelihood that certain specific orders will be heard by a certain group of people." At the same time, he states that any form of domination involves a minimum of voluntary compliance, submission. In a political system based on traditional authority, legitimacy is conferred by faith in the validity and sanctity of the old rules, traditions and customs. "In such a system, the ruler is chosen on the basis of traditions, his authority being based on unwritten laws, considered sacred."[1] People owe their leadership for their tradition, their obedience being based, more cases, personal loyalty, or simply ideas shared by each individual.

In this paper we will try to consider the meaning and measurement of trust and legitimacy of law in the context of democratic regimes. We aim to make three contributions. The first is to draw conceptual distinctions between trust and legitimacy, while also clarifying the ground on which these the two concepts are based. The second is to review the content coverage of the existing legislative controls of the legitimacy of law. The third is to consider how trust and legitimacy may variously motivate law-related society behavior.

2. Conceptions of democratic legitimacy

Although in contemporary political philosophy there is a general convergence on the idea that a certain form of democracy is superior to any feasible political regime so far, different approaches to its normative justification (which are sometimes incompatible) were proposed. The common question these approaches are therefore trying to answer is if the policy of the authority established by a democratic regime is legitimate or on what the "permissiveness of a state to

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[1] Max Weber, *Economy and Society*, (University of California Press, 1978), 227

issue and impose order" is morally based.[2] Most generally, conceptions of democratic legitimacy are divided into two categories, called democratic proceduralism and democratic instrumentalism.[3]

Democratic proceduralism is the position stating that democratic legitimacy derives from the intrinsic characteristics of the process by which democratic decisions are taken. In its turn, democratic proceduralism can involve two dimensions, even if some of the theories that are part of this family mainly (or even absolutely) focus on one. These two dimensions are: (1) the aggregrative one, which refers to the fairness[4] of the electoral mechanisms, most often operationalized in the form of the principle "one man, one vote"[5] and (2) the deliberative one, linked to the importance of the public debate before voting, being "anchored in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association derives from public argumentation and reasoning among equal citizens."[6] Perhaps the most important proceduralist view of democracy belongs to Robert Dahl. It proposes a series of 5 criteria, the maximum satisfaction of which is the idea of perfect democracy: (1) the effective participation, according to which citizens should have adequate and equal opportunities to express their preferences on the priorities of the public agenda and on the results (2) equality of vote at the decisive stage, according to which citizens must have equal opportunities in collective decisions to express options equal to those of others, (3) an enlightened understanding that citizens must have equal opportunities and appropriate to find out which of the electoral alternatives best serve their own interest, (4) control over the agenda, according to which the demo should have the exclusive opportunity to decide which issues will be prioritized on the public agenda and (5), which implies that all citizens of a state must be included in the demos.[7]

Democratic instrumentalism opposes the procedural approach. This is, according to Richard Arneson, "the combination of two ideas. One is instrumentalism in political arrangements: the form of government that should be established and sustained in a political society is one whose consequences would be better than any feasible alternative. The second idea is that under modern conditions, democratic political institutions would be the best in terms of the instrumentalist norm and should therefore be implemented."[8] This approach may also include several types of distinct theories, depending on how we interpret the idea of good consequences. An intuitive version of this approach assumes that the notion of good consequence is strictly related to the facts produced through the democratic process, considering that they are on average morally superior to those produced by any other political regime. As stated by Joshua Cohen, this epistemic conception of democracy implies three elements: (1) an independent standard (against the outcome of the vote) of what is a right decision, (2) a cognitive perspective on the vote, according to which the vote expresses beliefs about what are the right decisions, not the personal preferences of the voter, and (3) a view of decision-making as a process in which individuals adjust their beliefs about the correctness of a decision based on the available evidence.[9]

Another version, preferred by Arneson, argues that epistemic aspects are not all that matter in the evaluation of the political regime, arguing that "a decision is morally legitimate only if, in the long run, it consists in results that are morally superior to those that would provide any feasible alternative procedure."[10] According to this view, even if democracy did not produce moral decisions superior to any other regime, it could still be preferable due, for example, to the civic culture that it builds in a particular community. It is important to note, however, two common aspects of the two instrumentalist approaches. First, both require the identification of an independent standard of good consequences, which is not derived from the outcome of the vote. Secondly, both allow partial "limitation" of the will of the majority in certain situations, as this limitation will lead to better moral results.

3. The concept of *Legality*

Legality, as a feature that must characterize the legal acts of public authorities, has as central element the concept of "law", which could be defined as a written general rule established by the public powers after deliberation, entailing direct or indirect acceptance of the governors. Ion Deleanu defines it as "an act containing general and mandatory rules sanctioned by the State's coercive force when its application is not realized by conviction and is susceptible to application whenever the conditions laid down in its hypothesis arises."[11] In a broader meaning, the concept of law includes all legal acts that contain legal norms. The law in its restricted sense is the legal

[2] David Estlund, *Democratic Authority: A Philosophical Framework*, (Princeton: Princeton University Press, 2008), 2
[3] Steven Wall, *Democracy and Equality*, (Philosophical Quarterly, 2007), 416-438
[4] Miroiu Adrian, *Teorii ale dreptății*, (București: Alternative, 1996), 274
[5] Jason Brennan, Lisa Hill, *Compulsory Voting: For and Against*, (Cambridge: Cambridge University Press, 2014), 54-59
[6] Joshua Cohen, *Deliberation and Democratic Legitimacy* in J. Bohman și W. Rehg, *Deliberative Democracy*, (Cambridge: MIT Press, 1997), 72
[7] Robert Dahl, *Democrația și criticii ei*, trans. by P. Iamandi, (Iași: Institutul European[2002] 1989), 151-160
[8] Richard Arneson, *The Supposed Right to a Democratic Say*, in T. Christiano and J. Christman (eds.), *Contemporary Debates in Political Philosophy*, (Malden-Oxford: Wiley-Blackwell, 2009), 197
[9] Joshua Cohen, *An Epistemic Conception of Democracy*, *Ethics*, Vol. 97, (The University of Chicago Press, 1986), 34
[10] Richard Arneson, *Defending the Purely Instrumental Account of Democratic Legitimacy*, (Journal of Political Philosophy, 11 (1), 2003), 123
[11] Ion Deleanu, *Drept constituțional și instituții politice*, (Bucuresti: Ed. Europa Nova, 1996), 509

act of parliament drawn up in accordance with the constitution, according to an established procedure and which regulates the most important and general social rules. A special place in the administered legal system has the Constitution, defined as fundamental law, located on the top of legislative system, which includes legal rules of higher legal force, which regulate fundamental and essential social relations, especially those concerning the establishment and exercising of state power.

The state of legality in the work of public authorities is based on the concepts of supremacy of the constitution and supremacy of law. The supremacy of constitution is a quality of the fundamental law that basically expresses its supreme legal force in the legal system. An important consequence of fundamental law supremacy is the compliance of entire law with the constitutional norms. The notion of juridical supremacy of law is considered to be the feature regarding the fact that the norms it establishes must not be in contradiction with constitutional norms or other legal acts issued by state bodies that are subordinated to the constitutional norms in terms of their legal effectiveness. Therefore, the supremacy of law in the sense above is subsequent to the principle of supremacy of constitution. Important is that the legality, as a feature of the legal acts of state authorities involves the observance of the principle of supremacy of the constitution and law. The observance of these two principles is a fundamental constitutional obligation consecrated by the provisions of article 1 paragraph 5 of the Romanian Constitution. Failure to observe this obligation attracts the appropriate sanction of unconstitutionality or illegality of legal documents.

The legality of the legal acts of public authorities involves the following requirements: legal document to be issued in compliance with the competence prescribed by law; legal act to be issued in accordance with the procedure prescribed by law; legal act to respect the rules of law as superior legal force.

4. Legitimacy without politics?

The meanings of the concept of legitimacy, a true political ontology (if we consider its implications that considerably exceed the immediate field of political practice), have always been imposed by elites to those privileged from the point of view of access to the binomial knowledge/power, trying to do their best to justify their position, while convincing societies that the *status quo* is at least desirable. Political elites have not always acted with the conscious purpose of manipulating the governors, weaving the wires of an esoteric political conspiracy of colossal proportions; the Athenian democrats or the French revolutionary bourgeoisie of 1789 honestly tried to identify the most appropriate governing formulas for their situation without realizing that their policies excluded most of the population from the public decision-making process: women, slaves, alienated in ancient Athens, peasantry and the so-called “passive citizens”, whose political non-involvement was perceived as the result of an individual choice, not as a form of coercion and exclusion of dictatorship - as was the case in revolutionary France.

However, from any form of policy benefits, involuntarily or not, a certain social category, the one whose representatives hold the power at that time and that particular political regime is usually trying to convince the rest of the social categories as convincingly, as possible, to join the social project proposed by it. Legitimacy is a quality attributed to the political regime by the people, a quality generated by the regime's ability to inspire confidence in its own legitimacy. The legitimacy of a political system is linked to its ability to impose and maintain the belief that the existing political institutions are best suited to a given society.

Legitimacy will always mean politics and politics will always mean representation, for which we can not really discuss a genuine political ontology, based on the distinction between the subject of study and the science (policy) of study, but especially its progressive transformation - because the rules and procedures we follow are pure, based solely on daily social practice; but there will always be a certain distance between society and the policy through which there is self-instilling, because we will never have direct access to irremediably fragmented social society, without immediate access through abstractions such as language, law, morality or legitimacy. The concrete is given only by a thick layer of abstractions that transforms us into something intelligible and malleable. Similarly, the (concrete) society exists only through the policy (abstract, which includes many layers of significant deposits over time), these two entities being different and impossible to unify; and yet the latter must remain the ideal of politics in excellence. Legitimacy only makes sense in the space between politics and society, being a contiguous field in relation to both categories, a field whose narrowing is paradoxically translated into exacerbating its exogenous effects, that is by bringing as close as possible the represented to the representatives.

The concept of legitimacy bears more quickly, a character of appreciation, an ethical character and also political one, while legality is associated with a legal-formal character and ethically neutral one. State power is, as a rule, legal. In the same time, it can be illegitimate, meaning that it is not accepted by society, if the people representing the state power make laws according to their own vision and use them as means of organized violence by doing arbitrariness. The legitimacy of state power - this is the recognition of the leading role that the social law is entitled to have in the society. Essentially, the subject that holds legitimate power is trying to create a situation in which the decisions to recognize and respect the law are made not through fear, but through conscience, with faith in the moral equity of judgments and laws. State power can

not count on a existence of long duration and actual activity, relying solely on violence, because the voluntary, strengthened consent is needed respecting the legality. By way of threats and repressions, it can be done to obey only a small proportion of citizens, But increasing resistance to power leads to mass disaffection.

The first premise of the voluntary agreement is the sure conviction of the people in the fact that the representatives of the power develop and translate their decisions into life on the path of the interests related to the state, not breaching what is considered private and personal. Where the legitimacy of power is questionable (not certain), the lawlessness and danger of revolutionary unrest.

Legitimacy is not only the legality of power from the point of legal-formal view, but rather the phenomenon of social psychology, which consists of accepting this political power by society or at least passive obedience to it. Thus, new regimes following the revolution, the coup d'etat may become legitimate if it would secure the support of a considerable part of it society. In connection to this, the very nature of legitimacy, its sources and the arrangements for insurance can be enough different, depending on the cultural level, traditions and psychology of the population. Being a complicated social phenomenon, legitimacy manifests itself differently. Talking about the power of legitimacy, we should take into account, on the one hand, its authority, trust, recognition, and, on the other hand, the devotion and the desire of the society to go after it and obey its requirements.

5. Authority, discretional power and proportionality

The meaningful links between these terms "legitimacy" and "authority" are quite obvious. The authority, by its nature, is a characteristic feature of power embodied by a person, an institution, etc. Its specificity is manifested by the fact that those subjects of power relations, to whom authority is characteristic, are given the recognition and trust of those who have invested them with power. The authority presents itself as a phenomenon of autogeneration of power, which transforms over time into one of the forms of its existence, most often related to the legitimacy process.

The application and observance of the principle of legality in the activity of the state authorities is a complex issue because the exercise of state functions also implies the discretionary power with which the state bodies are invested or otherwise being said, the authorities' right of appreciation regarding the moment of adoption and the content of the ordered measures. What is important to emphasize is that discretionary power can not be opposed to the principle of legality, as a dimension of the rule of law.

In our opinion, legality is a particular aspect of the legitimacy of legal acts of public authorities. Thus, a legitimate legal act is a legal act, issued within the scope of the discretion recognized by the public authorities, which does not generate unjustified discriminations, privileges or restrictions of subjective rights and is appropriate to the factual situation that is determined by the purpose of the law. On the one hand, legitimacy makes the distinction between discretionary power recognized by state authorities and, on the other hand, excess power.

Not all legal acts that meet the conditions of legality are also legitimate. A legal act that complies with the formal conditions of legality but generates discrimination or privileges or unjustifiably restricts the exercise of subjective rights or is not appropriate to the factual situation or the purpose pursued by law is an illegitimate legal act. The legitimacy, as a feature of the legal acts of public administration authorities, must be understood and applied in relation to the principle of the supremacy of the Constitution.

Addressing the question of the boundaries between legitimacy and discretionary power, Leon Duguit[12] has achieved an interesting distinction between "normal powers and exceptional powers" conferred on the administration by the constitution and laws, and on the other hand situations in which state authorities act outside the normative framework. The author divides these latter situations into three categories:

1. excess power (when the state authorities exceed the limits of legal authority);
2. misappropriation of power (when the state authority fulfills an act falling within its competence for other purposes than those prescribed by law);
3. abuse of power (when the state authorities act outside their powers, but through acts that are not legal).

Proportionality is a fundamental principle of explicitly enshrined law in constitutional and international legal instruments. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or adequate relationship between actions, situations and phenomena as a criterion for limiting the measures ordered by the state authorities to what is necessary to achieve a legitimate goal, guaranteed fundamental rights and avoid the excess power of state authorities. Proportionality is a basic principle of European Union law being expressly enshrined in the provisions of Art. 5 of the Treaty on European Union.

Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess power in the work of state authorities. This principle is explicitly or implicitly enshrined in international legal instruments or by most constitutions of democratic countries. The Romanian Constitution

[12] Leon Duguit, Manuel de Droit Constitutionnel. Théorie générale de l'Etat - Organisation politique, (Paris: A. Fontemoing, 1907), 445-446

regulates this principle in Art. 53, but there are other constitutional provisions involving it. In constitutional law, the principle of proportionality is particularly applicable to the protection of human rights and fundamental freedoms. It is considered an effective criterion for assessing the legitimacy of State authorities' intervention in limiting the exercise of certain rights. Furthermore, even if the principle of proportionality is not expressly stated in the constitution of a State, doctrine and case-law consider it to be part of the notion of the State of law. This principle is applied in several branches of law. Thus, administrative law is a limitation of the discretionary power of public authorities and is a criterion for exercising judicial control of discretionary administrative acts.

Proportionality is not only a question of fact but a principle of law, including constitutional law and the courts of ordinary law, administrative litigation or the Constitutional Court can rely on it to sanction excess power. Our constitutional court may explicitly invoke the criterion of proportionality only under the conditions provided by the provisions of Art. 53 paragraph (2) of the Romanian Constitution. Therefore, there is no possibility of sanctioning excess power of the legislature, using the criterion of proportionality, and in other situations, especially in cases where, through the measures ordered, the legislator goes beyond what is necessary to achieve a legitimate goal.

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of the Constitution, applying in the field of the restriction of the exercise of certain rights, is insufficient to give full meaning to the significance and importance of the principle of the rule of law. It would be useful to be added in the context of Article 1 of the Constitution a new paragraph stipulating that "the exercise of state power must be proportionate and non-discriminatory." This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the adopted measures fall within the limits of the discretionary power recognized by the law. At the same time, it is possible for the Constitutional Court to sanction the excess of power in the activity of the Parliament and the Government on the way of the constitutionality control of laws and ordinances, using as a criterion the principle of proportionality.

In the administrative doctrine, which mainly studies the issue of discretionary power, it was emphasized that the opportunity of administrative acts can not be opposed to their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on the grounds of opportunity.[13] Consequently, legality is the corollary of the conditions of validity, and opportunity is a requirement (a dimension) of legality. However, the right of appreciation is not recognized by the state authorities in the exercise of all their duties. There is discrepancy between the jurisdiction of the state authorities which exists when the law imposes on them certain strict decision-making behavior and on the other hand the discretionary power, particularly the situation in which the state authorities can choose the means for achieving a legitimate purpose or generally, when the organ which the state can choose between several variants, within the limits of its law and competence.

Although the issue of discretionary power is mainly studied by administrative law, the right of appreciation in the exercise of certain duties is a reality encountered in the work of all the state authorities. The Parliament, as the supreme representative body and the sole legislative authority, has the widest limits, and manifest discretionary power, which is identified by the very characterization of the legislative act. Since the interwar period I. V. Gruia stressed: "The need to legislate in a particular matter, choosing the moment of lawmaking, choosing the moment when the law was enforced, by setting the date of law enforcement by the legislator, reviewing previous laws that can not bind and oblige the future parliament work, the restriction of social activities from their free and uncontrolled deployment and their obedience to the norms and sanctions of the law, the content of the legislative act, etc., prove the sovereign and discretionary appreciation of the function of the legislative body."[14]

Discretionary power also exists in the work of the courts. The judge is required to make a decision only when he is notified, within the limit of the referral. Beyond this, the right to sovereign appreciation of the facts, the right to interpret the law, the right to fix a minimum or a maximum penalty, to grant or not to attenuate circumstances, to determine the amount of damages, etc. is manifested. Exercising these competences is nothing more than discretionary power. Exceeding the limits of discretionary power means violation of the principle of legality or what in law, doctrine and jurisprudence is called "excess power". Excessive power in the work of state bodies is equivalent to abuse of the law, as it means the exercise of legal competence without a reasonable justification or without an adequate relationship between the measure, the factual situation and the legitimate aim pursued.

The opinion expressed in the specialized literature was that "the purpose of the law will be the legal limit of the right of appreciation. For discretionary power does not mean a freedom beyond the law, but one allowed by law."[15] Of course, the "purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of state bodies and can therefore be considered a criterion to delimit discretionary power from excess power.

[13] Antonie Iorgovan, *Tratat de drept administrative,* Vol I, (București: Ed. Nemira, 1996), 301
[14] I. V. Gruia, *Puterea discreționară în funcțiunile Statului*, (Pandectele săptămânale, 1934), 489
[15] Rozalia Ana Lazăr, Legalitatea actului administrativ. Drept românesc și drept comparat, (București: Ed. All Beck, 2004), 165

Conclusions

Analyzing different approaches and concepts regarding the legitimacy of the law expressed through state power, we can mention that legitimacy, as a way of social recognition, presupposes a bilateral relationship: first, the perception of power, the relationship between power and the subject that holds the power; secondly, the understanding by the subject who holds the power of law regarding the defining and practical elements of the power he owns. From the above, we can conclude that state power can only be maintained to the extent that the power structures are legitimate and political decisions, including laws, express general will and are not used against a part of the population. And the legitimacy of a state power can be viewed from a dual perspective: (1) as an act of designating the structures of power (the conquest or act of establishing power); (2) the consistency between the content of political decisions and the expectations of those governed.

Our aim regarding this paper and also further research is to outline the role of normative functions in contemporary society and to define the paradigms of law in relation to the evolution of relations between civic society and public, as well as private institutions.

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