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THE RULE OF LAW, DEMOCRACY AND HUMAN RIGHTS

I.

The principle of the *Rule of Law* and the concept of the *Legal State* are paramount moral and legal values that are incorporated in the very foundation of the Western, and particularly European civilization (*Lord Lloyd, Freedman, 1985*). In respect to human rights their significance is essential for implementing the notion of *legality* of government decisions, as without the framework of the rule of law and the legal state, no modern political and legal system can be conceived.

Originating in the mid-19th century, the concept of the *Rechtsstaat* rests on a *normativistic legal model* of regulating social relations. According to this model, general legal norms (formalized in general legal acts, *e.g.* statutes, laws, regulations, *etc.*) prescribe the rules of social behavior. General legal norms are subsequently decomposed into concrete legal provisions contained in individual legal acts (*e.g.* administrative decisions, judicial ruling, *etc.*) that directly effect the behavior of individuals and other legal entities. The main feature of the normativistic model is that the legitimacy of legal action (including the legitimacy of legislative, judicial and administrative decisions), *derives* from the *legality* of the legal acts. In other words, a legal decision (*i.e.* legal act) is legitimate by virtue of its legality (*Blankenagel, Galligan, Lilić, Levison, Sajo, 1997*). This model in its initial form, however, cannot be implemented today without peril to the idea of fundamental human freedoms and rights and the concept of political pluralism and democracy – one needs only to have in mind any racist or other totalitarian regime that rests on so-called „law and order" (*Tošić, 1948*). As consequence, the values of the *Rechtsstaat* concept today can only be seen as a *precondition* of democratic political and legal systems.

As opposed to this formal concept of legality, modern concepts of legal legitimacy base their fundamental principles on the *idea of the rule of law and human rights*. The legality of government and administrative action, therefore, does not *ipso facto* include the legitimacy of these actions. In order to achieve legitimacy, government bodies, courts, administrative and para-statal agencies must also achieve *in concreto* legitimacy of each action they undertake or decision they render. This is done through various instruments and mechanisms of parliamentary, judicial and administrative control (*e.g.* parliamentary debate, hearings, judicial review, ombudsman interventions, *etc.*). Consequently, modern concepts of legal legitimacy, based on the idea of the rule of law and human rights derive from the premise that a governmental action is legitimate not by virtue of the status of the subject or legality of the procedure, but by *virtue of substantial democratic values incorporated in these actions and decisions* (*Mescheriakoff, 1990*).

Modern concepts of the legal system rest on models of government as a complex and dynamic system of human inter-action (*Pusić, 1985*). In this model the government is projected as a complex and dynamic „relatively closed" system of structures and procedures within itself, as well as an „open system" that communicates with other segments of the global social system (*e.g.* the political and economic system) active in the social environment surrounding it. As a system of human inter-action that derives from the fact that individuals in society achieve their interests either through *mutual cooperation*, or through *mutual conflict*, the main *social function of the legal system*, actively integrated into various patterns and forms of human behavior, is to regulate social processes. As realization of individual or grown-up interests can either be achieved by domination or by compromise, the function of social regulation of a legal system plays a essential role in *neutralizing contingency* effects of illegitimate social behavior or conflict (*Luhmann, 1984*).

II.

The rule of law and the modern concept of the legal state based on substantial democratic legitimacy and human rights are particularly reflected within the framework of *government administrative action*. Traditional political theories define administrative action as *an administrative function*. Administrative function is defined as one of the legal functions of the state, as a normativistic modality of *Staatsrecht, i.e. „State Law"* (*Jellinek, 1914*). According to these concepts, the administrative function is a specific, legally regulated, function of state power that features the formulation

of individual compulsory orders and commands and is authorized to perform acts of legally permitted (*e.g.* political) repression. This traditional concept of *state law*, modified by the Marxist definition of the role of state and law „after the proletarian revolution" has been widely circulated in all Central and Eastern European countries under communism, particularly under the influence of the Soviet legal theory (*Collins, 1976*).

On the other hand, the concept of the administration as a *public service* originated at the turn of the century in conditions of social, cultural and economic development of highly industrialized nations of Western Europe. Administrative activity is now perceived, not as a function of state political power, but as a complex system of *public services*, *i.e.* activities focused on development, democracy and general welfare of society (*Unger, 1976*). This lead to the concept that the essence of administrative activity is to *render public services*, *i.e.* activities that play a „vital" role in the everyday life and work of individuals (*e.g.* education, medical care, *etc.*) and society as a whole (*e.g.* transportation, communication, *etc.*) (*Diguit, 1913*). According to this model of the administrative system, in conditions of developed social structures and functions, government administration undergoes a substantial transformation, as administrative activity no longer represent only a (legal) *instrument of government*. Administrative activity is now a product of a complex *public* administrative system charged with rendering *public services* with the goal of undertaking actions aimed at securing the welfare of its citizens, as well as the cultural development and economic progress of society.

III.

Western European integration and transition processes in Central and Eastern European post-communist countries cannot be interpreted only as compulsory responses to economic and technological competition and pressures (*Baker, Raadschelders, 1990*). Integration in Europe is also the result of autonomous development patterns of both economic and political systems in this region. The developed countries in Europe have achieved the level of democratic, social, economic, human rights and technological development, that sets them within the general framework of modern post-industrial (*Galbreith, 1979*) and information societies (*Bell, 1973*).

On the other hand, post-communist countries in Europe still on levels of mid and late industrial development, as well as those in early stages of social and economic developments, will doubtlessly need to consider present European integration tendencies, not only in respect to their general

social and economic development strategies, but also in regard to their governmental systems and actions as well. Within this dynamic social and economic environment, the recognition of the need of the social systems of European post-communist countries to adapt to integration processes is prerequisite for the active participation, cooperation and integration of these systems into European integration processes. In this context, in the Central and East European post-communist countries governmental and legislation reforms and their compatibility with West European integration processes should be the basis for future transformation of the respective post-communist social systems and their organizational and functional development (*Lilić, 1990*). Comparatively speaking (*Timsit, 1987*), the transformation of each respective legislative, judicial and administrative system should also be aimed at undertaking functional and organizational (*Emery, 1969*), as well as technological (*Baquiast, 1986*) and personnel (*Reinemann, 1987*) reforms that are in line with achieving higher standards of democracy and human rights protection (*Buergental, 1995*).

Another result of the transition process, is the consequent de-centralization and de-concentration of centralized government administrative systems into organizational and functional forms of a higher order. This is due to the fact that increased complexity, and particularly the „informatization" of society, have practically rendered centralized directing, management and control of social processes obsolete, as the traditional government structure is inflexible and inefficient to adapt to the dynamics of the changing environment (*Baquiast, Donk, 1986*). To achieve substantial integration of legal and political systems that are compatible with tendencies in the developed European countries, hierarchical models must be substituted by new forms of organizational, functional, technological, human resource and financial integration patterns that enable multiple communication, not only with the internal governmental subsystems, but with the external international political, economic and legal systems, as well (*Simon, 1961*).

Transition and integration processes in Europe also have a significant impact on the perception and quality of human rights, that should be taken into account in the present and future reforms of these systems (*Rosas, Helgesen, Gomien, 1990*). The legalistic principle of legality, expressed through the ideal „that all citizens are equal before the law", has historically played a crucial role in institutionalizing (particularly in regard to judicial and administrative procedures) the relation between the citizen and the administration (*Lilić, 1990*): the greatest moral value and practical effect of the „equality" principle being the (legal) protection of the citizen from the foul actions of the state (*Schmid, Jongman, 1992*). Today, how-

ever this traditional principle is considered one-sided: it is argued that for the principle of legality to be legitimate in a modern political and legal environment, apart from the law, the consent of the citizen is also needed. This is the result of the higher level of information and knowledge the citizen has access to, as well as ideological and economic independence of the citizen in communicating with the legislative, judicial and administrative system.

IV.

Due to the need of efficient regulation of social, economic and technological processes, modern government administrative action show a general tendency towards substituting traditional authoritative instruments of administrative power, with higher forms of achieving micro and macro level social regulation (*Pusić, 1989*). *Grosso modo*, it may be concluded that the use of administrative force is counter-proportional to the level of general social and economic development (*Moharir, 1989*). It can be said that government and administrative repression today is a feature of underdeveloped social and economic systems that leads to the phenomena of „*vicious bureaucratic circles*": once applied, repression leads to more repression, which agitates the problem even more, then more repression is applied, and so on (*Crozier, 1963*). Thus, the tendency of development of modern government action is less and less oriented toward the use of force and repression, as there is objectively less possibility of compulsory social regulation.

A specific question to be addressed in the context of post-communist governmental and administrative reforms is the issue of efficiency. Generally speaking, the more there are technological factors present in government action, the higher the level of the efficiency of the legal and administrative system. Nevertheless, particularly in countries that are expe-riencing political and social „turbulences", an opposite tendency in the development of governmental and administrative systems can be detected. Times of crisis generate a tendency of extensive „administrating", primarily due to the general inefficiency of the social and economic system. Inefficiency gives rise to the need of more authority, but authority itself does not resolve the problem. This model, logically, requires authoritative government action, as authoritative decisions can only be implemented by means of political force and repression. Consequently, authoritative government action cannot substantiate and resolve the economic, social turbulence by mere „authoritative administrative efficiency". Such situations, particularly

receiving active political support, can easily become the main obstacle for general social, political, economic, legislative, judicial and administrative reforms (as is the case with present Yugoslavia).

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