# ROMANIAN STATUS

**Paul-Iulian NEDELCU**[*]

**Abstract**

*The socio-political and legal thinking of Marcus Tullius Cicero is based on the concept of the supreme good without which a state cannot last. Therefore, the subordination of the individual to the state is a natural law, and the city must be organized based on public law and moral principles. Starting from morality, like Plato but contrary to Aristotle, Cicero argues that the philosopher, as a sage of the city, must be involved in politics and even lead, because he is the link between the upper, lower and middle classes.*

*The state seen as res publica is the work of the people, but the people are not just a bunch of people gathered at random, but a crowd united in a legal system founded by a common agreement for the common good. We distinguish from the above that justice is the basis of the state and is not to be confused with the usefulness reached by man's immeasurable love for others, by subordinating his own benefit to the general.*

**Keywords:** *supreme good, fortress public law, moral principles, res publica.*

## 1. Introduction

The socio-political and legal thinking of Marcus Tullius Cicero is based on the concept of the supreme good without which a state cannot last. Therefore, the subordination of the individual to the state is a natural law, and the city must be organized based on public law and moral principles. Starting from morality, like Plato but contrary to Aristotle, Cicero argues that the philosopher, as a sage of the city, must be involved in politics and even lead, because he is the link between the upper, lower and middle classes.

The state seen as *res publica* "is the work of the people, but the people are not just a bunch of people gathered at random, but a crowd united in a legal system founded by a common agreement for the common good."[1] We distinguish from the above that justice is the basis of the state and is not to be confused with the usefulness reached by man's immeasurable love for others, by subordinating his own benefit to the general.

The state must be governed, and "power must be entrusted to one person, to an elite, or to all citizens"[2]; so we believe that three forms of government can be identified: the monarchy, the state ruled by a small group of people, called optimists, and the state, in which everything depends on the people. But in order to resist, the state, the fourth form resulting from the optimal combination of the three originals would be the best. However, Cicero states that the monarchy is also good, provided that the king is virtuous, a conclusion he reaches based on the idea that just as the universe is ruled by a deity, so the state must respect and be based on the principle single leadership best assembled by the king.

What we can observe is that regardless of the form of government, the law is seen as the cohesive element of the community, and legality is ensured through a judicious distribution of functions in the state. Thus, the praetor must be at the head, the judge must judge, and the consul must give advice based on the perception "The welfare of the people should be the supreme law for all"[3].

Directly involved in the political activity of ancient Rome, Seneca promoted exactly the perceptions of the Stoic school according to which wise men should lead public affairs from the top, or be advisers to those who lead them. As an educator of Nero, through the maxims of government, he created a discourse of philosophy of the monarchy, considering that royalty is a form of the virtue of the sage, it is the image of the universal order.

Seneca is a follower of the principality, because he sees in the monarchy a form of state in accordance with nature, the only one capable of stopping some exaggerated, destructive liberties. The prince becomes the spirit of the state, whose body is the citizens; he must be present in the farthest corners of the empire. Therefore, clemency is the best art of government, because any harm to the community affects the prince.

It is also observed that although he is a follower of the empire, he tries to state the principle of individual autonomy above the political activity that he considers

[*] Lecturer, PhD, Faculty of Juridical, Economical and Administrative Sciences, "Spiru Haret" University of Craiova, Attorney at Law, Dolj Bar (e-mail: avocatnedelcu@yahoo.com).

[1] Cicero, *About the state*, Scientific Publishing House, Bucharest, 1983, p. 258.

[2] *Idem*, p. 60

[3] Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *Philosophy of Law. The Great Currents*, All Beck Publishing House, Bucharest, 2002, p. 73.

a personal choice for the achievement of good in society. Seneca's assertions predicted that the balance between the state and the individual would be upset in favor of the latter.

## 2. Content

### 2.1. The evolution of the rule of law in the Middle Ages

If Greco-Latin antiquity was based on the notion of the Constitution, the analysis of which defines the political doctrine of the Jewish regime, Christian principles start from the idea of an agreement between God and the chosen people. He who rules, whether king or not, is only a deputy of God.

Even if he is chosen from among men, he can rule only by the higher will of God. The divine law is superior to any human constitution.

The city of God, according to St. Augustine, is in reality a double, eternal city that coexists with the earthly, time-limited city. These are defined in detail in Book XIV, chapter 23: "Two kinds of love built the two cities; self-love to the point of contempt for God: the earthly city; love of God led to self-loathing: the city of God*."*

The city of God can be understood as a community of the elect, which already exists but is not visible on Earth and overlaps to the point of coincidence with the earthly city or Satan's, a kind of community of the condemned. God is the one who created the world over time; From the beginning, the world needed divine assistance, but God did not intervene in the election of his representative on earth - that is why St. Augustine does not legitimize by divine will any holder of power.

The authority, in its conception, must fulfill three functions: command, foresight, wisdom. The command, given to a person endowed with superior virtues that takes him away from the vulgar, gives the possibility to expose and make decisions. Foresight means finding out what is good for the people, and taking them away from what is bad, taking them away from vice to the path of virtue. Wisdom joins this prediction of the leader that he must help and support the people.

The notion of divine creation enables the philosopher to evaluate all political regimes — monarchy, aristocracy, democracy — provided that the holder of power is right. Imbalances are the result of the lack of determination of the leader or leaders, the lack of virtue, devotion to the general interest or the nature of the regime.

*Thomas Aquinas followed in his views on the state the political ideas advanced by Aristotle, believing with him that "Man is naturally inclined to live in society. The society is a crowd organized under a law of justice in consensus with a common interest"*[4] and that is why the state occupies a special place in society, because it ensures to the highest degree the perfection of the human individual.

The state thus ensures order in society, and although man must obey this order, he also enjoys a certain freedom of action, just as the state has a certain autonomy from those who compose it. However, the individual must submit not only to the legal order of the state, but also to the divine order "which objectively limits the full potential power of the state*"*.[5]

The state must, therefore, develop in close connection with the perfection of the members of society, not against them, it being a fact of reason imposed as a social framework, to which we are bound by history. Given this purpose, the forms of government are defined, in full accordance with those of Aristotle, as: monarchy, aristocracy, republic - pure forms that can degenerate into tyranny, oligarchy and democracy. But following St. Augustine, he states that the holder of power must pursue justice, the pursuit of good.

It can be seen that d'Aquino is one of the followers of democracy, provided that the prince has the virtues necessary to hold this position. Therefore, elites and the people must be equally involved in governing the public good. In this sense, the best form of government of Aristotle is resumed, in which everyone participates in the exercise of power, from the prince to the citizens who have the right to choose and to be elected.

In his analysis of the powers and in his proposal for the establishment of a mixed regime, he will make a compromise between reason and faith, which will bring the reproaches of the Aristotelians and Augustinians; the former reproaching the betrayal of reason, the latter the sacrifice of faith for the benefit of reason. We can see, then, that the Thomistic doctrine thus confers a double origin on power. God is the only and last foundation of power but, through its forms, it is organized by the people, so it belongs to the human domain**.**

But the one who provides the organizational framework of the state must remain the law, which is based on the natural law, the rational law. This statement leads us to conclude that the foundation of legality is legitimacy and not legality is legitimacy. Therefore, Thomistic philosophy is not limited to maintaining obedience, which is necessary for those in

[4] Antonio Brimo, *Les grands courants de la philosophie du droit et de l'Etat*, A. Pedone Publishing House, Paris, 1978, p. 61, quoted by Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *op. cit.*, p. 94.

[5] *Idem*, p. 115.

authority, but introduces elements characteristic of modernism: the participation of citizens and not their unconditional submission.

Considered conservative, Thomas Aquinas's work aims to strengthen the church's role in the political leadership of society, putting authority above the will of individuals, man becoming a means and not an end in itself.

**2.2. The rule of law in the modern and contemporary era**

It has been argued that talking about a rule of law is a pleonasm[6], appreciating that every right is a rule of law and every state is a rule of law and the rule of law is a formal principle that designates all procedures for generating the rule of law.

The rule of law thus becomes a coercive order, an order that justified the police state.

This theory of the time produces an important change in traditional legal thinking, which catches the attention of legal theorists and obviously attracts a lot of criticism from them.

The criticisms come from several directions, among which we could mention, on the one hand, the critique of the identification of the state with law, the critique of the application to the legal order of a formal mathematical logic or, on the other hand, a critique of the concept of purity. the object of the science of law.

Of these, the one that led to the conception of a rule of law is the identification of the rule of law, the theory characterized by objectivism, which results from the very importance that the author attaches to the legal norm and constructivism developed based on a conception of hierarchy of norms in the legal system. on the constitutional norm. Starting from this objectivism, it can be said that the essence of the rule of law is normativism „*This is not the Government of the People, it is the Rule of Norms. After the Inferno of Arbitrary Power and the Purgatory of Controlled Government, the Pure Existence of the Rule of Law Means Legal Paradise*".[7] Proclaiming the power of the rule, the rule of law is nothing but the high order of principle and this in the name of eliminating power. In support of this normative order, the norms - order and norm - foundation are no longer enough. The state, as an order of law personified, makes its presence in absolutely all areas through an order of systematized legality, the norms being "the narrow gate of legality".

As the rule of law is the normative order in application, "it essentially tends towards a normative perfectionism, the norms not determining the order except as part of a certain degree of normative intensity and extension"[8]. The rule of law tends to the perfect being who must be everywhere. Normative perfectionism proclaims legality as absolute, which is equivalent to proclaiming it totalitarian, the rule of law embodying, in this sense, the concept of absolute value. All these powers of the rule of law are designed in the name of democracy, to guarantee human rights and to predict the obstacles that may arise in the establishment of a legitimate power.

Critics of Rechtsstaat's Kelsian theory point to the contradictions of this theory. We briefly present some of them:[9]

a. Normativism tried to eliminate any contradiction that might arise between the enactment of the rules and their application, proclaiming, intensively and extensively, normative absolutism. This is not possible because the application of the rule by the judge is a real work of recreating it according to the concrete needs, the rule of law proclaiming the power of application. Each time, however, through the work of application in which the norm is recreated according to each particular case, a real fault is always created within the rule of law. The one who applies the rule becomes an unknown force;

b. the idea of the rule of law has as main requirement the elaboration of concrete norms. The level of abstraction of the norm, however, remains to the liking of the legislature. The idea of the rule of law concerns the concrete norm, but the notion of norm allows the increase of the level of abstraction according to the needs of the power, which can always create a very dangerous arbitrariness;

c. the normative perfectionism of the rule of law allows it to regulate the exceptions normatively in its own principles, because the exceptions are also norms. What the citizen does not allow as a human being, he accepts in normative form. "The normative technique is a surrogate of freedom";

d. the rule of law of normative essence is the state of what must be. But trust in the state is about what it is, not what it should be, as is the nature of the norm. Under the principle of legal perfectionism, the rule of law can change its own rules, which could potentially be an attack on non-retroactivity. The more we regulate, the less we stop at the past in which the future has often already begun. In accentuated retroactivity we kill self-confidence for the future;

e. the rule of law must ensure[10] maximum

[6] Hans Kelsen, *General Theory of the State*, Bucharest, 1928, p. 59.
[7] W. Leisner, *L'État de Droit - une contradiction ?*, in Recueil D'Études en Hommage à Charles Eisenmann, Cujas Publishing House, Paris, p. 66.
[8] *Idem*, p. 67.
[9] *Idem*, p. 397 şi 398.
[10] Hans Kelsen, *op. cit.*, p. 128.

predictability, *i.e.* the state is bound in all its actions, especially those of authority, by general rules according to which the citizen will be able to calculate future risks. However, predictability is often compromised by the density of the norm fabric. Reality does not remain unchanged, and law must adapt to change. The legislature, the one that regulates, makes these normative changes, not allowing the executive to lead the details. The legal imperative that emanates from the legislature, apparently in general form, will in reality always be more detailed, closer to the concrete case. "Normativism produces, in fact, only one result: it transposes on the legislative level the dynamism of adopting the law, which, in this way, will make the state act in the administrative field".[11]

In such a system in which the state and law are identified, the individual possesses freedom only to the extent that the state does not legislate. Otherwise, everything is under the rule of the legal norm, whose domination is absolute: normative imperative.[12]

If Kelsen[13] he advocated an imperative normativism and the identification of the state with the rule of law and his critics fought against them by supporting the rule of law XXI, with a flexible structure, susceptible to evolution and change.

## 3. Conclusions

The legal literature has consistently emphasized over time that the notion of the rule of law has its own universal dimension, it being expressly enshrined in several international and European documents[14], the existence of the rule of law depends essentially on national realities, which have contributed to the definition and citizenship of the rule of law as a primary concept of the existence of the modern state.

As a legal term, the rule of law comes from the German constitutional tradition - Rechtsstaat, but in the vast majority of constitutions in the world it is found under various names - état de droit, state of law, statto di diritto, estado de derecho etc., each of which being marked by the constitutional historical traditions of each system.

Seventeenth-century England is the one that promotes the idea of the rule of law in a social-historical context dominated by the common-law tradition, to which were added a number of acts of the British Parliament of a constitutional nature[15]. These, together with the establishment of the separation of powers and the organization of an independent judiciary, were the first step towards the establishment of the rule of law.

By the constitutional acts of the English Parliament not only was the rule of law established, but also the supremacy of Parliament in a monarchy in which the Constitution and public law were not recognized. Thus, the "rule of law" in the British system can be translated not only "rule of law" but also "rule of law", more precisely compliance with the rules of positive law, respectively the rule of law in all areas of social life, through the control exercised by Parliament[16] and by ordinary courts.

The idea of a violation of what should be law persists not only in the common-law tradition, but is also embraced by other traditions, considering that "there is no doubt that the primary element, that idée mère, in the constitution of justice was the idea of conformity with the law".[17] No one wants the law to interfere in every detail of privacy, although everyone agrees that in every day's conduct a person can manifest, and actually manifests himself either in a just way or in an unjust way, so here's how John Stuart Mill conceived of the rule of law over the life of the individual. However, the magistrates point out that in the case of additional inconveniences, it is fearful that magistrates will be given such unlimited power over individuals, even if we are happy to see fair conduct rewarded and unjust punishment punished.

In France, the rule of law is a building that has been built over time, characterized by the fact that "historically, the judiciary has never played a major role in defending individual freedoms[18]", a building in which the almighty state, as a representative of the people, inherits the rights of royalty, but limits its power through the Constitution in relation to those governed, beneficiaries of rights.

Therefore, in France, the "state of law" must be understood in the spirit of the French Revolution, "government governed by law" and ensured by the

[11] W. Leisner, *op. cit*., p. 71.

[12] Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *op. cit*., p. 399.

[13] See Hans Kelsen, *op. cit.*, p. 130. He claims in law that this is an "objectivist doctrine of the pure state." He considers that law is a system of valid rules in itself, valid in relation to another rule which is superior to them. But it is incapable of limiting the State by law, for the individual is deprived of all his objective liberty before the State whose force is the essential legal virtue".

[14] European Convention on Human Rights, ratified by Romania by Law no. 30 of May 18, 1994; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, published in the Official Gazette of Romania, Part I, no. 107 of 13 February 2008.

[15] Petition of Rights - 1628, Habeas Corpus Act - 1679, Bill of Rights - 1679, Act of Settlement –1701.

[16] Ewald François in L'Etat providence argued that "Parliament can do anything but turn a man into a woman, no."

[17] John Stuart Mill, *Utilitarianism*, All Publishing House, Bucharest, 2014, p. 74.

[18] Alain Monchablon, *The Citizen's Book*, Humanitas Publishing House, Bucharest, 1991, p. 11.

separation of powers and the practice of constitutional authorities[19] specially created for this purpose.

One of the sociological-legal conceptions about the state and law was elaborated, claiming that any society is a discipline, and man, not being able to live without society, can only live subject to a discipline.[20] Any political system must be based on the postulate of a rule of conduct that is binding on all. The legal rule that is imposed is not based on respect and protection of individual rights, but the need for social cohesion in order to fulfill the function, the "duty" of each individual.

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Under the influence of Enlightenment liberalism, the German philosopher Immanuel Kant [21] directed the conception of state, law and morality on a rational path systematizing the conceptions of Rousseau and Montesquieu, "it is impossible to conceive of a reason which, aware that it is the author of its judgments, attribute the determination of judgment to his reason, but to an impulse"[22]. Thus, the law is defined as "all regulations that reconcile the autonomous will of the subjects based on the absolute principle of freedom"[23] and the state is seen as "a set of people and rules of law" aimed at guaranteeing individual freedom by law. Kant is said to have "ushered in a new way of thinking, with a method exactly the opposite of what we are currently pursuing[24]." Referring to Kant, Fichte said that he "confined himself to pointing out the truth, he did not expose it nor"[25].

Formulated and based on philosophical and political coordinates, the concept of "rule of law" acquired legal content in German doctrine in the early nineteenth century in the works of authors such as Otto Baehr[26] who, extending the notion of all state activity, support the principle of independence and a sine quo non condition of the rule of law, stating that "a court sentence is just only if the judicial activity is separated from the executive activity of the state and assigned to independent state bodies. The importance of this separation lies not only in the separation of state activities between them, but especially in the possibility of subordinating the administration to an external jurisdiction. For the rule of law to become a reality, it is not enough for the state activity to be strictly circumscribed in legal frameworks, but above all there must be a capable jurisdiction to apply the law in concrete cases and to be an unequivocal basis for restoring legality in case its harm".[27]

**References**


- Cicero, *About the state*, Scientific Publishing House, Bucharest, 1983;
- Nicolae Popa, Ion Dogaru, Gheorghe Dănișor, Dan Claudiu Dănișor, *Philosophy of Law. The Great Currents*, All Beck Publishing House, Bucharest, 2002;
- Antonio Brimo, *Les grands courants de la philosophie du droit et de l'Etat*, A. Pedone Publishing House, Paris, 1978;
- Hans Kelsen, *General Theory of the State*, Bucharest, 1928;
- W. Leisner, *L'État de Droit - une contradiction ?, in Recuil D'Études en Hommage a Charles Eisenmann*, Cujas Publishing House, Paris;
- European Convention on Human Rights, ratified by Romania by Law no. 30 of May 18, 1994;
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, published in the Official Gazette of Romania, Part I, no. 107 of 13 February 2008;
- Petition of Rights - 1628, Habeas Corpus Act - 1679, Bill of Rights - 1679, Act of Settlement –1701;
- John Stuart Mill, *Utilitarianism*, All Publishing House, Bucharest, 2014;
- Alain Monchablon, *The Citizen's Book*, Humanitas Publishing House, Bucharest, 1991;
- Leon Duguit, *Traite de droit constitutionnel*, II-eme tome, Ancienne Librairie Fotmeing, 1928;
- Immanuel Kant, *Introduction to the Theory of Law in the Volume Metaphysics of Morals*, Antaios Publishing House, 1999;


[19] The control of the constitutionality of the law was established by the Constitution of 1795.
[20] Leon Duguit, *Traite de droit constitutionnel*, II-eme tome, Ancienne Librairie Fotmeing, 1928, p. 59.
[21] Immanuel Kant, *Introduction to the Theory of Law in the Volume Metaphysics of Morals*, Antaios Publishing House, 1999, p. 157.
[22] Immanuel Kant, *Critique of Practical Reason*, Scientific Publishing House, Bucharest, 1972, p. 65.
[23] *Ibidem*.
[24] Mircea Djuvara, *Essays on Philosophy of Law*, Trei Publishing House, Bucharest, 1997, p. 265.
[25] Mircea Djuvara, *op. cit.*, p. 265.
[26] Otto Baechr, *Der Rechtsstaat*, Wigand, Cassel și Gottingen, 1864, p. 87.
[27] Ernest Wolfgang Bockenforde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, Festschrift für Adolf Arndt, Frankfurt-Maine, 1969, p. 63.

- Immanuel Kant, *Critique of Practical Reason*, Scientific Publishing House, Bucharest, 1972;
- Mircea Djuvara, *Essays on Philosophy of Law*, Trei Publishing House, Bucharest, 1997;
- Otto Baechr, *Der Rechtsstaat*, Wigand, Cassel și Gottingen, 1864;
- Ernest Wolfgang Bockenforde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, Festschrift für Adolf Arndt, Frankfurt-Maine, 1969.