



## ORIGINAL PAPER

# Redefining Civil Society in Relation to Their Relationship with the State and Their Contribution to the Building of the Rule of Law

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### Abstract:

If it were conceived that the civil society might be without right, it should be admitted that the individuals who make up this society are by their nature independent of the community. However, since communities that make up the population are a component of the state, if each individual by his nature would deny his belonging to civil society, the concept of "state" would be limited to territory, excluding the idea of a human community, which would be a paradox. The relationship between civil society and the rule of law is based on the principle that the powers emanate from the people themselves, and as a consequence, the sovereignty of the people becomes the basis of government. Comparative analysis of constitutional texts reinforcing the idea that society is a central and defining element of the rule of law, being taken into account: the Constitution of Romania, the Constitution of the Hellenic Republic, the Constitution of the Republic of Austria, the Constitution of Italy and the Constitution of the French Republic. In order to be able to redefine civil society, we will analyze: the relationship of the civil society with the rule of law and the way in which this society participates in building the rule of law.

**Keywords:** *society; sovereignty; rule of law; Constitution.*

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## **Redefining Civil Society in Relation to their Relationship with the State...**

### **Introduction**

The purpose of civil society is to contribute to defending a democratic legal order. In fact, the expression "democratic legal order" is almost pleonastic, because a democratic order is, by definition, legal. However, not every legal order is democratic, because in a state in which civil society is only allowed to mimic participation in its edification, the organization of civil society means only the procedure by which the state implements and perpetuates its own monopoly of constraint.

The relationship of civil society with the state and the way in which it participates in its construction is of paramount importance for the continuity and consolidation of the rule of law. The current civil society is involved in the decision-making process of the state, being an active, central and defining element of it, well organized, being the source of state sovereignty.

Through the participation of civil society in the exercise of democratic power, individuals defend, promote and exercise their universal and fundamental rights in order to attain their legitimate interests. Thus, the state is for the civil society a mechanism for materializing the rights of its members, while civil society is for the state the source of power.

The rule of law is that state which organizes the civil society in such a way that the individuals that make it can exercise their right to be free only through the state itself, while the rule of law can be built with the support of civil society only by guaranteeing individual freedom that allows citizens to contribute directly to the rule of law.

### **The relationship of civil society with the rule of law**

The law appeared during the time that the individuals grouped and formed the civil society. So, where there is a society, exists the law, the society and the law conditioning each other. This reciprocity derived from the fact that, on the one hand, the individuals who formed the society they can't be protected by failing of any rules which regulate the behaviour and to pass their own rights' limits and obligations, and, on the other hand, in the society's absence, the all regulatory system would become a sum of inexplicable legal texts.

In another train of ideas, if it conceived that the civil society could exist without the law, it should be admitted the fact that the individuals who form this society are independent to the community due by their community. Or, starting to the moment that the communities which form the population, represent a component of the state, if each individual by his nature would deny their membership of the civil society, the concept of the „law” would limit just to the territory, excluding the idea of the human community, which it would be a paradox.

The relationship of the civil society with the rule of law is based on the principle that the powers emanate by their own nation which are exercised and, as a consequence, the sovereignty of the nation becomes the basis of government. For example, in the Constitution of the Hellenic Republic, the provided texts in the article no. 1 highlights the fact that the nation comes back the role to legitimize the power that it itself obeys and accepts, the lawfulness of the state power turning into a legitimate character: „The national sovereignty is the foundation of governance. All the powers emanate from the nation and exist for it and for nation; it would be exercised due to the provisions of the Constitution”. (Constitution of the Hellenic Republic, art. 1, alin. 2 și alin. 3).

The hellenic constitutional text could be interpreted due to the fact that, although, the legal rules are issued by the state, its are issued in the name of nation and for it. Constitutional provision which states that „all the powers emanate from the nation” include all the states’ powers, the hellenic constituent nonmentioning in a specifically or limited way which powers emanate from the nation. So, the legislative power, the executive power and the judiciary power exist for the nation and the people which conferred the state the exclusive right to establish the issue of legislation and its application by the coercive force. Starting from this way, the relationship of the civil society and state becomes, essentially, a double sovereignty report. On the one hand, the act of governance is based on the nation sovereignty, and, on the other hand, the sovereign state assigns its normalised and constrained competence above the civil societies from which emanate the sovereign power.

Of course, the time when it is referred to the civil society, it must be taken into account the fact that it includes not only the individuals who form the nation and the people, but the state itself. Practically, the nation and the state are inseparable, the both component of the civil society being interdependent. If the individual groups who form the nation would exercise the power by their own, the state would not be sovereign, just as if the powers did not emanate from the nation the concept of state law would become an absurdity.

The relationship between state and the civil society trains obligations on the one hand and on the other hand, the state committing in respecting the human’s rights as an individual, but also as a member of the society, reserving the right to request to citizens to exercise the obligation of social and national solidarity. It can be highlighted as a headline like an example to this paragraph in an article from the same fundamental law of Greece where are specified not only the guaranteed rights to human being of the state, but also the purpose of their recognition and guarantee: „ The recognition and the protecting of fundamental and inalienable rights of the man from the state follow *the realisation of a social progress concerning to the freedom and justice*. So, at least from this point of view, the protection of fundamental rights and freedom have the right purpose the accomplishment of the human freedom principle, but also the streamline of justice acts. Essentially, the justice it is the one which assures the social order by its subsumption of a normative orders. So, the justice is necessary conducting to social relations and becomes a privilege of the sovereignty of the rule of law. By this fact, probably, it conditioned the hellenic constituent to the recognition and protection the fundamental rights by the realization of a social progress concerning the justice.

Due to the specified report of interdependent between the civil society like a unique source of state sovereignty and the sovereign state, it is necessary to underline the fact that, starting from the moment in which the nation gives the state the exclusive right to exercise the competences based on the sovereignty principle, the nation’s sovereignty becomes s virtual one. For example, in the Constitution of the Republic of Austria it is mentioned the fact that the state’s sovereignty gives from the nation, no the fact that the state is sovereign or the sovereignty would become to the nation. Even if it seems illogically, by the fact in which is formulated the constitutional text due to the fact that the nation is the source of state’s sovereignty and, however, this sovereignty does not belong to it just in the moment in which legitimate the power that becomes subject. The same idea it breaks out of Italy’s Constitution, which provides „ The sovereignty belongs to the nation, which exercises it in the forms and limits of the Constitution”.

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No matter which point of view would be analysed the relationship between the civil society and sovereign state, the nation as a source like the origin of sovereignty becomes the central and defining element of the state law, which follows the implementation of justice by the guarantee of fundamental rights and freedom of the man. Just like this, the state law and the justice become inseparable. What it means, it is the fact the justice becomes a *sine qua non* condition of the state law, and also as the state law imposes the existence of the justice which makes it possible the exercising, by the citizens, for real, of established rights to a constitutional level.

Concerning to all these, it can say that the civil society and state law form a segment between the limits of which is made mutually the transfer of the powers. In support of this idea, the Document of the Meeting from Copenhagen by the 1990 over the human dimension of C.S.C.E., states in the article 6 the fact that the fundamental of the authorities and the legitimacy of a govern represents the free expression and equitable of the nation's will concerning the elections.(International Treaties, No. 1: art. 286). As a consequence, due to the same article, the citizens have the right to participate directly to the governance of their countries, as through the representatives that they elect them by vote, but also in a direct way. In continuation, through the nation's will, the states come back the obligation to protect the democratic order which the nation establishes in a free way.

The essence of this regulation included in the Document of the Meeting from Copenhagen it is also found in the constitutional texts of the states. For example, in the Constitution of French Republic it states that „*the principle of the Republic is: the governance of the nation by the nation and for the nation*”. The sovereignty belongs, but, to the nation as a whole, the french constituent highlighting the fact that “*none of the part of the nation and either a human being can not assume the exercising of the sovereignty*”, the nation exercising this sovereignty on the referendum way and through representatives.

The essence of the fundamental sovereignty bold in the Constitution of French Republic it is also found in the Romania's Constitution, in the article no.2 “*the national sovereignty belongs to the romanian nation, which exercises through its representative authorities, based on free, periodical and correct elections, also through referendum*”. (alin.1) „*None of a group and either a person can not exercise the sovereignty by its own.*” (alin. 2). From these constitutional provisions it could deduct the fact that the romanian state conduct in the name of the nation and for the nation and the fact that this has the right to impose the law. But, in the content of the same fundamental law, in the article no.1 alin (1), it states the fact the „*Romania is a national state, sovereign, independent, unitary and indivisible*”. This provision contradicts to a certain extent the democratic principle due to the fact a society can impose the law in the sovereign state. The mentioning at a constitutional level due to the fact that Romania is a sovereign state „*assume that the state determines the competence of its competences*”. (Dănișor, 2009:26) On the same note, the legal rules are issued in the name of the state, this being the only one which can establish „*the extent of the effects of autonomous normative acts*” (Dănișor, 2009:26) and only it can resort to the application of the coercive force over the individuals who form the population found on its territory. By this way, the state seems to be over the right and, of course, over the individuals which form and which submit them through legal rules. As a consequence, this perspective closes to the absolutism of Thomas Hobbes, due the fact that the “*the law it is not a limit for the state*”. *The law does not have other source than the State.*” (Lavroff, 1994:86). Hobbes

tries to focus on the *Leviathan* paper the fact that the social peace it can not exist if the people oppose some face resistance to the power. So, they have to search and to follow the peace, this thing being a fundamental law by nature. (Mareş, 2008:114) So, the people have to obey, because in its vision, the civil society it is not a power, because the people who form it abandon the own sovereignty to give it to an absolutely authority, the State.

In quite another point of view John Locke presents the civil society, which in his vision exercises a legitimacy and sanctions role which have as a result preserving life and the security of the society's members. For Locke the political society has the purpose to add to the natural condition three elements: „a stable law”, a judge who has to be impartial and a power which enforces the sentences. (Locke, 1999:130) The philosopher argues the fact that the people become free for real only when these obey for their will to the legal rules to which they consent.

On the other notes, the individual freedom it is conditioned by the obeying of the man of the legal state order and, as a consequence, the subjects of legal order are free only just because they are involved in an equally way in by building this order. From this point of view, it can pass three cumulative conditions of the individual freedom of the existence: 1. The individuals to obey to the legal order of the state; 2. The obeying of the individuals to be by their will; 3. The individuals to get involved in an equally way in the form of the order to which they obey in a constant mode.

No matter the point of view it is analysed the relationship between the civil society and the state law, it is in an essence a double report of sovereignty. The nucleus of this report is based on the fact that the state of the power exercised in the name of the nation from which provides has as a fundamental the arbitration between the social forces. If the sovereign state weren't equidistant from the socio-economical groups, would exist the risk that a certain group to exercise the sovereignty by its own, and that would annihilate the sovereignty of the state.

### **Civil Society Contribution to Building the Rule of Law**

The fact that the civil society which constitutes the sovereign people contributes to the building of the rule of law has already been established. It must, however, be clarified: the way of how it contributes, the limits of the contribution, the real power that society owns and can use it, the way in which it transfers the power by legitimizing the state authority, or it changes it through the democratic exercise of the right to sanction those originated acts from the legitimate power that would damage the fundamental rights of those who legitimize them.

Starting from the idea that the civil society which constitutes the people is sovereign, leading the state through the existence and direct activity of the individuals that make up it, the state is not only led rationally and through democratic means by individuals, it becomes a form of materialization of the universal and fundamental rights of state members, the latter voluntarily submitting to the laws and principles in order to attain their legitimate interests.

As regards the way in which the civil society participates in the building of the rule of law, it must be taken into account the transition from the universality of rights to their individualization, which implies the reaching of the individual's particular purpose by reference to the universality of a certain right or certain rights. Consequently, the conduct of individuals becomes a *sine qua non* condition for their substantial freedom, the goal pursued by them being the freedom, because if the individual is not free, he can

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not participate directly in the building of the rule of law, being compelled only to obey of some rational and universal norms, a situation where the power could not be transferred and either distributed in a balanced and fair manner. For example, if the individual did not have the freedom to vote and thus to legitimize the power of which he is subjected to, the basis of government would become the act of government itself, the basis of which would be an absurdity, because it would exclude the reality that the individual is a member of the state, turning him into a prisoner. Or, the state's role is just that to focus on the fundamental rights, respecting the individuals' right to manifest themselves freely, without intervening in certain spheres, such as, for example, that of the private law which regulates the marriage. By exercising the right to marry, individuals not only perpetuate the species, but also ensure the continuity and consolidation of the rule of law, because before the individual integrates into the civil society and accepts or assumes certain rules of conduct, he develops morally and spiritual within the family. Marriage is essential for the civil society, because this institution allows the creation of orderly communities.

However, although individuals enjoy of the autonomy regarding to the manifestation of the right to marry, the state draws some limits on the exercise of this right, but without these limits being void to the individual as a member of the civil society or the state. In this respect, the constitutional guarantee of the right to marriage in Romania is edifying "in the spirit of the democratic traditions of the Romanian people" (Constitution of Romania, art. 1:3). Thus, the Romanian Constitutional Court was notified of a legislative proposal of citizens whose object was the revision of art. 48 par. (1) by the Constitution, related to marriage and family formation, requesting for the term "husbands" to be replaced by "man and woman".

The initiators of the draft law, entitled "Law on the Review of the Romanian Constitution", argued in the explanatory memorandum that by revising Article 48 (1) ensures of the family's protection made up of heterosexual people, invoking that in Romania, according to some historical, cultural and moral considerations, only one man and a woman make up a family. Further, in the argumentation of the legislative draft, it is mentioned that since the Universal Declaration of Human Rights, the European Convention on Fundamental Rights and Freedoms and the Romanian Civil Code, the term "man and woman" is used in the matter of consecration and recognition of the right to marriage, it is necessary to replace the term "spouses" with "woman and man" in the constitutional article that governs the fundamental right to found a family. Replacing the term, they support the initiators of the legislative project, would remove any risk of unhealthy development of society, otherwise the term "spouses" could suffer "alterations, constraints and interpretations" (Constitutional Court Decision No. 580 of 20 July 2016) would be inconsistent with the interest of family protection.

Forwards, it was argued the fact that other human communities which have not established categorically respecting and promoting the legislative framework designed to protect the family "were disappeared" or "were absorbed and assimilated" by certain groups which do not have as a fundamental purpose the perpetuation, but only assumption of the family concept.

Considering the legislative proposal for the revision of the Constitution, the Constitutional Court notes that the initiative is constitutional in relation to the provisions of the fundamental law, because the modification would not affect the express and limiting values provided by the same law (national, independent, unitary and indivisible

character of the Romanian state, governance, territorial integrity, independence of justice, political pluralism and official language).

Further, the constitutional judges acknowledge the conformity of the citizens' initiative with the constitutional principles and guarantees, the amendment which is the object of the initiative, which is not capable of suppressing their fundamental rights or freedoms or guarantees and does not affect or abolish the right to marriage or guarantees, through the legal content of art. 26 of the Romanian Constitution regarding the intimate, family and private life.

Regarding to the Article 26 of the fundamental law, invoked by the Court in motivating the constitutionality of the legislative initiative to amend the Constitution of Romania, it is necessary to analyze paragraph (2), which provides that each person can dispose of himself without affecting the rights and freedoms of others, good morals or public order.

Although the individual as a citizen of the state can dispose of himself within the limits set by the law, being protected against of any forms of discrimination, of the category to which it belongs also the discrimination on the grounds of sexual orientation, the Constitutional Court states that the exercise of the fundamental right to marriage can be exercised by partners of different biological sex, leaving it to be understood that the conclusion of same-sex marriage might be contrary to good morals, public order, or could prejudice fundamental rights and freedoms of others.

Certainly, that the individuals belonging to sexual minorities are also holders of the supreme values guaranteed by the Romanian Constitution and can dispose of themselves, as is apparent from the content of the fundamental law, but the recognition of the civil partnership would result in the redefinition of the institution of marriage. The equality of rights invoked by people belonging to sexual minorities to obtain the legal right to marry is a forced one, because not every kind of equality is democratic and compatible with the principles of the state law. Just for this statement that any legal norm "must be interpreted in the sense of maximizing individual freedom" (Dănișor, 2014: 212), it should be taken into account the hypothesis in which "families" made up of the same biological sex would issue claims for the adoption. The moral health of adopted children would suffer, these being forced to develop, to grow, and to form into a pseudo-family abnormality, and to be guided to the same guidelines and marginalized in society.

Although the legal rules in civil matters state that marriage is concluded between a man and a woman, the term "spouses" from the fundamental law is likely to give rise to contradictions and interpretations, just based on the principle of "specialia generalibus derogant". It was therefore imperative that in the Constitution the term "spouses" be replaced by the term "man and woman".

Not granting the right to marry same-sex couples does not mean establishing or perpetuating inequality or discrimination, but rather a state law based on the rights and fundamental freedoms by human being which can not, from a procedural point of view, to correct so-called inequalities so as to affect the rights or freedoms of others.

Therefore, on the one hand, the Romanian state can not grant the right to marry to gay couples because, as is apparent from Art. 1 par. (3) from the Constitution, the supreme values of the state law (dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism) are guaranteed "in the spirit of the democratic traditions of the Romanian people". It can therefore be inferred that the supreme values are guaranteed only if their holder exercises constitutional rights

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according to the democratic traditions of the people. But, according to these traditions, the marriage ends with a man and a woman, based on a fundamental principle of human society: that to value human breeding. Because of the fact that the institution of marriage is a traditional one and the respect for traditions have been inserted into the constitutional norm, enjoying by supremacy in the internal legislative hierarchy, the recognition of the civil union of people belonging to sexual minorities would be unconstitutional in the limiting sense provided by art. 1 par. (3) from the Romanian Constitution.

Therefore, the exercise by a person of the rights and freedoms guaranteed by the rule of law is possible within the limits of traditions, which means that the socio-moral values of the majority of society are imposed in the face of the trial of sexual minority attempts to demand the guarantee of family values that do not correspond traditions and, therefore, are undemocratic and unconstitutional. This explains the fact why the citizens' legislative initiative for the revision of the Romanian Constitution in the sense of the amendment of art. 48 par. (1) of the Constitution, replacing the term "spouses" with "man and woman" had over 2.6 million supporters.

Another worrying issue that concerns legalization of same-sex marriage legalization is adoption, since once marriage is accepted, the homosexual couples will have the same rights and obligations as heterosexual couples.

The possibility of adoption in the case of people belonging to sexual minorities is a more complex issue than marriage, as it implies the adoption of a child that can come from three totally different situations: the use of a surrogate mother, the in vitro insemination or simply the adoption of a child from another couple.

Already in the world there are jurisdictions that allow gay couples, married or not, to adopt children. However, people belonging to sexual minorities can not guarantee that they do not violate the fundamental rights of the adopted child, a child who may be subjected to major psychological imbalances and may suffer behavioral disorders, being forced to bear marginalization and become a victim of differentiation in the charging society such an attitude. In this case, would that state be the state of law that can not guarantee the protection of free development of human personality ?! For if the development of human personality is a foundation of human dignity, and this foundation is reached in its substance by granting the right to adopt homosexual couples, human dignity, guaranteed in the state law, would turn from supreme value into fictitious value.

Therefore, the tolerance is democratic, but individuals must respect the constitutional right of people belonging to sexual minorities to dispose of themselves, rather of because the Romanian Romanian state is a state law in which the supreme values are guaranteed only if their owners have them the limitation of respect for the democratic traditions of the Romanian people can not be allowed to legalize the conclusion of marriage between people of the same biological sex.

This is only an example of how the contribution of individuals to the building of the rule of law is limited not only through of some constitutional texts, but also through the externalization and manifestation of individuals' will for whom the family is not just a tradition, but also a moral foundation of the state. Hence it follows that the state exists in the consciousness of individuals, and its existence outside civil society can not be conceived, just as the civil society can not rule out the existence of the state. The limiting of the exercise by a certain right, such as the right to marry for people belonging to sexual minorities, does not remove them from the freedom to dispose of themselves, a freedom which enjoyed by all individuals of civil society, but that limitation is necessary



because in a state law the freedom must be organized in such a way as to impose differential application of the protection of individuals rather than uniformity.

Thus, the rule of law is that state which organizes the civil society in such a way that its members can materialize the purpose of being free only by the state itself, whereas the rule of law can be edified only by guaranteeing the individual freedom that permits them citizens to contribute directly to the rule of law.

Practically, the individual freedom as the basis of human dignity is not only the supreme value of the individual, but it is the fundamental truth that, once appropriated by individuals, causes them to control their instincts to rationally contribute to the creation and perpetuation of civilization in an organized manner. Therefore, the individual freedom has a dual quality: it is not only a goal that civil society seeks to attain, but also a means by which it participates directly and directly contributes to defending the democratic order to which it itself obeys. By virtue of the principle of freedom, the civil society can sanction certain acts of legitimate power considered inappropriate in a state governed by the state law. For example, on February 5, 2017, more than 600 thousand people protested in Romania to demand the repeal of an emergency ordinance (Government Emergency Ordinance No. 13/2017) adopted by the Government, which contained a threshold of 200 thousand lei for the abuse of service abuse. Following the pressure of civil society, which considered that the normative act was unconstitutional and immoral, this was abrogated. It can, therefore, admit that the civil society has exercised a sanctioning role, seeking to defend the security of its members, thereby demonstrating that those elected to legislate in the place of the people do not have the power only temporarily, exercising it in a limited way and only by the will of civil society who consented to the transfer of power by legitimizing state authority. This example is meant to emphasize that in a state law the legislative and executive powers must not take legal risks that contradict the will of the majority and the common good that must govern the life of the civil society.

#### **Redefining of the civil society in relation to its relationship with the state and its contribution to the building of the rule of law**

The state power is not absolute, just as the individual freedom is not absolute. The state power emanates from the civil society, which is an active element of the rule of law. Taking into account all the arguments which were set out above and taking into account both civil society's contribution to the building of the rule of law, but also its relationship with the state, it can be concluded that: *"The civil society represents that active, vital, central and defining element of the rule of law which legitimizes, oversees, influences and controls the state power to which it confers the competence of normalization and constraint for the defense of the democratic order which the people themselves establish and to whom they voluntarily obeys by the virtue of the fundamental principle related to the individual freedom."*

Practically, the civil society is the mechanism that makes the democracy work, as the institutions of this society have the role of correcting dysfunctions that could unbalance the democratic order. However, this correction can not only be done through overseeing, controlling and influencing those decisions of the state power that concern the public interest and the common good. As a consequence, the influence exercised by the civil society in the administrative and economic policy of the rule of law is not only a right of it, but also an obligation, the ultimate goal being to administer society in such a way that the individual and the state do not exclude each other. The civil society is

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fundamental to legitimizing the democratic power that not only norms, but also applies the coercive force in order to maintain, consolidate and perpetuate that social order subsumed in the legal order.

### Conclusions

The civil society is essential for democracy and for democratization, as the process of democratization is one that evolves alongside the civil society. In fact, the mechanisms for achieving the democratic and liberal of the rule of law depend on the way and the limits in which the civil society can use the democracy procedure to participate to the public life, to support or change the political power which legitimizes and oversees it. When the society adopts a certain kind of conduct by obedience to the legal norms imposed by the state, in fact the civil society itself obeys itself, just as the state itself obeys the same norms that it issues. So, if the civil society is not above the law, either the state itself is not above the law.

As a consequence, in a democratized legal order, as the civil society as an active element of the state is a component part of it, also the state, which organizes legal, social, territorial and economic the civil society, is part of it. The political power can control or dominate the civil society only to a certain point and only by some means, just as the civil society can engage in decision-making with certain limits. It is, however, vital for democracy that this double-control should have only one purpose: the realization of the right.

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### Article Info

*Received:* April 15 2018

*Accepted:* August 12 2018

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