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National Administration vs. Private Foreign Investors

Our article speaks about one of modern tendencies in public administration - signing contracts with private investors in almost all domains of activities. Characteristics of this process must be carefully examined as implications are too important not to be analyzed: an answer to this problem can be that identification sign for one or another political party leading the country in concordance with its ideology.

To better understand this idea and give an answer we shall, first, examine private intervention in the period of dictatorship; second, try to determine few principles of this operation in democracy. As the 1990s brought democracy in the middle of political discourses (1945 – 1989 being ideological conflict years), finally we shall examine a little what is politically correct¹ in the area.

Private intervention in the dictatorial regime. The article discusses one of modern tendencies in public administration: private intervention in quotidian activities of entities which are obliged by law to fulfill all social necessities (with one condition, to be recognized by law; without this recognition, it will be only a legitimized interest).

In fact, this entity is public administration, the notion understood as a system able and obliged to register social needs of the people², having in the same time immense duties to fulfill them.

As a supreme confirmation (for fulfilling social needs of the people) we gave examples the democratic states, because in those places democracy and responsibility are concepts not only theoretically understood, but having entered social mentality (they are fixed and children are educated from the first days of their life in this spirit) – in an articulate democracy those rights and obligations are incontestable values – no one tries to contradict that – if someone tries to do this, it is a heresy.

But in dictatorial states there is a problem: a supreme role of public administration is not to serve citizens, it must serve only politic power (in fact, the problem is a little more complex – in dictatorship it is important for a political leader to have the support of the army; this helps to make public administration a prisoner of a dictator).

At the same time it is necessary to understand one thing: not all authoritarian leadership is dictatorship. A real dictator kills his internal political enemies and creates a strong army and police. As a supreme characteristic, the number of soldiers and policemen is higher than normal³.

Analyzing relations between a dictatorial regime and fulfilment of social needs we must underline that under a real dictatorship state and public administration knows a hyper-centralization in this sphere.

Public administration in dictatorships is only an instrument – but in the same time this political control has two effects: one is in public services direction and one is the private property area.

In fact, public services are a completely state affair as to fulfill all social needs in this kind of a state a total political control is a must – in reality, political leaders (and only their

¹ What is really politically correct? This answer, in our opinion, differs from country to country and from society to society – only one vision of reality for the whole world means that “only one state is independent, and its values are that way of control over the rest of the world”.

² Balan E. *Institutiile administrative / Administrative institutions* / Ed. C.H. Beck. Bucharest, 2008. P. 7.

³ For economy the maximum number of soldiers and policemen is 1% of population. A higher number means problems, because taxes must be directed for their housing, clothing, food, etc.

closed group, without citizen's control) can establish which needs are "really social needs" and in what proportion those social needs can be recognized and solved by state intervention.

Dictatorship means centralization – public services are controlled by the state, and no administrative actions can be undertaken outside supreme state rules. The state in this case is the only one actor able to fulfill social needs – even if the state tries to concession a public service to a private investor, this investor is 100% controlled by state⁴.

Second direction is property. In fact, this system uses only one concept trying to define this institution – property is the second important domain for a dictatorial state (the first one is represented by a constellation of measures that assure the supreme purpose for leaders – keeping the power forever) which has in the centre a notion very well-known in administrative law (and for extension in public law): public interest, most of the time this concept is joined with national interest.

So, as a result, all property in a dictatorial state belongs to the state – not directly, but in reality the state is the only owner of goods.

This idea can be a surprise, but in fact, it is not. A dictatorship represents in fact a total control of borders with army and police, as a legitimate force holder. At the same time, those institutions are the strongest in every country, because they are only one lawful subject able to adopt a regulation and at the same time to implement it and assure that regulation against every violation.

So, when in one state a dictatorial regime emerges it means that army and police can assure the application of every rule, and if political power decides changes in the state's property structure, they will carry them out – so, this control of security agencies is translated into one conclusion: a dictatorial state is a real owner in a country (there are no important limits for recognizing and respecting private property).

There are some differences between the ruling wing of that dictatorship (the most understandable example is Afghanistan between 1970 – 2001, all leaders trying to impose their variant of state's vision: more or less left / right, but all of them choose when they lead the country only violent measures to implement their strategies – and political visions, of course).

In fact, if the right wing rules the country, the property right is not abolished – everyone can keep his/her property; the problem appears when a state tries to manifest its characteristic against few owners – their property can be expropriated any time, in every conditions and state can receive the ownership of those goods.

At the same time the state can decide who is "a correct owner" of a good (of course, only a member of the group). So, if citizens accept rules and don't create problems, they can keep their property, but all the time there is a Damocles sword above them – if the state decides that another person must be the owner, they will lose that – in that moment the property right becomes an eventual right⁵.

In the leftist dictatorship the property right is a victim: all the time owners are targets of political campaigns – "they are guilty because they are" – that means a leftist vision set in the middle of the society (state and only the state).

Why did we analyze those differences?

First, because in the world there cannot be democracy as this notion is understood in Europe – the reason for this statement lies in numerous differences between societies

⁴ In dictatorships sometimes there was a practice (not in the sphere of public services, but in a few industries) to attract private investors (mainly foreigners) keeping them under the state control; if those investors tried to avoid those directives, the state replaced them with an administrative decision (as a legal instrument). Officially (from the public aspect) there was a joint-venture between a state enterprise and a private foreign investor.

⁵ As it is well known in the civil law theory, property rights are real ones. This character is essential – if the property right became eventual, its substance would be affected and we would lose it. Balan E. Dreptul administrativ al bunurilor / Administrative law of goods. / Ed. C.H. Beck. Bucharest, 2007. P. 32–33 .

(religions, traditions, different languages, history, etc.). Globalization is not the perfect medicine for everything, especially for the problems like that, and its speed can cover for a while some important aspects of misunderstandings, but not always and not for ever.

So, as a consequence, we must understand that it is possible for different forms of democracy to exist – more than that, those traditions could generate social conflicts if we tried to create a mix between old ones (sometimes hundreds of years of application behind them) and new concepts – trying to be politically correct.

Dictatorship is bad, of course, there are a lot of injustices in this world, but sometimes to change those realities it is necessary to start a war, and in this dispute you know how you start, but never how you finish.

In this way we can analyze situation with women in the Islam world: women are not in the first positions, and it is difficult to believe that men are happy to let a superior position – but who can imagine a war between men and women in Islam? The first problem is where women will get any weapons from (in Islamic countries women are not enlisted in military service).

Equality between men and women is normal in democratic Europe, but in a lot of societies (and most of them with millions of people – like Pakistan, for example) situation is settled on another coordinates: only a force able to destruct memory and life can create another society, where all people are equal⁶.

Returning to our subject, in societies like that private intervention in the property domain is minimal – in fact the state creates framework for all interventions (actually, only in a right wing dictatorship it can be a private intervention to fulfill public services, in the left one it cannot exist because all enterprises are administrative).

More than that, private intervention in a communist state (prototype for left wing) is reduced so much that even normal actions with small property allowed by state are made impossible: for example, under Romania's Law no. 4 and Law no. 5 from 1973 it is forbidden to transfer property by inter vivos acts, only mortis causa acts being permitted. Thus, private intervention in public administration's life became almost impossible, and foreign private investors made joint-ventures with Romanian administrative enterprises under strict state control (and product was sold in Romania with a Romanian enterprise name, and abroad only with a private investor's name).

In fact, that disposition was an expression of Constitution – the fundamental law of every communist state proclaimed in the preamble or in the first articles that property belongs to workers and peasants, and the state is an expression of this alliance. This state will administrate all goods – and in a society where all members are from the same category, a single human being does not exist – a perfect crushing machine was created.

In conclusion, a connection must be underlined between different kinds of dictatorial regimes – even if they respect private property, the reality is simple: all rights are only eventual, anytime an administrative decision can change the good's faith. This feature is promoted by a total control over justice – complaints against administration, even if they can exist in a positive law, cannot be exercised as administration is a personification of a ruling class – and ruling class in a dictatorship is never wrong.

Private intervention in a democratic regime. Democracy is understood in this text as a correspondence between moral and law; this agreement is understood and respected by the whole society and all citizens: the supremacy of law should be created like that (in fact, a single common thing between European countries, in our opinion, is respect for law, while the whole history, traditions and mentalities separate them).

⁶ In this point we can speak about a global policeman and its “politically correct vision of world and countries” – more geopolitics than administrative law.

In 1990 democracy was restarted (in this research study we shall consider the starting point of democracy the moment of January 1st, 1990, when the legal year started) and from this year we can discuss private intervention in public administration, as the debate is more important in Eastern states than is the Western part of the continent.

In 1990 (and 1991 too) an affirmation was made in political debates: the Western world won cold war, so winners started imposing their system (and their peace⁷). For them the supreme value (in economy) was the preeminence of private property. More difficulties appeared because in the Western world there was not a united command; thus, if the whole democratic system proclaimed its victory, inside the winners there were (and there still are) a lot of differences: from a state with almost totally private economy (the U.S.A.) to another one with a strong public sector inside – France.

In the Western world two countries with different problems can be identified: the first state had in the 1960s – 1970s a strong public sector⁸, but later it has shifted to a more aggressive private intervention in public services (the United Kingdom); second, a strong economy was forced to pay a big amount of money to reconstruct the eastern part of country (Germany).

So, in former communist countries a strong pressure was manifested: the ruling role of private economy and less state intervention in economy. It was normal to start again private enterprises, and it was normal that a state should reduce its presence in economy. And to persuade the state's leaders a lot of Western and North-American experts invaded Bucharest, Moscow, Prague, Warsaw, Budapest and Sofia.

But this operation was accompanied by another phenomenon: it was a strong action against former state monopolies which were replaced by firms from Western Europe. That moment a good part of population, educated in a different style during the communist rule wondered if democracy meant only the replacement of public ownership with another one (as that change was accompanied by the advent of a new problem, officially unknown under communism: unemployment).

This question brought a lot of problems in reality, because some efficient left campaign helped former communists to retake power after first years of defensive actions⁹, but they didn't stop this tendency too much. Population accepted that considering the nationality of those firms (after many years of communist exploitation with not so many positive things, the returned western "occupation" was accepted and welcomed).

During all these years private intervention was growing in economy, and it entered the provision of public services too: it was necessary then to adopt a distinction - in what area the state must keep its control and where the presence of another actors can be allowed.

As a good part of intellectuals adopt new liberalism in economy, public services sphere (provided by public administration) was restricted in public debate only to what it was strictly necessary to function as a main public purpose: to protect citizens (so – army, police and justice) and to promote some interests in a few economy domains (for example, in the whole pipe-line legislation we can find this domain, as a strategic and strong public presence is there). If politicians don't want to respect those ideas, they receive a bad-name: reactionary communists.

But those areas were not enough for modern intellectuals – neo-liberals, most of them (only one criteria is established to recognize them: partisans of the United State's policy – more Republicans than Democrats) try to create in Eastern Europe a replica of American system – and they forget about fundamental differences that oppose those continents – the leitmotiv of the 1990s was only „privatize, privatize, privatize”.

⁷ Especially in economy: markets, actors, prices, etc.

⁸ Keynes influence, of course.

⁹ *Kuloglu S.* describes this problem very well in *Se intorc rosii? / Reds are coming back? / Ed Cavaliotti. Bucharest, 1996.*

And in Eastern Europe privatization¹⁰ was accomplished: a lot of people became the owners of enterprises which functioned in all social areas; public services lost their former characteristic they used to have in the communist times – to be delivered by state. Privatization was made by national owners, but also by foreigners – most of them were from Western Europe (former Europe), United States and Canada.

”No problem” we can say – those were the first years after epochal changes of 1989. At the same time, for most people another fact was obvious: the Soviet Union’s presence became less important, and its place in the world economy was taken by few Western European states.

Another consequence became apparent in public law: if the communist system had crushed, it was normal to replace its principles with new ones: the most important principle in our area is the proportionality principle that establishes criteria for public administration to choose between one or another possibilities; being translated in “public contracts language”, the proportionality principle determines if public authorities will fulfill an administrative action themselves or they will negotiate with a private entity for carrying out this purpose¹¹.

In a dictatorship the proportionality principle did not exist; there was only one thing – the wish and will of the ruling party and the execution of its orders. Democracy had established for the first time a control – and a social contract between public administration, society and private investors was respected: that was a victory of public moral in the satisfaction of public services. At the same time an unwritten convention appeared: private enterprises can be only from old democracies or from liberated states, but not from Russia (and for a good part of new democratic years this rule seems to be strong like steel).

This rule was much more flexible in relations with the European Union’s countries – for entrance in this “club” former communist countries must be “very open” to “former Europe” investments and investors. That means if those countries manifest a special interest to a special direction, they must receive “free way” to take it – all citizens of “new Europe” understand this and they accept this sacrifice.

Decisions adopted by Bruxelles “authorities” were in the same direction: to grow concurrence inside European economy – they tried to be a government, but without a special force able to assure the respect of their decisions.

Reaction? Every state has been trying to protect its own interests, but this protection strongly contradicts the Bruxelles “regulations”. Alarmed, even bureaucrats from Belgian capital were forced to adopt a different position – but this position is in contradiction with all principles brought by the democracy imposed now.

The problem is that public services are now being provided by entities other than national state, but there is a continuous danger: the previous state was replaced by another state – so what is changed is only state, but not the public fulfilling in fact. What is more dangerous for the state selling/ franchising this public service is that the new owner is a private entity (controlled by another state) or a foreign investor, who must be protected like national ones.

In oil industry, for example, there is a danger all the time: states with a lot of natural resources are always subject to negotiations with different foreign investors (more or less private), and if they are not open to these foreign investments, those countries are presented as “bad actors in international affaires” (from this aspect Romania is a good actor, but with a lack of the gold reserve).

And all those problems are a result of privatization, because this concept was “sold” in the 1990s as a miraculous remedy for economy, and small states (a good part of them divided – not only politically, but territorially as well) were too weak to oppose.

¹⁰ In our text *privatization* means : a) to sell a former public enterprises and b) to create a new private one.

¹¹ Balan E. *Institutii administrative / Administrative institutions*. Ed. C.H. Beck. Bucharest, 2008. P. 28–29.

So where is the limit for private investors in public services (and public contracts)? What is that rule able to stop private intervention (or the consequences of private intervention in privatization) at any moment? This question is more important because the last years even countries of neo-liberalism have adopted a number of measures to protect their investors (e.g. when a Chinese firm tried to buy a huge American oil operator).

In our opinion this answer is a consequence of three concepts present in all Constitutions that remain and exist in the same form¹²: sovereignty, independence and national interest.

The content and characteristics of sovereignty and independence were fixed hundreds of years ago. National interests cannot be replaced by communal ones, despite all fine words that promote the new construction. In reality not all new concepts are good and not all old things need to be changed. Public contracts are always conditioned by the respect of those notions, in this way limits of private intervention in public administration's activity being established.

Thus, the state must understand, first, what its social purpose in relations with private investors is, and, after that, it must separate national investors from foreign ones. To help national investors national interests are imposed, and only in those spheres where it is possible not to hurt such interests foreign presence can be allowed.

Synthesizing: the state must define its national interest(s) and its role in providing social and public services; what was not identified in this definition can be introduced in relations with foreign investors.

¹² Despite a lot of analysts who said that those concepts are transformed today.