
THE ANATOMY OF A DOCTRINAL ENTHUSIASM TURNED INTO NATIONAL DESPAIR

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Abstract: *The concept of the rule of law was a rather new one for the former socialist states, including the Republic of Moldova, but it was a necessity since the fall of the totalitarian regimes in the early 1990s. Until then, there was a broad range of scientific studies on the rule of law in Western literature. The domestic doctrine took up the rich Western scientific sources with enthusiasm and without stepping down the democratic character of the rule of law, emphasized the individual's freedom as a key element, even though the rule of law implies many other defining features. This undue optimism on the possibilities of the institutions to guarantee the rights and freedoms of individuals has not been accompanied by an analysis and a review of the staff of those institutions that should have promoted a new approach of the relationship between the citizen and the state and, as a result should have put themselves in the service of society, to protect citizens. The researchers left out the question of the quality of the human factor, the human resources that originated in a society where everything was controlled by the Communist Party bodies and proceeded to work within a society where nothing (or almost nothing) was subject to society's control. The independent media was established later, mostly as a response to the communist's arrival to power (in 2001). Article developed within the Project "Modernisation of Governing Mechanisms Focused on the Protection of Human Rights", cipher 20.80009.1606.15 in the Scientific Research Laboratory "Compared Public Law and e-Government", Law Faculty, Moldova State University*

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1. Preliminary findings

The concept of the rule of law presented for the ex-socialist states, including the Republic of Moldova, a new concept, but of an urgent necessity after the fall of the totalitarian regimes, i.e., at the beginning of the 90s of the last century. Taken with great enthusiasm by politicians, lawyers and ordinary citizens, the idea of *the rule of law* was considered to be a possible and achievable reality as soon as possible for a state that wants to embrace democratic values, to implement aspirations, but also practices of the societies in which it managed to establish itself.

Until then, in Western publications there was a rich spectrum of sources that referred to the scientific description of the Rule of law, its defining features, but also the pitfalls that can occur on the way to the rule of law, the dangers that could be avoided if they were taken into account. If the first category of works had been taken with great enthusiasm, then the last ones, which warned of the pitfalls – had not been considered. The national doctrine inspired itself from the works on the principles and values of the rule of law, without pedalling too much and insistently on the democratic character of the rule of law, bringing to the fore freedom and human rights as the main element of the rule of law, although the rule of law involves many other defining elements. In this sense, we have found a great support in the publications of Romanian university professors Tudor Drăganu (1992), Sofia Popescu (1998), Ion Craiovan (1995), Ion Craiovan and Ioan Ceterchi (1993), Ion Deleanu (1995), Ioan Huma (2009), of some French authors (Chevalier, 1994) whose works reached us also with the generous help of the colleagues from Romania.

It should be noted that, coming from a regime that demagogically exacerbated socio-economic rights, these rights were not given due attention, more attractive being initially political and civil rights as fundamental rights and freedoms.

The rule of law has undergone certain stages of development in the world, which have demonstrated the need to take into account the society in which are expected to be built the rule of law, the construction of certain components, mechanisms and fundamental procedures, capable of being permanently improved, through appeal to the experience of other states that are at a stage of development comparable to the national one, but which have managed to make substantial progress on the path to democracy and the rule of law. The solutions practiced by the states in transition to the rule of law depend on the nature of the regimes that preceded them, related to the governance of law. Returning to the regime that preceded the Declaration of Independence in the Republic of Moldova, we find a complete lack of political, state and even doctrinal interest concerning the governance of law, the separation of powers, the possibility of protecting the individual before the state, etc., when, in fact, the previous regime had emphasized only on people's observance of the laws. These being the realities, it is obvious that a democratic culture could not be established immediately and practiced, because the remnants of the paternalistic culture subsisted, the respective culture being created and promoted by the soviet regime in the sense, as Sofia Popescu (Popescu, 1998, p.165) wrote, of the unconditional acceptance of the centre of power, of its exclusive domination, the orientation of all hopes, especially of the material ones,

towards the centre of power, the rejection of any criticism or appeal concerning the power, intolerance of other points of view, official or personal.

Against this political and cultural background, insufficient attention was paid to the issue of adequate civil society and a lack of cooperation of the rulers with civil society organizations. However, the doctrine had a positive attitude towards the establishment of a civil society capable of increasing the level of democratization of society, campaigning to expand the dialogue of politicians with the society within serious dialogue platforms, which will discuss the most pressing issues of the society. The reality was more complicated, as governments reduced the possibilities for involving civil society in the decision-making process, including attempts to create a parallel civil society (Official Monitor, nr.301-315/18.08.2017) that would glorify governmental actions. However, it should be noted that real civil society organizations have stood the test of time and played an important role in assessing the decisions of the rulers and in expressing relevant reactions to human rights violations and anti-democratic and unconstitutional slips.

The scholars argued that the origin of the rule of law lies in liberal doctrine, which focuses on the values of humanism, freedom and dignity of the human person, political pluralism, balance of power, equality before the law, but the classical liberal doctrine was already abandoned even by the states of the West, all the more did not match the realities of a state recently out of totalitarianism.

2. Retrospective landmark

After the proclamation of independence, the Republic of Moldova chose the path of market economy development and implemented Privatization Programs. However, the former state-owned enterprises were brought to the brink of bankruptcy, state-owned goods were sold at ridiculous prices, and in this context the subsequent privatizations can be described as an insult to the people who created those properties. As a result of the privatizations, very few, closer to power or even to power, got rich, and the vast majority gave for nothing the privatization vouchers to investment companies, whose activity proved to be inefficient. In 1995, in the National Report on Human Development in the Republic of Moldova, signed by W. Temple, UN Resident Coordinator, the resources of the Republic of Moldova included the electronics industry and agro-industry; if the agro-industry still exists, the electronics industry is completely missing.

Relatively successful was the privatization of housing, by 2000 92% of housing had already been privatized, and for the remaining ones the deadline was extended until May 31, 2024. Through this formula of exemplifying the way in which actions have been initiated aimed at capitalizing on fundamental rights and freedoms, we emphasize that sharing visions such as the ideology of the rule of law and the proclamation of intent are not enough to follow the path to practical realization, they require actions in accordance with well-thought-out mechanisms, capable of contributing step by step, stage by stage, to the cultivation and establishment of democracy and democratic values in the country's realities.

The realization of the principles of the rule of law required certain steps, among which the creation of conditions for society's involvement in decision-making, for organizing free and fair elections, the widest possible communication of power with society, decision-making transparency at the level of central and local authorities. An essential role in these activities was to be played by the independent media, which, for economic reasons, was formed later.

The state was to build its relations with the citizens on the basis of mutual respect and to guarantee their legal regime by the fact that the state itself obeys its own law, and the state authorities understand that they obey their own legal regime, established by law.

A certain momentum in the preparation of the transition from authoritarianism to democracy was felt in connection with the adoption in 1994 of the Constitution, art. 1, par. (3) which stated: The Republic of Moldova is a rule of law, a democratic state, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism are supreme values and are guaranteed. Doctrinarians (especially jurists) began to reflect in their works the essence of the rule of law (Avornic and Lupu, 1996) without relating it to the social state and to the democratic regime; institutions and mechanisms capable of turning the principle into reality were characterized. Among these institutions, mechanisms and principles were mentioned: the institution of control of the constitutionality of laws, administrative litigation, independence of the judiciary and judges, designed to give citizens leverage to defend their rights and legitimate interests.

In the context of promoting the rule of law with a new breath, scientific research was revived that updated the theories promoted by thinkers since the modern period. The principle of separation of powers has become the subject of research, subject of doctoral theses, being correctly argued that the mutual limitation of the three powers can be a guarantee in the protection of human rights.

A particularity must be taken into account, and it is determined by the development of societies and openings to the outside world. The changes at the social level impose both new formulas of analysis and of realization in practice of the state social organization of the separation of powers and the law. Referring to the multiple formulas in which the separation is currently carried out (*separation of professions, separation of powers, separation of the church and the state, separation of the civil society and the state, separation between representatives and the represented ones, separation of facts and values, or of science and life*), P. Manent (2001, p.25) reveals overlapping points and intersections between them. In particular, talking about the separation of powers, which in the three (legislative, executive and judicial) also cumulates / indicates the real power of the fourth (mass-media), which in the society of high technologies, globalization, has a decisive role in the configuration of the social system, on the functionality of state institutions, on its legal policy, manifesting itself as a real power, capable of directing, influencing, imposing itself, and imposing. In relation to this, revisions are needed on the formula in which they contribute, or should do so, in order to build a democratic society in which the law is for the benefit of society and of each person.

Outside openings, multiple connections between states, knowledge of social realities from other socio-cultural backgrounds etc. determine the increase of individuals' expectations, of the hopes for a better future. In this context, people's aspirations, oriented towards the democratization of societies, are related to the concrete social-state conditions, but also to the living standards of other societies built on the idea of the rule of law, in which human rights are guaranteed. Thus, the rule of law and human rights become a meeting place between people, between social realities, distinct disciplinary areas, but which overlap and are convergent from a conceptual point of view.

The undoubted relevance of these dominant concepts is demonstrated, once again, by the fact that neither the country of origin, nor the institution of affiliation, nor the age or the professional training is an impediment in being interested in the quality of citizen and man. Especially, if we refer to the current context of the Republic of Moldova, which in addition to the crisis caused by the pandemic, until recently was also traversed by frequent political crises, a context in which deeds and words went in different ways, in which the theoretical/normative framework of law and the applicative one (in the sense of realization) have often been contradictory. Consequently, multiple claims and interrogations about the value of the law and its usefulness have been formulated and continue to be formulated both by citizens who want effective law institutions and by representatives of state institutions and academia who are looking for solutions. It is in this course of interrogations and searches of those who wish – in fact and *de jure* – to enjoy the benefits offered by the rule of law through its institutions, being aware of the essence of the relationship between personal and general interest, to proceed to a new formula for valuing responsibility and solidarity. Or, as many of those who understand the depth of these issues, they find the statement *so true: Rights are not demanded, are not received, but are lived.*

As long as the legal dimension dominates social, political and private life, as long as the citizen is – through the Hobbsian formula of the social-state organization – the one who ceded his rights and assumed obligations, through that of J.J. Rousseau (2001) – all persons renounce their natural rights in order to receive them back as civil rights, and through that of J. Locke – empowered to terminate the social contract, if one of the parties does not honour its obligations, there remains place for improvement, revision, claim, rationalization. Probably, trying to ensure one of the fundamental needs, that of security, the individual continues to hope for a perfect formula of social organization, where he will be provided with favourable conditions for development and, at least, there will be a mechanism, an instrument through which his minimum social conditions will be created, in which his civil rights will not be violated, and he will live in *a just society*. Democratization means that states make promises: that people will lead safer lives, that the judiciary will function impartially, that the population will have the chance of a better standard of living, etc. For all this to happen, states must be able to perform complex functions (Grungel, 2008, p.76).

3. Registered problems and solutions

The effort of states to implement democratic values, to establish true democracies has not always been successful: some states succeed in building and maintaining democratic

traditions, others are in constant transition and self-search, the third category being in a continuous process of democratization, a process in which they are not able to overcome the transition stage, in order to establish and deepen a genuine and real democracy, which is specific to a rule of law. The syntagma rule of law refers not only to the presence of the formula in question in the text of the Constitution (art. 1 of the Constitution of the Republic of Moldova), but also to its implementation at the level of social, political, and legal practices, being a priority, a guide in the activity of all social actors (politicians, representatives of the legislative, executive, and judicial authorities, civil society, citizens).

The critical point of reference for the states that have followed the path of the rule of law and democratization, as is the case of the Republic of Moldova, and have failed to go through the three consecutive stages (liberalization, transition and consolidation (Grungel, 2008, p.76, et alii.)), stopping somewhere in the middle and stagnating, are the fundamental rights and democratic values to which today's legal policy relates from a historical and philosophical point of view. The Republic of Moldova, beginning with the Declaration of Independence, has quickly assimilated dominant concepts specific to the rule of law and followed the path of sharing democratic values. Freedom, equality/justice, and solidarity are present in the national legislation, being elucidated as fundamental values, but the Republic of Moldova is still considered a state in an uncertain process of democratization.

Another problem arises from the six formulas of manifestation of separations, in particular from the one referring to the separation of facts and values, of science and life, which was quite pronounced in the conditions of the Moldovan society, this formulating another problem, that refers to the need to eliminate the gap between legal theory and practice (Ciobanu, 2020), between promises made by rulers and their fulfilment. Even if the theoretical framework systematizes, eliminates controversies and contradictions, builds arguments, however for legal practice they are often overlooked, most often being neglected, avoided, or even denied.

Regardless of the option, the law as a reality constructed on the basis of the great diversity of lived reality, will produce consequences, and will build new realities. The transfer from the plane of theories about law to the plane of legal practice makes the transfer to the realization of law. A theory of law, as R. Dworkin (1998), points out, must be both normative and conceptual. Contemporary law is marked by the fact that it continuously generates new concepts, theories, classifications, and rules, but also by the inability, impossibility to achieve and increase its practical efficiency and effectiveness. From a theoretical point of view, conceptual solidarity, capitalized also through extrajudicial matters, with a greater degree of abstraction, could contribute to the identification of internal resources for the realization of law, taking into account ongoing evaluations and discussions on legal practice controversies, as well as by appealing to pertinent explanations and assessments of the scientific environment. From a normative point of view, a variety of topics remain in the spotlight, such as: the theory of legislation, a theory of adjudication and one of conformity – all three address the issue of the legal norm from the point of view of the legislator, judge, and ordinary citizen.

For the author of the paper *Taking Rights Seriously* the theory of law must go far beyond the problematic framework of legal branch fields, placing itself at the level of metascience, approaching a generalizing perspective, including topics that are not treated in other fields, conceptualizing them and, through this, manifesting not only its disciplinary individuality, but also its practical utility. As a result, based on the expectations of individuals, the law must review its own identity and usefulness, in particular to determine through joint efforts the realization of the law, which is currently one of the most important issues on the agenda of national authorities. In this case, change and modernization must be a conscious and assumed act of responsibility and social and intellectual solidarity (in the sense of professionalism). Thus, in this context, solidarity acquires the quality of a methodological principle of the path towards the modernization of institutions and the realization of law. Perceived as an assumed rational act of change, of continuity of actions, decisions, social policies, solidarity is found at the intersection between structures (institutions) and the action capacity of the social actor (person), social changes being continuous, procedural, sectoral (Vlăsceanu, 2011, p.115), solidarity is necessary to be reported to the most important institutions (Pop, 2003, p.100), that govern social life today: the institution of rationality and rationalization, the institution of scientificity and the institution of the social actor.

On this line of thinking on the rule of law and democracy in the Republic of Moldova, returning to that act of will create the Constitutional Court and the decisions of the first panel of constitutional judges that inspired confidence in the soundness of arguments advanced in doctrine regarding its position on the part of the sovereign people when politicians do not respect the Constitution. The Constitutional Court has given impetus to the legitimate hope of the people that it (the Court) is on its side and cannot be categorized as an ally of the legislative or executive power (Aramă, 2000, p.41, 67). The following compositions of the Constitutional Court were not (with small exceptions) at the level of the first composition, the danger of politicizing the institution becoming real, which ultimately resulted in its participation, in 2019, in the process of usurpation of state power.

Moreover, the adoption of the Law on Administrative Litigation came a decade late – it was not until 2000 that it was enacted and published as evidence of the protection of the individual against the arbitrariness of state bodies, primarily the executive branch, but not only. However, since the first years of application of this Law, attempts have been made to reduce the scope of the possibilities of this institution.

The signals that came from the Western doctrine regarding the possibility of establishing a government of judges were not taken into account by the local authors, considering them to be exaggerated for the national legal space. As a result, the judges were given immovability in the absence of an integrity test, expressing an exaggerated confidence in the moral qualities of the representatives of the judicial guild. The independence of judges is not a goal, but a means of promoting justice in social relations, but the abuse of independence and self-discipline may be caused by the lack of effective control, including society through its organizations and the media, over this phenomenon, called juristocratic dictatorship (Cattaneo (1994), apud. Popescu, p.152).

An exaggerated optimism about the possibilities of these institutions to ensure the rights and freedoms of individuals was not accompanied by an analysis and review of

the staff of those institutions that had to promote a new approach to the citizen-state relationship and as a result put themselves in the service of the society, to protect citizens. From the researchers' equation were omitted the aspects regarding the quality of the human factor, the human resources that came from a society in which everything was controlled by the organs of the communist party to a society in which nothing (or almost nothing) was subject of the control of the society.

Vicente Baretto, as mentioned by Prof. Sofia Popescu, related the issue of the rule of law to that of tolerance, stating that in the West tolerance has been associated with religious freedom, and in the modern state this concept has extended to political tolerance. In the process of democratization, the nature of tolerance changes in the sense of assigning the state with an active role in overcoming economic and social inequalities. We could say that in the former union republics of the USSR the claim of national rights was met with resistance from the Russian-speaking or Russified communist nomenclature, which led to zero tolerance between the ethnic majority of the population and national minorities, a unique case (or at least rare in history), where minorities have launched strikes against the decreeing of the language of the majority of the population of the Republic of Moldova as a state language, a natural thing in any state, but not in the Republic of Moldova, which was created following the Ribbentrop-Molotov pact, as a result of which the intellectuals, people with studies (the vast majority) either took the path of emigration, or were exterminated or sent into exile in Siberia. Under these conditions, the state apparatus and the staff of the university institutions consisted largely of people who came from outside the national territory and who had no knowledge, possibly no desire, to own something specific to the population they led. In some places and among the non-natives not recruited in the state apparatus (salesmen, secretaries, petty officials) a certain opinion was formed about the superiority of those who came over the natives, all leading to unfavourable consequences, culminating in virulent reactions to the decree of Romanian as a language state and the use of this pretext for the separation of the territory on the left bank of the Dniester and the creation of the Transnistrian Moldovan Republic with the exit from the jurisdiction of the constitutional bodies of the Republic of Moldova.

Here and there, and among the non-natives not recruited in the state apparatus (salesmen, secretaries, petty officials) a certain opinion was formed about the superiority of those who came over the natives, all leading to unfavourable consequences, culminating in virulent reactions to the decree of Romanian as a state language and the use of this pretext for the separation of the territory on the left bank of the Dniester and the creation of the Transnistrian Moldovan Republic with the exit from the jurisdiction of the constitutional bodies of the Republic of Moldova. Of course, this aspect could be corrected by an intelligent language policy, which, in general, was not achieved, but the politicians who remained at the helm of the Republic of Moldova speculated on the language issue and national identity, appealing to their claim, especially during the election period to ignite the spirits. Under the guise of this situation, politicians (at least some of them) took care of their own interests, enriching themselves on the existence or promotion and practice of separatism in public discourse.

In a state with such limited social cohesion, where poverty threatened the majority of citizens, their response was to bring politicians to power, who, on the one hand,

promised to return to ensuring the minimum socio-economic rights of existence, in the situation in which there were new economic realities, crises, including those on the international arena, and on the other hand, the political opponents of the former propagated the rapprochement with the European Union as a solution to internal problems. The doctrine enthusiastically welcomed this desideratum, at the same time showing that the European democratic institutions are clearly superior to those that, according to their model, had been established, in a broken formula, in the Republic of Moldova.

The free, independent press began to investigate, which led to the establishment of an oligarchic regime, which committed numerous frauds, but whose exponents remained unpunished in the situation in which the regime subordinated its organs of justice, prosecution, police, i.e. of the apparatus that was to defend the rule of law and to support the citizens in their fight for legality, responsibility, as premises for the building of a democratic society and a prosperous life for the citizens. A ray of hope has emerged in connection with the establishment of the new power, resulting from the parliamentary elections in the summer of 2021, but it remains to be seen to what extent it will succeed in meeting the expectations of society, which, from what we see, want a state that protects the citizen and democracy, with functional laws, with judges, honest prosecutors and politicians who are interested in the well-being of the citizen.

4. Conclusions

In conclusion, we will point out that the long transition to the rule of law has encountered many obstacles, including those generated by objective factors, such as lack of experience in organizing state institutions, economic crises, the inability to use the old economic links, but also subjective factors: insufficient attention to the democratization of the society, which does not end with the vote of citizens in elections; lack of an independent press; the quality of human resources used to build new democratic institutions, etc.

Currently, there is little hope and confidence in the reality of establishing the rule of law in the Republic of Moldova. But in the current conditions, being aware of the mistakes made so far, in order not to reach again the beginning of a road that leads nowhere, it must be a responsible assumption of all: both from an involved and conscious civil society, of the scientific environment dedicated to solving the problems faced by the state of the Republic of Moldova and their citizens, through the evaluation, appreciation and pertinent expertise of the strategic directions of development, of independent media institutions, as well as a credible, competent government interested in promoting and capitalizing on the opportunities offered by democracy and the rule of law.

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