Doctoral thesis: “Principles of rule of law”

Presentation

This doctoral thesis is conceived as a study on „rule of law” generally and „principles of rule of law” particularly, based on major doctrinal views and positive law. Our approach aimed to address a dual perspective, historical and comparative, of origin and evolution of rule of law, having founded on constitutional principles of such state.

What is common, today, to all these perspectives approach, is the fact that all deals with issues „rule of law” in terms of respecting the fundamental human rights and, we add new, of citizen.

Those mentioned forced us to use comparative law arguments, when we pursued the realization of the concept of “rule of law” and constitutional principles of the Romanian Constitution and the fundamental E.U. documents.

Scientific Objectives:

In the present thesis we suggest the following:

- to redefine “rule of law” in terms of mutations that were produced by economic globalization and IT revolution;
- to determine the main effects of this change in the organization and functioning of the Romanian state;
- to estimate the evolution of the concept in the near future;

  In light of these objectives, we intend to respond to the following questions on the agenda:
- how it works today and how will it operate in the future, "the rule of law";
- which are its current targets, if they have changed;
- if the means to achieve them are appropriate. This are a few problems, simple in their statement, but complex with the information they require and their meanings and practical implications, endorsed by demarche for the nonce.

We won’t feed with the illusion of the possibility to solve all these problems, but with the real conviction to be identified and explained the basis and targets covered by *rule of law*, its current functioning mechanisms to contribute to a better understanding of urgent need to promote it in socio-historical context of understanding Romanian society after the collapse of communism and full integration into E.U. and to formulate some improvements of amelioration to some existent “fractures”.

The ideas that have stimulated us to choose and research this topic for developing the doctoral thesis are simple, keep the records, we will mention them:

- degrade of interest, of theoretical concerns, systematic, legal and non-legal on the "rule of law" previously unprecedented;
- degree of misunderstanding between the public and professionals of the political and legal world, on the issue of *rule of law* and not only;
- tension between the perspective of political, economic and legal understanding about the rule of law.

There are, certainly, some evident, for understanding those mentioned. We have in view, firstly, the difficult language, technical and specific, away from the daily, to which law specialists use in presentation of their concepts to the public; the complicated processes it follows the laws of their development to implementation and even in the development and implementation processes.

Methodological and theoretical scientific support

The methodology used is, naturally, historical[1], but, necessary comparative and interdisciplinary.

Historical method it was necessary for us for researching the origin of the concept "*state of law*" and of realizing this form of organization of state in real life. Comparing the facts to others of the same kind, similar or contrasting, is appreciated as a essential method in case of social human science, where can not be made rigorous experiments.

From the data the history provide, in research of high juridical institution, the science of law, notes their age, monitors their development, configuration, functions etc. However, the origin and development of state and law can not be studied disregarding or ignoring what history tells us, considered, justly, as constituting what mathematics is for nature sciences. Sometimes, based on historical data, physiognomic reconstruction is done to some institutions of law, which permits a retrospective analysis with large implications to understanding the real positions of those institution in actual law; or, vice versa, starting from analysis the current state to return to past to understand that still inarticulately announces to be a future bud.

[1] We say "naturally" historical - comparative and interdisciplinary whereas these approaching pathways are imposed by the nature of the domain where it belongs the theme, of juridical science, by the complexity of the theme and by the followed objectives.

Tradition of legal analysis credence belief that many juridical phenomena can be clarified and explained supporting the formal logic and, especially, the legal one, of argumentation. This modalities were inevitably used throughout the thesis.

Also, our demarche, can not be but a critical one by the objectives mentioned, especially, regarding the analysis on current concepts over *state of law* and those on evolution of *state of law* in post-december Romania.

In preparing the analysis background of the theme we made some preparatory steppes.

So, we presented the significant moments in chronological evolution of the concept of rule of law, to, identify thematic guidelines have been established in modern establishment of the field. On this basis, we passed to the current definition of the concept of rule of law, as outlined in the existing theories and realities as reflected in European legal plan and Romanian.

We should make clear, also, that, what is original and is new in its efforts, is the systematical analysis and detailed presentation – historical and current – of principles *rule of law* materializes.

Thesis content

Thesis content is divided in two parts each containing sections and chapters. These are prefaced by introductory remarks, followed by conclusions and relevant bibliography.

Part I of the thesis, is structured in two chapters and several sections, so:

Chapter I, devoted to presenting the historical evolution of the concept "rule of law", is divided in three sections for researching: significant moments in the evolution of the concept "rule of law"; of thematic guidelines and, in the last section, to the concept of natural law in political statements and programs.

In ***Chapter II*** are presented and analyzed various concepts of rule of law. Research carried out suggesting that, concept of rule of law is one of the defining features of European constitutionalism whose influence in today's world is undeniable. Under the auspices of this concept, the state restrains its own actions in relation with its own system of values.

If the state itself ignores the positive law, which is his own creation, exercise of power is very legitimacy questioned. "Public power, which affects the legal system that has established itself gives its own decay", noted the Dutchman jurist Rudolf von Jhering[2].

[2] Rudolf von Jhering, *"Fight for law"*, Publisher All Beck, Bucharest, 2002.

In the ***Second Part*** of the thesis, which contains ten chapters, each chapter containing several sections, I presented the analysis to constitutional principles in organizing the rule of law.

The aim is to highlight the content principles and legal norms as they are expressed, and decisions of courts and the Constitutional Court are invoked.

What is appearing to be essential to mention is the fact that rule of law can not be judged, logically, like all other proximate.

Of course each in its specificity, but in their reality, rule of law combine their action, mutually sustaining. In other words, we believe that through their field of action by content principles of rule of law overlap sometimes in "penumbra zone" so that the transition from one to another is hardly noticeable.

What would be the consequences of treating isolated? Direct response would be: one-sided picture that would lead to depletion of nature and complex functions of the rule of law.

In Chapter I *from Part II of the thesis*, I highlighted the evolution of constitutional principles relating to the rule of law and theoretical and practical importance of studying these principles. We consider principles of rule of law, methodological benchmarks of its construction.

Chapter II, presents the principle of legality in establishing and strengthening the rule of law and also its realization in fundamental law of Romania and various other regulations.

To the state of legality we can reach through respecting a legal order voluntary, by conviction or by applying the law enforced by the coercive power of public power. Rule of law and supremacy of the Constitution, the requirements of the rule of law, are expressly enshrined, explicit or implicit, walking across the entire constitutional edifice.

Romanian Basic Law expressly enshrines the principle of legality in art. 1 align. (5). As Professor Cristian Ionescu claims whose opinion we share, the whole law of the Constitutional Court starts from the principle written in art. 1. align. (5) from Constitution.

Chapter III, was for research human rights and freedoms, as provided in the Romanian Constitution and in international documents.

This chapter focused on research first legal instrument to protect human rights. Fundamental documents that focuses the content of problematic of human rights in the United Nation system are brought together as the *International Bill of Human Rights*.

Also, in Chapter III, we assigned an important area (thirty-three pages) to presentation and examination of fundamental human rights in the European system and developing tools created by the Council of Europe system.

I considered it appropriate to analyze some solutions of the Court of Strasbourg, by the pronounced decisions in matter of fundamental human rights and reflected in decisions of Constitutional Court of Romania.

Our country manifested its interest and wish to integrate in the international community, based on idea of ensuring, promoting and protecting the fundamental rights of man by connecting national legislation to international standards, through democratization and reform of law institutions in the country. Slowly, but sure steps international guarantees of human rights and fundamental freedoms have become for Romanian lawyers a tool for almost as widely used as internal regulations. A key contribution in this process was a Constitutional Court which, its activity of removal of antonimies between internal regulation and Constitution, accorded the priority, under the constitutional precautions, international regulations in matters of fundamental human rights.

Chapter IV research focused on the *principle of equal rights and duties of all citizen*. Regarding the principle of equality, professor Ion Dogaru and professor Dan Claudiu Dănişor, are proposing a distinction between "equal rights" and "equality in front of the law":

"There is a difference in terminology that can be confusing. Is the same thing equality in rghts with equality in front of law? Expression – equality in front of law – leads, on the first moment, to idea that equality looks for law enforcement. Which adds the right to equality and equal rights is equality in law development. A true equal rights implies therefore, with necessity, possibility of regulation control. Without control of the constitutionality of laws, equality before them is ineffective" [3].

For better clarification of the research we have examined, through four sections, existing legislation on equal rights and duties of all citizens.

Acceptance of the principle of equality in country life, was actually supported by decisions of the Constitutional Court, some of these decisions are analyzed and presented in this doctoral thesis. (See pages 198-200, 203-205, 208-209, 210-213).

In Chapter V we analyzed free access to justice. Constitutional principle of free access to justice has been and remains, in practice, first constitutional argument that one who wants to protect its legitimate rights and interests will rely on its support. That's how things stand, it confirms the jurisprudence of Constitutional Court from Romania, court has been called on numerous occasions to rule on compliance with various laws and ordinances that principle. Thus, arose a series of decisions which, by the effort to align solutions to the European Court of Human Rights handed down in this area, formed a true guide for a fair interpretation of Art. 21 of the Constitution.

The conducted research highlights the fact that, in rule of law, free access to justice, correlated with the right to defense, right to a fair trial, along with other procedural safeguards, holds particular importance for ensuring legal certainty for

[3] I. Dogaru, D. C. Dănişor, Human rights and public liberties, Publisher Zamolxe, Chişinău, 1998, p. 81.

citizens and dignity. Therefore, the Constitutional Court held that access to justice is one of the fundamental rights that, according to art. 152 para. (2) of the Constitution, can not be suppressed by revising the Fundamental Law.

Chapter VI, investigates the principle of independence of the judiciary. Can not be ignored, principle of judicial independence implicitly assumes the independence of judges and is one of the raw conditions of the *rule of law*. Firstly, the principle benefits of consecration in the Basic Law, the constitutional text scoring it in the first provision from Title covering the whole "*Judicial authority*".

Regarding the independence of judges, clear that the rule of law [as required by art. 1. (3) of the Constitution] judge has a crucial role, since the state of this type can not really work, in judicial, except under the supervision of a judge, implying that he should be able to control power in relation not only to citizens, but also legislative and executive power. Judge paradox is that the judge depends on the state, the other powers but must control it; he represents both power and powerless; he embodies the duality law / force.

This principle, very complex, not rarely exposed to simplistic interpretations, focus itself as a paradox and tragedy of human creations Law, loaded with immense responsibility, appeared as barrier against many forms of social injustice.

In chapter VII we investigated the principle of presumption of innocence, fundamental principle *in rule of law*. Basic Law has raised the presumption of innocence at the Constitutional statement and provided in art. 23 para. (11) that "until the final court decision of conviction, the person is considered innocent".

It is said about this principle that, if not work, the penal process would be a real judicial barbarity. The connections of presumption of innocence, with other guarantees and criminal procedure institutions as the right to an impartial tribunal, to a fair trial, or procedural implications to which some procedural measures deprivation of liberty or with a patrimonial character may have on the presumption of innocence, are also treated in this chapter.

In chapter VIII we examine the principle of democracy and pluralism in the rule of law. We highlighted and compared the forms of democracy in the rule of law: *representative democracy, direct democracy and semi-direct democracy, representative democracy detailing*. We also showed popular intervention procedures: referendum, popular veto, popular initiative, popular revocation, plebiscite and the courts decision recall.

Sharing the view of professor Dan Claudiu Dănişor,we believe that democracy is perhaps the only form of government which recognizes to be imperfect, ie one which continuously builds: a procedure which always call into question its principle, it always rebuilds. There is no single democratic principle, immutable, but a optimization reconstruction procedure principle. Maybe that's why it is so difficult to

define the democracy: every time you define a process rather democratic way each time changing.

Democracy will take the knowledge and understanding based on the actual state of things and human life. It is more an action, working strategy aimed at that "better", yet no one could define only contextually. So to say what is democracy, is more to determine how it is made.

In this chapter of the thesis we investigated the effectiveness of Romanian regulations, included both the Constitution and the special laws that upholds the right of association of citizens.

In the performed research, I appreciated that the principle of freedom of political parties involves and interference or limited state interference in the internal organizational structure of parties. The Strasbourg Court, in some cases, held that the dissolution of political parties, even for reasons put forward on the threat to national security, constitutes a serious and disproportionate to the aim pursued in a democratic society. According to the Court in Strasbourg, there is no democracy without pluralism.

In Chapter IX, we presented and analyzed the principles of administrative decentralization, local autonomy and decentralization principle in the Romanian legal system. Basic Law of Romania, as is the Law. 215 of 2001, the local government (as amended by Law no. 286/2006), enshrines the basic principles on which government in territorial-administrative units.

Also be noted that although these principles were stated by the constitutional way and detailed by Law no. 215 of 2001, can not be said that decentralization is particularly evident. This occurs in conditions in which Romania has a strong centralist trend, with an old tradition , that has always neglected the province for capital and to strong centralization of decision.

Professor Dan Claudiu Dănişor shows that, deconcentration is not a democratic technique but a authoritarian technique, intrusive way of central power to local level, a technique of centralization.

Administrative decentralization and local autonomy under the rule of law, raises numerous questions which have not yet been answered. Without our saying we can respond, we would mention them because of their deep implications on the future *rule of law*:

- Decentralization is dispersion, fragmentation of public power or standardization?
- Up to what point decentralization can be theorized? In other words, it is possible theorizing departmental, regional, urban, municipal phenomena? And if so, at what level: national, European, global?

- How can the discussion phenomena can be correlated to structural power of law or with its performative efficiency?

Despite such unresolved issues, decentralization is in the agenda and the legislation is in progress, without care or hidden effects, not rarely, perverse. Decentralization is the system that has as a fundament recognition of local interest, distinct from national, localities having organizational structures, functional and its apparatus, but, we add new, without having the necessary ways and without the legislature to take care of the division of competencies.

In the last chapter of the thesis we investigated the *principle of separation of powers*. This principle was introduced in Constitution by revision from 2003. Art. 1 para. (4) from Basic Law books *expresis verbis* the classical principle of separation and legislative power balance, executive and judiciary in the constitutional democracy. The quoted text puts away one of the critics to the 1991 Constitution, lack of a text which embodies the principle of separation of powers.

This point is very important, especially, rule of law and thus implicitly the principle of separation of powers, became for Romania EU accession criteria (Copenhagen criteria).

As professor Cristian Ionescu says, theory and the practice of power separation presently now it removes from the original form of the principle or it looks for other ways of transposition.

This does not mean that policymakers way, doctrine, government, would not see in power separation the antidote for tyranny. Rather, the rule of law is inextricably linked to that principle.

Today the political phenomena is becoming more complex, more related to global issues of a region or continent, even of the planet; political game is more crafty and discreet, Civil society increasingly claimed the right, "power" to take part to lead. For these reasons, professor Ioan Muraru says, theory of separation of powers takes part through a process of aging. Spawn new power centers (we refer to intermediate bodies) - as legitimate as the three powers - that take decision on their behalf, although implementing it, it objective it in the classical model of theory of Montesquieu.

Justly, professor Ion Deleanu state that today the focus is not on separation of powers, but their collaboration, as Hegel already demonstrated in the nineteenth century (Principles of philosophy right). It can not be omitted from this "influence power", pressure over them, made not only by the political parties between them, but also of unions and NGOs, which impose their will sometimes over powers, causing them to act or not, certain governmental actions. A good example is the initiation process in Romania amending the Education Law no. 84 from 1995, as a result of student strikes in October 1995, although that law was adopted shortly before.

In the end of these conclusions, we point that *rule of law* is not a perfect historical reality, somehow not completed, but opened to perfection, to amelioration. He shows a series of vulnerable aspects: there is a tension between general and individual interests, between legitimacy and effectiveness, between consensus and dissension / conflict / division; between bureaucratic resistance to change and renewal; the chosen people in representative organs manifests sometime insufficient competence and moral qualities required by their social status; abusive exercise of independence of the judiciary; understanding and misunderstanding of rights and liberties by ignoring the obligations / duties.

Finally, the rule of law has the ability to control the negative aspects, by improving mechanisms enlightened in time which has as basis the principles of the constitution and which makes it a perfectable institutional organization. Not perfect, rule of law can be regarded as the highest form of organizing collective life created by humanity, unsurpassed by man, which function as social system in the best possible way due to its open system of self-regulation. The algorithm of this self-regulation is assured by respecting its principles both theoretical and practical approaches.