THE CRISIS OF THE RULE OF LAW - SHORT THEORETICAL AND PRACTICAL ANALYSIS

Andrea KAJCSA[*]

ABSTRACT:*The rule of law theory should help us understand the issues that now, at the dawn of the third millennium, arise and need to be addressed so as to promote human rights and stop the arbitrariness of power in the context of an ever growing social complexity and globalization. It can certainly be asserted that these issues configure a crisis of the rule of law that affects both the operation of the democratic structures of those states that have adopted the model as well as the international protection of human rights.*

In the light of certain exogenous processes in which the use of force at international level has as justification the protection of human rights, however done by means that constitute by themselves breaches of international law, the classical scheme of state power distribution and differentiation, typical to the state of law, seems to be obsolete from a functional and spatial point of view, while the human rights theory is forced to deal with issues that by far exceed state limits thus becoming international.

KEYWORDS: *rule of law, human rights protection, globalization, legislative inflation, sovereignty.*

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The „rule of law" theory should help us understand the new problems that now, at the dawn of the third millennium, must be approached in order to promote human rights and stop the arbitrariness of power in this context of ever-growing social complexity and globalization. These problems can be categorized as adding up to a crisis of the rule of law, crisis that affects both the functioning of democratic structures of those states that have adopted the model as well as the international protection of human rights[1].

The reasons for this crisis of the rule of law can be divided into two: first, the growing social complexity of advanced industrialized states involved in technological and

[*] Teaching assistant, "Petru Maior" University of Tirgu-Mures, Faculty of Economics, Law and Administrative Sciences Ph.D. student at Western University of Timişoara, ROMANIA.

[1] According to reports of the United Nations and other non-governmental bodies, such as Amnesty International and Human Rights Watch, millions of people all around the world are, in present, victims of fundamental rights violations, without precedent.

informational revolutions, and, secondly, the integration processes both at regional level – see, for example, the European Union, and global level. Concerning the first point, of high importance are two aspects: the crisis of the ability of the legal system to regulate social relations and the decreasing efficiency in the protection of human rights. The second point includes, as a primordial issue, the erosion of state sovereignty and the prevalence of certain powers and trans-national bodies that are not subject to institutionalized mechanisms of power differentiation and distribution.

Certainly, it can not be argued that the philosophical premises of the rule of law are today in crisis. On the contrary, it can easily be determined that individualism seems to have penetrated every aspect of social life: from consumer habits to life style, from family to professional experiences. What seems to be undergoing a crisis is the governing capacity of the legal system, more exactly the regulatory efficiency and the application of legal norms. One of the explanations of this phenomenon of functional impasse indicated by the sociology of law consists of the so-called legislative inflation.

The differentiation process of social subsystems binds the legal system to react to their rapid development through the elaboration of more and more specialized and particular legal provisions. However, law represents a rather rigid and slow structure in comparison to the fast and flexible evolution of other social subsystems, such as the economic or scientific-technological one. This reality brings about legislative inflation and this in turn means depreciation, redundancy and normative instability. Not only has the number of normative acts increased but their texts has also become much too long, charged with technical terms and references to other legal provisions.

The fragmentary nature of the legal provisions, the references made to „emergency situations", the tendency to rather programme than regulate only worsen the trend to make legislation lose its general and abstract character and become consequently more similar to administrative acts. Obviously, the codification model with its adherent claims of clarity, systematization, universality and unchanging character over pass of time seems now, to a certain degree, a true historic relic, overwhelmed by a diffuse flood of micro legislation.

Alongside such a phenomenon, especially in the case of the European states directly involved in political integration processes, correlates the multiplication not only of domestic normative sources but also of supranational ones. The tendency towards anomy due to normative overcharge is thus worsened because of the difficulty of identifying the general principles of the legal system whose definition is given by jurisdictional bodies that claim the prerogative of interpreting national, European and international law. This creates a jurisprudentially made European law that, by definition, falls outside the boundaries of the rule of law[2].

The decreased regulatory capacity of law consequently affects the certainty of law and implicitly the legality principle is in peril. The hypertrophy of both criminal and civil law increases the power of interpretation of those that have to apply it, namely the judges, to such a degree that the courts detain o true normative power. Not only is *ignorantia legis* widely spread, the *nemo censetur ignorare legem* becoming absurd, as contented by

[2] A. Laquièze, „*État de Droit and National Sovereignty in France*", in P. Costa, D. Zolo (Ed.), „*The Rule of Law. History, Theory and Criticism*", Springer, 2010, p. 261 – 292; L. Ferrajoli, „*The Past and the Future of the Rule of Law*", in P. Costa, D. Zolo (Ed.), p. 323 – 352.

professor Gheorghe Mihai, for citizens are incapable of knowing which normative provisions are in force and thus regulate social relations, but the deliberate ignorance of law has become a practice both in the activity of courts and of public administration. Accordingly, in the structure of the rule of law, the areas for *ultra legem* and, not seldom, *contra legem* autonomous decision processes are multiplied.

Decreased efficiency of human rights protection. In his essays regarding citizenship in Europe, Thomas Marshall argued that the recognition of civil rights – especially, right to private property and contractual freedom – proved to be fully functional up until the early stage of market economy extension. Political rights, on the other hand, appeared as a consequence of class fight characteristic to the 19th century, favoured the entrance of the working classes in the elitist institution of the liberal state. As far as social rights are concerned, Thomas Marshall underlined their radical paradox. Unlike civil rights and most of the political rights, social rights were in contradiction with the acquisitive logic of the market, for social rights were in principle oriented towards equality while the market produces inequality. Despite these circumstance, Thomas Marshall considered that the English institutions, moulded on the rule of law, will succeed in subordinating the market mechanisms to social justice and that, finally, the economical inequalities and the social competition would be to a great extend reduced.

Despite the criticism brought to the analytical scheme built by Thomas Marshall due to its evolutionary reductionism[3], it however suggests a useful approach to the relationship between the development of the market economy, the progress of the political institutions and the recognition of individual rights in modern Europe. Having this scheme as a starting point, it could be argued that the gradual recognition of civil, political and finally social rights in continental Europe has been accompanied by a gradually more selective, legally imperfect and politically reversible[4] protection. A sort of a decreasing efficiency law in the matter of human rights protection could be argued. A law such as this one exists due to the different relationship that gradually has been established in Europe between the acknowledgement of human rights, on one hand, and the functional requirements of a political system correlated to the market economy, on the other hand. Starting with the industrial revolution, the rule of law concept opened itself to the formal acknowledgement of successive generations of rights. The European Chart of Human Rights (December 2000), drawn up by delegations of 15 member states of the European Union has additionally extended the list of rights by including certain new ones, such as environmental protection, consumer protection, protection of physical integrity and the prohibition of reproductive clones[5]. Taking all these into consideration, along the history of euro-continental constitutionalism, the formal recognition of new citizen rights has not been concurrently accompanied by their effective protection and application.

[3] A. Giddens, „Class Division, Class Conflict and Citizenship Rights", in A. Giddens, „*Profiles and Critiques in Social Theory*", London: Macmillan, 1982, p. 171–173 and 176.
[4] D. Zolo, *cited above*, p. 47 and following.
[5] See the European Charter of Fundamental Rights, especially art. 3 (Right to integrity), art. 8 (Protection of personal data), art. 37 (Environmental protection), art. 38 (Consumer protection).

If this is the reality, it could be expected that the destiny of these new European rights to be the same one. In comparison to the civil rights, political rights have always been less deeply rooted in the European political tradition[6].

Hans Kelsen argued that in the political party state of the 20th century the political rights of citizens are nothing more than a „totemic mask", of sovereignty and popular representation – political institutions that no longer entail any effective participation in the exercise of power[7].

More obviously than the political rights, the social rights, from the moment of their apparition – the Weimar Constitution – have been less efficient, being more directly exposed to market contingencies. In order for social rights to be effective these require public services – social security, financial allocations, minimal standards of education, health, etc. – that consume a great quantity of resources. It results, consequently, that social rights, due to their considerable impact on fortune accumulation and taxation, are precarious. Today, because the global success of market economy has imposed on Europe the need to reform the social state, social rights have lost to a great extent the legal requirements of universality and actions – see, for example, right to work and right to health – and tend to become national assistance services discretionally provided by the political power. This demonstrates the limitations of the idea argued in last century Europe according to which the rule of law progressed naturally not only towards the protection of the so-called negative rights but also towards the protection of substantial equalities.

According to certain opinions expressed in the scholarly literature, the globalization process, by depriving states of an important part of their traditional prerogatives, tends to reduce the functions of the state essentially only at assuring the internal-political order. According to this opinion, the social state seizes to be the safeguard of the collective good and transforms in the safeguard of the individual security of its citizens.

Erosion of state sovereignty. The globalization process has definitely caused a crisis of the sovereign state model – the collapse of nation-states sovereignty now seems to have become an irreversible process, states no longer being able to approach and solve global issues, such as environmental pollution, demographic balance, economic development, peace, repression of international crimes etc. and alongside nation-states appear new, powerful subjects on the international scene, such as multinational corporations, regional unions, political and military alliances, non-governmental organizations. Besides international conventions and treaties, new sources of international law develop. Alongside these shifts, the judicial function and power tends also to expand towards an international level, additionally eroding the judicial sovereignty of the state, as proven through the setting up of ad-hoc criminal international courts and of the International Criminal Court in Hague[8].

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[6] At more then a century from the bourgeois revolutions, the right to vote is not recognized to everybody, but more so to certain categories chosen by market-related criteria. Additionally, large sectors of individuals marginalized economically were excluded from the right to vote up until the last century. This was the case for workers, farmers and women, whose political exclusion disappeared only at the middle of the 20th century.

[7] H. Kelsen, „Doctrina pură a dreptului", Humanitas, Bucharest, 2000, p. 288 - 289.

[8] P. P. Portinaro, „*Beyond the Rule of Law: Judges' Tyranny or Lawyers' Anarchy?*" in P. Costa, D. Zolo (Ed.), p. 353 – 370.

In the context of a system of international relations, mainly conditioned by financial and economic corporations, the already weak governing capability of the state legal system becomes overwhelmed by the dynamics and the innovative decision power of the market forces. In the light of the above mentioned, international law goes through a series of changes, accompanied by a crisis of the international legality and of traditional functions of international bodies, especially the United Nations that no longer has the ability to control the use of force at international level. In this context of general erosion of state sovereignty the traditional principles of respecting territorial integrity and political independence of states are under close scrutiny.

In light of exogenous processes, in which the use of force at international level has as justification the protection of human rights, done however by means that constitute in themselves violations of international law, the scheme of power distribution and differentiation, typical to the rule of law, seems to be obsolete from a functional and spatial point of view and the human rights theory is forced to deal with problems that by far exceed state horizons, being international[9].

Certain authors consider that the attempt to revival state sovereignty and to conceive cosmopolitan projects of unifying the world politically and legally are unrealistic[10]. Others argue that in the light of a future possible global constitutionalism a key-role could be played by an international criminal court acting based on a universal criminal code. The new International Criminal Court is considered in this context as one of the main instrument of human rights protection and repression of arbitrary actions of power at international level[11].

In this context of globalization it particularly presents interest for our research the impact that the integration of Romania in the European Union will have. Clearly, it is understood that the integration of Romania in the European Union structures will impact considerably the sovereignty of the first.

At the beginning of the 1990's, Romania made its choice for a constitution that would fundament the classic representative democracy, the people thus becoming the depositary of indivisible and inalienable sovereignty that it either delegates to its chosen representatives or exercises directly, by means of referendum. The mandate of those chosen is representative in nature, assuming therefore that they act in the name of the nation and of its general interests.

The logic of the Union, nonetheless, was that the last states to integrate would have to adopt the European union *acquis* and therefore to adopt and respect already used rules of law and enter a pre-established institutional logic.

This means that, firstly, Romania will have to adopt a modern approach of sovereignty and realise that shared sovereign attributes with the Union represents a gain in comparison to the transfer of certain powers related to the control of economic or commercial activities to the Bruxelles institutions. The focus will be made on the economic-political components of sovereignty.

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[9] D. Zolo, cited above, p. 49.
[10] See K. Ohmae, „*The End of the Nation State. The Rise of Regional Economies*", The Free Press, New York, 1995; J.-J. Roche, „*Théories des relations internationales*", Editions Montchrestien, Paris, 1999.
[11] B. Onica-Jarka, „*Jurisdicția internțională penală*", C.H. Beck, Bucharest, 2006.

The integration of Romania in the European Union imposes the implementation of the European *acquis* and the alignment and adaptation of the Romanian legal system to the system of European norms and this reality objectively involves changes at the level of constitutional order.

All Romanian fundamental laws appeared over a period of one and a half century had as a central core the protection of national prerogatives. In this matter, the Romanian Constitution, adopted in 1991 and revised in 2003 is no exception, characterising and defining the elements of the Romanian state in article 1: „Romania is a national, sovereign and independent state".

The main problem of integration, at least at a theoretical level, is represented by the ratio between the supremacy of the Constitution and the priority of European law at national level.

The Romanian constitutional order is essentially altered as a consequence of adopting the European *acquis*, accomplished, in part at least, through the modification of the Constitution by Law no. 429 from 2003. The revised Constitution contains a general clause that authorises the transfer of power to the European Union (article 148).

The direct effect and supremacy of the European law are not clarified, still, after the 2003 revision of the Constitution. Although after the first paragraph of article 11 (International law and national law) a new paragraph has been introduced, it is still mentioned that the treaties represent sources of law only if Romania is a part. However, a great number of European rules of law that enjoy the prerogative of direct effect have as a source the court of Luxemburg. In the Romanian Constitution, the complete title of this article should be „The supremacy and direct effect of European law".

The belief that articles 148 and 149 implicitly change national regulations, projecting on the latter ones the new situation derived as a consequence of the integration but letting the interpretation of these texts to one's own wish or possibility, has no practical sustainability.

This solution adopted and maintained at the moment by the Romanian Constitution is in contradiction with the position adopted by the European Court of Justice of Luxemburg as early as 1964, in the decision given in the Costa vs ENEL case: "*It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.*"

The opened questions regarding the entire experience of the rule of law are numerous. How could the certainty of law be restored in the so complex contemporary societies? What can be done to restore the abstract and general character of the legal norm and to stop the legislative inflation trend? Through what means can the legality principle regain its effectiveness considering that the power differentiation scheme is overwhelmed by phenomena such as: degenerative metamorphosis of political representation, technical decline of legislation etc. How is it possible to protect political rights and, more so, social rights given the privatization of social functions, the downfall of the public area and of social solidarity collectives? What will the destiny of new rights be, especially of foreigners when detained and trialled? What will become of environmental protection and the cognitive autonomy of the public-audience subject to subliminal pressure from the media?

Similarly, concerning international law, we wonder if it is possible to counteract the arbitrary of great world economic and military powers through legal means? It is doubtful that Kelsen's theory – peace through law – can be considered the most proper means of promoting international peace and reduce the political and economic imbalances in the world. More so, it is equally controversial the idea that a new vigour can be given to the state legal system allowing these to submit the global forces of the market to the rules of law. Similarly, it is not very clear in what way will the European Union be able to inspire itself from the rule of law model, freeing itself from the hegemony of powerful economic and financial interest and the usurpation of administrative bureaucracies.

Society needs an authority to govern it, to ensure its unity and order and to contribute to the common good. For the state to be able to fulfil its specific attributions, it must neither be overburdened with extreme requirements nor assume assignments that can much better be accomplished by the local communities. To this end, the minimization of the role of the state as an economic operator, the decentralization of resource allocation, the diminution of the distributive function of the state and the increase of the stimulating one, the restriction of the bureaucratic body alongside the simplification of legal provisions, the transfer of certain normative attributions towards professional associations are just some of the solutions that could ensure a better functionality of the rule of law in Romania.

The accomplishment of legal order in a state characterized by the rule of law can not be assured unless there is a democratically chosen, representative Parliament that controls the ways in which state institutions follow the legal order in the rule of law. We believe that the uninominal vote, recently adopted in Romania, after seven years of parliamentary debates represents a start in solving the issue of the „clean character" of the Parliament. Certainly, the uninominal vote has its deficiencies and is far from being perfect but its introduction in a proportional system can to some degree be efficient, but no miracle changes are to be expected. We believe that the changes brought to the election system are welcome but they must be done with care and responsibility and must not have follow the short term political interest of any political formation or orientation but the insurance of long-term political stability. The advantage consist of the fact that through the uninominal vote the chances of true professionals, competent people to be chosen to represent the people increase, for they vote not a list but a name. The disadvantage is that at a certain moment it is possible that the Parliament be made up of persons from different parties, with different aspirations and opinions, and this could lead to lack of communication and disputes and not to a consensus in solving the general problems of the nation, as normal and fair.

Theoretically, the three powers are separated and in balance. We cannot talk about their hierarchy. Between the three powers in the state the most efficient one should be the judicial one, from the perspective importance and not the subordination one for it has the attribution of settling any eventual malfunctions in the separation of power system and to protect the citizens' rights and liberties. Justice can guarantee the functioning of the rule of law whenever the State falls in the pitfalls of certain elites that detour the resources and use these for their own interests.

The legal order in a state characterized by the rule of law entails laws accordingly, general compliance with laws and whenever they are violated legal sanctions must be applied regardless the status of the offender. The exact and rigorous respect of the

constitutional principle of *nemo censetur ignorarae legem* ensures the legal order that characterizes the rule of law. Likewise, the revision of the entire legislation so that no law or legal provision contravene to the new constitutional dispositions could represent a solution aimed at realizing the legal order compatible with the rule of law, and with the international provisions and regulations.

As far as the present judicial system is concerned, it is characterized by the slowness of the procedure, the average duration of the trials being, generally, quite lengthy. The longer the duration of the proceedings, the less chances that justice will be done. A just decision depends not only of the establishing of the truth and the correct application of the law, but also of the reasonable duration of the proceedings. The revisions of the Civil and Criminal Procedure Codes, with the goal of reducing the duration of the trials would be a measure aimed at regaining trust in the justice system and in the sentiment of justice.

Concerning the political control exercised by the Government on the Parliament, in order to have a true responsibility of the ministers in front of the Parliament, a short term solution could be represented by the modification of the Senate' and Deputy Chambers' Regulations, in order to have a greater rigour. On the long term, however, a political education in the spirit of democratic values and mechanism could determine a better efficiency of the Romanian parliamentary system.

The organic law should regulate, regarding the control exercised by the Ombudsman, certain sanctions for those who refuse to collaborate or do so with delays, or refuse to support the Ombudsman in fulfilling its attributions.

The rule of law should be based on the following: legitimacy of power, its constitutionality, the separation of powers, protection of fundamental rights and liberties, political party pluralism and the limitation of power exercise for each public authority and agent of public power. Only by considering all of these criteria cumulated can we find ourselves in the presence of the rule of law.

From the analysis of the constitutional provisions it results that Romania applies, in most part, the conditions that define the rule of law. However, this does not mean that they represent the entire ensemble of constitutive elements of such a system based on the rule of law, as demonstrated by the diversity of opinions in defining the rule of law.

We appreciate that the functionality of the rule of law in Romania records, still, some deficiencies, in the following aspects: the parliamentary inertia in the normative process, the multiplication of judicial errors, the insufficient receptivity and promptness of the administrative bodies in applying legislative acts, elements that breach the independence of justice such as the lack of professionalism of certain judges and the dependency report between the career of the judges and the ministry of justice, the usurpation by the prosecutors, agent of the executive branch subordinated to the ministry of justice, of certain attributions of the judicial power, the lack of a true control function of the Parliament over the Government, the conflict relation between the President and the Prime-Minister, as functions, manifested particularly through the tendencies of the President, as a institutions, to subordinate de Government, the politicizing of the Constitutional Court, with serious consequences for the quality of the constitutional jurisprudence and political neutrality of its decisions and with negative effects on the constitutional order and protection of human rights.