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DOCTRINAL APPROACHES TO THE CONCEPT OF THE „RULE OF LAW"

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The rule of law is a fundamental, historical and widespread concept in contemporary society. The doctrinal approach of this term has preoccupied many scientific researchers from different periods of time. By this concept, at first sight we mean legal state, state of rights, state based on justice and integrity, and its detailed analysis – we intend to carry it out in the present scientific approach.

Keywords: rule of law, legal norms, integrity, independence, doctrinal references, fundamental rights and freedoms of citizens, etc.

ABORDĂRI DOCTRINARE ALE CONCEPTULUI „STAT DE DREPT"

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Statul de drept este un concept fundamental, istoric și pe larg răspândit în societatea contemporană. Abordarea doctrinară a acestui termen, i-a preocupat pe numeroși cercetători științifici, din diferite perioade de timp. Prin acest concept, la prima vedere înțelegem stat juridic, stare de drepturi, stat bazat pe justiție și integritate, iar analiza detaliată a acestuia – ne propunem a o realiza în cadrul prezentului demers științific.

Cuvinte-cheie: stat de drept, norme juridice, integritate, independență, referințe doctrinare, drepturile și libertățile fundamentale ale cetățenilor, etc.

Introduction. The rule of law, a legal term frequently used in the literature, appears as a concept whose realization is currently a vital necessity for the existence of all contemporary states. The search for principles, ideas for establishing the correlation, the interdependence between power and law began in ancient times. In the process of developing the conceptions of law and state, the idea of the correctness and fairness of this form of organization of society was outlined. The initial-defining ideas of the concept of the rule of law can be identified as: the existence of the power of law as a correlation between force and law (Aristotle) [11, p.56]; the distinction between forms of government – correct and incorrect, mixed government and the role of law in the typology of state forms (Socrates, Plato, Aristotle) [11, p.53]; the correlation between natural law and law determined by the will of members of society (Democritus, sophists) [11, p.50]; equality of people according to natural law (some sophists, Romanian jurists) [11, p.63].

Methods and materials used. The materials used in the scientific structuring and assembly of the article are the vast complex of specialized literature both in the country and abroad – In the field of research on the concept of ,,rule of law".

The scientific methods applied in the process of studying and elaborating this scientific approach are part of the most diverse category, being used the most efficient methods in the field of legal research. Thus, in the foreground, priority was given to the method of analysis and the comparative one. Subsequently, in order to present a comprehensive structure and essence of the article, scientific appeals were made to the methods of synthesis and deduction, including the historical method.

Basic content. In the medieval period, the ideas of the rule of law on the positions of historicism were expounded by the progressive thinkers of the time – Nicolo Machiavelli and Jean Bodin. In his theory, Machiavelli sought to clarify the principles of politics in order to determine the image of the state that would reflect the demands of the times. He saw the purpose of the state in the free use of property and in guaranteeing the security of everyone. Priority was given to the republic as a form of state, because the republic meets the demands of equality and freedom [7, p.73]. Boden defines the state as a legal administration with several families and their assets. The purpose of the state is to ensure rights and freedoms [11, p.58]. Later, during the bourgeois revolutions, which characterized the beginning of the modern period and especially the development of the rule of law, Grotius, Hobbes, Locke, Montesquieu, Jefferson and others contributed to the development of the idea of the rule of law. According to Grotius, the purpose of the rule of law is the protection of private property by means of legal norms, which would ensure that everyone has the free use of his property with the consent of all. As a source of the state form, Grotius considers the social contract, therefore, he mentions, the people can choose any form of government [3, p.39].

Another representative of the time, Hobbes, presents himself as a follower of the absolute monarchy in England. However, he put forward a series of ideas that presuppose the domination of law in social life, which were later developed by other researchers in the field. Among these ideas we can mention the formal equality before the law and the equality of contracts. Hobbes advanced the concept of human freedom, understood as the right to do everything that is not prohibited by law, and thus established the theoretical basis of the most effective principle of regulating social relations – through law [10, p.204].

Locke, for his part, notes that the state, formed for the protection of inalienable human rights, creates laws for the establishment and administration of property and uses public forces to enforce these laws and to protect against external danger. Such a state is dominated by the law that ensures fundamental rights in the field of property, individual freedoms and equality. According to Locke, the freedom of the people under the rule of law is the basic rule, established by the legislature, the essence of which is expressed in the freedom to act according to one's will in all cases, unless the law provides otherwise, and to not to be dependent on a permanent, indeterminate, unknown authoritarian will of another man [4, p.3-4].

According to the ideas of the French thinker Montesquieu, in order to prevent abuses of power, strict observance of the laws by all is necessary. ,,Freedom is the right to do whatever is allowed by law. If the citizen could do everything that these laws forbid, then he would not have freedom, because other citizens would do the same" [6, p.289]. For Montesquieu, political freedom means the establishment of freedom and security. These are established by the separation of powers in the legislative, executive and judicial, concentrated in different authorities and which mutually limit themselves and balance each other. This idea was realized in the constitutions of the different civilized states of the world.

Thomas Jefferson, author of the ,,Declaration of Independence of the United States of America", put the rule of law into practice on the American continent. From the positions of the social contract and the inalienable rights of the people, he criticizes the form of monarchical government. The Declaration solemnly proclaims the inalienable human rights, for the assurance of which the state is used.

In the works of the valuable philosophical scholars of the past we also find characteristics of the rule of law that identify the phenomenon with a construction, which leads to a legal nonsense (in the opinion of H. Kelsen), the expression being considered a myth, dogma (after J. Chevallier). The scholar A. Hauriou generally regards the concept of the rule of law as useless.

Kant, in turn, elaborated and motivated the philosophical basis of the theory of the rule of law, in which the main place is occupied by man, personality. An important thesis formulated by Kant is the following: ,,Each person represents an absolute value; no one can be considered the means of fulfilling even the noblest plans" [21, p.132]. As a basic principle of public law, the German philosopher considered the prerogative of the people to demand the right to participate in the process of establishing the rule of law by adopting a constitution that would express their will. When the state operates on the basis of constitutional law that expresses the will of the people, then there is a rule of law; the rights of the citizen regarding personal freedoms, constitution, thought and commercial activity cannot be limited. In the rule of law, the citizen must have the same possibility of imposing the rulers on the exact execution of the law, which the rulers have on the citizen [8, p.51-52].

Progressive conceptions of the rule of law are found in other researchers. Jhering, for example, considers that the rule of law can exist only where the state power itself is subject to the order prescribed by it, which acquires definitive legal stability. Only the rule of law can develop the national welfare, trade and crafts, the mental and moral forces of the people [9, p.47].

According to Jellinec, the state is considered to be representative of the general interests of its people, a dominant union of the people that presents itself as a legal entity that satisfies individual, national and general human interests in the direction of progressive development of society [22, p.287].

The modern period, which we tried to identify in the complex process of formation and consolidation of the rule of law in order to highlight its importance for determining and developing a considerable number of legal phenomena, which in turn establish the dynamics of development the relationship between the legal and the company does not include in itself all the representatives mentioned above. Some of them are characteristic of the medieval period, even if they manifested themselves at the end of it. However, the ideas promoted in their works largely influenced the formation of the premises for the emergence of the modern period. The conditions for the appearance and development of a certain period are established long before the conventional confirmation of its appearance, usually closely related to a certain historical event. The factor of continuity in the formation and development of the concept of the rule of law is of particular importance. Through it we can demonstrate the logical continuity of the development of civilization and the legal phenomenon in relation to this civilization. Namely the social evolution and the legal doctrine can be considered as factors that influence the development of a democratic political regime. A pronounced development knows the concept of the rule of law in the contemporary period. The technical-scientific progress, the democratization of the human society as a whole, especially the creation of the circumstances in which the cold war proved to be out of date, determined a new impetus in the development of the concept of the rule of law. Starting with the interwar period of the twentieth century, the next stage is formed and begins its practical realization, which we can conventionally attribute to the rule of law – the stage of the

constitutional rule of law. At this stage, the phenomenon of the rule of law can be characterized by the prism of the fundamental principles of qualitative, democratic law, which have been reflected in the fundamental laws of the states of the world recognized by democratic regimes. The set mentioned by the principles also determined the main requirements for the existence of the rule of law as a constitutional state. It is necessary to mention that the state of constitutional law, through the principles of law that have obtained a constitutional protection, has manifested itself as an effective weapon in the confrontation between states characteristic of the cold war. Namely, the democratization of society as a result of the democratization of law, through these constitutional principles of law, which as a whole characterized the rule of constitutional law, allowed to obtain advantages in competition, the struggle that took place between capitalist and socialist regimes. The concept of the rule of law, characteristic of the mentioned period, is also approached in a considerable number of scientific papers and publications, whose authors characterize, from a scientific point of view, the geographical area of this phenomenon and the importance of its research. The new methods of scientific research of the legal phenomenon, in general, and of the rule of law, in particular, highlight new valuable works in the field, which contribute to the formation of more complex conceptions of the rule of law phenomenon. Analyzing the essence of the rule of law, the specifics of the development of the concept in English, German and French schools, analyzing the steps or levels of the rule-building process, I came to the conclusion that it is necessary to give a more precise definition of this phenomenon. The presence of a real independence of the judiciary in the process of manifesting its essence. The special interest given to the concept of the rule of law has obviously determined the large number of researchers in this field, respectively the presence of an impressive number of definitions given to the rule of law. We will demonstrate this statement by presenting some definitions of the rule of law found in various experts in the field: ,,the rule of law means the subordination of the state to the rule of law" [5, p.2]; ,,It is the state which subordinates its action over the citizens to the rules which determine their rights and determine the means which it is authorized to use" [5, p.3]; ,,It is the state bound by law, the state that respects the law" [5, p.10]; ,,The state in which the power is subordinated to the law, all manifestations of the state being legitimate and limited by law" [1, p.32]; ,,The rule of law means the limitation of power by law" [2, p.29]; the rule of law ,,corresponds to a rational legal order, the depersonalization of power" [2, p.31-32]; ,,The rule of law means fundamental guarantees of public liberties, protection of the rule of law" [12, p.107]; ,,The rule of law implies the existence of constitutional rules that apply to all" [2, p.57]; ,,The rule of law is the hierarchical and systematized legal order" [2, p.61-62].

We can be convinced that the concept of the rule of law is treated differently by specialists in the field. However, from this totality of definitions of the rule of law we can select the main ideas regarding this social phenomenon. First of all, this phenomenon is characterized by the limitation of the state by law, because the existence of the principle of equality of all before the law presupposes the observance by the state of the norms of law created by the state itself. Secondly, the rule of law cannot exist without the presence of a system of democratic methods of government governed by law, which aim to protect the fundamental human rights and freedoms. In the Romanian specialized literature we meet an impressive number of works in which the definition of the concept of the rule of law is given. We consider it necessary to present in the paper some definitions of the rule of law expressed in Romanian literature.

In the vision of Ioan Ceterchi and Ion Craiovan, the rule of law can be understood as a political-legal concept that defines a form of democratic regime of government to respect the relationship between state and law, between power and law, by ensuring the rule of

law, rights and the fundamental freedoms of man in the exercise of power [14, p.117].

Tudor Drăganu is of the opinion that the rule of law ,,should be understood as a state which, organized on the basis of the principle of separation of powers of the state, in whose application the judiciary acquires real independence and pursuing through its legislation of its regulations by all its organs in their entire activity" [15, p.17]. In this regard, the Final Document of the Copenhagen Meeting on the Human Dimension, finalized on 29 June 1990, emphasized that the rule of law is not just a matter of formal legality, designed to ensure regularity and coherence in the establishment and implementation of the democratic order, but also a full acceptance of the supreme value of the human person, guaranteed by institutions, constituting a legal framework for its most complete expression.

The evolution of the concept of the rule of law, through its scientific-practical value, allows us to draw parallels with the evolution of the concept of justice, characteristic of various levels and models of civilization. The qualitative transformation of the political regime, which is the moment of interaction between the society and the state power, generates an interdetermination and an interdependence with the phenomenon and the value of justice characteristic of the respective society. These interdeterminations and interdependencies, in their final essence, characterize the purpose of the respective state – the proclamation, protection, promotion, realization, efficient and qualitative restoration of the rights and freedoms of man and citizen.

A particularly important role for the characterization of the rule of law is played by its social and political premises. We can state that the mentioned premises are presented as ,,parts" of a whole, this whole being in our case the rule of law. In most authors we find in most cases the same social and political premises, the presence of which allows us to confirm the existence of a rule of law. Analyzing the appearance of these premises and their selection over time, we can examine the periods of formation and finalization of the concept of the rule of law. At the same time, in the contemporary period we can highlight a diverse and different development and popularization of both the mentioned premises and the very concept of the rule of law. In Romania, for example, after 1989 this problem is analyzed by an impressive number of specialists, including Tudor Draganu, Ion Deleanu, Genovieva Vrabie, Sofia Popescu.

Tudor Dragan, in his paper ,,Introduction to the theory and practice of the rule of law", highlights the following social premises of the rule of law:

a) rooted in the civic consciousness of the belief that there are rights inherent in human nature opposable to the state;

b) a democratic system for adopting laws;

c) separation of powers in the state;

d) independence of the judiciary [15, p.17].

Sofia Popescu highlights the following defining features of the rule of law:

a) the subordination of power to the rule of law;

b) the pyramidal structuring of power and its division into a large number of organisms;

c) guaranteeing the fundamental rights and freedoms of the citizens;

d) the participation of the citizens in the exercise of power through jurisdictional control and control of a political nature;

e) the limitation of each of the three powers – legislative, executive and judicial – by the other two;

f) a hierarchy of the executive power and of the judiciary that would allow the control between the existing authorities in the system of the same power [20, p.239].

Referring to the characteristics of the rule of law, Paul Cosmovici summarizes that it ,,must act on the basis and respect the form of law, as an expression of the general will. The features and characteristics are similar to the essential ideas of a democratic legal regime in modern societies, namely: the sov-

ereignty of the people who find their expression in free elections and a pluralistic political system, separation of powers and limitation of presidential prerogatives, independence of the judiciary, equality before the law, freedom of opinion and expression, the right of association, etc., ie the promotion and protection of human rights" [13, p.22].

The importance of the premises of the rule of law or, as they are also called in the literature, of the features of the rule of law becomes evident in the process of characterizing the phenomenon and, especially, in determining the various stages of evolutionary development of the concept. Undoubtedly, the phenomenon of the rule of law undergoes transformations in the process of its evolution, a fact observed in the process of its characterization at different stages of historical development. The features of the rule of law, as determinative ideas of the phenomenon, undergo transformations, some new ones appear, others would be outdated, they present only an academic-historical value as a factor that characterizes the phenomenon. In the contemporary democratic state, based on the rich experience of the authors who conducted research in the field, as well as their own theoretical and didactic experience in the field, we can highlight features that, in our opinion, identify the main ideas, characteristic signs of the rule of law. The rule of law is a state with a democratic political regime. Thus, the presence of democratic methods of achieving and maintaining power in the state is presented as an obvious feature of the rule of law as a contemporary democratic state. This feature requires the presence of others, oriented towards the formation of the contemporary democratic state. We highlight the presence of a state apparatus that realizes and effectively applies the rules of law, so we are talking not only about a real separation of power, but also about a mutual control of the branches of state power, with the categorical exclusion of a pyramidal shape. In general, the pyramid structure of power in the contemporary democratic state is excluded by arguing the need for mutual control in the branches of state power (executive and legislative), as well as control by the judiciary, which also presupposes and requires reciprocity. In turn, the control of the jurisdictional authority and the control aimed at elucidating the quality and efficiency of the act of justice require the existence of another characteristic characteristic of the contemporary rule of law – the independence of the jurisdictional authority.

The features, or principles of the rule of law, identified differently by different authors, in their essence, include the same requirements for a democratic political regime that would characterize the process of manifestation. Requesting as determinants the principles highlighted by the Romanian scientist Tudor Draganu, we consider that as a fundamental principle, determinants of the rule of law and, obviously, as a determining factor in the process of establishing a democratic political regime, the presence of an independent judiciary is required. Characteristics of indisputable value are also found in the works of other authors mentioned above, but we assume the audacity to highlight the general character specific to the approach of the phenomenon in question to the above-mentioned author.

The plurality of definitions referring to the nature and essence of the rule of law does not allow us, however, to state that they give a complex and broad characteristic of the phenomenon. The terminological variety of the concept is identified in different theses that determined it, but each retaining its characteristic individuality. Thus, in German legal doctrine it is defined as Rechtsstaat, in English – Rule of Law (although identity is often disputed), in French doctrine – État de Droit, in Italian – Stato del dirito, in Spanish doctrine – Estado of Dereco. Beyond the terminological nuances, with the exception of Rule of Law, for which there is still a reservation in being considered without a doubt a synonym, the notion of ,,rule of law" covers, in essence, the same set of requirements [17, p.57].

It should be noted that these main theo-

ries, reported above, do not exhaust the multitude of those that refer directly to the rule of law. The germs of the concept are still in antiquity, developed by liberalism and later interpreted by various currents, cumulatively, they contributed to the finalization (a relativistic alternative of the term) legal category and politico-economic reality – the rule of law in the contemporary sense, being as argumentative basis and inspiration for further research.

From a political point of view, there are several forms of edification (corresponding to the doctrine of a certain historical period): police state, legal state and constitutional state.

The police state (Polizeistaat) is one of the primary forms of the rule of law. This form presupposes a strong administrative authority, with a more or less complete freedom of decision, creator of the right, which can apply to the citizens all the measures that it considers useful [16, p.105]. The obligations of the individual are set by law, which is not the case with the administration. The administration is not governed by any law, but only by the internal rules, of subordination within the system. So in the individual-administration relationship, the subjects are not on an equal footing. Even if a right is given to the right, this right is devoid of any element of ambivalence and reciprocity [18, p.68]. The law of the police state is an instrumental right.

The police state is based on the good will of the prince (administrator) who has no obligation to comply with any rule.

The police state is not necessarily synonymous with bloody tyranny or disorder [19, p.303], however in the individual-administration (state) relationship there is no such thing as a reverse relationship, by which the values of society would limit the legal order, sometimes abusive, imposed by the administration.

The legal state, as another form of evolution of the rule of law, has found its mirror especially in France of the third republic. Carre de Malberg, the promoter of this form, argued that France does not apply the rule of law, but the system of the rule of law, differentiated from the rule of law by two main aspects:

– the law is not only the limit of the administrative activity, but also a condition of it, the administrative function is reduced to the execution of the law;

– the primacy of the constitution over the law is not ensured, because the law cannot be the object of any appeal. In essence, the rule of law is the ,,Rule of Law", enshrined in Anglo-Axon doctrine. The rule of law tends to ensure the supremacy of the legislature, whose crisis can lead to the dysfunction of the political system as a whole.

The shortcomings of the legal state are filled by the constitutional state, to respond to the inability of the Parliament to overcome the crises [16, p.106]. That more or less perfect mechanism of interaction of the state organs appears. Normativity also remains fundamental, although it does not axiologically encompass the protection of human rights.

Conclusion. Thus, the forms of political edification also express an evolution of the concept of the rule of law. Starting from the concept of police state – the regulation of the obligations of the individual, we moved to the legal state – the overall regulation of social relations, including the position of the state. Later, a more perfect form was taken - the constitutional state, in which the three functions of the state: legislative, executive and judicial have a distinct position in the accumulation of interdependencies, and the law as a regulator of social relations is adapted, guaranteed and executed by them.

Their importance is reduced to the practical verification of some theoretical concepts. Theoretical modeling has not always been able to analyze the impact of the cumulative determination of social life, which could be done by building one model or another. The development of human society after the Second World War has shaped new values and demands on public power, emerging new interpretations: the social state (paternal), scholarly state, nation state, which now tend to be incorporated into the contemporary sense of the rule of law.

Bibliographical references:

1. Brian A. W., Simpson, Reflections on „The Concept of Law" OUP Oxford, 2011;
2. Hans Kelsen (with a new introduction by A. Javier Tevino) General Theory Of Law And State). New Brunswick, NJ: Transaction Publications, 2006;
3. Hugo Grotius, On the Law of War and Peace, Cambridge University Press, Edition Critical, 2012;
4. John Locke, Second Treaties of Government, Early Modern Text, Chapter II State of Nature, Jonathan Benett, 2008;
5. Lt Col Mike Cole, British Army, Rule of law handbook a practitioner's guide for judge advocates, Virginia, 2011;
6. Montesquieu, On the Spirit of the Laws, Vol. I, Scientific Publishing House, 1964;
7. Niccolo Machiavelli, Discourses on Livy, translated by Harvey C. Mansfield and Nathan Tarcov, The University of Chicago Press, 1996;
8. Immanuel Kant, Groundwork for the metaphysics of morals, edited and translated by Allen W. Wood, Yale University Press, New Haven and London;
9. Rudolf von Ihering, Law as a Means to an End, translated by Isaac Husik, 1912, Boston Book Company;
10. Thomas Hobbes, Leviathan or the matter, form and power of an ecclesiastical and civil community, translated by Alexandru Anghel, Bucharest, Herald Publishing House, 2017;
11. Vecchio (del) Giorgio, Lessons in Legal Philosophy, 4th Edition of the Italian text. New Europe, 1995;
12. Korkunov, N. M., General Theory of Law (English translation by W. G. Hastings) 2nd Edition, Macmillan Company, 1922;
13. Cosmovici Paul, Les communautes europeenes et l ' etat de droit // Revue roumaine des sciences juridiques, nr.1-2, 1991;
14. Ceterchi Ioan and Craiovan Ion, Introduction to the General Theory of Law, Bucharest, 1993;
15. Drăganu Tutor, Introduction to the theory and practice of the rule of law. Cluj Napoca: Dacia, 1992;
16. Deleanu Ion, Institutions and constitutional procedures - treaty, Arad, Ed. Albeck, 2006;
17. Ionescu Steluța. Justice and jurisprudence in the rule of law. Bucharest: Universul juridic, 2008;
18. Miculescu P., The rule of law. Bucharest, 1998;
19. Boris Negru and Alina Negru, General Theory of Law and State, Chisinau, 2006;
20. Popescu Sofia, General Theory of Law, Bucharest: Lumina Lex, 2000;
21. Bychkova E.I., Suntsova E.A., Volchanskaya A.N., Pravkin S.A., Theory of State and Law. Course of lectures: textbook. Moscow: Unity-Dana, 2015;
22. Jellinek G., The general doctrine of the state. SPb., 1908.

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