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THE HIGHLIGHTS OF THE INTERWAR LEGAL THINKING IN THE CONSTRUCTION OF THE CONTEMPORARY RULE OF LAW STATE

Valentin MARGINEANU
Doctorand, Universitatea de Stat din Moldova,
Chișinău, Republica Moldova
e-mail: *vmargineanu70@gmail.com*
https://orcid.org/0000-0002-4223-5890

Rodica CIOBANU
Doctor habilitat în drept, conferențiar universitar, Universitatea de Stat din Moldova,
Chișinău, Republica Moldova
e-mail: *rod.ciobanu@gmail.com*
https://orcid.org/0000-0001-6071-8178

Lately, the need to re-evaluate the axiological dimension of law and to reconsider the idea of the rule of law and democratic values has been increasingly emphasized, not only in the conditions of states with young democracies such as the Republic of Moldova. The radical transformations that post-Soviet states entered towards the end of the 20th century made them aspire to the establishment of societies in which the principles of the rule of law are not only enshrined in normative acts, but are also practiced. Thus, given the diversity of challenges facing contemporary states, the processes and crises that increasingly challenge democracy and the rule of law, we consider it appropriate to return to philosophical and legal thinking and to the determination of its valences in building the contemporary rule of law, highlighting its particular, specific and original character, which determines its place in the universal philosophical-legal thinking.
Keywords: *rule of law state, natural law, positive law, philosophical-legal thinking, fundamental values.*

VALENȚELE GÂNDIRII JURIDICE INTERBELICE ÎN CONSTRUCȚIA STATULUI DE DREPT CONTEMPORAN

În ultimul timp tot mai mult s-a accentuat necesitatea reevaluării dimensiunii axiologice a dreptului și a reconsiderării ideii statului de drept și a valorilor democratice nu doar în condițiile unor state cu democrații tinere precum cea a Republicii Moldova. Transformările radicale în care au intrat statele post-sovietice spre sfârșitul secolului XX au făcut ca acestea să aspire spre constituirea unor societăți în care principiile statului de drept nu doar sunt consfințite la nivel de acte normative, dar și sunt practicate. Astfel, ținând cont de diversitatea provocărilor la care sunt supuse statele contemporane, de procesele și crizele care tot mai frecvent pun la încercare democrația și statul de drept, considerăm oportună revenirea la gândirea filosofico-juridică și determinarea valențelor acesteia în construcția statului de drept contemporan, prin evidențierea caracterului particular, specific și original al acesteia, ceea ce-i determină și locul în cadrul gândirii filosofico–juridice universale.
Cuvinte-cheie: *stat de drept, drept natural, drept pozitiv, gândirea filosofico-juridică, valori fundamentale*

LES VALENCES DE LA PENSÉE JURIDIQUE DE L'ENTRE-GUERRE DANS LA CONSTRUCTION DE L'ÉTAT DE DROIT CONTEMPORAIN

Dernièrement, la nécessité de réévaluer la dimension axiologique du droit et de reconsidérer l'idée de l'État de droit et des valeurs démocratiques a été de plus en plus soulignée, non seulement dans les conditions des États avec des jeunes démocraties telles que la République de Moldavie. Les transformations radicales dans lesquelles les États post-soviétiques sont entrés vers la fin du XXe siècle les ont fait aspirer à l'établissement de sociétés dans lesquelles les principes de l'État de droit ne sont pas seulement inscrits dans des actes normatifs, mais sont également pratiqués. Ainsi, compte tenu de la diversité des défis auxquels sont confrontés les États contemporains, des processus et des crises qui mettent de plus en plus à l'épreuve la démocratie et l'État de droit, nous jugeons opportun de revenir à la pensée philosophique et juridique et de déterminer ses valences dans la construction de l'État de droit contemporain, en soulignant son caractère particulier, spécifique et original, qui détermine également sa place dans la pensée philosophico-juridique universelle.

Mots-clés: *état de droit, droit naturel, droit positif, pensée philosophique et juridique, valeurs fondamentales.*

ВАЛЕНТНОСТЬ ЮРИДИЧЕСКОЙ МЫСЛИ МЕЖВОЕННОГО ПЕРИОДА В СТРОИТЕЛЬСТВЕ СОВРЕМЕННОГО ПРАВОВОГО ГОСУДАРСТВА

В последнее время все чаще подчеркивается необходимость переоценки аксиологического измерения права и пересмотра представления о правовом государстве и демократических ценностях не только в условиях государств с молодыми демократиями, таких как Республика Молдова. Радикальные преобразования, в которые постсоветские государства вступили к концу XX века, обусловили их стремление к созданию обществ, в которых принципы правового государства не только закрепляются в нормативных актах, но и реализуются на практике. Таким образом, учитывая многообразие вызовов, стоящих перед современными государствами, процессы и кризисы, все более подвергающие испытаниям демократию и правовое государство, считаем целесообразным вернуться к философско-правовому мышлению и определению её валентности в построении современного правового государства, выделяя её особенный, специфический и самобытный характер, что и определяет её место в общемировом философско-правовом мышлении.

Ключевые слова*: правовое государство, естественное право, позитивное право, философско-правовая мысль, фундаментальные ценности.*

Introduction

The axiological dimension of law, increasingly, seems to be under a rising need of reassessment, and under the need to reconsider the idea of the rule of law and democratic values, and not only in countries with young democracies, such as the Republic of Moldova. As a result of radical transformations in the post-Soviet states towards the end of the XXth century, these countries aspired to create a society in which the rule of law principles are defined and practised. Therefore, given the diversity of challenges faced by contemporary states, the processes and crises that increasingly challenge democracy and the rule of law, we consider it necessary to review legal-philosophical thinking and define its value in the construction of the contemporary rule of law, highlighting its particular, specific and original character, which also determines its place in the framework of universal legal-philosophical thinking. As C. A. Dumitrescu [1, p. 7-12] argues, the establishment of the rule of law remains a fundamental objective not only for the legal science, but also for the social philosophy and philosophy of law, given the fact that the definition and identification of the axiological dimension which will be considered for centuries as the foundation of the

state-social organization, has been and remains a challenge for the human kind.

Along these lines, Mircea Djuvara claims that the state is „the strongest and most interesting (...) reality of law, and the most exciting to study" [2, p. 67]. Determining the dependency relationship between the *state* and *law* produced a notable concept, causing continuous debates over several centuries, and it remains an ongoing and constant subject of debate, not only in academic, but also in daily life, which has not been totally resolved by now, but perhaps it has been updated. Even though, over time, many scholars made significant scientific progress in the study of the *rule of law*, the concept was more often associated with human desire than with reality, and this is why the debates surrounding its establishment have been an increasingly topical imperative aimed at identifying a model of social organisation based on fundamental values, considered by professor C. A. Dumitrescu [1, p. 8] to be socio-legal meta-values. At the same time, the intellectual exercise to identify the axiological foundations of the societies' organisation in accordance with the rule of law ideal underlines that we must also attempt to document the socio-legal practices implemented to redirect and define other ways to achieve the rule of law. Thus, the concept of the rule of law must not remain only an aspiration or an ideal, but it must become a solid foundation for and on behalf of which the society is established and which offers fair opportunities for all its members.

Defining the concept and applied areas

The concept of the *rule of law* emerged alongside the debate on the relationship between the state and law in order to safeguard the individual's rights and to prevent state abuses, including abuses from those in power. Originally it was formulated within the philosophy of law, but since then it gained considerable scientific interest and has been a constant subject of research for various social sciences and, naturally, first and foremost for the legal sciences.

For several centuries it has been an ongoing research concern, but it seems that today, the concept of the *rule of law* has spread to many fields, such as politics, and it is frequently used in a simplified or a stereotypical format. Frequently, we witness the populist use of the *rule of law* concept, which is justified by a noble will to build, strengthen, enhance and promote the *rule of law*, ultimately ending with the profanation of the concept. In this way, it distorts, neglects and forgets the substance and fundamental idea of this concept, as it was envisaged by the doctrinaires that carefully and consistently developed it. This reality reinforces our conviction that, despite the remarkable achievements in the field, this subject is far away from being exhausted. The undeniable relevance of the subject derives, on the one hand, from the need to identify concrete means and mechanisms to put the concept into practice and, on the other hand, from the need to redefine it and return to its original founding essence.

Therefore, the concept of the *rule of law* has emerged as a driving force behind the individual promotion of the rights and freedoms, and limiting the power and scope of the state, representing the mechanism to guarantee the supremacy of law over politics. The development of this concept unequivocally shows that ensuring efficiency and effectiveness requires a return to the origins, to the basis of what was originally thought - to ensure peace in society. As G. Pohoață argues [3] with reference to the state's goal in Imm. Kant's view „it means only the protection of rights; and the state must guarantee to its citizens the possibility to enjoy their rights, but it must not interfere in individual activities, nor must it take care of individual activities. The state has fulfilled its function when it has safeguarded the freedom of all; to this end the state must be a

state based on the rule of law". Therefore, the peace cannot be achieved without a real protection of individuals from possible abuses and excisions of power, a fact that unquestionably leads us to agree with the opinion of Professor G. Pohoață [3], who points out how relevant are the ideas of the „eternal peace" project proposed by Imm. Kant, and that intended to ensure a world order in which wars and their consequences are avoided, and the rule of law set up. In other words, social peace can only exist in a society where justice, reason, fairness, equity and the common good prevail, all of them being also the prerequisites for *the rule of law*.

Most frequently, the concept of the *rule of law* is attributed to Imm. Kant. Although the author does not explicitly use the mentioned concept, in the direction of the development of this concept the essence of Kantian doctrine seems to be embodied, and according to which the purpose of the state is only to protect the rights and guarantee the rights and freedoms of individuals. According to Giorgio del Vecchio, there is some truth in the Kantian theory „namely that the state must acknowledge the value of the human being and limit its actions wherever it would destroy this value, that represents a right as well" [4, p. 292]. However, Giorgio del Vecchio concludes that „it does not mean that the State is by its nature indifferent or alien to public economic problems, to culture and to moral life, and that it must abandon the promotion of the public good" [4, p. 292]. Nowadays, the understanding of the term "*rule of law*" has evolved in the direction of assimilation and diversification of its meanings, and we can see a great diversity of interpretations and definitions formulated by many scholars. Despite this diversity, some common elements can be identified, such as: - the guarantee of fundamental human rights and freedoms; - the primacy of the law over the authority of the state; - the authority of the courts, first and foremost to safeguard the fundamental rights and freedoms, etc. To this end, the liberal concept to restrict the activity of the state, minimising its involvement in private life and encouraging individual initiative, must be revised. Therefore, the state must include in its activity any area of human activity, but only within the limits of the law, since the law is the expression of justice and justice is an outcome of human nature.

Researchers aiming to address the topics of social organisation, state, law, etc. through a distinct and profound approach focus the scientific debate on the existence or non-existence of the link between the *rule of law* and natural law. Exploring these debates, sometimes, one can argue that they are not without substance, but in our opinion this solution is superficial and obvious. It is practically widely accepted that one of the fundamental principles of the *rule of law* is the guarantee of fundamental human rights and freedoms. However, fundamental human rights and freedoms have their origin in those natural rights that philosophical and legal thought have identified, promoted and imposed over hundreds and even thousands of years. Even Im. Kant, through his doctrine „did nothing else than to concretize and clarify, through a more thorough method, the earlier ideas of the school of natural law (...) through Kant, the school of natural law ends and the school of rational law begins." [4, p. 106-107] Starting from this observation, we also endorse the view that „the idea of the rule of law (...) has its ancient origins in natural law" [5, p. 108], and „the rule of law cannot be anything else than the rule of natural law of a nation" [6, p. 120].

Indeed, as stated earlier, it is crucial to return to the original content that framed the concept of the *rule of law*. Accordingly, it would be useful to recall the scholars who developed this concept, who promoted the inherent human rights, who laid the foundations for a democratic political re-

gime, a system which cannot be designed without the *rule of law*, without human rights, without the guarantee and effective implementation of human rights, without a reasonable basis of relations between the state and the individual. These criteria are also successfully met by the Romanian thinkers from the interwar period, whose ideas are still relevant nowadays and can be emphasized from several perspectives. Here we refer to „authors such as Dumitru Drăghicesu, Nicolae Titulescu, Constantin Stere, Valeriu Iordăchescu, the philosophical-legal thought of Eugeniu Speranția and Mircea Djuvara, Mircea Vulcănescu, etc. Therefore, the study and exploitation of their philosophical-legal ideas is a must to ensure the theoretical foundations for the continuous evolution of the law, which should be founded on spiritual values, such as equity, justice, freedom, justice" [7, p. 293-294]. With a view to erase any doubts, the author Rodica Ciobanu poses some rhetorical questions: „Is it possible that the rational character of law, for which Drăghicescu opted, is no longer relevant? Is it possible that the break between law and morality to be so huge that there is no need to return to the analysis of the relationship between these two normative domains? Or perhaps, there is no more confusion in the analysis of the nature and dynamics of law? Has the problem of the interpretation of law been solved? Or perhaps, there isn't any evolution in the methodology of law? Which is the role of human beings as subject of law, and yet as an object? Or perhaps, does it any more exist a common understanding between life, reason and society?" [7, p. 294]. These questions relate directly to the concept of the *rule of law*.

Valeriu Iordachescu: The rule of law and natural law

Naturally, this article might not be understood if we seek to highlight in a superficial or even generalizing way the major contributions made by all the representatives of the interwar period. For this reason, instead, we choose to highlight the ideas of an influential interwar thinker, less known today and even back then, the priest ***Valeriu Iordăchescu*** (1885-1975). There is no doubt that the questions addressed by V. Iordăchescu have an interdisciplinary character and are not alien to contemporary time, just mentioning, for example, those linked to the exploitation of the social-normative system - deadlock situations for society, social crises, absence of a system of norms, values, principles [8, p. 28].

V. Iordăchescu, though a retrospective overview, summarizes the historical concepts of law and discovers an extremely wide variation in them. Analysing the various law definitions of different authors throughout history, V.Iordăchescu classifies them into two opposing categories: a) the conception of law as power; b) the moral notion of law. Following this analysis, V. Iordăchescu notes that the first conception equates law with physical power, which directly acts through force, while the second one places law in a perspective of an ideal power that does not act directly through physical force of the body, but with reason. Thus, since the first conception confuses the law with power and ultimately leads to the claim that the state is the sole source of law, it cannot be a feasible and acceptable one in the author's view. Instead, V. Iordăchescu, accepts the second one that „claims that the law is the main focus of justice, which is the natural moral virtue by social excellence" [9, p. 12] and the law understood as moral or rational power is called by V.Iordăchescu natural law. [9, p. 14] Taking into account the retrospective benchmarks, we will draw attention to several aspects, which in our opinion frame and emphasize the best V. Iordăchescu contributions.

First of all, we want to discuss the ***relationship between law and morality,*** which is also present

in the works of outstanding philosophers (such as Kant). V.Iordăchescu, through an exploration on how this subject is addressed, rejects the opinions of those who support or promote the separation of law from morality (empiricists, positivists, neo-Kantians). [10, p. 118] Rather, he states that the law, along with good and virtue, constitutes a major building block of morality. [10, p. 117] However, in order to fully understand the essence and nature of law we need to know the meaning of justice, an indispensable part of a modern understanding and definition of law. Only by drawing on the meanings of this notion is it possible to understand the nature of law, from the point of view of its theoretical and practical relevance. According to V.Iordăchescu, justice has two meanings: - a subjective meaning; - and an objective meaning. The subjective justice is a fundamental moral virtue „which lies in the human being's will to practice objective justice". [10, p. 117] While objective justice means „the quality of what is right". [10, p. 118] The latter alone establishes what is right in each particular case and thus determines the essence of morality in the society. According to the author, this category of justice has three fundamental characteristics: ***objectivity, universality and sovereignty*.**

Through the perspective of a correlative approach, V.Iordăchescu also presents different forms of objective justice, referring to certain criteria cited or formulated by the author. Accordingly, he operates with natural justice and positive justice. The first one derives from human nature and the second one - from positive human determinations.

Another point of view, in his work, refers to how V.Iordăchescu uses the same perspective of approach with reference to the clarification of law, ***delimiting between objective law and subjective law***, but at the same time, connecting it with justice. Both forms are portrayed as indispensable to objective justice. „Subjective right is the moral power that a human being has in order to claim what is just and according to objective justice" [10, p. 120].

For the objective law, it is mandatory to comply with the objective justice and is defined by V.Iordăchescu as „a just interest or function" [10, p. 121]. From this compulsory correlation, the author draws the following characteristic features of the objective law: demanding, inviolability and not subject to prescription.

Therefore, starting from the classification of justice into natural and positive, V. Iordăchescu also distinguishes between natural law and positive law, giving priority to natural law. Looking for an explanation of what natural law means, V.Iordăchescu states „natural law means the legal order, based on nature, known only through reason and independent of positive law" [9, p. 16]. While some natural rights are embodied and sanctioned by positive law, nevertheless these rights maintain their unwritten and universal character, ultimately, positive being only the penalty.

V.Iordăchescu also analyses the real foundations of the concept of natural law. He tries to identify whether there is a legal order based on nature, i.e. natural law. The answer is affirmative, considering for example that there are inviolable rights, regardless of whether positive law enshrines them or not (right to life, right to freedom, etc.). Furthermore, even within the society itself, the individual conscience raises its voice against unjust positive rules, conceiving certain changes to the positive law, in other words, the idea of what these rules should be emerges. In this way, the tendency towards an ideal, natural law arises, derived with the help of human reason.

In order to prove the existence and usefulness of natural law, V.Iordăchescu points out some senseless consequences of its denial:

- Any positive law, by the fact that it exists, should be considered just.

- The human person could have no other rights than those recognized by the positive law.
- There would be no international law unless an international force that imposes it.
- The binding nature of positive law, when the individual can avoid the force, disappears. [9, p. 23]

A relevant dimension in the work of V. Iordăchestu is the need to discover the ***foundations of the law based on justice***, which is supported by the fact that justice is what defines and precedes the law. Considering that objective justice represents one of the objective moral values, V. Iordăchescu argues that „justice, law (...) is the moral good, applied in the social life of human beings" [10, p. 122].

Considering the questionable nature of the foundations of law, V. Iordăchescu denies the biologist solution, the solution of private utilitarianism, the solution of social and state utilitarianism, and accepts, supports and fully defends the rationalist solution, according to which „the nature and moral person of the human being is the foundation of law and gives to it the quality of an objective moral value" [10, p. 126]. Accordingly, natural rights are made by the life and development needs of a moral person.

Special attention should be paid to the way V.Iordăchescu prioritizes natural rights according to the interests and functions that they represent. On a higher position are placed the natural rights of the conscience, which meet the needs of the moral person. These are absolute and sovereign, they cannot be abolished, curtailed or suspended. Close to them are the rights of society, to which the rights of the empirical person are subordinated. At the bottom of the hierarchy are the rights of the lower society (the family), which are subordinated to the rights of the higher society (the nation) [10, p. 128]. This hierarchy, according to the author, is a natural one and involves not only the subordination of lower rights to higher ones, but also their horizontal coordination within the same category. V.Iordăchescu argues that only this natural hierarchy of rights does not allow a particular right to suppress the others, each preserving their sovereignty.

Once the relationship between law and morality is established, the hierarchy is set up, it is necessary to highlight the fundamental principles of law and the relationship between natural law and positive law. With reference to the principles, in the foreground appears the principle of equality of all human beings. However, V. Iordăchescu rejects the idea of absolute equality and affirms the essential equality and individual inequality of human beings [11, p. 71]. With reference to the second topic, of the relationship between natural law and positive law, this is explained by the fact that positive rights are necessary in the changing conditions of social life, and are also pragmatic implementations of natural rights, without affecting the essential immutability of the latter. There is therefore a material agreement between natural rights and positive rights, rather than opposition. Consequently, the state does not create the right, but rather determines the natural right, brings the sanction of social force, and places power at the service of the law. This conclusion, V. Iordăchescu argues, is also based on the fact that any positive right that contradicts natural right is unjust, and moral conscience does not recognise it as a right and therefore protests against it in the name of justice and natural right. After analysing the relationship between natural law and positive law, V.Iordăchescu notes a historical, but not essential, relativity of law and justice, determined by two factors: - the differences between human intelligence in terms of knowledge of law and justice; - the differences resulting from the application of natural law to different conditions of social life, depending on time and space. [10, p. 130] The legal

phenomenon is ruled by two factors: - one internal, dynamic, permanent and in constant continuity, which is identified with the natural sense of justice; - another factor is external, varying in time and space, and in its form, found in positive law, but not as a product of power, but rather of the natural law.

Furthermore, the author emphasised the rational basis of the principles of natural law, which allows the transformation of natural law from a purely theoretical, speculative, idealistic concept into a practical concept that can be realised, even in the long term. V. Iordăchescu expressly states that the concept of natural law does not exclude that of positive law, but gives it a different content. The positive law is not a blind manifestation of power, but a totality of consequences of natural law, applied to the changing conditions of social life. Thus, natural law is subject to evolution, to accidental variations, while preserving its essential immutability.

Conclusions

Drawing on the subject and conclusions of national and foreign doctrines, V. Iordăchescu has been constantly concerned with the nature of the just law and has reassessed the concept of the positive law, the natural law and the relationship between them. The formulas of analysis and conclusions drawn by V. Iordăchescu point to certain similarities and challenges that are placed in relation to the law's effectiveness in the current formula of the rule of law. When the author observes that the society, including the law, is going through a crisis, which represents a serious threat to its future, it must be noted that this threat is also evident nowadays as societies are frequently subject to the various forms of crises. In these context, V. Iordăchescu's argument that the main cause of the dysfunctional nature of law is the lack of a concept, a definition of law, accepted by all members of society, or at least by its leaders, is also valid [9, p. 10], perhaps a better understanding of the importance and need for a unified vision on priorities in promoting the fundamental values of society organised according to the rule of law would be an important step towards redressing the situation.

The belief of V. Iordăchescu in the fact that the society can only be saved by a rational law and his regret that, especially in the 19th-20th century, the concept of powerful law prevails, highlights once again the role of the individual as a rational and moral being in the practical implementation of the concept of the rule of law. However, the fundamental principles of the legal order are rules of reason, states V. Iordăchescu, since the reason shows that these things are favourable to the existence of the individual within the society where he belongs. From this last point, we conclude that the greatest achievement of V. Iordăchescu, who tried to restore the value of the concept of natural law, is perhaps rather a return to moral and rational human nature, in a time when they were neglected and in the context of the revival of debates on the essence of the state and law in today's society.

References

1. DUMITRESCU, C. A. *Achieving the rule of law-a fundamental objective, both for the philosophy of law and for social philosophy,* Cogito. Multidisciplinary Research Journal, Bucharest, Pro Universitaria Publishing House, vol. XI/4, 2019.

2. DJUVARA, M. *General theory of law. Rational law, sources of positive law,* ALL BECK, București, 1999.

3. POHOAȚĂ, G. *Immanuel Kant or on "The international peace project"*, Cogito. Multidisciplinary Research Journal, Bucharest, Pro Universitaria Publishing House, vol. II, 2010.

4. DEL VECCHIO, G. *Legal philosophy lessons,* Europa Nova, București, 1994.

5. DELEANU, T. *Constitutional law and political institutions,* Europa Nova, București, 1996.

6. MOTICĂ, R., MIHAI, Gh. *Philosophy of Law,* Editura Almanahul Banatului, Timișoara, 1995.

7. CIOBANU, R. The model of rational legal culture in the interwar period*,* În: Revista de Filosofie, Sociologie și Științe Politice, nr. 3(181), 2019.

8. CIOBANU, R. Interdisciplinary approaches to the value of social normative system in the works of V. Iordăchescu*,* În: Revista de Filosofie, Sociologie și Științe Politice, nr. 2 (162), 2014.

9. IORDĂCHESCU, V. *Strength of right,* Union of Orthodox Clerics of Bessarabia, Chisinau, 1933.

10. IORDĂCHESCU, V. *Moral philosophy*, Institute of Graphic Arts `A. Terec`*,* Iasi, 1939.

11. IORDĂCHESCU, V. *Christianity and communism,* Institute of Graphic Arts `A. Terec`*,* Iasi, 1938.