LE COLLOQUE INTERNATIONAL "LA CRISE DE LA LOI". UNE INTRODUCTION AUX DEBATS
THE INTERNATIONAL CONFERENCE. "THE CRISIS OF CONTEMPORARY LAW". AN INTRODUCTION

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En octobre 2019 a eu lieu la table ronde organisée traditionnellement par l'Association Roumaine de Droit Constitutionnel en collaboration avec Villa Noel – CEREFREA. L'évènement a porté sur le sujet de la crise de la loi dans les démocraties contemporaines, sous tous ses aspects principaux.

Nombreux auteurs affirment qu'on se trouve en pleine « *crise* » de la loi. Principale source de droit dans le système de droit romano-germanique, la loi se confronte avec une série de problèmes qui font qu'elle n'apparaît plus comme l'acte normatif nécessaire pour ordonner la réalité sociale et pour assurer la protection des droits et des libertés du citoyen, mais au contraire, elle est réduite à une simple solution, un élément du programme politique du / des parti(s) au gouvernement. Légiférer ne se fonde plus sur les deux conditions essentielles spécifiques : la connaissance de la réalité et l'application adéquate de la technique législative. Au lieu de réglementer la réalité sociale par l'identification des plus appropriées normes de conduite, afin d'atteindre « l'idéal normatif » dont parlait jadis Mircea Djuvara, le législateur contemporain créé une réalité parallèle et un monde artificiel, qui mettent en danger les fondements du pilier social législatif, et, par conséquence, la sécurité juridique du citoyen.

La doctrine s'est déclarée préoccupée par cette question depuis longtemps. Georges Burdeau avertissait depuis 1939 que la loi commence à perdre son prestige devenant simplement le résultat d'une procédure de gouvernance ; se succédant à grande vitesse, les lois ne fournissent que des solutions provisoires, et la loi perd ainsi ses caractères essentiels de norme générale, abstraite et permanente. Dans le même sens, Pierre Mazeaud affirmait que « *la loi est devenue, en réalité, un rite tel une incantation, surchargé des détails, le plus souvent imprécis, qui divague … et, par conséquent, inefficace.* » Jean-Claude Bécane, Michel Couderc, et Jean-Louis Hérin constatent l'existence d'une crise de la loi, générée par une inflation législative, par la croissance du rôle d'autres sources formelles du droit, par le manque de prédictibilité de la loi, par une non-intelligibilité de la loi moderne. Bertrand Mathieu écrit sur la « pathologie » de la loi, constate son déclin et propose des solutions pour le dépassement de l'impasse.

Si le libéralisme économique a voulu offrir à la loi simplicité et docilité, le marxisme a fait répandre l'idée que la loi est seulement l'expression de la classe dominante, et les transitions démocratiques ont contribué à l'amour civique de la loi par le citoyen force est de constater aujourd'hui une crise profonde de la loi générée, parmi d'autres, par l'incapacité de l'État d'assurer la prévisibilité et l'accessibilité de la loi, par la croissance du rôle du Gouvernement au détriment du Parlement dans l'activité de légiférer, par l'instrumentalisation politique de la loi et son traitement médiatique, par la corsetage de la loi nationale par le droit de l'Union Européenne.

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Le présent numéro de la Revue Roumaine de Droit Comparé contient une sélection des contributions présentées à la table ronde, qui valorisent l'expérience des pays comme la France, la Grèce et la Roumanie. Dans une perspective plus générale, l'article du Professeur Ioannis Tassopoulos propose une analyse de l'impartialité du droit et de la loi, un sujet d'actualité dans le droit constitutionnel comparé contemporain. Ainsi, selon l'auteur, malgré les défis de l'impartialité – comme valeur associée à l'État de droit – et grâce aux garanties qui l'assurent, l'impartialité reste un aspect indispensable du droit constitutionnel contemporain. L'article discute le problème de l'impartialité dans le contexte du droit constitutionnel américain, mais aussi en faisant référence à la jurisprudence

de la Cour Européenne des Droits de l'Homme et aux systèmes de droit constitutionnel européens (Grèce, Allemagne).

Le professeur François-Xavier Fort discute la crise de la loi par le prisme de l'expérience française : « La France est affectée par ce phénomène, au point que les plus hautes autorités de l'État dénoncent cette situation. Le droit des collectivités territoriales constitue un exemple caricatural de cette crise puisque la loi est instable et des plus complexes ». L'impact plus fort de la crise de la loi sur le domaine des collectivités territoriales s'explique par l'importance accrue du cadre législatif : « Le principe de libre administration est conçu comme une garantie défensive, la loi doit garantir cette libre administration ; il est alors nécessaire que la règle législative soit de qualité afin que cette liberté de nature constitutionnelle puisse être exercée."

La motivation et, implicitement, la qualité de la loi font l'objet de l'article du Professeur Elena Simina Tănăsescu, qui affirme que la prise en compte de la motivation d'une loi met en œuvre des exigences éthiques et morales qui sustentent et nourrissent le concept de l'État de droit. La concordance de la jurisprudence de la Cour constitutionnelle roumaine avec la jurisprudence de la Cour de Justice de l'Union Européenne et de la Cour Européenne des Droits de l'Homme est aussi soulignée et expliquée. La qualité de la loi en tant que standard de constitutionnalité adopte par voie prétorienne par la Cour constitutionnelle roumaine est le thème de la contribution de Bianca Selejan-Guțan, qui est centrée sur les éléments de ce standard, tels qu'inspirés par la jurisprudence de la Cour de Strasbourg dans la matière : clarté, accessibilité, prévisibilité. L'exemple roumain est mené plus loin par des exemples plus précis de la situation interne, dans l'article de Ramona-Delia Popescu, qui souligne dès le début le grand décalage entre l'idéal fonctionnel de la loi et la réalité institutionnelle, et se demande si la crise de la loi n'est pas, tout d'abord, une crise de la représentation. Finalement, Bogdan Dima touche le sujet de la délégation législative, une source inépuisable des crises de la loi ou de la légifération en droit roumain. L'article porte surtout sur les deux initiatives de révision constitutionnelle, présentées au Parlement suite au referendum consultatif convoque par le Président de la Roumanie en mai 2019.

Sans épuiser le sujet très sensible de la crise de la loi dans les démocraties contemporaines, le présent numéro constitue un bref compte-rendu des

problèmes qui pourraient déclencher une ou plusieurs crises de la loi. Ce compte-rendu ne fait que préfigurer les situations plus graves qui ont survenu dans ce domaine essentiel de l'État et de la Constitution, à cause de la crise sanitaire de 2020, situations qui soulèvent des nouveaux signes d'interrogation sur la stabilité des systèmes législatifs contemporains.

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Various authors claim that we are in the middle of a « *crisis* » of the law. As the main source of legislation in the Roman-German system, the law has faced a series of difficulties which show that it is not a regulatory and necessary action to set up social reality and to provide the protection of citizen's rights and liberties. On the contrary, it is reduced to a mere solution, to a political program of the party or parties in government. Furthermore, law-making is no longer based on awareness of reality and proper observance of the legislative technique. In order to reach the « *normative ideal* » that Mircea Djuvara once talked about, the contemporary legislator creates a parallel reality and an artificial world, putting at risk the fundamentals of the legislative social pillar, and therefore, the legal certainty of the individual, instead of regulating social reality by identifying the most appropriate rules of conduct.

Legal scholarship dealt with this issue since long. Already in 1939 Georges Burdeau warned about the law beginning to lose its prestige by simply becoming the result of a governance procedure; by succeeding each other at high speed, laws are the expression of provisional solutions and, therefore, they lose their essential characters: general, abstract and permanent norms. Likewise, Pierre Mazeaud argues that « *the law became, in fact, a rite, an incantation, overloaded with details, most of the time vague, which rambles…, and therefore, ineffective* ». Jean-Claude Bécane, Michel Couderc, and Jean-Louis Hérin note the existence of a law crisis, generated by a legislative inflation, by the increase of the role of other formal sources of law, by the absence of law's predictability, and by modern law's lack of comprehensibility. Moreover, Bertrand Mathieu writes about the so-called « *law's pathology* », noting its decline and proposing solutions to break the current deadlock.

Economic liberalism wanted to make the law straightforward and compliant, Marxism spread the idea that it is simply the expression of the

dominant class, democratic transitions contributed to the citizen's civic affection for the law. It is clear today that the law's profound crisis is generated, *inter alia*, by the state's inability to provide predictability and access to law, by the increase of the Government's role at the expense of Parliament, by the political instrumentalization of the law and its media approach, and by constraints imposed by the EU law.

The current issue of the Romanian Journal of Comparative Law comprises a selection of the contributions presented at the conference, which bring forward experiences of countries such as France, Greece or Romania.

The article by Professor Ioannis Tassopoulos proposes an analysis of the impartiality of the law, a topic of great interest in the contemporary comparative constitutional law. The author claims that, despite the challenges against impartiality – a value associated with the rule of law – and due to the existing guarantees, that ensure it, impartiality remains an indispensable aspect of contemporary constitutional law. The article discusses the issue of impartiality in the context of American constitutional law, but also by making reference to the case law of the European Court of Human Rights and to European national constitutional systems.

Professor Francois-Xavier Fort discusses the crisis of the law through the prism of the French experience: "France is affected by this disease, and former president of Constitutional Council talked about it. The complicated and instable law on local government is a real example of this crisis. Despite this observation, the consequences of this crisis are not only a question of law, it is becoming a problem of democracy and an issue of the relationship between citizens and local authorities." The more powerful impact of the crisis of the law on the field of local collectivities can be explained by the higher importance of the legislative framework in this matter: „The principle of free administration is conceived as a defensive guarantee, the law must guarantee this free administration; it is then necessary that the legislative norm be of a good quality, in order to exercise this constitutional freedom".

The focus of the contribution made by Professor Elena Simina Tănăsescu is the motivation and, implicitly, the quality of the law. The motivation of the law is the expression of ethical and moral requirements that are essential for the concept of the rule of law. The consistency of the case law of the Romanian Constitutional Court with the ones of the Court of Justice of the

European Union and European Court of Human rights, respectively, is also highlighted and explained. The quality of the law as a constitutionality standard adopted by the Romanian Constitutional Court is the topic of the contribution of Bianca Selejan-Guțan, focused on the elements of this standard, as inspired by the case law of the European Court of Human Rights: clarity, accessibility, predictability. The Romanian example is taken forward by more precise examples from the domestic law by Ramona-Delia Popescu, who emphasizes from the outset the gap between the functional ideal of the law and the institutional reality and rhetorically asks if the crisis of the law is actually a crisis of representation. Bogdan Dima develops the topic of the legislative delegation, an endless source of crises of the law and legislation in Romanian law. The article focuses especially on the two constitutional amendment initiatives presented to the Parliament after the consultative referendum convened by the President of Romania in May 2019.

Without exhausting the very sensitive topic of the crisis of the law in contemporary democracies, the current issue of the journal is a concise outline of the issues that may trigger one or more crises of the law. This outline is also useful because it heralds the sometimes very serious disfunctions that appeared in the matter of law-making during the sanitary crisis of 2020, disfunctions which raise new questions on the stability of the various contemporary legislative systems.

CONSTITUTIONAL PERSPECTIVES ON THE IMPARTIALITY OF LAW

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Abstract

Impartiality in constitutional law is associated with the Rule of Law; it is fruitfully juxtaposed to extreme partiality. The latter usually takes the form of arbitrary legislation without reasonable justification. The guarantees of the impartiality of law have been political and legal. From the comparative point of view, the national approaches to the impartiality of law vary according to their position on the appropriate combination between the legal and the political guarantees of the impartiality of law. The view of law as the expression of the general will has been very influential, especially in France. However, in Post-War constitutionalism, the focus of the constitutional state to secure the impartiality of law is not on the legislature, but on the courts, through judicial review. New techniques have developed to this end. Two of the most serious problems related with the impartiality of law in the contemporary context concern the neutrality of law and ad hoc balancing. Notwithstanding the variety of perspectives on the impartiality of law, the latter is an indispensable aspect of constitutional law and a core principle of public law.

Keywords: *Ad hoc balancing, arbitrary (will, desire), comparative constitutional law, constitutional state, ECtHR, general will, impartiality, judicial review, legislation, neutrality, reasons, partiality, public law (theory), Rule of Law*

Résumé

L'impartialité dans le droit constitutionnel est associée avec l'État de droit; elle est fructueusement juxtaposée à la partialité extrême. La dernière prend habituellement la forme de la législation arbitraire sans une justification raisonnable. Les garanties de l'impartialité de la loi ont été de nature politique et juridique. Du point de vue comparatif, les approches nationales à l'impartialité de la loi varient selon leur position sur la combinaison adéquate entre les garanties

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juridiques et politiques de l'impartialité de la loi. La vision de la loi comme expression de la volonté générale a été très influente, surtout en France. Toutefois, dans le constitutionnalisme d'après la seconde guerre mondiale, l'accent de l'État constitutionnel pour assurer l'impartialité de la loi ne tombe pas sur le législateur, mais sur les cours, à travers le contrôle de constitutionnalité. Des nouvelles techniques ont été développées à ce propos. Deux problèmes sérieux de l'impartialité de la loi dans le contexte contemporain concernent la neutralité de la loi et la conciliation ad hoc. Cependant, la diversité des perspectives sur l'impartialité de la loi, elle reste un aspect indispensable du droit constitutionnel et un principe fondamental du droit public.

Mots-clés: *Conciliation ad hoc, arbitraire (volonté, désir), droit constitutionnel comparé, État constitutionnel, Convention Européenne des Droits de l'Homme, volonté générale, impartialité, contrôle de constitutionnalité, législation, neutralité, raisons, partialité, droit public (théorie), État de droit*

1. Introduction

Impartiality does not necessarily entail the elimination of the subjective point of view; it may coexist with the personal standpoint, offering a different perspective where the agent, instead of placing her individuality at the center of the world, thinks of herself as one among the many, lost in the multitude. In this alternation of perspectives, impartiality sets a limit to extreme partiality. In the case of law, this moderate conception of impartiality is appropriate and congenial. It is juxtaposed to the more ambitious one, which tries to efface altogether the partial point of view; the latter seems to be implicit in the ideal of a government of laws and not of men Section 2 of this paper discusses the meaning of impartiality in constitutional law, focusing on the modest conception of impartiality.

Impartiality lies at the heart of some central values of the Rule of Law: equality before the law, general rules, impartial courts to try disputes. The impartiality of law has therefore at least an *institutional* aspect regarding the source of law in the legislature, which connects it with democratic legitimacy; a *formal* feature, which considers the abstract and general character of statutory provisions, i.e. rules understood as general norms, which satisfy the requirements of *legalism*,[1] and are contrasted to individual

[1] Judith Shklar, *Legalism – Law, Morals and Political Trials* (Cambridge MA: Harvard UP, 1986), p. 109.

commands;[2] and a *substantive* aspect associated with the promotion of the public interest. There have been various national traditions regarding the impartiality of law. According to the political and legal history of each country, different perspectives have developed on the impartiality of law; but as they were not insulated, they fertilized each other and contributed to a common discourse, e.g. the theory of public law in late 19th century Europe.[3] Section 3 of this paper highlights some important aspects of the national perspectives on the impartiality of law.

Section 4 discusses the transformation of the impartiality of law in post-World War II period, where the Constitution has replaced legislation as the main guarantee of impartiality. In this context, the emphasis is on the judiciary and on judicial review of the constitutionality of law.[4] In the constitutional state, judicial review for the implementation and enhancement of the impartiality of law in a world of partial lawmakers extends over the rationality of legislation, the motives of the legislature, the findings of legislative facts etc.

Currently, the most serious problems in relation to impartiality concern the judge rather than the lawmaker. Two of the most characteristic challenges to the impartiality of law in the constitutional state have to do, first, with the neutrality of law[5] and, secondly, with the breakdown of horizontal impartiality as a result of ad hoc balancing which impedes meaningful comparisons from case to case and undermines the ideal of treating like cases alike (Section 5).

The survey on the changing perspectives on the impartiality of law shows that it is an indispensable aspect of constitutional law and a core principle of public law, notwithstanding the variability of the forms it takes from time to time and from one legal tradition to the other.

2. The Meaning of Impartiality

Analytically, impartiality, as the etymology reveals, should be understood as the negation of partiality; as a limit or constraint to extreme partiality.

[2] Franz Neumann, *The Rule of Law* (Heidelberg: Berg, 1986), p. 32.

[3] Maurizio Fioravanti, *La scienza del diritto pubblico,* vol 1 (Milano: Giuffrè, 2001), pp. vi, xvii.

[4] Alec Stone Sweet, *Governing with Judges* (Oxford: OUP, 2000), p. 31.

[5] Ioannis Tassopoulos, *Neutrality*, January 2017, Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL] https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e396?rskey=zrXLMj&result=131&prd=MPECCOL.

This is the way that Adam Smith analyzes impartiality in *The Theory of Moral Sentiments*.[6] In more recent philosophical thinking Thomas Nagel, among others, also focuses on the importance of both perspectives (partial and impartial).[7] By contrast, the more ambitious version of impartiality, which attempts to eliminate partial considerations altogether,[8] is developed in Kant's view of morality on the basis of the categorical imperative,[9] and in Rawls's metaphor of the veil of ignorance, in the context of his discussion of justice as fairness.[10] The Kantian and Rawlsian accounts have largely shaped our modern conception of the ideal of impartiality in the law.

The key point to understand the relationship between impartiality and law is to distinguish it from partiality. Impartiality defines a conception of the law as a norm founded on (valid)[11] *reasons*, rather than on what C. Sunstein has called "*naked preferences,"* which express the sheer will of "raw political power."[12] To understand impartiality as a limit to extreme partiality, it is

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[6] Adam Smith, *The Theory of Moral Sentiments*, D. D. Raphael and A. L. Macfie (eds) (Indianapolis: Liberty Fund, 1979), pp. 82, 83: "We must, here, as in all other cases, view ourselves not so much according to that light in which we may naturally appear to ourselves, as according to that in which we naturally appear to others."

[7] Thomas Nagel, *Equality and Partiality* (Oxford: OUP, 1991), p. 10. Thomas Nagel, *The View from Nowhere* (Oxford: OUP, 1986), pp. 171-172: "From the objective standpoint, the fundamental thing leading to the recognition of agent-neutral reasons is a sense that no one is more important than anyone else. […] The areas in which we must continue to be concerned about ourselves and others from the outside are those whose value comes as close as possible to being universal. […] [On the other hand] Each person has reasons stemming from the perspective of his own life which, though they can be publicly recognized, do not in general provide reasons for others and do not correspond to reasons that the interests of others provide for him."

[8] Bernard Gert, *Morality – Its Nature and Justification* (Oxford: OUP, 2005), p. 149: "On this view [Rawls's veil of ignorance], moral impartiality is achieved only by the total elimination of individuality. It is a consequence of this view that all persons who are morally impartial must agree, for any features that could lead to disagreement have been eliminated." See for the discussion of the two approaches to impartiality (Smith – Kant, Rawls) in Amartya Sen, *The Idea of Justice* (Cambridge MA: Belknap), p. 124 (Closed and Open Impartiality).

[9] Derek Parfit, *On What Matters*, v. I, (Oxford: OUP, 2011), p. 321.

[10] John Rawls, *Justice as Fairness* (Harvard: Belknap, 2003), pp. 15, 18, 87.

[11] See Cass Sunstein, *The Partial Constitution* (Cambridge MA: Harvard, 1993), p. 24: Reasons that provide "justification by public-regarding explanations that are intelligible to all citizens." In essence this means that legislation must at least promote the public interest, as the latter is discussed in the text from the point of view of impartiality. See Section 4, on the forms of control of impartiality in the constitutional state.

[12] *Ibid.*, p. 25.

useful to think of the lawgiver in Hobbesian terms. The lawgiver is someone who strives for power; but the appetite for power is not satisfied with the enjoyment of moderate power; rather, it is a desire for absolute rule.[13] In this sense, the discussion on impartiality as a limit to partiality is inextricably linked to certain anthropological assumptions, which, far from being neutral, consider the aspiration to absolute power as being natural for man. These assumptions taint the understanding of *political power* in constitutional law as something which is also not neutral: *Il faut que le pouvoir arête le pouvoir*.[14] For this reason, the separation of powers is so embedded in constitutionalism, that Article 16 of the French Declaration of the Rights of Man and Citizen provided that: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."[15] In the Hobbesian understanding of deliberation, "the debate in a deliberation appears between or among desires alone […]. Reason's inertness in once again implicit in Hobbes's remarks on will. […] Will therefore is the last Appetite in Deliberating."[16] Impartiality in constitutional law marks the first crucial step to overcome this understanding of deliberation and political will, not necessarily to reject the realism of the account, but in the direction of restoring the role of reason in "a debate about practical reason and desire about how we should act."[17] If political partiality corresponds to legislative will as the expression of desire, constitutional impartiality stands for the formation of a rational will, where reason checks and constrains desire by differentiating between valid and invalid reasons for action. The sensitive equilibrium between reason and will in constitutional law is the reflection of a similar unstable and uncertain vacillation between impartiality and partiality in constitutional deliberation and argumentation. In this sense, constitutional law is of dual nature; political law and public law, simultaneously.[18] Impartiality is a central, indeed a fundamental, principle of public law. As

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[13] Leo Strauss, *The Political Philosophy of Hobbes* (Chicago: Chicago UP, 1963), p. 10.

[14] Montesquieu, *De l'esprit des lois*, vol. 1 (Paris: Gallimard, 1995), book XI, ch. vi.

[15] Translation from Avalon Project. https://avalon.law.yale.edu/18th_century/rightsof.asp#:~:text=The%20free%20communication%20of%20ideas,shall%20be%20defined%20by%20law.

[16] Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge UP, 1986), p. 19.

[17] *Ibid.*, p. 19.

[18] Ioannis Tassopoulos, *Popular Sovereignty and the Challenge of Impartiality* (Athens: Kritiki, 2014), p. 79 (in Greek).