MODERNITY CRISES AND THEIR IMPACT ON JURIDICAL SCIENCES IN LATE MODERNITY

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1. Modernization and modernity; conceptual specifications
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3. Modernity crises and their impact on Juridical Sciences in late modernity

Arguments:

1.   Ancient people did not discuss political matters as <<objects>> claiming a specific   <<method>> specifically represented among the sciences of nature, but considered it as a regime (*politeia*) granting the society its central significations, ordering its *institutions and rules,* moderating its members' habits and way of life. Part of the social and human ontis, law cannot be subtracted from this assertion.

2.   In ancient people's view, political matters were at the same time:
- A way of organizing the city,
- A way of life for the city

This is where distinctions between formal democracy and substantial democracy take their origin, as well as positive law and objective law, abstract justice and distributive justice, impartial justice and distributive justice etc. The genesis of the difference between *right* and *just*.

3.   If formal democracy is the sine qua non condition (but not enough) of substantial democracy, as democracy in actu (way of life), law is the sine qua non condition for just, as lived and accepted normality; formal democracy and law have the role of means in reaching and achieving desired and expected human condition, substantial democracy and just are the extent in which elaborated institutional and normative framework, built and applied, transforms human condition meaning the way of life for the people in the City.

Or, because *formalized* democratic societies are by nature *plural* (including even plural communities), implicitly and implacably create not only *polyarchies*, but *hierarchies* as well (natural – objective, but, more seriously, oligarchic type).

Understanding the relation between formal democracy (including the right) and substantial democracy (including the just) requires explanations of democratic transformations (historical coordinate), as well as the transfer of the idea of democracy (table p. 32). Note from 33

MODERNIZATION AND MODERNITY
I₁.   Localization of the phenomenon of modernization in time

Many authors have elaborated studies on modernization, modernity, post-modernity (late modernity).

This makes that the same process – modernization – be located in time in different stage, which causes a series of difficulties in the standardized research and also reveals the lack of unique recipes and it cannot happen otherwise, considering geopolitical differentiations, multi-differentiated rhythms, various institutional constructions. Therefore, political science and sociologic studies consider the ***terminus a quo*** of modernization the period of the English and French Revolution (the 18th century). Then, most of historians speak of the debut of the modern age with the discovery of America (the end of the 15th century 1492). There are also point of view claiming even farther periods – beginning of the 14th century (Auguste Compte claims that the "actual origin of the entire modern history" is connected to the beginning of the 14th century, either by virtue of communes occurrence within the social system and political subsystem, either as a consequence of growing potential of working classes in an age marked by violence and insurrections in the European West – especially France and England -, either due to the use of mechanic forces in technological processes) [1].

Such various meanings – plus compulsorily the meaning introduced by anthropology – involve an understanding of modernity and modernization in their complexity. Briefly, modernity is ***the phenomenon – product of the process of modernization***, non-linear process, developed over a period of time, conditioned by multiple factors, which creates major differentiations between states.

An interesting pattern, that could bring many clarifications in the understanding of modernization and modernity at political level is the one proposed by Huntington when speaking of the two "waves" of reflux [2]. Why shall we consider Huntington's pattern? Because it clarifies many of the aspects we are dealing with nowadays, in the age of globalization. Therefore, considering democratization as an essential coordinate of modernity, it is naturally understood that the stability and consolidation of democratic regimes depend on a system of factors like: accelerated rhythm of economic and political reforms, institutional construction, authority and legitimacy of democratic regimes, political participation and trust in democratic values, social status of the individual, developed pluralism, real and functional of multiple parties, political culture, sustainable promulgation, stable political order (internal and international), fight against poverty, increasing the "domino effect" of the democratization process and the power of the democratic pattern example, decreasing and limiting the pressure of reflux by limiting the pressure of totalitarian regimes and their supporters etc.

„Fluxes" and „refluxes" that Huntington speaks about in the democratization – political modernization – modernity relation exemplifies both the challenges to democratic regimes stability, and also the elements of functional stability of these regimes. In a maximum synthesis we may say that the multiple factors system considered above is circumscribed to the two intrinsic coordinates of the democratic regime: ***institutional architecture*** (formal democracy) and ***social status of the individual*** (substantial democracy). Without detailing these aspects here, we have to keep in mind that while for

many states modernization has closed a cycle (that of modernity), for many others modernization is a process developing in the phase with finality in this first cycle.

I₂.   Conceptual specifications: *change*, *development*, *modernization*

A problem still raising the need to clarification is the one connected to the analysis of internal mechanisms of political systems, of their interactions to internal and international environment, with subsystems and every individual separately (individuals and groups). At the same time, the balance providing the functionality of the system is a dynamic one, *dynamicity* that has to have as *constant finality* political order and stability.

For clarifications, normative judgments have to be replaces – to the extent possible – with Weber's axiological neutrality, avoiding appreciations like: "to politically develop and modernize" is the universal panacea to create the opportunities for a "better world". Persisting in normative judgments means eluding *comparative politics* and remaining encapsulated in Europocentrism.

Starting from D. Fisichella's conclusions [3] , *development* is a species of <<change>> genre, the phenomenon of change revealing two sides of a system: or a change of the system, or a change between systems: "Besides the systemic change that refers to the entire system and includes all its elements, the change within the system refers to the transformation of one or several components, of one or more factors inside the system". The distinction – as the author himself admits it – is of analytical utility and does not exclude "some areas of superposition in certain cases", the concept of development being applicable only to the social, political, economical and cultural system. Exemplifying, we can say that the **change inside the system** (componential) is:

- Transformation of the electoral system from proportional vote on the lists to uninominal vote;
- Transformation of the parties system by passing from bipartidism to multipartidism;
- Parliamentarianism transformation from unicameral to bicameral etc.

Then, an *intracomponential* change (factorial) refers just to one or some of the elements; e.g.: transformation of the mass party into a catch-all party. The change referring to transformation regarding interdependences between components and factors is a *intercomponential and interfactorial* change; e.g.: change generated by connections between the system of parties and electoral system, depending on the number of parties and stability of government, after passing from majority vote into one ballot to the system of proportional ballot. In Morlino's opinion, the analysis of change has to consider seven aspects: method, deepness, direction, content, time, origin place and historical location (see picture).

Aspects	Change		
Method	continuous/discontinuous	Peaceful/violent	balanced/unbalanced
Deepness	fundamental/marginal		
Direction	finalized/not finalized	expansion/restriction	
Content	innovating/ not innovating		
Time	accelerated/slow		
Origin place	Internal /external		
Historical location	delimited/not delimited (from historical point of view)		

Analyzing dichotomies characterizing the aspects of change, Domenico Fisichella claims that they configure various continuums, whose extreme poles have to be indicated, "remaining in force the fact that for every size it is possible to establish the transition threshold that, once passed, marks the passing from a part of the continuum to another".

For understanding, I shall use here the classical example of water aggregation, the continuum having extreme poles for liquid state 0^0 C and 100^0 C. Exceeding the temperature of 100^0 C for liquid state generates passing to gaseous state; going below 0^0 C of water in liquid aggregation state generates the passing to solid state.

Fisichella's analysis is interesting and brings some examples that I consider exemplifying. First of all, we have to keep in mind that a *change is continuous* when it is initiated and accomplished by virtue of the same transformation regulations or procedures, provided by a system or by its components, while *discontinuity* is, on the contrary, a break, unpredicted situations by the relevant system and not regulated by it.

Therefore, while *reform* is a continuous change, *revolution* is an example of discontinuous change. On the peaceful/ violent dichotomy axis there are mainly the means used for achieving transformation, in which case revolution is an example of violent transformation. Then, balanced/unbalanced dichotomy is especially relevant in relation to componential change, factorial one and with specific operation. Here, the author feels the need for a modulation: "Actually, it does not always happen that a certain transformation of a component of the system lead to the transformation of all the other components in the same sense. If it lacks a common and homogenous rhythm, change tends towards unbalance, as can happen, for example when inside a system, with the same components, with the influence of the same factors, traditional and modern characteristics coexist"[4].

As far as *fundamental* change is concerned, we mention that it produces in case of change of the system logics, its components or factors. A fundamental change is either the *lasting* result of marginal and gradual transformations, either the result of a process produced in a fast rhythm, change being a consequence of a *tear of continuity* (revolution is at the same time discontinuous, violent and fundamental).

"What differentiates, from conceptual point of view, the reform from the revolution – claims D. Fisichella – is, among others, the fact that the first one takes into consideration the possibility to interfere in the course of events in order to decrease unwanted effects of transforming action, while revolution does not have such an opportunity, generating numerous unpredicted consequences or resulting from imprudence, including the <<opposite danger>> (opposite in relation to the initial purpose)"[5].

The option expressed above is not new, but values a lot of experience in modern history. I say this because ever since 1790, the father of conservationism Edmund Burke launched his famous book "Reflections on the Revolution in France" where he directly expressed his option for *reform* compared to *innovation*, due to safety and lack of dangers ("a successful reform would bring something better, and an unsuccessful reform would make too little harm") [6].

The analysis may continue upon these aspects of change, but we just say that historical – social times accelerating is one of the characteristics of modernity in relation to tradionality, that internal changes can be influenced by the positive contamination (Pasquino), that political decadence is an inadequate answer of the system to the challenges coming from the environment [7].

The concept of *development* is even of higher complexity. This, because it is necessary to identify some modulations that give the meanings to development, correlated both to a high degree of universality and abstraction, and to the conceptions of development, especially to political development conceptions. Beginning with the 60s last century, several conceptions occurred regarding development, among which:

- Conception of political development seen as condition for economic development;
- Conception reducing development to the policy of industrialized societies;
- Conception identifying development with political modernization;
- Conception understanding political development as operation of nation state;
- Conception identifying political development with juridical and administrative development;
- Conception seeing in the political development the increase of participation and construction of democracy;
- Conception understanding development as change foreseen in time (Asiatic and African states that have become independent);
- Conception connecting political development to the level and degree of the power that the political system is able to mobilize (power mobilization is understood as the amount of natural and material resources that the system can use);
- Conception through which political development is presented as an aspect of a multidimensional aspect of social change etc[8].

The diversity of conceptions regarding political development has lead to a variety of definitions for it. Therefore, political development is represented by:

a). the whole of political changes identified at historical level at the launch of industrialization;

b). the whole of new features, immanent to institutions, necessary for maintaining stability and management of social conflict;

c). change in the structures and functions of the power, doubled by changes at the conversion levels of energy within the social system;

d). the capacity to absorb political and organizational, internal and external, changing requirements;

e). the need to create government structures and administrative organizations in order to efficiently solve specific problems of public policies;

f). the need to create stable, but sensible political mechanisms, in order to connect interests and changes of the society to political power;

g). fast social and cultural change, that still preserves the meaning of the community etc[9].

We can notice, from the mere listing of definitions, both some superposition elements, and certain aspects that make generalizations difficult. Hence some contradictory elements, especially in a political reality including (coexisting from geopolitical point of view) various political regimes (democratic, authoritarian, totalitarian). That this is true is proven, for example, by the definition of political development through the coordinate of *democracy construction*. That the error is obvious is proven by the political reality itself:

- There is political development in people that insured democracy long time ago (to make the idea of democracy construction eternal, to make democratization an infinite process);
- There is political development – to a certain extent – in non-democratic regimes as well (the case of China – and not only – proves it).

This is why, we need a definition with a high degree of generality, that can be applied for all types of political systems and regimes. Such a definition was proposed by Samuel Huntington when identifying political development with *political organizations and procedures institutionalization,* understanding by institutionalization *the process by which organizations and procedures get validity and stability.* Before detailing, I mention that, from at least two points of view, Huntington's opinion bears certain considerations.

Therefore, if *stability* supposes – mainly – functionality in a dynamic balance of political system, *validity* of organizations and procedures refers at the same time to a certain type of legitimating/ legitimacy, as well as an efficacy that leads to obeying (assumed obedience), accepting order as being complying to desiderates, governing by providing the authority institutions. "Validity" supposes both ideal – Weber's types of legitimating, providing the admittance of authority, and the efficiency of procedures in maintaining a certain political regime (even in cases when political power is discretionary). There occur of course question marks connected to who validates?, on what grounds does it validate?, who appreciates validity? etc.

Then there are other elements deriving from the comparison of political systems, appearing most of the times an exaggerated europocentrism or americanocentrism. I take into consideration the comparison of lignajer type societies institutions with those of modern states – meaning a comparison between what cannot be compared – which rather puts first the *contrast analysis* that the comparative method. I do not think that Huntington could not see these faults, but that he intentionally omitted them, being concerned, during the Cold War, by highlighting *the stability of government* in some states becoming great powers. Still, Samuel Huntington, when talking of a political order of changing societies, insists on four elements grounding *the level of institutionalization* of any political system: *flexibility*, *complexity*, *autonomy* and *coherence* of organizations and procedures of the system. In this way, the level of institutionalization of any organization or any specific procedure "can be estimated based on its flexibility, complexity, autonomy and coherence". By considering these attributes, Huntington thinks that it is useful and possible to compare political systems based on levels of institutionalization, but also to veridically appreciate progress or regress of the level of institutionalization of certain organizations or procedures *within a given political system*. Consequently, we can talk of a double comparison: a comparison between political

systems and a comparison between phases of institutionalization within the same political system.

Domenico Fisichella explains on the attributes (elements) of the institutionalization level. Therefore, flexibility – as ***adaptability process***, is an ***organizational and procedural*** characteristic, being opposed to rigidness. Hence we can say that – according to Huntington, degrees of flexibility give degrees of institutionalization: the more adjustable (flexible) an organization or a procedure is, the more elevated its institutionalization level is and on the contrary, the more rigid it is, the lowest its institutionalization level is.

The same occurs in the matter of complexity, the institutionalization level being higher for complex institutions, than for simple ones.

Huntington's equations apply regarding the other attributes of institutionalization: autonomy and coherence; the size of autonomy refers to the extent in which political organizations and procedures are independent ***both in relation to other social groups***, and in relation to ***other ways of behavior,*** while coherence refers to unification, solidarity, integration (opposed to disunion, fragmentation, disaggregation).

Political institutionalization supposing the attribute of autonomy "means development of political organizations and procedures that are more than just an expression and projection of social subjects' interests. A political organization, that is the instrument of a social group – family, clan, class – lack autonomy and institutionalization. If the state, according to traditional Marxist statement, is a real <<executive committee of bourgeoisie>>, then its characteristic as an institution does not really worth too much." [10] In the same way, the more advanced the coherence of organizations, the higher the institutionalization level is, and the more disunited the organization is, the less institutionalized it is.

We have to admit that, in estimating the institutionalization degree of organizations and procedures, Huntington's equations have certain validity. Especially from the methodological point of view of introducing some main indicators for selection and establishment of empirical verifications able to estimate this quota (institutionalization).

D. Fisichella expresses certain reserves towards Huntington's approach: "It may not be true, for example, – says Fisichella – that rigid organizations have a low level of institutionalization and, consequently, are instable and poorly supported (accepted), appreciated in terms of validity (value) by the public. Let's examine a case: if a political culture does not have the possibility to know some adequate alternatives, because the political systems keeps it in isolation conditions in relation to other experiences able to present various patterns of organizational and procedural behavior, then even rigid institutions can stay permanently stable and be considered as bearing values".[11]

We keep in mind that these considerations are pertinent, proving the lack of completeness of Huntington's equations, mainly resulting from the unilateral character of relations extracted at the level of every attribute of institutionalization. Or, in Huntington's equations, other coordinates have to be necessarily introduced which change the point of approach from a linear one to a complex one, with multiple factors. In equations, elements correlated to power have to be introduced, like the ones determining order, authority, legitimacy, factors of manipulation or persuasion, leaders' or political elites' prestige, institutionalization of control factors, values correlated to political power and supposing rules, laws, regulations that lead to obedience: "How could a man get somebody else's obedience – asks Maurice Duverger – if the system of social regulations

and values does not recognize its power?"[12] Then, anthropology studies (Van Velsen, Balandier, Clastres, Lapierre ş.a.) reveal the ambiguity and sacred character of power, its negentropic character, institutionalization ability in various degrees, but hard to place in a hierarchy most of the times. Just like it reveals the relativity of the observations regarding the existence or absence of certain institutions. For example, Georges Balandier draws attention on the fact that only in certain cases, negative conclusion on the absence of organized government in some societies, has absolute value. This conclusion expresses only the lack of institutions *comparable* to the ones governing modern state. I take into consideration, at the same time, the fact that the borders of political matters have to be traced only towards various social relations and to culture as well (which was discussed by D. Fisichella as well), the culture seen as a whole or in some of its elements. For example, E. R. Leach and B. Malinowschi speak of the role of *myth* and *ritual* in justifying the claims in matter of rights, status and power. Therefore, Leach, in his study on the Kachin Society in Burma, reveals the global correlation between political matters and culture: the more advanced cultural integration is, the more efficient political integration is, considering myth and ritual as a <<language>> providing arguments, justifying claims. In his turn, B. Malinowski, naming the myth <<a social charter>>, expresses the recognition of its ideological component. The justifying function of the myth is used both by tradition supporters and by managers of the political apparatus[13]. We do not discuss these aspects here in detail, but they reveal a series of question marks regarding unilinear equations established by Huntington.

The effort has to be continued, because above we doubted the completion of the conception presented by Huntington, which identifies development with institutionalization. We discuss here the doubts launched by D. Fisichella regarding this identification, considering that the *critical point* is the confrontation of the part with the whole. In short, institutionalization is a part of development (therefore not the only one), development being accompanied, besides the phenomena of institutionalization by other phenomena and processes. This is why, the definition of political development is not solved, Fisichella proposing its definition by relation to *change*.

The notion of change "allows us to define development as a fundamental change (continuous or discontinuous, peaceful or violent, balanced or not balanced), innovating, extending, unlimited from historical point of view"[14].

Infinity from historical point of view of change clarifies another aspect: *the possibility of political development in more historical periods*. This conclusion allows to approach development through the concept of *modernization*, which is a *species of genus, development which refers strictly to a given period*.

The juridical phenomenon, as social phenomenon, can be studied from several perspectives: sociologic, philosophical, anthropologic, logic, historic, juridical a.s.o. Such approaches are not a mere "fashion" but a fundamental need within many aspects, that the juridical phenomenon, law, in particular, brings to the theoretical juridical conscience.

In good reason, the principle of equality in front of the law is called (in Romanian "Nobody is above the law" – art. 16 of the Constitution), insisting on the exception of non-constitutionality of any law creating privileges for some people, but, to the same extent, proving some regulations that create injustice is allowed. It is just, right for everybody what is legal? A question that causes many other (especially related to legitimating, legitimacy, consensus, consent etc.) and that supposes a complex answer referring to the

results of the theory of juridical positivism, and to the products of utility theory regarding the law and not only.

In 1977, Ronald Dworkin – one of the most significant representatives of principle based liberalism – wrote the paper *Taking Rights Seriously* in which he developed thirteen extremely significant themes: 1). Jurisprudence; 2). Rules pattern I; 3). Rules pattern II; 4). Difficult cases; 5). Constitutional cases; 6). Justice and rights; 7). Taking rights seriously; 8). Civil breach; 9). Reverse discrimination; 10). Freedom and morality; 11). Freedom and liberalism; 12). What rights do we have? 13). Can rights be object for controversies?

Coming back to the question above, we argue to what extent everything that is legal is also right for every individual in a community in which "what is lawful" is included in regulations. Let's take into consideration another subsequent question: If "what is lawful" is the result of a *conventional political attitude*, can it cancel people's insecurity? We can answer briefly: insecurity regarding a conventional political attitude shall also be reflected in an insecurity regarding the law. But this answer has to be modulated, especially in order to catch the reflexes of modernity crises on juridical sciences in late modernity. We shall discuss, for the beginning, one of Dworkin's remarks, the one interested in defending a liberal theory of law to another theory "broadly accepted as a liberal theory", named the *dominant theory of law*, due to the popularity and influent role. I mention here, that under the apparent linguistic matter, there are matters of moral principles (for example, the concept of "guilt" or the phrase "exempted of liability"). Consequently, we introduced a hypothesis launched by Richard Rorty in his book "Contingency, irony and solidarity", which puts language in relation to its *contingency* (original theme in American pragmatism).

Therefore, the word language in Rorty *names the categorical framework or conceptual scheme where our thought and knowledge.* The presumption he discusses, in the succession of a relation tradition going down to Nietzsche and Wittgenstein is that this categorical framework mirrors an a-temporal previously established order.

Rorty shall oppose this way of analysis to the supposition that fundamental conceptual schemes of a language *are not discovered* but *created* and therefore are not *necessary,* but *contingent.* Consequently, there is not an order preceding any knowledge and valorization, whose penetration makes people adopt for ever a certain categorical framework. One language or another or a certain categorical framework are a creation of people (*a contextual invention*). In a human community, distinctly configured from cultural point of view, categories and principles of thought were born as accidental inventions, were created and could be established to the community exclusively due to their functional value and ability to adjust in relation to *the needs occurred and generally accepted goals*. In comparing languages, the essential criterion is *efficacy*: their ability to work adequately to achieve certain *goals* (and not introducing some constraining rational actions) [15].

The contextual character (relativity) of language requires an interpretation of the dominant theory of law, theory structured in two parts, considered independent: a) one part established in an approach on what is the law: "in a ess dramatic language – says Dworkin - , it is a theory on conditions necessary and enough for the truth of a juridical phrase"

This is, in this author's view, a juridical positivism theory, a theory saying that the "truth of juridical phrases consists in facts connected to the rules adopted by specific social institutions, and nothing else". Consequently, the reflexes of modernity, including aspects regarding legitimating, representation, authority are found in late modernity. Just like the

ghost theory of democracy includes a series of hidden presumptions – resulted from the contextuality of language: demos – people; kratos – power, authority) – just the same the theme about law includes, besides the rules adopted, the legitimacy presumption of the institutions adopting rules. As a matter of fact, the diversity of positive law existing in the world today (a real "Babel's tower", as Gh. Mihai notices), confirms the dependence of rules (in their content) to the nature of specific institutions.

The second part is b) a theory on how juridical institutions should act. This is an utility theory, supporting that "its laws and institutions have to serve public welfare and nothing else".

Proving that both parts of the dominant theory on the law derive from Jeremy Bentham's philosophy, Dworkin criticizes each of them, and also the claim that they are independent on one another, accepting an idea, which is also part of the liberal tradition, idea that is not found in juridical positivism and in utilitarism either: the idea of ***individual human rights*** (idea that Bentham qualified as a <<nonsense on stilts>>).

Consequently, Jaques Taminaux's paradox – that of dispute creating tensions developing from the point of view of science and point of view of theory (paradox of withdrawal and appurtenance) – universe develops sine die.

The thinker has to temporarily isolate in a world it belongs to, but in this way, a double risk operated on it: on one hand, the risk of total isolation in absolute contemplation (demanded by Plato), on the other hand, the risk of excessive accomplishment in society, by giving up any critical capacity (imposed by Marx). And the dispute between epistemé and gumption is correctly preserved by Dworkin who claims that a general theory of law has to be on the contrary conceptual and normative. It could not have happened otherwise, because law does not transcend ages and civilizations under the form of archetypes, immutable matrixes, genetically structured into the human Ontis. On the contrary, Blaise Pascal's notice regarding justice ("Funny is this justice bordered by a river or a mountain. Truth beyond the Pyrenees, error beyond"!) is obviously valid for the law, otherwise how could we even discuss the need for ***lege ferenda***? Consequently, the question what is law (basically positive law), has to be doubled by the question: how should positive law be? Therefore, it occurs in the equation apart from the system of values, completed by a system of individual regulations and hopes. These hopes can be convergent to what it is ***appreciated*** as public welfare or can be in contradiction. Then, public welfare is a ***convention,*** depending on the ones circumscribing its sphere (depending on ideals, goals, interests ***appreciated*** as public through the perception of welfare extension at the level of people). Public welfare is the expression of perception of representatives appointed upon the perception of the ones appointing to represent them.

The result of this projection is the objective public opinion. Bu the sphere of human goals in not exclusively melted for the public welfare, as man is both social being and individual. The appointment of that ***ius in omnia*** that Hobbes speaks about is not an entire appointment to Leviathan, because individual will is a part of being, of the individual. A part that gives it the legitimate right to fight against and cancel the Leviathan if it goes against the individual, breaching the contract. This is why, it is important not just to establish the sphere of public welfare, but the sphere of private welfare as well (as a sphere of non-interference) and especially justify who is entitled to establish the content (also different and differentiated) of public welfare. Welfare – as distribution to the people of the city– for many, as many as possible, but only in an utopist act for everybody. This is why

Dworkin introduces the idea of ***individual human rights*** in approaching the general theory of law, normative and conceptual theory.

The normative part has to deal with many subjects concentrated in:
- A theory of legislation ;
- A theory of adjudication;
- A theory of conformation.

These three theories of the normative part refer to juridical regulation from the point of view of:
- lawmaker
- judge
- mere citizen, according to the pattern:

➢ ***Theory of legislation***, that has to include a ***theory of legitimacy*** describing circumstances in which a private person or a group of persons are entitled to make the law and a ***theory of legislative justice describing the law*** that they are entitled to have to make;

➢ ***Theory of adjudication,*** that would involve a theory of controversy fixing ***the standards*** that judges use for solving various cases and a ***theory of jurisdiction,*** which explains why and when judges and not other groups or institutions have to make the decisions required by the theory of controversy;

➢ ***Theory of conformation*** that has to approach the two roles and make the difference between them – and has to include a ***theory of diference,*** which discusses the nature and limitations of citizen's duty to obey the law in its various forms and in various circumstances and a ***theory of compulsion*** which identifies the goals of compulsion and describes how official people should react to various forms of offences and guilt.

The conceptual part of the general theory of law is inspired by the philosophy of language and, consequently, by ***logics and metaphysics:*** "For example, the question on what do juridical phrases mean and whether they are always true or false establishes immediate connections to very difficult and controversial matters in the philosophic logics. A general theory of law has to constantly discuss the disputing positions regarding matters that are not specific to law" [16].

But, interdependences between the various parts of a general theory of law are complex. For example, the matter of constitutionality – as a political matter – is an object of the theory of legitimacy but the fundamental principles of the Constitution (although connected to aspects regarding legitimacy and jurisdiction) are a subject of the concept.

We mention that under the apparent linguistic problem, there are moral principles matters. These can be noticed in Dwurkin where, nor the normative part of the general theory of law, neither its conceptual part lack connections to various fields of philosophy: "The normative theory will be included in one more general political and moral philosophy which, in turn, could be based on philosophical theories on human nature or objectiveness of morality", and its conceptual part will inspire from the philosophy of language. As a matter of fact, the latest theory of this type was elaborated by the Anglo-American trend in Bentham, finding the structure according to the normative and conceptual component: in the normative part, distinct theories of legitimacy, legislative justice, jurisdiction and controversy can be found (reunited under the form of a political and moral philosophy of utilitarism) and a more theory of empirism. This normative part – in all its components – has been developed by various theoreticians of law, but evaluating such aspects of development, Dworkin concludes that "the dominant theory of law in law schools, both in

Great Britain and in America remains a Benthamian theory". The conceptual part of Bentham's theory – *juridical positivism* [17]– has been improved a lot, the most solid contemporary version of positivism being the one proposed by H. L. A. Hart, which was criticized by Dworkin in *Taking Rights Seriously.*

The two components of the dominant theory – juridical positivism and economic utilitarism – are criticized by the positions of various forms of *collectivism* that reject both juridical positivism in the name of the idea according to which legislation can be the result of a general or comparative will (hence the idea that law is elaborated by explicit social practice or through institutional decision supported by juridical positivism or rejected), and utilitarism. The latter is rejected due to its individualist character: ‚"It establishes the standard of justice in legislation, the purpose of general or average welfare, but defines general welfare as a function of individuals' welfare, taken separately and constantly opposes to the idea according to which a community as a distinct entity, has certain interests or distinct rights" [18]. Then, individualism and rationalism of the dominant theory are criticized by the ones called "the excluded" in political debates: ‚"They think that economic utilitarism is narrow through its consequences, because it perpetuates poverty, as a tool of efficiency and lacks the theory on human nature, because it sees individuals as atoms of society concerned with themselves, instead of social beings, whose feeling of community has an essential place in the structure of their ego" [19].

Numerous critics of the dominant theory are supporters of political law (especially Hayek, and other supporters of libertarian liberalism).

The theory of political rights, originating in Edmund Burke's conception considers that valid law in a community is not just the incorporation of a decision taken in relevant institutions, but the incorporation of a morality of that community, <<a traditional morality>> diffuse, that exercises a great influence on these decisions. Consequently, laws adopted in a community should be confronted not just with the procedure of their adoption, but to what is conventionally considered as standards for a general welfare and moral experience of that community.

Ronald Dworkin's status is more various: "None of the critics show that the dominant theory is incomplete, because it rejects the idea that individuals could have rights against the state previous to the rights created by explicit legislation. On the contrary the right and left side opposition is unanimous in convicting the dominant theory for its excessive concern, as they consider, for individuals' faith taken separately" [20].

In the *Philosophy of European Unification,* the chapter Liberalism Today, Andrei Marga synthesizes the special point of view expressed by Dworkin in the interpretation of legislation. Therefore, the author of *Taking Rights Seriously*:

➢ Defends the idea that rights are individual, even if they are not connected to relevant institutions and even if they are correlated to the goal of achieving general welfare and by the moral experience of a community: a reliable solution in legislative matters cannot be achieved unless individuals are taken as carriers of rights, individual rights being *tronfi* in the hand of individuals;

➢ He places individual rights on a more thorough plan that rights registered in laws (that positivism takes as the last reality); he admits that individuals may take equal rights different than the ones created through decision and explicit practice; this means that they can have adjudicative decisions even in the extreme case when a decision or practice

does not pretend it. Principle related arguments count in justice along with legal arguments in positive sense;

> ➢ Principle based arguments are compatible to democratic principles because they do not result from a substantial metaphysics; there are individual rights, but among them there is a fundamental and axiomatic, formal right. This fundamental right is a distinct conception of the equality right, named by Dworkin the right to *equal consideration and respect;*

> ➢ It takes such a conception of rights, that no rights is identified with the rights defined by a person or by a distinct group. In this sense he proceeds to a derivation of the right to freedom (that classic liberalism took it as *natural right),* in a social convention, with the purpose to provide equality.

In essence, a general theory of law is both normative and conceptual if rights are approached seriously. An official interpretation of the law lawmakers in various positions: either in the position of an intra-paradigmatic communication on technical matters – easy mission – either in the circumstance of dealing with matters that are not technical and consequently there is not general agreement in the matter of a procedure. An example is the ethical problem that occurs when a magistrate does not ask himself whether a law is efficient, but whether it is *right.* Other examples may occur in relation to the sphere of guilt, the sphere of responsibility, the sphere of judgment, the sphere of courts material competence, the primate of Constitution, the sphere of citizenship etc. such problems are the object of multiple controversies transferred with the idea of justice from modernity to late modernity, juridical sciences seeking for fundamental explanations.

3. Modernity crises and their impact on juridical sciences in late modernity.

Talking about processes transcending the modernization phase in states reaching the stage of modernity and processes accompanying modernization, it is fair and adequate to analyze these crises in relation to development. This by virtue of an established truth: crisis is the sharp tip of a processual defiance and consequently it can have an extended and inclusive development in time.

Literature distinguishes three main political phases (or political - cultural) – the ones related to legitimacy, secularization and participation – and three mainly social-economic crises – related to *industrialization*, *urbanization* and *distribution* (re-distribution) of the national income. There are also other classifications that we shall not discuss here[21]. The interest of this study is focused on the transfer of these crises in late modernity perpetuated including in the incertitude on juridical theory making thus necessary to relate its normative character with the conceptual one.

I mention that I use the generic term of juridical theory in order to designate the synthesizing conception in the field.

Regarding these crises we have to shape the answer to the question: is it right everything that is legal? And more than that, which is the threshold (established according to some standards) that the state interference in the individual's life (bearing rights) cannot be breached?

In essence, the legitimacy crisis includes an identity crisis as well. A legitimacy crisis refers to all the trust related problems within certain institutions and fundamental rules of the political system (implicitly juridical). We shall distinguish between a *genetic*

or transition crisis, supposing the passing from a historical phase to another (from the legitimacy related to the Old Regime, to democratic legitimacy, of passing from a totalitarian or authoritarian regime to a certain type of democracy) and a *functional* or rejection crisis (a relevant agreement regarding legitimacy shall be broken at a certain time); society appears integrated with its political structures that, due to internal circumstances, are rejected at a given time (recent example: the suspension of the president of Romania, due to the fact that the Parliament refused the constitutional settlement of conflicts between the President and the Government). Developed as a lack of trust in institutions, the legitimacy specific to modern age and late modernity (in the trinomic classification introduced by Weber – traditional legitimacy, charismatic legitimacy and rational legitimacy – types of legitimacy generate types of authority) refers to rational legitimacy (legal). Component of the crisis of legitimacy, the identity crisis refers to the subjective bases of appurtenance to a political community. This is why it supposes individuals' acknowledgement of the appurtenance to the same political community to the fact of feeling parts of its and consider other subjects as parts of it as well (for example, considering a religious group, linguistic group, ethnic group as parts of the political community).

The vector of the legitimacy crisis in the period of challenging the construction of the state and establishing nations (transcending including modernity) is the *penetration* crisis. It refers to the relations between the political system and its environment; in essence, it is the process through which a state with central authority undertakes to interfere in various fields of society. Institutionalized relations objectify interactions between public administration, groups and citizens. The results of interactions are multiple, reaching a cultural standardization.

The participation crisis refers to individuals and groups drawing in the political process and therefore to the expansion of political *citizenship*. It has the effect of decreasing activism (increasing passivity, absenteeism), as well as development – as alternative – of new forms of citizenship („micro-citizenships").

Finally the *distribution* crisis refers to those processes tending to launch economic equivalent measures for population groups and territorial regions, with the help of social services extension and progressive fiscality, while the *secularization* crisis refers to, to a great extent, structurally and culturally, the matter of relations between the state and church or religious confessions.

These crises are at the origin of cleavages in late modernity, with serious repercussions on justice. Therefore, certain aspects like the ones related to *crimes promulgation,* enforcing *rules by judges* (realists claim that judges actually decide depending on their political or moral tastes and then they *chose* an adequate juridical rules as *justification*, *the discretionary power of justice by justification* (argumentation), *substituting the legislative* by executive or juridical, *the paradox of equality in front of the law and release on bail, legitimacy of juridical authority and legitimacy of civil* are only a few examples of the many that can be given. I would argue only through the *matter of justification,* affecting at the same time: the extent of the juridical authority, the size of individual's political and moral obligation to comply with the law *created* by the judge, the conditions that can be questioned by a controversial opinion etc.

To an intermediary conclusion:

Modernity crises understood as crises of development require scientific solutions, that cannot forget the obligation of *prima facia*, or the *natural individual rights*. Meaning, juridical sciences, conceived as general theory, has *to be not only conceptual,* but *normative* as well.

Democratic regimes, like any type of political regime, include immanent tensions, developed especially at the levels of *institutional modernization* trials, due to dissatisfactions to the operation of the existing regime (limitations of the democratic regime) reported to the desired way of organizing the City. These limitations prove the preservation of tensions between formal democracy based on elaboration and compliance with the rules and provisions (including on institutional construction) and substantial democracy, completed by formal provisions results for citizens' welfare. The same happens in the case of *right – just* relation. Let's exemplify:

The *prospective* coordinate of the regulation shapes the optional field of the subject into an acting future, which is a guidance, a direction for choosing the strategy; it is correlated to a *teleological* coordinate (axiological engagement of the subject has to comply with the axiological engagement of the regulations' proponent, therefore to its purposes). Be it known that any regulation is circumscribed to s system of values (values are at the same time immanent and transcendent to the valuing subject and to valued object), the problem of an axiological conflict occurs, which is at the basis of the dichotomy right-just.

Generally speaking, the goal is the supreme purpose (which includes the tendency to perfection), and successive achievement of individuals' purposes (the purpose is the ideal projection upon the finality of an action), to which actions are subordinated, are stages to the personal goal achievement.

The following question occurs: To what extent social normality becomes a significant element for individual goal? A brief answer can be: to the extent in which regulation proponent's axiological engagement does not comply with the individual's axiological engagement and not last, to the extent in which, although theoretically grounded (grounded on *postdictic* and *predictic* grounds, on prospective researches), individual goal cannot be achieved within the existing social normality.

Through their imperativeness, social regulations seek to encourage actions and behaviours in relation to general interests and prevent bad behaviours, being circumscribed to some stimulants for a behavior in compliance with their provisions or provided with penalties for inadequate behaviours.

The behavior of every individual integrated in a community can have any of the following forms:

a. Individual behavior complying with the provisions of the regulation, that would coincide with the personal conscience as well (the case in which personal interests match the interests of the community; it is the fundamental interests and an agreement regarding the essential and fundamental at the level of interests);

b. Individual behavior complying with the provisions of the regulation, but not complying with the individual conscience. Case in which the individual is aware of the conflict of interests arising from the conflict of values (between its own axiological system and the axiological system of the community), but chooses normality for fear of constraints (compromise based on an optional fake → alienation, dissimulation);

c.   Deviant individual behavior, based on a   conflict between axiological commitment of the individual and axiological commitement of the proponent (resulting from discrepancies of interests and their great diversity; at this level, what appears fundamental and essential for the community, seems peripheral for the individual in its axiological system, the hierarchy of values being different);

d.   Deviant behavior from normal provisions, resulting from interests that are not axiologically grounded (in essence, the development of such a behavior comes from an exacerbation of non-legitimate interests, individualist selfish, a basis for limiting others freedom, due to an arbitrary understanding of its own freedom).

From the point of view of this study – considering the matter of legitimacy – we can conclude that only *c* and *d*   hypothesis are of interest for clarifications. We can conclude that non-compliance with the regulation is based on two types of beliefs regarding the finality of the action (inaction), the belief that the individuals "does good" for itself and for the community (*c* case*.*) and the belief that personal welfare is wrong for the community (*d* case*.*). both undertaken. If for c. case deviance results from a conception on welfare, based in values and wanted by the individual in a framework of normality that would provide another degree of freedom for itself and for the community (and decrease the axiological conflict), in *d.* case, the conception on welfare is not based on values, false, and the individual only seeks to achieve its own goals, being convinced that it does it through illegal means and that no normativeness allows it to. Therefore *c.* case involves responsibility while *d.* case involved irresponsible actions (*d.* case also considers acknowledgement).

As far as the evaluation of the ways to perceive the distance between right-just is concerned, we have to say that expectations, desires are structured in:

a´ *verisimilar subjective* opinions (individual) – accepted or denied level of the just;

b´ perceptions of groups, objectified communities – *public opinion* (accepted or contested level of the just);

c´ elaborated forms of conscience (theories, doctrines) regarding the capacity of the *right* to turn human condition in a community (objective evaluation, based in scientific indications, or progress/ stagnation/ regress of the level of the just compared to the right) and from this point of view behavior can be justifying/ contesting.

Taking into consideration aspects like: legitimacy, speed of the act of justice, efficiency and correctness of legislation, objectivity of courts' solutions compared to the state of fact, contradictory cases in identical circumstances etc., the result of the evaluation of trust in the Gorj justice is alarming. Therefore, during the investigation made by "Constantin Brâncuşi University" in the summer of 2008, of the 11 public institutions and authorities included in the investigation, justice is last (see picture).

Therefore, there still remain in the knowledge based society, unsolved problems resulting from modernity crises. But the contemporary picture of epistemological concerns and positions is extremely various. A participation to the understanding of the society of knowledge supposes and systematic analysis regarding:

➢ Many internal transformation, of way and style of thinking in modern and current science, but especially in the analysis of the new social and economic, cultural and political status of sciences within information bases society;

➢ The new methods and means that allow to perform ***theoretical*** researches (logical-mathematic, semantic, meta-theoretical) and empiric (psychogenetic, psycho-sociological, historic, anthropologic, cybernetic, etc.), that used to be inaccessible;

➢ Methods, techniques and instruments giving researchers a higher degree of positivity like: formalized analysis and logical-mathematic reconstruction of scientific theories and intuitive epistemological concepts (theory, model, explanation, prediction, testing, truth, etc.).

➢ Historical and critical and psychogenetic methods (revealing the growth mechanisms of knowledge and historical way of main hypotheses evolution and succession etc.).

Questions remain open for juridical sciences:

↓ Which is the extent where jurisprudence contradicts legitimacy?

↓ When can we talk about the decrease of velocity?

↓ To what extent can it be reached with <<public interferences>> in the sphere of the <<private>>?

↓ To what extent the reform of institutions provides not just efficiency but justness of laws as well?

↓ How can the principle of equality be made compatible in front of law with the interference of the economic in the juridical plan (release on bail)?

↓ To what extent does positive law restrict natural individual rights?

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