CONSTANT ASPECTS OF LAW

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Abstract:
"Are we watching, in the succession of history, the appearance and disappearance of legal systems or assisting, in a greater or lesser extent, to what might be considered, in a sense, an evolution of those systems?"[1]
Law, indissolubly linked to the general evolution of society, has recorded a number of differences in time and space, both in terms of content of various types and positive law systems, and also in terms of forms that take the rules of law, authorities who have the ability to edict it or the procedure to be followed.Indeed, there is no law for all times and all places, as law is not an abstract product of our reason, it comes from the human experience, it is a product of history and that is why institutions of each society can only be different from one society to another.[2] *But, as in reality there are not quantities of history - many, little or very little - but just history*[3]*, we can say that in typology there is not socialist law absolutely different from bourgeois, feudal or slave law, so there is just law.*
By this approach, I wanted to bring back into question the existence of some factors of constancy in law, those "legal permanencies" investigated by Edmond Picard, believing that "there is something in the legal relationship that necessarily subsist anywhere"[4].

Keywords*: constant aspects, diversity, "given", "constructed", continuity*

Introduction:

This subject has been researched in the specialized literature under different aspects: unity and diversity in law typology, "given" and "constructed", continuity and discontinuity in law.

Unity and Diversity in Law Typology

Any state has its legislated laws, in accordance to its own social-political exigencies, to the traditions and values it proclaims. Unlike the principles of natural rights, the legislated norms are variable over time and space.

Man himself renders different value to the abstract concept of equal chances and the abstract freedom of choice. We are born with a common biological setting, nonetheless we each consolidate our own features, aspirations, values. And, although we are alike through the values which are given to us, we are different by the capitalizations we make. There is no perfect, timeless, spatial and universally moral model.

Individual identity is given by the sense of belonging to a certain community and therefore the potential conflicts that might arise cannot be settled through instituting a universal positive law; the law of each state represents the expression of living experience.

Our planet's mankind is not at the present moment in the same historical phase or stage[5]. Correspondences and contamination between cultures are common, however uniformity is out of the question. Behaviors differ depending on race, ethnics and religion. The normative structure of

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[1] Ion Gheorghe Maurer, *Cuvânt înainte*, in „Studii şi cercetări juridice", nr. I/1956.

[2] Radu I. Motica, Gheorghe Mihai, *Teoria generală a dreptului*, (Bucuresti, Ed. All Beck, 2001), p. 35.

[3] Radu I. Motica, Gheorghe C. Mihai*, Fundamentele dreptului. Optima justiţie*, (Bucuresti, Ed. All Beck, 1999), p. 7.

[4] Ibidem.

[5] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, (Bucuresti, Edit. All Beck, 2004), p. 47

communities has always differed from one tribe to another, from one people to another, from one nation to another. Even the Romans, who conquered so many people, understood the existing differences between civilizations and did not impose the established law of Rome to abolish the existing rules governing the conquered people.

The evolution of the human civilization is not a uniform process. Thus, every law areas and types emphasized by historical evolution have specific particularities, which are determined by ensemble set of factors influencing law, rendering it dynamic, of evolutive nature, distinctive. The natural framework, social-political transformations from one phase to another, the interests of social structures, human individuals with their aspirations, the role played by tradition in different historical moments, ideological differences, in other words, the totality of factors that have configured the law have generated changes in the normative contents of the law, qualitative and quantitative modifications in the systematical structure of law, emphasizing on one hand the idea of juridical progress and, on the other hand, the fact that there cannot exist an universally valid legislation.

However, summing up, we can say that just as history cannot be expressed as a quantity a lot of history, very much history, some history, very little history – but there simply is history[6], there is no socialist law in typology that is absolutely different than the bourgeois law, the feudal or the slave law, but there is law; institutions and principles exist that are based on roman law and that have survived over societies that have created them, being applied throughout millennial evolution; notions and concepts exist (such as subjective right, legal deed, legal act, legal will) that surpass national framework and have the same significance in any theory on the system of law; a general theory of law exists (juridical encyclopedia) that "chooses from all law elements what is essential, what constitutes the very articulation of legal thinking and by willingly establishing its logical process, defines what law is". [7]

Therefore, there cannot exist a common legislation for all societies however "there is in the juridical relation something that necessary subsists anywhere"[8] and that "something" is represented by the legal permanencies, the **constant aspects of law**, subject matter to the legal encyclopedia.

Given and Constructed in Law

Montesquieu drew attention over the fact that "the laws that seem opposed are in some cases based on the same spirit".[9] In this context, we will attempt to answer the following question: can the legislator create ("originate") the law by simply establishing norms in the form and upon the procedure required by laws or, on the contrary, besides these "exterior marks", is the legislator conditioned by some merits, contents criteria because of which the efficiency and validity of legal norms depend? [10]

François Gény distinguishes between the "***given***" that arises from the very nature of things, and exists prior to the legal phenomenon, and the "***constructed***", which consists of the legislator's work. As regards the "given" aspects of social life, Gény classified such in four categories:

a) real "given", consisting of all conditions that arise from the nature of things and that impose themselves to any will (both natural conditions and conditions that refer to the anatomic and psychological structure of man, his moral aspirations);

b) historical "given", that accompany mankind evolution, and provide such with a series of precepts arising out oflived experiences (for example those concerning private property);

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[6] Radu I. Motica, Gheorghe C. Mihai*, Fundamentele dreptului. Optima justiţie*, Ed. All Beck, 1999, p. 7

[7] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică*),(Bucuresti, Ed. All, 1995), p. 6

[8] Ibidem

[9] Montesqieu, *Despre spiritul legilor*, III, (Bucuresti, Ed. Ştiintifică, 1970), p.118

[10] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

c) rational "given", meaning the totality of rules dictated by reason, basically referring to the content of natural rights;

d) ideal "given", that concentrates all aspirations, feelings, beliefs of mankind in respect with the progress of positive right, the utmost objective to which law aims.

Paul Roubier also is of the similar idea that the work of legal creation has two phases: acknowledging such "given" elements of social life and based on them constructing the legal rule[11]. By analyzing the basics of legal rules, Roubier shows that in case the legislator creates the legal rule without taking into consideration the "given" aspects of the social order, then the legislator creates a useless piece of work. Consequently, there are three groups of factors that need to be taken into consideration: economical factors (interests), religious and moral factors (traditions) and political and social factors (ideologies).

Emphasizing the importance of the fact that the historical materialism developed by Karl Marx exaggerated the importance of the economical factor, placing such as the basis of all social phenomena, Roubier considered it was absurd to render unilateral explanation to great historical events, whereas such are always based on a complex set of causes.

Essentially, Marx asserted that the legislator did not invent laws, but merely formulates such.[12] In the opinion of Marxist philosophy, the rights (equivalent to positive rights) is the result to the conscious creation of people; nevertheless, Marxism admits the idea of a "given" in law, which it places in the natural and social environment and in the framework of which the work of "constructing" law is developed.

The Marxist philosophy considers that the legislator cannot create laws randomly but, in order for the legal norms to be efficient, a series of factors must be taken into consideration regarding not only the form but also the grounds of juridical regulations, which factors compose the "given" side of law and that concern *social relations, the human factor and objective laws on the development of society and thinking.*

Therefore, the relations established between people at a certain historical moment (economical, political, cultural, family relations) represent a fundamental "given" aspect of the law whereas, on one hand, they represent the subject matter of legal provisions and, on the other hand, by their specific nature, by means of their influence over the human reason, feelings and will, they drive the solutions comprised in such provisions.[13] Nonetheless, the action of law over social relations is always meant as a participation of the legal conscience[14], an idea which will be further developed herein.

Man is a complex factor to be considered by the legislator; man, with his biological and social specific nature, is a product of his era, is a fundamental "given" of law, from two standpoints: as subject of the legal provisions and furthermore as their addressee. His interests, beliefs, ideals are the ones that drive the legislator's activity and the evolution of law.

Moreover, only if the aims set up by the legislator and the solutions created in order to fulfill such are in accordance with the laws of nature and society development, then legal provisions can play a positive social role, guiding society's evolution on a normal path, and not hinder historical development. That is because "efficiency can only be achieved grounded on what exists. The

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[11] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, (Éditions Dalloz 2005), pag. 193

[12] Marx, Engels, *Opere*, vol. I, E.S.P.L.P., (Bucuresti, 1957), p. 166

[13] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

[14] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr 3/1966

purposes only have a precise significance if they are adapted to the means. Problems are not socially meaningful unless they can be solved"[15] and law giving is the product of discerning human actions.

The study of the three main components of the "given" aspect in law shape the Marxist notion over the historical nature of law, over its dependency of time and place conditions as well as the powerful connection established by Marxism between the right of every formation and the development level of the production forces at a given moment.

Continuity and Discontinuity in Law

The idea of a "given" aspect in law does not have to lead to establishing some general and invariable criteria, situated beyond human experience, which criteria would discipline creation in law. On the contrary, the "given" in law being itself variable, explains the existing differences between legal systems, also under the aspect of content and finality of legal regulations belonging to some different types of law.

Admitting nonetheless that, on a psychological level, in the way of thinking of an age traces can be found of the thinking method of the previous age/ages and, furthermore that life does not start over with every instauration of a new production method (idea which has been emphasized from the very beginning of this research), we can mention a series of continuity elements in the "given" aspect of law and, in addition, the transposing of such into "constructed" of law as well.[16]

Thus, referring to social relations in various historical ages, we can easily notice the differences of content between ownership relations in the slave society, for example, and that of feudal, bourgeois and socialist societies; however through an abstractization process, elements of continuity can be noticed on the level of such relations' structure, which elements are reflected in law under two aspects: in the juridical regulation subject matter – the fact that certain categories of social relations (ownership relations, relations between spouses, between seller and buyer) are regulated in all areas of law; in the logical-conceptual mechanism – certain legal categories and concepts (such as the ownership ones, contract, juridical rapport) can be found in all the systems of law, emphasizing the permanent value of the logical structure of law.

Irrespective of the existing differences, all law families (German-Roman, Anglo-Saxon, Muslim, etc) protect the same fundamental institutions: individual's primate, property, family. Although etatic law changes along with states (34 at the beginning of the 20^{h} century, approximately 102 at the middle of the same century, over 200 at the beginning of the 21st century),[17] the notion of legal norm does not render different meanings, but it has "the same significance, same legal function and the same logical form, irrespective time and space, and regardless to the legislator and the normative form that includes it".

Professors Traian Ionaşcu and Eugen A. Barasch, while researching the legal institution of contract in socialist and bourgeois law, reveal that what has changed from one regime to another are the interests to which the law serves; therefore, the end scope of the two types of contracts are different from one age to another, thus "the contract in the socialist law is a whole new different contract"[18]. Nevertheless, in both regimes the concept of contract exists and thus the concepts are maintained, while what changes are the concepts' functions, the substance; the same technical construction, i.e. the contract –, takes, fundamentally different end scopes and contents.

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[15] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr 3/1966

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[17] Gh. Mihai, *Fundamentele dreptului,* vol. I-II, (Bucuresti ‚Edit. All Beck, 2003_, Generalităţi introductive

[18] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

A current positive does not cease connections with the precedent positive law, meaning a series of principles and normative ideas are maintained. The institution of the civil contract, the principle of liability for an illegal action, are not the creations of a certain modern positive law, but have instead a millenary legal oldness[19]. Conclusive to such end is the way how many of the principles, institutions, concepts and categories created by the Roman law have survived to the society which had created them and were taken over and successfully applied in feudal society as well as in the modern one.

To this end, the words of Professor N. Popa are clarifying: "In the case of law, but not only, it is necessary that each time we start with the Greek and Roman antiquity because that is where the source of the entire European development lies. Although nowadays society is no longer similar to the old one, while the institutions which govern us are radically different, somewhere deep, at the level of the founding principles, universally valid ideas can be found, which govern us in the present as well."[20]

The existence of principles is innermost related to human activity; "law cannot function outside general principles."[21] They constitute the underlayer of positive law. The general principles of law represent a stability factor in law; they ensure the legal system's evolution, the continuity of the legal order and are characterized by longevity. If the loss or modification of a simple law rule is only "of episodic nature", then eliminating a principle "risks causing a large damage to the legal order because the fate of numerous legal rules is at stake"[22].

In this respect, Professor Nicolae Popa shows that the general principles of law have a double dialectics[23]. The internal dialectics refers to "the set of internal connections characteristic to the legal system, the interferences of its composing parts", while the external dialectics regards the dependency between principles and the set of social conditions, being reflected in the legal conscience of a nation at a certain moment; its evolution imposes the "rethinking of some principles in accordance to the economical-social mutations that demand for adequacy according to the legal regulations and institutions"[24].

Continuity in law also has that law fundamental "given" aspect, consisting of objective social laws, the action of which sometimes exceeds the frame of a single social-economical formation; for instance, the law of value, whereas "the precise law is unviable outside values, which values are always typically expressed in the wording of a law system's principles." [25]

The more so the human factor, the central area of interest for the legislator, represents a continuity factor in law, on one hand, through their physical, biological, physiological characteristics – which are common to all people – and on the other hand, due to volitions, ideals, interests for which they have fought along history and which are also found in the plan of legal regulations' end scope. Therefore, the history of human rights can be synthetically described as being the struggle for having human dignity respected by the state authorities.

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[19] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III,(Bucuresti, Edit. All Beck, 2004), p. 46

[20] Nicolae Popa, Ion Dogaru, Gh. Dănişor, D.C.Dănişor - *Filosofia dreptului. Marile curente*, (Bucuresti, Ed. All Beck, 2002), p. 3.

[21] Gheorghe Mihai, *Fundamentele dreptului – Teoria izvoarelor dreptului obiectiv, vol. III*,(Bucuresti, Edit. All Beck, 2004), p. 138.

[22] Jean Louis Bergel, *Theorie generale du droit,* 4 edition, (2003, Dalloz)

[23] Nicolae Popa, Mihail Ctin Eremia, Simona Cristea, *Teoria generală a dreptului, Ediția 2*, (Bucuresti, Ed. All Beck, 2005), p. 105

[24] Nicolae Popa, „*Cu privire la conceptul şi rolul principiilor generale de drept"* , RDP nr. 1-2, ian-dec 1996

[25] Gheorghe Mihai, Fundamentele dreptului, vol. I - II, (Bucuresti , Edit. All Beck,2003), p. 167.

In its grand historical-spatial diversity, in spite of the normal differences, the law presents a permanent nature represented by a bunch of constants. Law does not mean the simple recording of facts but also the permanent relation to values and principles and, thus, observing these constant guide marks.

Professor Djuvara considers that "the law can be a science, and the legal knowledge changes also into science when, having as an objective a higher number of documents related to law, they arrange and relate them according to their essential characteristics through legal notions or principles that are universally valid, just like the laws of nature". [26]

The Transition from "Given" to "Constructed": Legal Conscience

Researching the fundament of legal regulations and end scopes pursued by such represents the essential task of legal science. But scientific research, fundamental or applicative, is elaborated in consideration of practice. Research means knowledge, practice means action, it calls for finding solutions to answer the needs revealed by theory.[27] Establishing what it is, the scientific research has to also determine what it could be, what it needs to be. As emphasized by Paul Roubier[28], the essentially normative nature situates law science in the "has to be" domain and subordinates it to the law of end purpose an, unlike sociology, which is an explanation science, dominated by the laws of causality and necessity. Law is not simple "social engineering", but it implies a social order inclined to reaching some end purposes.

Any positive law has its end scopes of which the law makes use differently, "legally dimensioning such, measured in terms of times and people; the Nazi social order, Arabic-Saudi or Japanese one do not portray the same meaning".[29]

The scientific research pursues at detecting that process of transition from "given" aspects to "constructed" aspects, from what it is to what it could be, from indicative to imperative. Social efficacy of law depends on the degree of compliance between "given" and "constructed".

The law creation activity cannot be arbitrary; tracing the correct line between necessity and freedom implies finding optimal solutions for assuring a climate that is favorable to all; the transition from what it is to what it should be is made by means of legal conscience.

Law, before being a normative state, is a state of conscience, a set of representations, ideas, beliefs. Legal conscience thus appears as a premise to law giving and the enforcement of law norms.

Juridical reality does not only imply norms, but also assumes value judgments, legal conscience, relating to facts and interests. Therefore, "a law system can only exist if its creators and addressees are aware of it".[30]

The transition from *sein* to *sollen* implies, first of all, knowing and understanding the phenomena of social life (the cognitive phase of legal conscience), so that those necessities that claim for legal regulation can be selected; legal conscience then proceeds to their examination, in its aim to take from the entire set only the social relations that, in relation to the interests that need to be protected, will wear the legal clothing (action hypostasis); also the axiological phase implies their capitalization, establishing the essential solutions that need to be promoted and the technical-legal means through which such can be inserted in law order.

The legal conscience has a complex structure: legal ideology contains elements of rational nature by which it is understood what it is, and legal psychology, composed of affective elements, refers to what must be accomplished.[31]

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[26] Ioan Ceterchi, Ion Craiovan, Introducere în teoria generală a dreptului,(Bucuresti, Ed. All,1992), p. 5

[27] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

[28] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, (Éditions Dalloz 2005), Préface

[29] Gheorghe Mihai, *Natura dreptului: ştiinţă sau artă?*, în Studii de drept românesc nr. 1-2/2000

[30] Gheorghe Mihai, Fundamentele dreptului, vol. I - II, (Bucuresti , Edit. All Beck, 2003), p. 156

The shift from conscience to norm is a process carried out through that determining factor of legal conscience, legal will, focused on the regulation of social relations, which will the legislator rises to the level of state will, expressed in the form of legal norms.[32]

Legal conscience and, consequently, the law, are changing along with the society in which they have appeared, depending to the ruling process such reflects. The form changes (law, legal conscience) correspond to some content modifications.

However, in spite of the existing differences between legal civilizations, there can easily be noticed the common aspects that compose the essence of law. To research the essence of law implies entering the intimacy of legal phenomenon, noticing its internal qualities, "establishing its substance" (Aristotle). Legal will is that which can be found in every norm and in the set of laws; irrespective the transformations faced by law, such legal will, of mandatory nature, represents a constant element of law.

Nevertheless, from the point of view of essence, the law systems are "identical", in terms of the way how they organize the content they are different from one another.

Conclusions

By distinguishing in any legal relation a factual element and a rational one, Mircea Djuvara shows that, as two individuals having the same figure or two leaves with identical shape cannot exist, the same goes for two factual relations that cannot be identical in their entire complexity[33]. The factual element always varies from on moment to another. "Laws do not remain the same, although their letter stays the same…The way in which Napoleon code is applied today is in many ways different than the one applied 100 years ago; how it is applied in our country is in many ways different that in France".

Therefore, "the idea law is fixed, eternal, immutable, purely rational, however its content varies". In their content, legislations are always different, norms and regulations differ in time and space, but in essence and form, constant elements do subsist.

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