REFLECTIONS ON THE JURIDICAL SYSTEM

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Abstract

It is professor Ion Craiovan`s opinion that law is an inherent condition of social life, fact of culture and civilization, expression of legal thinking, specific normative system, entity in the world of values or contemporary reality[1].

In this study, we aim to highlight the systemic nature of law. Related to the societal system, the juridical phenomenon is a subsystem, interdependent to other subsystems: the moral, economic, political, religious and scientific phenomenon. In his turn, law is only a part of the juridical phenomenon, which evolves depending on the other components: legal conscience and juridical relations.

If defining law by relating it to its essence implies "to find what is permanent, stable and defining for the reality named law", in terms of descovering „an universal underlying of juridical, an universal law concept, arising from the very nature of things by means of a meta-historical vision"[2]*, we believe that the unity of the whole law system, its clarity, coherence, consistency and completeness are due to the general juridical principles.*

In our opinion, the whole law system is held by this assembly of guiding ideas which, having a privileged position in the positive juridical order, direct both the legislator and the law practitioner.

Key words*: juridical system, essence, juridical principle, unity of the law system, completeness of the law system.*

Introduction

The aim of this article is to emphasize the law's systemic character, detect the influences it sustains from some external factors and emphasize the features of the law system by analyzing them from the perspective of general legal theory. Following the research's line we will notice on a spatial axis the existence of not just a single law system but that of variable law systems that occasionally are consistent in certain common aspects. These we shall name the constants of law. The analysis of juridical systems reveals a community of sources, principles and institutions that mask their apparent diversity.

Through its origin, evolution and features, the Romanian positive law is part of the Romano-Germanic law system (meta-system). In specialized literature it has been highlighted that the Romanian positive law "has the same mode of expression, universal for the contemporary Elder law: law inscribed in normative acts and unwritten, customary, stipulated through oral tradition law"[3]. The formal origins of Romanian positive law are the normative act, normative contract and, as we will notice, the controversial jurisprudence.

In the first analysis we can observe that the law principles are not included in the origins' hierarchy through which the law is expressed. They are considered guiding law regulations that give the system's measure and have as subordinates the structure as well as the system of law's development[4]. It is unanimously admitted that the principles are those that insure the unity, cohesion, equilibrium and development of the law's system. However, are the principles formal origins of law?

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[1] Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, Foreword.

[2] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2006, page 22.

[3] Gheorghe Mihai, *Fundamentele dreptului,* vol. I - II, All Beck Publishing House, Bucharest, 2003, page 204.

[4] Nicolae Popa, *Teoria generală a dreptului,* 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, page 90.

Are they exterior to the positive juridical order? Should we place them in the "given" of law? And what is hiding behind the principles of law? We are aware that behind law and jurisprudence exist institutions and people; behind doctrine, savants and law schools; behind common law lays the entire society; behind the Muslim law's revelation is the prophet or church. How about behind law's principles? Are they autonomous origins of law or do they result from the other origins already assigned? Are they premises or extensions of formal origins?

These questions constitute in fact an invitation to continue reflecting on the law's formal origins because, as Hayek said, "it is the great lesson which science has taught us that we must resort to the abstract where we cannot master the concrete".

Content

The idea of a system exists since Greek and Roman antiquity, its wording being, however, tributary to modernity. In general, it is considered that the system designates an ensemble of methods organized in the base of a methodology or a complex of interacting elements, these interactions having an organized character. Society itself is a complex and progressive system that self-organizes the structures, components and functions under the influence of internal and external factors. Multiple connections exist between the components of any system.

The systemic analysis is being used even on the level of law by emphasizing law's specificity, the ensemble's coherency, its logic and finalities as well as the subsystems that compose it and the realities to which is gives expression. The juridical norm, law's basic cell, cannot be conceived isolated; law is a system of conduct rules detached from the juridical conscience through the mean of the state's will. In the law system we notice other two subsystems: the objective and subjective law. The objective law is also a system composed of juridical branches, sub-branches and institutions. Among the objective law it is also distinguished, from a diachronically perspective, between the "out-of-date law" and the actual law. The present objective law is called positive law.

Law's systemic character was detected by Pierre Pescatore in the following way: going from simple to complex the individual regulations are reunited in institutions which are reunited in branches, among which some have been codified; the branches, in their turn, are coordinated in a national juridical system which in its turn is integrated in a universal juridical order whose expressions are the nations' law and the legislations conflicts' law, the private international law[5] especially.

The law's system is defined as the totality of juridical norms existing at a given moment, bounded between each other by common features made to point out their unity and relatively separated by some particularities in rapport to the object and method of juridical regulation[6].

Other definitions emphasize the fact that juridical norms are assembled in an organic way by forming a unit that is not reduced to its component parts, thus conferring an internal coherency to the system that ensures its functionality and applicability; simultaneously, the multiple interdependencies that exist between juridical norms are highlighted[7].

Also, our attention is drawn towards the fact that the law's system does not constitute the arithmetic, mechanical, static and constant sum of the present juridical norms but the unity and ensemble of the norms that are structured, juridical and systemically organized based on certain

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[5] Pierre Pescatore, *Introduction à la science du droit*, Luxemburg, 1960, page 255, *Apud* Alexandrina Şerban, *European integration – consequences on the unity and diversity of law systems,* in Studii de Drept Românesc, year 15 (48), no. 3-4/2003, pages 255-264.

[6] Dumitru Mazilu, *Teoria generală a dreptului,* 2nd edition, All Beck Publishing House, Bucharest, 2000, page 253.

[7] Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului,* All Publishing House, Bucharest, 1992, page 105.

criteria and principles[8]. The law's system cohesion is assured through the interdependency of the elements that compose it.

Depending on the influences supported from some external factors, Alexandrina Şerban distinguishes between the closed systems, which are insensible to the outside pressures, and the open systems, that accept the confrontation with other competitive systems, under the conditions of social life's complexity. The author shows that Kelsen as well as Luhmann imagined juridical systems closed from a normative point of view: for Kelsen the juridical system is purged by any ideological, political, sociological influence, and for Luhmann, the juridical system represents a self-organized and self-determined system that produces its own structures and frontiers through its own mechanisms and without accepting any external determination[9]. In the author's opinion "the juridical system must be in relation to the exterior thus it cannot be completely closed".

As far as ***the features of law's system*** are concerned, these have been analyzed from the branch juridical sciences' position as well as from the perspective of the general legal theory.

Ion Deleanu considers that in the law's system the juridical norms behave as parts in relation to the whole but also as subsystems in relation to their own structure. Law's system is an open and dynamic system that support the influence of social environment and influences, in its turn, the development of social relations; it arises as a complex of interactions with all the other phenomena of the superstructures, conditioned by it through the possibility of resorting to the state's constraining force. On the other hand, interactions are also established between its composing parts and the branches of law as well as between these and the whole. Simultaneously, the author points the law's system characteristic as being an organizing ensemble through the mean of normative activities developed by the state's bodies[10].

Dan Claudiu Dănişor, Ion Dogaru şi Gheorghe Dănişor extract from the systemic character of law two consequences: no juridical norm can be understood while isolated since it is necessary to refer to the juridical order's coherency in its ensemble and, on the other hand, reports of formal classification exist between the juridical norms, hence, with the exception of the Constitution, each norm must be supported on a superior norm[11]. In the opinion of the said authors, the law's system should be defined through *clarity, coherence, consistency and completeness*.

Clarity presumes the system's feature of being logical, axiomatic and formalized. Given that juridical thinking implies and requires valuable judgments, the perspective of a perfectly logical law is purely "enticing". "What matters is not the logical beauty of laws, but the social value of the result. If the law is defective, misfit, anti-economic or even unjust, a perfectly logical reasoning will only serve by amplifying the premises' or the initial rule's defect. Consequently the material criterion prevails in law in relation to the formal one". Therefore, the law's logical character remains to be desired.

The coherency of law's system is translated by the non-contradiction of its internal elements. Seeing as the law is not missing antinomies, it intervenes itself by creating certain "conflict rules that will repair these incoherencies".

The consistency implies the existence of a system based on correct deductions. However, the law is full of inconsistent areas caused by its linguistic nature, but also of the reality's complexity to which it must answer. Some concepts are imprecise, susceptible to multiple and even divergent interpretations. Nevertheless, the law requires a certain dose of inconsistency and flexibility thus often deliberately creating imprecise notions that will lead to flexible precautions.

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[8] Sofia Popescu, *Teoria generală a dreptului,* Lumina Lex Publishing House, Bucharest, 2000, page 210.

[9] Alexandrina Şerban, *Integrarea europeană – consecinţe asupra unităţii şi diversităţii sistemelor de drept* in Studii de Drept Românesc, year 15 (48), no. 3-4/2003, page 255-264.

[10] Ion Deleanu, *Drept constituţional şi instituţii politice,* vol. I, Europa Nova Publishing House, Bucharest, page 25

[11] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului,* C. H. Beck Publishing House, Bucharest, 2006, page 34.

The completeness of a system is translated through the lack of gaps. In our law system the laws oblige the judge to statute even in the absence of some dispositions applicable in the species (speţă) under the sanction of justice denegation. Thus it is considered that the law cannot have gaps, and in the absence of regulations the judge must resolve the cause under the light of general principles of law.

For the reason that a "system of law can be assimilated to a three-dimensional plan, with a temporal, spatial and infinite cote axis"[12], we will distinguish, on a temporal axis, between *the "non-elderly" and elderly law.* Although the savage man had the quality of human, a rational creature, he "did not have the values guide marks, he did not coexist, instead he lived in herds". Consequently, the first form of social organization is considered to be the tribe, in which people led themselves under an ensemble of rules; nevertheless, "the old rules did not have the purely juridical, moral or religious character but a syncretic, moral-juridical-religious one". The state did not invent community, however it related to the past by creating new forms of organization and using everything that seemed useful from the unorganized society.

"Society's history is that of the law's historical systems included in the history of social juridical phenomenon"[13]. In society's history the following forms of elderly law succeeded themselves: the positive law of slavery, the feudal positive law, the bourgeois positive law and the socialist positive law. The right of a society is a historical phenomenon, meaning that on every step of evolution its structural elements gained a certain configuration, certain specific features.

On the spatial axis we have shown at the beginning of this paper that not just one system is submitted, but variable law systems that sometimes are in accordance in certain common points. These we have mentioned to be the constants of law. The analysis of juridical systems reveals a community of principles and institutions that mask their apparent diversity. Through its origin, evolution and features, the Romanian positive law is part of the Roman-Germanic law system (meta-system).

When we analyzed the form of law we evoked the opinion of professor Nicolae Popa, according to which a double possibility of formulating the origin of law exists[14]. The genetic conception aims at discovering the factors that stand at the basis of the juridical norm's emergence and existence, and the gnosiological conception proposes to put into value the indications through which the juridical character of norms of conduct can be recognized.

Regularly, the distinction is made between ***real origins of law***, a "given" of law and ***the formal origins of law***, under the meaning of legal criteria of validity that are respected by the said juridical system.

The picture for law's formal origins includes the juridical habit, judicial practice and the judicial precedent, doctrine, normative contract and normative act (the law). All these form "a systemic virtual unity: it is that which is named the origins' law"[15]. Given the historical-spatial diversity of law, these formal origins are converted on the level of each law system. Furthermore, the form-content dialectics specific to law has determined and continues to generate modifications in the structure of these origins from one historical phase to another in the same law system.

As far as the Romanian positive law is concerned, "it has the same forms of expression which are universal for the contemporary elderly law: the law inscribed in normative acts and the unwritten,

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[12] *Idem,* page 190.

[13] *Idem*, pages 190 and the following.

[14] Nicolae Popa, *Cu privire la conceptul de formă a dreptului,* in Analele Universităţii Bucureşti. Filosofie. Istorie. Drept, year XXV-1976, pages 105-109.

[15] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedia juridică),* All Publishing House, Bucharest, 1995, page 463.

customary and stipulated through oral tradition law"[16]. The formal origins of the Romanian positive law are the normative act, normative contract and as we will notice, the controversial jurisprudence.

In the first analysis we can observe that the law principles are not included in the origins' hierarchy through which law is expressed. They are considered guiding law regulations that give the system's measure and have as subordinates the structure as well as the system of law's development[17]. It is unanimously admitted that the principles are those that insure the unity, cohesion, equilibrium and development of the law's system, but including them in the picture of formal origins of law is avoided. Other times they are defined as super-legislative formal origins.

Law's principles still have an ambigous statute. Are the principles formal origins of law? Are they exterior to the positive juridical order? Should we place them in the "given" of law because they are "a permanent and universal inspiration for law"[18]? What is hiding behind the principles of law? We are aware that behind law and jurisprudence exist institutions and people; behind doctrine, savants and law schools; behind common law lays the entire society; behind the Muslim law's revelation is the prophet or church. How about behind law's principles? Are they autonomous origins of law or do they result from the other origins already assigned? Are they premises or extensions of formal origins?

Upon analyzing the report between origins' law and positive law, Mircea Djuvara has raised a very interesting problem: **can we say that the effective law practiced in a country coincides in a necessary and absolute manner to the law formulated through its origins?** In his opinion the answer can only by negative. A country's positive law can only be the law put into practice, regardless of the legal prescriptions left unapplied. A state's real constitutional law is not "the one solemnly inscribed on paper but the law practiced effectively by the recognized political organs in their efforts to order and lead the interests of that specific society". The author shows that the real positive law, the "live" law, is the jurisprudential law[19].

Moreover, throughout his research Djuvara was led by an important distinction of law in rational and positive law. The rational law is that "live" law which needs to correspond entirely to society's real life; it is not a universally and eternal rational law as the natural law School thought would find, but a rational law variable in time and place. The rational law exists under the form of principles which are logically ahead of the positive law they are founding; they constitute a "substratum of positive law". Thus, the positive law, as an ensemble of norms expressed through formal origins that apply at a certain time in a society, must develop and apply the rational law's principles.

Conclusions

A state's totality of juridical norms is integrated in a system whose unity, clarity, coherency, consistency and completeness are owed to the general principles of law. The entire law system is sustained by an ensemble of directing ideas which constitute reference points for the legislator as well as for the practitioner. However the following question arises: does the law science create these principles or does it only discover and formulate them?

From the ensemble of opinions expressed in specialized literature result the following ideas for configuring the place that the principles occupy in the system of law:

1.Law's principles cannot be dissociated by the evolution of human society.

The existence of law principles is strongly connected to the existence of a society

[16] Gheorge Mihai, *Fundamentele dreptului,* volumes I - II, All Beck Publishing House, Bucharest, 2003, page 204.

[17] Nicolae Popa, *Teoria generală a dreptului,* 3rd edition, C.H. Beck Publishing House, Bucharest, 2008, page 90.

[18] Jean louis Bergel, quoted paper, page 114.

[19] Mircea Djuvara, quoted paper, page 470.

system. With the role of its subsystem, the law permanently interacts with the other components of society: moral, religion, politics, economic. Law cannot restrain the laws of evolution and neither can it ignore the traditions and social reality. Law's principles thus evolve strongly connected with the general principles that govern the human activity.

Law and society cannot be separated: *ubi societas, ibi jus.* If law is society's creation, as Durkheim affirmed, and society is a nature *given,* law's principles should exist since society started to exist as well. Gheorghe Mihail considers that "to assert the contrary implies asserting that society can exist outside the normative order, in anarchy to be more exact"[20]. The archaic society was led by a complex of rules founded on juridical, moral and religious values; these incipient rules were transmitted through tradition and influenced, in a certain manner, the following elderly laws. Even if the state instituted its own organizational forms and more adequate instruments for regulating social relations, the essential values have been kept and constitute a permanence in society's evolution.

In general the evolution of law "does not reside in legislation, jurisprudence or doctrine, but in society itself". Consequently, a part of the social order that is regulated by the official legislation exists, nevertheless a spontaneous social order exists as well, which is regulated by "live norms" and represents the creation of society's juridical conscience[21].

2.The principles compose the substratum of positive law.

Objective law is universal. Nevertheless, within social reality, the objective law is distributed in systems of positive law, relative normative orders, which are conditioned by the vigor of time factor. The principles are not subjected to this sort of conditioning, instead they are situated in the universal space of objective law: the principles precede and establish positive law.

The principles of law's origin, which are universal concepts with an axiological dimension, is *extra legem*; their source of inspiration was searched in natural law, in moral, equity and in the political history of civilization. Despite the statute ambiguity, the principles represent the keystone of the juridical edifice. The principles are directives, logical premises of elaboration of positive law, they are situated upstream the norms built by positive law. Because they impose as mandatory for the juridical norms, a normative character is attributed to the principles in report not only with the social reality but with the positive juridical system as well[22]

3.Law's principles constitute "the spirit" of laws.

Law must carry within equilibrium between the letter and spirit of laws. The entire official legislation, instituted or sanctioned by the state, in other words "the letter of the law", must be went through by the "spirit" of law's principles. The necessity of overcoming the rigidity of the law's text application has been felt even since the time of the Romans since the law was seen as an art of equity.

The principles constitute reference points for the legislator, as well as for the practitioner, in the process of elaborating and applying the norms of positive law. They assume the function of harmonizing the positive law system. The law's support orientates the legislator's will: "the normative act's text acknowledges about that certain will the legislator has, resonant with the law's spirit, itself configured in the value principle of justice and, on a wider scale, in the century's spirit"[23]. It is emphasized that the law's spirit, in its universal meaning, is situated above the legislator's spirit; such an abstract spirit has a metaphysical character[24]. Law is creation, not invention, and the creation belongs to the spirit. Thus, we were saying that the general theory of law only *discovers and formulates the principles* which belong to law's spirit.

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[20] Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv,* vol. III, All Beck Publishing House, Bucharest, 2004, page 138.

[21] *Apud* Dumitru Mazilu, *Teoria generală a dreptului,* All Beck Publishing House, Bucharest, 2000, page 119.

[22] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *quoted paper*, page 156.

[23] Ioan Humă, *Probleme controversate privind tehnica istorică în interpretarea dreptului,* in Revista Română de Filosofie a Dreptului şi Filosofie Socială, issue 2/2005, pages 68-72.

[24] Gheorghe Mihai, *Fundamentele dreptului,* vol. I - II, All Beck Publishing House, Bucharest, 2003, page 489.

4. The principles ensure the normative system's unity

Granted that the principles have a normative character in report to the positive law system, we must identify the place it occupies in the hierarchy of this system. However, can the principles be formed on the hierarchical system? The principles proclaim values; could we consider these values to be more important and others less important? In doctrine, the opinions vary from including the law principles in the category of formal origins of law until they are considered to be super-legislative sources, super-constitutional, forgoing and superior to the positive constitution.

In the field of juridical norms, the hierarchy is established through the norms' report to one another, in order to make possible the analysis of validity, conformity and the possibility to depart from them. Such a hierarchy is possible because of the necessity to establish law in a logical and systematic manner.

As far as the hierarchy of law's principles is concerned, such an operation is difficult and, in my opinion, voided of practical reason. Most of the times, the justice ideal is considered to be the ultimate principle from which all the others derive. But what is a justice outside its equity or, worse, legality? As far as I am concerned, I consider that the general principles of law, universal real cause of the judicial, occupy together the same floor within the juridical top of the pyramid, from which it is transmitted and gains specificity on the positive law's level.

The general theory of law is the synthesis of all principles that dominate law. The entire law science consists in reality of "emitting from the multiplicity of law dispositions in their essence, namely these exact ultimate principles of justice from which all the other dispositions derive. Thus, the entire legislation becomes intensely cleared and is caught in what is called juridical spirit"[25].

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[25] Mircea Djuvara, *op. cit.*, pag. 214.