THE NOTIONS OF „GIVEN" AND „CONSTRUCTED" IN THE FIELD OF THE LAW

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Abstract

Montesquieu drew attention on the fact that "the laws that seem opposed are in some cases based on the same spirit". In this context, we will attempt to answer the following question: can the lawmaker 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 lawmaker conditioned by some merits, contents criteria the efficiency and validity of legal norms depend on?[1]

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 effectiveness of law depends on the degree of compliance between "given" and "constructed".

Keywords: *given, constructed, sources, norms, lawmaker.*

1. Introduction

The system of rules of law is the result of the interpretation of a certain lawmaker of the social relationships and of the appreciation of these interpretations according to own criteria[2]. The rule of law is the internal form of the law and its wording is the external form of the law. The rule of law does not come out of thin air, but it has a social background. This social background is the „given" notion of the law which entails the „constructed" notion of the law.

According to Hegel, there are two kinds of laws: laws of nature and laws of right. The laws of nature are independent and are valid as such; we just need to learn to know them, because they actually exist and are accurate, our ideas being the only ones which may be wrong. Instead, the laws of right are not absolute, they are established and originate from people so that „the thought of right is not something that we can own from the very beginning, but the right thinking is the knowledge and acknowledgment of the thing and this is why our knowledge must be scientific"[3].

The knowledge of the laws of right must originate from the social reality (this condition being necessary even in case of legal transplants[4]), due to the fact the law cannot avoid the complexity of the social system. The actual social life of each community is subordinated to two factors: space and time. In what concerns law and space, Montesquieu urged us not to separate the laws from the circumstances in which they were created, while pointing out that „the laws which seem to be opposed are sometimes based on the same spirit". The law is not an invention, but a *creation*, and the creation belongs to the spirit.

In terms of the situation in time, it is understandable that the legal phenomenon cannot be penetrated in its entirety only through a systemic approach, purely technical, but it has to be viewed from the perspective of the social-historical traditions. Without the values left behind by the history, the law would be an artificial construction. In order to decode the bases of the creation in the field of the law, the review of the historical conditions and of the whole social background where the law emerged and was developed, is needed.

2. Content

The beginnings of the society legal life were connected to the religious phenomenon, the law being perceived as a divine phenomenon. For instance, "law was considered by the Sumerians and Babylonians as being divine. Sumerians even had a goddess of law, Nanse, and at the Babylonians, the law was guaranteed by the deity of Heaven and Earth, Shamash"[5]. It was believed that the human's creative intervention in the material world can only be superficial, because the human being cannot cause essential modifications in the order of the matter by means of the externalized will[6]. The human beings live on the hope that they are „at the

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[1] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, in Studii şi cercetări juridice no. 3/1966.

[2] Gh. Mihai, *Fundamentele dreptului* , vol. I-II, All Beck Publishing House, Bucharest, 2003, pag. 454.

[3] G. W. F. Hegel, *Principiile filosofiei dreptului*, Paideia Publishing House, Bucharest, 1998, pag. 13.

[4] For more details on legal transplants, see Laura-Cristiana Spătaru-Negură, *Exporting Law or the Use of Legal Transplants*, CKS e-Book 2012, pag. 812-819.

[5] Laura-Cristiana Negură, *Legal Sanction in Ancient East*, CKS e-Book 2010, pag. 988.

[6] Sever Voinescu, *Drept şi logos*, in Studii de Drept Românesc, year 11 (44), no. 1-2/1999, pag. 30.

helm of the society" and that the law is the result of their will. The universal vector the society is led by is the will of God, and the social human creative activity is the „pale copy of the great Creation".

The iusnaturalism removed the law from the field of the religion and placed it into the field of the human judgment. The natural law doctrine thoroughly researched the bases of the creation in the field of the law, an issue assessed from a dualistic perspective, namely the perspective of the natural law and of the positive law.

The Modernism placed the human being in the center of all legal concerns, any law system being intended to protect the fundamental human rights. Another feature of the modern society is rationalization, due to the increasing number of legal experts. The creation in the field of the law was also imagined as a duty of a rational lawmaker, a fiction by which the doctrine sought to prove the idea of rationality of the law.

Luc J. Wintgens, professor of the European Academy of Legal Theory of Brussels, believes that, as of the 17th century and until the 19th century, the legal modern thinking was dominated by legalism, which conceived the normative conduct only as a need to comply with the rules, regardless their origin; „the law is designated as being given, just there"[7].

According to Ioan Vida, nowadays we witness the collapse of modernism and the emergence of a new way of perceiving society: *postmodernism*. The modernist model of the legislative decision, based on simplicity and on the exclusive resort to the given of the law, is outdated. The new paradigm is the transition from the simple decision within the legal regulation process, to the complex legal decision, based on the multidimensional legislative approach and on the need to direct the normative process to the European standards[8].

All thinkers were concerned by the issue on the metaphysical development of the law: **is the law a result of the social phenomena, being variable in time and space as the phenomena are or, does the law hide behind it a bunch of absolute and universal principles which human judgment discovers?** Nowadays, this issue still raises concerns, this is why many people acknowledge the tendency to the revival of the natural law.

The law is a social reality constructed under given historical and social circumstances. There is also an *a priori law*, developed by the human judgment, which is mandatory for the lawmaker. This *a priori law* was called by Mircea Djuvara rational law, consisting of certain principles which are logically prior to the positive law which is based on them.

François Gény is the one who introduced the notions of „*given*" and „*constructed*" in the assessment of law creation process. By means of his scientific approaches, Gény wanted to end the „fetishism of written law" and faith in its sufficiency, estimating that it is incomplete and that „no matter how sharp the human being mind is, it is not able to cover the whole image of the world living in"[9]. Therefore, the lawmaker is bound to investigate the given in order to fulfill the constructed.

By assessing the relation between the science and the technique of the law, Gény distinguished between the „given" which arises from the nature of things, having emerged before the legal phenomenon and the „constructed" represented by the work of the lawmaker. If the given of the law entails a certain continuity and is mandatory for our judgment, the constructed is represented by those artificial and variable elements, the effectiveness of which is ensured by human will.

The given of the law is that reality outside the positive law, which grants it the substantiality necessary in order to exist. The given must „express the rule of law as it emerges from the nature of things and as far as possible, in the raw state".

According to Gény, the given consists of four constitutive elements:

real given, represented by the total conditions emerging from the nature of things and which are mandatory for any will (both natural conditions, and the conditions concerning the anatomical and psychological constructions of human beings, their moral aspirations);

historic given, accompanying the evolution of mankind, by providing a series of precepts born of experiences (for example, those on private property);

rational given, the total rules that the judgment orders, being mainly about the content of the natural law;

ideal given, which concentrates all aspirations, feelings, beliefs of mankind in what concerns the progress of positive law, the ultimate goal of the law.

Only the overall interpretation of these four elements can lead us to understand the essence of the law. According to François Gény, the development of the law entails a thorough observation of social facts and the knowledge of the legal experiences lived by different peoples in different eras. The law cannot be explained outside its historical reality because it is not created by sudden leaps, but step by step. The genesis of the law is an integral part of the historical process, of the historical development of the society itself. But the law is not a pure

[7] Luc J. Wintgens, *Legisprudenţa – studiu pentru o nouă teorie a legislaţiei*, in Studii de Drept Românesc, year 18 (52), no. 3-4/2006, pag. 240.

[8] For more details on the complexe decision system, see Ioan Vida, *Orientări post-moderniste în procesul de creare a dreptului*, in Studii de Drept Românesc, year 12 (45), no. 1-2/2000, pag. 27-39.

[9] *Apud* Philippe Malaurie, *Antologia gândirii,* pag. 316.

explanatory discipline but has essentially a regulatory nature. The law is not limited to the description of the legal reality, by indicative sentences; it cannot emerge only from the facts, from what it is; *the law speaks to imperative*, it is based on value judgments and its appreciations start from an ideal.

The development phase of the law is followed by the legislative technique. The construction of law must be the essential part of law creation process. If the knowledge of the law is dominated by the rational element, the technical development is a work created artificially. „This form remains essentially a construction, largely artificial, of the law, rather an action work than an understanding one, where the will of the law expert can move freely".

According to Gény, the given of the law belongs to the science, and the constructed belongs to the legal technique. This opinion is contradicted by Paul Roubier, who shows that the legal technique is a set of processes which relate to the external form of the rule of law; but, the construction of the rule impacts its internal content, which is a matter of legal and not of technical policy[10].

According to Paul Roubier, the knowledge of the law content entails the understanding of the creation of rules of law. The establishment of a rule of law must always start from the knowledge of social life needs, according to which the rule is enacted, and then, according to them, the organization of legal relationships is proceeded with. If the first approach is scientific, the second belongs to the art of law. The society is under a continuous development and the law is permanently renewed. It is not enough for the human beings to know how things are, but they will always seek to discover how things should be. The human being relates all the time to an ideal and this ideal cannot be reached by means of scientific methods but only by means of value judgments. This is why the law is an art, directed towards the reaching of an ideal: *the ideal of justice*.

„The laws of physics which do not allow exceptions, which enable predictions and retrodictions and can be expressed in mathematical language, do not belong to the field of the law", due to the fact that the history of the society is „a permanent assessment of the communities in what concerns the possibilities to organize efficiently their coexistence and cooperation structures, where the law is imminent"[11].

Paul Roubier lays at the basis of the law structure two givens: the experience and the ideal of justice, which turn the social order into a superior moral order. Justice „is undoubtedly a constant given of our spirit, but it is likely to embed different forms, depending on the society". The ideal of justice is not the same for all peoples and is not the same in different historic moments.

The ideal of justice is the actual (material) source of the positive law. In the absence of such an ideal, positive law would be a simple construction of power. Even if this ideal is impossible to be achieved, the law needs to aim it, due to the fact that each and every legal institution is judged in the light of this ideal.

Roubier criticizes the excessive formalism emerging from the pure theory of the law expressed by Hans Kelsen, which builds the rule of law strictly on its external appearance, by removing from its content any moral or political element. We will not be able to understand the law if we stick to the study of the rules of positive law. In his opinion, Kelsen's theory is primarily contradicted by the case law. How can an interpretation, which is in accordance with the opinion of the lawmaker, be useful, if it is in total disagreement with the legal practice? The rule of law is outdated if it cannot be adapted to the needs of social life. Kelsen's theory disregarded the fact that the legal phenomenon is constantly subject to improvement. By denying the dynamic nature of the law, the pure theory restrained the givens of the law, by annihilating its possibility to meet legal reality[12].

Therefore, the legal creation work covers two stages: the acknowledgement of those givens of the social life and the construction of the rule of law based on them[13]. According to Roubier, three groups of factors have to be taken into account: religious and moral factors (*traditions*), political and social factors (*ideologies*) and economic factors (*interests*). By assessing the foundation of the rule of law, the author shows that, if the lawmaker creates the rule of law without taking into account all the givens of the social order, the lawmaker performs an useless work.

The distinction between what is given and what is constructed was assessed by distinguished professors Traian Ionaşcu and Eugen A. Barasch, in a study dedicated to the fundamental and applied research, as they combine on the land of the law[14]. They pointed out that although the distinction between the scientific and technical field is not approached in the Marxist legal literature, such an approach can be noted. If the substance of the law is

[10] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Edit. Dalloz, 2005, pag. 192 and the following.

[11] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 258

[12] Paul Roubier, *op. cit.*, pag. 70.

[13] Paul Roubier, *op. cit.*, pag. 193.

[14] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, in Studii şi cercetări juridice no. 3/1966.

rooted in the material existence conditions of a given collectivity, then the role of the technical field is to include this substance in the rule of law. The scientific field will indicate the scopes and the technical field would propose the most appropriate procedures in order for the substantive requirements of social life to become rules of law. „Effective things cannot be achieved unless we start from what is given. The scopes do not have significance, unless they are adapted to the means. From the social point of view, problems do not have meaning, unless they are likely to be solved".

According to another opinion[15], the given of the law is represented by „the directive, the standard of justice, the rational necessity which creates the objective validity of a legal system". This given is informal, is a fluid, non-crystallized state, therefore the lawmaker is bound to use certain techniques in order to create a formal reality. The transition from the given of the law to the constructed law is performed by means of the legal technique, by being itself impregnated with value considerations.

Contrary to Savigny's theory according to which the law does not need to be created, but it is self-created, as a natural phenomenon, the work of law development is the result of conscious human actions. However, the German historical school had the great merit of showing that the law is the result of social, historical and moral factors and that lawmakers cannot create it arbitrarily by means of their simple will. The lawmaker must take into account certain requirements of social life, because behind all formal law sources, real sources, called by G. Ripert „the creative forces of law", are laid. Essentially, the natural environment, social environment and human factor represent the bases of positive law, by jointly contributing to the development of the legal phenomenon.

The natural environment impacts the law by means of all its components: geographic framework (topography, climate, water, air), biological, physiological, demographic factors. The location of human being in stable communities and coexistence depended on landforms and the nature of soil necessary for agriculture, the climate influenced food production, mood and body development; nowadays, demographic factor exerts a great influence on the legal regulations, by calling for legislative measures on population growth limitation or on the contrary, on birth rates stimulation.

The structure of the social environment consists of several components: economics, politics, culture, moral, traditions. Due to the fact that each of us is the product of the social environment living in, the understanding of the legal phenomenon requires the knowledge of the influences of this law configuration factor. Sofia Popescu describes the influence of culture and traditions on the legal phenomenon, by writing that the law is not a simple regulatory texture, it cannot be reduced to a set of legal force endowment modalities, but it is a complex cultural entity incorporating human culture and which organizes a great number of traditions[16].

According to Mircea Djuvara, from the sociological point of view, nowadays, all peoples are the result of different races mixtures. Even though, physically speaking, we cannot establish continuity by means of heredity, psychologically and mentally speaking, it can be noted that current nations have the same mental features, as two thousand years ago. But the influence of the social environment is so great that, despite the strong persistence of mentalities, if races mixed, as inevitably happens, they lose their specific mentality in order to adapt to the mentality of the people they get lost in.

In what concerns the influence that the human factor has on the legal phenomenon, the precedence of human being or of the society was always questioned. Under the assumption that the individual is not self-sufficient, Aristotle showed that the society preceded the individual; after having been established, the society created the individual. The opinion of Gény is at the opposite end, in his opinion the individual being the basis of the society.

The human being is the central area of interest of the lawmaker. The law is constantly related to the presence of the individual within the society, due to the fact the scope of the individual is social coexistence. However, unlike the moral, the law considers human action in a system of given relations. The law does not concern thoughts, inner life or individual's intentions. It was claimed that the law lacks of faith in human perfectibility, as it does not concern the actual human beings, with their aspirations, but concerns only the individuals involved in a system of relation, the abstract, standardized individuals, who are bound to fulfill their obligations. There were cases when human settlement in communions was missed by the laws, the individual being abandoned in „the narrow circle of its own singularity"[17].

The law has to be based on the existential understanding of the individual as a human being, who is often sacrificed in favor of certain figures: person in law, person in state. Moreover, in Romanian, *persoană* (person) meant the mask behind which the actor was hiding on the stage when interpreting a role. By means of analogy, the Romanian took over the concept and used it in the

[15] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, pag. 196.
[16] Sofia Popescu, *Cultura juridică, concept-cheie în cercetarea căilor integrării europene în domeniul dreptului*, in Studii de Drept Românesc, year 14 (47), no. 3-4/2002, pag. 266.
[17] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, All Beck Publishing House, Bucharest, 2004, pag. 197.

field of the law, by suggesting the roles the individual assumes when creating legal relations.

Nowadays, the European citizen, namely the person, not the human being, is at the center of the community concerns. The Constitutional Treaty[18] provides that „Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship". In our opinion the institution of the Ombudsman is an extremely important institution of the European scene considering the role played by it in protecting the rights and interests of the European citizens[19]. „Variables of places and time which cannot be easily estimated are interceded between the abstract human being of his fundamental rights and the worldly human being"[20].

3. Conclusions

Therefore, the law has real and formal sources. *The real sources of the law*, consisting of all the components of the given do not have a regulatory nature, but only determine will to adopt a certain regulation; these sources stay outside the legal system, by having an influence on law construction work. But, up to the extent certain ideals are taken over from the given of the law and expressly provided by the rules of law, as in case of the democratic traditions of the Romanian people and the ideals of the Revolution of 1989, established by the Constitution of Romania, revised in 2003, the real sources turn into mandatory rules of law and become *formal sources* of law. The constitutional architecture puts on a place of honor the principle of the separation and balance of powers[21].

The research of the basis of legal regulations and of the aims pursued by them is the essential task of legal science. But scientific research, either fundamental or applied, is developed in consideration of practice. The research is knowledge, the practice is action, entails finding solutions to meet the relevant theory needs[22].

By establishing what it is, the scientific research is liable to establish what it could be and it must be. The essentially regulatory nature places the science of the law in the field of the „must be" and subordinates it to the scope of the law, unlike sociology, which is an explanatory science, dominated by the causality and necessity law. The law is not a simple „social engineering", but it takes into account a social order directed towards the fulfillment of scopes.

Every positive law has its scopes, which the law enhances differently „by legally classifying them, in relation to time and people; the Nazi, Saudi Arabian or Japanese social order do not have the same meaning"[23]. The scientific research aims to describe the process of transition form the „given" to the „constructed", from what it is to what it must be, form the indicative to the imperative. The social effectiveness of the law depends on the correlation level between the given and the constructed.

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