SOME CONSIDERATIONS UPON THE GENERAL THEORY OF THE LAW'S REALIZATION

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Abstract: *In this paper work are exposed some considerations upon the general theory of the law's realization, starting from the definition of the concept of law's realization and from its forms.*
Also, it is especially important to underline the fact that, in regard to their respective appearances, the similarities between state and law are obvious and it was stated that the law is an intrinsic dimension of human existence.

Key words: *The law, juridical norms, general theory*

In order to approach the present topics, we should start from the definition of the concept of law's realization and from its forms[1].

A first imperative precision concerns the link between law and society. Briefly, this connection may be expressed through the following lines:

a) the society is one of the structures of the international relationships;

b)the law constitutes the bone' skeleton of this structure (of society);

c) the law is the instrument through which is made the attempt to create a certain type of society. This fact leads to some consequences:

- the law is a normative value, because it enunciates what ought to be, not what exists;

- the law is not a purpose by itself, it is an instrumental reality, vowed to the realization of a purpose;

- with the modification of the aimed social purpose comes the modification of the law;

d) the law is an instrument of inter-subjective coordination able to ensure the co-existence of inter-related liberties[2];

e) the individual person has to respect the other's liberty[3];

f) the law has to obtain wilful recognition from its subjects[4];

g) through its influence upon the education of individuals, the law exerts a disciplining function;

h) the law presents itself as a rational standard for the individuals' behaviour towards the others;

i) the positive norm makes use of a middle standard, due to the various cultural levels of individuals; the standard's value should increase with the individuals' cultural level;

j) the state intervenes, especially through the functions of prevention, stimulation and repression, within the law's realisation.

We think it is especially important to underline the fact that, in regard to their respective appearances, the similarities between state and law are obvious. As in the law's case the appearance

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[1] For developments, see: Nicolae Popa, *Teoria generală a dreptului*, Editura All Beck, 2002, p. 159 and allowing; Idem, op. cit., 2002, p. 220-236; I. Dogaru, D.C. Dănișor, Gh. Dănișor, *Teoria generală a dreptului*, Editura Științifică, București, 1999, p. 345-378; Gh. Dănișor, *Teoria generală a dreptului*, Editura Themis, Craiova, ., p. 189-233; I. Dogaru, *Drept civil român*, Editura Europa, Craiova, 1999, p. 213-225; Collective (coord. I. Dogaru), *Ideea curgerii timpului și consecințele ei juridice*, Editura All Beck, București, 2002, p. 36-75.

[2] Respectively, to obtain the highest possible level of freedom in a certain context, in the relationship with the others, that is to say within a certain type of society.

[3] As he wishes for himself that his own freedom should be respected.

[4] In other words, they have to educate themselves, because the law's finality, consisting in attending the highest level of freedom within relationships, may be reached especially through the individual's education.

of the state is determined by the changements that occurred within the primitive commune' system, which rendered obsolete the ancient forms of settlement and organization. A new form imposed itself, the one of state and politics[5]. Here is a new connection between law and society.

As a conclusion it was stated[6] that the law is an intrinsic dimension of human existence. More, it was said that, into the system of human relationships - that is as complex as the law - in a continuous process of extension, a special signification is carried by the regulation, through juridical norms, of the most important social relationships[7]. Therefore the quoted authors do consider that: "The law is determined by the purposes imposed to the action"[8].

The law, the juridical norms, are created in order to be respected and applied, thereby to be realized. The realization of law is a hard and difficult task, but it is as important as the process of the law's creation (elaboration).

It is a process through which the general and "abstract norms are shaped within a certain type of society through the conformity of its subjects' behaviour to their prescriptions and through a framework of state's actions vowed to ensure their application in view of the common good (welfare)"[9].

The realization of law is also defined as the process of "implementing the stipulations of juridical norms into social life, through their respect and execution by the members of society and by their application through the competent state organs"[10].

Nicolae Popa defines the realization of law as "the process of transposing into life the contents of juridical norms in the frame of which the people, seen as subjects of law, do respect and execute normative dispositions, while the state's organs do apply the law, on the ground of their competence"[11].

Ultimately "a law is stated due to the wish of bearing an influence, in a certain sense, upon the human behaviour. Its appearance is legitimated by the necessity to juridical rule certain behaviour in social relations, either because such relations have known, for the first time ever, a certain evolution asking for a juridical regulation, or due to the fact that the dynamics of these relations has led to transformations which impose a new regulation"[12].

Being made in order to be applied, the law ought to be applied correctly, because if badly applied, a good law does not fulfil its purpose[13], a fact which means that the realization of law, as a deed, turns off from the principle of equity and by its nature, does not support the order provided by the law[14].

From this definition, to which we agree, some defining ideas rise:

- as a general and abstract rule, the juridical norm has to cross from universality to particularity, from abstraction to concreteness, through its respect by the law subjects or by its application through means of state's authority;

- the positive law is an instrument, able to achieve a concrete, particular purpose;

- the realization of law is a complex achievement, which supposes the passage from prescribed behaviour to real behaviour;

- the realization of law has an unbreakable connection with the individuals' education and supposes the increase of the ratio of understanding the norm and conforming to it;

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[5] Nicolae Popa, *Teoria generală a dreptului*, Ediţia a 3-a, Editura C. H. Beck, Bucureşti, 2008, p. 74.

[6] Nicolae Popa, Mihai Constantin Eremia, Simona Cristea, op. cit., p. 202; "A complex product of society, law presents itself as an indefeasible dimension of the human existence, within determined social and historical circumstances".

[7] Idem, op. cit., loc. cit: "The significance of the regulation through juridical norms of the most important social relationships is strongly underlined by the unprecedented amplitude of intra-social contacts, through the processes of production, allotment and exchange of activities among people".

[8] Ibidem, op. cit., loc. cit.

[9] Ion Dogaru, D. C. Dănişor, Gh. Dănişor, op. cit., 1999, p. 347

[10] D. Mazilu, *Teoria generală a dreptului*, Ediţia II, Edituta All Beck, Bucureşti, 2002, p. 264.

[11] N. Popa, op. cit., p. 222; N. Popa, M. C. Eremia, S. Cristea, *Teoria generală a dreptului*. ed. II, Editura All Beck, Bucureşti, 2005, p. 204

[12] For details see I. Dogaru, S. Cercel, *Drept civil. Partea generală*, Editura C. H. Beck, Bucureşti, p. 32-40

[13] Idem, op. cit., loc. cit.

[14] See I. Dogaru, *Drept civil român*, 2000, p. 53.

- the realization of positive law involves as well the individual action according to the normative prescription and the state's action creating a hierarchy of social values and increasing, for the individuals, their level of understanding and education.

The forms of realization of the law are another highly important matter for the approach of this theme.

The law's realization supposes "the transformation of the lawful order - as a theoretical concept - in real social relations"[15], this achievement taking two forms:

a) the realization of law through the activity of executing and respecting the laws and;

b) the realization of law through the juridical norms' application by the state's organs.

We share the opinion that the realization of law through its natural respect (the natural execution of the law's stipulations as the first form of this achievement) pertains to generality through this very important process.

In recent Romanian juridical literature[16] the application of law was defined as the process of elaboration and realization by the state of a system of actions aiming to transpose into practice the dispositions and sanctions stated by the law's norms; in foreign juridical literature, according to P. Pescatore[17] the concept of law's application contains all the actions, performed by the state, necessary for ensuring the practical protection of subjective rights.

In the sense of the second definition, this concept points to the second form of law's realization, the one involving the action of a state's organ.

The definitions we mentioned, seen together, give rise to the following ideas[18]:

a) the effective application of law, of the norms which constitute the juridical order, is a fundamental problem for any organized society;

b) the juridical order supposes that the state should elaborate the juridical norms and effectively take them into action;

c) The application of the law implies, from its organs, two categories of actions: repressive and simulative ones;

d) the application of juridical norms by the organs of the state represents the second form of law's realization which involves the intervention of a state's organ, within the limits of its stipulated competence, in order to determine subjects to comply with the normative disposition, the first one being the respect and execution of juridical norms with no intervention from the state's authority;

e) the deed of law's application implies the passage from the general view (the juridical norm) to the concrete act of the organ /the particularity);

f) the application of law through the involvement of the state's authority takes place according to the principle of power' separation within the state.

As a conclusion to what we have noticed let us state that two causes lead to the realization of law through the respect and execution of normative prescriptions:

a) the degree insofar positive law is the expression and effective action of the collective "self". This "self" is seized by the individual person as being her own nature;

b) the fear not to suffer some applied constraint. The given definitions demonstrate two forms taken by the application of law:

a) the respect and execution of juridical norms' stipulations with no intervention from the state's organs;

b) the application of juridical norms due to the action of the state's authority.

About the phases of the law's application, some previous precisions are imperative:

a) the application acts of the law are issued either from the administration or from the courts of justice;

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[15] D. C. Dănişor, *Drept constituţional şi instituţii politice*, vol. I, Editura Ştiinţifică, Bucureşti, 1997

[16] N. Popa, op. cit., 1992, p. 164; Idem, op. cit., 2008, p. 185-189.

[17] Op. cit., 296

[18] See I. Dogaru, S. Cercel, op. cit., 2007, *Partea generală*, p. 32 and following; I. Dogaru, *Drept civil român*, p. 53 and following; I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, B*azele dreptului civil. Tratat*, vol. I, *Teoria generală*, Editura C. H., Beck, Bucureşti, 2008, p. 153-157 and 256-262.

b) in both cases the application of law is carried out through the same phases;

c) as a principle, administrative acts are submitted to juridical control[19].

In the process of applying the law matters of fact do appear[20], as well as matters of law[21]:

- the matters of fact are the reality of facts and the evidence standing for them, as they are called;

- the spotting of the applicable juridical norm and its sense's elucidation do constitute the matters of law, as they are called.

From many points of view, it is important to distinguish between the matters of fact and the ones of law;

a) the judge could no more revise the matters of fact, but he may do that upon the matters of law;

b) it is a matter of law to qualify the facts[22];

c) finally, the question of evidence concerns as well mainly the facts, but sometimes the law's norm, too especially in the cases of customary law, of autonomous norms and of the rules of foreign law.

The correspondence between the juridical norm and the facts is worthy for the application of the norm to the respective facts; the major premise is the juridical rule, while the minor one is the matter of fact; the solution of the case is the conclusion.

Through the juridical fiction given by the principle *nemo censetur ignorare legem*, a fiction which is so necessary for the system's functioning, the theoretical equality of people in respect to the law is accomplished[23].

It is just that, under an almost unlimited dynamics of the normative system, it seems, rather impossible to be aware of the whole of it. This is why the knowledge of laws exceeds the limits of a presumption in that matter even, for specialists. The *nemo censetur ignorare legem* model to be followed is, therefore, valid not only for the citizen, but for the legislation too, which finds itself obliged to ensure the knowledge of the law[24].

The juridical act issued as an unilateral manifestation of will from the state organ is the conclusion of the syllogistic reasoning concerning the facts' reality and their qualification.

The consequence of the emission of an act applying the law does not necessarily mean the exertion of a physical constraint. The state will be justified to apply by force the respective act, that is to say through the institutionalised way, only if there would be no voluntary conforming to it.

The last phase of applying the juridical norms is the execution of the application act. In this regard, we have to distinguish the following situations:

- in most of cases, the application act is wilfully executed by the respective subjects. Only if the voluntary obedience should lack, the state would proceed to forcefully apply the act, calling for the support of the lawfully institutionalised violence.

The main features of the law's application do concern:

a) the establishing of the applicable rule;

b) the lacunae of the law;

c) the law's obscurity;

d) the determining of the application area for the law's rules and

e) the jurisprudential creation of law is taken as a premise.

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[19] It results that the judge is the one who, ultimately, controls the process of the law's application

[20] *Quaestio facti*

[21] *Quaestio iuris*

[22] See I. Dogaru, D. C. Dănişor. Gh. Dănişor, op. cit., p. 353.

[23] "If this principle could, until now, produce effects without too much hurting, the common sense insofar expresses «the belief into the knowledge of a law that is accessible for all» today would tend more and more towards the description of a «science-fiction» status" (Jean Pierre Henry, *Vers la fin de L'etat de droit?* in Revue de droit public, 1978, p. 1211-1212)

[24] For developments, see I. Dogaru, S. Cercel, op. cit, 2007, *Partea generală*, p. 32 and fallowing; I. Dogaru, op. cit., 2000, p. 53 and fallowing; I. Dogaru, N. Popa, D.C. Dănişor, S. Cercel, *Bazele dreptului civil. Tratat,* vol. I, *Teoria generală*, Editura C. H. Beck, Bucureşti, 2008, p. 153-157, 256-262.

It would be too presumptuous and it would bear no scientific stamina to dare stating that laws have no lacunae, so they would be containing all.

A lacuna means: "the omission, by the law, to solve a problem that should necessarily be solved"[25].

This definition gives rise to some ideas, either straight or implicitly:

a) an overall regulation for all the inter-subjective relationships that should be ruled in the name of law is rendered impossible by the variety of needs in society and by the multiple concerns of people;

b) there are a lot of details which escape from the sight or the deed of juridical regulation. Once formally issued, the laws are enforced for the future, wherefrom we may notice that no matter how piercing our prevision might be, it still would not be overall containing;

c) the evolution of society, of things going by human experience and, generally, by all that means social diachronic provide evidence for the fact that often, the regulation gaps (the lacunae) are pointed out after the respective law's enforcement;

d) in the field of juridical regulation, the omission has to be understood in its largest sense:

- the total lack of regulation for a problem and
- its precarious regulation;

e) not every lack of the law represents a lacuna[26];

f) it would be too much and even abusive to state that there are no lacunae (in the word's proper sense) because they would all be remediated through interpretation[27] the use made of logical procedures, to which these authors refer, in respect to the legislator's will, is constructive, as the lacuna is the expression of this will itself.

The lacuna's causes[28]. According to the cited author and to the discourse he refers to, the causes of the lacuna's appearance in the legislative system are:

a) the legislator's disregard about regulating a problem, with no distinction made about the causes of such disregard;

b) the law's contradictions, encountered when the law's stipulations are reciprocally annulling themselves, leaving by this some space unrolled;

c) the legislator's will to leave certain questions to the latitude of the applying organ;

d) a problem might not yet exist, about certain relationships, at the very moment of the law's issue, but it might yet appear afterwards.

The Romanian Civil Code contains two texts regarding the resolution of the problem of law's lacunae:

- the stipulations of art. 3 which precise that the judge cannot refuse to judge, under the pretext that the law is either silent or obscure; to do otherwise would be a denial of justice;
- the stipulations of art. 4 which forbid to the judge to pronounce general stipulations or regulations.

The study of these two texts points out that:

a) the respective norms do raise the problem of the lacunae's inner features;

b) these texts do limit the judge's creative possibilities;

c) the reunited study of the two texts leads us to the conclusion that only lacunae could be completed by the interpreter, the other imperfections being exempted from the benefit of this kind of treatment;

d) spotting and completing the lacunae, the solution given by the judge does not yet have the value of a juridical norm. It bears only the value of the judged matter, which is relative;

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[25] I. Dogaru, D.C. Dănişor, Gh. Dănişor, op. cit., 1999, p. 357.

[26] So, for instance the law's imperfection does not stand as its lacuna, because, while the imperfection is of a moral, social or economical nature, the lacuna is the result of the lack of logical coherence shown by the positive juridical system (see, to this purpose P. Pescatore, op. cit., p. 300 and following).

[27] So has argued Huc, *Commentaire du Code civil*, 1892-1903, t. I, p. 165. See also Valette, *Cours de droit civil*, Paris, 1872, t. I, p. 35 quoted by I. Dogaru, D. C. Dănişor, Gh. Dănişor, op. cit., p. 357

[28] See, to this purpose Lacré, *Legislation civile commercial et criminelle ou commentaire et complément des codes français*, t. I, p. 156 and 160, concerning the preliminary discourse at the French Civil Code

e) the judge's solution about the lacuna's spotting and completion is compulsory only for the sides (inter *parts*).

Through the texts noted above, the Romanian Civil Code does institute the following two principles:

a) only the laws may present lacunae, but not the juridical system itself;

b) the juridical decisions that could be opposed *erga omnes* are forbidden, this means that:

- this second principle flows from the one of power' separation within the state;
- this principle forbids to the judge to create the law.

There are two kinds of lacunae for a law:

a) the lacunae in the proper sense, the one concerning an absolutely new situation, one that the legislator could not foresee at the regulation's very moment;

b) the lacunae resulted from an inadequate conception of the law's text.

In order to fill in the lacunae of the law, the judge is able to make use of the following two methods:

a) to prolongate (by reasoning) the existing juridical system through the procedures of systematically interpretation, analogy and induction;

b) to point out the existing differences between the unregulated situations and the already ruled ones, through the *a contrario* argument.

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