IS THE GENERAL THEORY OF LAW A SCIENCE OF ESSENTIALIZING?

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Abstract: *This paper work tries to answer the question if Is the General Theory of Law a science of essentialzing? The General Theory of Law studies concepts, categories, principles and basic notions regarding law. The curricula of the profiled faculties constantly places the discipline General Theory of Law in the I-st year of study, for the last 60 years, starting from the premise that, indeed, a glance upon the whole perspective of the juridical science' system and of the branch disciplines that students have to go through is needed, even if there were voices saying that its place would be more adequate in the last year of study when such disciplines are already studied and assimilated.*

Key words: *General theory of law, law concepts, law theories, principles.*

The curricula of the profiled faculties constantly places the discipline General Theory of Law in the I-st year of study, for the last 60 years, starting from the premise that, indeed, a glance upon the whole perspective of the juridical science' system and of the branch disciplines that students have to go through is needed, even if there were voices saying that its place would be more adequate in the last year of study when such disciplines are already studied and assimilated.

The General Theory of Law copes with a specific object: it follows "its logical organization within the explicative process it coordinates, it systemizes knowledge, tightly cooperating with the specific language of branch sciences"[1].

The General Theory of Law studies concepts, categories, principles and basic notions regarding law. It is the "laboratory where are created: "the essential instruments through which the law, as an aggregate, is elaborated"[2] and it studies its elementary formal structure, the system's joints; its method consists in generalization, grounded upon the study of the juridical phenomenon, being the effective expression of the branches' synthesis[3].

The General Theory of Law has elaborated essential instruments to think the law with, into specialized literature[4]. Among them are concepts like: "the law (its essence, contents and form), the juridical norm, the source of law, the juridical relationship, the juridical technique, etc." categories and notions expressing realities and contained as such by it.

We might say that the finality of the General Theory of Law is to analyse the law's structural elements and to expose the principles of its basis in their essence. The fact that it is also named "Introduction to law" is to be explained by the general informative purpose that this discipline fulfils for the law as an ensemble. The General Theory of Law deals with its, wholeness, with its determining, its joints and inner features, its components and structure, providing for it the expression of fundamental concepts. It is built on the ground of the whole Law, not upon some whatever side of it. Thus, the General Theory of Law is not a branch of it, but a juridical matter "of large generality and principality"[5].

Its specific asset consist in the fact that it elaborates fundamental concepts, studying the genre of law (as a whole), not the species (whatever branch of it), expressing the determining core of the whole, not some side of it, thereby functioning as a science of essentializing[6], even if some

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[1] Nicolae Popa, Mihail-Constantin Eremia, Simona Cristea, *Teoria generală a dreptului*, Ediţia 2, Editura All Beck, Bucureşti, 2005, p.7

[2] Nicolae Popa, *Teoria generală a dreptului*, Editura All Beck, Bucureşti, 2002, p. 8

[3] See, to this purpose: Ion Dogaru, Dan Claudiu Dănişor and Gheorghe Dănişor, *Teoria generală a dreptului*, Editura Ştiinţifică, Bucureşti, 1999, p. 6.

[4] See: N. Popa, op, cit., p. 8; see R. Niţoiu, Al. Şorop, *Teoria generală a dreptului*, university manual, Ed. a 3-a Editura C.H. Beck, 2008, Bucureşti, p. 2.

[5] Ion Dogaru, *Elemente de teoria generală a dreptului*. Ed. Oltenia, Craiova, 1994, p. 32

[6] Ibidem, p. 32-33

law sciences, like Civil law, do "provide" more elements able to preserve the substance of the General Theory of Law than other sciences[7].

The purpose of this matter is to analyse , discover and underline what exactly is the law as an aggregate, what determines it, how it is connected to other sciences, how it is structured and of what, how the joints hold between its parts. It defines law as an external structure of behaviour rules, functioning as a reductive or constraining order, relying on the ground of human ego-centrism, issued from his insufficient self[8]. It is a systemic aggregate, and this features its internal elements, through coherence, as well as a formal hierarchy within which whatever norm (except for the constitutional ones)[9] is supported by another above it.

The coherence of the law's norms and the logics of their functioning as a system is mostly assured by the coherence obtained through the analysis performed by the General Theory of Law[10]. It also has components represented by the general theories of the main branches of the law[11].

As a juridical matter, the general theory of law, studying its essence, contents and form, does not limit itself just to underline a branch's degree of generality; it has to reach for the aggregate it self's perspective.

The General Theory of Law does not re strain the application of the concepts it has elaborated to one or another among the law branches, but draws out what is common for and defines the entire ensemble, essentializing the meaning of these concepts for each of the branches. This asset also results from the fact that such a discipline is cardinal for all the juridical sciences, the same way as the Philosophy of Law is the science explaining the law[12]. If the General Theory of Law stands as a referential discipline for the science of law, this happens firstly because it is qualified to be the science in search for the law's essences, and secondly because such a science is necessary, imperatively imposed, as well by theoretical and practical requirements.

Then, the General Theory of Law embraces the purposes to enrich and amplify the knowledge of law, both in science and in practice. So, the General Theory of Law, as a referential discipline for the science of law, through the area of its investigations, generalizing through essentialization the most important asset of every branch, contributes to harmonize the mechanisms of branch disciplines and to achieve, for the law system, the purpose of inner unity[13].

The specialized literature in regard to these elements[14] issued the following definition: "The General Theory of Law presents itself to be the juridical discipline which studies the ensemble of law, more exactly its determining, its joints and essences, its structure and inner components, a matter inside of which are elaborated the instruments through which law - as an ensemble - is thought of, instruments like the concepts of «law» (seen through its essence, contents and form) «juridical norm», «source of law», «juridical relationship», «juridical technique» etc."[15].

This denomination General Theory of Law - is rather recent[16]. In-between the two World Wars, the matter was named: "juridical encyclopaedia", "law's encyclopaedia".

The first ever attempt to analyse law encyclopaedically is made by Wilhelm Durantis, in his work "*Specullum juris*" in the second half of the XIII-th century[17].

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[7] Ibidem, *Elemente de teorie generală a dreptului*, Ed. Oltenia, Craiova, 1994, p. 19-23
[8] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, op. cit . p. 44
[9] Ibidem, pag 45-48, part where the features of the juridical system are analiyed.
[10] For details, see: Ion Dogaru, Sevastian Cercel, Op. cit, 2007, p. 6-7.
[11] See, to this purpose: Ion Dogaru, Sevastian Cercel, Op.cit,2007, p. 28
[12] For details, see: N.Popa, M.C. Eremia, S. Criste, op. cit., p 8-9
[13] See, to this purpose, Ion Dogaru, Sevastian Cercel, *Drept civil*. Partea generală, university course, Editura C.H.Beck,Bucureşti,2007,pag 12-15. In the same line,Ion Dogaru, Nicolae Popa,Dan Claudiu Dănişor
[14] Ion Dogaru, *op. cit.*, 1994, p. 32
[15] See also: M. I. Manolescu, *Ştiinţa dreptului şi actele juridice*, Editura Continent, XXI, Bucureşti, 1993, p.27, concerning the general concept of juridical science: "Under the general concept of juridical science, we will have first the theory of law, which ought not to be mistaken for the philosophy of law or for the encyclopaedia of law. The theory of law is the discipline which vows itself to discriminate what we will call the science of law from what we will call the practice of law and from the general components of the juridical science".
[16] See: Ion Dogaru, Dan Claudiu Dănişor, Gheorghe Dănişor, *op. cit.*, p. 5.
[17] See Nicolae Popa, *Teoria generală a dreptului*, T.U.B., 1982, p. 10.

Adolf Markel[18], Edmond Picard, John Austin, Victor Cousin, E. R. Bierling and a lot of other authors kad the purpose of "substituting the Philosophy of Law and the Natural Law, which had orientated the juridical thought, until that time, on a purely speculative path"[19].

In the second half of the XIX-th century, the discipline receives the name of "law's encyclopaedia" and its finality consisted in realizing a study that could point out the most general considerations upon the law.

According to Edmond Picard, the encyclopaedically study of law is defined by six directions to go towards[20]: a) the Universal Encyclopaedia of Law; b) the vulgar encyclopaedia (the profanes' initiation to law); c) the preliminary encyclopaedia (considered to be a kind of introduction to the law); d) the complementary encyclopaedia (the study of particular law, completed with general notions); e) the national encyclopaedia; and f) the formal encyclopaedia (the highest and purest law, concerned about the study of juridical permanent values).

In our country, thinkers like Mircea Djuvara and Eugeniu Speranţia do greatly contribute to the consolidation of this matter's statute.

The juridical normative system is a living organism, which goes along with the human individual life, seen as an universe of its own, since birth and even earlier till death, and even afterwards, in respect to its consequences as a juridical event[21] , but which also chaperons the entities that it has created[22]. Human beings are concerned by such entities and their consequences either in their quality of physical individuals[23] or insofar they have constituted moral persons[24].

This perpetual movement of the juridical normative system aims to smooth down the way for the development of individual social life this movement constitutes the rule (the law's diachronic) while the exception is constituted by its relative stability (the law's synchrony). This relationship has been well outlined by the work of Nicolae Titulescu[25].

During the periods marked by revolutions or by (deep and abrupt) reforms, juridical regulations "get refreshed", enhancing the process of transition towards a new physiognomy. This involves a series of absolutely necessary measures able to ensure, for the law, the relationship between "diachronic and synchrony", so would be preserved, in such times as well, the principle of unbroken unity for our national law system. In our country, the recent specialized literature[26] has analysed this aspect in regard to Civil Law regulations.

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[18] Into the work: *Juristische Enzyklopëdie*

[19] Nicolae Popa, *op. cit.*, 1982, p. 10; See also Gheorghe Dănişor, *Teoria generală a dreptului*, Editura Themis, Craiova, 2001, p. 5-6.

[20] Into the work *Le droit pur*

[21] "The entire human life, since birth or concerning this moment until death but also into what concerns this latter event, in respect to the successional legacy, is ruled, in its essential aspects, by the norms of the civil law" (Ion Dogaru, *Contractul, consideraţii teoretice şi practice*, Editura Scrisul românesc, Craiova, 1983, p.5).

[22] "Some juridical institutions, pertaining to this branch of law, deeply participate in the regulation of the moral person's life, since its founding or relatively to this process till its ceasing through reorganizing or dissolution, and even about the consequences issued from these taken actions". (Idem, *op.cit., loc.cit.*)

[23] About the individual (physical) person seen as a law' subject for rights and obligations, see: Ion Dogaru, Sevastian Cercel, *Drept civil*,Persoanele, Editura C.H. Beck, Bucureşti, 2007, pag 43-263

[24] About the moral persons, see: Ion Dogaru, Sevastian Cercel, *Drept civil*, 2007, pag 267

[25] "Few people do know that Titulescu's lectures, the courses he held in class, were constructed under the vivid light of the law's philosophy and of the general theory of law. As evidence supporting this statement stands the genial application he has found to do, in the generality of law and, especially, into civil law, of the philosophical categories of "synchrony" and "diachrony". According to his vision, as well for the generality of law as for, especially, the civil law, diachrony is the rule, because the normative juridical system is permanenty submitted to improvement, including through the changes it goes through. Thus, the law's mobility (diachrony) is the rule, and its synchrony constitutes exception, but the relative stability appears mostly in the domains of its rules, principles, constants. It is only this way, in Titulescu's conception, that the law could step along arm in arm with the evolution of society, supporting it "(Ion Dogaru, *Pretext şi profundă datorie morală,* în Academica, Revistă de ştiinţă cultură şi artă, editată de Academia Română, nr. 36, martie 2005, p.47).

[26] "The juridical regulations pertaining to Civil Law come from various sources: many of the norms from 1864's Romanian Civil Code are still into force; from 1947 to 1989 a series of normative acts were emitted, them too being, most of them, still into force, the post-December legislator ruled, through the Constitution but also through a lot of other law's proving a special interest for the social realities in-becoming towards a new physiognomy. Such a desideratum

So, the idea was present that[27] it ought to be remarked how extensively and abundantly are applied today some texts from the Civil Code that were shyly and scarcely used of from 1947 to 1989. This because new regulations are "tied up" with the ancient ones. Some of them might, possibly, be maintained, while others might be abrogated.

About the law's mobility, Titulescu concentrated his own vision into an aesthetical formulation: "Peace through order, law into a perpetual becoming and into a perpetual connection with the inconstant stroll of life, the human soul into its continuous striving to achieve itself through the concrete forms of an incessantly rising through and generosity, here are the conditions required for escaping from chaos and for the organized life towards which all people are hankering".

The Romanian Neo-kantian philosopher. M. Djuvara expressed his vision too: "The force should become a tool of the law and not the law to become a tool of force"[28] (means agitat *molem*). At the end of his six tomes, the author comes to the conclusion that the concept of law is a rational one, and an independent one, while the juridical discipline is a science[29], having "one of the most beautiful and high destinations"[30], as the role of the jurist is to substitute "through a complex and delicate operation, this empirical knowledge by a scientifically one ... establishing a rational order, which is the skeleton itself of the social order"[31].. This because the law "is the representative of a sacred ideal, it is the carrier of the highest aspiration that a society might nourish, the one towards justice and morality"[32].

The author's conclusion is that the juridical phenomenon only appears as a reaction against natural events and that the juridical appreciation is opposing to force and could not be mistaken for "it"[33].

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concerning the social relationships, which request an adequate juridical regulation, imposes new coordinates to the legislative activity, but also to the law's theory and practice on behalf of the relationship «diachrony - synchrony into the law», relationship in virtue of which the mobility of law ought to prevail, since it constitutes the rule, in regard to the exception (its relative stability)". (Ion Dogaru, *Drept civil român. Tratat*, vol. I Editura Omnia Uni S. A. S. T., Braşov, 1998, p.7).

[27] Idem, op. cit. 1998, pag 78: "Into this context, there are some aspects pertaining to the principle of preserving the unity of the national law system. Therefore, the legislator, the practice and theory of law ought to be careful about:

a) the degree into which some texts of the Civil Code of Romania from 1864 which, from 1947 to 1989 were shyly and scarcely applied, have become in our days the juridical ground for the resolution of an explosive jurisprudence;

b) the degree into which the new civil legislation "ties up" with the one previous to 1989;

c) the degree into which, due to the general evolution of the legislative phenomenon and especially to the one from the domain of civil law, some normative acts, emitted from 1947 to 1989 and still intoforce now, are or not eligible to be maintained or either are to be renounced at, and substituted by newly issued juridical norms;

d) the degree into which, in its contents and its form the, juridical physiognomy of highly important juridical institutions is rebuilt, such as the juridical institution of the ownership right as the prototype of real rights, bearing direct consequences upon the juridical assets of these latters;

e) the degree into which, in the context of the new juridical realities, some of the civil law's juridical institutions do present a peculiar interest and a distinct significance for other juridical institutions pertaining to the same law branch, or for some juridical institutions pertaining to the field of private law. There is more: we do not think it is an exageration to state that some juridical institutions pertaining to civil law do present interest and significance for a series of institutions pertaining to the branches sited in the field of public law. N. Titulescu confessed that the institution of the contract, as he had found it within civil law, really helped him to understand the international treaties, to seize and operate with what, in international public law is called "consensus";

f) the degree into which some juridical norms, obsolete from 1947 to 1989 are starting to act again;

g) if, and at what extent, the regulative process of the general theory of law, and especially of civil law, might be supported, in order to give the best answers possible, both to the general and fundamental interests of the entity organized as a state and to the citizen's interests, rights and liberties" (Idem, *op.cit., loc.cit.* p.7-8).

[28] In *Teoria generală a dreptului* (*Enciclopedia*), vol.6, Editura Librăriei S.O.C.E.C. & Co. S.A., Bucureşti, 1930, p.258.

[29] Idem, *op.cit.*: "The general conclusion of this essay (the six tomes [our note], was that the idea of law is a rational and autonomous concept, and therefore, that the juridical discipline is a science and has an object and a method of its own".

[30] Ibidem

[31] Ibidem

[32] Ibidem

[33] Ibidem

A battle is going on between spirit and matter, where "the former does not let itself to be enslaved, on the contrary, it is vowing to subordinate the latter"[34].

Due to the fact that it is a system of norms, bearing the power to impose itself, it also is a disciplinarian factor by its inner features. It is made by the people, that is to say vowed to design their behaviour in their reciprocal relationships and in the ones between them and society. Justinian said that: to ignore the persons for whom the law itself was created[35] is to recognize to it only a petty value, respectively to think of it as rather worthless. It is easy to understand that the human person is the purpose of law, an idea highly cherished by the Romans, which determined Ulpianus[36] to state three capital principles: to live honestly, to do no harm to other people and to give to each person hi own due.

It is just that law has to be constructed and "maintained", so that it could be able to help the people and the entities they have created.

We may, undoubtedly, say that an irrational law bears certain costs to be paid. In his study *Reflection from Latin America*[37], Claudio Salvator Lembo precises that "The legislation, irrationally elaborated, leads to catastrophe, of which a lot of economically grounded plans stand as evidence[38]. His conclusion is that a law, elaborated according to the constitutional principles, should not be promulgated without a previous analysis of its ricochets upon the already existing legal system and of its costs for the society. Speaking of Brazil, the author considered that: "A law is not a magical device. It has to integrate to an economical infrastructure. We have to understand that, in regard to human, necessities, resources are always limited. There from the impossibility of creating expectations without previously being aware of the effectively available resources consumptible and not always easily renewable in regard to the economical conjecture"[39].

Otherwise, two costs might appear after the law's promulgation: the direct price, consisting in the law's impact upon the relationships' field; the latter is "the price of shadows", accountable as time passes. The author points out to the irrationally elaborated legislation: "a Brazilian feature. It leads to catastrophe, exemplified through a lot of plans in economy and through a bitter scenario, for the whole of Brazil, for our own days"[40]

The object of the General Theory of Law is to precise and explain the elementary notions of the juridical science and to outline the image of law as an unitary phenomenon. M. Djuvara[41] considered that: "The encyclopaedia of law has a formal object, not a material one ... it studies the form only, no matter of the juridical relation's contents by itself".

The general theory of law focuses upon the form taken by the law's contents, upon the law's structure, upon the positive elementary formal organisation of the law and upon the joints of the law seen as an ensemble.

This juridical discipline searches for and explains the law's elements and principles.

The observation and research of juridical grounds consist in the study of the law's basic notions, principles, concepts and categories. As a science, it tends to globalist, to knowledge through conceptualisation: "through the inclusion of particular phenomena and their essentializing into highly general categories, instruments of thought with a propension to expand themselves"[42].

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[34] Ibidem, *op,cit., loc.cit*

[35] In Inst. Iust. I.2.12. *„Ac prius de persones videamus. Nam parum est ius nosse si personae, quarum causa statum est ignorentur”*("First let's preoccupy ourselves about the persons. Indeed, it would be a worthless thing to know the law, if the persons should be ignored, the ones for whom the law itself was created"). This way, Justinianus aimed to identify what might have been called the *Grundorum*, this concept being a kind of fundamental norm that ought to be respected into every branch of the law.

[36] *„Juris precepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*” ("The law's precepts are these: to liwe honestly, not to harm the others, give to everyone what is due to him"): D.1.1.10.1.Ulp.1 reg.

[37] Published in: Ad honorem, Ion Dogaru, *Studii juridice alese*, Editura All Beck, Bucureşti, 2005, p.70-76.

[38] Claudio Salvator Lembo, *op.cit.*, p.70.

[39] Idem, *op.cit.* p.71.

[40] Ibidem, *op.cit., loc.cit*

[41] In *Teoria generală a dreptului*, Socec & co., S.A. Bucureşti, 1930, p. 23.

[42] Nicolae Popa, *op. cit.*, p. 1982, p. 8.

So, we might rightfully say that: "The General Theory of Law, through the analysis of its specific object, aims to organize it logically; it coordinates and systemizes knowledge, in the frame provided by the specific language of each branch's juridical sciences, structural disciplines as they are defined because they are particular sciences which study relatively closed domains"[43].

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[43] Ion Dogaru, *op. cit.*, p. 34; See also Nicolae Popa, *op. cit*., 1982, p. 8: "The general theory of law, as a general juridical theory, provides the set of concepts through which the science of law judges and explains the juridical reality. It searches to seize the inner and permanent features of the juridical phenomenon, in order to define and outline the space it holds within the social and historical system to which it belongs. The General Theory of Law assumes in proper as well the philosophical perspective of the research upon the juridical phenomenon - the study of the law's necessity and possibility, in principle - as the straightly scientific perspective - the study of concrete causes, of the determining historical way through which the juridical phenomenon (the juridical reality) appears and of its forms of action".

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