SCIENCE OF LAW - SCIENCE OF KNOWLEDGE ELEMENTS OF CONSTITUTIONAL LAW (II)
LAW - SCIENCE, ART OR TECHNIQUE ?

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Abstract:
It was thought that science was only the privilege of the lawmaker or of specialists in other fields and less that of those studying law, and lawyers merely had the role of analysing legal or jurisdictional texts. The ideal was faithfully expressing will in the sources of law. However, an object for investigation was clearly defined in this activity, a series of legal concepts became more precise, a more rigorous methodical spirit manifested, and, in this context, the undeniable contribution of legal positivism, through Kelsen's contribution, namely through his distinction between legal regulations and texts regarding law, through the necessity of not confusing law with the science of law, must be mentioned. A reinvigoration of the scientific research of law has benefited from the contemporary epistemiological achievements, which have highlighted, among others: the opposition between natural sciences and humanistic sciences does not have insurmountable borders; the introduction of the concepts of chance, order and disorder, which significantly nuance the traditional opposition between determinism, specific to natural sciences, and finality, specific to humanistic sciences, the role of the observer in scientific research has been re-evaluated, noting the impossibility of ignoring the topic; the theories of all the sciences are not verified directly and have a provisional value.
Keywords: *science of law, legal phenomenon, general theory of law, constitutional law, legal thinking, legal philosophy*.

The concept of science and the science of law

The history, dynamics, but also the insufficiency of knowledge of the science of law have been revealed by the juridical literature [1], only inasmuch as they limit themselves to the classical fields, in a series of main areas, of which the following can be enumerated: the analysis and interpretation of legal texts, of jurisprudence, putting law in a logical order; a certain danger of passion in the content and form of law and its tendency to block and limit legal knowledge; a need for overcoming the crisis in law through increasingly resorting to scientific criteria in the field of legislative ideology and creation of law. [2]

A reinvigoration of the scientific research of law has benefited from the contemporary epistemiological achievements, which have highlighted, among others: the opposition between natural sciences and humanistic sciences does not have insurmountable borders; the introduction of the concepts of chance, order and disorder, which significantly nuance the traditional opposition between determinism, specific to natural sciences, and finality, specific to humanistic sciences, the role of the observer in scientific research has been re-evaluated, noting the impossibility of ignoring the topic; the theories of all the sciences are not verified directly and have a provisional value.

Seen from the perspective of the science of law, the following may be added to the above: the history of law provides past experiences; the legal experience of mankind may be approached as a social experiment in relation to the genesis of the science of law, of legal concepts and theories; the possibility of subjecting law to a systemic representation; law may have an experimental character; lawyers currently have at their disposal procedures for systematic verification and use.

Therefore, it may be stated in a substantiated manner that discovering the limits of scientific objectivity and the complex contemporary aspects of the term science may free the knowledge of law from an old complex, namely that it is only a doctrinal knowledge, which does not reach the level of science, not even in contemporary times.

Law - science, art or technique

Within an analytical look on law in the sense whether law is a science, an art or a technique, the idea of science appeared relatively late, towards the end of the 19th century and the beginning of the 20th century, having a rather sinuous and contradictory evolution, but not without transformations. [3] The concept of science referred to an initial step of the process of creating law required by knowing the social reality which must be regulated, and, in this context, it was thought that science transpired in law only inasmuch as legal regulations were well created and clearly expressed. It was thought that science was only the privilege of the lawmaker or of specialists in other fields and less that of those studying law, and lawyers merely had the role of analysing legal or jurisdictional texts. The ideal was faithfully expressing will in the sources of law. However, an object for investigation was clearly defined in this activity, a series of legal

concepts became more precise, a more rigorous methodical spirit manifested, and, in this context, the undeniable contribution of legal positivism, through Kelsen's contribution, namely through his distinction between legal regulations and texts regarding law, through the necessity of not confusing law with the science of law, must be mentioned.

Overcoming the position of law as technique, of course without abandoning it, but in order to integrate it into a more ample knowledge, on several levels, the aspiration of law towards a certain scientific status, is not clear and distinct at present, not even from a terminological point of view, with all the efforts for standardising and formalising it, through the use of the English language as a common linguistic system. In this respect reference can be made to the English term legal doctrine which represents the space of multiple approaches, of controversies [4] and different and sometimes coexisting options. Moreover, other English terms may be observed, namely: the term legal dogmatics which represents the normative knowledge specific to law, reserved par excellence to specialists interpreting the law, relatively captive in their field of activity and who have very little inclination towards an interdisciplinary approach, towards interfering with issues of juridicity; the term jurisprudence which represents a theory of case study par excellence: the term general jurisprudence which designates a strictly necessary theory of case study; the term legal science being seen as an aspiration towards the knowledge of law which reaches principles and regularities in the legal field as well, similar to other sciences. Nevertheless, it is an inconsistent terminology for Scientia juris, [5] a notion relatively synonymous in meaning around the common note, actually being the result of scientific research of the legal phenomenon. [6]

The field of knowledge of law cannot and must not remain singular, currently having connections, interferences, transfers of concepts, methods and techniques with and from other sciences, and which can no longer be listed as only having a secondary role in the knowledge of the legal system. After all, the power lines of contemporary knowledge, of the conceptual revolution in science, with its major tendencies towards unification, but also towards specialisation, which the law, without denying its specificity, cannot eschew, are found in this process. It is without doubt that the unity of science manifests in diversity and it does not represent an unexplored area of knowledge or the

absence of the configuration specific to a field at all. A complex approach, without limitations, of the legal phenomenon, is necessary, confirming in this case also the epistemiological thesis according to which any absolute limit proposed is marked by a problem wrongly expressed, rather being a momentary pause in thinking which must be treated in terms of a programme establishing what is to be done from then on. The borders between subjects are useful for deans and booksellers, they must not, however, be overestimated, and, similarly, legal systems must not be separated from their non-legal context because the principles of law and the legal precedents can be explained by placing them in a certain social, political and historical context. [7] The need for an integrating legal knowledge in the postmodern era, which articulates legal dogmatics - that is, the totality of general and sectorial theories on law which deal with describing and rationalising legal regulations - with the interpretation and systematisation, with legal philosophy and sociology, has also been highlighted.

Thus, it has been shown that the paradigm the general theory of law as an encyclopaedic synthesis regarding law, with all its traditional values - which must be and can be safeguarded - is not satisfactory any more in terms of the totalising knowledge of law. The acts of knowledge in the field become increasingly numerous and complex, follow one another in an accelerated manner, such as, for example, the impact of the informational society on law, they cannot merely be collected in a simple, even if perfect, archive any more. They connect, interfere, transfigure one another, place known facts in a different light, impose new clarifications in terms of meaning, fundamental structures, functionalities, which in the socio-human context of juridicity make reference to the nature and possibilities of the science of law, involve new levels in which knowledge is of an integrative type.

Statements regarding legal thinking have revealed that : Legal thinking, just as any thinking has always been, throughout eras and everywhere in the world, an effervescent dialectic, a battlefield for debating justice, utility, good, evil : the great stakes of life. [8] Final answers were not given in the battlefield of debate on Law, since, indeed, scientific culture on the one hand, the humanistic one on the other, have not kept their promise of giving final answers.

The struggles in the world of ideas, the modern and contemporary experience of science have shown that the absolute foundation on knowledge, either on principles or facts, is illusive, that there is no absolute measure of truth independent of the corresponding life situation, that a theory may be false although it successfully passes the tests it is subjected to, that we cannot actually test one single theory, since it is connected to an entire network of hypotheses, that in certain moments in the history of science only persuasion and propaganda, and not scientific arguments, are used for fighting. [9]

The concept of integrative knowledge would be configured as a concept for coordinating a kaleidoscopic picture of legal knowledge which blurs dogmatic exclusion and intolerance. [10] It tries to correlate different ways of thinking - some neglected or wrongly interpreted, into a common activity for solving legal problems.

The concept of integrative knowledge may be looked at with distrust due to an excessive caste solidarity, not willing to cease preserving certain elitist positions, being seen as between specialities, thus not being trustworthy, difficult to publish, with effects judged as modest in relation to different costs.

The epistemiological approach on the concept of integrative knowledge is able to overcome the scientific specialisation seen as dogma, for instance when the quantitative approach is judged as being the only scientific one in relation to the qualitative approach, the hegemony and the colonisation of knowledge. The move from the epistemiological sovereignty proclaimed by certain conceptions or from the divergent epistemiological approach may be achieved by overcoming segmentation, from simultaneity and integration into structures and configurations, to an epistemiology of cooperation, collaboration and coagulation, which exploits the entire experience of science in solving problems.

It is not just a simple requirement, objective interactions are the basis for integration, the epistemiological pluralism is supported by the principle that any single way of understanding a complex phenomenon is insufficient. This involves:

- recognising the value and validity of several types of knowledge in solving problems.
- finding a common denominator of particular epistemiologies, for instance the person as a legal being in the legal field.

- making the different ways of approach operational through continuous negotiations in the field of knowledge, highlighting the ways of moving closer rather than making compromises.

The coalition of perspectives, the convergence towards contextual values, the action based on multiple epistemiologies, outlines integrative knowledge as a new paradigm of scientific production, distributed socially, oriented towards transdisciplinarity and application, with multiple responsibilities, able to overcome epistemiological boundaries, to use integrative concepts and suitable methodologies.

Therefore, in this context, the virtues of the integrative approach seem to be promising in legal knowledge as well. It may be able to inspire a minimal integrative epistemiological programme in which to combat dogmatism using arguments, to re-analyse epistemiological boundaries as closures which open, emphasising cooperation and not exclusion. [11]

In this approach, the paradigms of legal knowledge - even contrasting ones - are stimulated to communicate, to accept new paradigms with a greater potential of integration, as, for instance, the communicational paradigm. [12]

In conclusion, the science of law [13] is not and cannot be the expression of strong thinking - like exact sciences - but of a weak thinking and perhaps the term supple or subtle thinking, which, however, may frequently win in the field of scientific knowledge, if it is reasonable, might be preferable.

The nucleus [14] of this science might be the legal rationality, scientifically configured, which confirms its status only if it is based on logic but also on history, it integrates social experience and the practice of law, the achievements of contemporary science, gives satisfaction to the human condition within this historical era, does not ignore the contradictions of juridicity, the aspiration towards interrogation, foresight and creativity, declaring itself always perfectible, upon critical endeavours, open and evolving.

Thus, legal science can more significantly affirm its status of socio-human science the specificity of which is given by the object of research - the legal phenomenon - that socio-human space which has Law as an imperative normative nucleus, susceptible to public constraint, given in the name of Justice, in a society

particular to a certain historical time and which makes the values of that time operational, regulates the main social relationships, incorporating ideas, conceptions, legal theories, influenced by the culture and state of that society. [15]

Conclusions

Exploring the legal dimension of the human, legal science is complex, multi-levelled, shows its nature at the confluence of defining features such as : a cognitive potential which cannot be simply reduced, in a strictly hermeneutic manner, to the postfactum reconstruction of the behaviour of the legal actors in order to understand it, but fully exploited for its explicative and predictive features, within reason, as any socio-human science ; an interdisciplinary methodology inherently required by the complexity of the legal phenomenon; an integrative exigence, given the fact that legal knowledge cannot eschew the connections to the human network of knowledge, as the legal phenomenon cannot eschew the connections, interdependencies and interferences from other socio-human phenomena. This integrativity does not encroach upon the specificity of certain legal entities or specialisations, such as the branches of law, legal concepts, principles or theories. However, it combats bad practices such as dogmatism, exclusivism, ignoring others, boycotting them, cultivating the non-discriminatory and non-hierarchical extension, opening up epistemiological boundaries, informational exchanges, recognising the generic ability of each entity towards knowledge in order to participate in solving human problems - including legal problems - based on relevant arguments; a practically applicative, jurisprudential dimension, which cannot be separated from the meta-theoretical and theoretical level and reduced to legal empiricism, without negative consequences such as a significant normative dimension, which must not be transformed, as the legal system is not an empty normative form, but is full of political, socio-economic, cultural content, an approach which does not dilute legal normativity, but explains it.

References:

[1] Hanga, Vl. (1980). Introduction. History of Romanian law, vol. I, Academy Publishing House, Bucharest, pp. 17-18
[2] Perrin, J.Fr. (1979). Pour une theorie de la connaissance juridique, Librairie Droz, Geneve, pp. 7-21.
[3] Geny, F. (1913). Science et technique en droit prive positif, Paris, Sirey, 1913.

[4] Twining, W. (2005). General Jurisprudence, Law and Justice in a Global Society, Universidad de Granada, Mayo, pp. 609–644.
[5] Peczenik, A. (2005). Scientia juris, in E. Pattaro, (ed.) A treatise of legal philosophy and general jurisprudence, Springer, Dordrecht,vol.4, pp.1-2.
[6] Coyle, S. and Pavlakos, G. (2005). Jurisprudence or Legal Science?, Hart Publishing House, Portland, Oregon, pp.1-15.
[7] Villey, M. (1975). Philosophie du droit. Definitions et fins du droit, Paris, Dalloz, 1975, p. 14.
[8] Malaurie, Ph. (1997). Anthology of legal thought, Humanitas Publishing House, Bucharest, p.10.
[9] Bernal, J. (1964). Ştiinţa în istoria societăţii, Ed. Politică, Bucureşti, 1964, p.28.
[10] Frodeman, R., Klein, Jt., Mitcham, C. (2010). Handbook of interdisciplinarity, Oxford University Press, pp. 1–31.
[11] Popa, N. (2008). General Theory of Law, 3-Edition, C.H. Beck Publishing House, Bucharest.
[12] Popescu, S. (1985). Contemporary conceptions about law, Academy Publishing House, Bucharest.
[13] Craiovan, I. (2001). Elementary treatise on the general theory of law, Legal Collection, University Course Series, “All Beck” Publishing House, Bucharest, pp.162-164.
[14] Naschitz, A.M. (1969). Theory and technique in the process of creating law, Publishing House, Bucharest.
[15] Rawls, J. (1971). A Theory of Justice, Cambridge, Massachusetts: Belknap Press of Harvard University Press.