

SCIENCE OF LAW - SCIENCE OF KNOWLEDGE ELEMENTS OF CONSTITUTIONAL LAW (I)

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Abstract

Since in philosophy and the general theory of law, as well as in specific theories of the branch the concept of law is deemed to be almost impossible to define in accordance with the classical rules of Aristotelian logic, by reference to the genus proximum et differentia specifica, it is preferable to explain the concept of law from a cultural, empirical and etymological perspective, the benefit of such an analysis consisting in showing specific constants of social perception and that of the human spirit, regardless of culture, in a broad sense, in which we place ourselves. In a modern doctrine, but inferring the attempt to define law from the point of view of impersonal will as well, in Romanian literature objective law is considered the expression of the manifestation of will of the authority, established in the state for the purpose of promulgating legal regulations. Or equating, synonymically, objective law with the rule of law itself, the law in a broad sense, objective law is deemed the legal standard itself acting in a cultural time and space and having as constituents the rule of conduct itself, social conduct as an attribute (in the sense of the quality that the regulation predicates) and the compulsory nature of the rule which is expressed in the form of the sanction.

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THE LAW - NOTION AND CONCEPT

The concept of law is a metaphor, the term *directum* being used in a doubly figurative sense, referring to what is, as a general rule, in accordance with the rule, with the law. The etymology from the Latin *directum* can be found in all the European languages. Thus: *drept* in Romanian, *droit* in French, *diritto* in Italian, *derecho* in Spanish, *diretto* in Portuguese, *Recht* in German, *right* in English. [1]

All these concepts, each in their respective language or language family, indicate the idea of direction (*directum*), that which directs (*dirigere*). As such, a *modus vivendi* is invoked, a totality, therefore, of rules involving an authority established in order to notice how such a social charter is applied and followed in society. Because law is a social phenomenon, it exists where we have a more or less organized society (*ubi societas ibi ius*), just as, whenever we identify a legal regulation/rule of law (in social archaeology) we

find the presence of a more or less complex societal organization (*ubi ius ibi societas*). [2]

In a very broad sense, law is considered a synonym of justice; such reporting is, however, lacking, since, in one opinion, it is considered that justice, under a certain aspect, consists in pursuance to a law, while in another opinion, it is claimed that law must be in accordance with justice [3].

In the most general meaning, the term of justice indicates a harmony, a convention, a certain proportion (*congruitas ac proportionalitatis quaedam* - Leibniz), a correspondence of states of affairs to something, to a predefined state.

Therefore, justice pertains to a certain representation of man regarding what is just or unjust, a collective representation which references both a mentality of the individual and of the group, it depends on the developmental and organisational level of a human community, on its historical and cultural experience, on how open or closed off the group/human community is, on the type of moralities [4], on the type of religiosity of social life, on the intensity of interpersonal communication, on the political power/powers, on the system of government, etc.

In a very broad sense, we can say that law translates into a collection of laws, regulations/legal rules, but is not reduced to legality. The legal regulation/rule of law must be complied with, but not fetishised, because legality, behind it is Law, Justice as a state of mind and as a collective mentality in full social movement. The foundation of the legal regulation cannot be anything other than justice, that in accordance with the Idealistic School of law. [5]

Law has its essential source in human nature, namely as subjective human nature, as being subjective consciousness. Law is a relationship between a subject and another subject, it is an inter-subjective relationship, but with a social content *vis-à-vis* one thing, more exactly a good (*res*), or an obligation, with a strongly ideologised content, because the subjects which enter into a social relationship with one another have a certain representation of the fact that the law grants them a certain power or that they have undertaken a certain obligation. [6]

Polysemy, under the aspect of the content of the term law, causes the distinction, in general terms, between five broad meanings in which the concept of law is used: objective law; natural law; positive law; subjective law; law as a scientific subject.

THE OBJECTIVE LAW - AN ESSENTIAL PART OF THE LAW

The concept of objective law means the set, the collection, the totality of legal regulations (rules of law) governing a particular type, a specific area of social relationships (relations), namely the legal relations between natural and/or legal persons. Such totality of legal regulations governing legal relations, state, provide, imperatively request, allow or recommend, recognize or prohibit, in an abstract, general, mandatory and impersonal way, a certain conduct (standard conduct) to subjects entering a legal relation, in certain circumstances, conditions, states of affairs, established by the lawmaker itself, and, having a repeatable character, they indicate the conditions or circumstances in which such relations arise, are modified or extinguished. [7]

Other times, legal regulations grant the subjects of legal relations a certain autonomy of will as regards the manner in which they themselves decide to establish the conduct which they intend to follow.

However primitive a society is in terms of organisation, even at a primitive level, elements of legality are found in its regulations, even if in the types of primitive societies we can speak rather of a specific regulatory religious-moral-legal syncretism.

Such a set of legal regulations are imposed or recognised by a social authority - in pre-state societies - or, as a general rule, by an authority or a set of public authorities, in state or super-state societies - within the European Union.

Law is also included among these tools and techniques of ensuring social order and discipline, as objective law, as a set of legal rules which express the general and abstract will of the lawmaker (in the classical sense of the definition) to impose models of standard desirable conduct in accordance with a set of social values produced, defended, promoted by the society in question, with two observations of content:

a) Although in the classical doctrine the will of the Lawmakers is referred to as an abstract and general will, in fact there is no such thing, because, if we take the term lawmaker in a strict, literal, narrow sense (*stricto sensu*), as a legislative power (in

constitutional terms - the parliament), it should be noted that this power itself, in accordance with the principle of selection (elections), consists of specific individuals, each of them carrying a specific ideological message, certain general and regional interests of the segment of electors they represent, the political program of the party which they represent in Parliament, interests (economic, professional, etc.), carrying its own subjectivity as well. As a result, the general and abstract will of the state is reduced to the sum of subjective, individual wills, therefore being, in fact, a collective will, which, many times, does not always show a clear and close connection to the people who actually draft the regulation provided by the lawmaker, people whose thinking on the drafting of the text of the law is itself determined by factors pertaining to the subjectivity of the group and of culture at that moment;

b) The State represents an abstraction, in fact it represents a legal order and structure of public institutions, necessary for the exercise of power, which, functionally and in order not to generate abuse, is classically separated and according to Montesquieu's phrase, *le pouvoir arrête le pouvoir* (power stops power) - into the legislative power, the executive power, and the legal power. The separation of powers, at the same time, imposes a mutual control of the powers and even an internal control of each power, on a vertical scale;

c) *Lato sensu* (in a broad sense), the lawmaker means not only the legislative power, but also any author of one or several legal regulations. For example: the Executive, issuing government ordinances or decisions; central or local administrative public authorities which issue, on the basis of the powers which are granted to them by law, administrative legal acts of a general nature; the general meeting of the members of a commercial company which is legally constituted, who adopt a decision (in the general meeting, by following the procedure laid down in its articles of incorporation, organization and operation), deemed as a law if, in accordance with the statute-constitution of the company/foundation such a decision is valid (adopted in accordance with the procedures laid down by law); the Court of law, as, in a broad sense, the final and irrevocable decision is itself a legal regulation for both parties to the dispute, as well as for the public authorities which, by law, are tasked with applying the decision issued, in an immediate and strict manner.

In general terms, it is said that the law is a conservative instrument for maintaining public order, that it represents a certain static element of society compared to other, more dynamic methods of regulation.

In the situation in which the imperatives, recommendations or limitations of permissiveness of one of the constituent regulations of the normative set or of the whole regulatory system are ignored, rejected or violated, the logical consequence of the state created represents the activation or, at least theoretically, the appearance of the logical consequence of a sanction, applied by resorting to the public/social authority, which has the use, for a repressive-punitive purpose, of coercive public force, including manu militari, whenever the social order and morals - both concepts understood in a paradigmatic context in accordance with the usually average standards of the community (in order for the law to be effective as a set of legal regulations) - is or are threatened, subjected to an imminent social danger.

Thus, objective law can be regarded as a normative order, i.e. a set of powers and obligations which organise social relations, the creation, modification or extinction of which represents the expression of the creative and regulating or moderating factor, called the legal regulation.

As a set of legal rules, the law, in an objective sense - as a phenomenal existence that can be perceived, known and measured sociometrically or by other specific methods and procedures of legal sociology - has a multiple functionality in an existing social order.

As such, objective law can be regarded as a technique of human cohabitation, starting with the elemental form, namely the ritual cult of death as a means of strengthening intra-tribal relationships - where the model prohibition exists simultaneously with the idea of the sacred-profane - legal regulatory pluralism especially as a result of change revealing itself, in all the richness of its manifestations, in our contemporaneity, going from a primary society to a secondary society.

The idea of legal pluralism underlies the doctrine of the Viennese professor Eugen Erlich and begins to be developed through a series of philosophers and sociologists of the legal phenomenon, such as Max Weber, Georges Gurvich, even being a collective research theme for Belgian and French researchers or for those of French culture. For Professor Jean Carbonnier, legal pluralism signifies a double aspect:

- from the point of view of the reality of the legal phenomenon, therefore, from the perspective of the sociology of law, "diversity has invaded the legal environment", because the industrial societies have produced volens-nolens, new centres producing laws, genuinely autonomous areas of law, on the one hand, and on the other hand, a strong rivalry was created between them and state law (the legal normative system legally promulgated/issued by the public authorities/powers of the state) (such as a special, corporate, statutory law, is created within trade unions, commercial companies and other groups of private individuals, or as lay law and canon law coexist in an internal legal order;
- from the point of view of the individual, legal pluralism can manifest as a collective phenomenon, possibly as a mental collective phenomenon, as well as an individual phenomenon .

In other words, legal pluralism consists of the coexistence, of the parallel functionality of two distinct, different bodies of rules of law, but which often tend to regulate the same problem. Legal pluralism can thus be both a material pluralism, and/or a formal pluralism.

As a set of legal rules, objective law is the expression of a general and abstract will of the lawmaker which promulgates or issues, or adopts rules of law, is stated as a general rule. It is the point of view of the classical doctrine of law, in particular that of the jurists of the French school or those influenced by the ideas of this school, jurists who have the Caesarian cult of the Napoleonic Code. It is true, there are also deviations from such a way of understanding of objective law, it being seen, even in the classical French doctrine, as being "the collective consciousness and will substituting individual knowledge and wills, for the purpose of determining the prerogatives, the subjective rights of each".

In a modern doctrine, but inferring the attempt to define law from the point of view of impersonal will as well, in Romanian literature objective law is considered the expression of the manifestation of will of the authority, established in the state for the purpose of promulgating legal regulations. Or equating, synonymically, objective law with the rule of law itself, the law in a broad sense, objective law is deemed the legal standard itself acting in a cultural time and space and having as constituents the rule of conduct itself, social conduct as an attribute (in the sense of the quality that the regulation

predicates) and the compulsory nature of the rule which is expressed in the form of the sanction.

As a matter of fact, we must insist on the compulsory nature of the rule, since this represents the defining feature which delimits law from morals, at least for the European legal mentality, whereas the emergence of legal obligations makes it possible, in historical cultural time, to have an increasingly more coherent intervention - in conceiving a differentiated and flexible system of sanctions - of the state in order to ensure public order and the legal safety of the person, the public will of directing social discipline acting together with the public will to enforce the law.

In general, different reactions to the position, of Caesarian influence, based on which the law represents the expression of the general and abstract will of the lawmaker (of the state, in the legal doctrines of authoritarian systems, as well as of totalitarian ones, if not the will of the single ruling party), emerged, which, in one cultural context or another, gave a different meaning to objective law.

Thus, for example, the historic School of law - a German theoretical orientation that responds to the idea of encoding German law of Napoleonic inspiration and represented by Gustav Hugo, Friedrich Carl von Savigny and Antoine Thibaut - believes that the law reflects national genius of the people to which it belongs.

Other legal paradigms of legal thinking, contemporary to us, consider, however, that objective law is nothing more than the legal order, either seen by itself, or by reference to an international legal order, such as, for example, the School of legal normativism.

However, the main objective in understanding the doctrine of objective law [8] is and will remain subordinated to the line inaugurated by Im. Kant and Hegel, who both see the law under its aspect of rationality.

CONCLUSION

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