THE LAW CONNECTED TO SOCIETY OR THE LAW BASED ON COERCION

Diana Cristina PÎRVU
Law School, University of Craiova, ROMANIA
diana.pirvu19@yahoo.com

Abstract
Starting from the premise that the law is at the same time projective and protective, it is necessary to see the degrees to which it is projective and protective. Is the law connected to society, following the social relationships, or does it have coercion at its core? To answer this kind of question, it is necessary to outline the differences between the anglo-saxon and the romano-germanic family of law. What is aimed for is the highlighting of the general traits of the two systems of law, the determination of the role of the judge in the two systems, but also the advantages and disadvantages that a lawyer has in. These problems are the aspects we will focus on in the analysis of the two models.
Keywords: *projective law, protective law, systems of law, advantages, disadvantages etc.*

INTRODUCTION

The law entails two types of functions: one the one hand the protection function, which defends the individual from the state, manifested through a regime of spontaneous development of the rules of law, and on the other side, the projective function of law, a traditional continental function manifested through social statism, which offers the state a primordial role in the organization and administration of the social life.

Thus, with regards to modern democracy, we are currently in the presence of a coexistence of two theories cantered on different subjects, the individual in the case of the pre-eminence of the protective [1] function and the state in the case of the projective [2] function.

Starting from the premise that the law is at the same time projective and protective, it is necessary to see the degrees to which it is projective and protective. Is the law connected to society, following the social relationships, or does it have coercion at its core?

To answer this kind of question, it is necessary to outline the differences between the anglo-saxon and the romano-germanic family of law. What is aimed for is the highlighting of the general traits of the two systems of law, the determination of the role

of the judge in the two systems, but also the advantages and disadvantages that a lawyer has in. These problems are the aspects we will focus on in the analysis of the two models.

THE ROMANO-GERMANIC LAW SISTEM

Thus, as regards the Romanian-German law system, which includes the Romanian law system, we can say that it is differentiated by the fact that it is based on the bill of law as a source of law. The existence of written law, the hierarchy of the sources of law, its separation into public and private law, but also in branches of law are other characteristics of the romano-germanic family.

States that emphasize the bill of law as the main source of law call for security as the argument of this choice. By publishing the law, it is ensured that it is known, an unrealizable aspect with the help of custom, which is ambiguous and uncertain. Written sources are considered to be factors of stability and security of the law.

However, this choice involves some counter-arguments. We can say that "the fixity of the law is a brake on the process of its adaptation to social evolution and risks a rupture between law and fact." [3] Moreover, the custom is said and applied, having an unwritten character, yet it is not incompatible with the idea of organized society.

Although in the modern times, due to the increase of the powers of the state, of the numbers of legislative and judiciary bodies, a multitude of legislation has emerged, the custom still preserves its role, as there are countries that still know the habit. Also, the law is often inspired by it. In view of this, we can say that "habit can appear as a complement to the law, when the law refers to it and can be taken into account whenever the law does not intervene, for the law cannot abolish the habit. [4]

By referring to the doctrine we can say that it helps to interpret the law. It often reveals errors in the law, highlights the inadequacy of a provision to the needs of society, and outlines the solution that should be applied to a given case.

Although in Roman-German law the doctrine is not a source of law, it has an influence on the achievement of legal norms where there is a legislative vacuum.

With the evolution of society, the role of legal sources also changes. Their position is not static. Thus, with the evolution of the legal technique, the importance of the sources of law also changes. In support of this idea, referring to Romanian law, we can bring the following arguments: [5]

1. In certain situations, custom has been established by law. For example: in matters of servitude and neighbourhood relations, in the field of house sales, etc .;
2. Although judicial practice has had only consultative value, it is in fact a true source of law. Analysing verdicts, decisions, judge orders, it is noted that the judge applies the law both in its letter and in its spirit by reference to judicial practice;
3. The doctrine, like the judicial precedent, finds its applicability, with specialist opinions being used by lawyers as an instrument in the application and interpretation of the law;
4. As regards both labour law and international law, the contract has been established as a source of law, establishing rules of a general nature.

An extra argument, in addition to the above, due to social, economic and political evolution, the traditional vision imposed by the French Revolution, in which only the bill of law is a source of law, was rethought in favour of the pluralism of the sources of law, which cancels the monopoly the state in creating the law. Thus, in the contemporary legal order, among the many sources of law are also the conventional international sources, namely the treaties.

Also referring to Romanian law as a Roman-German origin, being a state of law is based on the principle of the separation of powers in the state.

In modernity, the principle of the separation of powers in the state is adopted by more and more democratic states either at the level of the fundamental act or as a general principle of constitutional nature through the work of the constitutional judge.

The principle of the separation of powers in the state presupposes that the functions of the state are attributed to distinct organs and, at the same time, independent of one another, in such a way as to be able to aspire to the pursued goal, namely to guarantee individual freedom from the public powers.

In Romania this principle is enshrined in the Constitution. Thus, art. 1 par. (4) states that "the State shall be organized according to the principle of separation and balance of power - legislative, executive, judicial - within constitutional democracy".

Although this principle implies important regulatory consequences, we will confine ourselves to what is of interest to us from the point of view of the comparison of the two systems of law, namely the role of the judge.

The principle of the separation of powers in the state underlines the idea that the judge can only settle legal conflicts between different legal subjects, being forbidden to legislate or apply the law. The role of the judge is different depending on the legal system in which he is used, in the Anglo-Saxon law, the precedent being mandatory while the Roman-German law excludes the precedent.

In Romanian law, the consecration of the principle of the separation of powers in the state in the Constitution has, as far as the judge is concerned, the following consequences: the judge will not be able to pronounce a decision if there is no litigation in the state of judgment. Moreover, he will not be able to adopt guidance decisions or to formulate a general and binding rule for ordinary courts.

This principle is also supported by the provisions of art. 5 par. (4) of the Code of Civil Procedure, which states that "It is forbidden for the judge to lay down general binding provisions by the judgments he makes in the cases that are submitted to his judgment."

The same article provides in par. (2) that "No judge can refuse to judge because the law does not state, is unclear or incomplete." Thus, the judge will be forced to judge any kind of litigation that is subject to trial, not having the possibility to refuse, by adopting decisions of principle in order to cover the legislative void.

The interpretation of the legal norms aims to highlight the exact meaning of the interpreted rules and is therefore an intellectual process that leads to the establishment of the meaning of the legal norm, to the verification of its applicability in relation to a certain factual situation, to the exact determination of the meaning of the terms used by legislator, but also to establish the limits of the respective rules applicable to a certain factual situation.

It is thus observed that the process of interpreting the legal norms entails two stages: first, the one in which the authentic sense of norm is sought, and second, the stage in which one seeks to apply and connect this authentic sense with the concrete case. The need to interpret the rule is thus outlined.

Speaking of the necessity of applying the norm, we can state that this is based on the following situation: although the law enforcement body faces a system of rules of a general and impersonal nature, it must clarify as clearly as possible the text of the legal norm and achieve the compatibility between the norm and the case. The necessity of this

is also due to the fact that the legal system has gaps, to the specificity of the legal language, to the internal contradictions that arise in the legal system, and to the dynamics of the finality of law [6].

Therefore, as interpreting by a judge when a dispute is settled, the effects of judicial interpretation are not mandatory, they apply only to the litigants.

Moreover, in his / her work, the judge will be able, when dealing with a case, to carry out only a review of the legality of acts issued by the administration. The judge will not be able to force the administration to issue a specific administrative act. However, court judgments must be motivated, so the judge can also be an interpreter, the law defining only the framework and providing only the directions.

With the development of society, the law must keep up with it to predict and prevent the directions in which it develops. The law should be a step forward, so there must be a spontaneous development of rule of law. In modern times, the bill of law no longer represents all of the law, and the judge cannot be the one who issues the law. He holds the power of interpretation, of adapting the texts, which implies a certain normative power.

In Romanian law, the judge is not the central figure, however, the principle of the independence and immovability of judges is enshrined in the law of judicial organization. Moreover, we encounter a hierarchy of jurisdictions, which helps to elaborate the law freely, without restrictions and without subordination.

ANGLO-SAXON LAW SYSTEM

As far as the Anglo-Saxon law system is concerned, unlike Roman-German law, where the basic source of law is the bill of law, the basic source of law is the norm formulated by judges and expressed in judicial precedents. Therefore, it is a common law-based court system. The common-law rules, less abstract than those of the Roman-German family of law, refer to insatnces of a case and not general rules, which may apply in any case. So the judge is the central figure of this type of law. It is he who reveals the right and protects individual rights.

Common-law comprises a set of rules of law established by judicial precedents. Judgments do not limit their effects only to the parties to the litigation which are the subject of the judgment, but they bind both the court which has ruled them and the lower courts, and they are obliged, in similar cases, to pronounce the same solution.

Anglo-Saxon family is also part of English law. It appears as a judicial right, developed by judges in the process of examining individual cases. Within it, the law does not divide in public and private, but in common law and equity law. Due to the fact that English law has gradually developed through judicial practice and legislative reforms and that the courts have a common jurisdiction, the other branches of law are not so well articulated within English Law. For example, there are no European-type codes in England, and the English doctrine does not address the issue of structural divisions of law, putting more emphasis on the result than on theoretical arguments.

There are also differences in the identity of some fundamental institutions, concepts and techniques. English law uses some completely different concepts. Thus in English law there are terms such as "trust", "real property", "personal property", and "consideration" that do not exactly correspond to the Roman-German law.

As regards the differences of perception regarding the protection of the rights of individuals and private collectives against governmental intervention between the British and the French or German systems, there is a clear outline of them since Enlightenment. An undeniable source of these differences is closely related to how human nature is perceived. British Illuminists, compared to the French or German, believe that interests, passions or desires are those that govern human conduct rather than pure reason.

As an argument in support of the idea that the law is connected to society, following the social relations we bring the following quote that outlines the political and moral philosophy of England through the Enlightenment: «The thinkers trained in this spiritual tradition do not regard the social arrangements - laws, rules, institutions - as materializations of rational anticipations or abstract projects, nor as results of deliberate conventions made by "rational" individuals. They always insist that the moral and political order of society grows spontaneously, through the interaction of individuals who pursue their own interests without subsuming common common ideals. The result of this interaction is always profoundly different from what is expected and consciously pursued by participants in "social play". The life of the community (its success as a whole) therefore does not depend on any "good intentions" of any "rational", "beneficial" or "ideal" nature of some theoretical schemes whose application would be required. It is too complex to be foreseen or planned; particular circumstances and involvement play a too

much role for reason to control or direct things. Therefore, neither the individuals - no matter how wise they are - nor the political power can and should never aspire to the establishment and imposition of a social, economic, political or moral order considered a priori "optimal". The only way to achieve a collective "optimal" human is to encourage individual freedom (within the limits of the natural legislative framework), tolerance of the personal initiative and acceptance of the "naturally" occurring outcome through the legal cooperation of all the participants in the game. Experience, and not the abstract criteria, indicates the best final form that the life and work of the community have to wear. The choices of people, but especially the habits, traditions and institutions that have been verified over time, which have grown - as we would say today - "organically" must always be respected, because they only guarantee the success of social cooperation. Any mixture based on preconceived ideas on theoretical principles, whether they are "generous" in the spontaneous evolution of the social "organism", is in fact a dangerous abuse. Limiting the interference of the political power of the state, in the life of society, refraining from any attempt of "brutal change" of the way people are the first condition of the welfare and happiness of a community. » [7]

The idea that the right has to follow social relations rather than constrain it is also apparent from David Hume's assertions in A Treaties of Human Nature that "The more the principles that support a particular kind of society are less natural, the greater the difficulties that a legislator will have to face in their cultivation and promotion will be. The best policy is to conform to the usual propensity of the people and to add to that nature all the improvements that it is capable of" [8].He also states that the only rule of leadership that is known and accepted by people is custom and experience because reason is so uncertain that it will constantly be subject to doubt and controversy.

A criticism of excessive reasoning is also supplied by Edmund Burk through supporting the idea that "the reason of the individual, and the thinking of a generation, communities, or epoch, is not infallible and therefore cannot constitute the sole foundation of collective existence. Tradition and even preconceived notions (which still contain a kind of practical wisdom, useful as an expeditionary tool) are called upon to help reason." [9]

Moreover, in his claims, "not even the most eminent people, nor the political geniuses produce perfect plans and projects, and as such no society can be based solely on the theoretical wisdom of a single generation or doctrine." [10]

THE ACTIVITY OF COMMON LAW LAWYERS AND LAWYERS IN ROMAN-GERMAN LAW

Taking into account the activity of lawyers qualified in common-low and those of Roman-German law, we can say that the differences between the two systems of law also influence and the way in which the lawyers operate. The two legal cultures have different styles of solving of concrete cases. A highlight of these is made by Neil McGregor, managing partner at McGregor and Partners S.C.A. in an interview with Bizlawyer. [11]

A first difference is that continental law only limits contracts to the code of law and other normative acts as opposed to common-law. The latter offers greater freedom of creation, especially since the volume and speed with which contracts are created nowadays lead to an impossibility of legislation to keep up with the needs of the market. Starting from the idea that jurisprudence is not a source of law in continental law, one can notice the main differences of mentality of lawyers in both jurisdictions. Thus, they start from different principles of how the judge will interpret certain contractual clauses, in common-law, emphasizing the principle of priority of external behaviour over the internal will of the parties, which leads to greater flexibility of the English lawyer as opposed to the continental lawyer who is rather technical, seeking to cover his arguments with the help of laws and documents. While the Continental lawyer is paying close attention to complying with the legality of the contract in order not to introduce a null or void clause, the English lawyer is more focused on how to execute obligations in order to get the most benefit for his client.

In British law, it is not necessary to enter into the contract in a certain form. What matters is the clear wording of the rights and obligations that the parties have agreed upon. From this point of view, the position of the English lawyer is more advantageous, and he has the possibility to negotiate clauses that clearly highlight the will of the parties.

Another difference is that in English law priority is given to the reparation of the damage by providing material damages, while continental law prioritizes the natural execution of obligations

CONCLUSION

In view of the above, it is noted that the features of each system create a specific legal mentality. This idea is also supported by René David's statement that "When a lawyer formed in the school of a particular legal system feels he does not understand anything from a foreign legal system, that is the best sign that he belongs to a different law family" [12].

It is noteworthy that due to an accelerated globalization, the two systems of law are increasingly intermingling, so that the Roman-German law has begun to reconsider the judicial precedent, while in the law system based on common-law, juridical legislation is becoming more and more important.

Considering this, we conclude by saying that the approach to this issue was done in a balanced manner without exaggerating one idea or another in the desire to emphasize that the right is a social phenomenon that has the role of protecting the individual by adapting to the individual. Law is a person's defender by following social relations, not constraining them.

References:

[1] Theory specific to the anglo-saxon law system
[2] Theory specific to the romano-germanic law system.
[3] Lidia Barac, Elemente de teoria dreptului, Ed. All Beck, 2001, București, p. 149
[4] Idem
[5] Lidia Barac, op. cit. p. 151
[6] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, Teoria generală a Dreptului, Ediția a 2-a, Ed. C.H.Beck, București 2008, p. 452
[7] Adrian Paul Iliescu, Mihail-Radu Solcan, Limitele puterii, Ed. All București, 1994, p. 27-28
[8] Adrian Paul Iliescu, Mihail-Radu Solcan, op.cit. Apud David Hume Essays Moral, Political and Literary, edited by Eugene F. Miller, ediția Liberty Classics, Indianapolis, 1987, p. 260
[9] Adrian Paul Iliescu, Mihail-Radu Solcan, op.cit. Apud Edmund Burke, Reflections în the Revolution in France, volum editat în seria The Harvard Classics, şi publicat de P.F.Collier and Son Corporation, New York, 1969
[10] Idem
[11] A se vederea http://www.bizlawyer.ro/stiri/piata-avocaturii/stilul-anglo-saxon-vs-stilul-romano-germanic-in-avocatura-diferente-de-mentalitateti-de-abordare-a-contractelor-capcanele-la-care-trebuie-sa-fie-atenti-avocatii-atunci-cand-se-afla-de-cealalta-parte-a-mesei-cu-un-avocat-britanic
[12] René David, Camille Jauffret Spinosi, „Les grands systémes de droit contemporains”, Ed. Dalloz, 2002, pag. 18