SOME CONSIDERATIONS REGARDING THE RULE OF LAW, RIGHTEOUSNESS, LAW AND JUSTICE (I)

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Abstract: *The state creates and, at the same time, finds its essence in the law, which configures the way it is organized, its role and actions.*

Subjective law cannot exist outside the rule of law, outside objective law that recognizes and guarantees its fulfillment, inclusively through the state mechanisms of coercion.

Taking into account the trend considering, all most exclusively, the justice as civil service, and the recent decisions issued by the European Court of Human Rights regarding Romania, we come to the conclusion that justifies and even makes necessary some observations and clarifications on the functions of the state and justice, and on the tasks of each state authorities – separately and in balance – for achievement of the regulatory role of the law.

Keywords: *rule of law, righteousness, law, justice, judicial system, juridical consciousness.*

1. Introductive considerations

There are some questions that represented constant preoccupations in the theory and philosophy of law, and the answer given, at one point or another, depended, without any doubt, on the evolution of society, on the way the regulator role of the state was understood, on the moral of the epoch and on the level of juridical consciousness.

What is authority? What is the source of subjective rights? What is the law? Of what comprises the act of justice? Here are a few problems that seek their answers for millenniums and that are still topical.

To these problems others were added, later, just as disorienting: What must be understood through the separation and equilibrium of the powers in state? Which is the role of the legislator and to what extent are the powers of the judge applicable? How are the laws elaborated and how should they be applied? How should a modern, efficient and credible judicial system be organized and how should it function in a constitutional state? What is being understood by an equitable lawsuit? Which are the sources of the judge's independence and impartiality? How important is educating the citizens and raising their awareness? What is the responsibility of the state? If and to what extent the judge is liable?

One part of the solution to these problems can be found in the Fundamental Law, in the content of the legislation acts that have as object the technical

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regulation in issuing legislation acts, in the law for judiciary organization, in the codes of curial proceedings, in the deontological codes or in different strategies, projects, and programs, as well as in judicial international or regional documents regarding the human rights.

Strictly referring to the Romanian judicial system, it can be observed, at present, that the attention is directed, mainly, to creating a legislative framework necessary for ensuring an equitable lawsuit, in the meaning of art. 6 of the European Convention for Human Rights Protection and of fundamental freedoms, as well as, in light of the European Court of Human Rights jurisprudence in regards to Romania, to finding solutions – legislative or of other nature – for problems, considered systemic, regarding the excessive duration of proceedings and non unitary practice of the court instances.

Following the analysis of the performance criteria based on which is appreciated the activity of the systems, the judicial organizations, in general, and Romanian judicial system, in particular, it is being noticed that the accent is placed on the quantitative or formal elements (duration of proceedings, their costs, access to court instance, level of satisfaction among the litigants regarding the services offered by the court instances, etc.), and the quality standards, even where they exist, seem to pass somehow between brackets the ultimate rationality, the profound meaning of the justice act.

This tendency to consider justice almost exclusively a public service, as well as some recent decrees of the European Court of Human Rights regarding Romania, we believe justify and even make necessary some observations regarding the functions of justice.

As professor E. Herovanu shows, justice must be perceived not just from the point of view of its judicial function, as distributive justice, but also, or maybe even more, as commutative justice, as virtue, the last and supreme expression of law[1].

As in any scientific undertaking clarifying the concepts is essential, we will try, first, to make a review on the different senses the notions mentioned in the title of the present article have gotten in different epochs.

2. The concept of law and its meanings

The law, as professor Matei Cantacuzino was saying, "is a discipline, namely the self-regulation of human actions, as these actions regard directly or indirectly the relations with other human beings or with the social group, or more exactly with the diverse social groups from which they belong [...] This mutual self-regulation of human actions – necessarily mutual, as it is a requirement of human relations – can be seen from three different points of view, namely: the first point of view raises immediately the following question – to which norms does the judicial discipline corresponds at one defined moment and in a defined environment; the answer to this question represents the study of *positive* law. This study suggests a second question regarding the origin of current norms and their transformation and evolution during time; the answer to this question represents the *historical* part of the study. But once this elaboration is done, there

[1] E. Herovanu, *Principiile procedurei judiciare,* Bucharest, 1932, p. 22-23.

will remain a third curiosity to be satisfied, and this curiosity, of *psychological* nature, regards the notion of law in its primordial essence"[1].

The law can be analyzed in the light of the three meanings of the notion, namely: *objective law*, understood as all the norms or conduct regulation established or sanctioned by the state within its legislative function and whose enforcement and respect is assured through the exercise of the other functions of the state – administrative and judicial; *subjective law*, understood as the possibility recognized by the law to the legal subject (natural or legal person) to have a certain conduct, to pretend other legal subjects an appropriate conduct, and, in case of need, to resort to justice, to the constraining power of the stat, and finally, *the science of law*.

Defining the notion of law has been proved, in time, to be an approach more complicated than it might seem on a first glance.

It is unanimously accepted that the action of individuals in society cannot be chaotic, but must be ordered, organized, the desideratum of social order being realized by respecting, for the common welfare, the rules of law.

The rules of law are rules of conduct, general, abstract and compulsory, laid down by the state and which, if not respected free-willingly, can be brought to fulfillment by the constraining power of the state.

"The rules of law – considers H. Kelsen – are not [...] phrases, nor regarding future events, nor past events. They refer, usually, to a future human behavior, but don't tell anything about it, but they prescribe it, they empower or allow it"[2].

The state and the law are closely related, support and condition one another. The state creates the law, and, in the same time, finds its essence in the law, which configures the way it is organized, its role and actions.

Individuals, recipients of the rule of law, become actors with vocation to play a role on the scene of the juridical life, gaining the quality of subjects of law that participate in the legal relationships, as carriers of rights and obligations.

The term person (derived from *persona*, the mask that actors wore in ancient theatre), which usually designates the individual, the human being as an indissoluble unit in all its structures, has not only a sociological acknowledgement, in which the human being is placed in relation with society, but also a legal acknowledgment, in which the human being appears as legal subject, having rights and obligations[3].

Therefore, the rules of substantive law recognize subjective rights to individuals, rights to which correlative obligations correspond.

As it is not possible for human beings to live in a society without their passions and interests raising disputes, when the rules of objective law are not abided, and the subjective rights cannot be achieved, the right gains a new character, in the form of claim, ultimately the role of establishing the social order being awarded to justice.[4]

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[1] M. B. Cantacuzino, *Elementele dreptului civil,* Bucharest, Publishing House All Beck, 1998, p. 1-2.

[2] H. Kelsen, *Doctrina pură a dreptului,* Bucharest, Publishing House Humanitas, 2000, p. 117.

[3] V. Hanga, *Principiile dreptului privat roman,* Cluj-Napoca, Publishing House Dacia, 1989, p. 49.

[4] V. M. Ciobanu, *Tratat teoretic şi practic de procedură civilă, Vol. I, Teoria generală,* Bucharest, Publishing House Naţional, 1996, p. 8.

Referring to legal order, for whose definition considered essential two landmarks – the rights and conduct rules comprised within the laws –, I. Micescu observed that "order is a form of harmony", and the notion of justice is "the concern of this superior harmony, which the feeling of justice requires"[1].

How can you know, was wondering the professor, if a claim is entitled or not? If it is right because it is compliant with the law, what is the law, and is really the whole law comprised in the laws? To what extent is the law "a work of justice and not a work of force", and which is the method through which, in the conflict between reality (*"the truth that is"*) and justice (*"the truth that has to be"*), the second one can be know.

To these questions others can be added: Why is the rule of law necessary? Which is the relation between objective law and subjective rights? What confers legitimacy to the first one and to what extent can the subjective rights be exercised? What is a human being allowed to accomplish for his biological, material and spiritual growth and development, respecting the rights of others?

3. Law order and subjective rights

Observing that, throughout history, most times, the notion of law was explained through the one of justice is no news, as, usually, the act of justice was identified with "spreading justice".

Sophist, for example, considered that law had no other purpose but to make possible life for individual in society, promoting a politics of force excluding the moral rules.

At the same time, if for Protagoras frugality and the sense of justice, materialized in the respect for the law, represented virtues necessary to any society, outside which the survival of the individual cannot be conceived, Thrasymacos sustained that justice is nothing else but the use of the most powerful one[2].

Aristotle was questioning the equality between the law and justice, both being considered necessary to ensure the equilibrium between extremes. Justice, for Aristotle, is "an absolutely perfect virtue because its exercise is that of a perfect activity; and it is perfect because the one that posses it makes use of it virtue and in favor of others, not just for himself."[3]

At the base of the democratic society, must lay the virtue of wisdom, the only one that eliminates the damaging extremes and the only one capable of avoiding social convulsions. Practical wisdom is the one that "directs the action and its deliberation"[4].

In ancient Rome, if in the time of the Republic, the law represented what the people commanded and constituted (*lex est quod populus iubet atque constituit*), after the instauration of the empire, the source of pozitive right was identified in the will of the emperor (*quod principi placuit legis hsabet vigorem*).

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[1] I. Micescu, *Curs de drept civil*, Publishing House All Beck, Bucharest, 2000, p. 57-58.

[2] N. Popa, I. Dogaru, Gh. Dănişor, D.C. Dănişor, *Filosofia dreptului. Marile curente, 3rd edition*, Bucharest, Publishing House C.H. Beck, 2010, p. 16-17.

[3] Aristotel, *Etica Nicomahică*, Bucharest, Scientific and Encyclopedic Publishing House, 1988, p. 106.

[4] *Ibidem*, p. 142.

Equity and good-faith (*bona fides*) are two concepts that confer the classic Roman law not just efficiency, but also the flexibility requested by a society that has reached her climax[1]. Therefore, as Ulpian was mentioning, the right is governed by three principles: *honeste vivere, alterum non laedere, suum cuique tribuere,* and justice is defined as constant and perpetual will to give everyone what is his (*constans et perpetua voluntas jus suum cuique tribuendi*).

For Cicero, "the right must be gained and cultivated as a value in itself."[2] Love for others, the desire for truth, order and equilibrium being just as many ways of virtue affirmation. The state must be organized having as foundation the public law and moral principles, and cannot last unless the leaders are preoccupied with the common-welfare. At the foundation of the state is the right, which is sustained by justice, understood as social ethic.

"Obedience to rule, to objective law, is a condition of subjective law; to the extent to which the activity of a legal subject is limited, to the same extent it is defended. To this end, the maximum of Cicero is just too exact: *Legum omnes servi sumus, ut liberi esse possimus*"[3].

In the juridical context, the Latin term *ius* was sometimes replaced, with the same signification, by the term *libertas*, being considered that a person that had a right over something or someone was acknowledge as well the freedom in relation to that person or object.

In another epoch, for Kant, the right is the science that limits freedoms in order to bring them into line.

If Montesquieu defined freedom as being "the right to do everything that is allowed by law", starting from the theory of natural right, Robert Owen and Pierre Joseph Proudhon have tempered the importance of individual freedom, underlining, by contrary, the importance of social justice.

Viewed from the legal point of view, freedom presents itself necessary as freedom-relation, acknowledgement that reflects not only the importance of individual affirmation as legal subject, but as well the significance of the context in which he manifests, of the legal relationships that he establishes[4]. The individual does not have an existence independent of the one of the society, but is a social being, the main axiological landmark of any legal system[5].

Only the legal norm sets the foundation and legitimizes the constitution and affirmation of the subjective law, that, otherwise, would be but a simple "unregulated faculty without any value". Subjective law cannot exist outside the rule of law, of objective law, understood as "coordination of freedom in imperative form", because "true freedom begins only when the natural possibility for action is accompanied by guarantee, by the existence of respect"[6].

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[1] V. Hanga, *op.cit*., p. 16.

[2] Cicero, *Despre legi*, Bucharest, Scientific Publishing House, 1983, p. 374.

[3] Giorgio del Vecchio, *Lecţii de filosofie juridică,* 4th edition of the Italian text, translation by J. C. Drăgan, Publishing House Europa Nova, p. 245.

[4] D. C. Dănişor, *Drept constituţional şi instituţii politice, Vol. I, Teoria generală,* Bucharest, Publishing House CH Beck, 2007, p. 538-539.

[5] I. Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat,* Bucureşti, Publishing House CH Beck, 2006, p. 452.

[6] Giorgio del Vecchio, *op.cit.,* 245, 248.

Referring to the connection that can be established between the objective law and the subjective rights, I. Micescu considered rights as the primordial element and laws as a derivative element, observing though that "under the burden of tradition and in the momentum of the French Revolution inspirations, in French authors you will find legislators place in the service of rights; in German authors, you will find rights subordinated to laws"[1].

4. Relation among law, justice and moral. Excess power in elaborating and enforcement of laws

The confusion between the three terms right – law – justice was explained etymologically starting from their Latin origins. It was shown, therefore, that the term *justice* comes from the Latin *juristare*, to rely on law.

In its turn, the word *right* finds its origin in the Latin *directum*, deriving from the verb *dirigere*, to make right, to comply with the rule. But still the Romans used the word *ius* both with the meaning of *right, law* or *justice*. To one opinion, *ius* comes from the verb *jubere*, to command, while Ihering considers that the origin of the term must be sought in the Sanskrit language, language in which the word *ju* has the meaning of connection.

Contradictions in opinions were expressed and in regards to the origin of the word *law*. Some authors claim the provenience of the term is from the Latin *lex*, while others take into consideration the verb *legere*, which means to read, to take notice, what makes the connection with the written law.

Yet, certainly, as it has been showed, the law started by being defined in relation to the moral categories (*ius este ars boni et aequi*), its main purpose being that of bringing legal and social order.

Thinking about the relation between moral and law, about the subtle way in which moral conceptions of the society at a certain moment determine both the form and the content of the laws in which materialize the law rules, but also about the effects that the law generates, in its turn, in the society whose product it is, M. B. Cantacuzino draw the attention on the fact that, even though "during time arbitration and almightiness of the legislators played an important role in the creation of laws, [...] in such a case, lacking the adhesion of the collective consciousness, which remains above the true basis and sources of law, the work of art of the legislator has a character purely formal, necessarily temporarily, and deeply disturbing. Laws cannot be a factor of the subsequent development of life unless they are the product of the collective needs experience. The law does not create neither the economical interest, nor the moral tendencies, of which are composed the human relationships; it recognizes, discovers, foresees, and guides them. It is one of the most serious errors and a source of great sufferings for a people that believes that legal order can be created arbitrary by laws"[2].

Another danger, not few times mentioned, is represented by the phenomena of imitation, of the more or less critical takeover of a regulation of a certain field from the legislation of a state, or even worse, of combining such "important"

[1] I. Micescu, *op. cit.,* p. 54.

[2] M. B. Cantacuzino, *op. cit.,* p. 9-10.

regulations, that prove then, in practice, to be incompatible between them, either among them, either with the autochthon reality on which they must be applied, shortcomings to which are often added errors in translations.

The analysis of the way in which law fulfills its regulating role implies not just the study of the mechanism of creating the law, but also of the process of law enforcement.

In a democratic state, the power comes from the people and belongs to it, and the three types of powers – legislative, executive, and judiciary, separated and in equilibrium, fulfill different functions of the state.

A rule, considered H. Kelsen, "is not valid only when it is totally effective, but when it is effective – therefore applied and rate-fixed – to a certain degree. The possibility of its inefficiency, meaning of existence of certain situations in which it cannot be applied and followed, always exists[1].

We won't insist here on the rules of creating the laws – that can be the sources of some clear, precise principles, beyond any discussions, or, on the contrary, can generate endless controversies – and neither on the way in which the judge is bound to master the science of law, law that he must be able to interpret and apply not only in its letter, mechanical, but also in its spirit, by recourse to legal logic and the principles of law.

However, we consider that it is necessary to underline, even from this introductory part of our study, the harmful character that the excess of power can have not only in the process of creating the law, but also in the process of applying the law. That is why, the task of the judge of bringing to fulfillment a rule of law acknowledged by a norm badly drawn – under the aspect of form or even content (an unfair law, whose application, therefore, cannot be an act of justice) – becomes even so more difficult as, in the process of law realization, the constitutional principle of the separation and equilibrium of powers in state must come first, not being allowed to the one applying the law to overstep the limits of the attributions conferred to the judiciary power, by interference in the domain of another power in the stat (legislative or executive).

[1] H. Kelsen, *op. cit.*, p. 118.