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The Social Reality as a "Given Fact of Law" – Between Modernist and Postmodernist Vision

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Abstract:

Social reality appears as a mosaic in which each element has its genesis and a different pattern, which are correlated, to become in this way a whole with specific dynamics. As a functional component of any society, law is influenced by social changes and seeks to regulate them through legal rules. Given that contemporary society is increasingly driven more by information technology, computing, formalization, globalization, it is often questioned whether the law will face these new challenges and how, based on modernist tradition in lawmaking activity or tilting the balance toward postmodernism? In this respect, the article is trying to find an answer to this question, analyzing the modernist and postmodernist theories regarding the foundation of the regulation solution. In the end, pleads for the passing from the simple decision in the regulation process to the legal decision based on complexity.

Keywords:

social reality, modernist and postmodernist theories, lawmaking activity, regulatory solution.

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1. The connection between social reality and the law

Human society constitutes the result of human activity in determined social-historical conditions. It is a complex system of human relationships, interactions between individuals and human communities meant to achieve the ends of existence.

Humans are by their nature social beings – as Aristotle stated "man is a social animal" – whose tendencies and fundamental instincts lead them to the creation of certain rules of cohabitation, which consolidate themselves within the framework of communities. However, humans are also rational beings and this quality allows them to spontaneously find ways of cooperation (Savu , 2007). Evidently, no social cohabitation is possible in the absence of a minimal system of rules, thus law and society appear at the same time, the former being indispensable to the latter. Roman jurists have first mentioned this undeniable truth. Through adages such as *"ubi societas ibi jus"* and *"ibi societas ubi jus"*, the Romans expressed faith not only in the existence of such a connection, but also in the fact that their law and society were eternal (Popa , 1983).

The law, irrespective of its sort or form is closely connected to the social life and is founded on collective acknowledgement, in the absence of which this correlation between the obligations of some and the rights of others. "The law is innately social, collective both through its exercise as well as its content" (Popa , 1983).

The perpetual quality of this position, which expresses the connection between society and the law exists due to its permanent confirmation throughout history. If the law constitutes a social phenomenon, it means that this quality originates from human cohabitation, since society is nothing else than the result of this cohabitation.

Human society represents a whole with all its elements in motion and interaction, a fact which gives the entire social process the quality of a process in evolution (Popa, Drăgan & Lepădat, 1999). The law experiences a similar ascending dynamic. With the exception of those promoting natural law, most juridical-philosophical systems of thinking have underlined the evolutionary quality of the legal phenomenon considering that the progress of the law is the natural result of society's evolution. Along the same line of thought, M. Djuvara noted "Without knowledge of society we cannot understand the law, the evolution of the

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former explains that of the latter and they happen one along side the other" (Djuvara , 1999).

The current social reality, whereby we understand the all the phenomena, events, situations and current issues that arise and develop in society or, synthetically put, all that takes place in society from an economic, political, moral, spiritual, demographic, technological and juridical point of view, is characterized by extremely quick transformations.

The social reality has the appearance of a mosaic, wherein every element has a different origin, development and evolution, which correlate with one another, to form a whole with a specific dynamic. As a constituent and functional element of any society, the law is influenced by the social changes and transformations which it attempts to regulate through juridical norms.

Sociologists ascertain that these social changes do not directly and immediately influence the evolution and transformations of the law, rather in most cases in a mediated and delayed manner through the action of certain intermediary political, economic and cultural variables. From this perspective, the following situations are identified, at a theoretic level at least: society suffers certain social transformations owed to certain causes outside the law, forcing it to subsequently give them a normative form in consensus with itself; at a given moment, the law evolves before society does, establishing (through its norms and limitations) certain social and structural transformations and changes; in some ages, the law remained behind society, failing to give a normative form to the new changes that had occurred in society (Banciu, 1995).

2. Modernist and postmodernist theories concerning the establishment of the regulatory solution

Throughout time, there has been a constant preoccupation to find a model of elaborating the law, which should correspond to the social realities that are forever changing, because one of the purposes of the law resides in its contribution to include the future in the present. In contemporary society this is more and more difficult to accomplish.

Developing the legal norm, on the basis of the necessities of life constitutes a terribly important activity with profound implications in the regular development of relationships between people. Within the framework of this process, a fundamental role, though not an exclusive

one, belongs to scientific knowledge, juridical theory – especially in modern society. Also, the technical procedures, artifices and practical means of normative construction are relevant. Through these, the requirements of the social life take on the specific form of juridical regulations (Popa, 1998).

We do not propose to make a historical-philosophical incursion in the field of the establishment of the regulatory solution, rather we will analyse a few opinions from the modernist and postmodernist age, that we consider applicable today also.

We find views concerning the development of the law in the twentieth century in Friedrich Carl von Savigny's work "The vocation of our time to create legislation and the science of law" (Savigny, 2006). By researching the internal substance of the law, he finds two aspects that dominate the manner in which the juridical rules are developed. This shows that the development of law is the necessary result to the organization of the nation and its history. The legal norm is not the arbitrary result of human reason, rather the expression of the social, economic, moral, historical requirements etc., without disputing human will and intelligence. The substance of the law takes shape in the conscience of the people, being shaped and changed into a certain form by the specialists, the jurists. The creation of the law can be found within the relation between the substance or content and the form or technique. The content has an essential role. The form is not passive, static, but on the contrary, it gives the substance if the norm a necessary juridical expression. Thus, the technique represents the scientific development of the law, by the jurists, in opposition with its spontaneous creation, in the conscience of the people and in politics (Grigore, 2009).

Important representatives of the modernist conception concerning the elaboration of the law is the French methodologist François Gény, whose theory we ascertain offers the valid criteria for the establishment of the foundation of juridical regulations.

Starting from ideas that are very close to those of the German Neo-Kantians and underlining the lacks in the doctrine of the schools of sociology and positivism, Gény concludes that each norm including the juridical one has a sufficient scientific content, but it is equally the result of the social practice (Mihalcea, 2000).

According to F. Gény, the process of creating the law is in close connection with the notions of "given fact" and "constructed fact" in

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the law. the French sociologist make a clear distinction between what "preexists" the juridical phenomenon and what comes from the exploration of this unknown factor through science and technique. For the activity of creating law, the fundamental element is represented by the "given" of the law, in the discovery and transposition of which the determinative role belongs to the juridical science and technique. As such, according to the French doctrinaire, the development of the law oscillates between the two independent poles: "the given" and the "constructed" (Gény, 1914).

The **"**given fact" of the law is actually represented by the social reality, more precisely by those external manifestations of positive law that give it the substantiality necessary to exist. As all that is scientific, i.e. necessary, universal and immovable, "the given" is the product of rationally processing the reality of the individual's external world.

For F. Gény, whose view we take into account nowadays also, there are four elements that come into the structure of the so-called "given" of the law. These elements form the foundation of any system of law: the real or purely natural "given"; the historic "given"; the rational "given" and the ideal "given". Each of these elements has its own "given fact" of the law, which is represented by nothing more than the components of the social reality, with each one having its own role in establishing the main directions of the positive law .

According to Gény, the real or natural "given" of positive law can be found in those fundamental conditions that are at the foundation of humanity and can be of a physical or moral nature (the climate, the earth, the production, the anatomy and the psyche of a human, the moral aspirations and religious emotions etc.), or of an economic, political or social nature. These realities so not give rise to juridical norms on their own, rather they outline their shape and especially form the necessary environment for the creation of juridical norms (Gény, 1915).

Thus, the "given" of the law appears to be a multiple phenomenon similar to the Roman concept of *jus naturale est quod natura omnia animalia docuit*. This "given" does not mistake itself for the law, but forms its foundation.

The historical "given" is regarded as a natural "given" consolidated by history. The elements of the real or natural "given", in time, give rise to a foundation formed of precepts that serve as a

framework for human conduct, and shape its external aspects (Gény, 1915).

In the opinion of F. Gény, the rational "given" of the law constitutes the fundamental direction which ensures, within the realm of the possible, the scientific development of positive law, represents the essential foundation of classical natural law and consists in the rules of conduct which are obtained by reason from the nature of man and his connections with the world.

Last but not least, the ideal "given" reveals a dynamic element, i.e. the spiritual and moral aspirations of a certain civilization at a certain time. Thus, the ideal "given" is represented by neither concrete realities, nor conditions of reason, nor a historical endowment, rather by a simple tendency towards the desired organization of juridical relations, without having the authority in itself to exercise a decisive influence on pure reason, although it can complete it, by intervening as an essential instrument of progress in the law (Gény, 1915).

Taking into consideration all these aspects, Gény concludes that by showing that the scientific development of the law is nothing more than a coordinate in the discovery of the legal "given". This stage is naturally followed by the technical elaboration of positive law, which implies an ensemble of procedures of juridical technique that form the legal "given". The technical development is seen as the essential part of the law-making process. As such, the legislative technique gives shape to the "constructed" while the "given" expresses the opposite of the former (Gény, 1921).

By analyzing Gény theory, contemporary doctrinaires note that "while science tends to capture as faithful an image of reality, the human structure, art or technique, to the contrary, accomplish new things that do not exist in reality. The field of activity for constructing covers the social and political order. In this context, we ask the question if the law is the "given", the object of science, otherwise put, the object of findings or the "constructed", the technical work. From a historical point of view, the law is obviously the "given", an object of science, as is the old law, the contemporary, national or international law that has been developed" (Craiovan, 2010).

However, the development of positive law involves a construction and from this perspective the juridical norms are the result of technique. The "given" is revealed by science which gives it a general

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orientation, generated by the social realities, meaning the economic, political, cultural and moral aspects etc. which generally determines the content of law. However, the content of the law has to be shaped so that it becomes a juridical norm, applicable, since it is above all a matter of juridical technique (Gény, 1921).

Speaking for ourselves, we consider that although Gény's theory is outdated, its fundamental determinations have scientific authority even today. What Jean Dabin and Paul Roubier have expressed later was nothing other than a resumption of the same ideas, an adaptation of these to the new social realities.

We ascertain that identifying the social realities as a given of the law in the law-making activities represents a minimal condition without which it would be exposed to subjectivism and the arbitrary.

In the same way, a French doctrinaire ascertained that the "given" must be understood as an ensemble of previous factors existing outside the normative activity which directs the process of developing the norm, on scientific coordinates. Developing the norm is dependent, in itself on the nature of social and economic problems that arise in relations between humans, on the concrete result following the principles of ethics, on the feeling of justice and on political opportunity (De la Marnierre, 1976).

Taking into consideration that contemporary society is governed more and more by information, computerization, formalization, globalization, one wonders more often whether the law can face all these new challenges and in what manner, either based on modernist tradition or inclining towards postmodernist? Therefore, a particular problem in developing the law, which receives different solutions, most of which focus on shifting from the simple decision in the juridical regulation process to the juridical decision based on complexity.

Amongst the doctrinaires that have already formulated new paradigms in this field we find J. Habermas who discusses the communicational paradigm of the law. In his opinion, the communicational activity is a constructive one for society. Therefore, the law must be defined from a communicational point of view, by replacing the monologue of lawmaking activities with the dialogue, thus creating an agreement between the juridical norms and the current world as a condition that validates the norms (Habermas, 1997).

Vittorio Villa, an Italian theorist, also forms another opinion. Starting from the idea of juridical, descriptive knowledge, it passively reduces the law to noticeable actions, it reaches a constructivist conviction, according to which juridical knowledge involves an intervention on reality, itself (Villa, 1994).

In today's Romanian society we are witnessing a true crisis of the law which is generated among other things and by the improper manner in which the legal norm is developed. This norm is no longer founded on the knowledge of reality and the adequate use of the legislative technique, so that there is a correspondence between the social reality and the reality reflected in the legal norm. Thus, the act of lawmaking constrains reality rather than regulate it. Consequently, reality is forced to allow and to be able to absorb more and more rules. The law in no longer created to regulate a certain reality, rather to create a parallel reality most often. The legislator no longer decides on reality itself and becomes a mere "fabricator" of realities.

In order to surpass this situation, theorists propose firstly a "reconstruction" of the law, a re-founding of the juridical universe (Goyard-Fabre, 1998).

We ascertain that this new vision should dominate the legislative activity, that it should begin from deciphering the particularities of every level of the social existence to identifying its functions and the connection and correlation of the imperatives of the human conduct in each compartment of the human existence. All these require first of all as efficient a use of public policies and not just, so that there can be a proper scientific research of the social realities, more precisely the juridical decision must be based on complexity. In this sense, I. Vida shows us that "the fundamental rule of a complex analysis must lead to the harmonization of the individual conduct in order to achieve the common goals of the inhabitants, to the sacrifice of individualism which affects the certainty of living in common within the human collectiveness or which affects the tranquility and security of community life" (Vida, 2010).

The author specifies further that "the problematic of reaching a complex decision pertains to the technical side of the legislative field. Within its framework, it is necessary to establish which problem shall be regulated; what follows is its inclusion in the multitude of possible plans; in this way, what follows is establishing the juridical solution for every

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plan; finally, there is the correlation of juridical solutions, in order to obtain a just and legal solution, capable of meeting the requirements of the juridical security" (Vida, 2010).

3. Conclusions

In conclusion, we ascertain that the activities of constructing the law should be simultaneously both an intellectual as well as a determined undertaking. We must not lose sight of the complexity of the social "given" and the fact that it is formed of numerous elements that belong to both the material and the spiritual world. The development of the law should not be limited only to its social determination because thus we misunderstand the relation between the action of social conditioning and that of rationally creating law, and thereby create the image of a passive legislator, who does nothing but copy social realities, without being capable of answering for the results of his regulating activities. On the other side, lawmaking without acknowledging the existence of the "social given" can by its nature create an unjust and arbitrary juridical norm, and the legislator would seem like the absolute master over the destiny of man, which cannot be accepted.

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