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THE LAW JURISDICTION AND CERTAIN DYSFUNCTIONS IN ITS ENFORCEMENT

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Abstract: *The compulsory, imperative power confers the law authority hence the safety of laws regarding the rule of law. At the same time, laws have certain shortcomings and some come from the legal process itself, others from their wording, the style of the laws or their not being correlated or the lack of legal standards in their enforcement. This leads in many cases to dysfunctions in enforcing the law. This study presents only some consequences of the shortcomings in the enforcement of laws.*

Key words: *authority of law, source of law, law insecurity, shortcomings of the laws, law dysfunctions*

1. Introduction

"The law is at the heart of the pyramid. But it maintains a special relationship with other written sources, situated above and below it in the hierarchy of norms [7] ".

Indeed, at present, the law has the greatest importance in the system of normative acts and regulations.

The content of law must find appropriate ways of expression. Hegel wrote, "The law goes in its factual existence first by shape, by being put into law ...".

This circumstance gives the law the opportunity to be known and, as a consequence, to be respected and enforced in specific cases.

In the theory of law and legal sciences, these specific ways of expressing the content of law are called roots of law and sources of law.

Currently, the law is of utmost importance in the system of law sources. The prominent place the regulatory document occupies in the system of law sources is explained by historical causes as well as through concepts which are related to the content and form characteristics of this legal source, the law, in relation to the other sources.

When using the formula "the legislation as a source of law", one should consider the broad sense of the concept of law (as act of mandatory power) and not in its restricted sense (the act that the Parliament adopts).

The enactment includes, first, the law passed by the Parliament but is not limited to this.

The law, which has several varieties (the organic law, the ordinary law, the finance law, the social security financing law) is the act of the legislature that is, in a parliamentary democracy, the expression of the people's will.

In the broad sense of the term, the law means any mandatory rule of law and includes any source of law.

The mandatory power of the regulatory act confers the law the unmistakable attribute of its authority in the system of the written law. H. Kelsen, an Austrian lawyer, seeking the origin of the compulsory essence of the rule builds "the pure doctrine of law [6] "according to the image of a pyramid in which each rule gets its" validity "from a superior rule that founds, in its turn, the validity of the lower standard".

Through successive regressions and accessions, thinking reaches the top of the pyramid, dominated, according to Kelsen, by the Grund norm (the fundamental form), which led to the "normative" theory.

This exaggeration through excessive rationalism reflects the idea that the rule is no longer a content but a form of thinking, "The fundamental form" always remains a "mysterious" presence, designed to ensure the deficiency of the Kelsian pyramid.

The safety of laws on the organization of the rule of law and the possibility of their immediate enforcement confers them an incontestable superiority over the other sources of law (especially to the custom).

The law is a true indication in legal progress, that peoples have moved from simple customary law practices to the written law. The right as organizer of social life could not be conceived in the absence of the authority of the laws emanating from the legislative institutions.

Legislation is the source of law created by the public authority bodies vested with legislative powers (the Parliament, the Government, local administrative bodies), which contains compulsory rules whose application can be achieved, if necessary, by the coercive force of state intervention.

The predominant position of the law in the modern system of regulatory documents is determined by the need to ensure the safety and the stability of the legal framework. Society certainly experiences the need for security, clarity and order in inter-social relationships, relationships that are characterized by a high degree of complexity, by an accelerated rate concerning the progress of social productive ties, the exchange of activities.

The rapid changes taking place in the modern industrial society generate a kind of uncertainty regarding the law, multiple uncertainties resulting from this accelerated trend of social changes.

For the acute need for safety, a safe and permanent measure becomes necessary. The law comes from the uncertainty of law under the rapid changes that occur in today's society.

The court order has authority (power) of res judicata. It means that the judgment in the same case cannot be reopened later, thus ensuring the stability and security of legal relations.

The authority and hence the predominance of law arise from the situation that it lends itself more easily to the application of development and systematization methods - computerized methods, legal programs, etc.

The system of regulatory documents is composed of laws: laws (in the narrow sense), decrees, judgments and orders of the government, regulations and orders of ministries, decisions and rulings of local administrative bodies.

The central place in the system of regulatory documents it occupied by laws.

It is normal to be so, if we consider the fact that the law is the regulatory document elaborated by the Parliament, the legislative power body which expresses the will and the interests of voters.

Other general acts, laws in the broader sense, legislated in accordance with the normative powers (with regulated capacity), distributed through the Constitution to other bodies (the executive

ones) should be subordinated to the laws passed by the Parliament.

They are developed with a view to the execution of laws. The law has all the characteristics of the rule of law which oppose it to a scientific or moral law [8] abstract, general, permanent and compulsory.

This last characteristic should be noted: a law is imperative when individuals are not allowed to deviate from it by convention; it is suppletory (or dispositive) when a manifestation of the contrary will is sufficient in order to remove it.

The distinctive aspects of the law reunite at least three specific features: it has a special elaboration procedure, it always has a normative character, it has a primary and originary regulatory jurisdiction, in the sense that the social relations must find regulatory reflection primarily in the content of the laws and not in other regulatory documents.

The authority and the status of law arise from the fact that it is even automatically included in the formula of justice which brings together three dimensions: the law, lawfulness and law enforcement [4]. Essentially, the formula of justice could be this: to give everyone what is his/hers.

While justice is the very purpose of the justice act, the law can only be a means to meet this end. However, in practice, the procedure is often inappropriate, which turns this value-means which is the law into a value-end.

Hence the frustration of people who find themselves set somewhere in a legal text that has nothing to do with the reason for which they addressed justice, and do not understand why the latter cannot solve their problems.

The judge correctly and conscientiously fulfils her/his duty incumbent to her/him by the law which s/he abides. Still, people do not specifically ask for law enforcement, they come to justice because they want justice and then, we think it is appropriate to ask ourselves whether the justice mechanism did not turn into a real stereotype that functions mechanically only by law enforcement.

The resort to Montesquieu could help us claim that "something is not right because it is the law, but it must be the law because it is just." The law must be consistent with reality, it is made precisely in order to help people and to dominate them from somewhere above.

The essential and decisive moment in the application of law is when you're right and the law does not render you justice, this is how difference is made between judges. A correct judge applies the law without being only interested in justice, he does his job, but a good judge does justice even if he risks sometimes not to enforce the law very precisely, but he does his duty to judge in its spirit.

The law is nothing but a manifestation of real life, and when the reality we live in lacks correspondence between the law and the sense of justice, nothing should stop a judge from proceeding independently in assessing what is just, even if he has to adjust a law through the interpretation that she/he gives to it.

Otherwise, we allow people who come to court only the opportunity to appreciate based on their natural ability what is just or unjust, and from there to the strong distrust in justice, there is only one step.

Judgments must be true guidelines in forming the sense of justice and not in that of forming an exaggerated legality.

In a relationship in which they are placed, the law and the person should undoubtedly specify what matters most in order to avoid this state of confusion that is reflected at society level. We believe that what matters is the person.

If we choose our values according to the importance we give to certain things, we can say that the highest value for most

members of society is the person and not the law, and the parliament that makes the laws [5], and the government that enforces them, and the judges that use them to do justice, because this is how it must be.

The mere legality is insufficient as long as it is not legitimate and it remains a simple legalism based on formalism.

The society feels that the state subject to the rule of law implies that lawfulness should not be regarded as the central value of law, this only becoming an accessory value, a value-means compared to the value-purpose represented by the individual.

And what is sanctioned by the people is the fact that the judge gets to be more concerned with legal norms, their application, without taking into account the reality.

Truth, justice cannot be in law but in reality that is brought before justice. The supreme value that must be respected is not the law, but the dignity of the person and the protection of their rights and freedoms.

The poor perception of justice comes from the fact that people expect justice from the court of law and receive only the justification of a law. Justice must exist for a reason: that of doing justice.

The way justice operates may be deficient, not only by the tension of two poles (two parties). It would be right that the functioning of justice be done by charging it from a single source of energy: moral principles.

They should be the fitting of any law, and of any act of justice, so that people do not wander in search of justice.

The law can never take the place of morality, because the law can never create virtuous people, but only cautious and clever people. That is why justice must therefore be firstly a measure for us and only then for the others.

Dysfunctions in the application of law derive from the shortcomings of the law [3] .A saying postulates that "the law is a necessary evil." As imperfect as it is, it is the condition of "freedom ".However, certain laws suffer either from congenital defects or faults inherent and independent of their established rules (which can be fundamentally good), revealing, in addition, the poor customs acquired by the government, almost always at the root of these texts, and by the Parliament [7] .Two French authors, Ph. Malaurie and Patrick Morvan reveal six categories of legislative shortcomings:

1. The laws "that include various provisions" for example the laws that include various social measures or economic and financial provisions. These contain, according to the opinion of the two French lawyers, university professors, "a considerable quantity of heteroclitic provisions."

There are "supermarket" laws, obese and without coherence. Lawmakers, justly assert the idea that the authors mentioned, vote projects whose content they ignore, the law no longer expresses the general will (not even fictionally), but that of ministerial services [7] .

2. The circumstantial law. They regulate individual cases and grant privileges (private law).The shortcomings of this law are seen in the fact that they favour private interests, the legislature loses sight of the general interest, abuses of its legitimacy and compromises the dignity of the law.

The result: an influential pressure group can obtain "its" law, even breaching fundamental freedoms.

3. Temporary laws. These treat the law as an interim product and do not have vocational firmness.

4. Retroactive laws and Validation laws favour legal uncertainty and violate the scope of judicial authority.

5. Symbolic laws. It is the situation in which the law does not change the positive law but the legislature takes refuge in symbolism rather than face the fundamental realities (unemployment, poverty, economic crisis, urban planning).

6. The laws correcting the laws enacted a short time before. They betray the poor quality of legislation and the rush in their issuing.

In our opinion, this picture of the shortcomings of the law with deep consequences in conducting, enforcing the law may be attached several other major shortcomings: the ambiguous legal texts, the mismatching of laws, the lack of sufficient legal standards.

Without them, many concepts covered in the content of the laws receive conflicting interpretations in an intuitive and empirical manner from judges, being the object of equivocal assessments. It is the case of the notions of "possible" "normal" "reasonable" “excessive’’ “significant” "’sufficient” “notorious” ”serious” "’manifesto” "morals" "good father of a family" "family interest", "interest of the child ","business interest "," seriousness of the offense", "severity of the damage "," night time ","obscene", "right now", "soon", etc.

Hence, in the absence of a standard as a reference of reality, when enforcing the law, the judge is inclined to use discretionary power in assessing and measuring behaviour and situations in a case or another.

We assert that is necessary to create a discipline of Legal Education according to the French model which would have the purpose of making laws and regulations so that the legislature and not someone else should define the norm of interpretation, of incrimination, to develop the legal standards of the terms used in laws and to provide a good legal determination and evaluation of them in the judicial process.

"In the doctrine, it was proposed that where the legislature has not yet defined the meaning of technical terms that the criterion of "the living law" be used, namely the law created by case law, giving an unlimited credit to the way in which case law has interpreted the respective technical term (especially the case law of the Court of Cassation).

It is not difficult to see that in this case, jurisprudence is given a decisive role in making up for the legislature's shortcomings (which had abdicated from its duty to clarify technical terms), which exceeds its functions [9] .

People do not ask specifically for the enforcement of the law, they come to justice because they want justice.

It is appropriate to ask ourselves whether the justice mechanism has not turned into a real stereotype that works mechanically only by enforcing the law?

"The problem of interpreting the law is primarily related to law enforcement. Often, the problem of law enforcement is reduced to the problem of settling litigations by the courts of law, the law enforcement act being close to a litigious situation and a pre-existence rule".

This view is inaccurate because the enforcement of the law aims at the fulfilment of purposes in terms of social life, and the interpretation of the law is essential in the implementation of the law; we will say then that law enforcement is not satisfactory, for it involves the interpretation of the law [1].

Indeed, the application of the law aims at its finality within the scope of social life and the interpretation of the law is indispensable in the application of law.

That's why law enforcement is unsatisfactory for it involves the interpretation of the law. From here numerous discussions start, particularly in terms of the perception of justice.

The proper functioning of justice should be done by feeding it from a single power source and that source can only be moral principles.

They must be the backbone of any law and of any act of justice for people not to wander in search of justice. The law will never take the place of morality, because the law will never create virtuous people, but cautious and clever people.

Justice, as a public service has a well-defined role in the realization of justice. In the fundamental law of each state, justice is one of the essential attributes of the state, being embodied in various expressions "judicial power" "judicial authority" "jurisdictional authority" etc.

The law is distinguished by some specific features: it has a special elaboration procedure, it has a primary and originary jurisdiction, in the sense that the social relationships must find regulatory reflection in a primordial sense in the content of laws and not that of other regulatory documents.

Before measuring the area of its range in time, the law must be defined. The word law [2] has multiple meanings (polysemy).

Etymology: from the Latin "lex" which apparently comes from the verb "to tie", but there are two corresponding verbs "legare" and "legere". "Legare" means "to bind", to compel. In this sense, the law would designate any rule that binds, written or not. "Legere" means "to assemble, to gather", the sense being in this case that the law is a rule that we read, written by a higher authority of religious people in the early times (the Tables of the law were written by Moses and Aaron, being dictated to them by the Divinity).

The laws need to mirror the state of a nation, to reflect its degree of development and understanding.

Only in this way can they benefit from the support of the majority, who would adhere to the sense of justice and safety that laws generate and instil in those who believe in social values that laws protect and coordinate for the good functioning of society and for the creation of a climate of understanding, based on the coexistence of freedom.

The law, prevalent today in law systems, contributed to the progress of human relationships within the community and to the development of society from ancient times to the present, when the state subject to the rule of law is the predominant form of organization based on respect for individual rights within the broader framework of respecting the rights of the entire society.

Hegel wrote in this regard: "The sun and the planets have their own laws, but they are not known; the barbarians are governed by instincts, morals, feelings, but they are not aware of this".

Through the fact that the law is established and known, all the accidental issues connected to feeling, to subjective opinions, to various forms of vengeance, to mercy, to selfishness are eliminated and only thus the law acquires its true identification and attains the true honour it deserves.

Only through the discipline of understanding does it become capable of universality, as in law enforcement, conflict arises in the fact that the judge's intelligence has an influence, for this is an absolute necessity, otherwise execution would be something completely mechanical.

The need to understand, in other terms, the interpretation of laws, is accurately depicted by the remarkable lawyer and economist Friedrich Hayek, Nobel laureate when stating that the judge's mission "is to explore the implications contained in the spirit of the whole system of legal rules in force or to express as a general rule what had not been explicit enough previously ".

The shortcomings of law are suggestively encompassed in the popular expression "law is a necessary evil." But, no matter how imperfect it may be, the law is the condition of freedom, it is the one which frees people. The condition is to admit that there is no true freedom without constraint.

In this respect, the law, as the distinguished jurist Eugene Speranța remarked, is like an idea that possesses the individual all his life, which influences his whole conduct.

Moreover, without ideas, without ideals of righteousness, justice, equity, the human life has no sense or goes in a wrong direction, it may fail.

Without justice, that is without justice and equity, the law cannot be understood, it would only be a means of torture among people, and not a means of peaceful coexistence among them.

Deviations from the social order can not leave indifferent the existing institutions responsible at a social level, in the sense of these not intervening.

It is therefore required to generate and regulate (renew) certain coercive mechanisms which would lead to the observance of rules and standards of conduct set by the agreement of the majority of members that comprise the social community, both the legal ones, as well as of those that refer to habits, customs, duties or civic responsibilities.

When individuals' adherence is manifested towards all existing rules in a legal system, the legality of rules involves the presumption of their legitimacy. In this regard, a number of views expressed in the legal literature consider that a legal norm will necessarily be valid and effective according to the criteria of legality (formal validity) or that of legitimacy (informal validity), expressed by the degree of adhesion of the individuals regarding rules.

However, none of the two forms of recognition, reception and adhesion regarding rules necessarily implies the other, although they tend to converge in the legal system regarded in space and time.

The effectiveness and functionality of a legal system are not reduced to the mere adherence to a set of rules and legal requirements, but requires the identification of "secondary" rules which result from the application of the "primary" rules at the level of the different individuals and social groups. So, in assessing the legal and legitimate validity of the legal rules, three components that participate at social scale must be analysed: the legislator, the judge and the social actors.

1. Most experts agree that defining, clarifying and interpreting the legal rules is concomitantly based on two principles: that of rationality and that of the sovereignty of the legislator.The legislator is regarded as the personification of the legal system.

2. Those who carry into effect the enforcement and compliance of rules (the judge). In the judicial system, the judge is the most typical "character", having the duty to enforce the law and to make justice by ensuring the legality and legitimacy of the solutions given in conflicts or disputes between individuals, groups and social institutions.

It is a kind of "intermediary" between the author of the rule of law (the legislature) and the social actors who are subject (voluntarily and forced) to rules, having the role to interpret and enforce the law text in the judicial process.

The special position of the judge derives from the situation that, on the one hand, s/he is obliged to give reasons for her/his decisions to the parties involved in the process, in other words to justify both the merits (the justness in relation to the rules), as well as the legality (in relation to the rights and liberties).

3. The individuals who are subjected to the rules and the way they react towards them (social actors). In this case, we include the individuals or social groups to whom the rules are intended and who can accept, bear and respect them or, conversely, they can infringe them.

Consequently, there may be individuals who recognize both the legality and the legitimacy of the rules, which ensures their consensus and adherence, but also individuals who do not acknowledge them, thus being nonconformists, deviants or even delinquents.

The legislation represents therefore a fundamental principle of any legal system, implies complying with the laws and normative acts by all state and non-state institutions and organizations, by all the players authorized to enforce the law, as well as by all individuals in a society.

The law has two basic purposes:

a.To formulate rules of conduct by establishing roles that individuals must meet;

b. To make sure that these rules are observed and respected by using legitimate means of pressure and coercion;

In this way, the law ensures the order and social integration.

From this viewpoint, the validity and effectiveness of law depend to a great extent, on the degree of similarity that exists between:

- the ethical-cultural model that refers to the forces of tradition (ideals, values, feelings, aspirations, the social ones);
- the roles established through the rule of law;
- the needs and aspirations of individuals who perform these roles.

The concordance or the disaccord among the three elements causes at a certain point the law to evolve before the society, generating certain social changes, however it can lag behind society, becoming a factor of social immobility.

When referring to the operation and validity of the law, we aim for two directions. On the one hand, the whole judicial system with all the institutions meant to ensure the execution of law. On the other hand, the democratic institutional system of regulation that can provide on time or late the laws necessary for the operation of areas, of social, economic life, the cohabitation of individuals in a society characterized by order, safety, stability.

The scope of regulation provides, not infrequently, ambiguous laws, although the law must have a degree of generality. In practice the judiciary system faces difficulties arising from laws contradicted by certain orders issued by the ministries in charge. Due to certain gaps and ambiguities, changing the law in the same field is a common practice, resorting to emergency ordinances which are then modified, or, as the law specialists consider, a law must function constantly at least two three decades in order to take effect.

Sources of legislative inefficiency and questions regarding the validity of the law also come from the fact that some laws or parts of their corpus enter into force far beyond the deadline imposed (e.g. the pension indexation according to the current law of pensions).

In judicial practice, we encounter misused laws, improper sentences with the force of *res judicata*. But laws are made in order to be used but not to make way for illegalities. Unfortunately, some officials have acted in this way and have found favourable illegal solutions to some judges.

Another failure in the realization of the law stems from the fact that some laws apply only to certain people and a blind eye is turned to others, which encourages corruption.

Due to the gaps and uncertainties of the laws, the problem of interpreting the laws intervenes, which correlates inextricably with law enforcement. Often, the problem of law enforcement is reduced to the problem of settling the litigations by the courts. This view is precarious because the enforcement of law refers to achieving its functions and aims in terms of social life, and the interpretation of the law becomes essential in its implementation.

The process of law enforcement has a complex character which does not limit to the interpretation of the law. Many arguments testify to this. Thus we invoke the link between the deed and the law, complex connection which requires that any legal solution result from a particular reasoning related to a variety of intellectual methods.

Other arguments derive from the letter and spirit of the texts, from the legal reasoning, from the deed-law or judge-trial report. In this way, the legal phenomenon goes into the concrete relations of social life.

A thorny issue regarding the interpretation of the law is whether this action is dictated only by the need to fill the gaps, the regulatory deficiencies and to regulate the ambiguities of the written rules.

Therefore, the problem of interpreting the law is necessary as an ancillary activity assisting the enforcement of the legislative texts, or does it cover essential aspects of law enforcement in general?

Currently the interpretation of the law actually aims at filling the gaps, detecting the ambiguities, but this activity should not be turned into an end in itself. The interpretation should be designed to increase efficiency and rigour in its substance, of the rule of law, in full agreement with the general purpose of the law so that the right become effective in social life.

The rule of law externalizes judicial order, it represents the formal element that can not be separated from the basis of law, from the foundations and purposes of the legal system. The temptation to legislate everything, even when this is not required, when it is not necessary inevitably causes the complicated invasion of the space for law estimation.

Legal statistics show that the area of laws and regulations of its kind in Romania is currently excessively loaded with tens and hundreds of unnecessary laws, some of them incomprehensible not only for the common people but also by the professionals of law science and practice.

The situation was created in the first decade after the Revolution and was perpetuated and amplified in Romania's EU pre-accession period when hundreds of laws were adopted, some obviously necessary in accordance with the spirit of Community law but others remaining superfluous. Without a radical cleaning in the sense of a radical clearing of the judicial map of unnecessary laws and regulations, the Romanian law today is hindered in the exercise of its mission and true essence.

It is noteworthy what the French specialists (Portalis) assert, that the excessive use of law in the contemporary era depreciate it. The same specialists call this state with expressions such as "legislative inflation", "bulimia of law".

Tacit had already denounced legislative inflation at the beginning of our era. The situation is repeated for the contemporary era is marked more and more by a bulimia of legislation.

The recourse to the rule of law trivializes its essence given the excess of legislation. The rule of law is not intended to regulate all the difficulties and misconceptions, even all conflicts (political, economic, moral, intellectual) even if it is not properly addressed to settling them. A rule

of law should have as one object to say what is wrong and to prohibit it, relating to the shared values received by the society at a time and in a specific country. Unnecessary laws do nothing but to weaken the necessary laws and undermine the certainty and majesty of the law.

The regulation policy is effective in the entirety of elaborations, it is efficient namely successful in the legal practice if it consistently incorporates in any law the fundamental rule of law: obligation and sanction. It governs human activities in a direct manner: requires, forbids or allows, this is why it is mandatory.

"The rule of law is the foundation of the state subject to the rule of law, but it can also result in an excess of law. Then, it produces indirect effects: sometimes prophylactic, other times on the contrary, perverse "[7].

The participatory role of law consists in forming the integrity and ensuring the efficiency of the unity by the mandatory nature of the legal rules implemented in the form of laws, the compulsoriness becoming in this way a powerful organizer of the people's efforts to balance the individual interest with the public one.

The role of law in securing the social action arises from its status as the main instrument for achieving social justice in its three aspects:

1. equality of individuals before the law
2. equal opportunities to access social positions and functions
3. equal distribution of tasks and duties between individuals.

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