THE CREATION OF THE GENERAL LEGAL NORM

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Abstract

The social life supposes some norms, which have the role of an organizing force of the human interactions. As it is known, the law represents the ensemble of some instituted or approbated norms by the state in social and economic conditions very well determined and by its nature is an instrument for the regulation or limitation of the boundless force. The behavioral norms are the main element of the social action. It derives from the society's necessity to accomplish purposefulness resulted from the nature its existence itself: order, harmony and social security.

The state of law reflects the coexistence of two different social entities that cannot be distinguished (the state and the law), of their mutual reports, manifested as relations between power and norms, the first with the domination and obedience trend, and the other one with hindering and primness trend. From there it results that the legitimacy issue of the state's authority with legislating power does not only limits to its preexistent legal status, but it pretends some political and even sociological aspects.

The legal technique consists of methods designed to shape the social into the legal, the behavior rules into binding legal rules, which will ensure the appliance of the law. It supposes a scientific elaboration of the law, "ensuring a technical armor destined to justify all the architectural pieces of the legal construction". The technique is an art which elaborates the formal sources of law because the law appears as a "given" which will have through this technique a normal form.

Thus, the legal norm is not anyway created. The authorities empowered to create the legal norm are held to obey particular proceedings through which the norm is created and several shapes that it must have.

1. The legal norm. Purpose of creating legal rules: the legal order and security

Social life involves rules that have the role as the organizing force of human interaction[1]. As Hegel said "the need for other requires law."[2] Right means a whole set of rules instituted or sanctioned by the state in social and economic well-defined conditions and by its nature is "an instrument for regulating, limiting the infinite strength"[3]. "The judicial, in Professor Nicolae Popa's view, is in other words, an inalienable matter of human existence in certain historical conditions"[4]. In an American paper it is shown that "law is one of the most profound concerns of human civilization, because it provides protection against tyranny and anarchy, it is one of the main societal instruments for the preservation of freedom and order, against arbitrary mixture in the individual interests..."[5].

The standardization of the conduct is, therefore, the primordial element for a social action. It derives from the need of the society to fulfill a purpose stemming from the very rationale of its existence: the order, social harmony and security. A well-known Italian sociologist at the beginning of of the XXth century show that "the order is a social problem, society being impossible without a specific order and discipline, because the need of the mateyness and of the discipline interpenetrate"[6].

Legal and other social rules coexist, so that features of the first category are encountered, in one way or another, in a separate analysis of each social norm. "The legal norm cell is the basic of the law, is the rudimentary legal system", said Professor Nicolae Popa, so the law cannot exist and neither can be explained outside its normative reality[7]. The Legislator creates such a "benchmark" of possible conduct of the law subjects participating in social relations that are in the content of any legal rule.

The rules are the legal representation of the "claims" and "requirements" of the society towards the conduct of its members in certain categories of social relationships, which are designed to defend it by their legal

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[1] Nicolae Popa, Mihai Constantin Eremia, Simona CRISTEA, *The General Theory of Law*, II[nd] Edition, All Beck Publishing, Bucharest, 2005, page 130.
[2] Nicolae Popa, DOGARU Ion Gheorghe DANIS, Dan Claudiu DANIS, *The Philosophy of Law. Major Currents,* All Beck Publishing, Bucharest, 2002, page 23.
[3] Nicolae Popa, *Lectures of Legal Sociology*, Ed University of Bucharest, 1983, page 118.
[4] Nicolae Popa, *Lectures of Legal Sociology* legal work quoted, page 115.
[5] Harold Joseph Berman, *The Historical Background of American Law* in *Talks on American Law*, edited by Harold Berman, New York, 1970, page 3.
[6] Vilfreso PARETTO, *Traité de sociologie générale,* Ed. Payot, Paris, 1917, page 589.
[7] Nicolae Popa, Mihai Constantin Eremia, Simona CRISTEA, *The General Theory of Law*, op., P. 130.

command and by the character of their exactingnesshave the strength to prevent and combat any deviant behavior. Legal relationships that take birth based on the rule of law constitute legal order – as a component part and the nucleus of the social order, as it ensures its balance, the completion guarantee of the essential rights of the individual and the proper functioning of the institutions in the conditions in which in the society many contradictory interests exist. Therefore, the legal norms are the means of achieving the ideal of justice in accordance with the social will which is expressed in the content of its provisions.

In other words, the legal rule appeals or should appeal to a set of internal values, irreducible, with the helplessness of being amended by an outside act, so being "impossible the applianceof the legal rules on the inside forum"[8], set of values[9] without which it is hard to imagine its mechanism oriented towards obtaining an outside human behavior.

The rule of law is, therefore, an abstract construction of high complexity, being built by the one that makes the law, but also by the one that administers it, therefore the last one breaks out the structural components of the legal norm (hypothesis, provision and penalty) form the texts of the normative acts that are describing hypothetical situations and assembles them so as to solve the concrete situation that is deducted to its judgment[10].

Mircea Manolescu in his "*Theory of legal rule*" shows that "in a methodological spirit" the complexity of the legal norm throughtout its standard features, which are solidary between them, that must be satisfied[11]: (1) The legal rule is general, designed for an unspecified number of individual applications, (2) The legal norm is uniform and impersonal, but its administration is subjected to reality, namely by features, (3) The legal rule is objective, namely outside of subjects that are thinking it, but is made in a subjective way by each of those who commanded it, (4) The legal norm pre-exist as a prediction, but it does not exist in reality, only to the extent that its existence is verified by its subsequent compliance, in one effectively consummed case, (5) The legal norm is abstract, but the it governs real cases.

On the other hand, Hans Kelsen assignes to legal norms only two defining features: the *validity* and the *effectiveness*; the first designate the existential condition of the rules and is a *Sollen* (a „should be"), the two

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[8] Mircea Djuvara, *Essays on the Philosophy of Law*, Three Publishing-house, Bucharest, 1997, page 61, taken from Maria Cristina BOLDUREAN, *Law and Rationality*, Ed CH Beck, Bucharest, 2007, p. 29.

[9] H.L.A. HART, Concept of Law, Sigma Publishing, Chisinau, 1999.

[10] Mihaela Elena Fodor, *The Legal Norm in the Processes of the Creation and Application of the Law* in volume *For a General Theory of the State and Law*, Arvin Press Publishing, Cluj-Napoca, 2003, page 253.

[11] Mircea MANOLESCU, *Standard Legal Theory*, The Royal Foundations Magazine, the Official Gazette and Printer's State, Bucharest, 1946, page 7.

expresses their role and take the *Seine*[12]. The conclusion, full of consequences, drawn by Kelsen, is that "the validity of a rule (the *sine qua non* of it) cannot have a foundation other than the validity of another rule"[13], the latter so being a high and a a prior form to the one that it bases. And that norm, being the base for the first, has, in its turn, the foundation of its validity in another norm, placed on a higher position in that judicial order. Therefore, a superior norm is the foundation for the validity of the inferior norm which is instituting, and which it confers bindingness, i.e validity: "The legal order is not a system of legal rules placed all on the same rank, but a building with more floors overlaid ... Its unity results from the connection to those items that are arising from the fact that the validity of a rule that is created under different rules based on it. In turn, the creation of the latter was also regulated by others, which in turn constitutes the foundation of its validity"[14].

Therefore, the definition given by Hans Kelsen to the legal norm is so illustrative of the content of the concept and the production of it: "The norm is the meaning of an act by which a behavior is ordered or allowed and especially with a person who is empowered (by an institution of whose authority is recognized and respected as such in the society) to adopt a certain behavior (...). For the norm expresses an obligation, and the volitional act, whose purpose is the norm, expresses an existence"[15].

2. The legitimacy of public authorities called upon to create rules of law

Legal rules are those that hold the general operation of the various state bodies, thus recognizing the ability of the individual in society. In such respect, the law combines the need and freedom ... It regards that mandatory coordination through rules, being the necessary premise for the coexistence of the freedoms. The aim is the strict observance of the human rights and fundamental freedoms[16].

For a better understanding of the problems of this study, we consider it necessary the attempt to remember, in the contextof the understanding the positive law, which is the legitimacy of state authorities endowed with powers to prepare and answer the question of who, how and in what form are created the legal rules?

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[12] Stefan Georgescu, The Philosophy of Law. A history of the Ideas of the Past 2500 Years, All Beck Publishing, Bucharest, 2001, page 162-163.
[13] Hans KELSEN, *The General Theory of Law and State*, Translated by Anders Wedberg, Cambridge, Harvard University Press, 1945, page 256.
[14] Hans KELSEN, *The General Theory of Law and State* ..., op., page 256.
[15] Hans KELSEN, pure doctrine of law, Ed Humanitas, Bucharest, 2000, p. 34.
[16] Mircea Djuvara, *The General Theory of Law. Rational law, sources and Positive Law*, All Beck Publishing, Bucharest, 1999 page 7.

The problem of knowing which individuals or groups of individuals must issue the law can no longer be the subject of a clean legal analysis, but of a sociological study, because it is difficult to determine exactly who they are, because they vary by historical circumstances, from a society to another and from one moment to another.

Mircea Djuvara believes that the recognition as a valid rule of law, i.e to have a "social efficiency", is "the last reason of its legitimacy" and supposes the existence of the belief that the state which created the rule of law had the power to do that: "a state which is recognized as being legitimate issues commands through its organs, organs, which often are recognized as legitimate by this. Also, even an authority in fact, that due to a higher issue issues provisions, can sometimes be recognized as legitimate"[17].

Therefore, the state body that because of a need because issues general legal rules should be recognized only the legitimacy of the organization and functioning (i.e to be recognized as legitimate). Thus, it will be able to deliver these standards with general and compulsory character for all because it is presumed to have consent from the democratically organized community, even if formally it is not materialized[18]. Such legitimacy can be judged only by reporting its concrete activities to its specific legal status established by the rules, because one of the functions of law and is therefore the organization and legitimacy of social power[19].

The rule of law reflects the coexistence of two separate entities different, but social nedisociabile (state and law), to their mutual relations, manifested as relations between power and norm, first with the trend of domination and submission, and other trends with braking and ordering[20]. So it appears form here that the issue of legitimacy of the state's authorities with regulatory power is not limited to its legal existence, but besides that, she claims, and some political and even sociological aspects.

The relationship between a legitimate governing authority and legitimacy of its right has a directly character because the law is definitely a form of governance, all acts of that authorities are in fact normative rules.

With regard to the role of the legal technic in the process of creating law, based on the social, political and cultural needs that life presents, this

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[17] Mircea Djuvara, *The General Theory of Law. Rational law...* All Ed Beck, Bucharest, 1999, page 529.

[18] Ion Mihalcea, *Valences of the Creative Art of Law*, Conphys Publishing, Ramnicu-Valcea, 2000, page 67. In the Roman-Germanic law system, of the written laws, power to regulation belongs to Parliaments.

[19] Nicolae POPA, Mihai Constantin EREMIA, Simona CRISTEA, *op.cit.,* pp. 117-118.

[20] Sofia POPESCU, The Rule of Law, in the Romanian Law Studies' Magazine, no. 3-4/1990, page 219-233.

represents a "big social resonance" and with "deep implications" action in the normal course of the fundamental relationships between people[21]

Two hundred years ago, legal thinking began to inquire about the theoretical side of the legislative process and to find the answer to the question whether the law was a "given" in addition to any human intervention, or it is "built". François Gèny gives, in this connection, a new targeting for the science of the law, overturning the old method of interpretation known as the exegetics school (exegetics method - which dominates both the doctrine and jurisprudence section of the XIXth century) and replace it with the "scientific method"[22].

The operation of regulation, which is made by the legislative bodies (named "legislator" or "law maker")[23], authorities in this regard, combines two methods: (1) it notes that the social situation at the time that legislates, being an operation of a great complexity, which assumes a very stretched the science of sociology, history and all of the social sciences and circumstances of the society, and (2) after the finding of fact was made, the legislature seeks to give account which is the legal ideal which should apply to such cases in fact, "leaving forever to be inspired by willingly or unwillingly into this latter operation by the legal conscience of the society in question"[24].

The legal technique is consists of ways designed to shape the social into law, rules of conduct into - mandatory rules of law, „ensuring it a tehnique armour mented to justify all the architectural pieces of the legal scaffold"[25]

In the conceptualization phase of the normative acts usually use the following procedures[26]:

- The inventory of the legislation in the field submitted to the future regulation, there are drawbacks referral and assessment of future regulations that are being proposed;
- The preparation of economic and social studies regarding the development and trends of the phenomena and relations that are to be subjected to legal regulation;

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[21] Nicolae POPA, Mihai Constantin EREMIA, Simona CRISTEA, *op.cit.*, p. 182.

[22] In the two monumental works of his "Method of interpretation and private sources in the positive Law" and "Science is a Positive Law".

[23] Nicolae Popa, Mihai Constantin Eremia, Simona CRISTEA, quoted work., page 182. They are primarily legislative bodies, entitled to primary and original regulate the fundamental social relations in society, to organize legal order of a nation or a community of nations.

[24] Mircea Djuvara, *The General Theory of Law. Rational law, sources and Positive Law*, All Beck Publishing, Bucharest, 1999, page 372.

[25] Vladimir HANGA, *Technical and Legal Right*, Lumina Lex Publishing, Bucharest, 2000, page 26.

[26] George BOBOŞ, *General Theory of State Law*, Departments and Pedagogical Publishing, Bucharest, 1983, page 150.

- The examination of the laws of other countries[27].

So, the legal norm is not created anyway. The abilities to create the rule of law are held to respect certain procedures that create the rule and certain shapes that it must take[28].

Therefore, the technique is an art that draws up the formal sources of law because initially, the law appears as a "given" that follows to get through this technique an appropriate shape.

3. The correlation between the principle of legality and the hierarchy of legal norms

What characterizes our system of law is that the legal rules do not all have the same force of applicability[29], so that makes them to be in a regulatory order[30]. This principle of the normative hierarchy, includes, in the liberal vision, two aspects: the existence of a constitution and rule of law, namely the impossibility of any constraints in the absence of a legal act[31].

The mere fact of *the existence of a constitution* determines the limitation of the power of the rules governing the inauguration of the public legitimation title under which the governing command and rules under which power is exercised in optical view of some authors[32], this must be supplemented by a supremacy of the rule that is jurisdictionally guaranteed. The power is no longer the property of those who have it, but a function, such as institutionalizationof it, by itself, as we shall see, a limitation of the randomly[33].

The second aspect of the hierarchization is *the commnadment of the rule of law* (*rule of law*). This law is not a simple act of will, but the expression of reason and a source of justice. As for the scope of the law, its generality is a guarantee of security for citizens because, on the one hand, the rule is the same for everyone, which excludes privileges, and, on the other hand, as it is impersonal, they do not have why to fear that it would be targeted

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[27] Ilariu MREJERU, *The Legislative Technique*, Academy's Publishing-house, Bucharest, 1979, page 29.

[28] I. DOGARU, D.C. DANIS, Gh DANIS, *The General Theory of Law*, The Scientific Publishing-house, Bucharest, 1999, page 124.

[29] We do distinguish the concept of "law enforcement" to see in this respect Nicolae Popa, Mihai Constantin Eremia, Simona CRISTEA, quoted work., page 207; BOBOŞ George, The General Theory of State Law, quoted work., page 162 - 165.

[30] Tudor DRĂGANU, *Acts of Administrative Law*, Scientific Publishing-house, Bucharest, 1959, page 63.

[31] Ion DOGARU, Nicolae Popa, Dan Claudiu DANIS, Sevastian EARRING, *Fundamentals of the Civil Law, Ist Vol.. General Theory*, CH Beck Publishing, Bucharest, 2008, page 48.

[32] Ibidem

[33] Ibidem

the individual measures affected by partiality[34]. Accordingly, there was noticed the omnipotence of the legislator (Art. 61 of the current revised Romanian Constitution[35]) "theorizing his ability to create legal rules by an act of will, which contains a lower dose or more of arbitrary"[36] so that all state organs are subordinated to laws, committed to such key features of the rule of law: the rule of law.

The exercise of the three functions of the state is subjected to compliance with the fundamental principle of legality[37] and the legal level and content different rules in this "regulatory cascade"[38] are subject to some others, ranked in descending order, depending on the issuer (formal criterion ranking) or according to thecontent of the act (material classification criteria). All these are in the same measure, mandatory forming the"block of legality"[39].
Therefore, the rule of law supplemented by the supremacy of the Constitution opposes to the legislature itself. Thus, the law is itself a source of safety[40].
Kelsen puts the question: why a particular rule is part of a certain order? "The reason for the validity, he gives the answer, is the validity of other rules"[41], therefore a norm which is why the reason for the validity of other rules is a higher standard in relation to the lower standard.

The mechanism for achieving legality consists of written sources (Constitution, laws, ordinances by the Government, international treaties, etc.) and unwritten sources (customary, the case law, the doctrine, the general principles of law).

Thus, both the ordering and prioritizing of the written law sources, they are based on the content of the legal standard, but also by the position that helds, in the system of the state structures, the issuing public authority, elements that, cumulative, reflects the degree of acting and putting the hierarchical ladder , namely its legal force[42].

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[34] Georges Le Burda¸ Liberalism, Seuil Publishing-house, Paris, 1979, page 49.
[35] The law for revisioning the Romanian Constitution in 1991, no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758/29 in October 2003.
[36] Mircea MANOLESCU, standard legal theory, the Royal Foundations magazine, the Official Gazette and printer state, Bucharest, 1946, p. 2.
[37] The failure to observe this principle of legality (situated on the constitutional principle of the rule of law) that attract penalty of the absolute nullity, relative or even no to the act.
[38] Lucian CHIRIAC, The compliance with the hierarchical nature of legal rules. Rule of law in volume For a General Theory of the State and Law, Ed Arvin Press, Cluj-Napoca, 2003, p. 171.
[39] P. PRESCATORE, Introduction a la science du droit, Centre Universitaires de L'Etat, Office des imprimes de L'Etat, Luxembourg, 1978, page 180.
[40] Ion DOGARU, Nicolae Popa, Dan Claudiu DANIS, Sevastian EARRING, Fundamentals of the Civil Law, Vol I. General Theory of Law, op., page 49.
[41] Hans KELSEN, The Pure Doctrine of Law, op, page 234
[42] Lucian CHIRIAC, The compliance with the hierarchical nature of legal rules. The rule of law in the volume For a General Theory of State and Law, op., page 172.

On the other hand, if between the various categories of legal rules are contradictions, the question of which of them are applicable, must be raised. The hierarchy of rules is the one that establishes the priority rules in relation to others, reporting some others, and not to the individual. Accordingly, hierarchy represents the normative priority of the relationship between legal rules[43].

From the above, we can conclude that the ranking of legal norms refer only to written sources, not to the unwritten! Moreover, text and art. 4 of Law no. 24/2000 on technical rules for legislative drafting laws[44] provides that "regulations are developed **according to their hierarchy**, by category and the competent public authority to adopt", the text drafted quite ambiguous, because the legislature had to mention that : (1) normative acts always takes the form of written (otherwise, could not be published, and, accordingly, should be non-existent); (2) are set only by the public authority designated only by the Constitution and laws (and any other body and no one may assume their task *iure proprio*).

[43] Ion DOGARU, Nicolae Popa, Dan Claudiu DANIS, Sevastian EARRING, *Fundamentals of the Civil Law*, *Vol I. General Theory of Law*, op., page. 59.

[44] Law no. 24/2000 on technical rules for legislative drafting laws, republished in the Official Gazette of Romania no. 777/2004, Part I, republished in the Official Gazette no. 453/04.07.2007.