

THE LAW AND THE RIGHTS, CONCEPTUAL REVIEW

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Abstract in original language

Definirea dreptului poate reprezenta o încercare atât descurajantă dar în același timp provocatoare, deoarece, așa cum spunea Augustin despre timp, ce este dreptul știi dacă nu te întreabă nimeni, dar dacă dorești să explici această știință a ta constăți că îl ignori . Pot fi date multe definiții ale dreptului, acestea arată că ori nu știm ceea ce este dreptul, ori el este privit mereu din alt unghi de vedere și spunem atunci că acela este cel corect și este ceea ce este.

Key words in original language

Drept; drepturi.

Abstract

Defining the right can represent a helpless trial but in the same time challenging, because, as Augustin said about the time, what is right you know without being asked, but if you want to explain your own knowledge you realise that you can't. We have a lot of definitions of the law , this means that either we don't know what it is, or we can see it always from different points of view and we say that is the right one and it is what it is.

Key words

Law; rights.

To define the law can represent a discouragement trying but, in the same time, a challenge, because, as Augustin said about time, you know what the right is when no one asks, but if you want to explain this science you'll see that you are an ignorant.

To define the right is necessary even this trying is hard and the results can be only approximated. The necessity of defining the right come foremost from possibility to give real solutions for theory details and for judicial practice.

The epoch in which European civilisation has its cultural and hystorical roots, the Antiquity, didn't give a certain and clear definition for the right, but it was content to help in understanding purposes and principles of rights, „honeste vivere, alterum non laedere, suum cuique tribuere” (Ulpianus), and admitting in the same time, just with a principle value, like „ubi homo, ibi societas; ubi societas, ibi ius”.

In the same period, was coming to the fore like one of the first definitions of the right, the known definition of Celsus: „ius est ars boni et aequi”, which was related to ethics categories because good and equity are ethics categories.

In a realist perspective, in mentality of Rudolf von Ihering, who put the concernment judicially preserved on the foundation of right, „the right is a form in which the state organise, coercively, the insurance of society life conditions”.

Anita Naschitz considers the right like a „complex of behavior rules who’s aim is to tie to rules, in a certain purpose, the expected behaviour of people, at least in its frame, otherwise the rule doesn’t have sense”.

On the other hand, Sofia Popescu considers that the right, like a judicial normative system by contrast to other normative systems non-judicial from society, is „the unit of general, abstract, impersonal, behaviour rules, which came from a public authority invested with power of judicial regulation or the unit of norms which come from individual decisions of judicial authority; this fact allow separation of the right from other normative systems,,

H.Bergman, in his work, defines the right as „one of the most profound care of human civilisation, because it offers protection against tyranny and anarchy and it is a principal instrument of society for liberty and order preservation against abusive intrusion in individual interests”.

In the same idea/apprehension, a Romanian author considers that the right concept is a metaphor, the word „directum” having a double figurative meaning, designating what is generally conform with law”. He argues his theory asserting that etymology from Latin word „directum” is discovered in all european languages: „drept” in Romanian language, „droit” in French, „diritto” in Italian, „derecho” in Spanish, „direito” in Portuguese, „right” in English, „recht” in German.

The definition given by teacher Nicolae Popa is: „the right is a complex of rules provided and certified by state, whose aim is to organise and to form human behavior for principal relations in society, in a specific climate for liberties coexistence, for capital human rights protection and for establish the spirit of justice”.

In a great measure this definitions of the right, aleatory chosen, explain that visible part of the right which is seen like a sum of norms included in laws, decrees, ordinance etc., respectively the easy commensurable part, objective right.

There is many definitions of the right which prove that is possible we don't know what the right is, or is always seen from a different point of view and then we can say that is the precise one.

On the other hand even term of right has more meanings: one for philosophers, other for sociologists and one different for jurists.

According to this authors the difference between philosophical meaning and judicial meanings of the right is that „while the first meaning presume an internal action which implies a distinction and an option between what is just and what is unjust, in a subjective area from consciousness of human being, the second meaning expects just an external active attitude and according with real rules; the right is never interested by internal adhesion of somebody to its imperatives, just if it comes from the broken rules. If a person respects the law, it doesn't matter for institutional justice if that person respects law by fear, fidelity or convenience”.

Legally, depending on the right meanings, there is many categories of „rights” like objective right, subjective right, positive right, equity right.

Objective right is an assembly of judicial norms which govern an organised society and whose keeping is guaranteed by the power of coercion of an admitted public authority, if is necessary.

Therefore judicial norms must to set social relations, to anticipate what is needed to be in the frame of social relations and to require a certain conduct and keeping it is guaranteed by public authority.

In the matter of positive right, it includes all judicial norms active in a state and it is continuu and immediatly applicable, compulsory and susceptible to be executed by an external power (statal coercion), like a legitimate good cause of a social resort express designated. Etymologically this concept come from *ius positum est* (the right had imposed) and represents in fact the objective right in action and mostly is indistincted by statal law in force, considering the fact that it include all judicial norms in force in a certain statal unit.

Mircea Djuvara has written that the positive right is „the right which can be applied in a society at a certain moment under auspices of that state, or, briefly, „it`s the applied right”.

This name of positive right come from scientific positivism created by Auguste Comte, who said that „every science must begin from a last reality from its field, a measurable reality, certifiable by senses or instruments, but regarding right – judicial norm is the first reality.

In the matter of subjective right term we can say it was and it is one of the most controversated notion from right theory.

According to a author, the subjective right is „the right which everybody have, *facultas agendi*”; it represents „an individual, judicial ability of a person in relation to another person”. In others vision subjective right is either „the prerogative given to a person by judicial order and guaranteed by right ways to dispose by a value which is known that belong to it”, or ”the prerogative of a subject of right to have a certain behavior or to require such a behavior from other in order to exploitation or to defend a certain interest, legally protected in a concrete judicial report”.

In my point of view, the connexion between the two last definitions represents the complete definition of subjective right.

Therefore, the subjective right can be defined like a prerogative given by law, in according to whom the titular of right can or must have a certain conduct and he can require to others to have a conduct adequated to its right, under sanction required by law, in order to value a personal interest, direct, born and actual, legal and juridical protected according to public interest and with rules of social cohabitation.

There is two vectors which determine the existence of subjective right: the essence and the achievement, that is the will and the interest of right subject.

The theory of volition belongs to liberal, voluntarist and individualist doctrines and considers that subjective right come from human volition: an individual volition or a collective volition. The subjective right can be then a power belonging to a person, a power of volition, a suzerainty of volition.

Begining with the idea that human volition can creates subjective rights, the autonomy of volition pleads for individual liberty, restricted just by imperative of respect a good behaviour and public order.

According to Rudolf von Inhering theory (*Geist des romischen Rechts*) the subjective right includes two elements: a substantial one and a formal one. The first element consists in utility and advantage of right and the second element consists in proceeding in justice. Advantage and utility are the content of right. It implies values and interests. The value show the limits of content and the interest has the shape of a report which exists between idea of value and subject of right.

So that, the subjective right express the interest and is necessary for the interest gratification because the law gives to subjective right its protection by a proceed in justice which can be used.

The subjective rights will be defined as „intrests juridical protected”. The state decides which interests are susceptible to be transformed in subjective rights. The state assures its protection just for such a type of interests. In a state organized really democratically and a state which respects individual

liberty, the subjective rights established by law will be in absolute conformity with society opinion.

The subjective rights aren't from human being just an aesthetic ornament. They are recognised, guaranteed and preserved to answer to life's needs, so that it's impossible to imagine a subjective right without an interest on its foundation, interest which public authority wants to execute.

Regarding to connexion between objective right and subjective right there was serious debates and polemics. At first subjective right was considered primordial because a judicial norm can't be understood without a right of a person beside another person. So that, the norm doesn't do anything else just determines rights of parts and the norm, means objective right, is evolved from subjective right.

After that an opposite opinion arrived in Germany from Georg Jellinek; he proved, in his book *The general theory of state*, that no one can have a right if a norm (which gives this right) doesn't exist. So that he jump to the conclusion that subjective right evolves from the norm.

In France, Leon Duguit, teacher of right, thinks further and he denied the existence of subjective right. In his work *„Traité de droit constitutionnel”*-1924, he write a theory, the social solidarity theory, which considers that individual rights represent only some social functions, there aren't subjective rights and there isn't a personal volition of a person which can give, independent and individual, an exercise of volition producing juridical effects.

Mircea Djuvara reviewed both opinions and after that his conclusion is that every school which sustained those contrary opinions had correct ideas because the two opinions are two sides of the same logical reality and it can't say about one of them that is the foundation for the other.

We are agreed with this conclusion because the subjective rights are evolving from objective right and are tied by it and there are an inseparability between them. Subjective rights can be determined in juridical norms, then they exists and can be exercised only if they are admitted by objective right because only the accreditation and the preservation of a value by a juridical norm confers to it the quality of subjective right.

Even both opinions about right are different in meaning they are two correlative images of right. The subject right can't exist outside the objective right because second is the fundament for the first, it's the frame of principiality and juridical regulation of subjective rights and of correlative engagements`execution. Objective right preserved subjective right, and rule of right is realised by practice of subjective right.

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