Contents

Introductory concepts of law

CHAPTER I

1.1. The notion of law

The Romanian term for **Law** "Drept" has its origin in Latin, where "*directum*" had the meaning of direct, but also proper, fair, according to the truth, justice[1].

In ordinary language, the term Law designates a set of rules of conduct governing what is right, a path to achieve what is right and fair, as opposed to what is unfair, unjust. The Romans, in this respect, spoke of the obligation of everyone to live honestly, in good understanding with the others[2].

For legal professionals, the term Law means the whole set of rules of conduct issued by the State that every person must respect.

This notion also designates the science of law or only a study subject, such as: civil law, criminal law etc.

From a historical perspective, several approaches to law are known, the so-called law schools.

Thus, we know the theory or the School of Natural Law, a doctrine founded by Hugo Grotius in his *"De jure belli ac pacis"*, claiming that the law is based on universal principles that do not change according to time and place. Laws made by men, according to this school of thought, cannot be inconsistent with the eternal, unwritten laws; the Law is a creation of reason and the laws are the expression of rationalism.

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[1] See I.N. Militaru, *Dreptul afacerilor. Raportul juridic de afaceri. Contractul,* Universul Juridic Publishing House, Bucharest, 2013, p. 9, See also R.W. Emerson, Business Law, fifth edition, Barron's, New York, 2009.

[2] See also C. Leaua, *Dreptul afacerilor. Notiuni generale de drept privat*, Universul Juridic Publishing House, Bucharest, 2012, p. 7.

In opposition to this view, the Historical School of Law, with its main exponent Charles Savigny, argues that the foundation of law is by no means reason, but the will of the people as expressed in their traditions and customs.

Subsequently, the Positivist School of Law appears, with its exponent Auguste Comte, who claims that neither rationality nor theoretical concepts are decisive in determining the law, but social realities, in reality man having no rights, but only obligations.

Each of these schools of thought has its limits and can be criticized – and they have indeed been criticized over time – but each marks a gradual ascending step in understanding the phenomenon itself, the evolution of Law, the establishment and enforcement of the rules of law.

1.2. The legal rule

1.2.1. Definition

Human society ensures its smooth running through the adoption and observance of rules of conduct. Some of these rules are moral norms, unregulated by the state; we can discuss about norms in other areas as well: religion, technology etc.

However, if the state considered that in certain areas, for the good running of society, some norms, some rules of conduct are required to be adopted, then the field in question was regulated by legal rules, issued by the state through its bodies.

As such, the legal rule is the rule of conduct prescribed by the public authority which regulates relations between people and whose breach attracts the intervention of the coercive power of the state.

From the point of view of its characteristics, the legal rule is different from other types of rules in that:

- it is **general**, *i.e.* it is addressed to either all persons or a category of persons that are in the same situation or meet the same requirements (*e.g.* the Labour Code, the Criminal Code etc.)

- it is **impersonal**, *i.e.* it is not addressed directly and immediately to a specific individual, but is considering an indeterminate number of persons.

- it is **mandatory**, meaning that if the persons to whom it is addressed do not comply voluntarily, the coercive power of the state intervenes to secure compliance.

1.2.2. The structure of the legal rule

Any legal rule has three parts, namely: hypothesis, prescription and sanction.

The ***hypothesis*** of any legal rule is in the circumstances, the situation in which that specific rule applies. In fact, when we talk about the hypothesis of the legal rule, we consider the social relationship which that legal rule is called to regulate.

The hypothesis is always present, but sometimes it is regulated in specific terms, with the exact circumstances – "killing a person ..." – or is generally determined, but without any statement or detailed description of the circumstances of its application. For example, the rule "the person which causes damage (…) must repair it" does not describe exactly how the damage is caused in order to attract liability. So, in this case, it is a hypothesis generally determined.

The ***prescription*** is the part of the legal rule which sets out what rule of conduct must be obeyed in the circumstances provided by the hypothesis. It can establish that in the given circumstances, certain ways of behaving are forbidden or, on the contrary, must be followed, or leaves it for the subject to decide on a certain conduct (spouses are free to choose their name upon marriage).

The ***sanction*** is the consequence of the failure to comply with the prescription, with the rule of conduct imposed. It is clearly seen in criminal law – prison, fines – in which case we can speak of relative sanctions determined by law – for example imprisonment within certain limits – and also alternative sanctions – prison or a fine, in which case the enforcing authority can choose one of these.

The sanction is also present in the case of the legal rules in other branches of law: for example, nullity of the unlawful contract concluded under civil law, nullity of the unlawful marriage etc.

However, it is to be noted that sometimes, this structure of the legal norm is not to be found entirely in the same legal text, but it can happen that one of its elements lies in other parts of the legislation. Some legal texts may include the hypothesis and the prescription, the sanction being provided in another legal text by reference to the situations governed there; other times, the law apparently does not provide any sanction for the situation described; but in this case, the mandatory legal provisions governing the general situation in the field are applied. One example is stipulated by contract law, where the general sanction of nullity of the contracts concluded in violation of mandatory norms is applied.

1.2.3. Classification of legal rules

Legal norms can be classified[1] according to several criteria, namely:

- according to the prescribed behaviour, legal rules can be:

• **Imperative** legal rules indicate that their observance is mandatory in all cases provided for by the hypothesis.

We can further discuss about rules which oblige to a certain action, called **onerative (imposed)** rules – *e.g.* art. 280 of the Civil Code requiring those who marry to make the declaration of marriage in person at the city hall – and **prohibitive** rules that forbid certain actions – *e.g.* art. 273 of the Civil Code which prohibits a new marriage for the person who is already married.

• **Disposal** legal rules are obligatory, but not absolutely. These fall into suppletive (complementary) and permissive rules.

Suppletive (complementary) rules prescribe a certain conduct as an alternative, when the parties have not expressly provided a conduct. If the parties to the contract have agreed on a conduct in a specific situation, then the contractual provision will apply, otherwise the provisions of the law shall apply.

Permissive rules are the rules that do not require a specific conduct or action but allow it. For example, the rule that a person who is 18 years old can marry is a permissive rule.

• **Recommendation** rules are those norms that recommend a certain conduct to the subjects of law whom they are addressed.

- according to their subject or content, legal rules are rules of civil law, criminal law, commercial law etc.

1.2.4. Sources of the legal rules

The sources of legal rules define the modalities for expressing them, their outward form, thus making it possible for them to be known by every person and also defining the hierarchy within the legal system of the state.

[1] See also S.L. Cristea, *Dreptul afacerilor, Ed. a III-a revizuită şi adăugită,* Universitară Publishing House, Bucharest, 2012, p. 26; A. Miff, *Business Law. Volume I. Introduction to business law*, *second edition,* Sfera Juridica Publishing House, Cluj-Napoca, 2009, p. 30.

The very first article of the Civil Code sets forth that **laws**, **customs** and the **general principles of law** are sources of civil law. It is worth mentioning that most of the legal rules in the Romanian legal system are contained in normative acts.

Depending on their source, namely on their hierarchy, legal rules are contained in:

- The Constitution – it is the supreme legal norm in the state; it is issued by the Constituent Assembly by a special majority, following a certain procedure.

This category may also include international human rights treaties to which Romania is a party and which, according to art. 20 of the Constitution, take precedence over domestic legislation and, nonetheless, in case of conflict of rules, the most favourable apply.

- The law is the normative act adopted by the Parliament with an ordinary procedure and regulating various areas of social life; laws may only be adopted in compliance with constitutional provisions.

Laws can be organic laws, *i.e.* those which under the Constitution must be passed by a certain quorum – two-thirds of the Members of Parliament, or ordinary, *i.e.* those laws governing all other areas, adopted by a normal procedure.

- Decree-laws are laws that have been used in our legislation in certain special situations – immediately after year 1989.
- Government Decisions – are normative acts adopted with the aim to enforce the law.
- Government Ordinances – are legal acts adopted during the parliamentary recess based on an enabling law issued by the Parliament.

This category includes Government Ordinances (G.O.), *i.e.* normative acts issued by the government in matters of social relations that would normally be regulated by Parliament, but are delegated to the Government by an enabling law. Such a law is issued for a specific period and a limited scope, but never in matters regulated by organic laws.

Government Emergency Ordinances (G.E.O.) are also normative acts issued by the Government but, as the name implies, they are issued under urgent, extraordinary circumstances, in cases where regulation cannot be postponed until the Parliament convenes.

After the adoption of Government Ordinances or Government Emergency Ordinances, the Government must submit the acts to the Parliament which can

approve or reject them by law. In the latter case, it is also specified what happens to the effects already produced during the implementation of such legislation.

- Orders and Instructions issued by ministers for the enforcement of laws and Government Decisions.
- Instructions, regulations, statutes, rules issued by different state bodies or professional bodies based on their powers granted by the law or the government.
- Decisions of local and county councils, as local government bodies concerning issues of local interest.

All legal acts are adopted and published in written form to be known by those to whom they are addressed.

Customs

As noted, among the sources of civil legal rules, the Civil Code in Article 1 provides customs, meaning the habit naturalized over time in a particular area.

They are unwritten sources, unless they are published in collections of practices issued by authorized bodies in the matter, such as Chambers of Commerce and Industry.

Having this nature, customs apply only in areas not regulated by law or in cases where the law refers to them. One such example is art. 613 para. 2 of the Civil Code which states how the distance between constructions and the property's limit is determined or art. 2.010 para. 2 of the Civil Code on the remuneration of the representative on a mandate contract.

General principles of law

Like customs, they are included among the sources of civil law.

General principles of law are applied in situations where a particular matter is not regulated by law, there are no customs recognized as such, therefore we have no choice but to rely on these general principles[1].

It must be noted that we would not find a list with such principles in any legal act and they are always inferred from the overall analysis of the legal system, but also from the practice of the courts and from the doctrine[2].

[1] For an European perspective, see O.-H. Maican, *General principles of law – source of European Union law,* Law Review, vol. VI, issue 2, July-December 2016.

[2] See also T. Ionaşcu *et all, Tratat de drept civil,* vol. I, Academiei Publishing House, Bucharest, 1967, p. 53.