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THE ROLE OF ECONOMY AS MATERIAL SOURCE OF LAW

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ABSTRACT: *The economic and social life are considered by most authors as necessary in order to properly understand the essential traits of law and consequently as having a particular weight among all material sources of law. The role of the economic and especially financial-banking environments in the process of formation and functioning of law is very complex and difficult to underline. However, it is our goal in this paper to try and extract the main controversies in this inter-correlation between law and economics.*

KEY WORDS: *economy, source of law, the legal provision, development, society*
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1. TERMINOLOGY

The phrase "material source" (social or real) is used in the context of our endeavour with a meaning very close to the etymological one, generically referring to the law configuration and substance determination factors and conditions. In this generic sense, the material source of law – in a broad usage – is the social-historic existence in itself[1].

The social-historical realities cannot offer a unique system of law or state organization that can characterize all human communities, regardless of their ethnic, geographic, historic typology. Obviously, there have been and still are certain rules of social behaviour and conviviality unanimously accepted by human society (Do not kill! Do not steal!), rules that overlap legal provisions. These, however, do not synthesize the particularities of all the legal system in their historical evolution.

The idea of the existence of complex factors that influence law has began forming along with the first theories regarding the evolutionary, changing nature of law[2].

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[1] Andrei Sida, „*Introducere în teoria generală a dreptului*", "Vasile Goldiş" University Press, Arad, 2002, p. 128.
[2] Nicolae Popa, „*Teoria generală a dreptului*", Actami Publishing House, Bucharest, 1997, p. 62.

There have been, in the scholarly literature, movements that considered the problem of material sources of law to exceed the area of legal science therefore denying the existence of any factors that would influence the will of the legislator. However, as a distinguished author underlines, the reduction of the issue of law sources only to its formal meaning can lead to the justification of any sort of legal regulations, independent of content and purposes. Admitting the existence of some configuration factors of law equate the recognition of the existence of certain social sources of law and represents a condition for understanding the birth process of legal regulations[3].

Economic life and social-political life are considered by many authors as necessary factors in understanding the essential traits of law and consequently as having a considerable weight among the configuration factors of law[4]. The role of economic environments, particularly the financial-banking one, in the formation of law, is complicated[5]. In the context where the resources found at the disposal of society are limited, some of them on the verge of extinction even, economy has been defined as the science of reasonable choice and studies the way in which a person or group of natural persons or legal persons manages and uses the limited resources to the end of satisfying its own necessities[6].

No other legal evolutionary factor has been discussed and analyzed more attentively than economy. The reason for this interest is that, without the possibility of controversy, there are extremely tight connections between the legal and economic life.

The economic analysis of law has been initially pointed towards areas of private law (trading companies, competition, intellectual property) and later on, this scope was extended to family law, criminal law, taxation, environmental pollution etc. [7]

The fundamental issue, however, does not lie in this intense correlation between law and economy, that no one denies and that can be noticed without resorting to statistics, but in the question whether economy always leads and dominates legal reality (Marx) or the legal provision is the logical form and economy merely the substance, the matter shaped through this form, a relation that would free of any unilateral or reciprocal influences both parties for they would be just facets of the same thing; or, finally, if, depending on the type of society that we refer to, economy can sometimes lead law and other times law can lead economy, their influence being at all times reciprocal[8].

The networking between law and economy can be approached from more than one perspective. We can, for start, conceive law as a shape taken by the economic policy in those situations when law intervenes in the relations between social behaviors, organizations and politics. Secondly, we can ask ourselves what does liberal economy, with its pretensions of being liberated from any State interference and State economic

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[3] Anita Naschitz, „*Teorie și tehnică în procesul de creare a dreptului*", Academy Publishing House, Bucharest, 1969, p. 20.

[4] François Terré, "*Introduction générale au droit*", 8th edition, Dalloz Publishing House, Paris, 2009, p. 40; Maria V. Dvoracek, Gheorghe Lupu, „*Teoria generală a dreptului*", "Chemarea" Foudation Publishing House, Iași, 1996, p. 51.

[5] Gheorghe Mihai, „*Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*", vol. III, All Beck Publishing House, Bucharest, 2004, p. 81.

[6] Mihail Udroiu, „*Aspecte privind analiza economică a criminalității*", in „Dreptul" Review, no. 1/2010, p. 173.

[7] Mihail Udroiu, *cited above*, p. 175. Activities that are connected to economy as well as independent ones from economy were analyzes with the use of economic instruments.

[8] Georges Gurvitch, „*Sociology of Law*", London, 1947, p. 233.

politics, from law. Finally, for law has penetrated the economic system through the policies it implements and sustains, for the bigger part of world states, a market economy by its own instruments, we ask ourselves whether economy has similarly penetrated the legal order and analyzes law by measuring its efficiency.

2. LAW – MATERIALIZATION OF PUBLIC POLICIES

Law is most frequently defined through its compelling force. In this conception of law, it represents, first of all, the arm of the State and, by its use the legitimate will manifestations take decisions enforceable to the entire social group. In other words, law is the form in which State takes decisions for all of us, concerning all aspects of social life, including economy.

As a consequence, law has power over economy for the former can decide and can impose itself, although numerous times it can show to be blind and to not integrate the results of the economic policy in question in confrontation with the expected results. Therefore, not few times, o normative act – implementation instrument of an economic public policy, can still remain in force and rule social relations despite the fact that the predicted and desired economic results fail to appear. It is not imperative, consequently, in the context of a traditional conception about the system of law, to measure the economic effects of a normative act[9].

If we consider law as an instrument of economic policy, the easiest for state power would be to allow political institutions to become economic agents or operators and in such way allow these to directly implement state economic policies. Public services, study object for administrative law, represent nothing else but the concentration in one single body of law, economics and politics.

U.E. law does not, however, trust to such great degree as member states law do, these public operators. U.E. law does not accept the state as operator (public company) or investor (state aid) unless it acts with the same instrument as an ordinary, common, private law operator or investor.

The provisions regarding competition of the Rome Treaty take as object not so much the regularization of the market as much as take the market as direct source of normative process: law expresses the law of the market. As such, the judge determines the relative market and then appreciates the behaviors that have or could have damaged it. These legal mechanisms put in motion crayon a legal system that protects the economic system that protects competition in itself and not the actors. Moreover, E.U. law proposal is to build a new market, one that had not existed up to that moment. Consequently, law is not, in this example, more than an instrument having an end in which resides its true normative power.

Therefore, the future of commercial markets will be built on the foundation of law and economy collaboration. Economy precipitates law towards a veritable innovation: a law without frontiers in financial matters.

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[9] Marie-Anne Frison-Roche, „*Droit et economie*", in volum „*Regards sur le droit*", Dalloz Publishing House, Paris, 2010, p. 120 and next.

3. LAW – CORNER STONE OF MARKET ECONOMY

Market economy can be conceived as set outside the legal construction for this is where demands meets with offer and the market is the bidder that allows production and obtaining the relevant information for the establishment of a balanced price. Market economy exists and revolves around legal subjects that law endows with rights and obligations. Moreover, market economy cannot function without the private property being guaranteed.

The contract, as a neutral means of exchange and of long-term organization management, represents without any possibility of denial one of the legal grounds of free economy. Also, in the hypothesis that a period of time passes between the settlement of the terms of the commercial trade and the actual exchange, the market, the economic cannot find solutions for this time-syncope without the intervention of law. In this case, law brings to economics what the latter lacks – binding force. The contract has binding force for it represents the law of the parties that will carry out their obligations in the future in the light of an obligation assumed in the past.

4. ECONOMIC ANALYSIS OF LAW

The purpose of economic analysis of law is to establish the efficiency of legal institutions and rules by applying to these the instruments of micro-economy.

From lecturing the works dedicated to the economic analysis of law written by economists[10], we can notice the fact that not few times equality is put between law and legal provisions, forgetting thereby that law represents much more than a collection of legal texts.

Economic analysis of law begins from the assumption that law in an instrument and the efficiency of this instrument is sought out to be measured and established. It results that law is no longer a means of prescribing certain behaviours and forbidding others, and its validity is measured in the light of the results desired by the legislator. Therefore, it is necessary to explicit the desired goal. A shift of the normative centre of law from legal provisions contained by normative acts to their finality has thereby occurred. How could such an endeavour practically be carried out? A simple way would be to measure the consequences of a normative act and then a confrontation between these findings and the normative effects desired by the legislator. If there is coincidence between the two elements compared, that law was respected and if not it should be changed.

In this context, we consider worth mentioning an initiative of the World Bank to draw up a yearly report (beginning with 2003), called Doing Business[11], that contains an evaluation of pertinent company legislation from over 180 states in the world and classifies economies according to some areas of regulation, such as start-up of a company, insolvency, foreign trade etc. It is interesting to notice the fact that according to these

[10] See for a detailed presentation of doctrine in this area lewis kornhauser, "*The economic analysis of law*", in „*The stanford encyclopedia of philosophy"*, Edward n. Zalta (ed.), 2011 http://plato.stanford.edu /archives/fall2011/entries/legal-econanalysis /; jon d. Hanson and Melissa r. Hart, *"law and economics"*, in „*A companion to philosophy of law and legal theory*" (ed. Dennis patterson), Blackwell Publishers LTD, 2000, p. 311 – 331.

[11] These reports can be found at URL http://www.doingbusiness.org/reports/global-reports/doing-business.

reports, that implicitly reflect the vision of World Bank on law efficiency, the less costing or less short a procedure is the more efficient it is considered to be. This is a sort of simplistic view on the law, in which complex aspect, intrinsic to law, are left aside, such as the formation mechanism of a contract, intellectual property protection, jurisdictional impartiality etc.

5. HOW DETERMINANT IS ECONOMY IN LAW DEVELOPMENT?

Both law and economy converge on the same object that is social behavior. Upon analyzing the history of law and thought in general in different societies, we can distinguish since the 19th century business law, trading company law and economic law[12]. At that time, the issue revolved around ordering persons that carried out special, economic activities, ordering that could be accomplished by a special type of law – commercial law, this branch of law being nothing more than an adaptation of the general rules conceived and applicable to civil persons[13].

After looking into the history of human societies during different forms of organization it is noticeable the fact that, in some historical periods it is economy that sometimes overpasses the reality of law and becomes a development factor for law and, in other times, law leads the economic reality and conditions it. For example, in the bourgeois and in the contemporary society, economy is without doubt moving in a more accelerated rhythm than law; therefore, since law is left behind, changes are influenced and perhaps even brought upon to a great degree by economy. Nonetheless, evenly indisputable, in feudal society there was a greater mobility of the legal system compared to the economic one; in this situation law dominates economy, sometimes fastening the latter inside rigid boundaries (seniorial law, guild monopoles), and in other instances pushing it towards free competition and wealth accumulation (roman law). In patriarch societies, on the contrary, law and economy influence each other equally while in the primitive societies and, to great extend, in theocratic empires, law, economy, religion and magic are not sufficiently differentiated one from the other, hence the belief in supernatural dominating both law and economy[14].

In any type of contemporary society, the economic component is determinant, wearing the ideology cachet characteristic to that society in a particular decade. Therefore, for example, the Marxist ideology considered not only that law must comply with the general economic situation and the type of economy ideologically imposed, but that economy represents the determinant factor for any legal development[15]. The liberal ideology proclaims the theory according to which law must set up favorable conditions for contractual economy and sanction with maximum clarity economic freedoms[16].

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[12] Relatively recent expression, economic law has as object the economic activities of economic agents as well as the movement of goods on the market.

[13] Phil Harris, „*An Introduction to Law*", 7th edition, Cambridge Publishing House, 2005, p. 89.

[14] Marie-Anne Frison-Roche, *cited above,* p. 236.

[15] In Marxism, the political power found its historical raison d'etre in economy. Jacques de Ville, „*Rethinking Power and Law: Foucault's Society must be Defended*", in „International Journal for the Semiotics of Law", 21st October 2010, p. 3.

[16] See Nicolae Popa, "*Teoria generală a dreptului*", Actami Publishing House, Bucharest, 1997, p. 67; Costică Voicu, *cited above*, p. 51. In this paper, the author gives the example of the Corporate Chart to demonstrate the theory that ideology influences economy and implicitly law. What is this document? It is an underlying

In our country, in approaching the subject of economy – real source of law, the positive part of the economy-law relationship is not denied, the practical aspects that prove that the shift from a closed, socialist type of economy to a free, market economy has not occurred without sparing law of any influence being recognized. On the contrary, we can notice that the regulatory activities after the 1989 events have been targeted and covered the most important aspect of economy, such as: privatization, capital market, competition, consumer protection, tax evasion, trading companies, there have been adopted specific laws to govern the banking system, financial institutions, etc[17].

We would like to make a few supplementary specifications regarding the area of credit institutions and banking law. From analyzing the legal provisions dedicated to this field of legal relations, by comparison to the legal relations that fall into the regulatory sphere of commercial law, it is easily noticeable and deductible the powerful influence that this domain has upon the legal provisions that are dedicated to it, and, by consequence, the strong force that economy, as a real, material source, has on objective law. Hence, unlike the vast majority of economic activities, those allowed to credit institutions, Romanian legal persons, benefit of a complex normative attention and can be exercised only by compliance in the preset legal frame as far as the particular legal subjects are concerned and well as the conditions of access and particular operation susceptible of being carried out by this category of economic agents.

The existence of this legislative plurality in the area of banking law is justified by multiple reasons. Amongst these, the cautionary nature arguments are predominant, determined by the rise and diversification of market risks that have doubled the evolution and alterations suffered in time even of the activities permitted to credit institutions. As far as the purpose is concerned, the legal frame desires to ensure, particularly, the stability of credit institutions, the guarantee of client interests' protection and by consequence the mere function of the banking system[18].

Moreover, the scholarly doctrine in this field mentions the turning of this branch of law into an increasingly public one as one of the elements that give particularity to banking law (there are discussions in the specialty literature on the autonomy of banking law and of it being a distinct legal branch or merely a species of commercial law). This means that there is an ever growing bond between banking law and public law, despite its

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document regarding the set-up and function of a corporation. In a broad sense, a corporative chart will serve as a means of defining the goal of starting a corporation. This means that the Charter will determine the type of society that is to be set-up, the area of activity of the corporation. On the basis of this information it is possible to determine the legal basis, the legal provisions applicable to the corporation in question. The history of corporate charter begins in England in the XVIth century, when the British Crown gave special privileges to traders in exchange of a percentage of their profit paid to the royal coffer. As a consequence of corporate pressures, laws were drafted that demanded that all goods imported by British colonies pass first through England, this legal regime being also applicable to all goods exported from the colonies to any other region of the world. From the taxation of the goods passing through British ports by this mechanism, huge fortunes were obtained both by corporations and the British Crown.

[17] G.E.D. no. 99 from 06.12.2006 regarding credit institutions, with all the alterations and completions brought by Law no. 227 of 04/07/2007 published in the Official Monitor, Part I, no. 480 from 18/07/2007, G.E.D. no. 215 of 16.12.2008 regarding some measures on the sustainability of development program concerning house building at national level, published in the Official Monitor, Part I, no. 847 from 16/12/2008 and by G.E.D. no. 25 from 18/03/2009, published in the Official Monitor, Part I, no. 179 from 23/03/2009.

[18] Lucian Săuleanu, Lavinia Smarandache, Alina Dodocioiu, „*Drept bancar*", Universul Juridic Publishing House, Bucharest, 2009, p. 12.

"membership" to a private branch of law – commercial law. This bond is nothing but the result of the remarkable interest that the activities allowed to credit institutions hold for the state.

The monopoly on these elements is justified if we take into consideration the interest of the clients and the need to protect them, arguments imposing that such operations have to be done only by bodies that offer security. In the considerations of the public interest the law has reserved, in this case, certain denomination and operations exclusively to credit institutions considered to ensure enough guarantees. As an extension of this monopolistic legal regime, the legal provisions that sum up banking law impose the exercise of a public form of control over the formation of credit institutions and the carrying out of the activities that represent the authorized object of activity for these entities[19].

It is clear that economy has always played a major role in social life. The economic freedoms of persons, be they physical or legal, concerning either property rights or claims, cannot be capitalized and their exercise within social life ensured and protected unless through legal provisions. If falls within the duty of the legal norm to set the framework of the legal regime of public and private property, to establish what are the right and correlative obligations of the active subject and passive subject of a legal relation that originates from a civil or commercial contract. No one could have possessed goods, no one could enjoy in safe conditions the possession, use and disposition of their goods had it not been for the legal provisions to ensure the unhampered exercise of these rights by the holder. Any action or inaction that leads to the disruption of the exercise of these rights is sanctioned through the legal norm. The economic regulations create a complex system of rights and obligations that, throughout history have passed through numerous and diverse alterations.

Law must regulate competition and sanction any deviation from the law of demand and offer, such as disloyal competition, fraud, deceitfulness, the exploitation of buyer ignorance etc. [20]

Law has a certain autonomy in relation to economy that derives from the way law takes over, selects and regulates certain elements from the economic life, from the continuity of legal provisions that have lasted throughout time surviving the economic agents that determined their existence, from the ability of legal provisions to create the convenient conditions for the emergence or evolution of new economic processes. Therefore, in the post December 1989 Romania, it became the task of legal provisions to ensure the necessary conditions for switching from a social economy, characterized by a closed market, to a capitalist economy, having an open market.

The major role of economic relations in the social development process and implicitly in the laying down of the content of elaborated legal provisions and of legal relations formed in the context of material life cannot be challenged without falling into the economic reductionism extreme.

The mirroring of economy in law does not equal a direct transposition into a legal provision of an economic type relation. Economy appears in law as a mediated reflection,

[19] Lucian Săuleanu, Lavinia Smarandache, Alina Dodocioiu, *cited above,* p. 11 and following.
[20] Nicolae Popa, *cited above,* p. 68.

filtered through the will, interest and capability of the legislator[21]. Modern economic law reveals the instrumental nature of law and numerous technical norms enrich with new defining notes the traditional content of law.

As underlined by professor Ioan Humă, the economic essence of law is indirectly revealed and the reverberation of economy in law does not equal the unprocessed transfer of economic problems into the legal field that is so specific. This transfer is done by the mediation of the human consciousness.

There is some autonomy between law and economy[22], this reality being proved by situations when legal provisions have survived economic factors that lead to their put into force and that have thus shown viability despite economic changes. Moreover, it has been stated in the scholarly doctrine that law has the ability of preparing from a legislative stand point the conditions for the formation and development of new economic processes. An example of this is Romania in the post 1989 period – a time when a number of normative acts were drafted meant to realize the passage from the communist to the liberal, market economy.

There have been in the course of history ideological currents that considered the role of economy as determinant for the substance of law and rendered it to be the most important of all material sources of law[23]. Marx has shown that law does not have a history of its own and that this means that it cannot be unbind from the production mechanism and the production relations it reflects, that its development is closely tied to those of the social-economic formations mankind has known.

6. CONCLUSIONS

Any form of social activity that produces a positive value produces law and is therefore a normative fact. Consequently, the micro-sociology of law must distinguish as many types of law as forms of social activity exist[24].

On the other hand, within each type of society, the role of different factors in the change and development of a social phenomenon (as a law, for example) is not the same. This is explainable not only by the fact that the importance of a singular factor depends on the characteristics of the entire, but also by the fact that the speed with which different social phenomena alter and move is not identical in all diverse possible types of society or in distinct moments of existence of the same society.

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[21] Andrei Sida, *cited above*, p. 31.

[22] The autonomy of law from economy derives also from the fact that law does not simply represent a mirror image of what already exists in the economic sphere, but can also, at its turn, create or sanction the disappearance or alteration of economic relations.

[23] I. Ceterchi, I. Demeter, Vl. Hanga, Gh. Boboș, M. Luburici, D. Mazilu, C. Zotta, "*Teoria generală a statului și dreptului*", Didactică și Pedagogică Publishing House, Bucharest, 1967, p. 88. The authors refer to F. Engels who presented that the autonomy of legislation is nothing more then an illusion and that its finds its grounds of existence and the justification of its development not within the social relations but in inner, self causes, in the notion of will; will is always formed in the frame and under the influence of a series of connections and interactions; only after knowing these the essence of law can be revealed; and in this line of thought Engels placed in the first line the importance of the economic factor, reproaching to people that "… *they forget that law sources from the conditions of their economic life, just as they forgot that they themselves are from the animal world*" (translation of the author).

[24] Georges Gurvitch, *cited above*, p. 232.

We can conclude, without any doubt, that the development of economy imposes alterations of social relations that law must take into consideration. The growth of markets alongside the growth of commercial exchanges requires adaptations of the legal provisions to the economic facts.