THE CONTRIBUTION OF LEGAL FORMALISM IN THE CHANGES OF THE ROMANIAN LEGAL SYSTEM PAST 1989

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Abstract*: An analysis of what formalism means for the Romanian legal system in the transition from a totalitarian to a democratic state is proposed here. In democratic states, theorists and practitioners of law habitually ponder between formalism and realism. Formalism involves framing the general situation (for regulation purposes) as well as the individual one (in the application or enforcement of the law) on the rule of law. In realism, the point of departure is the situation and by complex interpretations of it, often exceeding its legal aspects, a resolution is being sought for, in the situation of apparent or explicit conflict, aiming at more than the implementation / enforcement of the law - namely an extra-judicial end. Although formalism promises to reinforce objectivity, too zealous applications of the principle can, especially in a disjointed regulatory system, be compromising to the very purpose of the law. The approach will be more theoretical, without excluding some possible examples of how the system works, whilst reminiscent of excessive formalism prior to 1989 practices of law.*
Keywords*: formalism, legal system, the goals of law, post-totalitarianism*

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COULD PERSONAL CONVICTION BE A RELEVANT FACTOR FOR THE LEGAL SYSTEM?

The issue was raised before the Romanian Constitutional Court in 2001. The Constitutional Court resolved the exception of unconstitutionality of art.63 (2) of the Criminal Procedure Code, now repealed. The text of the law provides that evidence may be judged by the intimate conviction of the magistrate, judge or prosecutor. The author of the plea maintained that the terms "their conviction" and "after leading the conscience" in the second part of the text of the law, contradict the meaning of article 123 in the Constitution, according to which "justice is carried out in the name of law" and "judges are independent and subject only to the law".

After examining the plea, the Court considered that the provision is unconstitutional, based on the text of the Basic Law invoked (Decision no.171/2001, Official Journal of Romania, Part I no. 387 of 16.07.2001). The intention of the legislator

has emerged from analysis of the debates on articles of the draft Constitution and the report of the Drafting Commission (Official Journal of Romania, Part II, no. 35 dated 13 November 1991 and no. 36 dated 14 November 1991) discussing the proposed amendment on completing the final thesis par.(2) art.123 of the Constitution by "[...] and their intimate conviction". After the debate, the Constituent Assembly with a majority the amendment, expressing in this way, willingness for judges to submit "only to the law", and not "their intimate conviction".

The decision can be analyzed from several perspectives, but the approach initiated in this article concerns only the appearance of excessive formalism, leading to missing the very purpose of justice, namely the administration of justice. Formalism is also explored in terms of the links with the totalitarian system in place before 1989, exercising powerful centralized and ideological influences.

Albeit addressing but one of the state's activities, the conception on court action is that of not involving personal law by those who contribute to the creation, implementation and enforcement. Extrapolating, formalism spreads in all activities of the public authorities, and the consequences of this are multiple: legislative inflation, a reluctance of civil servants called to execute and enforce the law, limiting access to justice through excessive formalism of the courts.

The premises from which we leave are two: first the legal system is understood here as a system of activities; secondly, it is claimed the significance of checking for explicit exercises of personal convictions of those involved in this system as legislators, public officials or judges.

The law can be defined as a unitary and coherent, structured system of activity formed of legal subjects (participants in legal relations) who are using certain tools (interpretation skills), according to predetermined rules (normative legal acts or individual), to work on a specific object of activity and measurable results (Lupu 2011, 231-238). Activity systems may include sub-systems. Some elements of the system activity have greater stability than others, as it is the Constitution in relation to the law.

In order to ensure cohesion, a community is governed by a set of rules included in the concept of ethics. Applied ethics constitute the moral practices. In outlining the first ethical reflexes, an important role is played by the family and the immediate community. In time, moral practices framing the activities of family and community are expected to infuse the human personality and function as an intrinsic element of it. Only later in life, individuals as community members become increasingly aware of their fundamental rights and freedoms. With the change of political regime, what was once the rule of law melts within the moral practices framing a morality system clashing with the changes in the new system of law? While the legal system can radically change very quickly, moral practices stand the test of time and therefore resist changes in law (Lupu 2015, 36).

Under the system of law, the manifestation of will has a particular relevance. A simple internal process, reasoning or impulse has no effect. However, the manifestation of will of a legislator, or of a civil servant called to enforce the law or to organize law, or that of judges applying the law, is preceded by an argument called interpretation. Purely objective interpretation is an unattainable ideal. Juridical intervention on social relations and the ways in which this intervention is carried on, remains an issue with a strong

subjective component. This component emerges from the legal requirements regarding the quality of persons that may hold positions or public offices [for access to a magistrate, candidates must "have no criminal record or fiscal record and enjoy a good reputation" - art. 14 para. (2) c) of Law no.303/2004, republished in the Official Journal of Romania, Part I no. 826 of 13.09.2005] or from the principles governing the exercise of fundamental rights and freedoms ("Romanian citizens, foreign citizens and stateless persons shall exercise their rights and freedoms in good faith, without infringing the rights and freedoms of others" - Art. 57 Constitution, Official Journal of Romania, Part I no. 767 of 31.10.2003). The fact that a particular conduct is a moral criterion for the choice / appointment to public office signifies the important role that "conviction" / "awareness" maintains within the legal system.

THE SYSTEM OF LAW IS, IN ITS NATURE, FORMALIST

Hans Kelsen' pure theory of law has notoriously coined the notion of legal formalism. Other sciences' specific causality (if A then B is / will be) shall not apply to science of law. Law awards its' specific relationships to attribution (if A, then must B). The number of items in a string of attributions is not the number of items in a causal chain, unlimited, but limited. There is a final point of the attribution.

The principle used is the release of law from all foreign elements of it. The legal provision works as interpretation scheme. The one ordering, enabling or empowering wants, and the one to whom the order, permission or authorization is addressed *must*. *Must* is being used in a wider sense than the current one.

A norm is neither true nor false but only valid or invalid. Constrained behavior is not mandatory; mandatory is the sanction.

Law-making should be seen as applying the Constitution, the general rules of which empower people to establish general rules that states coercive acts.

The basic norm delegated the first constitution in history to establish procedures for the purpose of issuing norms stating coercive acts.

The requirement to separate the right moral and therefore entitled justice, it just means that if an order of law is judged as moral or immoral, right or wrong, it expresses the relationship of legal order with one of the many moral systems possible and not single moral report will be issued in this way a value judgment only relative, not absolute, and that the validity of an order of positive law is independent of correspondence or lack of correspondence in relation to a certain moral system. Where morality is not a consideration, two conditions are necessary for a legal system to exist: to be widespread, though not necessarily universal; to recognize as a moral obligation of obedience required by law.

Production of general rules of law, that the legislative process is regulated by the constitution and the laws regulating formal or procedural materials law enforcement through the courts and administrative authorities.

HLA Hart in Kelsen's theory further, claiming that moral examination of the law is the only instrument that can protect citizens in the face of authority abuse of power. The principle of justice is based on two ideas: metaphysical premise of the existence of

the original balance between good and evil; when this balance is broken by human intervention, it must be restored; premise metaphysics, ethics and equality of individuals: being equal by nature, people should be treated equally. The principle can be formulated as: treating likely cases that are alike and differently cases that are different. Also, when the moral character of a law is being analyzed, the law's rightness should clearly distinguish from the righteousness in law enforcement.

Superior Law is taken as axiomatic. But what happens when it confirms the severe curtailment of fundamental rights or a totalitarian system? The legal positivism theory can justify such a regime. Giving legal value to the totalitarian ideology, fascist or communist, next formalism compromise the very idea of constitution as law designed to stop abuse.

The Pure Theory of Law (system adjusts itself through normal reporting to upper norm) only addresses a normative analysis system, extra-judicial considerations eviction. The system is not open, but closed. The closed system provides a legal purpose when it should provide an extra-legal one (Dănişor 2013, 14).

FORMALISM - A POSSIBLE OPTION FOR THE LAWYER DURING THE TRANSITION FROM A TOTALITARIAN REGIME TO A DEMOCRATIC POLITICAL REGIME

Change of political regime generates hope for a smooth transition to a society structured on principles fundamentally opposed to those who led to the revolt against the old system. The transition, however, in most countries that have experienced a totalitarian regime has proved difficult.

If the establishment of a totalitarian regime is due to exceptional circumstances or only aware of people as exceptional, with the promise of a better society, but only after a period of sacrifices made and the elimination of those who induced the crisis, revolt against totalitarian regimes strives for an immediate creation of a society designed to ensure a life of rights and fundamental freedoms, including, primarily, changing the regulatory system.

In developing a post-totalitarian legal system, in terms of the objective pursued, there have been outlined three main areas: regulation of redress against the former regime abuses; developing a regulatory framework to ensure the transition; legislative measures specific to the new regime. Understanding this new reality was quite difficult for lawyers educated and trained in the legal system previously. The solution could be only formalism, anchoring more the letter of the law than its' spirit.

In order toensure the shift from a totalitarian to a democratic society, new constitutional laws are relatively easy and quickly adopted. Typically, the Constituent Assembly borrows, sometimes without prior censorship, the constitutions of democratic states with richer traditions. Consultation of people in adopting the Constitution, in the immediate aftermath of regime change, does not pose big problems. The revolutionary enthusiasm, objective criticism, especially without a prior exercise, it's doable. Contradictions arise with and application of constitutional government.

More problematic, it seems, is "building" infra-constitutional legal system. Social division specific to the totalitarian regime, with all its' personal and group "purchases", is felt only now. The trend is for a large part of society to maintain the status quo - community. Expressed formally, this trend involves renouncing of the first two directions mentioned above and adopting specific legislative measures focusing on the new regime. The motivations may be unable of repairing mistakes of the past and the need for immediate changes designed to blur the differences from countries with established democracies. Infra-constitutional law making process reveals conspicuous contradictions between constitutionally enshrined democratic values and specific manifestation of totalitarian ideology above. The contradictions will increase with execution and application of laws and law enforcement by justice.

Communism was not just a certain species of political regime, one of the many forms of dictatorship that mankind has experienced since antiquity. It was unique in trying to shape the human psyche, in its' hubris myths and in its' perseverance to enrol people and force them to behave after some Pavlovian recipes for happiness. The myth of a classless society where all political and economic tensions will be abolished in favour of a paradise of equality and human dignity functioned as an excuse for voluntary retirement from militant communists use of reason (Tismaneanu, 1997: 23, 42).

Education in the spirit of the values proclaimed before 1989 required the formalistic approach to the right. The new realities (private property, market economy, political pluralism) were more difficult to close in objective terms and, therefore, the incipient solution was formalism. Adopting fundamental law in 1991 gave expression by regulating the supremacy of the Constitution and by institutionalizing constitutional review exercised by the politico-judicial authority which does not fall within any of the three traditional powers, legislative and judicial, Kelsian normativism, essentially formalist.

The moral character of a rule of law is one of the criteria for its validity. In the words of Kelsen, this is the thesis that social order after the law is one that does not conflict with accepted moral norms, if it does not impose a kind of morally prohibited conduct, or does it rejects an action morally commendable.

Since the values enshrined in the communist period corresponded with heavy interests of the majority population, there is a considerable cleavage between the legal system and society. Cleavage could be covered only by exaggerating formalism. Passing over Kelsen' s axiom (fundamental law includes moral values essential for strengthening community over many generations, expression, while human nature), right, component imperative of State (included in the concept of sovereignty) It happens to be, often, as in the case of communism, set at the highest level of values contrary to fundamental rights.
Communists tried not only to impose a conducive view of human nature, but to change this nature in a fundamental way. And it could not do that by essentially formal means: no education, but physiotherapy; not persuasion but coercion often transformed into abuse.

The lack of juridical value of Constitution's provisions stems out of regulating virtually anything that deprives it of efficiency and finality. The individual is unable to understand the social mechanisms that should protect him/her from abuses of power.

Totalitarianism is reinforced by transforming the human being into an object to be handled, even created in the exercise of power (Dănişor 2012: 10).

Before 1989, the communist ideology influenced everything about creation, implementation, and enforcement law. After 1989, the new system is nearly incomprehensible to lawyers and the only alternative in practicing law was strict adherence to the letter. Or, the rule of law means formalism. Hence the hesitation many judges to directly apply the constitutional norm (Constitutional Court Decision no.1 of 12.01.1993, Official Journal of Romania, Part I no. 129 of 17.06.1993).

If in the case of formalism, the judges may further lead to a solution that expresses at least part of the idea of justice (under the guise strictly applied) in totalitarianism, the very idea of justice may be compromised. The scope of possibilities is much higher. In addition, the judge is himself relieved of the burden of sanctions. The best example is the evolution of the concept of the constitution. If the first constitution could not be conceived in the absence of regulation of rights and freedoms and the principle of separation of powers, later became the fundamental law, the supreme value, which regulates the most important relations in the state, relations on the establishment, maintenance and exercise. Setting limits to the exercise of power has not been addressed by the Constituent Assembly.

The educational system has compromised the development of legal education. Many of the great teachers, also politicians of the forefront post 1989, were removed from education. Unlike other areas, for which there is particular interest (sciences and engineering) as the country's industrialization interest are rising in a new economical order, social sciences experienced a striking involution. Many of the well-recognized lawyers in the country, some politically active, were even forbidden to practice (Vespasian Pella, Angelescu, Octavian Ionescu Paul Negulescu, lieutenants, Nicolae Steinhardt, Victor Fall Emil Haţieganu, Istrate Micescu).

Law school programs were overwhelmingly targeted due to drastic restriction of fundamental rights, only to strictly legal matters. The system was preserved after 1989. If in the prestigious universities in the world are trying interdisciplinary education for an institution to be understood in its complexity, first in extra-science perspectives (economics, psychology, political science, sociology) and then from a legal perspective, in Romania, openness to a profound understanding of legal phenomenon is still insular (Organic Law School, 2012).

The judge, according to current regulations, obeys the law. Removing from the law of „consciousness" as a court of justice can turn reporting into a simple exercise in formal logic. Several magistrate qualities such as courage and empathy are annihilated by a purely formal enforcement. The solution is anchored in the law strictly. The text gives such satisfaction and no extra-judicial solution designed to bring social balance. Justice becomes easy to judge, but the situation remains basically an unresolved conflict. Often, judicial decisions are not implemented aspect sanctioned European Court of Human Rights - Bogdan Voda Greek-Catholic Parish v. Romania (2627/2004).

Possible consequences of excessive formalism are: legislative inflation, almost unknowable and harder, executed or implemented; reluctance of government officials to

resolve the demands of their competence, which generates promoting legal actions thus unduly loading the courts to change property titles; inapplicability judgments.

Excessive formalism generates the need to regulate when it is not. As I notice a familiar doctrine, referring to the inclusion in the Constitution of institutions such as "democratic values of the Romanian people" or "the ideals of the 1989 Revolution," "The Constitution loses the legal form by the need to regulate anything what practical a lack of efficiency and finality. The individual is unable to understand the social mechanisms that should protect it from abuses of power.

However, it should be noted that, in some cases, excessive formalism was sanctioned. In 2003 (Art. I pt. 9 of the Emergency Ordinance no. 58/2003, Official Journal of Romania, Part I no. 460 of 28.06.2003) was introduced into the Civil Procedure Code art. 3021; by that mandatory elements of the appeal were set unconstitutional in relation to art.21, art.24 para. (1) and Art.129 of the Constitution. Taking into account the European practice, the Constitutional Court found (Decision no.176 of 24.03.2005, Official Journal of Romania, Part I no.356 of 27.04.2005) that the provisions of that article, which is sanctioned by absolute nullity failure specify the contents of the appeal elements (domicile or residence of the parties or, for legal entities, name and registered them and, if applicable, registration with the Trade Register, or registration in the register of legal entities, registration code or where appropriate, the tax code and bank account and - if the appellant lives abroad - an address in Romania, which is to be made all communications regarding the process), which also are found in the folder background, appearing as a formality unacceptably rigid, seriously endangering the effectiveness of the remedy and exercise unduly restrict access to justice. Moreover, in the system of the Civil Procedure Code, the appeal is conceived as an extraordinary remedy, i.e. as a last level of jurisdiction in which litigants can defend their subjective rights. Establishment sanction of invalidity for lack of such formal requirements without any possibility to remedy the omission, deprives the appellant, without reasonable justification, the opportunity to examine the path of appeal, its arguments based on how illegal settlement dispute which is part of the judgment under appeal.

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