THE GENERAL THEORY OF LAW IN THE CONTEXT OF NEW REALITIES PARTICULAR TO THE 21ST CENTURY

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ABSTRACT

The general theory of law is source for every other branch of law. In the present context, the general theory of law must incorporate new concepts particular to cognitive psychology. The challenges posed by virtual environments require ethical clarifications. Artificial intelligence, datism and algorithms are all factors that entail new regulations which must be incorporated in the general theory of law.

KEY WORDS: *law theory, state, philosophy*

INTRODUCTORY REMARKS

The general theory of law is a component of juridical sciences that are tightly interwoven with field specific juridical disciplines. I believe that is important to highlight the role played by the general theory of law in shaping the future legal expert. Without a doubt, this traditional area is a source for every other branch of law. Also, reflecting upon the fundamental concepts and categories of values derived from it has been a constant preoccupation of mine. Being aware that no answer can rise to the magnitude of its original question, in this article I will try to provide an answer as well as to open a few new possible directions for questioning within the general theory of law, directions that are directly derived from the context of new realities offered up by the 21st century. I am aware, of course, that there are overlaps between the philosophy of law and political philosophy. In order to be considered a science a theory must be objective, universal and unbiased. In other words, a theory about law can be scientific and general at the same time if it is successful in going beyond the (i) particularities of each branch of law and (ii) the character of national laws. Throughout time, this science of law has been known under 4 distinct designations[1]:
a) juridical encyclopaedia or formal encyclopaedia
b) general theory of law
c) philosophy of law
d) introduction to law

It is well known that until the XIXth century, the general theory of law has been a subdivision of the philosophy of religions, of ethics or politics. The general theory of law has passed over to the juridical and became autonomous only during the XXst century.

The general theory of law must not be understood as a simple catalogue of norms and juridical institutions, but instead, it should be viewed as a thorough, philosophical

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[1] https://studentladrept.blogspot.com/2008/

exploration of juridical concepts and categories. It formulates the most general, valid categories for every juridical branch; meaning disciplines that tackle the history of law and every other specific juridical branch. Each branch of law is studied separately and constitutes a separate juridical subject: constitutional law, family law, labour law, international aw etc.

The general theory of law is "source of law" and inspiration even for dedicated, special juridical sciences that aim to aid the juridical activity conducted by a jurisdictional institution: forensic medicine, legal psychology etc. The general theory of law ensures the methodological, inner cohesion of these disciplines and juridical branches. It also provides interrogative options to other legal disciplines.

Philosophy of law - as a standalone branch of juridical sciences - would be involved with the gnoseology of juridical realities. This also implies a critical evaluation of the basis for juridical authority and implicitly of the moral ground that fundaments every legal decision, i.e. ethical jurisprudence. Moreover, with the aid of its specific instruments, the general theory of law affords an analysis of juridical systems based on the nature of law, i.e. analytical jurisprudence.

Natural rights - developed during the middle ages, although based on Aristotle`s Nicomachean Ethics and late stoicism, - stipulate that the law must be in conformity with the "universal natural law". During the middle ages, human law had to be subordinate to divine law.

Later secular scholars (Th. Hobbes, J. Locke and J.J. Rousseau) supported the thesis according to which law must reflect certain aims and objectives that are natural to humankind. Both versions insist on the idea that law incorporates a strong moral core, as expressed by the famous Latin adage „Lex injusta, non est lex" (An unjust law is no law at all)[2].

In opposition to the naturalist conception of the XVIIth century, XIXth century positivism (Bentham and J. Austin) postulated that law can be defined without any kind of reference towards its content: "The existence of law is one thing; its merit and demerit another.", wrote Austin.[3] According to positivism, law is the will of a sovereign power or the souverain himself and is accompanied by sanctions that are considered adequate by him.

H. L. A. Hart`s famous "The concept of law" (1961), can be included in the same trend of positivism (inaugurated by Auguste Comte); Hart constructs a more intricate positivism, according to which law is not a simple list of arbitrary commandments but a complex network of "primary and secondary rules" whose legitimacy depends on the possibility of deriving them from a "fundamental rule of recognition"[4]. Defining law based on its origins and not its contents, i.e. a deductive model of hierarchical rules that form a closed system, as understood by Hart, has been amply criticised - especially for the limits of this deductive model in explaining innovation and the emergence of the new in the real juridical system.

I. THE GENERAL THEORY OF LAW WITHIN THE PRESENT CONTEXT

According to Alex Carey: "The twentieth century has been characterized by three developments of great political importance: the growth of democracy, the growth of corporate

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[2] F.Antony, *Dicționar de filosofie și logică,* Ed. Humanitas, București, 1996, p.100
[3] Ibidem
[4] Idem, p.101

power, and the growth of corporate propaganda as a means of protecting corporate power against democracy"[5].

XXst century general theory of law will have to reconsider the relationship between human rights, not only in rapport within the classic state-individual dyad, but also in relationship with this new entity that encroaches on individual rights, especially negative ones. Under the pretext of developing new types of positive rights, corporations tend to elude certain negative rights (certain categories of liberties), the very category of rights that we know for certain to represent human rights and best describe a person`s unique essence. Corporations propose a utilitarian ethic, which by definition, is always teleological and eminently futuristic.

Another paradox tied to the end of the XXst century and the beginning of the XXIst was international terrorism, a problem faced by many old democracies. It is a paradox because the outcome of this confrontation was a curtail of civil rights in order to protect the general interest. The very universal essence of law is somewhat negated, for, as J.S.Mill (one of the fathers of modern liberalism) acknowledged „Having a right means having possession of something that society owes to protect"[6].

Also, the general theory of law will have to clarify or to redefine fundamental concepts pertaining to judiciary practice and theory, such as "responsibility" or "intent". It will have to take into account the progress registered by fields such as neurology or cognitive psychology according to which not every act can be tied directly to consciousness event if the act proves a certain *sui generis* intent, in the sense that it is oriented towards something. Within the conceptual change from "*res cogitans*" to "the extended mind", the issue of responsibility is changed noticeably in the sense that the notion becomes much more complex and nuanced. Yet, law systems already incorporated much more vague concepts such as diminished responsibility, state of altered conscience, discontinuity of conscience *etc.*[7]

Beyond behaviourism, which considered every deed to be directly tied to consciousness, thus presuming intention, and with the development of cognitivism in defining consciousness, new consequences have been produced, that are to be replicated in the near future in various concepts and branches of law.

The main problem of ethical jurisprudence concerns the notion of responsibility. Under what circumstances can a court hold someone responsible for their actions or for abstaining from certain actions by omission? Roman and Greek law philosophical edicts might be of service in this direction and can be succinctly expressed through „*Actus non facit reum nisi mens sit rea*" („A deed does not make a man culpable if his mind is not guilty"). But what is the mental element (*mens rea*) supposed to be a compulsory condition for guilt? Aristotle and the tradition inspired by his writings considers that „*mens rea*" is tied to will, *i.e.* to a previous act that implies decision. Conceptually, these delimitations are limited and from a practical standpoint prove to be inadequate, for example when considering neglect inadvertence.

Closely tied to the issue of responsibility is a philosophical questioning related to the justness of the punishment. The traditional justification was retribution or, best case scenario,

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[5] Baillargeon Normand, *Petit cours d'autodéfense intellectuell,* Éditions Lux, collection Instinct de Liberté, Paris, 2005, p. 247

[6] S. Mill, *Despre libertate,* Editura Humanitas, Bucureşti, 2017, p.53

[7] I. Mladin, *De la res cogitans la mintea extinsă,* Ed. Institutul European, Iaşi, 2018, p.63

discouragement. Today, the idea of punishment seems outdated in legal terminology; more curative terms being preferred: education for inclusion, resocialization, etc.

II.THE GENERAL THEORY OF LAW AND THE VIRTUAL WORLD

A large part of our private and public life is shared today between the physical and the digital world. It is therefore necessary to transfer the discussion pertaining to our safety, individual rights and freedom towards the digital space. This argument was sustained by a 2015 report issued by the general director for foreign policy of the European Parliament: "As peoples` lives follow a transition towards the online, their rights must accompany them … the objective of protecting human rights must be transferred in the digital reals. It is explicitly stated that "The main challenge faced by the European Union is to bring human rights into the digital sphere" [8].

The internet is defined by the EU as "a tool for promoting the right to education"[9]. The EU aims to bolster confidence in this tool and to ensure its credibility by identifying and tackling risk factors that threaten individual freedom and human rights. According to the report the main threats posed by the virtual environment are: the violation to the right for private life through surveillance software, encroaching on the freedom of expression, freedom of association, various forms of discrimination *etc.*

Another important role played by the internet is that of fostering development and innovation – according to the 2016 ONU resolution pertaining to the promotion and protection of human rights on the internet "Individual rights available in the physical world must be equally protected online, particularly the freedom of speech…The global online network must fulfil its role of facilitator of development and innovation"[10].

In the '80s, M. Kranzberg defined the 6 laws of technology. The first stated that „technology is neither good nor bad; however, it is also not neutral"[11]. Contemporary philosophical thinking on technology reached the conclusion that technology is not axiologically unbiased, especially since information technology poses important ethical influence through its programming and computational algorithms. The algorithm has been considered a rational product (belonging mainly to exact sciences) for a long time, completely nonmoral and subject only to logical and mathematical rules. Yet, by governing the virtual space, it gains ethical attributes. It is no longer sufficient to regulate online environments, regulations must reach at a much deeper level, one that involves developing and creating hardware and software solutions. This level mediates relationships between humans, affords communication, gathers and analyses data, offers solutions and makes decisions. Because IT related social outcomes are important, the field needs to find solutions in order to incorporate ethical elements during the programming and design stages.

Philosophers Brey and Sorakes argue that: „software environment and hardware systems can be evaluated from a moral perspective independently (partially or completely) from their users. It can be argued that software and hardware incorporate values in the sense that by usage, they tend to promote certain values". Therefore, it would be necessary for all

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[8]   https://revista22.ro/eseu/bogdan-diaconu-moga/infrastructur-algoritmic-specificatii-etice
[9]   ibidem
[10]   ibidem
[11]   ibidem

software applications and hardware solutions to be endowed with ethical algorithms that ensure all desirable moral values [12].

American professor M. Ananny, in his article "Toward an Ethics of Algorithms" (2015), shows that algorithm control an ever-increasing part of the public and private spheres of our lives, therefore it is necessary to regulate the premises and axioms on which these algorithms are built upon. Without a serious debate and thorough regulations, the ethical and juridical mishaps particular to the field shall severely affect the social freedoms and rights in the form they have been designed before the advent of the internet. Ananny asserts: "algorithms govern because they have the power to structure possibilities. They establish what information is included into an analysis; they forecast; plan and process data, offer results with a certain degree of objectiveness and certainty, act like filters and mirrors by selecting information that make sense within the logical framework of a computational system within which they were created". Algorithms not only speed up commerce, journalism, finances or any other area but also impose a discourse and culture of knowledge". [13]

Algorithms have the ability to process immense quantities of anonymous data which in turn serve as decisional basis in the health sector, public safety, labour markets *etc*. As highlighted by a study (centred on internet and human rights) conducted by Viadrina University of Germany, these algorithms function just like people or institutions. "These operate either like main or auxiliary tools or even as single deciding factors in areas of life that were non-existent a decade ago, as well as in traditional areas in which decisions used to be taken through human judgement as is the case in public health or HR. Algorithms occupy activities that involve subjective decision making judgements."[14]

The interference of algorithms into the private and public aspects of the individuals' life, into government policies and into every corporate decisional pattern is undeniable, yet regulation efforts are timid at best. One such initiative belongs to the German "Algorithmwatch" NGO which proposes a manifesto addressing decisional algorithms. This is based on 5 principles:

1. Decisional algorithms (AD) are not unbiased;

2. AD creators are responsible by the generated results;

3. AD must be easy to comprehend so that it can be democratically controlled;

4. Democratic societies are to ensure AD comprehension by relying on available technologies and the regulation of surveillance institutions;

5. We must decide how much AD is allowed to infringe on our liberties.[15]

CONCLUSIONS

|In order to protect a person in an online environment (where they are not an abstraction but a human being), to ensure the transfer of their rights from the real to the virtual world (which is sometimes more real than reality itself) it is necessary to amply interrogate the possibilities afforded by technology, to evaluate the programming algorithms in addition to an ethical reconsideration of the decisional factors involved in both software and hardware technology. Without a doubt this involves the collaboration of many fringe sciences, but, I

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[12]   ibidem
[13]   ibidem
[14]   Y.N. Harari, 21 de lecții pentru secolul XXI, Editura Polirom, București, 2018, p.34
[15]   https://revista22.ro/eseu/bogdan-diaconu-moga/infrastructur-algoritmic-specificatii-etice

believe, that is compulsory to analyse these new realities within the general theory of law, because everything that is to be regulated will become source of law and hence reference for the next decades.

The enormous ethical implications of this new environment are already areas of reflection and even subject to regulation for many branches of law (as well as auxiliary branches of law), yet the major role played by the general theory of law, I believe, is to bring this new reality to the agora of the spirit in order to clarify its content through an interdisciplinary and ethical approach. The characteristics of morally sensitive IT systems – by being associated with private life, justness and democracy - must be thoroughly addressed.

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