FUNCTIONS OF LAW AND LEGAL CERTAINTY

1. The assumption of theorizing about functions of law is to conceive law as a fact of a reality which acts upon other phenomena. But since this reality comprises social and psychological events and linguistic phenomena affecting human conduct, practically each legal theory can analyse some aspects of the functions of law (1).

There are many typologies and classifications of the functions of law. The functions of law contain all the effects of law in any sphere of reality. The aims of theoretical analysis, however, require often more specified conceptual tools and, hence, we have to single out various types of functions. For my analysis it is sufficient to use two classifications of these functions.

1.1. I divide the functions of law according to subjects affected by them. The first group of subjects are the «private» individuals performing their non-institutional social roles in their own name. The second group is that of the organs of institutions acting according to determined rules of competence and of procedure as representatives of organized collectives. There is no need here to draw a sharp line between these two types of functions and to enter into the controversy concerning theories of institution.

1.2. The second division of functions concerns the ways in which law influences upon behaviour. I single out the direct and indirect functions.

Law functions directly when the information concerning it reaches the subject through various channels and influences upon his decision-making. In a standard case an information about legal provision modifies the range of decisional alternatives taken into account by a decisión-

(1)This is the wide concept of «Law as fact». Cf. K OPALEK, J. WRÓBLEWSKI, *Axiology: Dilemma between Legal Positivism and Natural Law*, Oester. Zft. f. oeff. R. 18, 1968, págs. 354.

maker. This modification consists in the change of the range of alternatives or of the values ascribed to them (2).

Law functions indirectly through decisions of the state organs applying law. The standard case is an influence of an judicial or administrative decisión upon an subject. Indirect functions cover a large area from the solving of conflict situations to the decisional declarative determination of certain legal situations or administrative acts (3).

2. Legal certainty is also understood in many manners. From the objective point of view legal certainty is treated as predictability in the law-making or law-applying activities, from the subjective one it is viewed as the subjects' feeling concerning the stability of law and legal security

2.1. The problems of legal certainty from the subjective point of view are treated here only in respect to the «private» individual /comp. point 1.1/ who fulfills certain conditions.

The functions of law are ,then, related with various kinds of evaluations, the appraisal of legal certainty included. The evaluation of legal certainty is determined by the attitude of the individual to the reality he lives in, and especially to the socio-political system and the law in force. The existence of many conflicts within a society, group conflicts and individual conflicts as well, an the variety of cognitive and evaluative attitudes of individuals is expressed in the multiplicity of evaluations of law, and, hence, of the functions of law. Especially the individual's approach to legal certainty depends on his attitude, which can be an attitude of e. g. conformism, ritualism, innovation, retreatism or rebellion (4). The analysis of all of them is evidently beyond the scope of my paper.

Hence I limit myself to the analysis of the functions of law and of legal certainty from the point of view of individual who has a conformist attitude. Such attitude is defined by following postulates: /a/ individual accepts the basic values expressed in the socio-political system and in the law in force, or at least tolerates them; /b/ the inlividual's activity does not demand for its success any radical change in the law in force: /c/ individual from time to time is in conflict with others,

(2) Eg. F. STUDNICKI, *Przeplyw wiadomosci o normach prawa*, Kraków, 1965; M. BORUCKA-ARCTOWA, *O społecznym działaniu prawa*, Warszawa, 1968, chop. IV, V; K. OPALEK, J. WRÓBLESWSKI, *Zagadnienia teorii prawa*, Warszawa, 1969, chap. V. pont 4.2.

(3) Cf. M. BORUCKA-ARCTOWA, op. cit., chap. VI; K. OPALEK, J. WRÓBLEWKI, Zagadnienia, op. cit., chap. V, point 3.

(4) Eg. R. K. MERTON, *Social Theory ond Social Structure*, Glencoe, 1957, chap. IV, V.

and such conflict demands a solution by the decisión of a state organ applying the law.

2.2. Besides I make two assumptions concerning the system of law and the operation of law, which form a part of the context the individual lives in. /a/ I a assume that the law in force belongs to the statutory law systems, in which the basic legal «sources» are the texts of statutes, and that state organs decide on the basis of statutes. This simplifies the issue, but *ceteris imparibus* one can apply my analysis with due modification to the systems of common law and to these systems which are between the two traditionally opposed types. /b/ I assume, further, that the activity of the state fulfills a minimum of the rule of law in the area of law-making and law-applying functions. This minimu is understood as required by the conformist attitude described above /point 2.1/.

3. In the strength of these assumptions /points 1,2/ legal certainty has to be analyzed in relation to the direct and indirect functions of law.

Legal certainty in respect to the direct function of law is viewed as the stability of law. Legal stability is referred to the law-making activity and is expressed in a statement or in an evaluation, that the law is stable. This kind of legal certainty is taken either in an objective or in a subjective manner, depending on the kind of probability of legal change is used.

Legal certainty in respect to the indirect function of law concerns the characteristics of the law-applying or of legal decision as its result. This kind of certainty, roughly speaking, consists in the predictability of legal decisions and the feeling of security of the individual affected by the decision.

4. Legal certainty viewed as the stability of law is evidently relative, because does change in history. This changeability of law, however, does not eliminate the problem of its stability either taken objectively as the predictability of change (5), or subjectively from the point of view of individual's evaluations.

4.1. I treat the stability of law, objectively taken, as a function of

(5) Certainty indentified with predictability is treated as the special value of the positive law. Eg. O. A. GERMANN, *Probleme und Methoden der Rechtsfindung*, Bern, 1965, págs. 29 sq., 333; O. BRASSLOF, *Rechtssicherheit*, Wien-Leipzig, 1968, páginas 21 sq., 26 sk., 59; O. BRUSIIN, *La objetividad en la jurisdicción*, Córdoba, 1966; pág. 75; P. HEXNER, *Studies in Legal Terminology*, Chapel Hill, 1941, páginas 135, 140; M. CORSALE, *La certezza del diritto*, Milano, 1970, chap. I, points 7-8.

the four variables: the social context in which the law operates /S/; the interferring systems of values in the social context /A_1/ and the result of this interference as axiological content of the law in force /A_2/; factual law-making process, having as its component the institutional procedures of the creation of law /P/.

The predictability of the stability of law /PL/ as the function of these variables can be theoretically determined provided sufficient informations concerning the values of these variables are given.

The formula of the predictability of the stability of law is:

$$PL = f\ /S, A_1, A_2, P/ \qquad /1/$$

The theoretical determination of the /PL/ is not, however, a substitute for a measure at legal stability. This measure, when referred to the subjective standpoint /point 4.2/, should be based on some criteria of preference requiring ultimately an external evaluation of law. And this compels to enter into axiological controversies. It seems that the most intuitive and objectivized criterion is that of a rationality of legal change. This rationality can be defined as follows: legal change is rational from the point of view of the values expressed in /A_2/ and the knowledge of the persons deciding in /P/ if the alteration in the social context /S/ instrumentally requires the legal change in question. This is a criterion of an internal rationality of law, which can be conflicting with the individual's evaluations of legal stability /point 4.2/.

4.2. Legal stability from the individual's subjective point of view /comp. point 2.1/ is treated by me as the limited function of the three variables: /a/ the area of legal regulation that is to say, whether it is larger or narrower in comparison with the existing one /R/; /b/ the content of legal regulation, that is to say the way in which the legal modalities /viz. duty, permission/ of behaviour or legal consequences of facts are changing /C/; /c/ The frequency of changes of R and C within a conventionally fixed period of time /Fq/, which determines the limits of the subjective stability of law. The minimum of changes means a frequency, which is demanded by the individual without hindering legal stability, and maximum means the limit which transgressed makes the law unstable.

The subjective stability of law /SL/, thus, is presented in the formula:

$$SL = f_{\min}^{\max}\ /R,\ C.\ FW/ \qquad /2/$$

The feeling of legal stability is conditioned by cognitive and evaluative factors. The individual feels this stablity if he has sufficient informations about the changes of /S/ requiring the law-making according to the /A_2/ and when he is informed about the instrumental knowledge on which the decisions in /P/ are based /comp. /1//. The individual has the feeling in question if his own evaluations /A_1/ are at least not «contradictory» to those of /A_2/. This relation is assumed *ex hypothesi* by the conformist attitude of the individual /comp. point 2.1/, but there are the possibilities of conflicts depending on the relations of /A_1/ and /A_2/. These conflicts eliminated by the assumption of the automatic indidvidual's acceptance of all law as enacted positive law would mean the ritualist attitude, which was not assumed here. The conflict can concern the evaluation of the necesity of changes and the choice ol legal instruments as well.

5. The certainty in the application of law (6) belongs to the indirect functions of law. This certainty is viewed either objectively as a predic tability of decisions, or subjectively as the feeling of legal security.

5.1. The certainty of decisions as predictability depends on the characteristics of the law-applying process. Referring to the standard example of judicial decision-making (7) I single out two components of this certainty: certainty of decisión-making and certainty of the content of decisión.

The certainty of the decisión-making /DM/ is the function of three variables: /a/ the certainty that there will be an action tending to initiate the decisión-making process /I/ /the initiators are either the «private» individuals acting according to their interests or state organs acting *ex lege/*; /b/ certainty concerning the selection of the initiatives by the state organ, who is competent to admit or to repect them /SI/; /c/ the certainty that the decision will be made according to the general duty to decide duly presented cases /D/.

The formula for the certainty of decision-making /DM/ is the following one:

$$DM = f/I, SI, D/ \qquad /3/$$

(6) Cf. J. WRÓBLEWSKI, *Wartosci a decyzja sadowa*, Ossolineum. 1973, chap. IV

(7) Cf. J. WRÓBLEWSKI, «Il modello teorico dell'applicazione della legge», *Riv. intern di filosofia del diritto I*, 1967; Idem, «Sadowe stosowanie prawa», Warszawa, 1972, chap. III, point 2; chap. VII-IX.

The certainty of the content of decisión /DC/ is the function of three variables too: /a/ the certainty of the choice of legal norms and of the determination of their meaning in the degree sufficiently precise for the decision-making /N/; /this contains the choice of the norms of procedure and of substantive law, the choice of directives of operative interpretation, if any, and the qualification of facts of the case/, /b/ the certainty concerning the decisions of evidence /F/ determined by the accepted rules of evidence and the judgements of relevancy of proofs; /c/ the certainty of the choice of the consequences of proven facts /Cq/, choosen by the law-applying organ within the lee-ways, if any, provided by the applied norms of substantive law and the binding directives of the choice of consequences.

The formula of /DC/ is, hence, the following:

$$DC = f/N, F, Cq/ \qquad /4/$$

The formula of the certainty of the application of law as a whole treated objectively as predictability of decisions /PD/ contains both the certainty of decisión-making /DM/ an the certainty of the content of decisión /DC/:

$$PD = DM + DC \qquad /5/$$

Hence, using /3/ and /4/, we obtain:

$$PD = f/I, SI, D/ + f/N, F, Cq/ \qquad /6/$$

The functions used in the formulas concern the certainty of the determination of the variables referred to. This certainty should *ex hypothesi* have an objective measure of probability. I cannot enter here in the obvious and well known difficulties of making the adequate measurements.

The conditions of the predictability in question are, of course, very complex. Generally one can assume that if the law-applying organs fulfill the minimun of the rule of law /comp. poin 2.2/ then the existence of law favours this predictability. Especially relevant is the form and content of legal regulation, the correctness of legal reasoning of the law-applying organs, the level of their legal and extra-legal knowledge, and the uniformity of their evaluative attitudes expressed in the evaluations taking place in various operations of the law-applying process.

5.2. The objective predictability of decisions influences upon the subjective certainty conditioning the feeling of legal security (8). This

(8) Legal security and legal certainty are often identified (comp. note 5) and sometimes the treatement of the former without using the term «certainty» clearly

feeling is based on the more or less justified assumption that the decisions with certain content shall be made. This feeling can be treated as the function of three variables, which influence the individual according to his cognitive and evaluative attitude.

These variables are: /a/ the information concerning the objective predictability of decisions /PD/ /comp. poin 5.1./, and the strengthening of this feeling could be a result either of the true information /when the /PD/ is high/ or false one /when /PD/ is low/; /b/ the conviction concerning the concordance of the individual's evaluations and those of the law-making and law-applying authorities /V/; /c/ the feeling of the general social security /SS/, containing the belief in legal stability and the stability of legal decisions.

The formula of the subjective certainty of decisions /SCD/ is the following:

$$SCD = f/PD, V, SS/ \qquad /7/$$

The conditions of the feeling of legal security are rather complex. Assuming the determined attitude of the individual the factors favouring this feeling are: the objective predictability of decisions and the information concerning it; the axiological conformity referred to above and the stability of the social system as a whole. If these factors are absent then the «false» feeling of security can be a result of an lack of information and the unjustified individual's evaluations.

6. The certainty of law and the feeling of it by subjects are higly relevant for functioning of the law.

Legal stability /comp. point 4.1/ is one of the praxeological conditions of the effectivity of law as a means of social control (9). If this control is thought of as motivating human behaviour by regulatives means, then we can contrast two types of control: control through individual decisions and control through general rules. In statutory law systems /comp. point 2.2/ law functions directly as the second type of control. The condition of its working so is the relative stability, because the too frequent changes of law in extreme cases functionally would mean a

indicates that it deals with the same problem. E. g. C. Cossío, *La teoría egológica del Derecho y el concepto jurídico de la libertad*, Buenos Aires, 1964, 2.ª ed., páginas 565 sq., 594 sq.; Legaz y Lacambra, *Filosofía del Derecho*, Barcelona, 1961, 2.ª ed., págs. 583 sq., 590.

(9) Cf. in general K. Opałek, J. Wróblewski, Zagadnienia, op. cit., chap. V, points 1-3.

shift to decisionism being the contrary type of control. The control by general rules is necessary in sufficiently complex societies and legal stability, hence, is praxeologically demanded.

Legal stability is a condition of securing the existence of the society organised in a state, because it serves the homeostasis of this whole system (10). From this point of view, however, one sees clearly the necessity of some changes in law, which are necessary for the proper functioning of the system in the changing situations of its existence. Hence the problem of the limits of legal stability.

The objective certainty of legal decisions /comp. point 5.1/ is also a conditions of the effectivity of law when performing an indirect legal function. If law has to serve certain social aims and when this requires an application of law then a condition of the functionality of legal decisions is their preformance within the limits determined by law. In this sense praxeologically legal decisions should be certain and predictable in the degree determined by the properties of the law in force.

The stability of law and the predictability of decisions influence the shaping of the attitudes towards law, the legal culture and the uniformity of social behaviour, and are a vital component of the global social certainty (11), which is appraised by individuals fulfilling certain conditions /comp. point 2.1/.

In this sense legal certainty has a praxeologically positive value form the point of view of the functioning of a stabilized social system in which law functions as a means of social control based on the sufficiently largely accepted systems of values.

7. Legal certainty is analyzed also from an ideological point of view.

The adherents of legal certainty are treated as the supporters of the *status quo*, which can be changed only by graduate, evolutionary and cautious steps. In this sense the value of legal certainty expresses the attitude of an acceptation of law as an element of the socio-political system (12).

Ideological acceptance of legal certainty is linked at least with the acknowledgement of the values expressed in law and in the application of

(10) The concept of the homeostatic end of law is introduced in J. WRÓBLEWSKI, «An Outline of the Principal Problems of the Relations between Law and Cybernetics», *Bulleinn II*, 1970, Centro di Giuscibernetica dell'Università di Torino, páginas 8 sq.

(11) Comp. the concept of «la certezza societaria», M. CORSALE, op. cit., chap V, points 8-10.

(12) Cf. M. CORSALE, op. cit., chap. IV.

law performed on the basis of the rule of law. This acceptance can be connected also with the idea of the formal justice which requires the equal treatement of all individuals belonging to the same essential category (13). Such formal justice is ideologically closely related with equality and with the certainty in application of law.

One should add, however, that the ideological problems of the certainty of law appear also on a lower level of abstraction in the ideology of the application of law. Here it is not the question of the maintaining the *status quo*, but the problem of the values of the application of law, viz. whether among them there is the certainty of law, and if it is included, then what place it takes in the hierarchy of values.

If we single out three basic types of the ideology of the /judicial/ application of law, then the problem of legal certainty can be rougly formulated in the following vay (14). The ideology of the bound judicial decision, continuing the traditions of the XIXth century positivist thinking and its false presentation of the judicial decision-making, puts the certainty of legal decision among the top values — the decision should be as certain as the law it is based on. The ideology of the free judicial decision, expressed in various forms of the freee law movements, does not treat legal certainty as a value at all, or at least it puts it as a third-grade requirement only.

The ideology of the legal and rational legal decision, as a compromise between the two preceeding ones, accepts legal certainty as one of the important values of judicial decision, but is aware of the limits, within which it could and should be realized depending on the properties of the law and the role played by evaluations in reasoning of the law-applying organs.

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(13) Cf. C. Perelman, *Justice et Raison*, Bruxelles, 1963, chap. I, point 2.

(14) Cf. J. Wróblewski, «Sadowe stosowanie prawa», op. cit., chap. XII. Idem, *Idéologie de l'application judiciaire du droit*. Oester. Zft. f. oeff. R., 25, 1974.