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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. Noțiuni generale de drept privat*, Universul Juridic Publishing House, Bucharest, 2012, p. 7.

In opposition to this view, the Historical School of Law, with Charles Savigny as its paradigmatig author, 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 main representative 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 principles, unregulated by the state; they can be found 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 that particular field would be regulated by legal rules, issued by the state through its bodies.

Therefore, 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 steps in to secure compliance.

1.2.2. The structure of the legal rule

Any legal rule has three parts: 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 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 stipulated by art. 1.357 of the Civil Code "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, according to art. 282 of the Civil Code).

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 it concerns 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.

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 rules can be classified[1] according to several criteria.

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. They 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 rules that suggest 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.[2].

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[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 Juridică Publishing House, Cluj-Napoca, 2009, p. 30.

[2] See also Dumitru O.I., Stoican A., *Business Law: lectures notes*, ASE Publishing House, Bucharest, 2019, p. 23.

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.

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, *i.e.* their hierarchy, legal rules are laid down in:

- The Constitution 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 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 need a certain quorum to be passed – two-thirds of the Members of Parliament, or ordinary laws, *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 legal 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 providing 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 (like the principle of property, the principle of good-faith, the principle of equality before law, etc.) are applied in situations where a particular matter is not regulated by law, no customs are recognized as such, therefore there is no choice but to rely on these general principles[1].

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[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.

It must be noted that no list with such principles is to be found in any legal act; they are always inferred from the overall analysis of the legal system, but also from the practice of the courts and from the doctrine[1].

European law

According to art. 5 of the Civil Code "in matters governed by this Code, the rules of EU law shall apply with priority, regardless of the quality or status of the parties".

Against this legal provision, the regulations and directives issued by the EU institutions will apply directly in the Romanian law, in which case we can regard them as true sources of law, obviously in the matter of civil law[2].

As regards EU Directives, it should be noted that, as a general rule, they are applied in national law by means of national legislation. If the state fails to transpose them into national law, those interested can file a case against the state by direct action, requesting damages.

As regards the rules of European law, the source appears to be somewhat atypical, indirect, since these rules must be transposed into national law (less the regulations) and only in the eventuality of a direct action against the state we can discuss about a source of law in the true sense of the word.

1.2.5. Application of the legal rule

The legal rule is not issued once and for all, most times the legal rules succeed each other in time and sometimes they are applicable only in a particular territory.

Frequently, in this situation, the question arises which legal rules apply when there is a succession of laws or in which territory one or more legal rules apply.

Such situations are regulated by the Civil Code in articles 6-8, the application of the civil law in time and territoriality of the civil law.

A. Application of the legal rule in time

According to art. 6 para. 1 of the Civil Code, **the legal rule generally applies as long as it is in force.**

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

[2] See also C. Lefter, *Fundamente ale dreptului comunitar instituţional*, Economică Publishing House, 2003, p. 91.

Therefore, the legal regulation refers to the period of time during which the law is in force. So the moment of entry into force of the legal rule and the moment it ceases to apply are to be considered.

The entry into force of the legal rule varies depending on the legal act in question.

Thus, the law and government ordinances issued on the basis of an enabling law adopted by the Parliament, will come into force 3(three) days after their publication in the Romanian Official Gazette, unless the very text mentions another subsequent date for its entry into force.

While this is the rule, there were cases when the normative act, although published in the Romanian Official Gazette, did not enter into force on that date, but its entry into force was established by a separate legislative act, issued subsequently. Thus, for example, the current Civil Code, although published in the Official Gazette on 24 July 2009, it entered into force on 1 October 2011, according to Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

Emergency ordinances shall enter into force upon publication in the Official Gazette and only if they have been previously submitted to the competent Chamber for notification.

The other acts shall enter into force upon publication in the Official Gazette, provided that they do not include the provision of a different, subsequent, date for their entry into force.

Usually, a legal rule no longer applies when it is repealed (abrogated).

Most times, normative acts are expressly abrogated, *i.e.* by a law expressly mentioning that another law shall cease to apply – therefore is no longer in force – upon the entry into force of the new law.

It is possible, however, that the legal rule also ceases to apply following the contradictory nature of its provisions to a new law. In this case, the abrogation is tacit, the new legal act implicitly repealing the old one, by the provisions that are contrary to the old ones.

Usually, however, the newly adopted legal act contains the provision in one of its final articles, according to which any contrary provision is repealed, therefore it is still an explicit abrogation of the legal rules.

A special case is that of the legal rule to be applied temporarily, when it includes the application period; the legal rule ceases to apply at the end of the period for which it had been adopted.

Typically, some social relations are governed by several legal acts adopted successively, in which case one must distinguish which of these rules are applicable.

In such situations, two specific principles of civil law apply: the principle of immediate application of the law and the principle of non-retroactivity of civil law.

According to ***the principle of immediate application of the new law***, it shall apply immediately upon entering into force and the old legal rule no longer applies. In other words, the new legal rule applies to those situations that arose after the law has entered into force, the previous law no longer having any applicability on them.

According to ***the principle of non-retroactivity of civil law,*** the new law shall not apply to previous legal situations: the past escapes civil law[1].

Concerning this principle there are, however, some exceptions, when the law is either retroactive or it ultra-activates.

Retroactivity of the new law, as an exception to the above mentioned principle, only applies in cases strictly determined by the new law. The most well-known example of this view is that of the more favourable criminal law, where the new law applies – if it is more favourable – also to legal situations arising before its entry into force, emphasizing that this rule is always laid down in the new law. This exception is stipulated directly by the Romanian Constitution in art. 15 para. 2.

Ultra-activity of the old law is another exception to those principles, in which case the old law applies to situations arising after its application ended. In this case, appropriate provisions must be included in the new law, in order to have ultra-activity. For example, art. 6 para. 4 of the Civil Code lays down that "the prescriptions, forfeitures and usucapio started and unfulfilled upon entry into force of the new law are entirely subject to the legal provisions that stipulated them."

According to the principle of *'tempus regit actum'*, the civil legal rule applies to those future effects of legal situations which have arisen before its application, if the legal situations exist after the entry into force of the new law.

It is the case of the provisions of art. 6 para. 6 of the Civil Code which stipulate that the new law also applies to the future effects of legal situations which have arisen before its entry into force, but only if they are "derived from the status and capacity of persons, marriage, parentage, adoption and the legal duty to care, from relations of property, including the general regime of assets and from neighbourhood relations if these legal situations persist after the entry into force of the new law".

B. The application of the legal rule in space

This matter is governed by art. 7 and 8 of the Civil Code and the rule is that **the legal act adopted by a central body applies throughout the country**, unless the same legal act provides that it only applies to a portion of the national territory.

[1] See also S.L. Cristea, *op. cit.,* p. 30.

If it is a legal rule issued by a local authority, it will only apply within the territory over which the issuing body has competence.

Art. 8 of the Civil Code also governs the extraterritoriality of civil law, more precisely in the case when the legal relationship contains an **extraneous or foreign element** such as: nationality, place of conclusion of the contract, place of performance of the contract, etc. The rules governing the conflicts in matters of private international law will apply, the text referring to Book VII of the Code, governing such situations.

Thus, in this case, we are in a situation of conflict of laws in space: the same legal relationship is potentially subject to several legal systems.

Conflict rules are called upon to resolve various situations related to, for example, the status of the individual (under Romanian legislation, it is determined by his/her national law), nationality of the legal person (the rule of the registered office applies under Romanian legislation), real estate/immovable property (in Romanian legislation, the place where the property is situated determines the applicable legal system), legal relations originating in civil offense (the place of committing the offense, under Romanian legislation, determines the applicable legal system), etc.

1.2.6. The interpretation of the legal rule

Sometimes, the legal rule is not sufficiently clear, explicit in the choice of words or does not cover – and most often it simply cannot cover – all situations that may arise during its application.

For this reason, sometimes it is necessary to interpret the legal rule, specifically to understand its meaning and to have a correct application of the law to a given situation.

Art. 9 para. 1 of the Civil Code provides that the same authority that adopted the legal rule is competent to issue its interpretation and the next paragraph stipulates that the interpretive rule only takes effect for the future.

Therefore, sometimes, the legislator itself, realizing at the moment of the adoption of the legal act or later during its application that the correct understanding of the meaning and content of the new legal rule will be difficult in practice, issues the correct interpretation, *i.e.* states those elements which in practice create problems in order to remove any difficulties in understanding the legal norm.

This type of interpretation is the so-called *official interpretation* and is given by the body that issued the rule, either with the adoption of the rule in question or afterwards by a separate legal act, the latter being also a legal rule.

In practice, however, in the process of applying the legal rule, courts are called upon frequently to interpret the legal rule. In this case we are dealing with a *judicial interpretation,* which only applies to the particular case standing for judgement before the Court.

There is also a third category of interpretation, *the doctrinal or non-official interpretation*, *i.e.* that interpretation which is made in the juridical literature, but also by lawyers in their pleas. Such interpretation is not binding, but serves to persuade the courts to adopt a viewpoint in the application of the law for a specific case, or to argue against a point of view adopted by a court or more courts in the application of a legal provision.

Methods of interpretation of legal rules

While for the official interpretation, the method of interpretation of the legal rule has no particular relevance – in that case the issuer explains its point of view which, thus, becomes a new legal act or is incorporated in the law that has been interpreted – for the judicial and doctrinal interpretations, as different issues arise, a number of methods of interpretation have been established to ensure a correct interpretation.

- *the grammatical interpretation*; it is that method of interpretation based on grammatical rules.
- *the systematic interpretation*; by this method, the legal act shall be interpreted taking into account connections with provisions of other legal acts or even of the same act.

As regards this method of interpretation it will be taken into account that the lower legal rule must obey the superior rule; also, the general legal norm is the rule and the special one is the exception, which, however, prevails over the general rule because it derogates from it.

- if for some situations there are no legal rules, *an interpretation by analogy* will be applied, *i.e.* the application of legal rules for a particular situation, although such situation was not taken into account when the rules were adopted.

However, no such application of the legal rule is possible if, by this method, the exercise of civil rights would be affected or when providing for civil penalties or when derogating from a general provision, according to art. 10 of the Civil Code.

- *the logical interpretation*; it is that interpretation which is based on logical reasoning. As regards this method of interpretation, among the rules that are