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ACADEMIA ROMÂNĂ



Diana PETRESCU

Legătura dintre evoluția societății omenești și drept pe teritoriul României – *studiu de antropologie juridică* –



Editura Muzeului Național al Literaturii Române



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OMENEȘTI ȘI DREPT PE TERITORIUL ROMÂNIEI**
– STUDIU DE ANTROPOLOGIE JURIDICĂ –



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ȘI DREPT PE TERITORIUL ROMÂNIEI
– STUDIU DE ANTROPOLOGIE JURIDICĂ –**

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- 2. Obiectivele specifice:** Elaborarea și implementarea de noi tehnologii-suport pentru derularea proiectului; formarea și perfecționarea cercetătorilor prin programe postdoctorale
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- 3. Domeniile cercetării:** filologie - literatură • științe istorice și arheologie • filosofie, teologie, psihologie, pedagogie • arte, arhitectură și audio-vizual • știința informației • sociologia culturii • antropologie • etnografie și folclor

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ADDENDA

Abstract

The Connection between Evolution of Human Society and Law in Romania. Study of legal anthropology

Law appeared gradually with the evolution of human communities and contributed to creating a favorable climate to further development of human society. In turn, the development of human societies has generated and facilitated the development of law. In other words, there is an inextricable connection between the development of human societies and law.

We can also say that between the evolution of individuals and the evolution of human societies at all levels and in all aspects (economic, social, political, legal and cultural), there is an intrinsic connection. Without legal norms to regulate all aspects and in all areas human relationships, society could not be organized. In the absence of organized societies, science of law could not exist.

All (nature, including climate, soil, subsoil; water, landforms, species of animals and plants; Romanian society as a whole, in terms of political, economic, social, scientific and, not least, legal) was and is in constant motion and transformation.

In the history of Romanian society there were recorded periods of decline that led to a huge decline of the society, to an authentic involution, which influenced the legal system as a whole and affect it in equal measure.

Changes in climate and fauna have facilitated the emergence of the first anthropomorphic monkeys and their gradual transformation, until the emergence of homo-sapiens, like man today.

The gradual development of people, both physiological and mental has led to their first discoveries. Man made the first tools and weapons looking to live better, to have an easier life. Rudimentary at first, these have evolved over time as: man began to build the first houses above ground, discovered fire, turned from hunter and gatherer in food producer, has domesticated the first animals, discovered bronze and iron, potter's wheel and initiated the first commercial activities.

One might say that these economic and technological progresses have generated the need for the first social and political structures of human communities. At first people live in hordes, like animals, without the notion of property or private property. Economic development required the creation of some form of protection of the people to protect their lands, houses, tools, food, herds of cattle, all wealth and, not least, their own life. Thus, appears the first races and tribes. Along with the first organized human communities appeared the first law notions, rudimentary at first. For example, if in the beginning, when people lived in bands (hordes) social relationships within a collectivity relied on getting food and mutual defense, in the last part of Paleolithic it passed from primitive bands to "large groups of relatives". During this period, relations between the sexes were not enclosed. Over time, these relationships begin to be prohibited between those from different generations (parents-children, grandparents-grandchildren). Thus, was born during matriarchy the marriage in the family group related by blood. In the matriarchal races children naturally belonged to the maternal relatives. In this period the regulation system had a traditional character based on traditional rules of conduct binding all members of the community.

As the roles of man increased among human communities, matriarchal races gradually began to be replaced by patriarchal races, composed of all patriarchal families. These hold in common possession a part of the territory of the tribe. Patriarchal gens family was headed by the head of the oldest family and the counsel of the races, which was composed of the heads of the other families. From the union of several patriarchal races were born the so called patriarchal kindred "phratries" which made the patriarchal tribe that was led by the most experienced chief of gens.

Further, the union of patriarchal tribes is based on blood. Between tribe members there is full equality all decisions are taken by the assembly of the tribe. We can not yet speak of a single chief.

It is important to note that for the first time in human history in the patriarchal family makes its appearance the private property. Private property along with the old form of domination in condominium, jointly, gradually led to the emergence of differences in wealth between members of the human communities. This is a turning point, with major implications, fundamental in the further evolution of human societies in all aspects, including legal.

The emergence and development of private property in the tribe has made prisoners of war not to be killed. They were put to work and formed the patriarchal slavery.

We can say that the emergence of private property has, as a logical and unavoidable consequence, the emergence and widening of the gap of wealth and social differences, resulting in the appearance of the state itself. As stated in the introduction to this work, the appearance of the state led to the emergence of the law because there can not exist a state without law, like no legal science can exist without a state in which to find their applicability and effectiveness.

During Hallstatt period, the organization of the Geto-Dacian tribes is that of military democracy based on military aristocracy.

The Dacian state was a monarchy headed by the King that had full powers. Of course, the formation process of the Dacian state was strongly influenced by external factors, mainly the imminent Roman danger.

Economic development leads to the widening of the gap of wealth and the creation on a social plan of two classes: nobility (Pileati) and ordinary people (Comati or Capilati).

Tradition was also the main source of law for Dacians. We can now talk about a genuine common law, which had a wide circulation in the first centralized Dacian state that survived after the Roman conquest, which had very significant consequences in preserving the identity of people and in its subsequent evolution.

Relevant to the evolution of the law in our country is the fact that, due to economic progress and social transformations that took place during this period, primarily resulting from the appearance and development of private property, along with tradition, appears another source of law: the law.

The development of human society in our country registers a new phase after the conquest of Dacia by the Roman Empire, after the two wars (101-102, 105-106).

The transformation of Dacia in a Roman province and its colonization led to substantial changes in all sectors of political, social, economic, legal and cultural life.

As imperial province, Dacia was ruled by a governor, representative of the Empire, named by the emperor among the members of the senatorial order consular rank, who had under his command several legions.

The municipal counsel gave binding decisions. Their magistrates were elected for one year, the most important being duumvirs and quatrovirs.

An undeniable proof of progress of human society in this period is the apparition of the legal entity. Thus, Roman law existed alongside individuals and legal entities.

Due to the great importance that it has, since ancient times, this fundamental human right, the property was in Roman Dacia, as well as throughout the Roman Empire, the main institution. After the roman conquest, most of the conquered land was confiscated from the local population, returning it to the emperor. Later, part of this land was assigned to veterans, colonies and troops stationed in the province. Important to note is that in this period Roman citizens did not have ownership of the land in Dacia. Owner was either the Roman state or the emperor. Indigenous population and their old congregations were left only the unproductive lands.

For ways of acquiring properties pilgrims were using tradition and occupation. Although pilgrims were guaranteed the right to quiet possession, they did not acquire ownership from the beginning like the

Roman citizens. Prescription may be invoked only when the pilgrim was in possession of that property.

The servitudes over provincial funds were established through pacts and stipulations.

Verbal contracts, common in races, have been used widely by the pilgrims from Dacia.

Of course, due to the Roman conquest and economic, social and cultural influences exerted by the Romanian Empire, the form, terms and effects of contracts of sale, lease, loan and association were governed in Dacia by the principles of Roman law.

Implementation of Roman law in Dacia is attested by epigraphic documents discovered in Transylvania. Particularly important is that in the province of Dacia, the Roman culture has not completely eliminated the local culture.

Noteworthy is that during the Roman domination, free Dacians have preserved their old political and legal institutions. However, the free Dacians were familiar with the Roman legal system, the language and Latin civilization. This proves tight and permanent connection between local people and conquerors.

The blend of the two civilizations had a decisive influence in the evolution of society in the Carpathian-Danubian-Pontic space, leading eventually to the formation of the Romanian nation and the Romanian language. Speaking about the Carpathian-Danubian-Pontic space we cannot but remember the Greek influences on the cities around the banks of Pontus Euxinus cities continued to apply, with some modifications generated by Roman conquest.

The attacks of Avar people, Slavs and subsequently the Proto-Bulgarian tribes in the 7th century ended the Byzantine domination in the Lower Danube. Roman-Byzantine dominion had an oppressive character. However, the local population has retained its old legal and institutional structure. It was thus ensured the political and legal continuity of the Dacian-Romans on both sides of the Danube.

The withdrawal of the Roman administration in the territory of ancient Dacia imposed burdens and political takeover by the village communities.

In the earlier 3rd century it appears the individual family, consisting of parents and children.

Local congregations were led by a council of good and old people.

The process of establishing the Romanian feudal states was achieved by joining social formations that had a regional character and consisted of communal territorial union. These were under the leadership of military commanders (princes, dukes, rulers, magistrates), which not only kept their powers but have turned the authority with which they were invested in a real political power, thus creating the conditions for the formation of a genuine state apparatus.

Municipalities and principalities were feudal states, true monarchies based on the principle of heredity in appointing leaders.

During this period, the Byzantine law was extended to the territories inhabited by Romanians of the Lower Danube and Dobrogea.

The main source of law it still represented by the Basilicals (translator's note: - royal laws).

We can say therefore that we are in the presence of the feudal type law, which was based on the fundamental principles of Roman law. During this period, however, the locals came in contact with Byzantine law, as positive legal system. Thus, we can say that we are in front of strong Roman-Byzantine laws.

Of course, with the evolution of human society as a whole, legal norms and institutions of law have also evolved.

During principalities and municipalities, inequality of wealth is shaped and deepened. Thus, arises an upper layer (counties, boyars, princes, voievodes) who receives large lands and incomes from the population and constitutes the feudal aristocracy.

Following the formation of the state apparatus, feudal lords had certain rights and privileges.

Along with the feudal aristocracy, was at the opposite, subservient peasants and free peasants.

Another social category is the population in fairs and urban settlements.

Private property and production development in towns and cities have imposed increased contractual relations and, not least, the adoption of new legal regulations.

The legal norms reflected the process of seizing the properties of the free peasants by future landowners and appearing thus, the so-called majores terae or potentes (higher people) and rustics (peasants). Some of the peasants continued to be free while others were in a relationship of dependency on majores terae.

The political, economic, social and, not least, the legal evolution resulted during the 14th century in the formation of the Romanian states: Walachia, Moldavia and Transylvania.

Land ownership had constituted a particularly important role in the political and legal feudal institutions.

After acquiring the title, feudal property knew ways of acquiring derived and native.

Regarding the holder of the property title, we distinguish a lord property (in Walachia and Moldavia) and royal property (in Transylvania).

Property rights in free congregation are characterized by joint rule (in condominium) on forests, fields and water. There is also a personal ownership of a house, courtyard or some pieces of land taken with the approval of the community.

Property right in the subservient congregation belonged exclusively to the feudal master. Subservient peasant had the right of possession on the house, on the delnice that he owned and the assets created by him (an opening in the forest, apiaries, etc.)

In terms of law, obligations were poorly developed in feudalism.

The written law, contracts of any kind must be based on mutual agreement of the contracting parties and there is no consent flaw.

One of the prominent figures of Enlightenment was represented by Constantin Mavrocordat.

Through his reforms, Constantin Mavrocordat followed to eradicate abuses generated by the old traditions of the land.

The development of commodity production and strengthening central power led to uniform legal norms.

The new elements of the economic life have generated the appearance of new legal regulations (e.g. the bankruptcy law, commercial law, the Promissory note since 1772)

In 1746, with the exception of the higher court, represented by the Royal Board, county courts and seats were converted into permanent tables²⁷¹. The latter have gained double competences: trial court and appeal court.

In matters of real rights, especially property, use and possession of real estate, were still applicable the regulations contained in the old legislations: Tripartite, Aprobatae, Compilatae, etc. There appeared new regulations for immovable property of the frontier guard.

During Habsburg rule were applied several criminal codes: Decree of Mary Theresa from 1776, Josefina Criminal Code and the Austrian Criminal Code from 1803. Subsequently, the acceleration of decomposition of feudalism and the rise of capitalism led to the increase of written laws in relation to traditional customs. For the first time it established the principle of legality, introducing mandatory for all persons to comply with the law, regardless of their social or political position.

Particularly important in the law of this period, in terms of content, is that is identical in Walachia and Moldavia.

Organic Regulations appearance, we can say that marked an essential moment, crucial in the evolution of human societies in our country.

Organic Regulations, which have had the role of constitution, represented the fundamental law for the two countries: Walachia and

²⁷¹ *History of the Romanian Law*, vol. I, II, Academy Publishing House, Bucharest, 1980.

Moldavia. Putting into practice the Organic regulations occurred in 1831 in Walachia and 1832 in Moldavia.

After the revolution in 1821, which took place in a broader context of the struggles from South-East Europe, followed the revolution in 1848 which also was within the revolutionary process in Europe.

During the reign of Alexander John Cuza, the legislation had a strong reformer character.

The most important legislative achievements of this period, developed at the request of Prince Alexander John Cuza, were: Civil Code, Code of Civil Procedure, Criminal Code and Code of Criminal Procedure.

After the appearance of the Civil Code in 1864, the role of tradition is narrowed. In the period 1866-1918, as a result of industrial development, the bourgeoisie weight in social life and state has increased considerably. The Constitution of 1866 was a leading instrument of the bourgeois-landowner state.

In 1918 took place the great union of Alba Iulia. The union of Transylvania with Wallachia and Moldavia imposed also a legislative unification.

If the constitution of the Romanian national unitary state was fully completed in 1920, the unification of legislation was a long and difficult process. Legislative changes that occurred reflected, as well, and until now, the recorded transformations of the society in the political, economic, social and cultural plane.

The existence of law and the existence of state are inextricably and irrevocably connected, mutual conditioned, evolving and regressing together.

Property right is central in this paper just because it is one of the fundamental human rights, being also one of the most controversial rights.

Over time there have been and there are many ways of acquiring the property that have transformed and evolved over time.

Property, both the public and the private could and can develop, could and can be guaranteed exclusively, by law. But we can say that the law evolves in unison with the evolution of society as a whole.

A strong and democratic state will always have a strong legal system, whose legislation will provide a favorable framework for the development and political, economic, social, scientific and cultural affirmation of the state. This development will lead implicitly, to the progress of legal sciences, thus emphasizing the strong inter-conditioning and indissoluble connection between them. In other words, there can be no law without a state as any state could not survive in the absence of law.

But as we have shown, human societies have known full period of decline and decay, which negatively affected legal sciences.

Thus, during the communist era, the law became a humble instrument of political power represented by the single party, the Communist Party.

Paradoxically, or perhaps not, scientific and cultural life has not regressed, on the contrary, it grew vigorously, both internally and externally.

The first ray of hope appeared in December 1989, when the Romanian revolution ended with the overthrow of the Communist Party.

On the political scene appeared many parliamentary and non-parliamentary parties.

Grand National Assembly was replaced by the Bicameral Parliament. Numerous laws have been annulled and others adopted. Romanian Constitution since 1989 promotes and protects the right to freedom of thought and expression, guaranteeing a range of other rights for the hard tried Romanian nation.

Now, law experiences a mild and timid revival.

Unfortunately, the same can not be said about the cultural and scientific life.

Researches conducted so far show close and indissoluble connection between the emergence, existence and evolution of the law on the one hand, and the emergence, existence and evolution of human societies, on the other hand.

It would be very difficult if not impossible for a single-volume work to capture and develop all the essential aspects that highlight the evolution of law in Romania.

This paper is not intended to be a history of the Romanian law that treats briefly, generically the important stages of the law over time. We prefer to relate to a single matter to analyze and develop: property.

Why the law of property? The answer is simple: because property is one of the most important and most controversial law topics (subjects) as having major importance, decisive in the evolution of human societies from ancient times until today.

Fighting from within human communities to acquire and then maintain the property led to the need for a legal framework to define and regulate this important concept.

Over time, scientists have tried to define the concept of property as eloquent as possible and the close connection between possession and property.

Obviously there can be no property without possession, while possession of something (whether it is movable or immovable thing) is possible without acquiring ownership of that thing.

Of course, we can not talk about the ownership or possession in the absence of a patrimony.

All rights and obligations of a patrimony that belong to a natural person or legal person constitute his/hers patrimony.

An asset can be viewed individually (*ut singuli*), but also as an active element of patrimony of a natural or legal person.

Between the notions of patrimony and notion of asset is a ratio like from a whole to a part (the whole being the patrimony and the part being the asset). It is important to note that the concept of patrimony and asset in law are assigned a different meaning than in common language, namely: a specific legal meaning.

Consequently, the patrimony consists of all rights and obligations of economic value belonging to a natural or legal person. Undoubtedly results that patrimony is not a purely theoretical concept, abstract, but a legal category that has a special practical importance.

Patrimonial rights are subjective civil rights with an economic content and are part of the natural or legal²⁷² person's patrimony as a component of it.

Possession is defined by the Civil Law as owning a thing or using a right. Possession consists of two cumulative elements that must be met: a material element ("corpus") and an intentional element, psychological ("animus").

Economic literature agrees with the theory of law that the structure of property is given by its attributes: possession, use and legal disposal.

The property has been defined as being "the subjective right under which the holder may, in the forms and within the limits provided by law, to approach assets, claim and dispose of their entire utility, exclusively and perpetually".²⁷³

Property principle is established in the Civil Code, other sources of law, but the highest legal force that ensures the consecration are those contained in the Constitution. Of course, this principle is established in the Constitution and developed by the Civil Code and other laws.

The property has undergone an evolution over time. Thus, at first property (the land, livestock, etc.) was owned in condominium by members of the same human community. In time, with the development of human societies it appeared the notion of private property.

This paper presents briefly the general ways of acquiring main real rights over time, closely related to the evolution of human societies, starting from rise, continuing with the acquisition of fruits by the holder in good faith, acquire co-ownership of the common wall, acquiring movable assets by the owner in good faith, acquiring ownership of the treasure, usucapio, nationalization, expropriation for cause of public utility and seizure, acquisition of assets with no owner, reconstitution of the property right, restoring a property right under the Land Law no. 18/1991,

²⁷² See M. Costin, *Major institutions of Romanian civil law*, vol. II, Dacia Publishing House, Cluj-Napoca, 1982.

²⁷³ T. Mircea, *Civil law, Real rights*, Argument Publishing House, Bucharest, 2000.

occupation, convention, traditions and judge's decision, carrying on with the defense and adverting of main real rights.

Another eloquent and indubitable proof on the close connection between the historical evolution (with all of its components: political, economic, social and not least cultural) and law in our country, is the issues of land book system.

Earlier, in the land book system regulated by Law no. 115/1938 were regulated two exceptional cases of acquisition of title by usucapio. Even if they have not been taken in the new regulation of land books, the problem is interesting in those situations in which the property is acquired by usucapio under art. 27 - 28 of Law no. 115/1938, before the entry into force of Law no. 7/1996.²⁷⁴

Thus, we can see the evolution of property rights over time, closely related to evolution and, in certain periods, involution of human societies.

Finally, we conclude that:

- a. The major purpose of law aims to ensure peace, security, independence and integrity of the state as a whole and to individual citizens.
- b. The evolution of man as an individual naturally led to the evolution of society. In turn, the evolution of human societies has spurred the evolution of the individual, in all aspects. In other words, human evolution is in a close interdependence with the evolution of society in general. All of these are highlighted by anthropology which was established as a science in the 19th century and studies the origin, evolution of men and human races.
- c. Legal sciences emerged and developed gradually being closely related to the emergence and development of human society. The evolution of society is inextricably connected to the evolution of

²⁷⁴ For considerations of entry into force of Law no. 7/1996, see S. Cercel, *Some special problems in the field of cadastre and real estate advertising*, in the "Journal of Legal Sciences", Craiova, no. 11-12/1997, p. 168-174; S. Cercel, E.G. Olteanu, *Special considerations regarding the enforcement of law*, in "Journal of Legal Science", Craiova, no. 20/2001, p. 202-215.

the law which, through legal rules, create the appropriate framework for the development of society at all levels and in all aspects.

In turn, the evolution of the law is tied to the evolution of society, because we can not talk about an evolved law in the absence of an advanced society that needs advanced laws as to assure her interests and needs.

Moreover, in the absence of organized state, law could not exist, because there would not be someone to enforce legal norms, and in the absence of law, organized state could not survive, because in the absence of legal norms there would be anarchy. In other words the law ensures human freedom.

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