

LAW AS DECISION AND PROCESS

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Das Recht ist dazu da, dass es sich verwirkliche. Die Verwirklichung ist das Leben und die Wahrheit des Rechtes, ist das Recht selbst. R. Ihering: Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, II, Leipzig 1874, s. 322.

Introduction

At the outset it is necessary to put forward the question: are we to continue indefinitely the dichotomy of law in books and law in action without even trying to discover the connections existing between the two? Does not this dichotomy restrict our thinking about law itself as one of the most important social phenomena? Whereas analytical jurisprudence, as a result of accepted premises, turns its back to legal and social experience, literature dealing with the functioning of law bears the characteristics of an excessive concern with the present, a total neglect of historical analysis, and a neglect of the analysis of the legal text whose functioning is the matter of research.¹

The removal of this dichotomy is necessary, because the confrontation of the legal texts in force with their implementation, or functioning —this is how I understand the functioning of law in this context— is able to provide the empirically founded answer to the question of the occurring cleavage between the sphere of what “ought to be” and what actually “is”.

The problem thus posed would unavoidably be further complicated if we were to say that law is not understood here merely as a social

¹ St. Ehrlich: *Le positivisme juridique, la sociologie du droit et les sciences politiques; Information sur les Sciences Sociales*, v.V,1, March 1966, Unesco, Paris-La Haye.

process, but as a social process of a particular nature: as a decision-making process which occurs on the plane of macro and micro-social structures and embraces, of course, the decisions of individuals –when they create law, which happens no more in modern times– as well as when they fulfill the law, being the recipients of normative utterances. This process is at the same time of a political nature, whatever the meaning of politics. It is therefore not my intention to belittle the achievements of the two main currents in legal thinking: of analytical jurisprudence and sociology of law. I wish to draw attention to a theoretical reflection which, treating law as a decision-making process, can fill a certain gap.

It will therefore be necessary to explain the meaning we attach to the term “decision” and “process”

I. *The Concept of Decision*

If we want to apply the concept of decision in order to explain the nature of law as a product of social life, we must be clear in our mind as to the source of that concept. The direct application of the concept of decision taken from the domain of statistical mathematics will not be useful in this context; on the other hand, the results of sociological research and, in particular of political sociology, the science of organization, and social and individual psychology can complement legal science and facilitate the search for an answer to the question as to how decisions are taken in society.

1. *Individual decision*

This is a choice of a specific kind of behaviour, by which we mean both action and inaction –to abstain or to desist from action. A further question arises as regards the proper understanding of decision: how is the choice being made? Without the evaluation of the information at our disposal a meaningful choice is impossible. And evaluation means attributing to an object, event, or person a positive or negative judgment, according to a previously adopted scale of values. This confrontation between the reality which surrounds us and the adopted values motivates finally our choice.

Of course, not each valuation is connected with a decision and not every choice is tantamount to a decision. A judgment concerning a painting in a museum is not connected with a decision, unless such a judgment has prompted the person concerned to steal the painting from the museum. We are dealing here with specific kinds of evalua-

tions which are the basis of a decision, for they motivate it. A situation which gives rise to an evaluation frees in the mind of a person a motivation mechanism which is inherent in the decision making process. The evaluation precedes the decision as much as by a fraction of a second. A decision arrived at and, all the more so, a decision executed reflects a previous evaluation and motivation which affects also the manner of execution.

That is why it is important to distinguish between two stages:

- a) the adoption of a decision
- b) the execution of the decision.

These two elements taken together constitute what may be called a real decision as opposed the mere declaration of the adoption of a decision.²

This banal distinction is characterised by the fact that the decision is taken and executed by the same person. This differs from social decisions in the case of which the same distinction —of the two stages— is being applied by both the science of organization and political sociology.³

2. *Group Decision*

Society as such, organized in a state —which is in this meaning a global organization, of course not identical with the state machinery or with the government of the state can not make decisions. Society within the framework of a state organization makes decisions only exceptionally, for instance when voting in a referendum, when electing in a general and direct suffrage a president, or when electing parliaments or local assemblies, provided that the latter elections are held nationally at the same time. However in the overwhelming majority of cases, in every day practice we will be dealing with group decisions. And on the legal level we will be dealing with groups organized in institutions of either public or private law —legal persons.

A group decision differs from an individual decision in so far as it concerns, in the first place, the behaviour of persons other than those

² St. Ehrlich: Introduction to Politics and Law —Polish—, Warsaw 1979 -3-d ed.—, p. 15.

³ H. A. Simon: Administrative Behavior, A Study of Decision-Making Process in Administrative Organization, 2-d ed., New York 1961; J. W. Lapierre: L'Analyse des systèmes politiques, Paris 1973, I,3 and 4,1.

who have adopted the decision, although it may affect also the behaviour of the authors of the decision as members of the group to which the decision is addressed.

As in the case of the individual decision, in the group decision two stages are to be distinguished: the adoption and the execution of the decision. However the mechanism in action is different. Quite often we learn about the adoption of an individual decision only when its execution is already under way. We can learn about the nature of an individual decision by drawing our information from medical science or individual psychology; on the other hand, the conditions surrounding a group decision and the methods of its execution can be explained by social psychology, sociology, and other sciences treated in this context as auxiliary ones. A situation in which a decision is to be taken, whether individually or by a group, can be defined as a decision area.⁴ This, however, is not only a category expressed in terms of space and time, for it covers also the element of timing, in which the adopted mode of behaviour, to be sensible, has to be put into practice. To underestimate the factor of timing may considerably increase the cost of the decision or even rule out the possibility of its implementation. Thus, the decision area covers the series of all possible modes of behaviour, out of which one will be chosen at a given time.

Whereas the mechanism leading to the adoption of an individual decision and its implementation is quite well known, to a large extent thanks to the results obtained by experimental psychology, our knowledge concerning group decisions is rather scanty, for we dispose only of fragmentary results of sociological and legal research. In sociology, for example, we have at our disposal the results of research small groups in the course of the educational process; in political sociology, the voting behaviour and legislative behaviour have been extensively studied; in legal science there are studies of judicial and administrative decisions, there are also empirical studies of juries and courts with lay judge participation. We are, however, still far from a unified theory of group decisions.

Once we speak about decision, we must deal with the question of the authorship of the decision. This question could be connected with the distinction accepted generally since the time of Cooley between small or primary groups and large, complex, or derivative groups.⁵ The first category includes groups whose members know

⁴ St. Ehrlich: *Introduction*. . . p. 17.

⁵ Ch. H. Cooley: *Human Nature and the Social Order*, New York, 1909; and his: *Social Process*, New York, 1918.

each other personally —families, neighbours, clubs, working groups, persons linked by mutual friendship and loyalty, very often groups of an informal nature. The second category covers state organization, political parties, trade unions, religious congregations, various association, in other words large groups whose members can not all know each other. Hence the necessity, on the one hand, of abstract and depersonalized decisions whose execution can be of a recurrent and continuing character, i.e., of decisions ensuring stable behaviour. On the other hand, complex groups end up by creating smaller groups of leaders and executives with hierarchically subordinated executants. We have a decision-making center and a chain of sub-groups composed of ordinary group members which executes the adopted decisions. These intermediary groups perform a double role. In relation to the decision making center they act as both a transmitting and executing agent, while at the same time directing the behaviour of the other members of the group. Thus, the role played by a person depends on the place he or she occupies in the hierarchy of the group. The number of links is greater in large, complex groups. These links bound together by well defined relationships constitute a whole which we call organization.

The decision-making center fixes the objectives of the organization and chooses the means leading to their achievement. It organizes the cooperation of the members of the group and settles the disputes between them or between the sub-groups. The decisions taken by the decision-making center are final in the sense that they can be annulled only as a result of a change in the internal force relationships, i.e., as a result of a change in the composition of the leadership in the decision-making center. The decision-making center determines the mode of behaviour of the members of the group, and this mode of behaviour can be enforced if necessary. We say, when speaking about the decision-making center, that “it exercises power”. Thus, power lies in the hands of a person or persons who can decide about the behaviour of the other members of the group, who can determine their mode of behaviour. This does not mean that these decisions have to be enforced in each case. Coercion is being used only as an auxiliary mean, as a rule the decisions are executed voluntarily. We say that a power has authority and is followed if its decisions are accepted willingly and are internalized.⁶

It is necessary to point out the close link between the decisions taken within a group and the group structure. This applies to both

⁶ St. Ehrlich: Introduction. . . p. 14.

simple and complex groups. Decisions generated within a group and executed by it are aimed at maintaining its identity and coherence. And this is their fundamental function.

If the decision making center is not represented by a single person, we say that the decision is a group decision in a double sense: that it is adopted by a restricted group in the decision-making center and that it is executed by a larger number of persons —the other members of the group.

Thus, an essential feature of a group decision lies in the fact that the persons adopting and executing the decision are not the same —which is not the case when we are dealing with individual decisions. The execution of a group decision is, as a rule, indirect, at least in two stage and in big organizations multistage. Great attention to these stages of the decision making and execution process is paid by H. Lasswell.⁷ The number of stages results in the fact that there can be no certitude that a group decision will be executed; one can only assume with greater or lesser probability that it will be so. We are however dealing with phenomena whose probability can be quantitatively determined.

The execution of a group decision depends on the fulfillment of specific conditions:

1) the information (statement) on the adopted decision must reach the members of the group (addressees) in an undistorted form;

2) the decision-making center from which the decision originates must enjoy sufficient authority so as to enlist the readiness of the other members of the group to execute it;

3) the addressees of the decision, i. e., those who are expected to execute it must give it the same, or a very close meaning to that of the decision making center, for this conditions the development of the motivation processes which determines the execution of the decision.⁸

On very rare occasions is a group decision carried out by all members of a large group. The larger, the more complex is the organization, the lesser is the probability that all three conditions which are of a mandatory nature could be fulfilled with respect to each addressee. That is why the execution of a group decision can be expected only by a part of the group membership. The greater that

⁷ I devoted to the pluralism of normative systems an article published in "State and Law"—Polish: "Państwo i Prawo"—no. 5—1979.

⁸ H. D. Lasswell: *The Decision Process: Seven Categories of Functional Analysis*, College Park, 1956.

part, the stronger the coherence of the group as a whole, the lesser the need to apply coercion.

This problem is closely linked to the question of mutual access: of the members of the group to the decision-making center on the one hand, and of the decision-making center to the members of the group on the other. Mutual access is of vital importance for the functioning of the decision-making mechanism in the group. The more active part of the group membership tries to gain access to the decision-making center in order to influence it.

The decision-making center of a complex organization which wants to be followed by its members can restrict its activities to decision-making alone. It must see to it that the decision is accepted and carried out. The members of an influence group who are respected not only by those in the decision-making center but also by the other members of the organization can render a very valuable service. The existence of influence groups is therefore also in the interests of the decision-making center, which can use that channel to get additional information and increase the probability that its decisions will actually be put into practice.

II. *Legal Rule and Group Decision*

In the light of the above considerations we may treat the legal rule as a social rule of a particular nature, as a group decision. It differs from all other rules, first of all, from the subjective point of view: for it is a decision by governmental organs, and here lies its uniqueness in the universe of normative systems.⁹ By the same token we eliminate from our considerations all theories which profess one of the many varieties of natural law and pay much attention to the relation between natural law and positive law.

Like specific categories of group decisions, in complex organizations a legal rule is of an abstract nature, i.e., is not directed to individual addresses; it imputes to them a recurrent behaviour, thus organizing the cooperation of the group. As a result of this the decisions acquire permanent features.

While carrying into the science of law the concept of group—social—decision, we shall apply to the legal rule the above adopted distinction between a) the making of the decision and b) its execution. The making of a decision will thus be tantamount to the making of

⁹ St. Ehrlich: Introduction. . . p. 18.

a normative utterance, its subject being a state organ ascribing to abstract addressees their behaviour.

In turn, as in the case of each group decision, it will be necessary, when considering a legal rule, to distinguish as its second inseparable link the execution of the normative utterance, if not in toto at least in part. Each normative utterance assumes further decisions taken by those to whom it is addressed; it assumes therefore a social fulfillment, an interaction within the group or between groups. And following the same reasoning as in the case of examining the nature of any social decision, one must conclude that a legal rule is nothing but a fulfilled normative utterance of a state organ and not only this utterance itself.

A legal rule considered as a social rule, i.e., as functioning at least to a certain extent, is a normative utterance many times fulfilled. However, a state organ taking a decision, i.e., formulating a normative utterance, cannot foresee, because of the variables affecting the social processes, how many addressees will execute it and how many will not.

It is therefore necessary to foresee the creation of a situation which I would define as decision margins or decision gaps. The author of the decision cannot be sure to what degree he will be followed. He can only expect that his decision will be executed to a greater or lesser extent and this probability can be expressed in terms of a percentage. It is in this connection that Luhman speaks of the “normative expectations” —“normative Erwartungen”— of the legislator.¹⁰ We are therefore confronted here not with a mathematical, abstract probability, but with a probability of an empirical type which is taken into account by each rational person when adopting a decision. The actual behaviour of the addressees, the frequency of deviations from the normative utterance, can be verified only empirically, i.e., ex post. The author of a normative decision acting in a state of uncertainty and assuming that he acts in a rational way must exclude both the certainty that his normative utterance will be fulfilled (and treat it as an instrument of fallible social action), as well as the impossibility of its execution.

¹⁰ N. Luhmann: *Positivität des Rechts als Voraussetzung einer modernen Gesellschaft* in R. Lautman, W. Maihofer und H. Schelsky —Hrsgb— *Die Funktion des Rechts in der modernen Gesellschaft*, Bielefeld, 1970, S. 179.

III. *The concept of Social Process*

1. *The Concept of Process in the Science of Law and in Sociology*

In the science of law the concept of process appears as a well defined sequence of behaviours by people and state organs —possibly also by social organization— set forth by normative utterances of a specific nature, called process rules. Since they serve to implement rights and duties contained in other rules defined as substantive rules, these process rules are considered by legal science as subsidiary and derived from the former. And such is the nature of the rights and duties which originate on the basis of process rules. The institution of a due process of law in a penal case assumes the perpetration of a crime, i.e., the violation of substantive penal law, etc. Apart from process rules there are also provisions which must be fulfilled in order to ensure the validity of a legal action, for instance, there are certain formal requirements concerning the written form of a notarial act. All these normative statements constitute formal law, as distinct from substantive law.

Also in the field of constitutional —and administrative— law the concept of legislative process is of a derivative nature in relation to legislative acts which have the form of normative utterances concerning the substance of the matter.

In legal science the concept of a process, or the imposition on groups of addressees of the obligation to respect certain formal requirements, appears, as a rule, as a form of behaviour institutionalized by legal provisions. The questions arise, therefore, as to whether the legal concept of process should not be confronted with the meaning given to the term “process” in social sciences, as to whether the legal concept of process suffices for the theoretical consideration of the law as a social phenomenon, as to whether the process of legislation has not its origins in the maze of group pluralism outside the framework of institutions provided for by constitutional law, and as to whether the implementation of the law does not take place to an extent which is difficult to measure, but probably extensive enough without participation of the state organs. Of course it is impossible here to study the problem in a systematic way, for this would require a monograph on the subject of the concept of process in social sciences. But to put it into a nutshell:

Various factors contributed to making the concept of social process an indispensable instrument of analysis in social sciences. The dynamic conception of society developed by Marxism is not limited to

the process of class struggle and historical studies. The economic structure of society, capital, the social class whose consciousness develops thanks to macroscale processes from “a class in itself” —Klasse an sich— into “a class for itself” —Klasse für sich— must be considered as a system and as a process. All great currents of social philosophy, sociology, or psychology make use of that instrument. Is it necessary to recall the “flow of consciousness” of Bergson and James, or the social categories of group interaction, adjustment, and conflict so indispensable in every analysis, or finally the clinical studies of psychologists whose subject is the process of perception of the natural environment and communication with the environment? H. Arendt quite rightly draws attention to the great role played by the concept of process in the social and political thinking of the XIX and XX century. The concept of process has built a bridge between natural and social sciences, has put an end to the gap between the general and the concrete. The concept of process has lent a meaning to events, which can no more be viewed as isolated entities.¹¹

However, the theory of the political decision-making process of A.F. Bentley expounded mainly in his famous work, “The Process of Government”, is for us of particular importance.¹² Bentley has analysed the mechanism of group conflicts —intertwined with various forms of cooperation. He pointed out that the mechanism in question develops as a rule around a decision which must be taken by some organ of the state apparatus and which concerns group interests. Such a decision can take the form of a law or of a normative act of a lower rank or of an individual administrative or court decision. It goes without saying that in Bentley’s understanding a process is not a procedure fixed by the law —not necessarily rules of the court— but a continuing sequence of events leading to a concrete initiative of a certain group and culminating in a political decision which takes an appropriate legal form. Having achieved that objective, the group will, during the next stage, strive to fulfill the set of normative statements which it helped to create. In the light of that position, the procedure formalized in its legal sense can be treated only as a segment of that continuing sequence of events which constitute a social process. For Bentley included also the law in books into the concept of one big developing process.

The decision-making process is understood in a similar way by J.A.

¹¹ H. Arendt: *The Human Condition*, Garden City, New York, 1959, and especially *Between Past and Future*, New York, 1961, p. 61 ff., 64.

¹² First edition, 1947.

Robinson.¹³ Also W. Thomas and F. Znaniecki make use of the concept of social process. They conceive it in a form of a specific evolutionary triad: from the stable organization of a group to its desorganization, from which the group may recover only through a reorganization leading to a new stability.¹⁴

The use of a broadly conceived sociological concept of process in legal science must cover the category of law itself as an outgrowth of social interaction which itself affects in turn its course. I said that it "must cover" because in the social sphere everything is process. There are no static societies, there are no static groups.

2. *Decision as a Process*

In order to avoid that, we adopted the notion of a group decision which became our instrument of the analysis of law as a social phenomenon, as a micro-process; evaluation, decision, making-decision, execution. However the present state of science teaches us that neither individual decisions nor group decisions occur in isolation. Social reality is dynamic and both individual as well as group decisions release an unending chain reaction of further decisions.

We are not concerned here with a simple sequence of events. We are confronting a process of a continuing transformation of information into decisions which are, in turn, treated by the addressees as binding information which they, in turn, transform into new decisions:

$$i-d-i_1 \quad \dots \quad d-i-d_2 \dots \quad i-d-i_n$$

Thanks to that mechanism we obtain a recurrence of behaviour which can thus be foreseen. H. Lasswell attached great weight to the various stages of development of the decision-making process.¹⁵ However, as the number of stages in that process increases –and that depends on the complexity of the organization– so increases the danger that the execution of the decision will not conform to the decision as expressed in the normative utterance.

It goes without saying that while examining any stage in that flow

¹³ J. A. Robinson in *International Encyc. of Social Sciences*, v. 4., *Decision Making*, III. *Political Aspects*.

¹⁴ W.J. Thomas and F. Znaniecki: *The Polish Peasant*, v. II, ch. I. *The Concept of Social Disorganization*.

¹⁵ H. D. Lasswell *ut supra*.

of information and decisions we must ask ourselves what is the origin of the information, who is the author of the decision. In social science and also in social practice we cannot restrict ourselves to the consideration of the text containing the information about the decision; from the scientific point of view, and all the more so from the practical point of view, it is necessary to have an indication as to how we, as the addressees of the binding information, must behave in the future, what are the decisions we have to make.