

Rule of law

Introduction

“...I am afraid I am a long-term criminal, because I do not know 99.8% of laws applicable in this country”¹. “Excessive regulation is directed against human freedom, is unproductive and leads to corruption. We are being flooded by the juridisation of life, or – as Habermas defines it – our world is being colonised by law”².

Within a society we can differentiate various entities, including the individual and the country – the latter being a socioeconomic supersystem. The state is a system managing a given country, also through shaping its law. The two quotes above quite clearly present the problem of law in relation to man and state.

We all know the advantages of law. But are there any boundaries to law – and if so, where? Can law be dangerous?

1. The individual as an entity

All of us engage in various activities. Be it by oneself or in cooperation – we always retain our subjectivity. We are autonomous systems, which means that self-control lies at the root of our behaviours. Even in situations where freedom of action is extremely restricted, we retain the ability to decide on our attitudes toward the environment, to agree to be influenced by it, to select the direction and extent of our response and involvement.

In terms of classification, an individual performs three kinds of operations with regard to themselves and the environment: cognitive, axiological and decision-making. The first kind involves exploration, classification and explanation with regard to a given object. These operations produce cognitive knowledge, concerning the essence, origin, creation and structure, existence, decline and change of the object. The second category makes it possible to assess and evaluate the significance and value of the object in terms of predetermined criteria and value ranking (e.g. efficient/inefficient; good/bad; beautiful/ugly). Axiology stimulates action (things deemed valuable prompt action), makes it possible to shape the object. Finally, decision-making operations put forth stipulations with regard to the object (what it should be like – norms), optimise the object and actions concerning it and lead to their realisation.

All the above categories of actions require that the question of the rules of “proper conduct”, i.e. norms, be answered. Norms provide us with the rules of conduct, show us what, how, when, etc., should take place. Thus they are of a directive nature, and at the same time they are perceived positively, as something desirable, exactly proper. Cognition proceeds according to norms, same as assessment and evaluation, and decision-making.

Undoubtedly, people function within a dynamic structure of norms, initially their own, then shaped by other entities, with or without their participation. Such a structure of norms creates a variable, complex and entangled environment of norms applying to individuals, groups and teams, as well as local, regional, national and global communities. In this situation, we humans face the “problem of norms”.

The problem of norms is also of cognitive, axiological and decision-making nature. When recognising some of the many variables as norms, we would like to know which of these variables can be given the status of norms. Thus, either we have a category model (attributes of a norm), or we must conduct diagnostic and projecting proceedings, to reach the conclusion

¹ P. Najsztab, in: “Twórcza rola afery” (The Creative Role of a Scandal), P. Najsztab’s interview with the Ombudsman, J. Kochanowski, PhD., *Przekrój* no 50/3208 dated 13th Dec 2006.

² J. Kochanowski, *ibid.*

whether we can determine the given variables to be norms. How to recognise norms and what are they? Which of them are valuable and what values do they possess? Which norms should be accepted, which should be chosen and applied?

2. Supersystem as an entity

The basic question which needs to be settled is the mutual relationship among entities.

The starting point is the relationship of partnership, wherein two or more entities (systems) maintain the balance of power, and there is no other supersystem dominating them. In this situation, no entity can influence others any more than it can be influenced by any of the other entities. The entities' autonomous behaviours are determined by their own norms. In this case, the source of norms binding all the entities is their grassroots agreement coupled with voluntary or forced compliance, thanks to initiating a bespoke mechanism. The mechanism works in conjunction with the norms that it applies to, and can be modified with them. We will refer to this scheme as coordination.

At the other end of the spectrum, we have a situation wherein the entities (systems) constitute elements of a supersystem, holding reign over each and all (including the supersystem itself)³. Separating the supersystem vests it with subjectivity, which is exercised on its behalf by a selected organ (for example, the state).

The transition from coordination to the supersystem is actually tantamount to permanent restriction of the entities' (systems') freedom of action in favour of the supersystem's freedom of action. The supersystem, by becoming a separate entity for the sake of internal and external relations, may restrict the freedom of action of its constituent entities (systems), also by defining and enforcing norms⁴.

The norms as such, if they are to play their decisive (directive) role, should possess "normative" features. These include: the values they represent (have; are assigned); the superior values and goals they serve; the doctrine they are based on; relationship with other norms; restrictions of application and use; the compliance system (e.g. scope of objects to they apply, enforcement mechanisms and tools). Indeed, the record of the norm itself, of its directive content, is but a description of a model, i.e. one of the "normative factors". The actual implementation of the model may be based on developing the other "normative factors", first in the form of other norms, supplementary, supporting and ensuring compliance with the elementary norm. In the end, we may deal with a system of norms focused and developed around a certain leading, principal norm.

We may assume that the state restricts the individual freedom of action solely through the application of norms, formalised and provided with an execution clause (enforcement and its tools), i.e. the law. On the other hand, we might assume that the state behaves like a highwayman, who does whatever and however he pleases. The law eliminates the highwayman, replacing him with a set of norms, ensuring predictability and legitimising the state's actions (etc. – functions of the law and state).

3. Individual vs. law and the supersystem

The citizens' freedom of action obviously cannot be zeroed, no matter how extremely it is restricted: the individual cannot in any way be deprived of the decision, as I mentioned above, regarding their attitude, compliance of their actions with the requirements of the supersystem, or involvement, including that in favour of the supersystem. This boundary is the subject of

³ The principles of building such reign are not the object of this analysis: for example, through claiming power, democratic assignment thereof, etc.

⁴ Another way is to apply coercion without revealing the values it serves or to develop power into an autotelic (autonomous) value.

endless discussion, primarily from the point of view of human autonomy and man's natural right, as well as the role and scope of the state's autonomy within the supersystem.

There are also other obstacles in the citizen vs. state (supersystem) relationship. They stem mostly from the hybrid nature of social systems and their subordination to law R.W. Ashby⁵. These difficulties bring about the loss of operational efficiency of the supersystem as a whole and its components, sometimes to the level threatening their existence.

The hybrid nature of any social system means that it is a whole whose parts originate in diverse types of sources (material, virtual, human). The integration of social systems will never be as complete as that of a machine, where components have a clearly defined freedom of action, acceptable from the point of view of the functioning whole. Autonomous cooperation of components in favour of the whole, which cooperation is not decreed, declared and prejudged in advance, is absolutely necessary. In other words – the state is not able, by definition, to govern the social supersystem by itself, it must cooperate and obtain the cooperation of its components, free in their actions.

A certain inflation of legal norms is also a natural consequence of law R.W. Ashby. It is meant to make sure that the state can increase its capacity of managing the social supersystem, which according to the law is impossible. Nevertheless, this inflation provides people with an environment of norms with an increasing scope and force. If, on top of that, this environment is also incoherent and variable, then there is a growing risk and – ultimately – necessity to respond (action – reaction) because of the weight of norms generated by the state to ensure individual success.

The obscurity, discontinuity and turbulence of the normative environment makes people respond in ways that support the autonomously perceived functioning stability and guarantee the expected success. One of such responses, available to those with the requisite potential, is the growing demand for legal services, which enhances the diversity of individual and local management systems at the disposal of citizens. All the responses fit into a continuum ranging from compliance and ignoring norms, through breaking, avoiding or fighting them, to responses typical of frustrating situations.

The state is not always able and willing to control the inflation of norms⁶, while the citizens are not always able and willing to control the growth of complexity and variability of the normative environment. When the rate of inflation exceeds the growth rate of the citizens' ability to control it – we are dealing with a situation leading to a growth of tension and imbalance between the parties involved (state – citizen) and the efficiency of supersystem management. One of the probable consequences thereof is a decline of the authority of the state and law, which is an expression of positive feedback: paradoxically, the more norms – the lower the actual authority. The lower the actual authority – the lower the efficiency of managing the social supersystem by the state.

Law in its essence provides form to certain content, supplemented by enforcement clauses and powers (means of coercion, authority). When it exists, one can refer to it automatically, almost instinctively. The first impulse, particularly on the part of the creator of law (the state), may rest on the assumption that there is nothing to discuss, there is no room for doubt, as we have norms in place. If they are there, the next step may involve legal definition of interpretation standards, or norms for correcting the law. This creates a self-multiplying mechanism of law expansion.

⁵ On the essence of law R.W. Ashby, see: H. Witczak, *Uwagi o systemie zarządzania krajem (Notes on the country management system)*, Core, www.witczak.pl, September 2006, pt 2b.

⁶ Exploration of the relationship between the inflation of norms generated by the state and the increase of variability and complexity of the normative environment for people is too complex to be delved into the detail of here.

4. Conclusions and recommendations

4.1. Conclusions

Seen as change is the normal condition in shaping the social system, it is impossible for the law established by the state to permanently precede changes or to apply invariably to any case. What is more, the odds that changes of the social system will precede changes in the law are quite considerable.

People's attitudes and activity vis-à-vis norms (both individual and collective) is also a function of their capacity to recognise them, evaluate them and make decisions, as well as the number, variability and complexity of the norms themselves.

Indeed, law has limits determined by its efficiency in the state vs. citizens relationship. Excessive law is just as dangerous as insufficient law – it is therefore necessary to strive for the balance among the various: categories of norms, entities and principles governing norms.

4.2. Recommendations

1) The state and its citizens are equally important and rightful entities defining norms (behaviours, actions, etc.), whereas the state is solely entitled to define the norms of law.

2) In defining law, the state must apply and utilise the law metamangement system (the law governing how law is defined, including law management). This system should eliminate the excess (via Ockham's razor) and deficit of law, as well as ensure consistency, order, topicality, flexibility, conformity and compatibility as well as other characteristics of the legal system.

3) The law should be shaped in a rational manner, according to the circumstances, laws of science and in equilibrium with other categories of norms.

4) It is necessary to allow for complete, free and democratic pursuit, including respect, of other paths for defining norms, such as for example:

a) Judgment. This is a source of norms to which the parties agree, consent. This category includes decisions by courts, authorities, grassroots consensus of the parties.

b) Cohabitation. Norms are determined in the course of mutual interaction in life, also in an imperceptible, evolutionary manner, as customary, cultural values.

c) Experience, including benchmarks.

5. In ordinary conditions and during social peace, authoritarian power and will should be eliminated as sources of law.

6. Communications related to norms (for example information about norms), supporting the norm formation process (for example, education for legislators and citizens) and the analysis of the value of norms (norm value vs. the cost of developing it) are inseparable components and features of a good system of norms.