

THE LEGAL NORM AND ITS RELATION WITH THE “JUST”

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ABSTRACT: *The set of rules originated from natural reason constitutes what we call natural in an objective sense or simply natural law. Consequently, to support the existence of a “natural right” means to support the idea that there are just things that are so (just) not only in virtue of an agreement or in accordance with a norm, but because they are due in virtue of a certain fact or in a certain situation. As the just is divided into natural just or natural law and positive just or positive law, the respective rules of law are also divided into natural and positive. The positive just comes from human will and thus its rules have the same origin as human decision. In exchange, the natural just has – in order to settle the enunciations of natural reason – its legal norm. Natural law – or the set of natural legal norms – is made of the prescriptions of natural reason, which states a duty of justice, whereas prescriptions are part of natural law.*

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The jurist’s object of study has always been the norm (or the law in a generic sense), understanding here the precepts regulating social life. There are diverse types of norms, starting with the law passed in the Parliament, governmental normative acts or legally obligatory customs, to the norm resulted from private autonomy (contracts), but they all have in common the fact they are mandatory normative prescriptions.

Without proceeding to an enhanced study of the norm, we must however understand the relation between norm (or law in general) and the jurist’s art, in other words, the relation between norm and *just* or justice.

The fact that there is a close connection between the two is highlighted by history and the language used for centuries. The laws received the name of *law* in Ancient Times and this usage has been recently intensified, so that today the word *law* is defined as *law* although it is sure that precisely the “law” receives the name of “objective law”.

The name of theory or doctrine of natural law is nothing else than the scientific explanation of a fact of experience, which is a natural given of man¹.

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¹ Javier Hervada, *Introduction critique au droit naturel*, traduction H. Devolve, éd. Bière, Ed. Pampelune 1991, p.129

Natural law and positive law – in our conception – are related to one another. The former has logic authority before the latter, conferring it the reason of being, to the extent to which positive law is justified by it (containing the *just*), so that we can talk of a single legal system that is partly natural and partly positive.

Only in the presence of such a set of norms called legal system are the consequences of the subjects of law predictable and can remain predictable – which means that law supports stable social relations.²

Juridical science and art must also conjugate natural factors and positive factors. In this respect, the science of natural law is science of law and jurisprudence.

We consider that science and art of law are at the same time *science and art of natural law* and of positive law, based on the fact that there are natural laws and positive laws, and the laws that are partly natural and partly positive are numerous as well. A science and an art of law limiting itself exclusively to the *positive* are a partial and often unjust science and art of law.

On the other hand, the science of law must strengthen its force and reconquer its jus naturalist dimension, as integrating element of his endeavour of interpretation and law knowledge. The main object of the science of natural law is – in our opinion – the exposure of the system of natural rights or the set of the *natural just*.

In relation with human conduct, our reason – that of all people in all eras – does not show us a universal indifference, does not consider indifferent all the acts man can physically achieve, but, independently from the positive laws adopted by people or society, it issues judgements of obligation: you must do this, you must avoid that. In connection with these judgements, reason also issues estimating or evaluating judgements: it is good you did this, it is bad you did that. These judgements are polarised around two known terms: *good* and *bad*. “*The good*” or what is good is what must be done; what is bad or “*the bad*” is what must be avoided. Within human behaviour, our reason grasps the things we must do – and we call them the good – and the things we must avoid – what we call the bad – so that we assess as good the deeds done as they had to be done, and as bad the deeds we should have avoided.

Although there were alternative conceptions that did not necessarily join the position similar to that supported by theologians as regards divine law, we cannot deny that, beside what we must do and what we must omit, there are also permissive judgements: we may do this (it is licit to do it), we may omit that (it is licit not to do it). We should not explain here that good and bad do not have a technical sense in this type of judgements and assessments. A crime or a delictus may be very well performed from the technical viewpoint and still represent a bad thing in all circumstances. *Good* and *bad* refer to what we call ethical or moral medium, i.e. human conduct, if it is or not in accordance with what man is, with his being and purposes.

We must remark that moral judgements we talk about constitute neither the conclusion reached by the subject about his action nor what to do in every moment. When a subject decides in a concrete situation what he will do, he undoubtedly judges that his behaviour – whichever his reasons may be – is the one he favours. He sometimes decides to act

² Brîndușa Marian, “Role of the sources of community law in the system of law sources” in *Romanian Journal of philosophy of law and social philosophy* no. 3/2006, ISSN 1584-1075, p. 97.

according to the signalled moral judgements, and other times he decides in opposition with them. This elementary observation shows that the evoked moral judgements precede the decision to act and are not to be confused with the personal judgement of the subject that leads him make this decision. Experience shows that such moral judgements occur by themselves as objective norms of action that we cannot mix that up with the subjective norm, i.e. with the particular judgement of the subject on what he has decided to do. Faced with the other's good, moral judgement says: "thou shalt not steal". A certain subject may decide not to follow this norm and to grab other person's good: his particular judgement "I have the interest to steal" and his decision "I will steal" are (subjective) norms and decisions.

In a wide conception, the law would be the directive or guide for the action of anything of being, or a guiding force of actions or effects.

As the *just* is classified into *natural just* or natural law and *positive just* or positive law, the respective rules of law are also divided into natural and positive. The positive just comes from human will and consequently its rules have the same origin as human decision. In exchange, the natural just has – in order to regulate the statements of natural reason – the natural legal norm.

The set of rules coming from natural reason constitutes what we call natural law in objective sense, or simply – by language transposition – natural law³. Positive rules of law receive the name of positive law in objective sense, or, in short, positive law. We encounter here again the division between natural law and positive law, this time when it comes to the rules of law.

Natural law – or the set of natural legal norms – is made of the prescriptions of natural reason stating a duty of justice, and prescriptions are part of natural law.

Normative definitions send – explicitly or implicitly – to the scary aspect of law, identifying it with "objective law" which keeps the sword raised above beneficiaries' head in the name of the general will that citizens express in submission; no trace of his wisdom, prudence, reason in protecting the freedom of beneficiaries who are born free and equal people when it comes to rights from nature – to be their shield, protection and guarantee⁴.

On the other hand, the study of law is mainly the study of laws, and the jurist often receives the name of «*man of law*». Jurists in Rome granted a high importance to the interpretation of laws, aiming on the one hand at applying them efficiently to social realities, and on the other hand adapting them to the new events created by life⁵. What is the origin of this relation between laws and the jurist's art?

³ Natural law – in an objective sense – is only a kind or type of legal norm. We must thus distinguish between natural law and other things it is adjacent to – an unavoidable imprecision –, for instance, the title of natural right. Concretely, the following are not proper natural law: a) objective conditionings of positive law, determined by the nature and structure of things; positive laws must take in account the consistency, properties and laws governing things as objects of regulation, but this is not a matter of natural law, but of legislative wisdom and common sense, of correct or incorrect laws. b) The rational moment or the dimension of rationality of positive law; any legal norm must be rational, so that an irrational norm ceases to be mandatory to the extent to which it is irrational; but here it is a property of positive norm, not of natural law. What we signalled constitutes the set of properties and conditions of positive norms, not a type or kind of legal norm, which is (or constitutes) natural law.

⁴ Gheorghe Mihai, *Foundations of law*, vol.III, All Beck Editions, Bucharest, 2004, p. 35

⁵ Lidia Barac, *Elements of the theory of law*, All Beck Editions, Bucharest, 2001, p. 116

We could believe that the jurist's art is the art of laws, but this would lead to confusion. Art is a «*savoir faire*», a know-how, a competency, a skill, a science to do things, thus to talk about the art of law would mean to make good laws, and this is not the role of the jurist, but of the governants; *ars legis* is part of the “art of politics” or a political prudence. The transformation of a set of norms into a system of law is the consequence of a political action. This type of political action represents a process of political-juridical centralisation (hierarchisation). A political centralisation in the system of social relations and a legal centralisation in the set of norms⁶.

In conclusion, this “*political prudence*” or the “*art to make good laws*” is not by far negligible as regards the protection and guarantee of natural subjective rights. Undoubtedly, the jurist has a role to play in the elaboration of laws: the jurist often makes proposals of *iure condendo*⁷; but his role is only auxiliary in this context.

Politicians, governments make the laws. This is a given that we should not forget: the function of the jurist begins once the laws have been established. The jurist interprets the laws for their correct application. But why is the art of jurist, that should be the art of the just, so much interested in laws and its interpretation? We may know the significance of a word, of several words of all the words in the sentence, but we miss the meaning of the sentence (...). In nature, objects bear no significance by themselves, they do not have their own meaning (...). On the contrary, a relation, a structure, a quality, an action, a deed, bears the significance their authors intentionally grant them... The absence of the comprehension of human deeds and acts has serious consequences in everybody's life⁸... and may seriously harm the right of each individual.

The legislators attempt to avoid such situations, but they cannot encompass the multitude of concrete cases that will fall within the incidence of their normative act.

Naturally, for this reason the art of the jurist is so much interested in the law and its interpretation: because there is a relation between just – right –and law, and the art of jurist in this respect is determining in the protection of beneficiaries' rights. The nature of the law shows this relation: the law in a certain sense is *rule*, word that has the same meaning as norm; and a rule is a measure. In general, the word norm is equivalent with that of rule ... in their immense majority, norms contain rules of conduct, assign rights, and set correlative obligations⁹. In other words, the law regulates law and correlative duty, i.e. it shows what things belong to each person, their right and duty, when and how the right may be requested or the debt must be paid etc. It results that the law- norm in general – has two functions as regards law. On the one hand laws may be cause of law, because they sometimes distribute things – materially or immaterially – granting the assignment titles, which have in justice a character of debt, i.e. they create rights. Although it is not

⁶ Brîndușa Marian, “Role of the sources of community law in the system of law sources” in *Romanian Journal of philosophy of law and social philosophy* no. 3/2006, ISSN 1584-1075, p. 100.

⁷ *De iure condendo*, (Latin phrase frequent used whenever one speaks of legislative politics). In practice, the respective Latin term is in general used to refer to debates related to the prescriptive of legislative change, essays in the matter, theses or doctrine,); source:

http://dizionari.corriere.it/dizionario_italiano/D/de_iure.shtml

⁸ Gheorghe C. Mihai, *The inevitable law*, Lumina Lex Editions, Bucharest 2002, p.150-151

⁹ Nicolae Popa, Mihail Constantin Eremia, Simona Cristea, *The general theory of law*, 2nd edition, All Beck Editions, Bucharest, 2005, p.131

the only cause of law, the law is often its cause; it is so because the laws create governing bodies and assign them the respective functions.

On the other hand, the law acts as measure of law, i.e. settles rights and the way of using them, it shows its limits, sets the hypotheses of capacity etc. The problem raised here is to reveal the pure sense of the terms “just” and “rational / reasonable”, and “unjust” and “irrational / unreasonable”. In classic conception, the law is „*Incarnation de la Verite, de la Raison, de la Justice...* comme un acte incontestable et sacre, dont le bien-fonde ne peut etre mis en doute”¹⁰. Starting from the premise that the law norm contains what a subject must accomplish, what he is entitled or not to do or what he is recommended or stimulated to fulfil, we may summarise: “*Legis virtus haec est: imperare, vetare, permitere, punire*” (the force of the law consists in : ordering, introducing, allowing, punishing)¹¹.

The law is here a rule of law. Hence its importance for the art of jurist.

It is obvious that in legal justice the individual's relations of justice with the community is regulated by the perceptions of the law. Consequently, the interpretation of the law by the jurist is an important part of his art by the fact it leads to the knowledge of the legal just, which is the matching of social life to its own rules, i.e. norms or laws.

Moreover, the distribution of goods and tasks in the political community is largely made by norms or laws of different rank. It frequently happens that the law regulates distributions in small communities; for instance, the legitimate inheritance, the distribution of benefits in commercial companies, the participation of employees to benefits etc. By this, also, the law measures the just and in this case the distributive just.

Finally, the laws also set the just in the relations among private entities (relations of commutative justice). For instance, economies often apply the legal taxation of prices, the legislation related to the renting contracts regulates the rights and duties of landlords and tenants, etc.¹²

Furthermore, the laws voted by the political community, as well as the prescriptions with normative character whose source is private autonomy, as well as collective connections, statutes, contracts and other similar legal acts of autonomy, also govern the just in a similar manner, and their interpretation is a part of the art of jurist.

The legal norm. According to all the above, we may state that the just has one rule; and this rule receives the name of rule of law, or legal norm.

From the viewpoint of the art of law or art of the just, it is obvious we should not mix up the norm with law. Although the norm receives the name of law, the norm of law is not law, but its rule. The norm is the rule of law , law being the just thing, as already

¹⁰ Gheorghe Mihai, *Foundations of law, vol.III*, p.160

¹¹ Modestinus, apud Nicolae Popa, Mihail Constantin Eremia, Simona Cristea, *op. cit.*, p.131

¹² “Measure of the just, rule of law and duty”, this is how the law comes before the jurist and this is the perspective in which the art of law studies and interprets it. The jurist regards the law from the perspective of justice – not the «ideal justice or the just in their analogue or abusive sense – contributing with efficacy to the institution of a just society in which everybody has what is his. Obviously, this is not possible since the beginning, but becomes gradually possible, in order to give to man, first of all, what is just by nature – his rights or requirements of justice inherent to the person. If natural rights were not the foundation of the jurists' tasks, this would consist in giving to everybody what the positive law indicates, detaching itself thus from justice, to become an agency of precepts of power or individual or group interests. The jurist is not a legislator, that is why, in case of conflict between law and justice, the true jurist gives precedence to justice and not to law, Javier Hervada, *op. cit.*, p. 121

explained. The norm thus receives the name of law (objective law) by analogue assignment, i.e. by language transposition.

As it is a rule of law, the norm is legal or juridical. Indeed, *legal or juridical* is the adjective indicating what is proper to the notion of *ius*, thus the “just” or “justice”. That is why the distinctive character of legal norm is justice: it is about the norm of just conduct. Where there is no relation of justice – legal, distributive or commutative – there is no legal norm¹³, in other words there is no norm that is not the object of the art of the just, although it can be a norm of another species.

Recently, legal norms have been regarded from other points of view. A very common viewpoint until now was that of social order. From an etymological perspective, the term of norm comes from the Greek term “*nomos*” which signifies order. The etymological analysis suggests that, through norms, society becomes a cosmos organised in an imperative order, indicative and sanctioning for conduct. No form of human association can operate properly without instituting a minimum of conduct rules, and we may affirm that society is born along with the genesis of the norm¹⁴. In accordance with this, the norms we refer to were understood as “prescriptions” of human behaviours toward the purposes of society, or delimitation of the spheres of freedom, or solution to possible conflicts of interest, or regulation and ordering of social relations, etc. Without doubt, these observations contain true things, even if in our opinion they are all summaries of the first observation: ordering of human behaviours towards the purposes of society. So in fact any regulation of social relations, any solution to conflicts, or any delimitation of freedom must be subjected, in order to be correct, to a supreme criterion, to higher ends, in other words to the common good of society. Or, we could not exclude from this sphere of the “*common good*” the protection and guarantee of natural rights. In this respect, no philosophic definition of the law seems more appropriate than that forwarded by Thomas d’Aquino: “the law is a rational ordering of human conducts in accordance with the common good”¹⁵.

Nonetheless, this perspective is a view belonging to political philosophy, i.e. to a contemplation of *conviviality* or *cohabitation* or human sociability depending on its concrete development (what belongs to political philosophy). But this is not the legal perspective (if by legal perspective we understand the perspective of the art of law, i.e. of the just) as the legal or juridical is its own *ius* or *iustum*; the norm is juridical depending on *ius* or *law* (in realistic sense). The legal perspective is not that of social order, but that of distribution of things¹⁶.

Consequently, the norm acquires the connotation of *juridical or legal* due to its relation with the distributive, the commutative or the legal. In this sequence, the laws of the state may have a very diverse character. Technical norms (for instance related to the construction of its own apparatus), of organisation, support for an activity etc., but they

¹³ Aristotle, *Nicomachean Ethics*, IRI Editions, Bucharest, 1998, p. 117

¹⁴ Ion Craiovan, *Elementary treaty of the general theory of law*, All Beck Editions, Bucharest 2001, p. 131

¹⁵ “Et sic quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata” (From the four conclusions drawn we may chose a definition of the law, which is nothing else than a prescription of reason ordered toward the common good, promulgated through he who cares of the community); S. Th., *Summa Theologiae, I-II, q.90, a.4*; in Rubin P. Alfred, *Ethics and Authority in International Law*, Cambridge University Press, England, 1997, p.17

¹⁶ Javier Hervada, *op. cit.*, p. 122

are all legal to the extent to which, marking what is mandatory according to the social good, are at the origin of a debt of legal justice. Consequently we will call juridical or legal norm any rule of conduct whose fulfilment will be an obligation of justice, a just duty, coming either from the social authority or from the persons' capacity of compromise, from the consent of people or from human nature¹⁷.

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¹⁷ Certains auteurs considèrent que le fondement de l'obéissance à la règle de droit est le droit naturel, c'est-à-dire l'ensemble des règles idéales de conduite humaine, auquel le droit positif doit être soumis(...). Pour Aristote et plus généralement les théoriciens du droit naturel classique (Platon, les stoïciens), le droit naturel (ce qui est juste) est le principe supérieur de justice inscrit dans la nature des choses et conforme au bon ordre de la nature et de la cité. Pour Saint Thomas d'Aquin, le droit naturel est inspiré par Dieu. Enfin, certains auteurs (appartenant à l'école du droit naturel moderne) considèrent que le droit naturel doit se déduire de la nature de l'Homme (Grotius), qu'ils définissent soit par sa puissance et son désir (Hobbes), soit par son aspiration au bien-être (Locke), soit par la dignité qui caractérise la personne (Kant); Gérard Cornu, *Vocabulaire juridique*, Association Henri Capitant, PUF, 1987-2007. «Règle», p. 774