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Positive Law and Natural Law

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Introduction: Is Natural Law Necessary for Identifying Positive Law?

No one doubts the existence of positive law (hereafter PL), but we wonder about its rightness. No one doubts the rightness of natural law (hereafter NL), but many wonder if it actually exists. PL exists even when unjust, but for NL to exist, it is not enough to be just. One way of comparing them is to articulate the notion of the existence of law or its being in force. Being in force of the intrinsic value per se, i.e., in virtue of its moral merits, has been distinguished from being in force as formal validity and from being in force as factual existence. But this is not very convincing, because a norm that was valid only axiologically and was not part of a normative system in some way effective would be pure and simple morality and nothing else. Law, unlike morality, requires some degree of factual existence. One of the few cases of "existence" of NL that we know of is the Nuremberg Tribunal, which condemned Nazi leaders for having obeyed unjust positive laws, i.e., for having violated NL though obeying PL, according to *Radbruch's Formula* which states that where statutory law is intolerably incompatible with the requirements of justice, statutory law must be disregarded in favor of justice (Radbruch 1956[5], p. 345).

The essential requisites of NL do not include factual existence and so it is not "law" in the narrow sense (Verdross 1958, p. 252). However, we may wonder whether effectiveness and formal validity are all that it is required for there to be "a legal system" and whether perhaps it is not also necessary a certain correspondence to criteria of justice, at least as regards the legal system as a whole (Alexy 1992). If it is felt that PL as a whole, in addition to being effective, must at least satisfy minimum needs for justice, then the problem of the relation between PL and NL really arises, but within PL itself. Hence the question needs to be formulated as follows: what role is played by values or principles of justice that are not dependent on human will in the concept of positive law?

PL is constructed by man and is hence an artifact. But this in itself does not mean that all its constitutive elements are controlled by human will. We know that this is certainly not the case for a series of logical and factual conditions the violation of which would imply the impracticability of PL, i.e., its nonexistence (e.g., prescribing the necessary or the impossible). Besides these constraints, are there legal norms from which no derogation is permitted?

Before answering this question, we need to take a look at the history of the main conceptions of the relations between PL and NL. The great legal cultures were built up around some general idea of what law should be like. For the Romans,

M. Sellers, S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*,
DOI 10.1007/978-94-007-6730-0_51-1

PL did not consist primarily in an arbitrary act of imposition of rules of conduct but in a set of rules deriving from the very nature of social relations. For this reason, the jurist Gaius (second century AD) could say that the first source of law is not statute but nature. Legal science itself is not knowledge of laws but of things, i.e., of right things (*iusti atque iniusti scientia*), that is to say of the *normality* of social relations. Cicero in *De Officiis* explains the fundamental legal categories (such as labor, property, self-defense and family) by making reference to basic inclinations of human nature like self-preservation and procreation. Reason itself is an inclination that induces human being to associate with his fellows, giving rise to the political community and its fundamental institutions. In the Middle Ages, NL operated within canon law, to which we owe – as has been demonstrated by Harold Berman (1983) and Brian Tierney (1997) – the importance of intention, consensus, and individual will in contract law, marriage law, and penal law, the first affirmation of natural rights. Moreover, the influence exerted by the rationalism of the Enlightenment on the codification process deserves mentioning. Lastly, how can we not recognize the enormous influence of the natural rights on the Universal Declaration of Human Rights (1948) and, through it, on the constitutional law of contemporary states and on general international law?

These are only a few of the many examples of how "in fact" an idea of NL has influenced a general understanding of PL and its contents. However, the fact that a conception of NL has inspired a PL culture does not mean that NL itself is relevant for a PL system. Indeed, we may think that this is the role and the task that the meta-legal has always had in the formation of legal rules. And so we have to go back to the main question: is reference to moral and political values an essential element for identifying positive law?

Three Faces of the Relationship Between Positive and Natural Law

We can only answer a question like the one just raised by appealing to a theory of PL and at the same time to a conception of NL (Bix 2002). In the normative sphere the problem of the relationship between PL and NL becomes inseparably mixed up with the problem of the relationship between a conception of one and a conception of the other (e.g., Covell 1992). Since the ways of conceiving the positivity and naturalness of law are multiple, we will have different conceptions of the relations between them. Here the issue must be looked at from the point of view of the positivity of law.

The relevance of NL might be detected within the three main profiles of legal theory: the foundation of the obligation to obey legal rules, the content of legal rules, and the form of legal rules themselves. For each of these three points, we can ask ourselves whether we need to have recourse to NL.

Why Do We Have to Obey the Law?

Legal positivism rejects the idea that the legal bindingness can be essentially or necessarily based on moral values or on principles of justice, one reason being that, since value judgments are controvertible, the certainty and autonomy of law would be lost. In order to ascertain the existence of law, it is necessary to describe it in terms that are purely factual, empirical, based on the observation and interpretation of social facts. This rules out the possibility of it being ultimately legitimate to have recourse to natural morality. Consequently, we have to separate the concept of validity seen as existence of law from the moral duty to obey its rules (Ross 1961). But if the identification of law does not serve to create a foundation for a true bindingness, then legal theory loses part of its importance, and moral theory (or NL doctrine) becomes more attractive for law (Cotta 1983). Precisely in order to avoid this outcome, Kelsen identified the existence and validity of a norm with its binding force, its strong obligatoriness, i.e., with the obligation to behave as it prescribes (Kelsen 1945, p. 30). In this way, the legal system takes on a moral quality, one that is not empirical even though not one linked to NL. Kelsen's intention is to confer on legal theory itself the normative advantages of the NL doctrine, stripping it of its metaphysical and axiological contents. This

appears to be necessary since no normativity can be deduced from empirical facts. The result is a concept of legal duty which is of the same genus of the moral one. In this we can still see a certain presence of NL within PL, i.e., the idea of bindingness that is proper to NL doctrine is preserved without its recourse to substantial moral values. For this reason, together with the need not to move away from empiricism, contemporary theory of legal positivism has gone the way of conventionalism (Green 1999).

A settled doctrine, which started from the ideas of Hart, maintains that "there are conventional rules of recognition, namely, conventions which determine certain facts or events that are taken to yield established ways for the creation, modification, and annulment of legal standards" (Marmor 2002, p. 104). Hence positivity indicates reference to certain facts that in turn are determined by conventional rules regulating the identification and exercise of authority. Therefore the central point in this concept of positivity lies in the nature of these conventional rules of recognition. How are they related to NL?

These conventions constitute the practice at issue. This means that there exists no law prior to the legal practice made up of the recognition's conventions (*practice theory of norms*). This rules out any law existing prior to PL and hence also any "NL," but it does not yet rule out the possibility of NL being present *within* legal practice itself.

For this to be ruled out, it must be felt that the normativity of law is only grounded in the fact that all participants in the practice consider the rule a reason for acting. As it is well known, this was contested by Ronald Dworkin (1977), when he maintained that judicial decisions also have recourse to principles of critical morality connected in some way to institutional traditions. The argument (Marmor 2002, p. 108) whereby legal conventions cannot provide reasons for acting that are different from the ones internal to legal practice itself does not rule out the possibility of law also being identified on the basis of moral and political considerations, since it is always possible that these are reasons internal to PL, as Dworkin and inclusive legal positivists maintain, though in a different sense (Himma 2002).

Another conventionalist argument against NL is the following: if one were to obey the authority for other reasons than those that depend on the authority itself, then this would be superfluous (Raz 1994). This rules out the idea of reference to moral values being an essential (and contingent too) element for identification of law. However, this argument depends on the role that is assigned to the legal authority, which can have a creative or productive task and/or an interpretative task. The latter binds the authority to showing that its interpretation of the fundamental values is correct even if it is not the best. This justification implies that the reasons why a norm is issued become part of the essential characteristics of the PL together with the element of formal validity. Here too one can recognize a certain presence of NL.

In conclusion, one can doubt whether the conventionalist perspective, with recourse to the use and beliefs of all participants in the practice, succeeds in grounding the bindingness of the legal rule better than the normative theory, which sees independent reasons for acting in the legal undertaking itself. Contemporary legal theory is marked by a debate on the understanding of the social practice that law consists in (e.g., Coleman 1989). While the conventionalist nature of legal rules is not denied, the fundamental issue concerns the way of seeing the forms of good inside a social practice, i.e., establishing whether these are essential goals or fundamental values that must in some way be guaranteed for human beings (Finnis 1980, p. 3) or whether they are merely contingent and conventional themselves. Only in the first case could conventionalism be reconciled to some extent with NL, i.e., satisfy the demand for a "natural" function in law.

The Content of the Legal Rule and Natural Law

The second question is whether it is a necessary condition for being PL that a norm is consistent with NL. Obviously it is not an issue of fact but a normative one, i.e., one needs to know whether a valid PL can in principle have any content – this was the opinion of Kelsen, who in the formal good of peace saw the only general aim of law (Kelsen 1945, pp. 13–14) – or whether there are ethical limits to contents. Jurists in the past admitted that

law requires an "ethical minimum," seen by some rather as a positive morality (e.g., Jellinek 1878, 42 ff., pp. 56–57) and by others as a natural morality (Cathrein 1909[2], p. 61). More recently it has been stated that law necessarily makes a "claim to correctness" (Alexy 1989). However, the doctrine that legal norms can have any content, even the most unjust and the most seriously offensive for human dignity, is also unacceptable for many legal positivists. Hart's doctrine of "the minimum content of natural law" is also one famous indication of this orientation. "Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, shows that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control" (Hart 1994[2], pp. 192–193). Here we are clearly not talking about positive morality but natural morality. It is not a simple observation of what actually happens in legal systems, but is a description of what must be expected, given certain conditions. According to Hart, these bound normative conditions are functional to the attainment of the general aim of survival, which is seen as the *reason* why certain prohibitions and obligations and certain legal institutions are present in some way in all legal systems. The difference between survival and peace, both Hobbesian and Humean aims, consists in the fact that the former appeals to a conception of human nature as it is in the present conditions of existence, while the latter does without this, deeming that the only evil that law wants to avoid is the illegitimate use of force. The NL doctrine of "commonsense" accepted by Hart is very restricted compared to the traditional one, both because like the modern one it regards only the means (Haakonssen 1996) and because it deems that the common aim is only survival. Precisely on the latter point, there is a debate going on in contemporary political and legal philosophy between a "thick" conception of fundamental values, like, for example, that of Finnis, and a "thin" conception of *primary goods*, like, for example, that of Rawls.

Moreover, if we consider law as a social practice of an interpretative type and not just a set of rules, then NL can be present in the judicial process insofar as the judge – as Dworkin believes – has the legal and moral obligation to include in the interpretation and argumentation principles and norms that are applicable not because they are legally valid but because they are morally right or fair.

Another interesting locus is that of international law, in which the notion of *jus cogens* has developed (Kolb 2001). At the 1969 Vienna Convention on the Law of Treaties (art. 53), reference was made for the first time to imperative and peremptory norms (Verdross 1966), the violation of which is a specific cause making treaties void. These norms, which cannot be derogated, protect some values that are essential for peaceful coexistence in the international community. The International Law Commission identified them in the norms forbidding aggression, colonialism, slavery, genocide, apartheid, and massive pollution of the atmosphere and the seas (Parker 1988–1989). This can be considered as a specific form of *jus gentium* in our time, i.e., a legalization of NL principles.

Conclusion: The Form of the Legal Rule and Natural Law

The third and last issue is whether the fact that legal rules must have a given form and not another and the fact that the legal system as a whole must have a given structure and not another are not a sign of NL constraints. Is not the form of legality itself a moral value (Maccormick 1992)? The theory of the *rule of law* is traditionally linked to the essential characteristics that a legal norm must have publicity, generality, non-retroactivity, clarity, consistency, constancy through time, practicability and congruity in application, and so on (Fuller 1964). All these conditions are formal in a broad sense, but they must be these and no

others for the law to perform tasks referring to substantial objectives or values like respect for liberty, equality, and people's expectations. While all agree in principle on the way to describe the elements of *rule of law*, there is major disagreement on the identification of these objectives or these values (Craig 1997; Marmor 2004). Even a "formal" conception has to justify itself in some way, and this should be a "substantial" way. As confirmation of this, Kelsen consequently expunges the theory of *rule of law* from the pure theory of law, i.e., from the object of legal science, considering it as a prejudice linked to NL. Hart deems it a necessary but not a sufficient condition for justice, in that it is "compatible with very great iniquity" (Hart 1994[2], p. 207). Nonetheless, there are marked analogies between Hart's "principles of natural justice" and Fuller's "internal morality of law." The procedural dimension of law presupposes a liberal view of human being, in that it is based on the presupposition that the human being is capable of self-determination and of understanding and following norms and making up for their defects (Fuller 1964, p. 162). For this reason, law is a purposive human undertaking. Hence – according to Fuller – there is a "morality" of procedures dictated by their internal reason for existing and the general aims for which they are made. That a public body must not perform acts ultra vires, i.e., beyond its own competences, is undoubtedly a moral procedural principle, and that the freedom of citizens must not be threatened by arbitrary acts by public powers is a substantial moral principle. These internal and external constraints of procedures have appropriately been configured as "a natural law of institutions and procedures" (Fuller 1981, p. 32). This means that the content of PL, at least in its procedural part, is neither arbitrary nor ethically irrelevant. Lastly, if we consider the nature of the obligation of functionaries in relation to these secondary rules, we have to recognize that they are closer to the moral ones than to the strictly legal ones, since they are founded on the principle of fidelity to law seen as a cooperative undertaking whose internal good is that of attaining justice in the best possible way with the legal materials available.

Cross-References

- ▶ Authority
- ▶ Binding Force of the Law
- ▶ Convention, Conventionalism in the Law
- ▶ Dworkin, Ronald
- ▶ Finnis, John
- ▶ Fuller, Lon
- ▶ Hart, H.L.A
- ▶ Ideals in the Law
- ▶ Justice
- ▶ Kelsen, Hans (on Legal Science)
- ▶ Law and Morality
- ▶ Legal Positivism
- ▶ Natural Law
- ▶ Normativity
- ▶ Obligation to Obey the Law
- ▶ Positivity and Validity
- ▶ Rawls, John
- ▶ 'Radbruch's Formula' and the Concept of Law
- ▶ Rule of Law
- ▶ Valid Law, Validity
- ▶ Values in the Law

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