Annals of the Academy of Romanian Scientists
Series on Philosophy, Psychology, Theology and Journalism
ISSN 2067 - 113X Volume **7**, Number **1–2**/**2015**

LAW, NORM, NORMATIVITY

Mihai BĂDESCU

Abstract. The carrying out of the legal relations require to demonstrate the law when it is contested or when it is required to establish the existence or inexistence of a fact or legal act. Over the time the role of the burden of proof was regarded differently, depending on the civil or penal nature of the act: in the criminal law the aim of the burden of proof is to establish the truth and to faithfully reconstruct the facts; in civil law the role of the burden of proof is to guarantee the safety of the parties. From the perspective of a elementary theory of the burden of proof there is a need to clarify the burden, the shift of burden, the object, admissible evidence and appreciation of evidence.

Keywords: gown, legal act, legal action, truth, trial, testimony, presumption, admissibility, legal system

1. What is Law?

A transcendental concept, imposing itself on human reason, a construct of social phenomena merely perceptible by virtue of experience and subject to universal determinism?

"There in resides the contentious issue of natural law"[1], as Alexandru Vălimărescu re-iterated, uttering the words of Bonnecase.

It is commonly believed that the issue be addressed in two basic manners, reflective of the two schools of thought contending to reflect the essence of Philosophy of Law: firstly, the *metaphysical, rationalist and idealistic school*, speaking of a natural universal, immutable law imposing itself on human reason, and, secondly, *the positivist, empirical school*, holding that there are no transcendental principles of law, but only social phenomena one confines acknowledgeable within the confines of our understanding.

Until the beginning of the XVIII-th century, nearly all philosophers and jurists had expressed their skepticism relative to the existence of natural law, including the Ancient philosophers, philosophers and theologians of the Middle Ages, who advocated the existence of natural law; Spinoza, Leibniz, Kant,

[1] A. Vălimărescu, *Tratat de Enciclopedia Dreptului*, Lumina Lex, Bucharest, 1999, p. 29 (in: M. Bădescu, *Filosofia dreptului în România interbelică*, Sitech, Craiova, 2015, p. 162.).

Grotius, Locke, Hobbes, J.J. Rousseau, Montesquieu debated the contents of natural law, postulating its existence as an indisputable fact.[2]

All the above had unfolded until the beginning of the XIX-th century, when The German History School (Hugo, Savigny, Puchta) proclaimed that there was no legal principle dictating human reason and that law was a product of evolution, developed under the spur of national evolution and placed, by definition, outside any manifestation of human will.[3]

Ever since, the doctrine of natural law has begun to crumble and Auguste Comte, in his positivist stance, delivers the final blow to the movement. However, legal practitioners of the XIX-th century did not lay down their arms and continued to advocate the notion of a universal and immutable law, with mild adjustments to the intransigent doctrine of natural law.

At the beginning of the XX-th century, a powerful re-birth of what Francois Geny termed the *"irreductible natural law",* could be witnessed. In the argument between the two lines of juridical thought, philosophers and jurists held different stances. Thus Bendant maintained that while contention as to the nature of the law's object may exist, the rules governing it, the methods employed and implementation may vary, whereas the concept of guidelines remains a necessity. Guidelines are to people what instincts are to animals. Only insane individuals pretend not to know what they are doing or saying; it must be borne in mind that, at the time of drafting an act, a lawmaker has a set goal in mind. Therefore, *"natural law exists, whatever name be bestowed on it, as it is nothing else but the ideal strived for under positive law…"*.[4]

Still, from another perspective,[5] legal metaphysicists who have translated the concept of law into its metaphysical counterpart, actively incorporated into the concept of the absolute, present it as a non-material element, quintessential to the life of humankind; one of essence, not to be mistaken for the various forms whose emergence it determines, but which it inhabits and through the incorporation of which it is rendered visible and concrete, *"…a non-changing type extant in reality and distinct, it is a principle in relation to which concrete objects are merely imperfect derivatives*".[6]

---

[2] M. Bădescu, *Filosofia dreptului în România interbelică*, p. 162.
[3] C. Beudant, *Le Droit Individuel et L'État: Introduction à L'étude du Droit*, Ed. BiblioBazaar, 2009, pp. 41-81.
[4] *Ibidem*
[5] *Also see Bonnecase.*
[6] *ibidem*, cf. Alphonse Boistel,*Cours de philosophie du droit, professé à la Faculté de droit de Paris, par A. Boistel*, 1899.

However, views expressed by advocates of material law have been promptly countered by positivists. To exemplify, during a conference at The University of Coimbra (December 3, 1923), Léon Duguit maintained that *positivism does not negate things*; according to Duguit, noone can scientifically acknowledge the existence of a conceptual reality. At the same time, humans, in an overpowering need to cling to the supersensory, naturally envisage a world outside perceivable reality. However, all of this becomes a component in the realm of metaphysical belief or religious projections and *not* the domain of science. Similarly, Duguit advocates the exclusively scientific spirit and banishes dogmas in any form: *"I practice science and science alone, based on an impartial observation of facts".*[7]

On a similar note, Georges Ripert[8] believes that it is futile to look for the abstract notion of justice in the battle of ideas and influence-driven conflicts; in the thirst for knowledge and power of conviction, the human spirit seeks to find the irreducible natural law, but this, to no avail. Perhaps, in a surge of faith, it may conclude its quest, but when it does, furthered by intuition, it will fail to instil it to ones only touched by reason: *"it is better still to have an accurate approach, that is less dogmatic and more of a purely realistic nature".*[9]

One may note that, in their attempt to define law, philosophers and legal experts have been known to take different stands; the first group typically holds that there are principles of absolute law and of supersensory nature, whereas the others will absolutely deny the existence of such dogmas and favor methods of purely factual observation.[10]

Over time, many definitions have been given to law; they mainly fall into three generous categories:

- definitions that originate in the contents of the concept of law, aptly postulating a certain view of the fundamental issue of law;
- definitions originating in the sources of law;
- formal definitions, that only consider the form social norms take when undergoing conversion into legal norms.

The first category includes *"the best-known among the Roman definitions"*[11], i.e. the one fathered by legal practitioner Ulpian: "*Iurispraeceptasunthaec:*

[7] L. Duguit, *Transformations du droit privé*,Francisco Beltrán, 1920, p. 67.
[8] G. Ripert, *Droit naturele et positivisme juridique, Annales de la Faculte de Droit d'Alx*, 1918, p. 32.
[9] Also see: G. May, *Introduction a la science du droit and Raymond Carré de Malberg, Contribution à la Théorie générale de l'État*, University of Michigan Library, 1920.
[10] A. Vălimărescu, *Tratat de Enciclopedia Dreptului*, p. 43.
[11] *Ibidem.*

honestevivere, neminemlaedere, suumcuiquetribuere", meaning, one must live honestly, not harm anyone, give anyone what is their own. This definition, lifted by Romans from the stoics, betrays a progressive mindset, morals not to be infused into Roman Law until the Classical Period.

The imperfection of the above definition resides in the fact that *"it is based on a special conceptualisation of law, in contradiction with both its imminent Roman interpretation* and *with its interpretation by other peoples"*[12] and, equally, that it fails to distinguish law from morals *("honestevivere"),* therefore placing itself outside the strict domain of law.[13]

The definition of law as worded by Celsus – "*Jus estarsboni et aequi*"[14], seems to have the "shortcoming" of transcending the limits of law; it further proclaims it as a rule incorporating the virtue of honesty.

To Thomas Aquinas, law is *"the ratio between two things ... a proportion that strives to restore equality, which is the aim of justice"*. This definition – which reflects the scholastic view on justice – can be strictly applied to legal systems based on equality, thus repelling all the ones thriving on inequality, such as *the cast system in India*, *slavery*, in place in all Ancient peoples, class difference, sanctioned in all countries prior to The French Revolution, etc. As law is defined in terms of equality, it is thus deemed that all institutions supporting inequality are *non-legal*, a fact which is not admissible.[15]

The illustrious definition of law given by Kant[16] is nothing else but the translation into law of the author's conceptualisation of the critique of practical reason. The entirety of Kant's moral system is grounded on the idea of autonomy of will or freedom; thus law is nothing else but the entirely of norms that determine each individual's free development.

As is the case with Thomas Aquinas' definition, Kant's counterpart displays the shortcoming of being merely the expression of a doctrine, and is permeable to criticism for the same reason: it bans all institutions founded on freedom fettered, from the legal sphere; still, these, however condemnable they may be, are still of a

[12] *Ibidem.*
[13] A similar perspective is noted in Jellinek's definition of law, according to which *"law is a minimum of ethics"*, a theory that combines law with morals (G. Jellinek, *Die socialethische Bedeutung von Recht, Unrecht und Strafe*, Adegi Graphics LLC; Elibron Classics series edition , 2011, p.42.)
[14] *"Law is the art of good and just."*
[15] A. Vălimăreanu, *Tratat de Enciclopedia Dreptului*, p. 43.
[16] *"Law is the notion emerging from conditions around each individual's ability to grow resonant with his neighbour's ability to grow, based on a universal law of freedom."*

legal essence. Slavery, despotism, the cast and class systems are not incorporated into Kant's definition.[17]

We may thus conclude that *law* manifests itself as a tripartite discipline: it is, concurrently, *science, philosophy and art*.[18] Aimed at establishing a norm for social behaviour, a threefold plight must flow into the concept:

- a *scientific work,* by which the diverse factors determining the emergence of the legal phenomenon building the social substratum of law across time and space, factors of a social-proper, economical, political, psychological, biological or moral nature, are studied under employ of scientific methods,
- a *metaphysical work,* by which human reason seeks to find the superior principles that must underly every social entity,
- a*technical work,* by dint of which the scientific-philosophical content is translated into purposeful rules.

2. What is a legal norm? How is it constituted?

The legal rule, i.e. norm is formed by two elements: an *external* and *formal* component, reflected by the very norm of positive law, by statutes, and, more importantly, an *internal* component, made up by the code of conduct (behavior), adopted by society and seeped into its members' subconscious mind.[19] Blending the two terms into a full entity engenders a norm able to meet its organic calling and organise society. The legal rule can be brought to life by either a primary internal, or by a primary external component. In the first instance, law is firstly nascent in the collective consciousness, under the pressure of various circumstances, as a result of a slow evolution, to later take on the form of either a custom or a legal precedent, that help constitute the external component. In the latter instance, a lawmaker deliberately and rationally creates a written law - i.e. the external component - that the human collectivity comes to adhere to over time, (mostly) observing it.

The first blending process is more *natural* and shall be referred to as such. On the other hand, the latter process bears markedly deliberate traits and shall be termed *rational.* The natural formation of the legal rule constitutes the more primitive approach in the creation of the legal norm.

---

[17] A. Vălimăreanu, *Tratat de Enciclopedia Dreptului*, p. 45.
[18] *Ibidem.*
[19] R. Goruneanu, *Ideea de drept şi procesul ei de formaţiune*, Bucharest, 1939, p.14.

The phenomenon underlying the natural creation of law consists in adopting a legal rule as a result of a factual situation, as proven necessary by circumstances. Below one can find a few examples to this effect:[20]

- under Roman Law, the formal acts *"per aes et libram"* are reminiscent of the real-life need to weigh metal, i.e. a pre-existing fact;
- in the evolution of criminalisation, laws were initiated by adopting and justifying *"private retaliation"*, i.e. prior facts; this principle came to be so effective that, if replaced with a mandatory or voluptuous component, the fine to be paid by the culprit would cease to be an expression of "punishment" *per se,* a price in return for renouncing the act of revenge;
- a natural gesture is converted into a legal gesture, also in Ancient Rome, in circumstances where a presumed father may receive the new-born infant into his arms and lifts him/her up in a gesture to acknowledge his paternity, and, contrarily, may lay him/her down at his feet, denying this status;[21]
- in Ancient Jewish society, if a slave was fated to stay in bondage for the duration of his/her natural life,[22] he/she would be pinned to the door with an awl to signal it;
- the entire institution of matrimony and lineage reveals, within the majority of traditional peoples, many examples of turning an initially contextual custom into a legal norm - for instance, in nuptial ceremonies, the imaginary kidnapping of the prospective wife and ensuing payment of damages to the lads of this woman's village of birth, should the woman be claimed by a stranger outside the village.[23]

From the *manifestations of the legal rule*, commonly known as sources of positive law, employed in the natural creation of the norm for purposes of outward expression to create the legal, visible layer of provisions that, with the added internal convictions, yielding the perfect norm – emerge *customs* and *jurisprudence*.

The custom is the sign which shows that a mood of a certain kind was born within the society. Meeting certain facts it will determine the social individual to have a steady attitude towards them, which will make it visible. Being the last manifestation of a rule in its natural ascent, the custom cannot exist, unlike the law, without an inner substrate[24].

[20] *ibidem*
[21] C. Stoicescu, *Curs elementar de drept roman,* Universul Juridic, Bucharest, 2009, p.85.
[22] *The Fifth Book of Moses*, pp. 15 and 17.
[23] I. Peretz, *Curs de Istoria Dreptului roman*, Bucharest, 1915, Part II, p. 180.
[24] Goruneanu R., op. cit., p. 18

It has been stated that customary law cannot exist unless established by jurisprudence; that is why it exists through court decisions which give him authority.[25]

The power of the legal custom applies through the endeavour of the individual to put into practice their ideas, meaning to behave as he thinks is right. For the unconscious beliefs this explanation is no longer necessary because they reflect themselves in gestures.

Regarding the second source of positive law, **jurisprudence**, it adjoins to an artificial law, to a law apparently subjected exclusively to its interpretation. When court decisions repeat in the same way they create a law.

Only the same decisions are, indeed, constant internal beliefs, which express through themselves, and only they show a norm. An isolated decision may be the result of a hazard.

Sometimes things related to the case, a detail, the good will of a party will convince the judge to rule in favour of one party. That is why isolated decisions are only arguments to the future trials. An older decision is for the judge an external cause, an argument brought to create a certain impression but not an old one which now functions as a mechanism. When the decisions are the same they create a certainty that an unquestionable conviction stands behind them. This conviction completes the rule[26].

The internal norm was born when the decision imposed from outside has penetrated the colectivity subconscious which obeys to it without realizing that it may act in a different way. In order to become unconscious it has to be, in the first place, complied with consciously and several times.[27] This implies two factors: the first one is the time. The positive norm has to be maintained in force long enough in order to become legal belief.[28] This time frame is also necessary in order to disappear any trace of a law that is contrary. The second factor is the effective enforcement, because it is not enough to be monitored, it has to be adopted as a norm and this can be done only to what the society effectively enforces. For this reason the assimilation of the law does not begin with the main and abstract principles but with those parts which are mostly used. Being always applied to different cases they will be assimilated and their sum will generate the rule, which is first general and then the principle is born from different rules, which is superior. The individual who does not know the law as a result of

[25]Planoil M., Traiteelementaire de droit civil, I, 1908, p. 45
[26]Goruneanu R., op. cit., p. 24
[27]See Spencer H., On Moral Education
[28]FaquetEm., La cutte de l'íncompetance, 1914, p. 70

studying it but from its every day usage will have a lot of detailed knowledge but hardly understands the meaning of the superior rule which make the connection between all practical solutions he has used. At this stage **rational creation** resembles the natural one as it is obliged to obey the rules of the society which go from individual to general and from practical to abstract[29].

In the rational creation of the norm the element which is created it external. The sources of law which may constitute it are the law and the doctrine.

The doctrine is sometimes regarded as a natural way in which law is exteriorized and in this instance it is compared with the jurisprudence.

The custom and jurisprudence are an experimental creation while the law and doctrine are hypothetical. The first two always rely on facts. The other two aim to anticipate the new facts that will be created; they regulate using a rational hypothesis; the experience will prove their rightness, potential and qualities only afterwards. From this reason the laws are rarely perfect. Not in vain did *Utopia,* created by Thomas Morris enter into the current usage as a legislation as difficult to apply as the one described by Platon in *Republica.*

The law and the doctrine are supported by words and not by notions. The jurisprudence, without giving general rules, states that a certain attitude was legal and another was not. A definition, a text of law has the most rigid character.

3. What is normativity? How does it manifest?

The norm is a natural, social, mental and legal fact. The legal field appears in this context as a phenomenon which completes the regulation.

The need for norms appears involuntarily to human beings – meaning at the level of natural impulses, which means that life in itself regulates. The norms, in general and the legal ones in particular are technical tools used to achieve some goals. They are obeyed by people through consensus, meaning the individuals obey the rules out of the need to conform to the others.

On the other hand we have a natural need to conform to the others. This comes from intuition. In this way one may assert that the need to conform to the others is one of the forces which put us in action.[30] This need is imperative. After all, the tendency of the members of a group to conform to is another natural need to obey the rules. Taking into consideration this imperative theory to obey the rules one may conclude that *social life as a whole implies rules and may be reduced eventually to the phenomenon of creating and obeying some rules given*

[29]Goruneanu R., op. cit., p. 28
[30]Esperantia E., *Introducere în filosofia dreptului*, Cluj, 1946.

by a number of communication consciences,[31]in other words, the society creates rules.

Within a universalist view there are three fields that generate the need to obey the rules: the rules of life in general, the rules of the human mind and the nature of the social. Analyzing these fields one may assert that without rules the life is not possible. These conditions are some kind of eliminatory rules, very rigorous and harshly sanctioned.[32]

When we talk about thinking we have the same situation: is the mind subjected to specific rules or it is the one creating them? Hypothetically, if we exclude the rules from thinking we will get absolute incoherence.

Regulation is an involuntary manifestation of the human psychic because the activity of human beings cannot be possible without obeying certain rules or without creating them. We might say that the main function of thinking is to create rules.[33] This function is also seen at the social level because the social organization is a result of the characteristics of the human mind. That is why the social life is regulated by rules and laws; that is why their lack will make these connections appear to human mind as irrational. How will, then, the society impose respect to human mind? The rationale, which respects only what has a rational character, would not find any more in the society the fundamental element for it: the rule.[34]

We have to note that at social level the norms are imposed by the people, who, instinctively, elaborate the coercive rules. However, the individual activity remains a priority when we talk about the rule as a result of the collective conscience. In other words, the logical rule is the foundation of the social normality. Without rules the spirit will disaggregate. Therefore, normality is inherent to spiritual life. Spiritual life is an effect of the human spirit. That is why the social life is inherent to a rule.[35]

Normality signifies that, in all his action, the individual has to follow certain directions and has to obey these limits.[36] The rule is the one which shows how it must or mustn't be. When we talk about rules we use *must*, which becomes dominant as compared to what it is. When we talk about *must* we enter a space of

[31]Ibidem, p. 305
[32]Ibidem.
[33]Sperantia E., op. cit., p. 306
[34]Ibidem, p. 307
[35]Ibidem, p. 308
[36]Popa N., Dogaru I., Danisor Ghe., Danisor D.C., *Filosofia Dreptului. Marile curente*, All Beck Publishing, Bucharest, 2002, p. 268

ideality which creates a certain type existence which is contradictory to what *it alreadyis*.[37] Even so, *must* cannot ignore what it is. Normality develops within the limits of a pre-existent existential framework. In this sense *must* has to meet what *it is*, meaning the rule is not different to existence as such.

The rule does not serve to accomplish a certain goal. The goals are only variants of its rules does not say which rule is compulsory in a certain case but states that one rule has to be enforced. All rules are variants of the general one. Legal rules, referring exclusively to social relationships, are variants of the categorical imperative which regulates the social life.

BIBLIOGRAPHY

Bădescu, Mihai, *Filosofia dreptului în România interbelică,* Sitech, Craiova, 2015;

Beudant, Charles, *Le Droit Individuel et L'État: Introduction à L'étude du Droit*, BiblioBazaar, 2009;

Duguit, Léon , *Transformations du droit privé*, Francisco Beltrán, 1920;

Goruneanu, R., *Ideea de drept şi procesul ei de formaţiune*, Bucharest, 1939;

Jellinek, Georg, *Die socialethische Bedeutung von Recht, Unrecht und Strafe*, Adegi Graphics LLC; Elibron Classics series edition, 2011;

Peretz, Ion, *Curs de Istoria Dreptului roman*, Part II, Bucharest, 1915;

Ripert, Georges, *Droit naturele et positivisme juridique*, Annales de la Faculte de Droit d'Alx, 1918;

Stoicescu Constantin, *Curs elementar de drept roman*, UniversulJuridic, Bucharest, 2009;

Vălimărescu, Alexandru, *Tratat de Enciclopedia Dreptului*, Lumina Lex, Bucharest, 1999.

[37] ibidem