ANDRÁS TAMÁS

The Law as a Command in the Pure Theory of Law and Technical Theory of Jurisprudence

1. Pure Theory of Law

In realistic terms, what the *public conceives* as lawful or unlawful is almost changing day in day out. Legal rules, too, are changing swiftly nowadays; what was still effective law yesterday may well have lost its validity by now. Court ruling, or judicial practice in general, also tends to be modified: judgment of yesterday are unlike those of today which, in turn, may be unlike those of tomorrow. In *practical law*, then, *change* is the most general feature.

Scientific views concerning law are changing as well. Especially mutable are those ideas of a scientific hue that intend to be actively involved in the processes of practice, ie., those that strive to alter people's concept of lawfulness and unlawfulness, that aspire to alter the legal norm, judicial rulings and legal practice in general. By implication, then, these notions aim at stimulating changes even further which do exist in practice after all.

At the same time, law *as a system of norms* continuously exists. The living together of human beings is characterized by the fact that their mutual behavior is regulated. The living together of individuals, in itself a biological phenomenon, becomes a social phenomenon by the very fact of being regulated. Society is ordered living together, or society is the ordering of the living together of individuals. To the individual the order appears as a complex of rules that determinate how the individual ought to behave in relation to other individuals. Such rules are called norms.[1]

The various types of the social order constitute law as well as operate it. For it is undoubtedly a different system of ideas that realizes as a social order, eg., monarchy or republic, liberalism or dictatorship, still each of these shares a *common* feature, the regulatedness of social relations, the legal regulation. On the bases of the theoretically deducible common properties of regulatedness we may presumably reach a *universal* essence. If in the course of this inquiry regulatedness is sought *from the premise of positive law* and it is assumed that in the interest of the social order certain social conditions are regulated by positive law, this may be construed in diverse ways.

The exploration of positive law is the focus of, eg., *J. Austin's* analytical theory of law,[2] the Scandinavian legal realism,[3] *Vishinsky's* socialist-normativism,[4] and plenty of other trends, primarily *Hans Kelsen's* pure theory of law. The theoretical trends scrutinizing positive law from diverse aspects are all to outline the universal nature of law — with different methods. The most homogeneous version of coherent analyses that can be abstracted from the real norms — as *par excellence* normativism — is the pure theory of law.

[1] H. *Kelsen*: The law as a specific social technique. In: What is Justice. Law and Politics in the Mirror of Science. Collected essays by H. *Kelsen*. University of California Press, 1971. p. 231.

[2] J. *Austin*: The Province of Jurisprudence Determined. Oxford, 1954.

[3] See, for example, A. *Hägerström*: Inquiries into Nature of Law and Morals, 1953., K. *Olivecrona*: Law as Fact. 1939., K. *Olivecrona:* The Imperative Element of Law. Rutgers Law Rewiew, 1964. 18., A. *Ross*: Towards a Realistic Jurisprudence. 1946., A. *Ross*: On Law and Justice. 1958., A. V. *Lundstedt*: Legal Thinking Revised, 1956,. F. *Castberg:* Problems of Legal Philosophy. 1957.

[4] А. Я. *Вышинский*: Вопросы теории государства и права. Москва, 1949.

„*The Pure Theory of Law* is a theory of positive law — a general theory of law, not a presentation or interpretation of a special legal order. From a comparison of all phenomena which go under the name of law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples. In this manner it derives the fundamental principles by means of which any legal order can be comprehended. As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science.

It is called „pure" because it seeks to preclude from the cognition of positive law all elements foreign thereto. The limits of this subject and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other.

To free the concept of law from the idea of justice is difficult, because they are constantly confused both in political thought and in general speech, and because this confusion correspounds to the tendency to let positive law appear as just. In view of this tendency, the effort to deal with law and justice as two different problems falls under the suspicion of dismissing the requirement that positive law should be just. But the Pure Theory of Law simply declares itself incompetent to answer either the question whether a given law is just or not, or the more fundamental question of what constitutes justice. The Pure Theory of Law — a science — cannot answer these questions because they cannot be answered scientifically at all."[5]

Positive law, which is the object of the Pure Theory of Law, is an order by which human conduct is regulated in a specific way. The regulation is accomplished by provisions which set forth how men ought to behave. Such provisions are norms.[6] In this sense, the legal norm refers to the conduct of two entities: the subject of legal relation, ie. the citizen, against whose delict the coercive measure of the legal sanction is directed; and the organ that is to apply the coercive measure to the delict.[7]

Such a way the element of coercion is an essential characteristic of the law. But if we say that a legal norm "exists" we mean that a norm is valid. To say that a norm is valid for an individual means that the individual ought to conduct himself as the norm prescribes. A law system of valid norms consists of "ought" propositions, statements, and not in which an "is", is expressed.[8] The validity of the norm may be expressed by saying: something ought to be or ought not to be, something ought to be done or ought not to be done. If the specific existence of the norm is identified with its *validity*, then by this a specific mode is meant in which the norm — unlike the existence of natural facts — is given.[9]

The norm cannot be logically deduced from the "is" *(Sein)* rule. From the fact that something is or happens, it does not logically follow that it (or something else) ought to be or ought to happen.[10] An isolated legal norm may be "valid" even if it does not prove effective in every single case.[11]

The reason for the validity of a norm supplies the answer to the question: why ought

[5] H. *Kelsen*: The Pure Theory of Law and Analytical Jurisprudence. In: What is Justice, *ibid.* p. 266. Theory of H. Kelsen, first in Hungarian language, see, *Kelsen* Hans: Az államelmélet alapvonalai (The Outlines of Theory of State). Transl. Prof. Gyula Moór. Szeged, 1927. pp. 90.

[6] H. *Kelsen*: The Pure Theory of Law and Analytical Jurisprudence. *ibid.* p. 267.

[7] H. *Kelsen*: *ibid.* p. 275.

[8] H. *Kelsen*: *ibid.* p. 268.

[9] H. *Kelsen*: Reine Rechtslehre. Wien, 1960. p. 10.

[10] H. *Kelsen*: Value Judgments in the Science of Law. In: What is Justice. *ibid.* p. 218.

[11] H. *Kelsen*: *ibid.* p. 225.

one to behave as the norm prescribes? Because the "validity" of a norm is its specific mode of existence, the reason for the validity of a norm is always another norm, never a fact.[12]

"The facts which condition the existence of a legal norm — the presence of a norm-creating fact and the absence of the norm — annulling fact — are therefore not the ground for the existence of the norm. They are a *condition sine qua non* but not a *conditio per quam*.[13]

The *facts* — either those of norm-creation or those of judicial practice — are, indeed, not to be annulled. In Kelsen's view the facts take on importance in a divergent aspect of interpretation: in judging the *efficacy* of the law, which is the domain of *sociology*. Normative jurisprudence deals with the validity of the law: sociological jurisprudence with its efficacy; but just as validity and efficacy are two different aspects of the law that must be kept clearly apart, yet which stand in a definite relation to each other, so there exists between normative and sociological jurisprudence, despite the difference in the direction of their cognitions, a considerable connention.[14]

In addition, normative jurisprudence and sociological jurisprudence may stand in a *complementary* relation to each other. The Pure Theory of Law by no means denies the validity of such sociological jursprudence. Sociological jurisprudence stands side by side with normative jurisprudence; neither is able to replace the other because each deals with different problems.[15]

For Kelsen, pure information about legal prescriptions must be separated from intrusive value judgments of all kinds. Despite the obscurities of this esoteric language, Kelsen is the true friend of the practitioner who wants to be called on to describe the law and nothing but the law in *office hours*.[16]

In the Pure Theory of Law — just as in sociological jurisprudence or in Hart's theory of obligation[17] —, the technique of law does not figure as a separate area of interpretation, let alone as an aspect for theory modeling. In other words: the technical solutions, although by no means indifferent from the aspect of theoretical tenets, do not appear determinant. At a time when Kelsen had already finished his oeuvre, *Herbert Simon* referred to a contingent interpretation, not expressly in terms of the law, that in the course of societal action it is not merely the means that should be found for the goals of society, but rather it is the *means existing in a given situation that mark out* the goals of society.[18]

It is possible that at a cursory look this interpolation seems meaningless, as the Pure Theory of Law does not deem the law a means of society and sociological jurisprudence is less inclined to grasp the bases of the efficacy of law in its normative and technical characteristics. The goal that is deducible from the means or following from them is for H. Simon too the manifestation of observation and experience: it is rather an empirical truth than a theoretical thesis. However, if the provisions of law direct human conduct,[19] then it is to be presumed that the technical characteristics, the functioning mechanism should scarcely be considered as unimportant. Rather, it can even be an aspect for system modeling; of course, the question is on what grounds.

[12] H. *Kelsen*: *ibid.* pp. 218—219.
[13] H. *Kelsen*: *ibid.* p. 219.
[14] H. *Kelsen*: The Pure Theory of Law and Analytical Jurisprudence. *ibid.* pp. 269—270.
[15] H. *Kelsen*: *ibid.* p. 269.
[16] J. W. *Harris:* Legal Philosophies. London, 1980. p. 3.
[17] H. L. A. *Hart:* The Concept of Law. Oxford, 1961.
[18] H. *Simon*: From Substantive to Procedural Rationality. 1978.
[19] H. L. A. *Hart:* The Concept of Law. p. 39.

2. On the interpretability of law

In people's view, law can be interpreted in terms of *what they think to be a legal rule*, then in terms of what is the meaning of *a lawfully constituted legal norm*, then with what content of meaning the courts and other official law — applying organs *apply* the legal rules as well as from several other professional aspects.

The result — if we wish to express the law — depends in a large measure on in what kind of *range of interpretation* we have tried to define the law.

Supposedly, the operativeness of legal system is a *fact* at all times, which, supposedly, may also be measured by setting out from the conclusion of legal cases and lawsuits. Much less definable is the number of cases in which people behaved in a manner held to be lawful, when the concrete situations did not come up for trial or failed to involve the authorities and courts. These cases, regarded as ones passing through a regular procedure, are not recorded in any statistical chart whatsoever. In every modern state there are case-statistics, court-statistics, criminological statistics and so forth. However, the data of these are invariably made up of the functioning of authorities, of what these perceive. People do not register into how many and what kind of legal relationships they have entered with one another, and how many times was their behavior lawful and how many times unlawful. These cases, therefore, cannot be summed up, nor can they be evaluated. The cases that can be handled as data and evaluated origina tefrom law-suits and affairs of the courts, the law — applying organs, the administrative bodies etc.

The cases known to the courts, the authorities and the administrative bodies are facts as much as those we cannot become familiar with in this manner. The cases as existing *facts*, and of these all that can be evaluated from the law-applying procedures with a technical method, constitute *two fields* as far as the law is concerned:

— cases that can be factually evaluated (these can be learned from the files of judiciary and other law-applying bodies),

— cases that cannot be factually evaluated (to know these in profundity no practical method exists).

In the case of law there is a possibility primarily for cases that may be contested, that have become debatable, cases presumably involving a violation of law as well as ones that cannot be effected without the participation of an administrative body. On the number of cases listed in the second field we have no data at all. If we have data on the facts of the first field, we are *not to infer* the second field from these. So if, for instance, the court tried a thousand cases in a month which were concerned with sales, we should refrain from deducing from this the number of sales contract within the competence of the court in the same period. And this also applies to so strictly — controlled a theme as delict: from the number of crimes that become known to the authorities we should not extrapolate the number of crimes actually committed. We need not justify that the number of cases is a far too general indicator, scarcely illustrative of anything, if we wish to establish something concerning the content of the rule.

If the functioning of the law manifests itself *in cases*, then the processing of cases that can be evaluated as well as their analysis and measuring, although feasible in theory, still is extremely relative in practice. Indeed, it is pragmatically possible to evaluate and measure only cases that are, as compared to the legal norm, disputable, contrary to law, perverted or wrong without the participation of the administrative bodies. And if we consider here also that in a substantial portion of cases the client can initiate proceedings — legal proceedings start when the plaintiff of his own free will commences an action, and this subjective decision

usually stems not from the motivation of positive law, but of the generally accepted law[20] — then suffice it to point out that the *measurability* of cases with legal relevance is *extremely relative,* fuzzy and of slight factual value.

Nevertheless the functioning of the law is a *fact*, which is *realistic* within a definite *duration* and a definite *space-relation.* Law in general and law in function actually — if seen from a variety of theoretical considerations — may be right or wrong, just and unjust, moral and amoral, necessary and unnecessary for society, imperative or incidental. These are aspects for principles. They can express the norm's sociability, the law's evolution and involution and other things. These are suppositions of principle, as there are other suppositions of principle, which, no matter how much factual content they have, are still *suppositions.* And a supposition can be substituted for by another: the fact — which defies any close definition — may be substituted for by a supposition from outset. This would lead us the Pure Theory of Law. In this, because of its normativistic interpretation, the facts are neutral from the aspect of theory-creation: they are irrelevant for the validity of the legal norm. According to Kelsen, if a norm exists *as law*, then it is *valid.*[21] The fact of the norm is: value as legal value. The law constitutes its value by being a *norm.*[22] The fact of the norm is of course neither that of legislation, nor that of jurisdiction, nor that of a legally significant act of the subject of law.

The intepretation of Technical Theory of Jurisprudence — although it is one of the premises of Kelsen's normativism — is not identical with this. Here the *act* is a *fact*: the act of legislator, law-applier, and of the subject entering into relation with the law. Not because this could be defined exactly at present, but because, at least in principle, it can be handled as a fact. It regards as crucial criterion the dimension of *time* and space, as coordinates of *factualness.* Functioning and the capacity for functioning cannot be interpreted without these.

The expressible boundary of this may be realized by the *practical validation of positive law.* Thus, however, the problematics of the validity of the law turns into the validation and efficacy of the law. This transition from the regularities of the norm is a switch over to the regularities of the validity of the norm: a switch over from the theses of the norm to the postulation, application and practical validation of the norm. Factually this is a *translocation,* and temporally an *asynchronity.* It can also be interpreted as a conversion from the regularities of the *norm* into those of the *efficacy* of the norm, ie., a transition from a "pure theory of law" into a "non-pure" or mixed or, if you like, a "dirty theory of law", into the theory of application and practical functioning.

In the interpreation of the pure theory of law as well as in the conception of dogmatics of jurisprudence, the functioning and prevailing of the law is essentially not a legal-normative but a political and sociological phenomenon: the *applied* legal norm, then, is not a pure legal norm. Applied law is *metajuristic*: it may be good sociology, policy, psychology or good administration, but it is not necessarily good legal dogmatics or legal normatics. What is "pure" in a normative sense would not retain this property in the course of the application of law. *Applied law* and the application of law can be deduced by no means only from premises of a "pure" theory of law or of legal dogmatics. The actually functioning law consists *not only of legal postulates.* Law is *not* solely comprised of rules. Rules are part of law. But in hard cases, judges are guided to their decisions by standards which are not legal norms. Such standards include policies and principles. A policy is that kind of standard that sets

[20] Compare Gy. *Antalffy*—A. *Tamás*: The State and law-making. Acta Universitatis Szegediensis de Attila József Nominatae. Acta Juridica et Politica. Tom. XXXIII. Fasc. 1. Szeged, 1985. p. 32.

[21] Compare H. *Kelsen*: General Theory of Law and State. Cambridge, 1949. p. 113.

[22] H. *Kelsen*: Reine Rechtslehre. p. 67.

out a community goal, generally an improvement in some economic, political or social feature of the community's life; for example, the policy that automobile accidents are to be decreased. A principle is a standard to be observed because it is a requirement of justice or fairness or some other dimensions of morality; for example, "no man may profit by his own wrong".[23]

The legal norm necessarily *prevails* by stepping out of its frameworks posited by legislation. The practical application of the legal norm engenders those *segments of interpretation* in the course of which legal regulation may be grasped as a programing or conditioning of society,[24] its normative analysis or even a specific algorithm-theory of it. The norm as rule standard and its judicial practice full with non-rule standards are together always in complementary relation. So the application of law is not a legal-normative regularity because the legal norm *can be* applied in this manner too, but because it *is actually applied in this manner*, and this is factual.[25] The fact is real, yet in itself it is still not science.

Scientific tenets can be constructed as much from abstract *principles* as from the contracted explication of the *facts* of reality. *A priori*, neither has an advantage over the other. If some version of jurisprudence can be verified by deduction from principles, then all versions that directly stem from facts are just as much verifiable. Pragmatically no exclusive grounds exist for either the "pure" or the "non-pure", that is, applied law. It is a separate question that these could well be self-contained areas of interpretation for a scientific proposition.

Of course, a scientific proposition is not an arbitrary thing which, say, arises in the spirit of *varietas delectat*. A scientific proposition requires the scrutiny of the objects of the domain at issue, according to necessity both subjective and objective.[25] The former can at best lead to a representation that in what manner can the *external* order and ranking be expressed. Inasmuch as the objective necessity of the object resides in its logico-metaphysical nature, the scientific closeness or even the seriousness of the scrutiny would diminish accordingly in the inquiry of insulated phenomena, and this leads to the acceptance of logico-interpretational ranges.

On this basis one could encounter *two* contrasting treatments. *One* of these aspires to make jurisprudence draw its rationality from *what already exists:* from the codified legal rules and from the practice of their application, and would set the principles deducible from these as the general principles of law.

The *other* approach builds directly upon *principles* which speak in generalities about the rightful and the just, about the valuable and worthless for society. This would create a theory — the abstract philosophy of law — that does not directly affect the legal norm in its particularity, only in its generality, ie., according to principles. Such theories may offer a variety of lessons, still these do lead to one-sided postulation. On the one hand, the interpretation of the dogmatic and pure theory of law comprises the precondition that it is capable of impeccably determine the pure criteria of law, which, as compared to the actual validity of law, constitute after all only a narrower terrain. On the other hand, law — without normative and dogmatic restrictions — becomes immoderate and arbitrary, and it will indeed be exclusively a matter of the manifestation in form what is law and what is not.

Theoretical explications, therefore, are usually allied with *facts* or *principles*. The number of explications is arbitrary. One further common feature of them is that between facts and principles they aspire now toward *coherence,* now toward *composition*. These are *com-*

[23] R. M. *Dworkin*: Taking Rights Seriously. 1978. p. 22.

[24] Compare for example, E. A. *Ross*: The System of Social Control. In: American Social Thought. New York, 1961. pp. 151—155.

[25] Compare *Vogel*: Der Skandinavische Rechtsrealismus. Arbeiten zur Rechtsvergleichung 56, Frankfurt am Maine. 1972.

[26] G. W. F. *Hegel*: Vorlesungen über die Aesthetik. Erster Band, Stuttgart, 1953. pp. 32—33.

binations as compared to the question whether the point of departure is primarily made up of *abstract* principles or *empirical* facts.

In terms of methodology, this is a fundamental question. In several respects this depends on the *choice of paradigm* in which — as Thomas S. Kuhn in his work "The Structure of Scientific Revolution" puts it — the confidence in the new scheme and paradigm is by no means irrelevant.[27]

However, there is no absolutely invariant — untainted by theory — principle of observation.[28] The theory can be comprehended as classes of empirical and analytical components, but there is not a logically marked difference between these. On each plane of the acquisition of knowledge a theory comes about on the basis of which predicate-classes can be formed,[29] with identical extensions in them. Nevertheless, the meaning of scientific predicates and their empirical content are discernible[30]. We may even say that for professional lawyers *one single* paradigm-system is given; they are working within the same paradigm, so pragmatically the choice of paradigm is irrelevant.

The precondition of the stability of the legal rule would attach the choice of paradigm to social-historical landmarks; this however is not necessarily true. Apart from the most fundamental legal facts — the axioms of law — almost everything is subject to change by sequences. At the same time, any one modification of rule rarely results in the revision of basic tenets and axioms.

The ascertainment of these can be factually interpreted on the bases of experience, although the theories and regularities might be labeled as subjective *if not* gained *with a measuring method*.[31] At present, the possibility of measuring is restricted in the realm of law. What can actually be measured are mostly cases of violations of law.

However, this does not imply that opportunities for getting to know the *functioning* are out of the question here. For if something is a *fact*, then it is real even though no reliable measuring methods are at our disposal today for measuring it. In the interpretation of facts realness and *verifiability* may in a peculiar way be complemented by *falsification;* that is, something which cannot be critically scrutinized does not deserve the attention of science, ie., it is most likely false. Yet it is worthy of our serious attention or even of our belief, with reservation though.[32]

As compared to these, the value of theories lies not in their veracity but in *their capacity for functioning:* and this is true for the theories of law as well. First of all, the theory is a *hypothesis* and not a conclusion. Secondly, it contains *generally accepted* tenets — just as the legal norm — which realistically have no specific, absolute truth-content. The norm — as Kelsen puts it — is neither true nor false, but it is either valid or invalid. There is no parallel or analogue whatever between the truth of the tenet and the validity of the norm.[33]

In *K. Popper*'s view the dynamism of society is an interaction between logic-imbued theory and irrationalized practice.[34] Law is not really rationality, points out *Gottfried Dietze,*

[27] T. S. *Kuhn:* The Structure of Scientific Revolution. Chicago, 1970. p. 206.

[28] J. *Giedymin*: The Paradox of Meaning Variance. Britisch Journal of Phil. Sci. 21. 1970.

[29] See M. *Hesse*: A Self-correcting Observation Language. In: Logic, Methodology and Philosophy of Science. Amsterdam, 1968., M. *Hesse*: Tje Structure of Scientific Inference. London, 1974.

[30] Compare for example, J. *Leplin*: Reference and Scientific Realism. Stud. Hist. Phil. Sci. 10., 1979. 4., R. *Carnap*: Meaning and Necessity. Chicago, 1956.

[31] See R. *Carnap*: The Methodological Character of Theoretical Terms. In: Minnesota Studies, I. Minneapolis, 1956.

[32] K. R. *Popper:* Truth, Rationality and the Growth of Knowledge. In: Conjectures and Refutations. London, 1963., K. R., *Popper*: Objective Knowledge. Oxford, 1972.

[33] H. *Kelsen:* Die Grundlage der Naturrechtslehre. Österreichische Zeitscrift für öffentliches Recht. No. 1—2. 1964. p. 2.

[34] K. *Popper*: Objective Knowledge: An Evolutionary Approach. Oxford, 1972.

law as men recognize or make it, be it unaffected or affected by desire, is thus not something merely rational. The saying, *error multiplex, veritas una,* could be complemented by the dictum, *lex multiplex, ratio una.* We know the law, but we are unable to discern the *ultima ratio.* This applies to all types of law, divine or natural, common or customary, written or codified.[35]

3. The Technical Theory of Jurisprudence

For the sake of analogy, proceeding at first along a Kelsenian argumentation, we may state that the Technical Theory of Jurisprudence is the theory of the functioning of positive law. Thus, it is a general theory of law and not the demonstration or interpretation of some kind of specific legal order. By comparing all phenomena labeled with the name of law, it attempts to detect the nature of the actually prevailing law, to determine the regularities of its functioning, the essence of its technology, with especial regard for those lasting forms as well as changing contents that might appear as its manifestation in various times and in various peoples.

Here, too, the point of departure is strictly the realm of *positive law.* The technical theory of jurisprudence, then, establishes those basic principles by means of which the *functioning* of any legal order is perceivable. As a theory, its sole objective is merely the cognizance of its object. It answers the question, what is the actually functioning law, and not what it might be, or what it ought to be. This latter question obviously belongs to the province of social philosophy and practical policy; the technical theory of jurisprudence, by contrast, is a theoretical science with realistic-pragmatic grounds.

The technical theory of jurisprudence is not a "pure" theory of law by any means. All those elements that play a role in the functioning of positive law are not irrelevant for this theory. The regularity of the practical functioning of law is a technique, an applied practical solution. To ascertain and generalize the regularities of this technique constitutes the technical theory of jurisprudence.[36]

Kelsen takes the view that positive law is a compulsory order the norms of which are made up of volitional acts of human beings — ie., customs created by acts of legislative, judiciary and administrative bodies or human beings. And as the norms of positive law are made up of volitional acts of human beings, these norms can be altered arbitrarily: they differ from one another according to ages and peoples.[37]

If this is true — and the human experience tends to make it plausible — then the primary features of law and especially those of the *functioning* of law overwhelmingly originate from human volition, and their explanation in many an area must ultimately be traced from this.

Will, direction, normalization: these are interlinking and entwining concepts. Seen from this angle, the law is a regular will generally acknowledged or the making regular of will.

That the will in *what form* is regular is posited by the pure theory of law.

Why and to what degree the will strives for regularities, is posited by the sociology of law.

[35] G. *Dietze*: The Limited Rationality of Law. In: Rational Decision. Nomos, VII. New York, 1964. p. 69.

[36] See A. *Tamás*: Vázlat a jogról mint sajátos társadalmi technikáról (Outlines of Law as a Specific Social Technique) Jogtudományi Közlöny, XXXVIII. 1983. No. 8., Gy. *Antalffy*—A. *Tamás*: The State and law-making. *ibid.*

[37] H. *Kelsen*: Positivisme juridique et doctrine du droit naturel. In: Mélanges en'l honneur de Jean Dabin, 1963. p. 141.

How the will becomes regularity, is posited by the technical theory of jurisprudence. This latter does not delimit itself rigorously from any other theory: it is eclectic like reality. It holds the facts stronger than the speculative or abstract principles. As opposed to any theoretically constructed homogenity, it prefers the real myriad of phenomena which still does allow for the prevailing practical composition to be generalized in theory.

According to this, the general methodological theses that can be related to the legal order as rule-standards are as follows:

— The law can be constructed as a specific social technique. In this respect the paramount theoretical interpretability of law is that it is a functioning social system of rule-standards. The configuration to be highlighted for inquiry in the first place is functioning. Any thesis of a legal character which fails to function in reality can only be interpreted as a law-related principle or legal ideology.

— The law as a system of norms is an induced form. In this capacity as a departure of normativity, it is perforce a hypothesis. This shows itself best in legislation as an operation of the technology triggering a process. At the creation of the legal norm, the validity and functioning of the norm is pure assumption.

— The general basis of the functioning of law is the credibility of its hypotheses, in a given case independently of the rightness, justness, unjustness etc. that may be associated with it, which are and will remain areas of interpretation.

— The actual functioning of law can be factually interpreted, irrespective of the fact that only data on legal conflict-situations are at our disposal. The law as a fact: this is practice. The law as a fact can be interpreted in time and space. The practice can be appropriately typified by the creation of the legal norm and the law case. A principal technological feature of the legal norm is that it can be multiplied to various kinds of law cases. A principal feature of the law cases is that they are unique and irreversible.

— The law as a norm — it is by necessity a defined form. It is indifferent from this regard that it is costumary law or codified law.

— Modern law — or the law functioning in the modern political state — is defined first and foremost by the state-legislative power, thus it constitutes one single paradigm-system.

— Modern law as a system of rule-standards primarily defined by legislation is based on one single axiom-system.

— In the designation of the generally known or unknown parameters of law as well as in the choice of paradigm the governing bodies play a crucial role. It is in the manner of form and not that of content that the law delimits government. For the legislative power can alter the content of legal rules at any time and, hence, the change of law is linked up with the change of government in modern political states. This, however, involves that in the modern political state the legislative and executive power tend to come very close to each other. This modern law-creation, compared to any that prevailed before, is the most purposeful, the most goal-oriented legislation that functions according to goals and builds in compliance with those and, thus, a constructive one.

Legislation is closely related with the administration of justice or *application* of law, with its official and professional apparatus and its purposefulness, which would not infrequently step forward even as a corrector of legislation. The goal-rationality and self- consciousness will increase both in the field of law-creation and in that of law-application, yet the finite nature of these unfolds all the more conspicuously. With this then — although under entirely different conditions, in a diverse way in diverse *sequences* — the law as a technique repeats itself in its model-like fashion,

Yet the more complex the relationships of the people, the more complication is involved in *making this* expediency *prevail*. From the vantage of logic it might be excepted that the

law-creation and law-application of the modern political state is the most conscious, centralized and coherent. And this is correct in several respects. Still, having surveyed the argument, we may say, despite all notions, ideas, concepts and schemes in favor, that modern law is not entirely a centrally-designed order and regulation.

The law as an actually functioning system of rules does not originate exclusively from a central idea, it is much rather self-generating. It *generates from itself as a fact.* This fact is the act of law-creation and the law case as an act. The imprint of a temporally earlier legilsative and executive will ever be left upon government and legal order, and will, among others, prescribe one of the finalities of the actions of government. This is a certain continuity in time and space, but it is not sure that it is a continuous rationality. And this applies also, to some degree, to earlier law cases. As opposed to this, the *interpretation* of modern law tends to argue with "rationalities". On closer inspection the majority of these appear as *evidence* or feeds on *axiom-like* bases.

The interpretation of *determinate* character is mostly worked out in the *professional* lawyers' sphere as the interpretation of law-creation and as that of court judging or law-application. *In terms of operation,* neither interprets directly principles or norms, but expounds rather *situations* of decision and judgments or rulings, that is, "rationalizes" by means of principles and norms. By means of *principles* like "rightness", "justness", "freedom", "equality before the law", "democratism", "fairness" etc. — as to the creation of legal norms — and by means of *norms* — in cases of law-application — which people *presuppose* to be right and just, which warrant equality before the law, freedom, democratism, which are fair and are equal to other similar principles: i.e, they are *lawful.* Significantly, these concepts, principles and norms not only hypothesize and symbolize reality in some manner, but the operations, the manipulation with them *somehow generate it as well.*[38] Or not, we may add.

It is not at all indifferent *how* they generate reality, or how they fail to generate it. Both the principles and the norms — although with different methods — are more or less always *defined,* and in this capacity they are given to the practicing experts of law-making and law-application. The making of the legal norm and the passing of the law-applier's ruling cannot be done exclusively from principles or from legal rules codified earlier. The concrete practical expediency *diverts* legislation from the legal principles and diverts jurisdiction from the legal rules. The task to be solved entails an unmasking of facts and a situation-analysis; there follows an interpretation *bound in time and space.* The content or material idea turns into a *technical* idea or principle.[39] In this the exactitude cannot be either verified or falsified, that is, it cannot be statisfactorily expressed in a positivistic way. The technical solution of the operation can be at least as purely logic as purely empiric. This latter — if *Popper* is right — is non-rational, ie., is empiric: it is irrational.

The question remains that what can guarantee the functioning of the legislator's and the law-applier's decision if at the passing of judgment neither law-creation nor law-application has at its disposal an exact mode of evidence. Or put it differently, what is the *admissible margin of error* in these cases?

A realistic answer is that it is society's recipiency at a given or concrete time-space dimension, or the credibility of the law-creator's and the law-applier's act. Credibility usually comes about not through the persuasive force of some kind of absolute and logically sound deduction. A ruling may meet a general social acceptance even on purely emotional grounds.

[38] See J. *Parain-Vial*: Note sur l'épistémologie des concepts juridiques. Archives de Philosophie du Droit. 1959. p. 132.

[39] Compare S. *Ritterman*: Méthode de la formation des notions dans la systematique du droit positif, notamment du droit civil. Archivum Juridicum Cracoviense, 1968. Vol. 1. pp. 116—118.

The basis of credibility may be varied, and may change in a variety of ways. This may be rationality, a correspondence with diverse principles and ideas, the manner of decision-making, confidence in the correctness or necessity of the procedure, belief, recognition of authority, feeling of intimidation, defencelessness, coercion, terror and so on. Credibility cannot be traced back always to the same cause, or the same type of group of causes.

In other words: the *functioning capacity* of the legal norm relies upon its *credibility* as a legal norm. Essentially, this is on the one hand the assumption that the legal norm contains a satisfactory, acceptable rule, and on the other that in case of a violation of the rule the law-applying bodies will indeed take measures against anyone who fails to observe the rule. The functioning capacity of the legal norm, therefore, lies in its usability as a *motivational technique* and the *coercive acts* of the official jurisdiction. The technology of functioning is thus a unity of persuasion and coercion, ie., the combination of *two kinds* of technique.

This unity is not a theoretical question, but in full measure a *pragmatic* one, which can be resolved only in a concrete situation. The situation is unique and irreproducible. Only similar situations can arise, and not identical ones. Because behavior — be it action or non-action — can invariably be enacted *in time and space*, and thus it is *irreversible*. The concrete judging of a concrete behavior is bound by the time-space dimension: so this too is unique, unrepeatable and irreversible as a process. The law as a norm endeavors to break through this artifically, eg., with its temporal force, nullity, rehabilitation, fiction, presumption and with other similar things. These are specific legal-technical resolutions. These may also be grasped as techniques which enable the flexible treatment of the admissible margin of error.

The functioning capacity of the judge's rule or the law-applier's decision essentially hinges on its *enforceability*. It may, of course, have a logical and emotional persuasive force or acceptability on rational grounds, yet its characteristic feature lies elsewhere. When a sentence of a judge has been passed, the subject of law is left without any real choice whatsoever. He has at best a chance that the decision cannot be executed for some reason. Usually, the number of inexecutable cases is an indicator not only of the disorders of jurisdiction but also those of law-marking.

The convincing interpretation — that is, one eliciting credibility — of the law-maker's and the law-applier's decision is not the same in these two fields. A sentence of the court can be satisfactorily accounted for by a legal norm, whereas in most cases a bill is not to be justified by referring to a judgment. These are not identical techniques. It is a moot point what is implied in a technical sense. The question is, then, what is the legislator's and the law-applier's *act* in general or in the abstract?

4. Law as a Command

For the pure theory of law the question is, what is the *legal norm*? According to one of its crucial answers to this question, the legal norm is a *"Sollen"*. For the technical theory of law the question is, what is the *legal act*? One of its crucial answers to this question: the legal act is a *fact*.

The solution of the pure theory of law could involve that the legal norm is some sort of will. The solution of the technical theory of jurisprudence could involve that the legal act is some sort of will-manifestation. Although in dissimilar dimensions, the implication is the same. However, this conclusion might lead us to a misunderstanding of either approach.

The methodological basis in the pure theory of law is the consistent distinction of the *"is" (Sein)* and the *"ought" (Sollen)* propositions: without this — ie., without the *"Sollen"* nature of the norm — law cannot be postulated "purely". The methodological basis in the technical theory of jurisprudence is a *disregard* of interpreting the legal norm as "Sollen"

or "Sein", for if either interpretation is made absolute, the *real legal operations* are bound to be unexplainable. In certain respects the pure theory of law determines the essence of law in normativity, while the technical theory of law its capability for functioning. Volition is a factor in both concepts, but not a key factor by any means.

The norm can be comprehended as a certain will, but the will is not necessarily a norm. Kelsen does not take it for granted that the will should have an exclusively *"Sollen"* character. Moreover, he does not preclude that the will may well have a *"Sein"* character in some relations; so he interpretes by this means the norm, and not the will. As far as its functioning is concerned, a "will" which, for instance, can be gathered from a legal rule is undoubtedly different from that which can be gathered from a court ruling of a concrete case, then from the act executing that ruling. Volition resides also in people's behavior, yet it should not be taken into account either as a norm-generating or as a norm-applying will; these are, so to speak, not of a command nature.

The originator of the *"command theory of law"* is *Jeremy Bentham*.[40] He held that all law could be analytically reduced to a "logic of the will", in which every human conduct could be seen either as commanded or prohibited, or not commanded or not prohibited, by the law. Where a human act was commanded or prohibited, it was the subject of a legal duty.

The most successful classic of the command theory of law is *John Austin*. Austin defines law as "rule", and "rule" as "command". He says, "Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands."[41]

A command is the expression of the will of an individual directed to the conduct of another individual — Kelsen wrote.[42] A command consists of two elements: a wish directed towards someone else's behavior, and its expression in one way or another. There is a command only so long as both the will and its expression are present. If someone issues a command to me, and before its execution I have adequate reason to assume that it is no longer his will, then neither is it any longer a command, even though the expression of his will should remain.[43]

Austin says, now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular.[44]

A so-called "binding" command — Kelsen argues — is said to persist even if the will, the psychic phenomenon, has lapsed. More accurately, however, that which persists is not really the command, but rather my obligation. Hence legal rules, which according to Austin constitute the law, are not actually commands. Legal rules exist, that is to say, they are valid and obligate individuals, even if the will by which they were created has long ceased to be. It may even be said to be doubtful whether some instances in which legal obligations exist as to certain behavior even represented the real will of anyone.[45]

The critique of the "law as command" propounded by *Kelsen* continues here, remarkably enough, not with a scrutiny of those tenets of Austin's which are dubitable on norma-

[40] J. *Bentham*: An Introduction to the Principles of Morals and Legislation. Burns and Hart ed. Of Laws in General. 1970.

[41] J. *Austin*: The Province of Jurisprudence Determined. p. 13.

[42] H. *Kelsen*: The Pure Theory of Law and Analytical Jurisprudence. p. 272.

[43] H. *Kelsen*: *ibid.* p. 272.

[44] J. *Austin*: *ibid.* p. 19.

[45] H. *Kelsen*: *ibid.* p. 272.

tivistic grounds (declarative laws, imperfect laws, repealing laws and maybe dispositive laws). Kelsen employs this time a realistic technical argumentation:

"The statute is enacted when a majority of the legislators have voted for a bill submitted to them. The content of the statute is not the "will" of the legislators who vote against the bill; their will is expressly contrary. Yet their expressions of will are just as essential to the existence of the satute as are the expressions of will of the members who voted for it. The statute is an enactment of the whole legislature, including the minority, but this obviously does not mean that its content is the will — in the psychological sense — of all the members of the legislature. ... And it is indubitable that in very many if not all senses, a large proportion of the members of a legislature who vote for a bill either do not know its content or know it very superficially. That a legislator raises his hand or says "Aye" when the vote is being taken does not mean that he has made the content of the bill the content of his own will, in the way in which a man who "commands" another to act in a certain way "wills" this conduct."[46]

Conclusion of Kelsen is the following: If a particular law is called a command, or "will" of the legislator, or if law is called the "command" or "will" of the "state", this can be taken as only a figurative expression. Law might be termed a "depsychologized" command. But a comparison of the "ought" of the norm with a command is apt only to a very slight extent. The law enacted by the legislator is a "command" only if it is assumed that this command has binding force. A command which has binding force is, indeed, a norm, But without the concept of the norm, the law can be described only with the help of a fiction, and Austin's assertion that legal rules are "commands" is a superflous and dangerous fiction of the "will" of the legislator or the state.[47]

It is evident also to the technical interpretation of law that the legal norm *as rule* is a depsychologized will. But if we consider the *actually* proceeding enactment of the law, or the *actual* passing of the court ruling, or the people's behavior of legal relevance, it is plain that the psychological will is present in these as well. We do not claim it is the essence of the operations, but its presence cannot be contested.

Admittedly, without the concept of norm the law can be described only with the aid of fiction. The question remains, however, whether in the various theories of law — the pure theory of law included — the concept of law is not a fiction. Or, put differently: are the various theories of law all-inclusive or do they present only a certain range of interpretation of the concept of law? In pragmatic terms, law is a norm *which functions as law*. If we expose the *technique* of functioning from this, we might arrive at a kind of range of interpretation. This, however, precisely because it is a technique, may be composed of elements brought from elsewhere yet assembled purposefully.

According to its actual functioning, law can be interpreted as a general, *indirect technique of motivation* of a central (state) administration. The *motivational planes* of this — and the technology pertaining to each — are different.[48]

A legal norm as law in force enacted by legislators in its functioning does not really concur with that applied by courts and other jurisdictional bodies as a legal rule. Moreover, it is different what people practically think to be a legal rule and the way they behave in compliance with that rule. And a rule is that which functions as one. Therefore, the concept of law changes actually according to the planes of legal motivation; though mostly similar, these concepts are still not identical.

[46] H. *Kelsen*: *ibid.* p. 273.
[47] H. *Kelsen*: *ibid* p. 274.
[48] Gy. *Antalffy*—A. *Tamás*: *ibid.* pp. 28—32.

Law consists of rules binding on everyone in principle, irrespective of the fact that the content of these rules is represented by the various motivational planes in various ways. That some rule is universally binding is a *principle* only. That some rule functions in reality as though universally binding is a *fact*. Of all those affected by the rule, the rule is practically obligatory on those who *accept* it, or those who are forced *by coercion* to observe that rule. The principle's turning into fact is promoted by persuasion and coercion.

In the legal norm, the element of *coercion* is the sanction. Institutionalized and regular coercion is realized by the jurisdictional functioning of the courts and other law-applying organs. With this, however, the element of coercion in law has not been exhausted. Just as the technical planes or levels of legal motivation differ from each other, each with a practical concept of law of its own, in like manner each of these levels has a coercive technique.

On the basis of the mechanics of functioning the question cannot be simplified by saying that the legal norm is a command, or is not a command.

The legal norm can indeed be interpreted *for the legislator* as a command, but there is not much benefit in this. Usually, in the norm the legislator gives a command not to himself, but to others. Although the enacted legal rule is binding on the legislator — thus far it is a "command" for him too — but he can modify it any time, that is, he can "repeal the command". The legislator — especially in the modern political state where the state executive has also legislative power[49] — decides himself in a technical sense whether to make a legislative or operative decision for the solution of a task. For in most cases an operative decision can be made in the form of a norm, and instead of norm-creation it is technically feasible to produce a sequence of operative decisions: the operative can be described as normative and the normative can be described as operative. The operative decision is by no means a command for the decision-maker — still it can be a precedent, a frame of reference even against the decision-maker as well.

The legal norm *for the court and the jurisdictional bodies in general* is a command inasmuch as they are obliged to apply the legal norms. The cases in which the courts and other law-applying organs take measures are typically those in which the "command" of the norm is addressed not to them but to their clients. The law-applier cannot alter the legal rule; he is not to repeal or modify the "command" of the legislator. In the course of his decision-making procedure, by contrast, he is free to interpret the legal norms with a relatively broad margin: thus the binding force of the norm is relative.

The legal norm *for the citizens and subjects of law* is a command inasmuch as they are, or can be, responsible for a certain behavior. If the subject of law does not deem this obligatory on himself, and he is not forced by the courts or the jurisdictional bodies to comply, then there is no real obligation. The citizen, or the subject of law is not to change the legal norm. If the legal norm is not observed, it cannot persist for long even with the coercive force of jurisdiction; this, however, applies not to an occasional case but to a massive number of phenomena, with the concomitant loss of both the legal norm's and the jurisdictional bodies' credibility. The legal norm is known to the subject on his own motivational plane and he judges it accordingly. The norm in this sense is not a command either, only a motivation heightened by coercion.

As opposed to this, *the court ruling and the jurisdictional decision is a legal command* for the one who is obligated by it. In this sense it is a command for others too: a judgment-at-law — apart from exceptional cases — is not to be altered by either the same or another court, either the legislator or the citizens. It is for one single case, and is valid definitively.

[49] Compare, for example, J. K. *Conant*: In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987. Public Administration Review, 1988. 5. pp. 896—897.

The court ruling and the jurisdictional decision is a real legal command, and not a norm, even if the *ratio dicendi* expounded apropos the concrete case may serve as an example for the interpretation of law.

Finally, the *generally accepted law* — ie., the tendency by which the legal norm as law in force enacted by legislators manifests itself in the behavior of subjects of law, the way people know and accept law — is not a command but a behavior pattern. The saying "behave as everyone does in similar situations" is more than a simple behavior-pattern. A behavior contrary to this motivation and behavior-pattern will lead to enforcing one's rights before the authorities: to suing someone, to reporting someone, to taking an action against someone, to cooperating with the law-enforcing authorities, etc. There is stimulation, or even coercion in this motivational field, too, but this is no command.

By way of conclusion it must be indicated that the *violation of law* is not a *denial of command* in either the pure theory of law or the technical theory of law. Concerning the disobedience of the subject of law, Prof. *John Rawls* thinks that in a just society one has to accept even the unjust rules, provided they do not transcend a certain limit of justness.[50] The discussion of the problem lies in the sphere of the questions of freedom and righteousness, ie., *in dimensions far removed* from the validity of law or the functioning capacity of law. In Rawls' view the denial of a command depends on the *justness* of the command.

The theoretical argumentation is imposing as well as engaging, yet not very convincing. On the one hand, it is not convincing that, in the case of an unjust regime, can the disobedience to law be interpreted as a denial of command? If the law is not a command, then the unjust law is not a command either. It is at best that a deliberate disregard for the execution of a judgment — at-law or a jurisdictional decision is a denial of legal command on the part of the obligant. On the other hand, Prof. Rawls arguments reveal that he performed an analysis of the problematics of command-denial from the perspective of philosophy — with no regard to any technological methods or their possible or impossible applicability. This latter aspect is somewhat beyond the scope of our discussion, we should still remark that the problem is not a purely philosophical-theoretical aspect at all, but much rather a realistic one. The Europe of our century is far too experienced as far as modern dictatorships are concerned, aware even of the fact that the fundaments of a totalitarian system are by no means the legal considerations and, conversely, there are no absolute legal guarantees for precluding it. A dictatorship is not brought about by law, nor is toppled by it, although it does have a role in both. Without expounding the argument: law is not a command in this sense either.

[50] *J. Rawls*: A Theory of Justice. Oxford, 1972. p. 351.