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The Concept of Law from a Legal Point of View

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Beginning with a quotation of Karl Popper about the difference between natural (physical) and normative law, the normative notion of law is explained as a product of cultural development. In the field of normative law there exists a distinction between laws made by human authorities in a formal procedure and natural law perceived by human reason, often entering into common law and statutory law (e.g. human rights). Law corresponds with reality in the sense that relevant aspects of reality are transcribed by abstract notions and combined with legal consequences. There exists a hierarchy of laws, a pre-eminent position of the legislative over other state functions and the supremacy of the constitution

1. Introduction

When I was asked to contribute to the workshop 'Natural Law', I hesitated, because the difference between physical laws and legal laws seemed to me too large for a fruitful participation in the workshop. Looking at the tradition of normative natural law I saw a common beginning and I accepted the invitation.

After having written my contribution I found a text from Karl Popper.[1] This text explains very basically the difference between natural laws and normative laws and seems to me a good transition from the contributions we have to my legal observations. Therefore I quote it:

> (a) A natural law is describing a strict, unvarying regularity which either in fact holds in nature or does not hold. If we do not know whether a law of nature is true or false and if we wish to draw attention to our uncertainty, we often call it an 'hypothesis'. A law of nature is unalterable; there are no exceptions to it. For if we are satisfied that something has happened which contradicts it, then we do not say that there is an exception, or an alteration to the law, but rather that our hypothesis has been refuted, since it has turned out that the supposed strict regularity did not hold or in other words that the law of nature was not a true law of nature but a false statement. Since laws of nature are unalterable, they can be neither broken nor enforced. They are beyond human control, although they may possibly be used by us for technical purposes, and although we may get into trouble by not knowing them, or by ignoring them.

> All this is very different if we turn to laws of the kind (b), that is to normative laws. A normative law, whether it is now a legal enactment or a moral commandment, can be enforced by men. Also, it is alterable. It may be perhaps described as good or bad, right or wrong, acceptable or inacceptable, but only in metaphorical sense can it be called 'true' or 'false', since it does not describe a fact, but lays down directions for our behaviour. If it has any point of significance then it can be broken; and if it cannot be broken, then it is superfluous and without significance. 'Do not spend more money than you possess', is a significant normative law, it may be significant as a moral or legal rule, and the more necessary as it is so often broken. 'Do not take more money out of your purse than there was in it,' may be said to be, by its wording also a normative law, but nobody would consider seriously such a rule as a significant part of a moral or legal system, since it can not be broken. If a significant normative law is observed, then this is always due to human control – to human actions and decisions. Usually it is due to the decision to introduce sanctions – to punish or restrain those who break the law.
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> …These two kinds of law have hardly more in common than a name. … We shall reserve the term 'natural law' exclusively for the type (a). … It is easy to speak [in case of (b)] of natural rights and obligations or natural norms, if we wish to stress the 'natural' character of laws of type (b)''.

2. Normativity

1. The term 'law' belongs to the bedrock of legal thinking. The notion of law is a precondition of jurisprudence or legal science. Law means commandment, prescription, rule, directive, order, requirement, obligation to do or to leave something, ought, norm; in any case law has a normative connotation.
2. Speaking in English about law we must take into consideration that all other languages distinguish between lex et ius, loi et droit, Gesetz und Recht, wet en recht or lag och rätt. Lex from which law is derived means enacted statutes, statutory law, today parliamentary-enacted law. With ius we describe the entire legal order of a country – German law, French law – or a branch of it – public law, private law, criminal law. The term ius, droit, Recht, rätt is also used for translation of common law, customary law, judge-made law. Both law in the sense of lex and in the sense of ius signify always a normative sphere.
3. Concerning the legislator, we distinguish in legal philosophy and history between divine law given by God through creation or revelation, natural law dictated by reason or common sense, positive human law in form of statutes enacted by parliament or by another human authority in form of executive orders, judge-made law or custom.
4. The normative notion of law is already a product of cultural development overcoming an earlier situation, in which law [=Greek nómos] meant the natural or divine order of things and not the commitment to a certain behaviour.[2] The divinely established nature of the various species of living beings manifests itself in the manner of physical law, teaching us for instance that bigger animals eat smaller ones. From the fifth century before Christ on, phýsis is the contrast notion to nómos. The normative character of law, be it positive human law, be it natural law in the sense of ius naturale, constitutes the decisive difference in comparison with laws of nature, which describe regularities of physical phenomena. Both types of laws are separate from one another.[3]

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3. Natural Law and its Introduction into Legislation

5. In the notion of natural law, we no longer find this archaic unity of law and human nature. Rather, the question is how the rationally perceived natural law shall govern human behaviour and the legislature. That was discussed in the ancient philosophical school of Stoa, by Thomas Aquinas, Francisco de Vitoria, Francisco Suárez, John Locke et alios. I stress once more, natural law (= ius naturale) is due to human control, actions and decisions. The law of nature explains physical phenomena. In other languages, it is easier to make a conceptual distinction. Natural law in Latin is not always lex naturalis, but also ius naturale, in German it is Naturrecht and in French droit naturel. The distinction between laws made by human authorities and natural law perceived by reason is an important question of legal philosophy.
6. The term 'legislature' is used for any law-giving authority as a function of the state, and also designating the institutions, which enact statutory laws through specific procedure. The concept of legislation in modern times cuts off the generally accepted precedence of 'the good old law' in the Middle Ages. Following the idea of Enlightenment, state legislation was based on natural law, teaching the law rationally, and combined it systematically in codifications.
7. Natural law, perceived by reason and elaborated over time, entered into common law and into statutory law and was useful for the interpretation of law. Let me explain this by the English law case of Dr Thomas Bonham, in which the famous English judge Sir Edward Coke in 1610 invoked common law and reason against a duly-passed English Act of Parliament.[4]

   Bonham had been fined by the College of Physicians and half of his fine would pass to the president of this College by Act of Parliament. Coke held the authorising Act to be inapplicable because it contradicted the common law principle that no man may be a judge in his own cause. Because the president and censors of the College were to receive half the fines they imposed, and so, having a direct pecuniary interest, they were not only judges but parties in any case that came before them.

   In the English law books, the case is mentioned as an example for 'natural justice'. Another example for natural justice is the right to be heard before being sentenced.
8. The catalogues of human rights in the constitutions since the end of eighteenth century are the most important example for the introduction of natural law into legislation.[5] The texts themselves say it: all men are by nature equally free and independent and have certain inherent rights (sect 1 Virginia Bill of Rights 1776). Men are born and remain free and equal in rights [Les hommes naissent et demeurent libres et égaux en droits] (Art.1 of the French Declaration of Human and Civil Rights). The aim of every political association is the preservation of the natural and imprescriptible rights of man [Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme] (Art. 2 loc. cit.). The twin relation between human rights and separation of powers is stated in Art. 16 loc. cit. [Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.]

4. Legislative Procedure and Content of Laws

9. The operative procedure of the legislative requires the interaction of a number of state organs:

   - the initiative comes either from members of one of the chambers involved in the legislative process or, as it is common today, from the government, which relies on laws for the realisation of its political agenda;
   - the deliberation in the legislative chambers is divided into plenary and committee stages. Following the chambers' decisions to pass the law;
   - the head of state certifies and promulgates the law.

   The principles of the legislative procedure are: discussion and information in the first two phases, additional publicness in the second phase and promulgation in the last phase.

   The dynamics of legislation give rise to the increasingly pressing issue of legislative organs and procedure.

10. The formal procedure of enactment requires expediency with respect to the implementation of the law, namely economic soundness, simplicity, and durability of the laws as well as these laws' side effects and consequences.

11. The enacted laws shall be 'general'. A law may be termed general, when the linking of an abstractly described state of affairs to a legal consequence refers to a category (genus) of cases and persons, which is open to future specifications. The generality of the statutory law is of considerable significance in two respects:

    (1) The time constraints imposed upon the legislators force them to issue general rules, so that they can concentrate on what is most important.
    (2) Because general law addresses an open category of persons, who are not yet defined individually at the time of its enactment, it guarantees the freedom and equality of the citizens to a considerable degree. However, this guarantee depends on the manner of how the category is formed and on its content. For instance, if according to tax law every person has to pay the same percentage of his income as income tax, the content of the statute ignores the individual economical capacity, which is a fundamental precondition of just taxation.

5. Interpretation and Application of Laws

12. As a norm of behaviour, the law corresponds to reality. Laws are enacted so that life conforms to them. Any application of the law is preceded by a general acceptance of the law by the citizens (acceptatio legis). The conscious application of the law occurs in the case of dispute by the public prosecutor or by the law courts and when proceedings are mandatory for its enforcement by administrative bodies. The application of the law is conditional upon the answering of two inter-dependent questions: What is the matter of the case? Does a law apply to this case? The normative impact of the law on reality presupposes that the ascertainment of the legal evidence from the world of events is already controlled by the law.

13. What are the conditions of realisation of the normativity of the law from the point of view of the state organs? In other words, how does the normativity of the law get into the court decisions? The courts and the administrative bodies are bound by the law. This principle constitutes a fundamental rule of all constitutions establishing a system of separation of powers (see No. 15). What can we state about the binding force of laws for the law courts? The legal methodology of interpretation has been criticised, particularly by social science. Sure, one cannot start from naïve legal positivism. Every interpretation and every application of law needs creative elements and a certain measure of appreciation. But that does not lead to a pure decisionism of court decisions or to a new supralegal natural law produced by a law court.
14. Laws are formulated in a way that they can be applied to reality. Reality has an impact on the formation of law. Relevant aspects of reality are transcribed by abstract notions. The legal consequence is also formulated in an abstract manner. For instance: 'Should any person's right be violated by public authority, he may have recourse to the courts'. Applying the law the judge searches in reality for what corresponds with the abstract notion of the law. The language itself permits using abstract notions to explain real situations. That is the same in law as in literature. Language serves as a necessary unifier to understand one another in daily life and in applying laws. The semantic understanding of notions used in new laws finds orientation in the legislative procedure itself. With respect to old laws, the relation between the abstract notions used by the law and reality seems easier, because experiences already exist how to apply such laws, particularly former court decisions, social experiences, the tradition and the formation of the lawyers determine the interpretation and application of laws.

6. Hierarchy of Laws

15. We have already learned (No. 13) that the legislative is assigned a pre-eminent position over other state functions, the executive power and the judicature, since administrative implementation and adjudication are bound to the laws, for which the legislative is responsible. That is called the pre-eminence of statutory law. We recognize a step-ladder of normative prescriptions. Laws enacted by parliament precede executive orders, ordinances, decrees, customary law, and, today, common law.
16. Following the step-ladder up, we observe in states with written constitutions normally the supremacy of the constitution. A constitution is a statutory law of higher rank. The constitution and laws amending the constitution as higher law are enacted in a special procedure with a two-thirds majority or other qualified majorities. Simple laws contradicting the constitution are null and void. The supremacy of the constitution, including fundamental rights, demands a constitutional court or another law court with jurisdiction over simple statutory laws. Otherwise the legislation has the competence to interpret authentically the constitution and the fundamental rights, which excludes the supremacy of the constitution in a strict sense.
17. Orders of precedence of laws (hierarchy of laws) also exist in federal states, where federal law takes precedence over state law in the case of concurring

competences. The law of the European Union – but only as far as sovereign powers have got transferred – takes precedence over the law of the member states.

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Christian Starck is Professor Emeritus of Public Law at the University of Göttingen, Germany. He has been a member of the Academy of Sciences at Göttingen since 1982, and president 2008–2012. He was a Justice of the Constitutional Court of Lower Saxony 1991–2006, and a corresponding member of the Spanish Real Academía de Jurisprudencia y Legislación since 2010. He has been an honorary member of the Korean National Academy of Sciences since 2012, and Honorary President of the International Association of Constitutional Law since 2004 and of the Societas Iuris Publici Europaei since 2007. He has published many books and articles in the field of German and comparative constitutional law.