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Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

Rechtspolitisches Forum
Legal Policy Forum

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Institut für Rechtspolitik
an der Universität Trier

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Philosophy of Law – The Concept of Legitimacy and Modern Constitutions

by

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Impressum

Herausgegeben von Prof. Dr. Gerhard Robbers und Prof. Dr. Thomas Raab
unter Mitarbeit von Claudia Lehnen, Linda Kern und Johannes Natus

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ISSN 1616-8828

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By now he has published 13 books and more than 30 articles in Turkish, English and French.

Introduction

In this article, my purpose is to try to explain the role and the importance of the philosophy and the sociology of law as it relates to constitutions, especially modern constitutions.

As we all know, constitutions are the main jurisprudence and the main legislation of the state, which is at the top level of the codification system. In the hierarchy of legislation, constitutions are the 'roof' of every legal system.

Constitutions prescribe the general status of a state's institutions. Constitutions have also some worldview, some philosophy that we might call ideology[1].

Philosophy and sociology of law study that ideology, that worldview, and try to establish an ideal system of law, an ideal constitution with regard to the nature of the human being[2].

What is human nature? Is it common for all of us?

Aristoteles (Aristotle) says: "human kind is a *zoon politikon*." That means that we all are condemned to live in society. Our intelligence shows us that crucial fact. Animals also live in a society, but for them that fact is instinct; for us, our intelligence makes the discovery[3].

The difference between us and animals is that we have a developed intelligence but animals do not.

If that is the case, we should create rules to retain order in society, otherwise societies will perish and we will go out of existence.

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1 ROBERT, Jacques et DUFFAR, Jean: Droits de l'homme et libertés fondamentales, Paris 2008, Montchrestien, pp. 7-21.

2 IBID: 31-46.

3 BRIMO, Albert: Les grands courants de la philosophie du droit et de l'état, Paris 1978, Pedone, p. 33-38.

In the societies there are four categories of rules:

- Ethical rules;
- Customs/mores;
- Religious rules;
- Law.[4]

Of course there are some interactions and bonds between these four categories of rules and a rule in one category can also take place in another. For example, burglary falls into all four categories.

I will not explain the differences between these four kinds of rules; I will only focus on our subject, the concept of law.

For some scholars law is the will of the state. If a person does not respect law, stringent punitive measures will force him or her to obey or face the consequences[5]. At first glance, this definition of law is correct, but further examination leads to some questions:

- What is the state?
- Who gives to the state the right, authority, and power to rule people?
- Should everything that the state suggests be law?
- Is it incumbent upon the state to take into consideration the social and economical situation of the society before making the law[6]?
- What is the role of justice in the *process* of making law?

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4 ARAL, Vecdi: Hukuk ve Hukuk Bilimi Üzerine (On Law and on Science of Law), İstanbul 1979, pp. 70-84.

5 IBID: 85.

6 DOEHRING, Karl: Genel Devlet Kuramı (Genel Kamu Hukuku) (General Theory of State), translated by Ahmet Mumcu, İstanbul 2002, p. 8, 10.

These questions and similar ones are the main problems of the philosophy of law[7] though they should work in harmony with the sociology of law.

Philosophy and the sociology of law are disciplines that try to understand the essence of the law. What do I mean by the essence?

Three elements contribute to the uniqueness of law versus other kinds of rules that exist in society:

- The will of the state, as we mentioned before;
- The social, historical, and economic factors;
- The idea or concept of justice.

So we can talk about the “three-dimensionality” of law. Let us focus on each dimension[8].

7 IBID: Introduction by Ahmet Mumcu, p. VIII.

8 ÖKTEM, Niyazi, TÜRKBAĞ Ahmet Ulvi: Felsefe, Sosyoloji, Hukuk ve Devlet (Philosophy, Sociology, Law and State), Der Yayınevi, İstanbul 2011, pp. 59-63.

1. The idea or the concept of justice or the School of Natural Law

The idea or concept of justice should be the founding principle of law. The two other elements are the secondary dimensions of the rule.

That phrase, that proposition above, that justice should be the founding principle of law, is the main approach of the Natural Law School whose principles are the main pillars of modern western states.

According to the Natural Law School (School of Jusnaturalism), human beings come into this world with some rights that are irrevocable, inalienable, and absolute. The state, which is a creation of human kind, must recognize and guarantee these birthrights. The state is only an agent to organize the structure of social institutions, and oversee jurisprudence. It should not have plenipotentiary power over the people who create it.

All natural rights are related to two main concepts: justice and freedom.

1.1. Justice

For *jusnaturalists*, like the ideas of ethics, truth, and aesthetics, the idea of justice is a universal and eternal value of human existence. In the process of codifying law lawmakers should take into consideration the idea of justice. As with the application of the law, the ultimate aim of a judge should be justice.

The concept of justice was given great consideration in early China. In his studies the great philosopher Kong Fu Zi (551-479 B.C.) emphasizes the importance of the country's justice

and ethical values. Retaining order in social and political life means to respect the idea of justice. Kong Fu Zi's considerations have become the main pillar of the Chinese jurisprudence system.

The Greek philosophers, and especially Aristotle, widely debated the concept of justice. Aristotle determined that there are three kind of justice:

- Justitia distributiva;
- Justitia commutativa;
- Equitas[9].

Justitia distributiva envisages absolute equality for members of a country. No one has any kind of privilege *vis à vis* the other. Every citizen is equal before the law. However, let us not forget that, in Ancient Greece, the rights of slaves and women were not recognized, two positions that Aristotle supported.

Justitia commutativa gives more rights and opportunities to those who contribute more or gives more punishment to those who do more damage. For example, the citizen who earns more money should pay relatively more tax to the state, and the thief who steals more than once should be imprisoned longer than a thief with only one offense.

Equitas. According to Aristotle, the main pillar of the justice system is ***Equitas***. With that principle, judges should investigate all the details of every case to find its core truth and should then rule with complete justice. For example, when a thief is brought before him, a judge should examine the thief's psychology, his family situation, the situation that pushed him to the crime, etc., and then he should rule according to the extenuating circumstances.

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9 For these concepts: IBID: 64-71.

Those three principles of justice still exist in the codifications of modern states. All modern constitutions have accepted the three perspectives of justice, including social justice.

Social justice is a relatively new concept that appeared after the Industrial Revolution with the creation of a new working class.

1.2. Freedom[10]

For the *jusnaturalist*, human beings have a free will. Man's nature is free. We can talk about determinism, but that does not mean our life is a fatal victim of destiny.

We also know that we are living in a universe that is not our creation. Water, fire, air, soil – the four basic elements, ***arche*** – were in existence long before humans came into the world.

Now we are engaged in an adventure – we are on a stage to play a game that we should play with gentility. We should respect the rules of the game and our acts should reflect the moral values of beauty, truth, and justice.

As our intelligence is more developed than the one of animals, we know the difference between good and bad.

This is human nature: we exist in a long running stage play and acting in that play is our great adventure.

All legal systems should recognize and respect this human nature. It is the state's duty to create a system for our natural rights. That means that the ultimate obligation of the state is to respect the human rights and to give all its citizens the opportunity to develop the conditions of his or her life, regardless of colour, race, religion, and beliefs, etc.

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[10] For the concept of freedom: ÖKTEM, Niyazi: Özgürlük Sorunu ve Hukuk (Problem of Freedom and Law), Istanbul 1977, İÜHF Yayını.

The duty of the constitution of modern states is to accept this obligation from the approach of the philosophy of law.

But the problem is not that simple. We cannot omit the social factors that are the second dimension of law.

Let us talk about the second dimension of law.

2. The Social and the Economic factors

As Aristotle says, human kind is a *zoon politikon.* Thus, philosophical analyses of law should emphasise its social aspect. If a lawmaker does not pay attention to the social, historical, or economic factors of his population, the codification of the laws he creates will not be successful. In comparison, we should consider the consequences if a doctor paid no mind to scientific research in pharmacology, biology, physics, etc., when he works on curing a patient.

Thus, in codification processes constitutions should reflect socioeconomic and historical *data* of societies.

The scientific base of law is the sociology, economics, and history of societies. What the *jusnaturalists* say is only wishful thinking. Their ideology is not realistic. Law is a concrete issue. You cannot analyze a concrete fact abstractly. Law is concrete and ideas like justice and values are abstract. So the methodology of the philosophy and the sociology of law must be positivism. The common denominator of different sociological schools of law follows this argument but as different schools approach social factors, each one's positivist paradigm is different.

How should we analyze the social dimension of law? What is our paradigm?

For different sociologists, the social nature of law is different.

Let's briefly look at some of the different approaches:

- Auguste Comte – Émile Durkheim – Leon Duguit – School of Solidarity;
- Karl Marx and the Marxist Paradigm;
- Historical School of Law;

- Utilitarian-Pragmatist School;
- Montesquieu and the role of the geography and the climate;
- Max Weber and the interaction between faith and economy;
- Ibn Haldoun and the living conditions of sedentary or nomadic people;
- Georges Gurvich and the pluralism of the social factors.

2.1. School of Solidarity

Auguste Comte[11], the founding father of sociology and the word "positivism", says: 'Let us forget all kinds of abstract methodologies in the sciences. In both the natural sciences and the social sciences the only methodology is positivism. The abstract methodologies, like the theological and the metaphysical methodologies are not scientific and will never bring us the truth.'

His ideological successor, Émile Durkheim[12], adopted this methodology to analyze law concretely.

According to Durkheim the origin of all kinds of social rules is based on the social nature of the human being. As we are *zoon politikon*, living in society is an inevitable part of our existence. The collapse of society is the end of humanity, so humans invent rules to retain their "togetherness" or solidarity. Like the other behavioural rules that grow from religion, ethics, and mores, for humans, the starting point and the purpose of

11 COMTE, Auguste: Cours de philosophie positive, Paris 1938, 16e édition.

12 DURKHEIM, Émile: Les règles de la méthode sociologique, Paris 1976, 18e édition, Presse Universitaire de France.

law is to remain in solidarity with one another. The discourse of the *jusnaturalists* is not realistic, rather a wish for their own type of utopia.

Nobody can deny the importance of solidarity for *zoon politikon*. However, is it legitimate enough to establish order?

It seems that Durkheim is not that interested in the quality of law; solidarity is his greater concern.

One of his disciples, Leon Duguit[13], uses **universal law norms** to sustain solidarity. For him universal law norms are the harvest, the heritage, and the culture of developed civilizations. He tries to accentuate the importance of the achievement of the human adventure through the centuries. We think he attributes some moral values to his concept of universal law norms.

When moral values come into play the concept of natural rights is inevitably a part of the codifications of constitutions. In other words, solidarity is all right, but a respect for human rights and moral values must be established as a foundation before codification.

It is impossible to escape moral values if we want to create a liveable society with liveable solidarity.

2.2. Karl Marx and the Marxist Paradigm[14]

One of the most influential sociologists of our time is Karl Marx. His contributions to the social sciences have opened

[13] DUGUIT, Léon: L'État, le droit objectif et la loi positive, Première édition, Paris 1901.

[14] MARX, K.: Pages choisies pour une éthique socialiste, avec une introduction par M. Rubel, Paris 1948, Rivière. And: MARX, K. et ENGELS F.: Études philosophiques, Éditions sociales, Paris 1947.

new and important visions on the philosophy and sociology of law. The impact of his thoughts is still shaking the world.

He is right to set the tone of history with the concept of the struggle between classes. He is also right in his analyses of history.

Marx says that socio-economic factors directly determine the nature of social rules in society. The nature and character of the production system specifies the nature of the law and the other rules in a society. He is also partially right on other points.

The Marxist school's analysis of freedom is also very important. This school says that the human beings are not free if they just accept destiny and do not do anything to understand social conditions and the consequences of natural determinism. They are alienated, slaves, if they do not struggle to learn the human conditions. They become free when they start to change the human conditions of their society. This approach, this paradigm, is also excellent.

Just like the solidarity school, the Marxist paradigm makes a mistake by excluding moral values from its analysis. Not considering an individual's psychological situation is another mistake. Human psychology is not so simple that only socio-economic conditions or the effects of cultural identity determine individual behaviour. The Marxist approach of psychology is not very willing to recognize the importance of other factors in its psychology.

In the end, we need to seriously consider the Marxist approach to the philosophy and the sociology of law, as it relates to the process of codifications and constitutions. Lawmakers should heed the working classes demands. As Marx says, exploiting the working class is not fair, so legal systems and

constitutions must establish class equality in their jurisprudence.

When you talk about equality, it means that you recognize the concept of justice. When you discuss world justice, you come close to the natural law schools, to natural rights, and to human rights.

It is impossible to escape moral values.

2.3. Historical School of Law[15]

This school insists on including historical factors into law, factors that determine the traditions and customs of different nations. For observers of this school, the concept of universal natural rights or natural law is not a realistic approach. Each nation has different traditions and these traditions determine law. The traditions and customs in China, for example, are different from those in Turkey or Europe, so the jurisprudence in these countries will differ.

I accept that lawmakers should take the customs and traditions of each civilization into consideration, but human nature has some common features regardless of where human beings live or to which civilization they belong. As the *jusnaturalists* say, justice and freedom are common features of human kind and all political regimes, all kinds of civilizations, all kinds of codifications should institutionalize the natural law endowed to each person.

This historical school has been the official ideology of fascist and Nazi regimes worldwide throughout history. These regimes want to prove that some nations deserve to be free and

[15] COING, H.: Savigny et Collingwood, ou Histoire et Interprétation du Droit, Archives de Philosophie du Droit, 1959. And KANTOROWICZ: Savigny and the historical school of Law, L.Q.R., 1953, p. 334.

the others do not. Those who deserve should govern; those who do not are subject. Thus, the advanced civilizations, the advanced skilled minds must have more rights than the ordinary people who do not deserve to be free.

2.4. Pragmatist-Utilitarian School[16]

This school insists on the fact that humanity seeks for pleasure. The main motivation of the human being is enjoying life. Consumption, sex, and other kinds of pleasures give happiness. There are no common values, such as justice, ethics, and aesthetics, mentioned by the representatives of the *jusnaturalists.* People are entitled to the good, the beautiful, the fair, and any and every event that gives them pleasure. But as each individual's interest conflicts with someone else's, society can see a real and concrete destruction. As Aristotle says, we are *zoon politikon*; if society perishes, so do we.

Thus, we have created a state to maintain order and not to perish. States create laws to establish a balance for each individual's pleasures and interests to exist in relative harmony. That is the duty of the state.

This is of course an interesting approach in the philosophy and the sociology of law. But the creation of order necessitates a judiciary and an equitable law system. Without it, people will complain about unjustness and they will not be happy. Thus, the Pragmatist-Utilitarian School's aim will come to nothing.

Again, the concept of the freedom, justice, human rights, according to the *jusnaturalists,* should be the main pillars of the state, otherwise the collapse of civilizations is inevitable.

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[16] DAVIDSON: Political Thought in England. The Utilitarians from Bentham to Mill, 1915.

2.5. Montesquieu[17]

The eighteenth century French philosopher insists on the importance of geography and climate upon the social life of people. Montesquieu says that the essence of human nature is the most consistent element of codifications. Man is a living creature. He eats, he or she has a sex life, and he lives in a society in the form of a family. Another very important aspect of the human nature is the believing on moral values.

According to him, human nature can also have different characteristics depending on living conditions, geographic conditions, and climate. For instance, according to him, people living in hot climates are mostly lazy, and the intelligence of the people who live in cold temperature is much more developed than of the others.

Lawmakers should take into primary consideration the effect of social life on human nature and, secondarily, the effect of geographical conditions on human nature. Without these considerations, argues Montesquieu, we cannot talk legitimately of jurisprudence and constitutions.

Montesquieu's approach is completely correct. You cannot avoid the human nature in the legislation.

He insists also on the importance of moral values. Nobody can deny the existence of the concept of justice and the ethics in life and in society. Thus, Montesquieu is coming very close to the philosophy of the *jusnaturalists*, because he is taking in consideration the importance of the moral values as an essential element of the human nature.

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[17] CHEVALIER, Jean-Jacques: Les Grandes Œuvres Politiques de Machiavel à nos Jours, Armand Colin, Paris 1950, pp. 100-141.

2.6. Max Weber[18]

The nineteenth century German sociologist insists on the irrational aspect of the social life. According to Weber, people prefer to organize their lives irrationally. They need a life centred on legends and beliefs. In addition, the believing in religion orients the human being and is the most important part of social existence.

Thus, the lawmaker should not forget the importance of religion as one of the most constructive elements of social life. He should not neglect it because it is irrational and because it is not scientific.

On the other hand, there is an interaction between religion, beliefs, and the economy. The codifications and constitutions must understand the influence of that important social fact and should organize jurisprudence according to the role and the influence of that knowledge even though it is irrational.

2.7. Georges Gurvitch[19]

The twentieth Century Russian born French sociologist expounds upon the importance of all the different factors mentioned above. We should analyze social life with a pluralistic approach, says Gurvitch, and the lawmakers should harmonize all social factors, national and international, to make constitutions: history, geography, local and international moral

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18 WEBER, Max: Économie et Société, Paris 1971, Plond. And WEBER, Max: L'éthique protestante et l'esprit du capitalisme, 1ère édition, 1904.

19 GURVITCH, Georges: Libertés humaines et déterminismes sociaux, Paris 1955. And: GURVITCH, Georges: Sociology of Law, Kegan-Paul Co. Ltd., London 1947.

values, mores of the international relations, the economy etc., etc.

But very often, some sociological events and social conditions could have detrimental effects. Lawmakers need to be very careful here. While making legislation and constitutions they should take measures to cure ill effects.

Conclusion

For most of jurists, the most important and clear difference between other categories of social rules and law is that the jurisprudence is the act of the state, and in the other rules, the state does not have any role. In a specific social rule, if the will of the state does not appear we cannot talk about law.

That statement is true. The will of the state is one of the three elements of law. At the end, law is the will of the state[20]. But we cannot consider every decision of the state as law. Law must be an achievement of a scientific process.

States can declare their will according to the perception of the rulers. However, if the norms are not the fruit of a scientific process of analysis of socio-economic life, the legitimacy of law is called into question. If law does not prescribe justice, if it does not promote human rights according to the perception of the modern state's concepts, legitimacy will always be an issue worth discussing.

The rulers can correctly obey the law in a specific state, but they may not act arbitrarily or use the norm exactly. In that specific case we can talk about the concept of rule of law, but not the legitimacy. That means that when the state applies law correctly, we can talk about the concept of rule of law. But if that state does not respect the concept of human rights and the nature of the human kind, such as freedom of expression, we can discuss the legitimacy of the constitution and all kinds of codifications in that specific state. Legitimacy necessitates freedom, respect of human rights, justice, and a taking into consideration of the data of socio-economic factors.

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[20] For the concept of the will of the state: BOBBIO, Norberto: Sur le Positivisme juridique, Archives de Philosophie du Droit, Tome I, Paris 1961, Dalloz. Also BRİMO: 271-321.

Das Institut für Rechtspolitik an der Universität Trier hat die wissenschaftliche Forschung und Beratung auf Gebieten der Rechtspolitik sowie die systematische Erfassung wesentlicher rechtspolitischer Themen im In- und Ausland zur Aufgabe. Es wurde im Januar 2000 gegründet.

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In his article, the author asks how legitimacy of law and the concept of rules of law can be described taking into account the interaction between aspects of philosophy and sociology as well as the will of the state in states' constitutions. As the rule of law, versus other kinds of rules in our society, should be regarded as a rule of "three-dimensionality" – an interaction between the will of the state, the social, historical, and economic factors, and the idea or concept of justice –, the author focuses his interest on the examination of these three factors always taking into account that law is the will of the state, but that not every decision of the state can be considered as law.

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ISSN 1616-8828