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LAW AS A SYSTEM OF NORMATIVE PRODUCTION

– LAW AND SEMIOTICS –

1. The law as objectivation of the form and substance of power

There is in a certain way a vulgate of legal theory in which the legal system is defined as a set of norms. I say Vulgate: a theory circulating widely enough to be considered the official theory, which is composed in a fairly undifferentiated way of a few doctrines put together (mainly Kelsenian and post-Kelsenian normativism, realistic theories, and logical formalization approaches).

Thus, the definition of the law immediately refers to that of the norms, as they are its constitutive components. According to the Vulgate, these are requirements, or behavioural models – accompanied, should they be breached, with the threat of sanctions. This definition raises a problem, which is primarily theoretical: what is the distinguishing criterion of the legal norm, given that there are other prescriptive systems? (I just said "theoretical", which is not, or not immediately pejorative: I'll wax theoretical myself, while nevertheless incorporating the *practice* of law into the theory by showing that work done *on* the norms is as important as the norms themselves.) [1]

The classic illustration of this distinguishing criterion issue is provided by the well-known comparison of two situations: the first is that of a bandit extorting his victims their jewelry, the second that of a bailiff seizing goods from a recalcitrant debtor. Why should the order the second be “juridical” and not that of the first? Kelsen’s response is that the bailiff is empowered by a norm pertaining to positive law, itself based on the assumption of a logico-transcendental fundamental norm; Hart’s is that it is a legal issue in accordance with a positive law recognized as such by all authorities. These statements hardly give the question a satisfactory answer. Finally, a band of robbers – in more modern terms, organized crime – is also institutionalized as a hierarchy and its members are subject to rules whose violation is accompanied by threat of sanctions. Granted, the state has a monopoly over so-called legitimate constraint, or at least it claims it does, but in the final analysis, this power also rests on a mere fact of life, whose legitimacy has been the subject of endless philosophical debate.

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[1] For more developments, see : Moor, P., *Pour une théorie micropolitique du droit* (Paris : Presses Universitaires de France, 2005) ; Moor P., *Dynamique du système juridique — Une théorie générale du droit* (Genève/Bruxelles/Paris : Schulthess/Bruylant/L.G.D.J, 2010).

What seems more crucial to make a difference pertains to the analysis of the modalities within which coercion action is exercised. In the context of a robbery, two purely subjective wills are at loggerheads, which have no other source but themselves and are not related – as wills – to anything other than themselves. The bailiff's situation is another matter altogether: he does not exercise his own subjective will, nor does the judge whose court order he implements, and nor finally does the legislator whose decision is grounded upon the law. Each in their own ways, they all act in accordance with an order that is superior to all of them and over which they have no control (and it is superior to the debtor, as shall be seen in a moment): they cannot change it as they please, as their actions have got to comply with it. And such compliance is not only the one they owe to the rules governing their respective formal skills – their empowerment –, it is as much about integrating to *substantive* rules the content of the acts they decide to undertake. And the meaning of their compliance is altogether different from what compels a band of robbers to obedience: it aims to embody the objective rationality of authority acts, that is to say, a transfiguration of *de facto* power (always subjective) into the power of reason. Legal determination can exist only insofar as what the authority decides is integrated into a set of rules, which, since these are beyond the decision-maker's control, warrant that his own will becomes irrelevant – insofar as possible. I call this transfiguration a "general rationality requirement", and it is the complex institutional system that guarantees this requirement is met. That complex is the essence of law. We might as well say it straight away: the legal norm is not what defines the law; quite to the contrary, any prescription can only become legal to the sole extent that it belongs to the law, as a system that has been so organized.

I should mention here it is true that, for Kelsen as well, the authority's intention becomes objective will: but only insofar as it is – formally – authorized. However, I believe this is not good enough to characterize the law: it is also necessary that objectivity be ensured in its substance.

One point needs developing at this juncture: it is not only the state power's will that is objectified: the individual's will also is, namely embodied in the legal person as subject of law. By integrating individuals via this figure, the law recognizes them as persons, that is to say, gets them to carry the burden of this general rationality requirement. The subject of law, thereby transfigured, is as much bound by the legal system as a whole (and therefore, but only therefore, by the norms herein) as the authority itself: it is bound to it, but also benefits from it in that, as a subject of law, he can enter into any legal relationship, whether as debtor or creditor, and is protected by it in these positions. Moreover, as such, he is entitled to that double compliance highlighted above – the formal and material integration to the legal order; we could even say this, perhaps: that, ultimately, is what properly defines him. That is why he is not only a "subject" ruled by a government, or even one "subjected to the administration", or finally, a "person subject to the law" – since all these terms are passive! The rationality requirement thus includes the legal persons who are such – as much as are authorities on their part – only because they are made so by the legal system, because it institutionalizes the rationality requirement. That *common reference* to the legal order as a system, without which no government or legal subjects could exist, is what is totally foreign to the relationship between a band of robbers and their victims.

The introduction, in the definition of law, of the rationality requirement has a number of theoretical implications. I mean, it must be said outright: this is a *requirement*, not a reality, in that nothing is ever granted. But I am merely pointing to an avenue of research that would lead to presenting checking institutions and correcting instruments (namely, for example, the good faith principle, or the concepts of gap).

2. Legal epistemology as the core of the theory of law

If the rationality requirement of law is the very essence of law, it means that any theory of law must include an argumentation approach: an analysis of the process the law undergoes before being formulated, a path through which any assertion can be said to be purely legal – that is to say *integrated* into the legal system. While this is also a jurisdiction issue, it is not only that. No legal expert will be satisfied with the competent judge's assertion that virginity on the wedding night is (or is not) a bride's essential quality (to take an example that has hit the press): the first and foremost focus is the argumentative chain by which the judge reached this conclusion. Evidence of it is that the judgment may be appealed, not because its quality as an individual norm issued by a competent judge could be challenged, but rather because the *material* implementation of this norm in the legal system is questionable. The purpose of the appeal is the appropriateness – the epistemic validity – of the argumentative chain in favour of which the lower court held that the norm is about to issue actually fits into the legal order.

It is therefore the object of legal theory that is involved here: how to define law. Law may be considered as established through a collection of norms. But in doing so, it completely ignores what the law is in terms of work to be done: it is a theory of law that law experts in their daily activities, in their practice, are entirely absent from: law devoid of the practice of it. Now, they spend their time writing, reading, speaking, listening, in short, arguing. Arguing to put forward that the rationality requirement has indeed been met, because there is no norm– at least in the modern times legal system claim they are grounded on – that can dispense with showing its credentials – even the one enacted by the supreme court.

This bears out that legal theory must begin with its epistemology: that is to say, by analyzing the mode of legal normative production, because it is precisely this mode of production that distinguishes it from other normative systems. I will do that here only in part, by focusing on the dynamics of institutional actors in the system.

To take up again the example I have just given: under Article 180 al. 2 of the French Civil Code, "should there have been an error about the person, or concerning the person's essential qualities, the other spouse may demand nullity of marriage". The legal question asked in the instant case is whether the bride's non-virginity is an essential quality, an issue whose solution will be given in the particular/individual norm ending the dispute. As for the legal problem, it is a matter of finding relevant arguments making it possible to move from the text of section 180 to the individual norm, a move that is no logical evidence, by far, witness two conflicting judgments on the same issue.

However, though that shift is not logical evidence, how should is it to be conducted so that it can be described as legal, i.e. considered legally valid? Besides, what are its impacts on the legal system?

3. Two modes of legal imperativeness

In terms of theoretical analysis, the answer obviously depends on the initial choice of the problems approach assigned to the theory of law.

Arguably, it is sufficient that the individual norm has been decided by the competent authority. This is the answer I mentioned above. The implications of this position are reflected in the concept of the sources of law: the law is what emerges at some point from an authorized source. What happens before it surges, as much as what happens afterwards, is concealed. Evidence of it is the wavering of the theory as to the characterization of jurisprudence as the source of law, and its refusal to regard the doctrine as such.

However, despite what I called concealment, it is perfectly true that a norm adopted in accordance with the rules of jurisdiction is considered valid, at least until another authority competent to do so has decided otherwise. In terms of specific / individual norms, the *res judicata* principle applies. In terms of legislation, the problem is the institutionalization of the control of their constitutionality. Once the force of *res judicata* has been acquired, the norm becomes undeniable: it is imperative by itself. I call this mode of imperativeness an *institutional* one, since it depends on the institutional arrangement of jurisdictions.

It should be noted that the force of the *res judicata* principle affects the pronouncement and it alone. The grounds themselves remain questionable. The cancelled wedding is cancelled once and for all, once the judgment becomes final, whatever opinion one may have of its motivation. Yet, if no appeal had been lodged against this judgment, nothing would have prevented specialists of marriage law to carry on discussing the grounds that founded it – hence turning it into a *legal* discussion, since it would have covered the definition of what is considered, within the meaning of Article 180 of the civil Code, as an "essential quality". Similarly, indeed, the argument followed by the Appeals Judge may be challenged. What would have been involved in either one of these discussions, which I would dub doctrinal, is the *material* integration of the particular / individual norm in terms of the legal rationality requirement. The persuasiveness of this precedent would have been challenged in favour of another argumentative chain, which would have lead to a different norm. And the purpose of this discussion would have been what I call the *epistemic* imperativeness, i.e. the compliance, of a *material* nature, of the solution brought to the legal system.

It is true that neither the doubts one may have afterwards on the merits of a final judgment, or even the certainty you might have afterwards of its lack of merit, does not result in any implication as to its institutional imperativeness (excluding exceptional grounds for review). That does not mean, however, they have no effect on the epistemic dynamics of the legal system.

We will now focus on the very dynamics.

4. Interpretation and application of the law: from the normative text to the general norm

We distinguish between interpretation and application. Interpretation means determining the meaning of a text for its own sake, while remaining at the same level of abstraction: for example, if a text contains the words "the French", are these to be interpreted in an epicene way, that is to say, including both sexes, or does it refer only to French males? As for the application, it is a matter of determining in the concrete case what is the particular ~~(~~individual~~)~~ norm that, with reference to the general rule applied, will solve the legal situation: for example, in such an accident, might any wrongdoing cause the author's responsibility to be involved? That question begs another: what are the duties of the author of the tort in the concrete circumstances in which he acted?

All too often, legal methodology is confined to exploring methods for interpreting texts; it neglects law application – as indeed it neglects the problem of finding the facts (probably because legal theorists read supreme courts' decisions, not the first instance or appeal judgements!). At best – as does Kelsen – it isolates the problems approach for exporting it, by attributing it to the so-called "judicial policy"; on one hand, such a strategy comes as no surprise since, for Kelsen, the validity of the individual norm does not depend on its material compliance with the superior norm. On the other hand, it is surprising, since, as I have already noted, a considerable part of legal experts' daily work is dedicated to establishing the facts and enforcing the law. But the reason why we should pay attention to it goes beyond the realistic concern of taking into account the actual practice of the law. The legal authority – that is to say, the power of definitively addressing a situation – lies in its essence in conferring meaning to concrete facts by *determining* what the general norm states only as an abstraction, i.e. as indeterminacy: do such and such clues allow to conclude the facts that have been presented are true? (E.g., has the defendant had an intimate relationship with another person? Was the ground slippery?), and are these facts likely to be given the characterization ensuing from the general rule? (May the act be considered as a fault? Is this monument worthy to be placed under protection?). Indeed, the uncertainty inherent in any abstraction relative to the historical peculiarities of any individual situation (idiosyncrasies) must be resolved by a choice between all the solutions indeterminacy makes possible. It is in this opportunity for choice that legal authority lies (and its micro-political dimension) – a considerable power, since it means *naming* things: facts become, and in imperatively binding manner, something other than what they are in themselves; they enter another world, a symbolic one: "adultery", "negligence", "essential quality" – in it, they are transfigured, and compellingly indisputable.

However, there is a profound difference between the logic of interpretation and of application (I leave aside the issue of finding facts). The first regards definition, logic that (in accordance with Umberto Eco) I call dictionary logic: it is a matter of replacing one or more terms with other terms that will be considered as their exact equivalent. This is what happens when the norm emerges as the "true" meaning of a text; actually, we only

substitute another text to the original one; the text of the norm is redrafted (e.g. “French men and women” instead of “the French”).

The application logic is that of the encyclopaedia. The particular/individual norm arising through application (or concretization) is a special *case* of the general norm– one among many others, hence not at all identifiable to the general norm. If I say, regarding a dispute to settle, that the pharmacist, who, by profession, knows the dangers of it, should take all necessary precautions for storing toxic drugs in a place inaccessible to children and that storing them on a shelf is not good enough, I develop a particular norm, which is one *case* of the notion of wrongdoing; yet, I might as well reach a particular norm that is the reverse, noting that, to access that shelf, he necessarily had to climb on a stool – this norm is also a case of the notion of wrongdoing (non-cases are also “cases” of the norm).

However, the cases of the notion of wrongdoing are endless, and occur in the most varied and most unexpected situations. To take another example, it is certain that, when it was adopted, in most constitutional laws, the guarantee of personal liberty did not know that cases could refer to the current legal issues related to data protection, artificial insemination, etc..., and we do not yet know what situations techno-scientific developments will create – and the judge will have to assess them in connection with this guarantee. Therefore, the specific norms constituting the encyclopaedia of indeterminate legal concepts such as “wrongful act”, “personal freedom”, etc., also are countless and unexpected; the encyclopaedia is permanently and essentially always *open* to being enriched with new cases.

A major consequence results from it all. The general norm cannot simply be the meaning of the text that formulates it. It is also the encyclopaedia of the specific norms that were decided by reference to that text. In other words, the general rule known as Article 1382 of the French Civil Code or as § 823 of the German Bürgerliches Gesetzbuch is not only the “dictionnaristic” meaning of these texts, but also *the whole encyclopaedia* of all particular norms issued to solve concrete cases of civil liability – a whole set that is always open to future developments.

This set is an organized and structured whole, worked out to become the system of the norm, with Article 1382 being the original text. It cannot be formulated in all its complexity; no textual formulation is able to account for all the internal differentiations brought into the norm by practice, i.e. into the richness and fertility of its encyclopaedia. Moreover, should this general norm be formulated – in a ruling, or by the doctrine –, as soon as it was being written, such formulation would immediately cease to be the norm itself, as it would in its turn become just one *text* among all possible ones. *Any* text *formulates*; therefore it merely fills *the role* of the norm; it is only that by which we can *speak of* the norm – it is even impossible to talk about it otherwise –, but it never will be, whatever its complexity, the norm itself. Besides, the original text has no other scope than to serve as the identical reference to all the discourses bearing on the norm – a reference that ensures that the former are about the same thing. Thus the general norm can perform itself throughout its history, whose episodes it keeps in mind to constantly organize and reorganize them.

Therefore, any norm exists as a complex *idea*, which resides in the collective memory of the legal community, beyond all textuality, but can only be understood within the world of texts which speak of it as their reference. It is complex because it organizes the "tradition" – to borrow a term from hermeneutics. The tradition began with the adoption of the original text (often even before: Article 1382 of the Civil Code did not come out of the blue in 1804) and continued with case-law casuistry. It has been, and is, permanently developed and organized, reworked and reorganized, not only by case-law but by the doctrine, which reflects it, i.e. works on it, systematizing and sometimes even anticipating it.

5. Argumentative paths

Any lawyer knows that only rarely can a specific legal issue receive an immediate solution. In most cases, there are several possible argumentative paths, leading to different normative solutions. While clear texts do exist, they are most often clear only in one aspect. For example, maximum speed in urban areas is 50 km / h; but the rule applies *generally*, which means that, depending on specific situations, it might be less, since "speed must always be suited to circumstances" (according to a Swiss legal provision; its equivalents are bound to be found in other highway codes). Then again, clarity is only apparent: for example, if there is a provision that "inside railway station buildings, dogs must be leashed", what about monkeys or snakes? The general norm will have to be formulated in a second text providing that "animals presenting a risk must be controlled adequately".

It is therefore necessary, since the text and the norm fail to achieve perfect clarity as formulated by interpretation, to argue until the validity of the normative solution is established. Arguing means showing that the solution about to be chosen is the one that fits into the legal system better than others, and the one the text itself would also have permitted. Normative indeterminacy exists from the start; therefore, it is necessary to make a choice by adopting a particular / individual norm – what I earlier called the "power of naming things". The need to make a choice, which creates the micro-political dimension of law, constitutes the limit of the rationality requirement, because, as it can never be fully met, it always leaves some room for subjective determination – that which decides which the most relevant argument is.

Two points are worth careful attention here, before a semiotic theory of interpretation and application is outlined, and before it is shown how it can account for the way information flows between society and the legal system.

The first point concerns the relationship that allows giving meaning to the norm, either by interpreting or applying the text. Legal language is written in ordinary language, whose signs it uses: the signifiers of the former are made up with signs of the second (/dog/, which is the signifier in the normative text, is the word *dog* found in common language). Yet, if, in ordinary language, the relationship between the signifier /dog/ and the signified, "dog" is arbitrary (there is no reason to attribute to the signified that particular signifier rather than another), the same can't be said of the legal language: in other words, the

relationship between the legal signifier and its signified is not arbitrary, it is *motivated*. However, as part of the legal code (not of the linguistic code), it can be *de-motivated*, that is to say, distanced from its meaning in ordinary language ("dog"), precisely according to its code. The interpretation and application can therefore use all polysemous possibilities and ambiguities of ordinary language, which form the semantic framework (all encyclopaedic potential meanings) within which the reading of the text evolves; it can even use figures of speech – e.g. metonymy, in the case of the legal signifier /dog/. However, de-motivation from the linguistic code and ordinary meaning of its signs requires re-motivation explaining the reasons (rationality) of this distortion of meaning. It is at this point that classical interpretation methods take place, with a heuristic function (as in the example of /dog/, the purposive (teleological) approach); they are used to suggest directions for other possible meanings, but they obviously do not directly provide the *reasons*, *motives*, *rationality* of such diversion. This is why, incidentally, there exists no methodology for methods of interpretation. This could be summarized as follows: any reader – as a matter of law – must be able to *understand* the normative text using the vocabulary and syntax of ordinary language, including the *surprises* embodied by diversions of meaning.

These reasons, contrary to what one might think, do not only have endogenous origins. Indeed, the legal argument not only contains reasons already known to be legal (*internal* argumentative schemes), but also the arguments it takes from its socio-cultural environment – arguments that, by taking them up again, gets them to become legal (external schemes). We are now addressing the second point here.

First, let us take an example. For a long time, on the basis of a text dating back to the 19th century, Swiss private international law used to recognize the divorce of foreign spouses living in Switzerland, provided their State of origin recognized that divorce; for spouses of different nationalities, the text was interpreted as requiring recognition by both states of origin. In 1968, at a time when Italy did not recognize divorce, the Federal Court proceeded to a reversal of precedent and admitted that only the law effective in the State of the requesting spouse was critical; the plaintiff was a French woman and the defendant was Italian (significantly, the Court, composed of five judges, ruled by a majority of three against two). Here is an excerpt of the reasons: "If the judge cannot base his judgements on considerations of desirable law, he must nevertheless strive [to interpret] the law in a manner as consistent as possible with the situation and the current mentality. To this end, he will often be led to abandon a traditional interpretation, which was probably justified when the law was drafted, but that is no longer sustainable because of changing circumstances or even due to the way ideas have evolved. [...] The cumulative application of each spouse's national laws is indefensible if the principle is openly laid down that divorce should remain an exceptional mode of marriage dissolution. Such a statement is inconsistent with reality, both in Switzerland and in most neighbouring countries."

What we see in this judgment, is the intervention in the argumentative path – assuming that the original text of the norm is drafted so as to allow both interpretations – of reasons relating to "change in circumstances" and the "evolution of ideas", in short, to "reality." So these are facts, not legal ones, which are considered critical: since the adoption of the

text, divorce has become common practice, an institution socially recognized for being ordinary, that has somehow fully become an everyday feature of life; therefore an interpretation restricting the possibility of divorce must be rejected, and the norm reformulated otherwise than previously. We see here that the assessment of a social fact – a culture, social knowledge – is taken up again by the court and, as such, will enter the legal order as a legal rationality reason.

The same goes for the case of the pharmacist, mentioned above, who stored a drug in a place where, by climbing on a stool, a child was able to grab and gulp it down it as if it were candy. The judge will have to decide between pharmacists' ethical duties (was the precaution he took good enough?). What about the duty of parental supervision (should they have watched their offspring's behaviour more carefully?). To do so, the law, in the current state of its encyclopaedia, might prove of no avail (if we hypothetically assume that there is no case-law and no specific legal provisions on one point or another): he will then have to resort to such patterns of behaviour that are considered as received in the customs, habits and manners of the society in which he lives and that, finally, the particular norm he will select is designed for – which presupposes it will have to be such as being socially acceptable.

There is therefore a constant information exchange between the law and society: on one hand, from the former to the latter, by providing knowledge, models, etc., and on the other, the latter reinstates the former in normative form.

6. Conclusion

Three conclusions actually, to gather all of the above, which may appear heterogeneous.

Firstly, institutional imperativeness – that of *res judicata* – is only one part of the legal order. What constitutes, organizes and systematizes it, allowing its coherence and development, thus ensuring the general rationality requirement, is working on epistemic imperativeness.

Second: norms are the result of production work. This work is accomplished through texts – the original text, the texts of the specific norms, those of the doctrinal systematizations. It is communication work: in other words, a constant exchange of discourses. All these discourses always give themselves the same reference, namely the original text, which ensures the unity of their object (which is the norm, their common *referent*, as we would say in semiotics); but this object is permanently found and recovered in enriching the encyclopaedia of knowledge that is being developed on this topic. A more rational encyclopaedia, as consistent as possible, so that it can project itself into the future, when it will have to include new specific norms, as they will be required to accommodate all of the unexpected situations that are sure to arise in future.

Thirdly: norms result from the work of all legal institutions. Not only the legislator but also the judges – past, present and future – as well as doctrine. The law is not only a static

reserve of texts (or of norms), but also a set of institutions that produce norms by working on texts. A *set of people* – the legal community – in whose operations not only memory, but also its actors' imagination, guaranteed by judicial independence and freedom of expression, play a crucial role. Or, more precisely than a whole set, it is a s*ystem*; by that I mean an organization that has three characteristics. Firstly, its identity lies in the way its elements relate to each other and at the same time – in second place – it, within itself, confers to each of them their own identity, by differentiating their functions; thirdly, this differentiation enables the system to maintain its own relations with its socio-political environment. And, speaking of the environment, we must specifically include, among the actors of the legal system, an essential category we sometimes tend to forget: the subjects of law, who, as such, are *inside* the system, but who, as individuals, remain *outside* – it is, factually, this dual nature as both a legal concept and a social reality that opens a channel of communication between the legal system and its environment. Indeed, the practices, knowledge, ideologies that prevail in society make up a secular legal culture, in a somehow inchoate way, awaiting consecration; a culture whose priestly caste – legal experts – keep fuelling its argumentative paths during the normative invention process. A dual nature, moreover, that also affects the judge's position, as he is both and at the same time a function as well as (he, too) an individual.

Conclusion of conclusions: a definition of the norm can hardly be given, let alone defining the law, without betraying the richness of its organization and the limits that the latter provides to what the law, as a social subsystem, is capable of producing in terms of rationality. This is impossible because, to account for it, one should be able to summarize in one single formula the complexity of the system it constitutes: we should be able to understand it in its entirety in one swoop. For example, what I said about the norm distinguishing criterion as postulating a rationality requirement cannot be fully understood unless we understand the normative production process. But, conversely, this process can only be understood if we understand that the law assumes a rationality requirement. There is circularity in the structure of the whole, which makes it impossible to isolate any one of its elements to define it by itself, and which to the same extent prevents the whole from being defined without taking its elements organization into account.