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ON THE BASIC NORM*

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I have been asked to talk to you about the so-called Pure Theory of Law. As it is not possible to deal within the short time allowed with all the aspects of this theory, I suggest that we discuss one problem that is most characteristic of this theory: the basic norm.

The starting point of the Pure Theory of Law—as of any legal theory—is a definition of the concept of the law. The Pure Theory defines the law as an aggregate or system of norms, as a normative order. Now, what is a norm? A norm is a specific meaning, the meaning that something ought to be, or ought to be done, although actually it may not be done. There are different kinds of norms, norms of thinking, that is, logical norms, and norms of acting, that is, moral and legal norms.

According to a legal norm, men ought to behave under certain conditions in a certain way. That a man ought to behave in a certain way means that this behavior is prescribed or permitted or authorized. In this sense, a legal norm is a prescription or permission or authorization. Such a norm may be the meaning of an act of will of one individual intentionally directed at the behavior of another individual. Using a figure of speech, we say: the norm is created or posited by an act of will; then it is a positive norm. The law as a system of norms created by acts of human will is positive law. The Pure Theory of Law is a theory of positive law.

The act by which the norm is created must be distinguished from the norm created by the act—for instance: A legislative act and the law or statute created by it. The act is a fact, the norm is the meaning of this fact. The act by which a norm is created actually exists in space and time, and as such is the effect of certain causes, according to the law of causality. Its existence is the existence of a natural fact. The statement referring to the act by which a norm is created is an "is"-statement. Since the norm is not a fact but the meaning of a fact, its existence is different from the existence of a fact. Its existence is its validity. The statement that a norm prescribing,

permitting, or authorizing a certain behavior is valid does not mean that this behavior actually takes place or that it will take place in the future; it means that it ought to take place, that men ought to behave as the norm prescribes, permits or authorizes men to behave. The statement referring to the validity of a norm is an "ought"-statement.

Now, the question arises: What is the reason of the validity of a definite norm, that is the question: why ought we to behave in conformity with a definite norm? The answer to this question can never be an "is"-statement, the statement of a fact; it can be only an "ought"-statement, the statement of a norm. In other words: the reason of the validity of a norm can never be a fact, even not the act of will by which the norm is created; it can be only a norm, another, a higher norm. It is a fundamental logical principle that from the statement that something is does not, and cannot, follow a statement that something ought to be, just as from the statement that something ought to be does not, and cannot, follow a statement that something is. To illustrate this principle by an example: If a father commands his child: you ought to go to school, the child may ask, why ought I go to school? If the father replies: because your father commands you to do so, that is to say, if the father refers to the fact that he has issued a norm to go to school, he does not answer the child's question. The correct answer is: because you ought to obey the commands of your father. That means: the reason of the validity of the norm issued by the father is not the fact that the father issued the norm, but the norm: a child ought to obey the commands of his father, that is a norm authorizing the father to issue norms prescribing a definite behavior of the child. The reason of the validity of this norm may be considered to be a norm laid down in the Ten Commandments issued by God on the Mount Sinai. If we ask for the reason of the validity of the Ten Commandments, that is to say, why we ought to obey the Ten Commandments, the usual answer is: because God issued the Ten Commandments; but this answer, referring to a fact, is not correct. The correct answer, referring to a norm, is: because we ought to obey the commands of God. As far as this norm is concerned, we refuse to search for a reason of its validity, we take it for granted, we consider it as self-evident. Since God is considered to be the highest norm-creating authority, this norm—which is the normative foundation of God's authority to issue norms—cannot be a norm created by an act of will, which could only be the will of an authority superior to God. Hence it is not a positive norm, but a norm presupposed in our thinking, if we consider the norms issued by God as the reason of the validity of other norms of a moral-religious system. It is the basic norm of this moral-religious order.

If we ask for the reason of the validity of a positive legal order, we arrive finally at a historically first constitution, which authorizes custom or a legislative organ to create general norms, which, in their turn, authorize judicial and administrative organs to create individual norms. The assumption that

these norms are valid presupposes a norm authorizing the Fathers of the Constitution to create the norms instituting legislation or custom as the basis of all the other legal functions. This norm is the reason of the validity of the Constitution and hence the basic norm of the legal order established in conformity with the Constitution. It is a norm presupposed in our juristic thinking; it cannot be a norm created by the act of will of a definite individual: if we consider the Fathers of the Constitution as the highest legal authority, if we—from the point of view of legal positivism—do not assume a higher, a super-human authority, for instance, God or Nature, commanding us to comply with the norms issued by the Fathers of the Constitution.

With respect to the fact that the basic norm of the Pure Theory of Law, which represents the reason of the validity of the positive law, is not itself a norm of positive law, the Pure Theory of Law has been misinterpreted to be a kind of natural-law doctrine. For, according to the natural-law doctrine, the reason of the validity of positive, *i.e.*, man-made law, is its conformity with natural law, which is not a man-made law but a law emanating from Nature, Nature being an authority superior to the human legislator. However, there is an essential difference between the Pure Theory of Law, which is a positivistic theory of law, and the natural-law doctrine, which is opposed to legal positivism. According to the natural-law doctrine, the natural, non-man-made law is not only the reason of the validity of the positive, man-made law, but also determines the contents of positive law, so that a positive law whose contents do not conform to the natural law is to be considered as non-valid, as no law at all. As a matter of fact, there is not one natural-law doctrine, but there are many different and even contradictory natural-law doctrines. Consequently, there is no positive legal order which is not in conflict with one of them, and, hence, to be considered as non-valid. According to the natural-law doctrine of Locke, only a democratic form of government is "natural", i.e., just; therefore a legal order that has an autocratic character is unjust and no valid law. According to the natural law-doctrine of Filmer, however, it is only autocracy, especially absolute monarchy which is just because commanded by nature; a democratic social order, being contrary to nature, is unjust and not binding upon the subjects. Cumberland taught that individual property coresponds to a law of nature, that collective property is a violation of this law. Thus he justified the capitalistic legal system, whereas Morelly tried to prove the contrary: that only collective property corresponds to nature and that communism only is a just and, in this sense, a valid legal order.

According to the Pure Theory of Law, however, it is impossible that a positive legal order is not in conformity with its basic norm and hence not valid. For the basic norm which is the reason of the validity of this legal order refers to the creation of the norms of this order; it does not determine the contents of its norms. The contents of the norms of a positive legal order are determined exclusively by acts of will of human beings: by the Fathers of

the Constitution and the organs directly or indirectly instituted by the Constitution or by custom, constituted by acts of human beings and instituted by the constitution as a law-creating fact. No norm of a positive legal order created in conformity with the constitution can be considered as non-valid, because its content is not in conformity with a norm that does not belong to that very order. The basic norm of the Pure Theory of Law is the reason of the validity of a democratic as well as of an autocratic law, of a capitalistic as well as of a socialistic law, of any positive law, whether considered to be just or unjust. This is the essence of legal positivism, in contradistinction to the natural-law doctrine. And the Pure Theory of Law is the theory of legal positivism.

Note

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