FUNDAMENTAL STRUCTURES OF LAW

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In this paper the term *structure* is employed, in the realm of social sciences, to indicate and ordination of interdependent elements, linked to one another, on account of the goals peculiar to them and, at the same time, on account of the aims inherent to the whole in which the component elements are integrate. Such an ordination implies, thus, a dynamic correlation between means and ends, which constitutes the characteristic marks of every structure of historical or cultural nature.

When we analyze social experience, as in the case of Law or Politics, we see a constant reiteration of certain acts or behaviors organically correlated, aiming to reach more or less permanent, or at least stable goals, involving a convergent plurality of individual or group interests. We say then that a *social structure* arises.

When a structure is not designated to represent only certain aspects of social reality, in organic unity, but implies also the problem of its "meaning" and, consequently, of the behavior hence derived, we say it acquires the value of a *model.*

Social structures don't have the same genesis, as a result of multiple factors. Some are, so to speak, "natural", in that they reflect bio-psychic necessities inherent to human coexistence; others are a consequence of the convergence of acts and facts originally isolated but that, little by little, make up organic unity; still others appear from the start endowed with leveled unity and, as such, rationally desired.

In the case of the social structures, consequently, it must be observed that they are constituted as:

a) a correspondence to realities or spontaneous demands of biological or economical order, etc., in compliance with the nature of the things *e.g.:* a family or an enterprise).
b) a result of intentional or volitional acts, starters of a rational plan or program (*e.g.:* the fiscal institutions).
c) an expression of a collective experience, that becomes unified little by little, through entities endowed with certain "formal resistence" (*e.g.:* a political party).

On the other hand, when a social structure reaches paradigmatic status, placing itself as a pattern to or reason for future behavior, it assumes the characteristics of a normative structure or, in other terms, a *social model* (political, juridical, etc.).

Every social model, and particularly the juridical one, is a dynamic, not a static structure: movement, the direction in the sense of one or more ends to be reached in solidarity, is inherent to it, which demonstrates that juridical experience is incomprehensible without taking into account its dialectic nature.

Having established these preliminary points, it occurs to me to inquire if it would not be possible, from the point of view of Philosophy of Law, to discriminate which are the *fundamental structures* of the juridical experience, according to distinct perspectives.

I place myself first in the function of the old theme of *Natural Law*, whose relevance results from the irrefutable fact of its recurring "currentness", so many times have we witnessed the declaration of the death sentence or of its rebirth...

Abstraction being made up of the multiple theories that divide the jusnaturalistic trends, it seems to me that it is undeniable that all of them end up conceiving Natural Law as a structure endowed with certain ideal values, considered necessary to the understanding of Positive Law, that is, of Law while it is a moment of human behavior and, as such, of historic nature in endless change.

At bottom, the idea of Natural Law is born from the acknowledgment or discovery that, if man through millenia doesn't despair of establishing a just social order, doing and re-doing laws and codes, something stable must exist, at least as an ethic requirement, in the historical process of juridical realizations.

Broadly speaking, we may say that the fundamental directives of Natural Law are two: one *transcendent* and the other *transcendental*. I consider transcendent the classic doctrine, of Aristotelian-thomistic inspiration, according to which it would be possible to establish *a priori* a normative structure, sound in itself and by itself, and able to give us the *comprehension* and the *foundation* of positive juridical order, at the same time.

Notwithstanding the multiplicity of theoretical positions, there would be a trans-historical normative structure, made up of the unitary correlation of certain behavior rules, without which it would not be possible either *to comprehend* or *to legitimize* Law.

The transcendental theory, originally of Kantian inspiration, but not necessarily linked to Kant's formalism, states, on one side the

requirement *a priori* of certain "juridical values", but on the other it places them in terms of the historical experience of Law, seeing that it starts from the essential statement that one can speak of "transcendental conditions" only in terms of a "possible reality".

In this second colocation of the issue, and which seems to me to be more acceptable, Natural Law is made up of the *axiological invariables*, that have been revealing themselves through the historical process without being, however, mere historical products. The value of the human being, not to give just one example, does not emerge from social experience as a product of an immanent causal process, but represents rather the concretization of a value so essential that, once it is attained, it transcends the horizons of historical contingency, in order to state "as if" (*als ob*) it would exist *a priori*, *i.e.*, independent from History, in whose bosom it was possible to reach it. Well, around the value of the human being that brands the comprehension that "man is while he ought to be" or, from another point of view, that "man's being is his oughtness", a whole picture of *fundamental values* is set up, like the one of *community* taken as *a society of persons*. In this context it is easy to understand that freedom, equality, participation, etc. are other examples of the axiological demands that make up a structure of means and ends, since "realizationability", is one of the characteristic marks of Law, in accordance to the classic doctrine of Ihering.

If we go on now to the level of Positive Law, we see that every juridical experience implies a normative ordination of facts in function of values.

While in Natural Law, however, this ordination is stated in an abstract manner, *i.e.*, without subordination to the contingent conditions belonging to each historic age, each form of juridical experience always represents a concrete relation between certain factors or social circumstances and the axiologic demands corresponding to them in the context of a given cultural cycle: this relation is expressed through normative solutions, such as legal or customary norms.

There is a mistake, however, when it is stated that a fact becomes juridical after its qualification through a juridical law, conceived "in abstracto". Before the moment when the lawyer or the judge qualify a fact in terms of a juridical norm, it must be remembered that, originally, this norm resulted from the appraisal of *facts*, according to *values*, by the legislator, *lato sensu* (*legal norms*) or by society as such.

The norm, later on an object of interpretation, consequently cannot be separated from the facts and values that made it up, for it emerges as an integration of these two elements, either to be declared objective-

ly the link that unites them, or for an eventual conflict to be overcome. That's what I call, the same way Recasens Siches did, the "tridimensional structure of Law".

To understand well the tridimensional structure of Law, and not to fall back in a juridical and abstract normativism, it is necessary to recall that the fact from which the legislator starts, in order to state a juridical norm, is never a *pure fact.* In it is to be found, as if immanent, an axiologic sense, which is inseparable from the socio-historical circumstances in whose contact the fact happens, in such a way that one could say that to every "type of fact" must correspond the kind of value adequate to its nature, and not any value freely chosen by the stater of the juridical norm. Hence, one can equally say that to each "type of fact" must correspond a norm of its own, and not any rule freely elaborated by the legislator. Among fact, value, and norm there is, in short, a link of such a nature that the three mentioned elements are arranged in a structure. This is why I state that the social event qualified by rules of law (what I call "normed situation") is not a "third", in relation to norm and fact, but is its expression "concretely, in a significant totality".

It seems to me that this concrete comprehension of the juridical reality allows us to give an answer to the existencial problems of our age with more assurance, for it takes into account the operating factors in the historical immanence of the juridical experience, but without losing the ideal or transcendental values that condition and legitimate it.

It does not suffice, however, to demonstrate that each moment of the juridical life corresponds to a complex structure, where different elements relate or oppose to one another in a "totality of sense", for it is also necessary to demonstrate the hermeneutic quality of this structure.

I have had occasion to stress the essential link between "norm" and "normed situation", which corresponds to the parallel correlation between "normative act" and "interpretative act", from the fundamental observation that there is no norm without interpretation. It results from this that, in trying to understand the juridical norm, or be it, upon wanting to determine the range of axiological statement inherent to the juridical rule, the interpreter re-makes, after a certain fashion, the legislator's way: it goes from the norm to the fact, but having present the facts and values that conditioned the appearance of the latter, as well as the supervening facts and values.

It's for this reason that the *hermeneutic act* also occurs in a structure that is syncronic or homologous to the *normative act.* There

cannot be a solution of continuity between one and the other: when it happens, juridical life is in crisis, by the verification of the insufficient or outdated *normative models* in effect, their substitution being imperative.

As can be seen, from the colocation of the issue of Natural Law up to the juridical homogenesis and its interpretation, we notice that the juridical experience cannot be fully understood without having present the complexity of its structure, which is not a static but a dynamic structure, liable to be seen in the frames of an "axiological historicism".

In this respect, I ask leave to reproduce here give statements I formulated about what I call "structural interpretation", for they can be the basis to the dialogue, which is the ultimate aim of every congress:

a) The interpretation of the juridical norms always has a *unitarian* character, its various forms having to be considered necessary moments of a *unity of comprehension* (Unity of the hermeneutic process).
b) All juridical interpretation is of axiological nature, *i.e.*, it pressupposes a judgment of value, according to the nature of the normative propositions (Axiological nature if the interpretative act).
c) All juridical interpretation happens necessarily in a context, *i.e.*, in terms of the global structure of the legal order (Integrated nature of the interpretative act).
d) No juridical interpretation can transcend the objective structure resulting from the unitarian and congruent models of positive law (Objective limits of the hermeneutic process).
e) Every interpretation is conditioned by the historical mutations of the system, implying both the legislator's original *intentionality,* and the supervenient *fatic* and *axiological* demands, in a global comprehension, that is *retrospective* and *prospective* at the same time (historical-concrete nature of the interpretative act).

For these reasons, it is possible to say that, since the analysis of the transcendental principles of Natural Law until the interpretation of particular legal rules, the life of law is the historical life of its structures, of different kinds and levels but linked by the common objective insight into the connection between means and end, that is, between the reality and the idea of justice.