

THE “NATURE” OF SUBJECTIVE LAW

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Circle of Various “Homini”

Homo Legis is different from *Homo Economicus* in that *Homo Legis* would not engage himself in a gainful activity unless his behaviour complied with norms prescribed by the valid legal system. *Homo Legis* is different from *Homo Logicus* in that he would refuse to follow logical conclusions if they were contradictory to the law. In this sense, *Homo Legis* would be inclined –despite vehement declarations to the contrary by representatives of jurisprudence –towards illogical reasoning. *Homo Legis* is also different from *Homo Sanctus*. *Homo Sanctus* gives the highest priority to those norms which he perceives as established by divine entity(ies). *Homo Legis* on the other hand –when he is compelled to make a choice– regards himself as bound by norms fixed by secular authorities.

Apparently in different cultures (and also at different stages of their development) *Homo Legis* constitutes only a peculiar part of the total *Normative Homo* (human being designed and constructed by norms, values, and behaviour patterns¹). In oriental cultures, *Homo Legis* usually constitutes only a small and secondary part of the whole human existence. As a rule –in these cultures– the *Decent Man* is not inclined to seek enlightenment and support from legal norms, since the norms of decency deal with human contingencies in a more comprehensive and appealing way. Thus, legal norms are summoned only on these special occasions when the normal rules of decency are insufficient. This happens in the entirely new social conditions created by unexpected sporadic events, in a situation of violent conflicts (for example, evolution), in a situation of the destructive clash of incompatible cultures, in a case of the imposition of new norms by

¹ The total normative homo would consist of: homo logicus, homo sanctus, homo ethicus, homo legis, and all these “homini” who are guided by value-oriented prescriptions.

an alien authority, in situations when the agents of a new legal system appear too inexperienced, lacking in prestige or too hasty in using sharp sanctions, when, on the whole, the imposed legal system appears to be too “thin” in wisdom and too “rich” in loopholes and inconsistencies and so forth.

Consequently, the experience and wisdom of the Decent Man is, at least, of triple importance. First, it gives the proper (more reliable than any other) guidance for human behaviour; second, it is elevated above the changeable political turbulences of the meanings of legal situations and their elements; and third, it effectively preserves the subtle interhuman structure-network which constitutes the most essential core of the whole society. Decent Man, that is, a person who personifies the crucial values of his society, has the ability to make comprehensive judgments, that is, to cope with a variety of unexpected situations, has a highly developed sense of security (fully internalized and values give him a sense of self-assurance), represents a socially visible reliability (his co-fellows have a tendency to rely on him). In sum: a decent person is able to pursue his interests without violating recognized interests of others. The social institution of a decent man appears to be quite useful: it saves all costs connected with the maintenance of an expensive apparatus of the formalized social control. It substitutes this control by the respect for decency.

According to several studies, *Homo Legis* plays (in modern Oriental cultures) only a subsidiary role. He enters into the social picture only when other means of social control fail. Paradoxically enough, the bulk of literature on “Primitive Law” gives quite a similar picture. In so-called primitive societies intuitive law plays the decisive role. The intuitive law, being not frozen there by the officially established rules and therefore recognizing mainly informal ties of mutually respected attitudes of rights and duties, is pragmatically flexible. Consequently, it is able to cement social structure in a much more cohesive way than official law. Thus, the notion of the Decent Man plays the decisive role in shaping the tangible spirit of the society although it remains as a whole.

On the other hand, the notion of a *Reasonable Man* stresses different features. If the Decent Man’s persuasive power is connected predominantly with his ethical and emotional authority, the Reasonable Man’s prestige is associated with his specific cognitive abilities. Reasonable Man is able not only to discern proper avenues for relevant behaviours and to foresee clearly their consequences but also, and above all, is able to balance, —on his unique intellectual weight— gains and losses of the accessible options. Reasonable Man is thus able to single

out this particular option which is —from the point of view of an accepted set of values— the optimal one. So, the reasonable man has supposedly at his disposal not only intellectual, diagnostic capacities but also an elaborated hierarchy of values necessary for the evaluation of the accessible courses of action. In the case of the Decent Man, a member of the community has an assurance that the pattern of behaviour suggested by him is based on his reliable integrity, whereas, in the case of the Reasonable Man, the member of the community has an assurance that the suggested pattern of behaviour is additionally well-grounded and viable from a practical point of view.

The functional validity of the model of a Decent Man is quite obvious in "transparent" social situations and inside "transparent" social bodies. When the consequences of extended ramifications of actual actions are socially visible then it is practically difficult (if not impossible) to be engaged in behaviours which later may transpire as harmful and/or socially malignant ones. Whereas, when social ramifications of actual actions are not so visible (or even difficult to grasp under the cover of spuriously neutral social-interactions) the sheer integrity may not suffice to recognize the entangled nets of situations or escape from traps consciously and laboriously set up by crooks and harm-loving individuals. Then the discriminatory cognitive powers —not only ethical reliability— are needed. Thus, one may say that the normative model of the Reasonable Man is broader than the narrower model of the Decent Man.² It would be appropriate to add that the model of Reasonable Man (in its broader understanding) fits better to institutions of the modern, highly developed societies based on the concept of the "Organizational Man". It is recognized that the Organizational Man is supposed to go along smoothly with other impersonal elements of formalized, compartmentalized, number-like elements of macro-structural societal units which he constantly faces. However, since the comprehension of such a complicated machinery trespasses even the possibility of the "Well rounded organizational" Man, he thus resigns from the claim to grasp the holistic totality of societal organization of which he constitutes an essential part. This abdication makes him a more valid and even more functional part of it. Typical Organizational Man, being unable to comprehend the totality of the functioning of a complex organization, is nevertheless properly trained and socialized to observe, organize, and evaluate a par-

² "Reasonable" may also —in a narrower sense— be perceived as efficient, pragmatic, useful, etc. In general: Somebody who knows how to achieve ends set by himself. This narrow understanding of being reasonable nevertheless misses some essential elements which might be attached to the "reasonable" in a broader sense.

ticular sector of the whole entity. Thus, he is able to force the consequences of those activities which are initiated and pursued in his domain. Nevertheless, the “reasonability” of an Organizational Man contains and hides, in its very essence, the mortal danger—similar to that of the bomb with the retarded ignition.

Individually-oriented ethics might be regarded as a body and conjunction of norms regulating social behaviour; they have as their main target the guidance of everyday behaviour in small groups. The dominating norms are those connected with the informal behaviour of the group. In this context, the fellow creature is a person whom we know personally, or whom we can potentially or easily come to know as a person. Generally speaking, individual ethics condemn thieves, murderers, forgers, people who commit adultery, people who give false evidence, and so on. We can say that if we accept the point of view of individually-oriented ethics, we condemn people who harm other people in the narrow scope of the relationships between them in ‘face-to-face’ situations. This type of behaviour usually produces direct personal and emotional reaction. Socially oriented ethics not only unmasks the limitations of the individually oriented ones (Catholic, Jewish, Muslim—to mention those which are the most familiar to the Western World) but also—in consequence—shows their dangers. From individually-oriented ethics one should distinguish the ethics of social orientation. The most important element of ethics of this type is not the evaluation of the personal features of a given individual (his or her “internal moral face”), but the evaluation of social effects which are generated as a consequence of playing a given social role or functioning in a given social position.

It is correct to say that individually oriented ethics are directed towards grievances which occur in small social groups, whereas socially-oriented ethics are generated as a reaction against situations in which an individual faces losses which result from apparently anonymous, neutral and impartial organizations or social institutions. Quite often, those who govern complex organizations of this type could present themselves as pleasant people who can even have highly sophisticated aesthetic taste and apparently impressive humanistic backgrounds. They may also be very sensitive about the psychological reactions of those whom they meet in direct personal contacts—when the results of their behaviour are taken into consideration, monstrous—yet at the same time they may monstrous criminals. They may be monsters by creating enormous harm through the long-term consequences of their administrative actions. Although this chain of events may not be directly visible, it may accumulate into such a large body

of harm that its enormity finally makes it evident to all. The world of organizations and institutions seems to generate the urgent need of the development of socially oriented ethics.

Being limited only to one aspect of social life, socially oriented ethics could be devastating to others. So, the broader understanding of the notion of the Reasonable Man may try to achieve a balance between various divergent currents shaping the totality of social life. Thus, the Reasonable Man would ask himself constantly which, among various, contrasting tendencies should he support. In this sense, it is the Reasonable Man's duty to try to put different versions of Organizational Man into coherent perspective. This perspective should take into consideration not only individual values (as they are commonly perceived and later elevated as to universalistic canons by traditional ethical systems) but also is supposed to take into account the coexistence of various large social bodies which dominate the every day life of the members of modern societies. Such an understanding of the concept of reasonable man implies a universalistic perspective: the demand to reconcile a comprehensive (global) feeling of justice. Global ethics can thus be described as a further enlargement (after individually and socially oriented ethics) of the notion of the neighbour or fellow creature. In this context, it is not only the physical person who becomes a potential enemy or neighbour and fellow creature, but also the abstract person in the form of the unknown administrator who, with the power of his own imperium, could attack or support people without their having the slightest knowledge that he is doing so. In this sense, the task of a Reasonable Man appears as an enormous one. It seems also to be an endless one.

Homo Legis Proper

One may say that *Homo Legis* is constituted by a syndrome of various features regulating social order which appear in modern Western societies.

Homo Legis, in the modern Western sense, is (1) claim-oriented, that is, he uses the law as an instrument to enlarge the scope of his material and non-material possessiveness, (2) duty bound, that is, he regards himself as obliged in a "principal" way to fulfill those expectations of others which he considers as valid —consistent with the system of accepted norms, (3) not aware that his principled attitude constitutes an element of instrumentally implanted political schemes (injected into his "ego" to maintain existing social order), (4) interwoven into the thicket of formal prescriptions which in, like a net of various institutions and organizations, create his new, authentic 'second home'

(far remote from the requirements of primary interpersonal relationships —or even contradictory to them), (5) oriented towards impersonal rules of procedure (the latter in many cases being more valid than his ordinary, sensory channels of communication and perception), and is finally (6) hooked to the empirical fact which gives him, in the last resort, the ultimate normative validity and legitimization.