A Treatise of Legal Philosophy and General Jurisprudence

Volume 1

The Law and the Right
A Reappraisal of the Reality that Ought to Be

by

Enrico Pattaro
CIRSFID and Law Faculty, University of Bologna, Italy

with an Appendix by
Alberto Artosi, Antonino Rotolo, Giovanni Sartor and Silvia Vida

Assistant Editor: Corrado Roversi

Springer
# TABLE OF CONTENTS

A Note on the Author and the Contributors  
Editor's Preface  
Assistant Editor's Preface  

Part One - The Reality That Ought to Be: Problems and Critical Issues

Chapter 1 - A First Glance
1.1. The Reality That Ought to Be as Opposed to the Reality That Is  
1.2. The Law and the Right. What Is Objectively Right and What Is Subjectively Right  
1.3. What Is Objectively Right as the Content of Norms. Four Meanings of "Right"

Chapter 2 - Dualism and Interaction between the Reality That Ought to Be and the Reality That Is: Validity as a Pineal Gland

2.1. Constitutive Types and Valid Tokens as Independent of Norms  
2.1.1. Validity as Congruence  
2.1.2. Some People Speak of Types. The So-called Typicality of Law  
2.1.3. Other People Presuppose Types  
2.1.4. Types Are Constitutive, Rules Are Regulative  
2.1.5. Simple and Compound Types and Tokens  
2.1.6. Competence, or Capacity  

2.2. The Chain of Normative Production. The So-called Typicality of Law  
2.2.1. The Primacy of the Reality That Ought to Be  
2.2.2. Valid and Invalid Behaviours  
2.2.2.1. Noblesse Oblige  
2.2.2.2. Four Possibilities  
2.2.3. Ought-Effects Are neither Valid nor Invalid
Chapter 3 - Taking a Dive into the Sources of Law

3.1. Where to Jump in From


3.2.1. General

3.2.2. Is-Facts Strictly Understood

3.2.3. Is-Acts Strictly Understood

3.2.4. Transactions, or Declarations of Will


3.5. Sources of Law as Ought-Effects (in What Is Objectively Right) Caused by Sources of Law as Valid Is-Events

3.6. The Sovereign Normative Will as the Source of Positive Law in the Natural-Law School and in German Legal Positivism Alike

3.6.1. Two Glorious Examples

3.6.2. The State of Nature and the Promise

3.6.3. What Divides and What Unites the Natural-Law School and German Legal Positivism

Chapter 4 - The Problem of the Matrix

4.1. The Matrix of Normativeness as the Ultimate Source of What Is Right by Virtue of Human-Posited Norms

4.2. A Problem of Authenticity

4.2.1. Orthogonal Norms and Straight Rules

4.2.2. A Few Qualifying Remarks

4.2.3. Umm al-Kitāb: The Mother of the Book, or the Matrix of the Koran

4.2.4. The Great-Grandmother of Positive Human Law

4.3. Nature as the Matrix of Normativeness

4.3.1. A Traditional Starting Point

4.3.2. Nature as the Will of God

4.3.3. Nature as Biological Instinct

4.3.4. Nature as Divine and Human Reason

4.3.5. Nature as the Cosmic Order

4.4. The Origin of the Term Jus Positivum
# TABLE OF CONTENTS

**Part Two - The Reality That Ought to Be: A Monistic Perspective. Norms as Beliefs and as Motives of Behaviour**

83

**Chapter 5 - The Motives of Human Behaviour**

85

5.1. Summary of Part One and Brief Considerations on Some Legal-Philosophical Orientations 85

5.2. Encoding of Behaviour-Types: Human Personality and Culture 89

5.3. The Conditional Connection between Types of Action and Types of Circumstance. Habits and Practices 90

5.4. Needs, Interests, Values, and Norms 92

**Chapter 6 - Norms as Beliefs**

97

6.1. The Concepts of Norm and Custom 97

6.2. The Existence of a Norm Presupposes at Least One Believer (Doxia) 98

6.3. The Conditionality of the Content of a Norm: The Type of Action and the Type of Circumstance. More on What Is Objectively Right 101

6.4. The Referents of a Norm: Being a Duty-Holder (Deontia) or a Right-Holder (Exousia). More on What Is Objectively Right 105


6.7. In the Case of Anomia, a Norm Can Be either Obeyed (Conformism of Duty-Holding Nonbelievers) or Not Obeyed (Nonconformism of Duty-Holding Nonbelievers), but It Cannot Be Efficacious or Inefficacious 112

6.8. Practising Duty-Holders and Non-Practising Duty-Holders 113

**Chapter 7 - How Norms Proliferate in Human Brains**

115

7.1. Subsuming Valid Tokens under a Type of Circumstance and Producing Derivative Norms from the Type of Action Conditionally Connected with the Type of Circumstance 115

7.2. Proliferation from Norms of Conduct. Static Systems and Dynamic Systems 117

7.3. Proliferation from Competence Norms 123
Part Three - Family Portraits. Law as Interference in the Motives of Behaviour

Chapter 8 - No Law without Norms


8.1.1. A Caution for All Visitors

8.1.2. A Critique of Voluntarism in Favour of Normativism

8.1.3. Norms versus Commands

8.1.3.1. Diversity among the Contextual Requirements

8.1.3.2. What Is Objectively Right: The Internal Point of View, a Point of View Internalised in the Brains of Believers, and Which Manifests Itself in Their Use of a Typically Normative Language

8.1.3.3. Universalisability of Norms (Catholodoxia)

8.1.3.4. Justified Reaction to Transgression (Dikodoxia)

8.1.4. In What Sense Can a Norm Be Said to Exist (Doxia)

8.1.5. Constitutional Norms (Hägerström and Olivecrona and the Rule of Recognition (Hart)

8.1.6. Misinformation about Scandinavian Legal Realism

8.2. A More Targeted Reckoning with “Validity” in Legal Discourse

8.2.1. The Broad and the Narrow Sense of Competence Norms and Norms of Conduct

8.2.2. On the Function of a Valid Slap

8.2.3. The Metonymic Validity of Legal Directives and Texts of Law

8.2.4. The Slippery Slope of Validity. Norms Cannot Be Issued, or Enacted

8.2.5. Validity in Its Traditional Sense as a Source of Misguided Legal Normativism: Validity, Law in Force, and Normativeness

8.2.6. Going beyond Hart in Treating the Relationship between Validity and Normativeness in Law

8.2.6.1. Intra-Systemic Norms

8.2.6.2. The Difference between Criteria and Rules as a Difference between Types and Norms

8.3. Hart’s Postscript Compared with Hart 1961: An Abjuration of Normativeness in Law

8.3.1. Hart’s Masterpiece of 1961

8.3.2. Hart the Iconoclast: The Postscript’s Destruction of the 1961 Portrait

8.3.3. Summing up on Hart 1961 and on Hart’s Postscript

Chapter 9 - But Norms Are

The Interaction between

9.1. From Norms to Pr

9.2. Indices, Symbols, a

9.3. Language That By

9.4. Language That Ov

9.5. Language That Aff

9.5.1. Influence Aff

9.5.2. Influence Aff

9.6. Language That M

Part Four - In Search of

Chapter 11 - The Reality I

11.1. Consciousness of I

Creation of Myth

11.2. Heimarmenē and A

11.3. The Double Cond

Origins of Chishol

11.3.1. Kata Moira
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter 9 - But Norms Are Not Enough. The Interaction between Language and Motives of Behaviour</th>
<th>187</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1. From Norms to Propositions: The Analytical Emasculation</td>
<td>187</td>
</tr>
<tr>
<td>9.2. Indices, Symbols, and Conative Effects. Directives</td>
<td>190</td>
</tr>
<tr>
<td>9.3. Language That Bypasses the Motives of Behaviour: Suggestion and Charisma</td>
<td>198</td>
</tr>
<tr>
<td>9.4. Language That Overwhelms the Motives of Behaviour: Power</td>
<td>201</td>
</tr>
<tr>
<td>9.5. Language That Affects the Motives of Behaviour: Influence</td>
<td>202</td>
</tr>
<tr>
<td>9.5.1. Influence Affecting Needs, Interests, and Values</td>
<td>202</td>
</tr>
<tr>
<td>9.5.2. Influence Affecting Norms</td>
<td>203</td>
</tr>
<tr>
<td>9.6. Language That Modifies the Internalised Reality That Ought to Be: Authority (Integration between Norms and Validly Enacted Directives or Texts)</td>
<td>205</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 10 - The Law in Force: An Ambiguous Intertwining of Normativeness and Organised Power</th>
<th>209</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1. Underscoring the Role of Force in Law in order to Avoid Misunderstandings with regard to Normatism</td>
<td>209</td>
</tr>
<tr>
<td>10.2. The Law in Force</td>
<td>214</td>
</tr>
<tr>
<td>10.2.1. Orthodoxia and Catholodoxia. The Normative Social Control on Believers: Dogmas, Heterodoxia, Paradoxia, Heresy</td>
<td>214</td>
</tr>
<tr>
<td>10.2.3. The Characters of the Play, the Play of Characters</td>
<td>222</td>
</tr>
<tr>
<td>10.2.4. Who Is to Say What Is the Law in Force: The Judges as Managers of What Is Subjectively Right (Dikaspoloi)</td>
<td>232</td>
</tr>
<tr>
<td>10.2.5. The Law in Force as Domination (Herrschaft)</td>
<td>240</td>
</tr>
<tr>
<td>10.2.6. On Authority, Autonomy, and Heteronomy</td>
<td>243</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part Four - In Search of Confirming Others</th>
<th>247</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 11 - The Reality That Ought to Be as Fate</td>
<td>249</td>
</tr>
<tr>
<td>11.1. Consciousness of Death, Anxiety, and Self-Defensive Creation of Myth</td>
<td>249</td>
</tr>
<tr>
<td>11.2. Heimarmenē and Moira: To Each His Own</td>
<td>260</td>
</tr>
<tr>
<td>11.3. The Double Conditionality of Fate. Huper Moron at the Origins of Chisholm’s Paradox</td>
<td>262</td>
</tr>
<tr>
<td>11.3.1. Kata Moiran: In Accordance with the Norm</td>
<td>262</td>
</tr>
</tbody>
</table>
Chapter 12 - What Is Right in Homeric Epic

12.1. Homage to Eric A. Havelock
12.1.1. Why Havelock?
12.1.2. A Heresy Unaccomplished
12.1.3. The Anthropology of the Homeric Poems: The Didactic Function of Epic in the Oral Civilisation of the Early Greek City-States
12.2.1. Premise
12.2.2. Norms and Society
12.2.3. Dikē as What Is Objectively Right
12.2.4. Dikai as What Is Subjectively Right and Its Management, That Is, Dikē as the Restoration of What Is Right
12.2.5. “Right” and “Wrong” as Adjectives Used to Qualify Things and People

Chapter 13 - What Is Right, What Is Just, Ratio as Type: Sanctus Thoma Docet

13.2. Three Senses of Quod Est Rectum, or What Is Right. Jus as What Is Right (Quod Est Rectum) toward Others
13.3. Jus as the Objective of Justice; Justitia Est Rectitud Causaliter Tantum
13.4. The Justice of Human-Posited Norms (Justitia Legalis) Presupposes the Constant and Perpetual Just Will of the Ruler Who Has the Community in His Care
13.5. In What Sense Is the Justice of Human-Posited Norms (Justitia Legalis) General
13.6. Prudence and Justice in the Judgments That Judges Are to Pass
13.7. Jus (What Is Right toward Others) Is Made Right, in What Concerns Its Essence (Essentialiter), by the Type (Ratio) Contained in a Lex (Norm)
TABLE OF CONTENTS

13.8. The Redde Rationem (the Day of Reckoning): Ratio as Type in the Rendition of the Fathers of the English Dominican Province 324

Chapter 14 - The Law and What Is Right. Hans Kelsen under Suspicion 333
14.1. Prologue 333
14.2. Kelsen in the 1940s 333
14.3. A Few Other Contemporary English Translations of objektives Recht and subjektives Recht 336
14.4. The “Dualism” between objektives Recht and subjektives Recht: A Further Investigation into Kelsen 340
14.6. How What Is Subjectively Right, Having Been Pushed out the Front Door, Slips in through the Back Disguised as an Individualised Norm 349

Chapter 15 - Nature and Culture 355
15.1. Summing up on My Confirming Others 355
15.2. Eighteen Thousand Centuries of Culture 357
15.2.1. From Homo Habilis to Homo Sapiens Sapiens 357
15.2.2. Culture Encoded in Human Brains and Culture Inscribed in Documents and Artifacts 358
15.2.3. Types and Memory 362
15.2.5. Norms in the Formation of Individual Personality. Socialisation and Normative Revolution (Metoania) 368
15.3. The Micro-Macro Link 371
15.3.1. Cognitive and Social Action: A Society of Minds 371
15.3.2. The Interaction between Social Structure and Character Structure 374
15.3.3. Norms and the Mental Implementation of a Social System 379
15.3.4. Internalising the Reality That Ought to Be: From Significant Others to the Generalised Other 384
15.4. The Palingenesis of the Psychological Aspects of the Internal Point of View. Overcoming the Analytical Paradigm: Willard Van Orman Quine, John R. Searle, and the Neurosciences 389

Appendix - Elements for a Formalisation of the Theory of Norms Developed in This Volume
(by Alberto Artosi, Antonino Rotolo, Giovanni Sartor, and Silvia Vida)

1. Preliminaries
   413
2. The Definition of “Norm”
   415
3. Duty-Holder (Deontia) and Right-Holder (Exousia).
   Efficaciousness and Inefficaciousness of a Norm
   416
4. How Norms Proliferate in Human Minds
   421

Bibliography
(Compiled by Antonino Rotolo)

Index of Subjects

Index of Names

A NOTION AND THE RIGHT

ENRICO PATTARO is professor of philosophy and a former president of the Italian Association for the Philosophy of Law; for example, from 1980 to 1997. His work in the history of ideas, compute, and with the formation of character. He has written fifteen books, including "Validità o verificabilità della procedura civile" and "Il pensiero politico." He has edited, for example, "Il pensiero politico" and "Il pensiero politico nelle idee di Giuffrè." He has also written extensively on the history of ideas, including "La crisi," in Diritto e politica, and "Lineamenti per una teoria della nozione Principi generali." He is editor of Le fonti del diritto, del Bilancio e della Provetta, and Codice di diritto dell'informatica.

ALBERTO ARTOSI graduated in law in 1974. He became research assistant in 1983, and professor of logic and subsequently professor of philosophy. He is currently professor of legal logic at the University of Bologna, and research fellow at the University of Bologna for History of Law, Philosophy, and Law. His major publications include, among others, Metodi tableaux per la logica del diritto, Il paradosso di Chisholm: Un'indagine storica (Milan, Clueb, 2000), and Studi...