

Алпатов А.А.

## ON INTERCONNECTION BETWEEN POSITIVE AND NATURAL LAW

**Abstract:** *This article reviews the problem of understanding the essence of natural law and its relation to the positive law. The author attempts to reconsider the long-settled understanding of the natural law. This approach is novel in that the natural law is described by the regularities of physical and social reality. With all this, its relationship with the positive law has a hierarchical and very complex structure. Taking into account the peculiarities of the human nature, the state and legal control of the deviant behaviour is obviously needed based on the requirements of objective regularities. At the same time the nature of state is of dualistic character as well. The natural law is indeed immanent laws of reality, rather than notions, desires or claims resulting from the human mind. In this focus of understanding, the natural law acquires new content which is unusual to the majority of theorists. It is not a mental model, or standard which is changing in accordance with the level of social development. It appears to be a hierarchical system of real laws to be considered – like it or not – in the positive (established by will) law. Their neglect will result in disorder of the social mechanism, impair the efficiency of juristic force, and cause social upheaval.*

**Keywords:** *human nature, regularities, multi-step nature, historical aspect, clash of opinions, revision interconnection, normativism, jusnaturalism, understanding, peculiarities*

The doctrine of natural law dates back to the antiquity. From the ancient times, it has passed through different periods of development, always reborning from its ashes, like the mythical phoenix, even when its opponents seemed to celebrate the final victory over it. The profound meaning of its vitality is that the issues of natural law were reconsidered at each milestone in the development of human society over the history of legal science.<sup>1</sup>

Natural law theory and legal positivism are often opposed to each other. V.A. Chetvernin states that the positivism adherers equate human rights with law and understand the rights as a product of forced rulemaking; while their opponents consider the rights to be a social control, at least relatively independent from the government and law, or even preceding to the law, e.g. as epihistorical natural rights, or common rights that are conditioned by history and society and arise out of objective social relations.<sup>2</sup>

The controversy between positivism followers and those of natural law is long standing in jurisprudence.

However, if to carry out a thorough analysis, their conflict will appear to be a non-issue. Despite the disputed meaning of their concepts, the classics of legal positivism, Jeremy Bentham and John Ostin in 19<sup>th</sup> century; Herbert Hart and Hans Kelsen in 20<sup>th</sup> century made a significant contribution in development of legal science. It were them who distinguished rights from morals, determined the subject of jurisprudence and limited it to analysis of legal norms. While calling the natural law a “labyrinth of confusion”, J. Bentham had never disclaimed the progress made by liberal philosophy. He urged to search for the foundation of human rights and their source in positive law, rather than in human nature, with decisive reformation of the former with a view to improve its democratic character. On the other hand, any theory of natural law presupposes that a system of positive law exists, and never denies the need in, and value of positive law norms which are established on the will of a sovereign who is entitled to make laws upon the social contract. The natural law appears united with the positive law, rather than being regarded as its criterion (which is very critical in the period of revolutions or major reforms). It is expressly demonstrated by the discussion held by two western legal scholars, namely H. Hart, a legal positivism adherer, and L. Fuller who shared the views of

<sup>1</sup> See A. Aarnio, *Philosophical Perspectives in Jurisprudence* (Helsinki 1983) at p. 94.

<sup>2</sup> See V.A. Chetvernin, *Democratic Constitutional State: Introduction in Theory* (Moscow 1993) at p. 13.

natural law school.<sup>3</sup> H. Hart believed that law and moral should never be mixed up; and the law itself should be studied as a system of logically related norms; within this system, any decision being relevant in law could be deduced using logical operations without coming to social, political or moral grounds. This is the reason for the problem of justice and injustice of the positive law to be out of the scope of legal science. L. Fuller argued that the law should include certain moral meaning to increase its authoritative power.<sup>4</sup> However, H. Hart did not deny that development of law was influenced by moral and that, in its turn, the law exerted certain impact on moral's evolution.<sup>5</sup> When Hart examined the J. Finnis's concept of natural law, he admitted that it is "in many respects complementary to rather than a rival of positivist legal theory".<sup>6</sup> This complementarity of law study approaches is highlighted in the Russian literature as well.<sup>7</sup>

If to summarize the statements above, it should be emphasized that a convergence process is now obvious with respect to legal positivism and natural law theory, and take place both in Western and Russian jurisprudence.<sup>8</sup> The opinions and reasoning described above suggest that a great theoretical and practical potential is hidden in this tandem. But we have to agree with I.D. Nevvazhai that classical concepts of natural law cannot be accepted by the current legal reasoning, while new concepts are now in the process of development and still open to discussion. He also offered an accurate observation that there is no appropriate philosophical interpretation of the "natural" in the law context. The positive law either disregards a certain "human nature", or considers it to be formed in a human being by the changes occurred in life circumstances (this thesis was clearly laid down in Marxism). Therefore, the natural law is opposed to the positive law in philosophical sense in connection with the opposition of two ways to understand a human being: 1) a human

being is a social creature made by outer environment; or 2) a human being is pre-determined in his existence by a certain inner nature. Here an old philosophical dilemma is clearly perceptible whether essence precedes existence or existence precedes essence.<sup>9</sup>

In I.D. Nevvazhai's opinion, the unity of natural and positive law is associated with adoption of thesis stating that a human being is a process of human formation. Therefore, it is not nature, or essence of a human being to be discussed but human abilities as they are. According to this concept, a human being is born with certain abilities of physical and biological, mental and behavioral nature, having which he claims for some necessary means and forms of existence. These claims provide basis for norms of human existence; the norms can be determined by the fact that human being, as a physical and biological creature, is subject to the laws of nature which act as a measure of the needed and forbidden in the human existence. The positive law ensures compliance with the natural human rights. The aggregate of natural rights draws a kind of coordinate system where any positive norm obtains its definition and meaning.<sup>10</sup>

Reasoning suggested by I.D. Nevvazhai leads to two questions which are very up-to-date and – in my opinion – aimed at the root of relationship problem in respect of natural and positive law. The first question is what should be understood by natural law? The second one is what its relation is to the philosophical meaning of human existence?

When jurisprudence just started to function as a separate branch of knowledge and social practice, the Roman jurists linked the natural law to the categories of justice and good, whereas the law itself (positive) was connected with the benefit.<sup>11</sup> However, the ancient law men provided no more details on the scope of natural law *per se* and its relations with the civil law. Perhaps, the most typical way to understand these aspects, likely to be used by the Roman jurists, was suggested by P.I. Novgorodtsev. From his point of view, jurisprudence employs the concept of law only to define positive norms, while the ideal requirements do not make the law in the strict sense of the word, being only proj-

<sup>3</sup> See H.L.A. Hart, "The Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 599-629; L.L. Fuller, "Positivism and Fidelity to Law – A Reply to professor Hart" (1958) 71 Harvard Law Review 630-672.

<sup>4</sup> See H.L.A. Hart, *Concept of Law* (Oxford 1961); L.L. Fuller, *The Morality of Law*, 2nd ed. (New Haven 1969).

<sup>5</sup> See H.L.A. Hart, *Law, Liberty, and Morality*. (1963) at p. 1.

<sup>6</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983) at p. 10. See J.M. Finnis, *Natural Law and Natural Rights* (Oxford 1980).

<sup>7</sup> For example, see O.E. Leist, "Three Concepts of Law" (1991) 12 Soviet State and Law 3-11; V.A. Tumanov, "Study of Law" in V.K. Babayeva (ed.), *General Theory of Law* (1993), pp. 11-33.

<sup>8</sup> See I.Y. Kozlikhin, "Positivism and Natural Law" (2000) 3 State and Law 5-11.

<sup>9</sup> See I.D. Nevvazhai, "On Relation between Natural and Positive Law" (1997) 4 Science of Law 164 – 166.

<sup>10</sup> See *ibid.*, pp. 164 – 166.

<sup>11</sup> The word "law" is used with two meanings, the first one being something ever just and good, which is the natural law. The second meaning assumes that the law is useful to everyone, or the majority in a state, which is the civil law. See *The Digest of Justinian*, selected extracts translated and commented by I.S. Peretersky, vol. 1, ch. I. 11 (Moscow 1984) at p. 25.

ects of the future law. The importance of the latter should not be impaired though.<sup>12</sup>

The above statement leads those concerned about interconnection of natural and positive law to a quite frequent and favoured conclusion that the natural law is a model, project and criterion to evaluate the positive law. In other words, the natural law is viewed as a system of common legal directives which ensue from the human mind and must be a measure and a guideline for the positive law, i.e. the former “prescribes” what must be the content of law.<sup>13</sup>

In my opinion, the natural law is indeed immanent laws of reality, rather than notions, desires or claims resulting from the human mind. In other words, the natural law represents objective regularities governing social relations based on the categories of equality, freedom, measure, and balance. In this focus of understanding, the natural law acquires new content which is unusual to the majority of theorists. It is not a mental model, or standard which is changing in accordance with the level of social development. It appears to be a hierarchical system of real laws to be considered – like it or not – in the positive (established by will) law. Their neglect will result in disorder of the social mechanism, impair the efficiency of juristic force, and cause social upheaval.

It would be absurd to fully equate the laws of nature with those created by people. However, as we are trying to comprehend the nature of a human, the latter uniting both physical and social components, then – whether we want it or not – we have to admit the close interrelation of the two. The fact that these two kinds of laws are closely interconnected enables us to speak about their common features. It should be noted that even the ancient philosophers made the attempts to consider this connection alongside with the common features. Aristotle, Zeno and Seneca pointed out that nature lived according to the rules set by the universal reason (logos). The latter can be perceived through the study of nature. This idea is developed by a Stoic philosopher Epictetus stating that the study of nature (physics) is valuable not because the knowledge received can serve to change the nature (environment), but because perception of the natural laws of the universal reason enables to adjust (organize) the own life.<sup>14</sup> According to Cicero, the laws and the reason of nature are characterized by the justice which

“pays to each his own and maintains the equality between them”.<sup>15</sup> Epicurus maintains the idea of justice coming from “nature” and emphasizes that “in general justice is the same for all”.<sup>16</sup> Without doubt, “in general” justice is the same for all, but a personality turns it into a relative concept by his individual perception often dictated by a social status, etc. In this regard, a well-known expression “justice is relative” does not maintain the Epicurus’s postulate, although his idea seems to be the most reasonable and well-grounded as it comes from the principle of universal equality, the latter being the so-called “Aristotle’s middle”. Thus according to the ancient philosophers the universal laws focus on public good, justice; and accordingly, the natural laws are aimed at holding an imperfect human on the path of virtue (morality). Naturally such perception of the reality is characteristic not only of the ancient. It is no news that many phenomena and processes of the reality have such inherent parameters as balance, equivalence and relative stability. This conclusion leads us to the idea that natural law in the above given sense, i.e. as a system of regularities, acts as a counterbalance to the imperfect human nature. When the problem is viewed methodologically, that is with consideration of the hierarchy of the regularities, it seems that the natural law itself constitutes the essence of the positive, while justice is a second-order essence preserving the balance between freedom and equality. This interpretation of the natural law includes hierarchical system of political, economic, mental, biological, physical and other regularities. However, the priority of economy in the sphere of public relations over other components of natural law should be mentioned. Thus in the ancient times when the natural primitive economy was in the process of development, Aristotle discovered that positive laws focused around the commodity-money relations.<sup>17</sup> Key importance of the economic factor in the sphere of public relations, i.e. prevailing of economic interests and needs over the others, was actively advocated by the classics of the dialectal materialism. It is remarkable that G.F. Shershenevich, an advocate of the strong state and public norms who worked in the 1890s, quotation of whom was considered a political rebellion in the Soviet times, considered that “legal norms are characterized by the organized protection”<sup>18</sup> and at the same time wrote that “when it is said that law is developing and forming under the dominating economic relations, this

<sup>12</sup> See P.I. Novgorodtsev, *Lectures in the history of law philosophy. Studies of the Modern Age. 16<sup>th</sup>-19<sup>th</sup> centuries*, 3rd ed. (Moscow 1914), pp. 110-112.

<sup>13</sup> See S.L. Ivashkevsky, “Ideal Essence of Law: the problem statement” (2007) 1 The Russian Law Journal

<sup>14</sup> See E.V. Verkhovodov, “Genesis of the Theory of Natural Law in Western Europe” (2001).

<sup>15</sup> Cicero, *On the State and Law* (Moscow 1966) at p. 19.

<sup>16</sup> See E.V. Verkhovodov, “Genesis of the Theory of Natural Law in Western Europe” (2001).

<sup>17</sup> Aristotle, *Collected works*, vol. IV (Moscow 1983) at p. 151.

<sup>18</sup> See G.F. Shershenevich, *Definition of the Concept of Law* (Kazan 1896), pp. 63,74; G.F. Shershenevich, *General Theory of Law*, 1st ed. (Moscow 1910) at p. 212.

cannot be argued from the historical perspective”.<sup>19</sup> Further he pointed out that “the great contribution of the historical materialism was that it promoted an outstanding importance of the economic factor and showed the way to link the grand conceptions and noble feelings with the material side of human existence”.<sup>20</sup>

It should be noted that when supporting the above viewpoint, my idea is in disagreement with the other Marxist postulate according to which law is a superstructure for the economic base. The reasoning in this article, on the contrary, leads to the idea that economic phenomena belong to the scope of natural law. Besides the above given arguments, the latter idea can be supported by the position of E.B. Pashukanis, who noted that the natural law school provided an example for the most thorough and clear interpretation of a legal form. There is a good reason for the natural legal doctrine to reach its high when the great classics of the bourgeois political economy appeared on the scene.<sup>21</sup> According to E.B. Pashukanis, the origins of law lie in the communication of individuals by means of equivalent exchange. The latter “represents the material base of the legal form in the simplest and purest way. The act of exchange ... focuses on the most essential components both of the political economy and the law”.<sup>22</sup>

Now let us turn to the second issue on the human nature, arising from the problem statement by D.I. Nevvazhai. We share the scientist’s position that becoming of a human is a fundamental point in his existence. Nevertheless, it should be mentioned that existence of a person is in great degree influenced by the imperfection of his social nature; and the latter fact determines historical and pragmatic meaning of human life. That is why we see the dualistic nature of human being as disclosing through the system of social and natural regularities, accompanying the entire human essence in all its forms, the latter opposing to the arbitrary actions coming from imperfection and selfishness of a person. A certain root of evil in the human nature predetermined by the dual character of the objective reality represents a kind of its evolutionary principle and the meaning of life.

It is obvious that the mentioned dualistic nature of a human being particularly shows itself both in the striving to solidarity and – at the same time – in the inclination to rivalry. The need in communication and collision of private

interests are the two fundamental truths which should be taken as a starting point by all the researchers of social phenomena, as P.I. Novgorodtsev stated. Law is a result of confrontation of different social forces, a complex product of their interrelations. The law considers various interests of different social forces and thus promotes peace and stability. The way and the extent to which the interests are satisfied depend not only on the wisdom and foresight of governing bodies; a certain force is needed, the lack of which makes even the best intentions vain. This very need turns the law into the force dominating over all the rest and finding representation in the governmental structure. The law alongside with the government tend to acquire the sovereign status and prevail over the conflicts of social interests.<sup>23</sup>

Taking into account the peculiarities of the human nature, the state and legal control of the deviant behaviour is obviously needed based on the requirements of objective regularities. At the same time the nature of state is of dualistic character as well. So, Aristotle associates not only natural or original rights with the virtue; in his opinion, state is also a virtue itself, and this constitutes an ideal base for political communication. Aristotle considers that as every state is a kind of communication organized for a certain virtue, then the communication resulting from the moral theory is aimed at reaching the supreme virtue. The latter is called the state or “political communication”. This type of communication discloses the nature and necessity of the state, which brings “law and order” to the people and which is in fact a natural virtue.<sup>24</sup> Aristotle also made an attempt to give a comprehensive interpretation to the categories of justice, state and law. He wrote, “justice on the other hand is an element of the state; for judicial procedure, which means the decision of what is just, is the regulation of the political partnership”.<sup>25</sup>

The above reasoning on the matter of the state leads to the idea that this phenomenon has got its own destination (thing-in-itself) and restricts human arbitrary actions, and limits selfish intentions by means of establishing and protecting the balance between equality and freedom. According to Aristotle, the latter are inseparably connected categories also belonging to the “natural” fundamentals of the state. At the same time the state *per se* is not perfect as its functions are performed by common people. That is why there will inevitably occur situations in which the

<sup>19</sup> G.F. Shershenevich, *General Theory of Law*, 2<sup>nd</sup> ed. (Moscow 1911) at p. 494.

<sup>20</sup> G.F. Shershenevich, *General Theory of Law*, 1<sup>st</sup> ed., pp. 125, 126.

<sup>21</sup> See E.B. Pashukanis, *Selected works on the general theory of law and state* (Moscow 1980) at p. 62.

<sup>22</sup> *Ibid.*, at p. 113.

<sup>23</sup> See P.I. Novgorodtsev (1866 – 1924), “Law and Morality” (1995) 6 *Science of Law* 103 – 113.

<sup>24</sup> See Aristotle, *Collected works*, vol. IV (Moscow 1983), pp. 317, 376, 378, 380.

<sup>25</sup> Aristotle, *Politics*, 1253a, 35.

representatives of the public authority ignore the objective regularities (thus violating natural laws) due to different reasons (from vanity to frank delusions), and the government itself goes as low as arbitrary rule. This reminds of the idea that not every will of a law-maker should be viewed as implementation of the natural law. This is the reason why human kind is in constant search of the form of the ideal state in which – according to Aristotle – there are no controversies between the natural and the state law.<sup>26</sup> To the point, Marxists hold to a similar opinion in their philosophical system. The position of the modern Russian scientists also has a lot in common with the same idea. Thus, V.V. Lazarev points out that material and other conditions of the social life forming the state should be reflected in written norms.<sup>27</sup>

In this way, we are coming to a paradoxical situation when there is a threat of arbitrary actions both from the side of a person and from the side of the state. Therefore it is of crucial importance that the state should function under the total control of the civil society performed in the first turn by means of special organization and division of governmental bodies based on the system of checks and balances and tending to minimum interference into the social affairs. Alongside with this, the intrusive intervention of the state into the social relations can be avoided if the government concentrates on fulfillment of the two functions. The first function is to ensure the equal initial opportunities for everybody and to maintain equal statuses being the major prerequisites for the search of the balance of interests. The second function is to protect the guarantees for settlement of the cross claims of the right holders on the parity base. It seems that performance of the mentioned functions enables a person to preserve the status of an active member of the society and to feel his involvement into common affairs. Adjusting his own freedom to that of the others, a person realizes the responsibility for his actions and tries to reach consensus with the social imperatives, which helps to minimize both arbitrary actions of the state to a person and the entire role of the state itself as this considerably reduces the risk of arbitrary actions of a person.

Thus according to the results of the research conducted in regard to the issue of interconnection between positive law and natural law and based on the overview of the existing scientific positions referring to the nature of law, the following conclusions have been derived.

First, the analysis of the modern approaches to the interpretation of the law shows that the most characteristic

tendency is convergence, or combination of the views supporting the natural law and positivism (search for criteria of the legal law, existence of natural, social regularities and their reflection in the legal system). The analysed theories mainly bear the criteria of sustainability, consistency and thoroughness. The tendency of many Russian scholars to consider the binding norms with no regard to social, psychological and historical background is explainable and determined not only by investigation of the nature of law but by the intention to reach a practical, regulatory and functional result. G.V. Maltsev emphasizes that legal positivism has a clear inclination to practical application by means of “a written law, certified by a signature and stamp of the legislator”.<sup>28</sup> This tendency was initiated by the works of S.S. Alexeyev, V.V. Lazarev, M.I. Baytin, A.F. Cherdantsev and others. Thus S.S. Alexeyev claims his conception to be instrumental, serving the purpose of disclosing the regulatory and value potential, or opportunities and the most reasonable forms of application of law in practice. V.V. Lazarev points out that when the law is interpreted in terms of its normative content, its instrumental role is best shown. Due to the instrumental character, the positive law can be characterized as binding, obligatory and textual. The definition of the law as a set of norms, or general rules brings forward such features of legal regulation as formal determinacy, accuracy, and unambiguousness. This is dictated by practice.<sup>29</sup>

Second, the natural law is made by immanent laws of reality and their reflections in the human mind, rather than desires or claims arising from the human reasoning. It is a hierarchical system of real laws that oppose egoism attributed to imperfect humans, rather than certain intellectual and emotional attitudes which are changing in accordance with the level of social development. In terms of methodology, provided that the objective reality is structured as a hierarchy of essence orders (regularities), we believe that the natural law is the essence of the positive one, while justice is a secondary essence in respect of the latter, and it is also a variable balance of freedom and equality. The natural law *per se* comprises a consecutive system of political, economic, mental, physical and other regularities. In addition, unlike other entities of the natural law, the social relations give the priority to economy.

Third, based on the set of analyzed materials that were reviewed above, we conclude that the described approach

<sup>26</sup> See Aristotle, *Collected works*, vol. IV (Moscow 1983) at p. 722.

<sup>27</sup> See V.V. Lazarev, “Searching for the Law” (2004) 7 *The Russian Law Journal*.

<sup>28</sup> See G.V. Maltsev, *Understanding of Law: approaches and problems* (Moscow 1999) at p. 394.

<sup>29</sup> See V.V. Lazarev, “Searching for the Law” (2004) 7 *The Russian Law Journal* 3-14.

can be successfully applied to comprehend the unity of natural and positive law, mainly depending on clear understanding of how economy and law interact with each other. It is very likely that it is the point where the clue to identify the true nature of law can be found.

**References (transliteration):**

1. Aarnio, A. *Philosophical Perspectives in Jurisprudence* (Helsinki 1983) at p. 94.
2. Aristotle, *Collected works*, vol. IV (Moscow 1983), pp. 151, 317, 376, 378, 380.
3. Aristotle, *Politics*, 1253a, 35.
4. Aristotle, *Collected works*, vol. IV (Moscow 1983) at p. 722.
5. Chetvernin, V.A. *Democratic Constitutional State: Introduction in Theory* (Moscow 1993) at p. 13.
6. Cicero, *On the State and Law* (Moscow 1966) at p. 19.
7. Finnis, J.M. *Natural Law and Natural Rights* (Oxford 1980).
8. Fuller, L.L. "Positivism and Fidelity to Law-A Replay to professor Hart" (1958) 71 *Harvard Law Review* pp. 630-672.
9. Hart, H.L.A. "The Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* pp. 599-629;
10. Hart, H.L.A. *Concept of Law* (Oxford 1961); L.L. Fuller, *The Morality of Law*, 2<sup>nd</sup> ed. (New Haven 1969).
11. Hart, H.L.A. *Law, Liberty, and Morality*. (1963) at p. 1. Hart, H.L.A. *Essays in Jurisprudence and Philosophy* (Oxford 1983) at p. 10.
12. Ivashovsky, S.L. "Ideal Essence of Law: the problem statement" (2007) 1 *The Russian Law Journal*. pp. 108-114
13. Kozlikhin, I.Y. "Positivism and Natural Law" (2000) 3 *State and Law* pp. 5-11.
14. Lazarev, V.V. "Searching for the Law" (2004) 7 *The Russian Law Journal* pp. 3-14.
15. Leist, O.E. "Three Concepts of Law" (1991) 12 *Soviet State and Law* pp. 3-11
16. Maltsev, G.V. *Understanding of Law: approaches and problems* (Moscow 1999) at p. 394.
17. Nevvazhai, I.D. "On Relation between Natural and Positive Law" (1997) 4 *Science of Law* pp. pp. 164 – 166.
18. Novgorodtsev, P.I. *Lectures in the history of law philosophy. Studies of the Modern Age. 16th-19th centuries*, 3<sup>rd</sup> ed. (Moscow 1914), pp. 110-112.
19. Novgorodtsev P.I. (1866-1924), "Law and Morality" (1995) 6 *Science of Law* p. 103 – 113.
20. Shershenevich, G.F. *Definition of the Concept of Law* (Kazan 1896), pp. 63,74.
21. Shershenevich, G.F. *General Theory of Law*, 1<sup>st</sup> ed. (Moscow 1910) at p. 212.
22. Shershenevich, G.F. *General Theory of Law*, 2<sup>nd</sup> ed. (Moscow 1911) at p. 494.
23. *The Digest of Justinian*, selected extracts translated and commented by I.S. Peretersky, vol. 1, ch. I. 11 (Moscow 1984) at p. 25.
24. Tumanov, V.A. "Study of Law" in V.K. Babayeva (ed.), *General Theory of Law* (1993), pp. 11-33.
25. Verkhovodov, E.V. "Genesis of the Theory of Natural Law in Western Europe" (2001)