# LAW IN THE EUROPEAN SPIRITUALITY

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**Abstract**: *Besides Truth, Good and Beauty, Law is a supreme value for the European spirituality, asserted from Antiquity, manifested until today when the role of law becomes essential for the European construction and, at the same time, for the totality of the international relations.*

**Keywords:** *Law, Rule of Law, European spirituality, European construction*

I do not know any voices in the research literature which to resist in an argumented way to the idea that **law has in the European spirituality a special place**, as a supreme value, besides Truth, Good and Beauty of the human condition, as Plato postulated, as an ordering principle of the mind and of the human conduct, as Celsius sustained in the formula *Ars aequi et boni* or as a set of rules that an ordering power of the society elaborates, promotes and sanctions; all resorting to the law that must govern the relationship between people in order to establish what is Right and to distinguish it from what is unfair[8]. Hence the idea that justice as a virtue and justice that is done and respected within a state are inseparable. They are rationally built by the prudent man and lead to the affirmation of the rule of law[9].

This law can have as sources, if we take into consideration the historical evolution of the law: the natural order of the Universe

[8] Leon Husson, *Novelles études sur la pensée juridique*, Dalloz, Paris, 1974, emphasises the role of the law in any society.

[9] Denis Collin, *Marile noţiuni filosofice*, Institutul European, Iaşi, 1999.

(whose harmony must reverberate over the institutions of the society, according to Aristotle) or the divine one (whose wise foresight encompasses the whole existence, as Thomas Aquinas argumented), the power of the customary laws, of some power institutions that stand at the head of a society, capable to organise and to lead and so, to offer it the basic norms for establishing what is and what in not Right (Constitutions, decisions, decrees, regulations, codes, treaties) or in the real life of the people, who, beyond the nationalization of the law, elaborate the norms according to which they organize their life together under the sign of this value[10]. Whether it is about the natural law, about the positive one, about the variety of the branches of law since today (private, public, financial, banking, social, insurance, computer law) due to the increasing of the complexity of inter-human relationships, it can be seen that within the European spirituality the value of law and the rule inspired by it had a decisive position among the elements structuring social life. This finding is supported by the specific evolution of the place of law within the European society.

Even though the sentence can seam full of contradictions, it establishes a relationship between law and society as distinct entities, when in fact it is about the fact that the law belongs to a society and societies are defined by a certain law. Hence the idea formulated by Brian Z. Tamanaha "the very phrase law *and* society, moreover, strikes some scholars as inapt because law is a thoroughly social phenomenon embedded within society not something that stand apart in a relationship *with* society"[11]. But treating them as entities in complex relationships allowed their analysis form very different theoretical perspectives all of them leading to the conclusion that there is no field of the social life in which the idea or the norm of law is not present, which determined S. Vago to write that "the paramount function of

[10] L. Huppes - Cluysemaer, N. Coelo (Eds.), *Aristotle and the Philosophy of Law: Theory, Practice and Justice*, Springer, Dordrecht, 2013.

[11] Brian Z. Tamanaha, *Law and Society*, in vol: A Companion to Philosophy of Law and legal Theory, sec. ed., Edited by Dennis Patterson, Ed. Wiley – Blackwell, 2010, p. 368.

law is to regulate and constrain the behaviour of individuals in their relationship with one another"[12].

It is true that within the European spirituality, along with Aristotle, it was founded the idea that the finality of the law is the establishment of order in the society, so that all its members to comply with it. Hence it was highlighted that the active character of the rule of law, inspired by a certain understanding of the value of law that a certain society has and that it is capable to impose to itself. But for this it is necessary to reveal another relationship between law and society that determines the latter to be a mirroring of the problems of the first. The same S. Vago, creating a history of the presence of this idea within the European culture, writes that "Law reflects the intellectual, social, economic and political climate of its time. Law is inseparable from the interests, goals and understanding that deeply shape or comprise social and economic life. It also reflects the particular ideas, ideals and ideologies that are part of a distinct – *legal culture* – those attributes of behaviour and attitude that make the law of one society different from that another"[13]. It is the synthesis of a current of thinking stated in Antiquity, and then continued by Montesquieu, H. Mayne, M. Weber.

In fact, law was seen, within the European spirituality, as an expression of the need of control of a society wishful to build its order according to its own identity. M Weber was the one who highlighted the idea that the value of law that is lived by a society can action as a regulating factor through the very daily behaviour of its members, in a customary form, but the real position of law in society is given by its institutionalization, by settling down the legal relations between people and by the assignment of this function to some professionals, invested with the authority of elaborating and applying the law. Instead of the habits, customs or moral norms the institutionalization of the law allows the building of a specialized state apparatus that to apply it, having the monopole of violence in order to compel the ones

[12] S. Vago, *Law and Society*, Upper Saddle River, N. J., Pearson Prentice Hall, 2009, p. 10.
[13] Ibidem, p. 3.

that do not respect it, in order to oblige them to conform to its previsions.

In this hypothesis law is related to the quality of the state, to its unitary or federal character, to its democratization degree, to the way of relating to the society whose behaviours are structured by it. The institutionalization of the law makes so that it acquires certain autonomy towards the society, which determined the known sociologist of the law R. Pound to write that "The law in the books is not the same as the law in action". This is explained by the fact that law is institutionalized in relation to the state, namely with the main institution of politics, there where things are decided by the power relationships. The one who has the political power within a state also has the power to make and apply the law.

We invoque to this effect the opinion of Paolo Grossi who saw that Roman Antiquity had a well articulated political and legal power, with a strong apparatus for exercising it, but it was followed by a Middle Age in which political power was inconclusive, *undetermined* in the terms of the author, so that instead of a Law related to the life of the people it was developed a Law related to things that ensure the everyday living. The anthropocentrism of Antiquity is replaced by a reycentrism that expresses the force of the daily life. To this can be added the fact the invasion of the Northern peoples on the space of the former Roman Empire that brings up the idea that power is not sacred, as the oriental tradition argued and the one who owns it does not represent Divinity on Earth but he is just a leader of his people. Such a thesis confronts with the one of the Roman Church, organized on large spaces and exerting a power that has found a "historical gap" instead of the Imperial power. As a consequence, "legal reports which discipline daily life" retrieve the natural character of mirror of the society's demands and of the plural forces which freely exercise within it. Law – wrote Grossi – because it is generated form the bottom, is nothing more than the complex and magnetic reality of the society

which auto-organises and which, doing this, ensures itself safeguard and conservation[14].

This law is not written in the command of a Prince, in an authoritarian text, in the work pages of a scholar; it is an *order* written in things – whether physical or social – where, with humble eyes, it can be translated into rules of life"[15].

In fact, P. Grossi is right when he considers that the great problem of Law was the one of being either the expression of some centralizing power, promoter of a drive of willpower, as legal monism argues, or of a cohabitation of different legal regulations, produced by different social groups[16].

As far as Middle Age (in fact a millennium of European history) did not have a centralizing political power, the unifying role within a society rallying in religion, socially was stated the role of some community structures, which are intermediary between the members of the society and a political power lacking consistency. To this effect Althusius coherently expressed the need of building a society in which the principle of subsidiarity to be the keystone of a slim edifice in politics (an organization with a variable geometry), in the virtue of whom a hierarchy of the legal norms having to be established in order to structure on each level of interest for the different types of structures of the society. Therefore there are norms that must regulate de behaviours of small communities, of the national ones, of the European ones and of the global ones[17].

Man survives in front of the vicissitudes of all kind not as a lonely being (*ut singuli*) but as a being encompassed in a community (*uti socius*). This being is dominated by the founding forces of her conditions of life which impose themselves as primordial realities:

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[14] Erhard Oeser, *Evolution and Constitution. The Evolutionary Selfconstruction of Law*, Springer, Dordrecht, 2003.

[15] Paolo Grossi, *L'Europe du droit*, Seuil, Paris, 2011, pp. 24-26.

[16] *Dictionnaire encyclopedique de theorie et de sociologie du droit*, dir. Andre-Jean Arnaud, L. G. D. J. -Story, Paris, Bruxelles, 1998.

[17] Liviu-Petru Zăpârţan, *Construcţia europeană*, Imprimeria de Vest, Oradea, 2000, pp. 19-74.

time, Earth and blood. Loosing the relation with ancient roots, Middle Age begins a new historical experience, in which man and society are rebuilding "from bottom – up" discovering what is the most convenient: the fact of life, its naturalness, related to the earth that ensures the life resources, the blood that ties the subjects of the social life through a set of virtues, of resources and functions which do not "betray" outside and time as duration which creates, destroys and modifies[18].

This real life created customs as sources of law, the community's own habits, whose life develop after rules established by itself and imposed by itself to its members through constraining mechanisms that it develops in the name of the values it believes in. Law becomes the expression of the local realities, of the geological, agronomic, economic, ethical and ethnic structures of a community, which makes so that, by customs collectivises to identify on a certain territory and to distinguish from other communities, often through secret conduct codes. Hence, customary law enrols in the deep structures of the community life, obliging political power to take them into consideration when it desires to elaborate a Code of laws[19].

For hundreds of years European Middle Age weaved a set of bindings between the law established by the custom and the law established in the staff room. The abundance of codes, of laws, of ukases is related to the richness of customs that Kings and Princes respected. What impresses to these norms is the fact that they interweave a Roman legal culture, centred on the idea of the individual private property, with the diversity of the forms in which it can be recognized.

While Roman law aimed at framing the behaviours into a pattern, Medieval Law is supple through the effort of organizing the concrete relationships of man with the daily fields, with the agricultural production and with its improvement.

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[18] Idem, p. 33.

[19] K. Whittington, D. Kelemen, G. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*, Oxford Univ. Press, Oxford, 2009.

To this can be added the role of the Roman Church, considered to be the real creator of the medieval civilization at the religious, cultural, socio-economic, political and legal level, for which legal order overpasses temporal particularities because it directly relates to Christ as the divine legislator. The law that it elaborates is not just a Canon law because it refers to a world in which "Heaven and Earth touch, where the sacred and the profane melt, where the citizen and the believer relate in a perfect unity". A synthesis of the two ways of conceiving the role of the law within a society will be able to be tested only when the relationships between the two types of power, politico-military and ecclesiastical shall be solved, meaning after the peace of Worms[20].

This agreement between Papacy and Empire will allow the acceleration of restructuring the mentalities and of engaging European spirituality on the path of some real mutations which shall generate Renaissance. It is understood that in the conditions of the feudal social-political life, of the decrease of the role of a central political power and also of the *removal* of the authority of the Church from the daily life of the people was stated the need for regulating the economic, production and exchange relations, that led to the affirmation of the role of commercial law. Hence we assist to the development of some great specialized branches of law, which require rediscovering man as the owner of pre-eminence towards the determined things, of his will set under the sign of rationality. On the steps of the huge synthesis realized by Thomas Aquinas will develop Patriarch's humanism, the affirmation of individuality, of the human personality, of time and space in which his creative will is expressed, that the sovereigns will try to frame within the norms of law that their own staff rooms elaborate.

The construction of law in Middle Age is considered to be a process full of creativity because men felt the need to norm their behaviours in order to maintain order, a civilized behaviour in which to specify the rights of the individual in front of the society, of the

[20] C. F. Alford, *Narative, Nature and the natural law*, Palgrave, N. Y., 2010.

latter over the first, the relationships between the society and its governing, the responsible behaviour of each towards the others. It can be stated that as increasing the degree of complexity of the social life, also increases the complexity of the enactment. But all legal systems refered to the relationships between man and woman, to the family, to what can lead to the achievement of Good, to the relations of organization and management[21].

Emperor Justinian elaborated, between years 529-533, *Corpus Juris Civilis* while on the Western space Roman law continued to apply, in writing and with a territorial character. The arrival of Germanic tribes in contact with the Roman legal culture meant their transition from a customary law related to tribes to a certain codification. It begins with *Codex Euricianus* for the Visigoths (approx. 475), *Lex Salica* (approx. 500) for the Francs, and *Edictum Rotari* (643) for the Lombards, known as *leges barbarorum*.

The existence of several legal systems is explained by the absence of a unitary political power which made that only Carol the Great tried imposing his legislation throughout the entire territory he controlled. It was only in the 11th century that the Justinian Code was rediscovered in West, and it shall be combined with Canon law and with the principles of the Roman law. A first synthesis is realized by Yves de Chartres but the best known is Gratiani Decretum from the middle of the 12th century. The study of law will be later developed in a decisive manner by the Universities, some of them, as the one from Bologna, being reputable in the field for centuries. An *ius comunae* will apply in the western area along with a customary law which will give the possibility to the future imperial political power to build a law that will lead towards the modern systems[22].

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[21] Hunt et all. (Eds.), *The Making of the West, Peoples and Cultures*, Bedford/St. Martin's, Boston, 2010.

[22] J. Anuvivkers, *Laws and legal codes*, în: Enciclopedia of Society and Culture in the Medieval World, Edts Chief Pam J, Crabtree Ed. Facts and File, N. Y. , 2008, vol III, pp. 598-614.

Exegesis insists on the fact that medieval law was "one", meaning that it was as a whole which had identity and consistency although the ways in which it was codified and applied were of a great diversity. Grouped in what was called *Libri feudorum* they allowed Baldo degli Ubaldi to be one of the commentators with the most profound philosophical vision over a synthesis of the European spirit which stands at the basis of the common law, of the Roman, Cannon and feudal ones. But, as we showed in the previous pages, since the time of Carol the Great, the edifice of the feudal spirituality begins to crack and for three or four centuries in its structures make way, slowly but surely, the elements of a transition towards what will be Renaissance and Modernity.

Patriarch is the one who is aware of the slow sunset of the Middle Age and of the birth of a new world, but the synthesis of this real transformation will be realized by Thomas Aquinas. His profound philosophical and theological reflection will have man as a premise, with his subjectivity, with his reason and intellect that want a true knowledge of the world and of God, in order to love and desire, to transform will into the guarantor of liberty[23].

As Paolo Grossi writes, spiritual renewal is related to the reconstruction of an anthropology that, from medieval reycentric becomes anthropocentric imposing a refunding of law towards the recognition of the free man, of the property that he has over himself and over the things.

Despite the resistance of the Church, expressed in 1303 by the Pope Boniface the 8th in the Encyclical *Unam sanctum* in the formula of a anti-historical theocratic project, the laic power affirms the right to enact over a territory, over a population that it governs.

The individualization of the sovereign states will be accomplished by the affirmation of their right to enact and as far as the Sovereign is the expression of the identity of a State, he has the task of organizing and leading it.

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[23] Ph. J. Alder, R. Pouwels, *World Civilization*, Wadsworth, 2010.

It is explicable the fact that, once affirmed the new structure of values in which humanism, sciences and arts develop, law is engaged in a profound restructuring of its basis. In the England of the 11th century begins the affirmation of the legal system of common law, as a common law for all the free man from the kingdom, which, elaborated at first by powerful kings as William the Conqueror and Henry the 2nd, will be elaborated and applied by the specialists in law.

In England is launched the formula *rule of law* that expresses the supremacy of the law not only over its citizens but also over the State and its servants. To this trend we can offer a first illustration with the *Magna Charta* from 1215[24].

From the kneading of the new era will develop the need for a new understanding of the law, of its sources, branches and authorities, which to overpass its local fragmentations and its dependence to a political power. To this effect the idea of a new natural law reappeared, as a set of rules and principles which impose themselves in the name of a value of Law, towards voluntarism, subjectivism and the arbitrary of a certain political power[25].

It was Thomas Aquinas that stated that God enrolled in the order of cosmos rules and principles of order which become the expression of a natural reason and hence explanatory objective for what happens to man. So, the task of knowing this reason is his. Freeing man of what F. Bacon called "the idols of the human mind", modernity puts him in the situation of being autonomous in his behaviour, of searching universal norms that put him in agreement with nature. Since the 13th century, he is a nature without God, so he is the subject of a natural laic law.

H. Grotius will desire even the building of a law according to mathematical rules. This double relationship of the society with the law gave birth to the famous discussion about the rule of law, about the supremacy of the law which imposes itself to all the citizens of a

[24] Brian Tamanaha, *On The Rule of Law, History. Politics. Theory*, Cambridge Univ. Press, 2004.

[25] Roger Cotterrell, *Law, Culture and Society*, Ashgate, 2006.

state, including to the ones who serve the State. Obedience to the law becomes a citizen obligation but for this the law must enjoy respect. The latter can be obtained through dictatorial means but the European spirituality is attached to the idea that a law which springs from the real needs of a society has legitimacy and hence it has also a recognized authority.

The theory of the social contract founded in a good measure, this idea according to which once signed the agreement between the members of a society it is the foundation of the political – legal institutionalization and so, it offers the basis of the rule of law. More pragmatically understood, the authority of the law may come from the fact that by respecting a law people obtain a series of benefits emanating from their social condition.

The law that has authority is the one which is recognized by a society as the expression of the need of enacting its own life on the basis of the value of Law.

In fact, this search of the objectivity and universality of the law comes butt against the specific of the social life in which people are engaged. And to this point the final contribution will be brought by J.J. Rousseau's contractualism according to which people relate in the name of their own will to live together under the sign of the law. Common will governs the law that expresses the way of being of a people, its identity in the face of history. Writing about the way of being of a people expressed in its legal culture, H. Patrick Gleen shows that the diversity of the ways of lawmaking is explained by the diversity of the ways of being of the societies, of their systems, of their traditions, stiles, mentalities, circles and spheres of civilizations.

It is in fact about the culture of a society through which it differentiates itself from others. It has, among other components, the legal culture, hence a specific way of translating the value of law[26].

[26] H. Patrick Gleen, *Legal Cultures and Legal Traditions*, in vol. Epistemology and Methodology of comparative Law, Edit. Mark van Hoecke, Hart Publ., Oxford, 2004, pp. 7-21.

Positive law will transpose this identity in the basic law of a society, in the Constitution, meant to highlights the basic principle of that identity. From Benjamin Constant to Hans Kelsen this thesis will argument the affirmation of the law as a supreme value of the life of a collectivity and of its relationships with other collectivities. From a principle of the enlightenment philosophy so clearly synthesized by Kant the consideration of law as a source of law will receive its consecration in the Napoleon Code that gives the State the power to be a unique source of the law, linking beyond dispute law to politics[27].

The main consequence of this approach will be an evaluation of the relationships between politics and law towards an institutionalism that Europeans will revise after the Second World War II, but which will allow a relatively independent evolution of politics and law towards the civil society. Rudolf von Ihering will highlight the possible ruptures between the terms and will urge for relating law to the real problems of a society[28].

So labour law, social and commercial law, and then other branches of law which are meant to respond to the historical evolution of Europe will develop[29].

The dramatic developments of the political life from the interwar period with the extension of the extremisms and of the totalitarianisms will persuade the Europeans of the idea of resettling law at the basis of the social and political edifice, put in relationship to the popular will.

This is what means the accomplishment of the famous formula Rule of Law, Etat de Droit, Stato di diritto, Rechtsstaat, which in the European culture has a long history, from the launch of the phrase by Albert Venn Dicey to the theorists in recent times (R. Dworkin, R. Dahrendorf, J. Habermas N. Bobbio, Luigi Ferrajoli), from the first

[27] B. Bix, *Legal Positivism*, in vol. Philosophy of Law and legal Theory, Ed: M. Golding, W. Edmundson Blackwell Publ., 2005, pp. 29-50.

[28] H. Avila, *Theory of legal principles*, Springer, Dordrecht, 2007.

[29] Diana-Ionela Ancheș, *Dreptul muncii și securității sociale, Suport de curs*, Cluj-Napoca, 2013-2014.

attempts to translate the concept in institutional formulas to the ones from the present when the rule of law was related especially to the respect of human rights[30].

Even though in each culture the expression receives specific meanings and particular ways of achieving it proves a consistent unity of its content elements denoting "the normative and institutional structure of a modern state within witch the legal system – and not other functional subsystems – is entrusted with the task of guaranteeing individual right, curbing the natural tendency of political power to expand and act arbitrarily"[31].

Beyond the differences that can be noticed between the four great traditions that connect state and law (in England expressing a tradition of the elaboration of law from "bottom-up", in France of the respect for the sovereign people consisting of free, equal and fraternal citizens, in USA related to the right of ownership and to the respect of the individual, in Germany to a strict functionalism and to an institutionalized liberalism[32]) the author considers that "the rule of law is a normative and institutional structure of the European modern State, within which, on the basis of specific philosophical and political assumptions, the legal system is entrusted with the task of protecting individual right, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives"[33].

In the new Millennium the rule of law is put under the question mark by a series of processed unprecedented in history: the increasing complexity of the advanced industrial societies, promoters of science and technology revolutions due to which is born a crisis of the government capacities and of the system related to the protection of

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[30] Danilo Zolo, *The Rule of Law: a critical reappraisal*, in vol: The Rule of Law, edites Pietro Costa, Danilo Zolo, Springer, Dordrecht, 2007, p. 4.

[31] Ibidem, p. 7.

[32] See also: Diana-Ionela Ancheş, "Le libéralisme roumain dans le XIXe siècle", in vol : Giordano Altarozzi, Cornel Sigmirean (eds.), *Il Risrogimento Italiano e i Movimenti Nazionali in Europa, Dal modello italiano alla realità dell'Europa centro-orientale*, Edizioni Nuova Cultura, Roma, 2013, p. 136.

[33] Idem.

human rights; on the other hand, it grows the degree of regional – e.g. E.U. – and global integration which erodes the State sovereignty and the prevalence towards the transnational powers and organisms which are a subject of power differentiation and distribution.

Nevertheless Europe does not have at the present moment an alternative to the *rule of Law* and what is more important than that is the fact that this principle must impose at a global scale[34].

Based on this finding the fathers of the European unification began by elaborating a legal construction which to regulate the activity of the Community institutions[35]. Hence, European law becomes an instrument of the creation of new relationships between the European people but to which it expresses their will[36].

It is significant that the law built on the European continent has the tendency to generalize on a planetary scale. It is a process that responds to the need of legal regulation with a universal character, which expresses the universality of the relationships between people[37]. Hans Kelsen receives after a century the confirmation of his fundamental hypothesis according to which a system of law must have a basic premise related to the identity of a society. This time it is about our identity as people[38].

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[34] Stephen Humphreys, *Teatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice*, Cambridge Univ. Press, 2010.

[35] See: Diana-Ionela Ancheş, *Tratatul de la Lisabona si sistemul institutional al Uniunii Europene* in vol. Flore Pop, Oana Albescu (eds.), Tratatul de la Lisabona, De la `metoda comunitara` la noile evolutii ale guvernantei europene, Drept si Politici ale Uniunii, CA Publishing, Cluj-Napoca, 2012.

[36] See: Drafting Legislation, *A Modern Approach*, Edited by C. Stefanou, H. Xanthaki, Ashgate, Burlington, 2008, pp. 165-213; Diana Ancheş, "The European Citizens' Initiative", in vol. Valentin Naumescu (ed.), *Democracy and Security in the 21st Century: Perspectives on a Changing World*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2014, pp. 224-247.

[37] See also: Diana-Ionela Ancheş, "Tolerance within the European Construction philosophy", in vol. *Altarul Reantregirii Journal, `Religion and Politics – the 12th International Symposium of Science, Theology and Arts`*, ISSTA 2013, Reintregirea, Alba-Iulia, 2013, pp. 305-314.

[38] J. von Bernstorff, *The Public International Law Theory of Hans Kelsen*, Cambridge Univ. Press, 2010.

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