

THE ROLE OF LAW AS A CULTURE-SHAPING FACTOR

MARIA BORUCKA ARCTOWA
Polonia

The relationship between law and culture may be considered in two directions:

- 1) as cultural conditioning of the law, i.e., as the influence of cultural factors on the definite content of the law, as well as its form, and on the application of law;
- 2) as the influence of law on the culture of a given society or, more broadly, of a given cultural circle.

It is the legal order and not law itself that is the subject of our analysis, namely, the whole of legal norms, both obligatory and virtually applied, and also the totality of politico-legal institutions called to make and apply the law.

The former interests of philosophy and theory of law, and especially of history of law, as well as of such social sciences as anthropology of culture and sociology, were mostly concentrated around the first of these problems, i.e., the cultural-conditioning of the legal order, while the subject of this paper is the influence of the legal order on the culture of a given society.

The ever growing role of law in modern society and especially in the system of social planning, and the fact that many spheres of social life are involved by legal regulation, as well as the growing innovating function of law, induce one to look for an answer to the following questions:

- 1) What does the culture-shaping role of law in the modern world consist of, and in what aspects should it be considered?
- 2) What does the stronger or weaker culture-shaping role of the law depend on?

Owing to the restrained limits of this paper, I will start with examining the first of these questions.

The trial answer presented here has the character of a model formulation, which allows to build a simplified scheme on accepting certain ideal assumptions. Just for these reasons operation of law upon culture is treated in one direction, though there also undoubtedly occurs here a reversed operation (a kind of feed-back).

1.2. Taking up this problem needs a preliminary definition of the meaning in which the term “culture” is used. The proposed definitions are connected with defined conceptions of culture and have their own methodological consequences. The mutual element of all definitions of culture is the notion of value. Many authors recognize that value is the principal element of culture. It seems that a normative definition of culture should be the most helpful in considering the culture-shaping role of law, this definition being understood as the totality of normative patterns for behaviour, socially accepted, learned and transmitted by means of symbols.¹

This definition, in spite of certain failures, which will be discussed in the further part of this paper, may be used as a starting-point for a model presentation of the influence of law upon culture.

It should also be emphasized for the sake of further considerations that the notion of culture may have a neutral or evaluating character. They may therefore concern either all values and the socially accepted norms bound with them, or definite values only, compatible with the system of values adopted by us.

The use of the term “value” may be associated with a determined ontology which accepts the existence of a specific kind of values as ideal objects. Such a stand-point cannot be consistent with the materialistic ontology and epistemology. When rejecting such a position, it is possible to link values with the activity of man. “Value” means “x is valuable”, being therefore the expression of evaluating experiences with regard to a determined subject. The evaluations may be assembled into larger entities, evaluations systems —or interchangeably “systems of values”— and evaluations widespread, prevailing in a given social group —“grane values”.²

Statements defined as norms have the character of directives; they fix a determined behaviour and are closely linked with evaluations. There can be norms for behaviour which, in a concrete empirical situation are deprived of any force of operation —dead norms. Therefore, by social norms one understands such norms which function in

¹ The works of anthropologists of culture as C. Kluckhohn, E.A. Hebel, M.J. Herskovitz and others had strong influence on the normative conception of culture.

² J. Wróblewski, *Wartosci a decyzja sadowa* —Values and judicial decision—, Wroclaw 1973, p. 43 f.

a relatively permanent and effective way in social groups as an element of certain institutions of control and organization systems.

As cultural norms are generally understood common norms which are socially accepted, widespread, and prevailing in the whole society or its majority,³ they are learned norms, transmitted by way of symbols –the role of the language; they have also features of a certain constancy linked with tradition and “culture heritage”.

Such a formulation shaped under the influence of anthropology of culture treats culture as some entity, unity, a monolith. Treating culture as an integrated entity may arouse some doubts; this leads sometimes to attribute predominating features of culture to individuals and not at all to taking account of the differentiations and conflicts of values occurring within the society;⁴ this is difficult to reconcile with the processes undergoing special intensity in modern societies which are characterized by quick changes expressed in new patterns of behaviour, i.e., in societies where the struggle in the competition between “old” and “new” is specially characteristic for its culture considered in the process of changes.⁵

Therefore, besides certain common and generally accepted values without which speaking about culture would be difficult, one cannot overlook and eliminate certain distinct features from it, a certain pluralism of values and norms which cannot be always formulated in the notion of “subculture”.

2.1. After these preliminary considerations, we may present the different kinds of operations of law exerted upon culture:

- a) independent –as a value by itself– and instrumental,
- b) direct and indirect,
- c) stabilizing and dynamizing,
- d) global and selective,
- e) synchronical and diachronical.

2.2. *Law considered as a value by itself* leads generally to quoting such values as social order, legality, and justice under the law, as well

³ The expression “norms socially accepted” is also interpreted in a different way, i.e.. these norms are spread and propagated among the majority of society (through mass media, system of education, literature, and other means); the emphasis put on these values does not mean a necessary acceptance of these values by the members of society.

⁴ For a larger presentation of the problem: M. Misztal, *Problematyka wartosci w socjologii –Problems of values in sociology–*, Warszawa 1980.

⁵ F. Kluckhohn, *Dominant and Variant Values Orientations –in– Variations in Values Orientations*, eds. F. Kluckhohn and F.L.S. Strodbeck, New York 1961 –presents an effort to overcome these difficulties.

as the certainty of law and the predictable results of its application. Some authors quote also social integration treated as a certain value.⁶

Acceptance of these values leads to the acceptance of law as such and to the forming of a legalistic attitude. The culture-shaping role of law consists, then, in enriching the catalogue or system of socially accepted values (considered by some authors as important conditions for a larger development of other cultural values).

An outlook upon law —as a value by itself— may be linked with the philosophical conception of value, already characterized here as certain ideal objects, absolute values (e.g., the Platonic notion of law as an idea of justice, embodying the greatest value which is social order resulting from a coordinated system of human conducts). An outlook on law as a certain independent value may also be linked with a structural-functional conceptions of legal order as an indispensable element for the maintenance and functioning of a certain system, of society as a whole.

It would be difficult, however, to attribute features of universally accepted values to the values characterized here; since we have taken notice also of some objections put forward in the modern world against law and the emphasized dangers linked with the stabilizing role of law and its conservatism, with the uncritical legalistic attitudes, juridization of social life, and the crisis of trust in the law and in law-making and law-applying institutions. Such criticism leads to the negation of treating law as a value.

The approach to the conception of law as a value by itself is not without importance, considering the culture of the given society.

2.3. The culture-shaping role of law may also be considered as an *instrumental* role. Law is treated then as means used by the legislator or the law-applying persons to realize some determined aim-values.

This instrumental role of law in forming culture may have the character of *direct operations* consisting in issuing and applying legal norms containing some definite patterns for behaviour, which represent an expression of preference and protection for certain values as liberty, equality, personal dignity, stability of family life, and others. These norms contribute to the spreading and strengthening of defined evaluations and attitudes over the whole society. A direct operation of law upon culture may also consist in issuing norms which exert influence on social coexistence and on relationship

⁶ J. Wróblewski, op. cit. p. 61 f.; G.L. Seidler, Z zagadnień filozofii prawa —On the problems of philosophy of law—, Lublin 1978, p. 5. f.

to surrounding milieu in quite different direction and which are generating such attitudes as xenophobia, intolerance, fanaticism.

This instrumental role of law in forming culture may also have an *indirect* character and consist in an organizing activity, i.e., by creating facilities and institutions favouring the development of culture and the spreading of cultural values —such as compulsory general education, etc.

2.4. The culture-shaping role of law may consist of an operation either *stabilizing* or *dynamizing* the existing systems of values and the norms for behaviour linked with them. The legal norms tend to realize a stabilizing operation consisting in retention of the existing state of social relations and of the system of values, and bringing them back to a state of equilibrium in case of their being disturbed. The activity tending towards forming the certainty of law (characterized under item 2.2.), refers also to the stabilizing operations, i.e., the durability of norms and the predictability of the results of law-applying activity. It is linked with the feeling of security not only of the individual affected by the decision but also spread over the whole society.

The dynamizing operation of law upon culture consists of transforming the existing systems of values and introducing new values; it is associated therefore with an innovating operation. The undertaking of such innovating activities necessitates from the view-point of durability of the studied system at least a certain degree of stabilization.

The development of modern societies shows the growing importance of innovation,⁷ it is connected with the necessity of a rapid reaction to new needs and situations and also with new prospects of controlling and planning a number of social processes. It often puts the contemporary legislator in a difficult position. A change introduced by the law is doomed to be a failure if it does not consider cultural conditionings and restrictions. At the same time these innovative changes cannot be carried out without breaking off with some of the present customs and morals. Legal innovation is very often a necessary condition for introducing conducts hitherto regulated by other normative systems.

Innovation means an activity characterized by an element of “novelty” as a constitutive feature; it is associated with activities undertaken consciously and according to plan.

⁷ M. Borucka-Arctowa, *Innovation through law in the system of social planning —in— Law and the future of society*, Warsaw 1977, p. 153 f.

When transferred on the ground of law, the notion of innovation needs a more accurate definition and modification.

An innovation in law must constitute the introduction of some “novelty” within a legal system. At the same time this novelty may, but not must, also represent some new solution in the general cultural scope of a society, and it may represent a novelty in relation to a legal system. In the latter case, the novelty criterion does not concern so much the content of the normative behaviour pattern as its character, the method of realization, and the consequence of not complying with the new norm. It is a criterion of great social importance, as it is not the content of the given norm, but its character that may awaken resistance and opposition (e.g., by not accepting an innovation in the form of law interference in family relations hitherto regulated by morality).

2.5. The next in turn of the singled out classified items of law operation on culture is the *global* and *selective* operation. The global operation consists of an influence on the culture of the legal system as a whole, as a certain system of values this being expressed here in legal norms, often defined as “internal” values of law.

We have also to consider the possible influence of “external” values, which may have a practical importance in applying law.

The selective operation consists of a culture-shaping role of defined branches of law or defined legal institutions, such as property, compensation, protection of immaterial rights, divorce and many others, the role of which in forming cultural norms (their strengthening or modification) does not raise doubts.

2.6. The operation of law on culture may proceed and also be analysed *synchronically* and *diachronically*. In the first case we are interested in the influence of the legal order on determined cultural norms in modern societies as the influence of human rights comprised in the constitution or other legal acts of the particular states, and on the way of interpretation and the degree of acceptance of the principle of equality “translated” into different kinds of cultural norms. The latter concerns, e.g., the customary norms for equalizing the rights of women and men where the operation of more detailed norms regulating this problem in such branches of law as family law or labour law seems very important (item 2.5.).

From the diachronical view-point we may investigate in a historical perspective the development of defined legal institutions and their operation (or lack of such influence) on the culture of determined periods of a given society. We may also study from a wider perspective the consequences caused in the development of the culture of a given

society in periods characterized by a disrespect of the law or law not keeping pace with the occurring social changes.⁸

A glance at the role of the law from the view-point of these criteria has induced historians to investigate the phenomena of asynchronism, i.e., such situations when changes of political institutions, or the reforms of law representing an expression of new values, did not reach the wide circles of society and did not fulfill their culture-shaping role.

3. The presented model of different kinds of law operations on culture is also connected in many points with an additional question, i.e., what does the stronger or weaker culture-shaping role of the law depend on? This problem exceeds the limits of my paper and must be largely examined. It seems however that the central point is the role of legal consciousness which is composed of knowledge, evaluations, attitudes, and postulates with regard to law and legal-political institutions. The legal consciousness of persons participating in the law-making and the law-applying process forejudges to a considerable degree the determined legal order, as well as the legal consciousness of all citizens as to which issued and applied norms will obtain social acceptance, thus becoming cultural norms (in accordance with the meaning represented here). The possible dissimilarity between the system of preference values, contained in the legal order and the system of preference values connected with the social reception of law, depends on many factors which may be generally defined as the degree of democratization of the whole legal-political system.

⁸ S. Grodziski, *Z badan nad kultura prawna Galicji –The study on Galizia legal culture–*, *Historyka* t. IX, 1979, p. 126.

SUMMARY

The subject of this paper is the influence and operation of law on the culture of a given society. After the preliminary settling of the meaning used when applying such terms as “culture”, “value”, “norm” and the methodological consequences associated with it, we are trying to give a model presentation of different kinds of means and aspects of law operation on culture (the distinguished classifications may interfere as they are based on different criteria).

One may therefore differentiate:

- a) Operation of law as a certain independent value by itself (connected with such values as social order, legality and justice under the law, certainty of law, social integration) and instrumental operation as a means for realizing certain aim-values.
- b) Direct operation consisting of issuing and applying legal norms involving some determined behaviour patterns, which represent an expression of preference and protection for certain values and indirect operation comprising an organizational activity consisting of creating facilities and institutions favouring the development of a culture and the spreading of cultural values.
- c) Stabilizing operation, expressed in consolidation and retention (using legal norms) of the existing state of social relations and the system of values associated with it, bringing also up to a state of equilibrium all the disturbances of that system and the dynamising operation of law on culture, which consists of transforming the existing systems of socially accepted values and introducing new values; this is then connected with the innovating operation.
- d) Global operation, i.e., operation of the legal system as a whole, as a certain system of values and the selective operation consisting of the culture-shaping role of defined branches of law or defined legal institutions.
- e) Operation of law on culture may proceed and also be analyzed synchronically and diachronically.

The final remarks denote the relation between the discussed problem and the additional questions, i.e., the role of legal consciousness as one of the leading factors conditioning a stronger or weaker opera-

tion of law on culture. Some former remarks also emphasize the simplifications and difficulties bound with treating cultural values as a certain entity, a monolith, as well as some consequences of examining culture in its transformation process-typical of modern society.